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,

NO. 77780

Electronically Filed
Aug 26 2019 04:16 p.m.
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 7 OF 19

Submitted for all appellants by:

ROBERT L. EISENBERG (SBN 950)
LEMONS, GRUNDY & EISENBERG
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Reno, NV 89501
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ATTORNEYS FOR APPELLANTS
LARRY J. WILLARD, et al.

Docket 77780 Document 2019-35676

CHRONOLOGICAL INDEX TO APPELLANTS' APPENDIX

NO.	DOCUMENT	DATE	VOL.	PAGE NO.
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	Exhibit 11: Highway 50 Guaranty		3	594-598
	Exhibit 12: Willard Responses to Defendants' First Set of Interrogatories		3	599-610
	Exhibit 13: Baring Purchase and Sale Agreement		3	611-633
	Exhibit 14: Baring Lease		3	634-669
	Exhibit 15: Baring Property Loan		3	670-705
	Exhibit 16: Deposition Excerpts of Edward Wooley		3	706-719
	Exhibit 17: Assignment of Baring Lease		4	720-727
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	Exhibit 19: November 2014 Email Exchange		4	731-740
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	Exhibit 24: 2013 Overland Federal Income Tax Return		4	775-789
	Exhibit 25: Declaration of Brian Irvine		4	790-794
16.	Affidavit of Brian P. Moquin	08/30/16	4	795-797
17.	Affidavit of Edward C. Wooley	08/30/16	4	798-803
18.	Affidavit of Larry J. Willard	08/30/16	4	804-812

NO.	DOCUMENT	DATE	VOL.	PAGE NO.
(cont 19)	Exhibit 31: *Promissory Note* dated February 28, 2006 for $13,312,500.00 by Willard Plaintiffs' in favor of Telesis Community Credit Union		6	1232-1236
	Exhibit 32: *Subordination, Attornment And Nondisturbance Agreement* dated February 21, 2006 between Willard Plaintiffs, BHI, and South Valley National Bank, Inst. No. 3353293, re the Virginia Property		6	1237-1251
	Exhibit 33: *Deed of Trust, Assignment of Rents, and Security Agreement* dated March 16, 2006 re the Virginia Property securing loan for $13,312,500.00		6	1252-1277
	Exhibit 34: *Payment Coupon* dated March 1, 2013 from Business Partners to Overland re Virginia Property mortgage		6	1278-1279
	Exhibit 35: *Substitution of Trustee and Full Reconveyance* dated April 18, 2006 naming Pacific Capital Bank, N.A. as trustee on the Virginia Property Deed of Trust		6	1280-1281
	Exhibit 36: *Amendment to Lease Agreement* dated March 9, 2007 for the Virginia Property		6	1282-1287
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	Exhibit 38: Letter dated March 12, 2013 from L. Steven Goldblatt, Esq. to Jerry Herbst re breach of the Virginia Property lease		6	1293-1297
	Exhibit 39: Letter dated March 18, 2013 from Gerald M. Gordon, Esq. to L. Steven Goldblatt, Esq. re breach of the Virginia Property lease		6	1298-1300

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

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EXHIBIT 1

EXHIBIT 1

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DICKINSON WRIGHT, PLLC
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Attorney for Defendants
Berry Hinckley Industries, and
Jerry Herbst

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

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

Plaintiff,

vs.

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

Defendants.
/

CASE NO. CV14-01712

DEPT. 6

DEFENDANTS' DISCLOSURE OF EXPERT WITNESS: MICHELLE SALAZAR

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.

_______________________________________/

Pursuant to Nevada Rules of Civil Procedure 26 and 16.1(a)(2), Defendants/Counterclaimants BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an Individual, hereby disclose the following expert witness and her report:

I. ► **WRITTEN REPORT OF MICHELLE SALAZAR**:

See Expert Report of Michelle Salazar, **Exhibit 1**.

► Opinions to be expressed and the basis and reasons thereto:

See Expert Report of Michelle Salazar, **Exhibit 1**.

► Data or other information considered by the witness in forming the opinions:

See Expert Report of Michelle Salazar, **Exhibit 1**.

► Any exhibits to be used as a summary of or support for the opinions:

See Expert Report of Michelle Salazar, **Exhibit 1**.

► A list of all publications authored by the witness within the proceeding 10 years:

See Expert Report of Michelle Salazar, **Exhibit 1**.

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A.App.1399

► A listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years:

See Expert Report of Michelle Salazar, **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 2nd day of December, 2016.

DICKINSON WRIGHT, PLLC

/s/ Brian Irvine
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
ANJALI D. WEBSTER
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100 West Liberty Street, Suite 940
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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 **DEFENDANTS' DISCLOSURE OF EXPERT WITNESS: MICHELLE SALAZAR** 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)

LAW OFFICES OF BRIAN P. MOQUIN
Brian P. Moquin
3287 Ruffino Lane
San Jose, California 95148
bmoquin@lawprism.com

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

DATED this 2nd day of December, 2016.

/s/ Mina Reel
An Employee of DICKINSON WRIGHT, PLLC

EXHIBIT TABLE

Exhibit	Description	Pages[1]
1	Expert Report of Michelle Salazar	27

[1] Exhibit Page counts are exclusive of exhibit slip sheets.

F I L E D
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CV14-01712
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Clerk of the Court
Transaction # 5834869 : yviloria

Exhibit 1

Exhibit 1

Expert Witness Report
of Litigation and Valuation Consultants, Inc.

In the Matter of

Larry J. Willard et al. v. Berry-Hinckley Industries et al.

November 30, 2016

Litigation and Valuation Consultants, Inc.
5488 Reno Corporate Drive, Suite 200
Reno, Nevada 89511
(775) 825-7982

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INTRODUCTION

Description of Assignment

This Expert Witness Report (report) is in response to the engagement of Litigation and Valuation Consultants, Inc. (LVC) in January 2015, concerning the litigation case of *Larry J. Willard et al. v. Berry-Hinckley Industries et al.*, Second Judicial District Court of the State of Nevada, Washoe County; case number CV14-01712. LVC was engaged to provide consulting services on behalf of Defendants.

Fees for LVC's services are billed at normal hourly rates: professionals at $195 to $225 and paraprofessionals at $70. Court testimony and/or deposition testimony will be invoiced at the above rates plus an additional $100 per hour.

Limiting Conditions and Disclosures

LVC and the expert preparing this report have no present or contemplated financial interest in or with the parties to the litigation. LVC's fees for work on this case are in no way contingent upon LVC's results or findings.

Information and documents, from which this report has been prepared, were provided to LVC through legal counsel from sources identified herein. The financial information was provided to LVC by third parties, also identified herein. This information has not been subjected to any audit or review procedures by LVC as defined by the American Institute of Certified Public Accountants (AICPA) during this engagement. The terms "audit," "examination" and "review" are described and defined in pronouncements promulgated by the AICPA. This report should not be construed or referred to, as an audit, examination or review of financial information by LVC. Accordingly, LVC takes no responsibility for the underlying financial data contained in the documents, schedules and worksheets presented, that were relied upon for this report, which are solely the representations of others.

LVC is not a law firm and the expert working on this report is not an attorney, therefore, comments and observations presented do not purport to represent legal representations or opinions.

LVC and the expert preparing this report reserve the right to amend the report in the event additional documents, pertinent information and/or other material is discovered subsequent to the submission of this report. Possession of this report or any copy thereof does not carry with it the right of publication, nor may the report be used for other than its intended purpose. Use of this report is restricted to the parties in the matter named above and to their legal counsel; therefore, this report should not be used for any other purpose or by anyone not informed on such matters.

Qualifications

The expert working on this matter is Michelle L. Salazar, CPA/ABV, CVA, CFE.

Michelle L. Salazar, CPA/ABV, CVA, CFE

Michelle Salazar is a licensed Certified Public Accountant (CPA) in Nevada with over seventeen years' experience in the public accounting, litigation support and business valuation arena. Ms. Salazar holds a Certified Fraud Examiner (CFE) credential which is administered by the Association of Certified Fraud Examiners and is currently certified in business valuation by the American Institute of CPAs (ABV) and the National Association of Certified Valuation Analysts (CVA). Ms. Salazar has worked extensively on forensic litigation cases and business valuation matters and has been qualified as an expert. She is the President of LVC. Her Curriculum Vitae and summary of testimony are enclosed.

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MICHELLE L. SALAZAR, CPA/ABV, CVA, CFE
PRESIDENT
LITIGATION AND VALUATION CONSULTANTS, INC.

EDUCATION & CERTIFICATIONS

BS, Bachelor of Science in Business Administration, University of Nevada, Reno
CPA, Certified Public Accountant, Nevada
ABV, Accredited in Business Valuation, AICPA
CVA, Certified Valuation Analyst, National Association of Certified Valuation Analysts
CFE, Certified Fraud Examiner, Association of Certified Fraud Examiners

EXPERIENCE

Ms. Salazar's experience includes over seventeen years in the accounting profession, including business valuation, forensic (investigative) accounting and litigation related experience. Ms. Salazar works exclusively on business valuation, forensic accounting and litigation support assignments. Her experience includes valuations for the purpose of divorce, financial reporting, estate and gift planning and business disputes. Ms. Salazar's forensic accounting experience includes work on fraud, embezzlement and divorce cases. For several years she worked as a CPA in a large Reno, Nevada based Certified Public Accounting firm. Her familiarity with many different accounting systems provides a unique ability to understand and work through forensic and business valuation issues. Ms. Salazar has testified and has been qualified as an expert. She is a Certified Public Accountant (**CPA**), a Certified Fraud Examiner **(CFE)**, and is currently certified in business valuation by the American Institute of CPAs (**ABV**) and the National Association of Certified Valuation Analysts (**CVA**), which is a national certification in the field of business valuation.

PROFESSIONAL/COMMUNITY AFFILIATIONS

Member, The Prospectors' Club
Member, Planned Giving Roundtable of Northern Nevada
Member, Estate Planning Council of Northern Nevada
Member, Reno Tahoe Young Professionals Network (YPN)
Member, American Institute of Certified Public Accountants (AICPA)
Member, Nevada Society of Certified Public Accountants (NSCPA)
Member, National Association of Certified Valuation Analysts (NACVA)
Member, Association of Certified Fraud Examiners (ACFE)
Member, Reno Chapter of ACFE
Member, Nevada Society of Certified Public Accountants Business Valuation Committee
Member, Institute of Business Appraisers (IBA)
Member, 2007-2012, 2014 Go Red for Women Committee
Alumni Member of 2005 Leadership Reno Sparks program
Honoree, 2007 Nevada Women's Fund Salute to Women of Achievement
Commissioner, 2009-2011 and 2013-2016 Washoe County Debt Management Commission
Vice-Chairperson, 2011-2012 Washoe County Debt Management Commission
Chairperson, 2012-2013 Washoe County Debt Management Commission
Advisor, Nevada Youth Empowerment Project
2015 Winner, Top Twenty Under Forty, YPN

PUBLICATIONS

"Small Business Self Defense," *Northern Nevada Business Weekly*, March 12, 2007.

"Small Businesses are the Prime Target for Internal Theft and Fraud,"
The Writ, Official Publication of the Washoe County Bar Association, June 2008.

"Five Estate-Planning Steps for Business Owners," *Northern Nevada Business Weekly*, July 14, 2014.

SELECTED SPEAKING ENGAGEMENTS AND PRESENTATIONS

Washoe County Bar Association, "Working With Expert Witnesses"

Western Nevada Society of Certified Public Accountants, "Business Valuation"

Western Nevada Society of Certified Public Accountants, "Forensic Accounting"

Reno South Rotary Club, "Business Valuation/Divorce Planning"

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MICHELLE L. SALAZAR, CPA/ABV, CVA, CFE
SUMMARY OF TESTIMONY

January 2008
Schweigert v. Schweigert
Re: Divorce/Business Valuation
Humboldt County District Court, Humboldt County
Judge Richard Wagner

April 2009
Albert and Vicki Potter v. AFAY, Inc.
Re: Business Dispute
Second Judicial District Court of Nevada, Washoe County
Judge Brent Adams

May 2009
Rottman v. Rottman
Deposition-re: divorce litigation, marital balance sheet

May 2009
Rottman v. Rottman
Re: Divorce
Second Judicial District Court of Nevada, Washoe County
Judge Bridget Peck

May 2010
Kressler v. Kressler
Re: Divorce/Business Valuation
Second Judicial District Court of Nevada, Washoe County
Judge Chuck Weller

March 2011
Consolidated Nevada Corporation and Paul Morabito et al. v. JH, Inc. and Jerry Herbst et al.
Deposition-re: punitive damages phase of trial

August 2011
Retiremen, LLC v. D&D Tire, Inc.
Deposition-damage calculation

May 2012
Pittman v. Pittman
Re: Divorce/Business Valuation
Second Judicial District Court of Nevada, Washoe County
Judge Chuck Weller

August 2012
Riverwood Douglas RDA, LLC, Riverwood Douglas, LLC v. MadDog Development, Inc. in the matter of Riverwood Redevelopment, LLC and Riverwood Partners, LLC
Deposition-business dispute

September 2012
Riverwood Douglas RDA, LLC, Riverwood Douglas, LLC v. MadDog Development, Inc. in the matter of Riverwood Redevelopment, LLC and Riverwood Partners, LLC
Arbitration
Arbitrator Robert Eisenberg

January 2013
580 Parkson Road, LLC v. Richard Steven Louie and Stephanie Yinman Chan
United States Bankruptcy Court, San Jose Division
Judge Stephen Johnson

February 2013
Jackson v. Jackson
Re: Divorce/Interest Calculation
Second Judicial District Court of Nevada, Washoe County
Judge Bridget Peck

March 2013
Flood v. Flood
Re: Divorce
Second Judicial District Court of Nevada, Washoe County
Judge Egan Walker

April 2013
Chernick v. Emmerich
Re: Business Dispute
Second Judicial District Court of Nevada, Washoe County
Judge Patrick Flanagan

May 2013
Loberg v. Loberg
Re: Divorce/Valuation
Fourth Judicial District Court of Nevada, Elko County
Judge Nancy Porter

November 2013
395 Lampe, LLC, Prim 1988 Revocable Tst et al. v. Kawish, LLC, Timothy Blixseth et al.
Deposition-business dispute

November 2013
VFS Financing, Inc. v. Stacey Gonfiantini, et al.
Deposition-business dispute

December 2013
Spirit Master Funding II, LLC v. Jerry Herbst
Deposition-business dispute

January 2014
395 Lampe, LLC, Prim 1988 Revocable Tst et al. v. Kawish, LLC, Timothy Blixseth et al.
United States District Court Western District of Washington at Seattle
Judge Richard Jones

March 2014
Kubel v. Kubel
Re: Divorce/Valuation
First Judicial District Court of Nevada, Carson City
Judge James Russell

April 2014
Ghiglia v. Ghiglia
Re: Divorce
Second Judicial District Court of Nevada, Washoe County
Judge Bridget Peck

April 2014
Inouye v. Inouye
Re: Divorce
Second Judicial District Court of Nevada, Washoe County
Judge Bridget Peck

June 2014
Medeiros v. Medeiros
Re: Divorce
Second Judicial District Court of Nevada, Washoe County
Judge Bridget Robb

July 2014
Kubel v. Kubel
Re: Divorce/Valuation
First Judicial District Court of Nevada, Carson City
Judge James Russell

July 2014
Fernhoff v. Fernhoff
Re: Divorce/Valuation
Deposition

July 2014
Farahi v. Farahi
Re: Divorce/Valuation
Deposition

August 2014
Monaghan v. Koch
Re: Divorce
Second Judicial District Court of Nevada, Washoe County
Judge Egan Walker

August 2014
Luciano v. Saint Mary's Preferred Health Insurance Company
Re: Damage Rebuttal
Deposition

August 2014
King v. King
Re: Divorce/Valuation
Second Judicial District Court of Nevada, Washoe County
Judge Egan Walker

August 2014
Farahi v. Farahi
Re: Divorce/Valuation
Deposition

October 2014
King v. King
Re: Divorce/Valuation
Second Judicial District Court of Nevada, Washoe County
Judge Egan Walker

December 2014
Ygoa v. Ygoa
Re: Divorce/Valuation
Humboldt County District Court, Humboldt County
Senior Judge John Iroz

July 2015
Anderson v. Tri-State Surveying, Ltd.
Re: Business Valuation/Economic Damages
Deposition

August 2015
The State of Nevada v. Mary Colleen Ortega
Re: Criminal Preliminary Hearing
Pershing County Justice Court
Justice Karen Stephens

November 2015
Grand Sierra Resort v. Peppermill Casinos, Inc.
Re: Business Dispute/Intangible Asset Valuation
Deposition

January 2016
Grand Sierra Resort v. Peppermill Casinos, Inc.
Re: Business Dispute/Intangible Asset Valuation
Second Judicial District Court of Nevada, Washoe County
Judge Patrick Flanagan

August 2016
Chester Mallory and TMX, Inc. v. Timothy Lukas,
James Newman and Holland & Hart, LLP
Re: Malpractice claim
Deposition

November 2016
Drake Offshore Master Fund Ltd. et al. v. Alternative Debt Portfolios, L.P. et al.
Re: Damages
Deposition

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DOCUMENTS RELIED UPON

The following sources of information were considered in preparation of this report:

1. Complaint filed August 8, 2014;
2. First Amended Complaint filed January 21, 2015;
3. Plaintiffs' Opposition to Defendants' Motion for Partial Summary Judgment filed August 30, 2016;
4. Various documents filed with the Court, including but not limited to, responses to interrogatories;
5. Lease Agreement dated November 18, 2005 – Willard Property;
6. Amended Lease Agreement dated March 9, 2007 – Willard Property;
7. Lease Agreement dated December 2005 – Wooley Property;
8. First Amendment to Lease Agreement dated March 12, 2007 - Wooley Property;
9. Second Amendment to Lease Agreement dated May 2011 - Wooley Property;
10. Lease Agreement dated June 2006 – Wooley #2 Property;
11. Operation and Management Agreement **(Bates #BHI-WW000045 - 000048)**;
12. First Amendment to Lease Agreement dated March 12, 2007 – Wooley #2 Property;
13. Short Sale Closing Statement **(Bates#LJW000338)**;
14. Overland Development, Inc. federal income tax returns, Form 1120 for 2013 and 2014;
15. Larry J. Willard federal income tax returns, Form 1040 for 2009 through 2014;
16. Edward C. Wooley and Judith A. Wooley federal income tax return, Form 1040 for 2014;
17. United States Bankruptcy Court Proof of Claim filed August 27, 2013;

documents relied upon

18. Settlement Statement dated May 20, 2014 for Wooley Property #2 **(Bates #ECW000114-000115)**;

19. E-mail from Josey Schenkoske dated February 27, 2015 **(Bates #ECW002250-2251)**;

20. State of Hawaii Balance Due Notice **(ECW-TT-000605-000606)**.

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BACKGROUND

Willard Lease

Until March 3, 2014 real property located at 7695 - 7699 South Virginia, APN #043-011-47 (Willard Property) was owned by Overland Development, Inc. (41%) and Larry J. Willard, trustee of the Larry James Willard Trust dated 11/14/1987 (59%). At this time, Larry J. Willard was the sole shareholder of Overland Development, Inc.

On November 18, 2005, Berry-Hinkley Industries (Lessee) and Larry J. Willard (Lessor) entered into a lease for the Willard Property. Under the lease, Berry-Hinckley Industries (Berry-Hinckley) agreed to lease the Willard Property beginning on February 24, 2006 until August 23, 2023. The base annual rental as defined in Exhibit A of the lease is $1,464,375 per annum, which is $122,031 per month. The base annual rental was to be adjusted by two percent (2%) per annum.

On March 9, 2007, Berry-Hinkley Industries (Lessee) and Larry J. Willard et al. (Lessor) entered into an amended lease. The First Amended Complaint (Amended Complaint) states that this amended lease shortened the term of the lease by 30 months. LVC has read the amended lease and does not note any changes to the term of the lease.

In March 2013, Berry-Hinckley stopped making payments on the Willard Lease. Negotiations took place between Berry-Hinckley and Larry J. Willard (Willard) and Berry-Hinckley continued to occupy the Willard Property until May 2013.

On March 3, 2014, the Willard Property was sold in a short sale.

As a result of the alleged default on the lease, Willard claims that they have been monetarily damaged, which will be discussed later in this report. The damages do not appear to be calculated by Willard based upon the terms set forth in the lease.

Wooley Highway 50 Lease

In December 2005, Berry-Hinckley Industries (Lessee) and Edward C. Wooley and Judith A. Wooley (Lessors or Wooley) entered into a lease for property located at 1820 Highway 50 East in Carson City, Nevada (herein referred to as the Wooley Property). Under the lease, Berry-Hinckley agreed to lease the Wooley Property beginning on May 1, 2006 until April 30, 2006, which appears to be in error. Based upon the Amended Complaint, the commencement date of the lease was December 1, 2005 ending on November 30, 2025. The base annual rental as defined in Exhibit A of the lease is $272,000 per annum, which is $22,667 per month. The base annual rental was to be adjusted by two percent (2%) per annum.

The First Amended Lease Agreement was entered into on March 12, 2007. The Amended Complaint states that this amended lease shortened the term of the lease by 30 months. LVC has read the amended lease and does not note any changes to the term of the lease.

The Second Amended Lease Agreement was entered into in May 2011. The base monthly rent was reduced to $20,025.82, beginning on the effective date of the lease which is assumed to be May 1, 2011. The length of the lease was not modified.

Therefore, from December 1, 2005 through April 30, 2011 the rent is based upon the $22,667 per month, increased by two percent (2%) per annum. Beginning on May 1, 2011, the base monthly rent is $20,025.82 which is increased by two percent (2%) per annum through the lease term of November 30, 2025.

In March 2013, Berry-Hinckley Industries stopped making payments on the Wooley Lease.

Wooley Baring Boulevard Lease

On June 6, 2006, Berry-Hinckley Industries (Lessee) and Edward C. Wooley and Judith A. Wooley (Lessors) entered into a lease for property located at 1365 Baring Boulevard in Sparks, Nevada (herein referred to as the Wooley Property #2).

On March 12, 2007, Berry-Hinkley Industries (Lessee) and Edward C. Wooley and Judith A. Wooley (Lessor) entered into an amended lease. The Amended Complaint states that this amended lease shortened the term of the lease by 30 months. LVC has read the amended lease and does not note any changes to the term of the lease.

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SCOPE OF WORK

LVC was asked to:

1. Evaluate and comment on the damage calculations of Willard contained in the Amended Complaint and Willard's Responses to Defendants' Interrogatories.

2. Evaluate and comment on the damage calculations of Wooley for the Wooley Property and Wooley Property #2 contained in the Amended Complaint and Wooley's Responses to Defendants' Interrogatories.

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analysis

ANALYSIS

1. *Damages Claimed by Willard for Alleged Default on Willard Lease*

Willard is claiming damages as reflected in **Exhibit 1** below:

EXHIBIT 1
Larry J. Willard et al. v. Berry-Hinckley Industries et al.
Summary of Willard's Claim for Damages

Present Value of Deprived Rental Income ($19,443,837)	$	15,741,361
Lost Earnest Money		4,437,500
Tax Consequences		3,000,000
Closing Costs		549,852
Insurance		4,555
Security Fence		2,669
NV Energy		10,393
Legal Fees-Bankruptcy		22,623
Accounting Fees		15,000
Legal Fees-Santa Clara		35,000
	$	**23,818,953**

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analysis

Each of Willard's damage components will be addressed below:

Deprived Rental Income

Willard is alleging damages for deprived rental income totaling **$19,443,837** as summarized in **Exhibit 2**. Willard's damage calculation includes the base monthly rental of $122,031 beginning on February 24, 2006, which has been increased by two percent annually.

EXHIBIT 2
Larry J. Willard et al. v. Berry-Hinckley Industries et al.
Willard's Alleged Damages for Deprived Rental Income

Beginning Date	Ending Date	Base Rental with 2% Annual Increase	# Months	Total Annual Rental
2/24/2013	1/23/2014	$ 140,175.55	12	$ 1,682,107
2/24/2014	1/23/2015	142,979.06	12	1,715,749
2/24/2015	1/23/2016	145,838.64	12	1,750,064
2/24/2016	1/23/2017	148,755.41	12	1,785,065
2/24/2017	1/23/2018	151,730.52	12	1,820,766
2/24/2018	1/23/2019	154,765.13	12	1,857,181
2/24/2019	1/23/202	157,860.43	12	1,894,325
2/24/2020	1/23/2021	161,017.64	12	1,932,212
2/24/2021	1/23/2022	164,238.00	12	1,970,856
2/24/2022	1/23/2023	167,522.76	12	2,010,273
2/24/2023	8/23/2023	170,873.21	6	1,025,239
Willards Alleged Damages-Deprived Rental Income				**$ 19,443,837**

According to page 4 of the Amended Complaint, Willard claims that the present value, as of March 1, 2013, of the $19,443,836, using a four percent discount rate, is $15,741,361. LVC questions why Willard selected a present value date of March 1, 2013 and how they arrived at their present value calculation. Based upon LVCs calculations, the present value, as of March 1, 2013, using a four percent discount rate, using Willard's figures would have been $15,526,949. Therefore, it appears that Willard has overstated the present value of their alleged damages by $214,412. It should be noted that LVC is not conceding to Willard's determination of damages. However, their calculations appear to be in error.

Lost Earnest Money

The Amended Complaint asserts lost earnest money of $4,437,500. Willard's Response No. 7 to Defendants' First Set of Interrogatories state that the lost earnest money is based upon the "actual value of earnest money invested by Respondent when the property was purchased." LVC has not been provided with documentation evidencing the payment of $4,437,500.

Tax Consequences and Loss of Capital Loss Carryover

Initially, Willard claimed that they have incurred at least $3 million in tax consequences as a result of Berry-Hinckley's breach of the Willard Lease. This is completely unsupported which Plaintiffs now concede. Plaintiffs now allege they have been damaged because the Willard Property was sold in a short sale, resulting in "lost" capital loss carryovers to Willard in the amount of $1,018,200 and Overland in the amount of $3,671,800. It should be noted that Overland's carryover is not a capital loss carryover but is a net operating loss carryover.

Willard owns 59% and Overland owns 41% of the Willard Property.

Plaintiffs have failed to consider that capital loss and net operating loss carryovers do not provide a dollar for dollar benefit to Plaintiffs'. Instead, any carryovers must be multiplied by the applicable tax rate to arrive at Plaintiffs' actual lost benefit. The actual lost benefit is set forth in the schedule below. However, the actual lost benefit must be compared to the amount of cancelled debt which was derived from Plaintiffs' federal income tax returns. Therefore, Willard benefited by $4,043,460 and Overland benefited by $2,214,960 as a result of the short sale **(Bates #LJW000338)**. There was no financial detriment to Willard or Overland because each Plaintiff enjoyed the benefit of not paying the outstanding debt owed. See the following schedule:

	Plaintiffs Position of "Lost" Capital Loss Carryover	Plaintiffs Position of "Lost" Net Operating Loss Carryover	Actual Lost Benefit from Carryover * (B)	Cancelled Debt ** (A)	Benefit to Plaintiffs (A) - (B)
Willard	$ 1,018,200	$ -	$ 152,730	$ 4,196,190	$ 4,043,460
Overland	-	3,671,800	1,248,412	3,463,372	2,214,960
	$ 1,018,200	$ 3,671,800	$ 1,401,142	$ 7,659,562	$ 6,258,420

* The carryover must be multiplied by the applicable tax rate to arrive at the actual lost benefit. Willard's capital loss carryover was multiplied by 15% and Overland's net operating loss carryover was multiplied by 34%.

** The cancelled debt was derived from Willard and Overland federal income tax returns. According to the 1099-C the cancelled debt totaled $8,597,250.

Closing Costs

Willard is claiming damages for $549,852 in closing costs. Utilizing the March 3, 2014 short sale closing statement **(Bates #LJW000338)**, the total closing costs, including commissions paid to the broker, $134,615. After a reduction is made for the credits from the buyer, the net closing costs total $84,260. It appears that Willard's claim for closing costs is overstated by $465,592 as summarized in **Exhibit 3**.

EXHIBIT 3
Larry J. Willard et al. v. Berry-Hinckley Industries et al.
Analysis of Closing Costs

Commissions	$	120,000
Title Charges		1,750
Title Charges		4,000
Title Charges		100
Title Charges		300
Title Charges		85
Title Charges		60
Title Charges		120
Recording Fees		8,200
Closing Costs (Bates #LJW000338)		134,615
Less: Credits from Buyer		(50,355)
Net Closing Costs		84,260
Per Willard Complaint		549,852
Overstatement of Closing Costs	**$**	**465,592**

Insurance, Security Fence, NV Energy, Legal and Accounting Fees

Willard claims that they were required to pay certain expenses for which they should be reimbursed. These expenses include insurance, security fence, NV Energy past due amounts, accounting fees, legal fees relating to a bankruptcy filed by Berry-Hinckley and legal fees for a suit filed in Santa Clara, California. LVC has been provided documentation relating to these expenses. However, in most instances, the supporting documentation does not agree to the alleged damages. Therefore, LVC questions the authenticity of these alleged expenses and whether documentation to support the alleged amounts exists.

Willard's claim for damages ignored the liquidated damages clause under Section 20(B) (iv) of the Willard Lease. Specifically, the damages under subsection iv include the following:

1. Present value of the balance of the **Base Annual Rental** ($1,464,375) for the remainder of the Lease Term using a discount rate of four percent (4%) (emphasis added);

2. **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%) (emphasis added);

As shown in **Exhibit 1**, Willard's alleged damages include the base rental with annual increases of two percent per year through the end of the lease term. However, Section 20(B) (iv) specifically states that the present value of the **Base Annual Rental** should be utilized in determining damages. Additionally, Willard's damage determination does not include a reduction for the present value of the reasonable rental value, which is also set forth in the Willard Lease, Section 20(B) (i) (iv). As a result, Willard's calculation of damages is overstated.

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Damages Claimed by Wooley for Alleged Default on Wooley Lease

Wooley is claiming damages as reflected in **Exhibit 4** below:

EXHIBIT 4
Larry J. Willard et al. v. Berry-Hinckley Industries et al.
Summary of Wooley's Claim for Damages

Present Value of Deprived Rental Income ($4,420,244)	$	3,323,543
Diminution in Value of Property Caused by Breach		2,000,000
Tax Liability from Sale of Wooley Property #2		512,000
Settlement Charges - Sale of Wooley Property #2		147,847
Property Taxes		1,500
Insurance		3,840
Maintenance Costs		4,000
Management Fee		2,500
Security Deposit from Subtenant		2,485
	$	**5,997,715**

Each of Wooley's damage components will be addressed below:

Deprived Rental Income

Wooley is alleging damages for deprived rental income totaling **$4,420,244** as reflected in **Exhibit 5**. It appears that Wooley failed to take into consideration the terms of the Second Amended Lease and the reduction of the base monthly rent to $20,026.

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EXHIBIT 5
Larry J. Willard et al. v. Berry-Hinckley Industries et al.
Wooley's Alleged Damages for Deprived Rental Income

Beginning Date	Ending Date	Base Rental with 2% Annual Increase	# Months	Total Annual Rental
3/1/2013	11/30/2013	$ 25,526.35	9	$ 229,737
12/1/2013	11/30/2014	26,036.88	12	312,443
12/1/2014	11/30/2015	26,557.61	12	318,691
12/1/2015	11/30/2016	27,088.77	12	325,065
12/1/2016	11/30/2017	27,630.54	12	331,567
12/1/2017	11/30/2018	28,183.15	12	338,198
12/1/2018	11/30/2019	28,746.82	12	344,962
12/1/2019	11/30/2020	29,321.75	12	351,861
12/1/2020	11/30/2021	29,908.19	12	358,898
12/1/2021	11/30/2022	30,506.35	12	366,076
12/1/2022	11/30/2023	31,116.48	12	373,398
12/1/2023	11/30/2024	31,738.81	12	380,866
12/1/2024	11/30/2025	32,373.58	12	388,483
Wooley's Alleged Damages-Deprived Rental Income				**$ 4,420,244**

According to page 8 of the Amended Complaint, Wooley claims that the present value, as of March 1, 2013, of the $4,420,244, using a four percent discount rate, is $3,323,543. LVC questions why Willard selected a present value date of March 1, 2013 and how they arrived at their present value calculation. Their calculations appear to be in error.

Diminution of Value

LVC has not been provided with documentation evidencing a diminution of value.

Tax Liability from the Sale of Wooley Property #2

According to the Amended Complaint, Wooley claims that they were forced to sell Wooley Property #2 located on Baring Boulevard in Sparks, Nevada. As a result, Wooley claims that they incurred a tax liability. In Wooley's response to Defendants' First Set of Interrogatories No. 9, Wooley responds that Wooley's accountant, Josey Schenkoske (Schenkoske), provided an estimate of the tax liability amounting to $512,000 which includes $378,000 in federal taxes and $134,000 in Hawaii state taxes. See **Bates #ECW002250-ECW002251**.

Based upon the 2014 personal federal income tax return filed by Wooley, it appears that the gain on the sale of Wooley Property #2 was $1,888,916. If <u>no</u> other income, expenses or carryovers are taken into consideration as included on the 2014 federal tax return, the federal tax due is $343,833. This tax was calculated as follows:

$ 73,800	x 0%	$ -	
383,800	x 15%	57,570	
1,431,316	x 20%	286,263	
$ 1,888,916		**$ 343,833**	

Schenkoske's calculation is incorrect because it assumes that the entire gain on sale is taxed at a capital gain tax rate of 20%. However, as illustrated above, the capital gain tax rate is tiered. Therefore, Wooley's determination is overstated by at least $34,167 ($378,000 - $343,833).

If the other income, expenses and carryovers are taken into consideration as included on the 2014 federal income tax return of Wooley, the tax due is $302,881. Therefore, in total, Schenkoske's tax calculation is overstated by $75,119 ($378,000 - $302,881).

LVC was not provided with the Hawaii state income tax return and was therefore unable to determine if the calculation provided by Schenkoske was accurate or not. However, LVC was provided with the Balance Due Notice **(ECW-TT-000605-000606)** which reflects a total balance due to the State of Hawaii of $114,790. Therefore, Schenkoske's estimated tax calculation of $134,000 for Hawaii state taxes appears to be overstated.

Settlement Charges – Sale of Wooley Property #2

In the Amended Complaint, Wooley claims a loss as a result of a "forced sale" of Wooley Property #2 in the amount of $147,847. In Wooley's response to Defendants' First Set of Interrogatories No. 8, Wooley responds that in addition to the $147,847, they also incurred a net loss of $186,522, totaling $334,369.

LVC was provided with the settlement statement **(Bates #ECW000114-000115)** which includes settlement charges to seller (Wooley) totaling $147,847.

LVC has been unable to determine how Wooley arrived at a net loss of $186,522. As previously stated, the federal income tax return of Wooley reflects a gain on sale of Wooley Property #2.

Additionally, it should be noted that the settlement statement also reflects cash to Wooley totaling $870,844 which does not appear to have been addressed by Wooley in the Amended Complaint.

Property Taxes, Insurance, Maintenance Costs, Management Fee and Security Deposit

Wooley claims that they were required to pay certain expenses for which they should be reimbursed. These expenses include property taxes insurance, maintenance costs, management fee and a security deposit paid by the subtenant. LVC has been provided documentation relating to these expenses. However, in most instances, the supporting documentation does not agree to the alleged damages. Therefore, LVC questions the authenticity of these alleged expenses and whether documentation to support the alleged amounts exists.

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CONCLUSION

Plaintiffs' damage calculation is overstated and contains numerous errors as discussed above.

LVC's conclusions are based on the information made available. If subsequent information is provided, LVC's opinions and conclusions may change. LVC reserves the right to revise and/or supplement this report if necessary. If you have any questions, please do not hesitate to contact us.

Sincerely,

LITIGATION AND VALUATION CONSULTANTS, INC.

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President

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD C. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, Plaintiffs, v. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; JERRY HERBST, an individual; and JH, INC., a Nevada corporation, Defendants.	Case No. CV14-01712 Dept. 6 **PLAINTIFFS' OBJECTIONS TO DEFENDANTS' PROPOSED ORDER GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS**
AND RELATED COUNTERCLAIM	

On January 10, 2017, following oral argument by the parties, the Court issued an oral decision granting Defendants' Motion for Partial Summary Judgment and instructing Defendants to prepare a Proposed Order. As discussed below, the Proposed Order submitted by Defendants includes facts not in evidence, misrepresentations of facts that are in evidence, conclusions of law and fact not made by the Court, and misrepresentations of the holdings of cited cases. Plaintiffs would have provided these objections to Defendants' counsel, but Defendants filed the proposed order without providing the five (5) day period to Plaintiffs as required by WDCR 9.

I. OBJECTIONS

Plaintiffs object to the underlined portions of the following paragraphs of Defendants' Proposed Order, with Plaintiffs' specific objections to each appearing immediately below each objectionable paragraph.

> ¶ 19. Upon Wooley's purchase of the Baring Property, Wooley entered into a mortgage loan for the Baring Property, which purportedly contained a clause which "cross-collateralized" the Baring Property and the Highway 50 Property. (<u>Baring Property Loan at 1.7</u>, Exhibit 15 to Motion).

Plaintiffs object to the underlined portion of this paragraph on the ground that there is no section 1.7 in the Baring Property Loan document. Defendants probably meant to cite to the Baring Deed of Trust, which does the applicable section 1.7.

> ¶ 20. It is undisputed that neither BHI nor Mr. Herbst were party to Wooley's mortgage loan, and <u>Wooley has admitted that neither BHI nor Mr. Herbst knew about the cross-collateralization provisions that are apparently contained in Wooley's financing documents. (Deposition of E. Wooley p. 119, 120, Exhibit 16 to Motion).</u>

Plaintiffs object to the underlined portion of this paragraph on the ground that it misrepresents the evidence. In his deposition, Mr. Wooley did not "admit[] that neither BHI nor Mr. Herbst knew about the cross-collateralization provisions that are apparently contained in Wooley's financing documents" and the Court did not so hold in their oral decision. In fact, in the cited portion of his deposition, Mr. Wooley affirmed his interrogatory response to the

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question, "Please identify and describe in detail any and all facts demonstrating that BHI knew at the time you and BHI entered into the Highway 50 lease that the Highway 50 property was cross-collateralized with the Baring property," that he was "presently unaware of facts responsive to this request."

> ¶ 22. Here, however, based upon the undisputed facts before this Court, the damages sought by Plaintiffs can be presumed unforeseeable as a matter of law.

Plaintiffs object to this paragraph because it is nonsensical and legally unsupportable. Presumptions by definition are relevant only *prior to* the presentation of facts that overcome them; presentation of such facts merely defeats the presumption, it does not give rise to the opposite presumption nor to any new presumption at all.

> ¶ 37. Pertinent to Defendants' Motion, Willard seeks the following damages as a result of Defendants' purported breach of the Willard Lease: (1) "[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 consequences and $549,852.00 in closing costs," (the "Short Sale" damages); (2) "Willard filed for bankruptcy protection, incurring $22,623.00 in legal fees and $15,000 in accounting fees in the process," (the "Bankruptcy" damages); 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" (the "California Action" damages). (FAC ¶¶ 15, 17, 18).

> ¶ 37. n. 2. Willard revised this amount to $4,668,738.49 in Plaintiffs' Opposition.

> ¶ 39. 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 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).

> ¶ 40. In the Opposition, Willard revised this damages request to no longer seek the tax consequences damages sought in the FAC, and instead seek purported "capital carryover losses" as tax damages.

Plaintiffs object to the underlined portions of these paragraphs on the ground that Mr. Willard notified Defendants both in their opposition and at oral argument that he had waived any claim for earnest money invested in the Virginia Property as well as the tax liability and the closing costs associated with the short sale. The Court recognized these waivers in its oral decision. Consequently, it is unnecessary and irrelevant for these damages to be addressed in the Order.

Plaintiffs further object to Defendants' discussion of "capital carryover losses" since these damages are not "tax liabilities" and consequently do not fall under any of the categories of damages contested in Defendants' Motion for Partial Summary Judgment.

¶ 46. n. 4. Plaintiffs' citation to various previsions in the Willard and Highway 50 Leases do not eliminate the requirement under Nevada law that all consequential damages must be foreseeable. <u>Both Plaintiffs have cited to various "remedies" provisions in the Leases that they argue provide "very strong protections for the Lessor in the event of a breach by the Lessee," and argue that those Lease provisions authorize Plaintiffs "to recover 'any and all' damages proximately flowing from a breach." However, Plaintiffs misstate which Lease provisions provide them with remedies against BHI in the event of a breach, and their argument ignores the fundamental requirement under Nevada law that, in order for a plaintiff to recover consequential damages, the plaintiff must prove that the breaching party had reason to foresee, at the time the contract was executed, that those damages would be a probable result of a breach. This is true even in the face of contract provisions that purport to address the issue.</u>

"Foreseeability is a fundamental prerequisite to the recovery of consequential damages for breach of contract." *Basic Capital Management, Inc. v. Dynex Commercial, Inc.*, 348 S.W.3d 894, 901 (Tex. 2011). In fact, the requirement that consequential damages be reasonably foreseeable to the contracting parties at the time of contract formation before they can be recovered can be traced back more than 170 years to the seminal case of *Hadley v. Baxendale*, 9 Exch. 341, 354, 156 Eng. Rep. 145, 151 (1854). And, this requirement clearly remains in place today under Nevada law. *See 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 § 351 at cmt. a. <u>Plaintiffs cannot rely on non-specific language in the remedies portion of the Leases to avoid these requirements when it is abundantly clear that BHI objectively had no reason to believe that</u>

> it would be responsible for the remote and unforeseeable consequential damages sought by Plaintiffs. If Plaintiffs' position were accepted, it would obliterate the foreseeability requirement for consequential damages imposed by Nevada law.

Plaintiffs object to Defendants' claim that Plaintiffs misstated which Lease provisions provide them with remedies against BHI in the event of a breach, since they did not and the Court never held that Plaintiffs had done so.

Plaintiffs further object to Defendants' statement that Plaintiffs ignored foreseeability in their argument, since the record shows that Plaintiffs addressed the issue at length.

Plaintiffs also object to Defendants' unsupported claim that, "[The requirement of foreseeability] is true even in the face of contract provisions that purport to address the issue," on the ground that the statement is nonsensical and legally without merit.

> ¶ 48. 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).
>
> ¶ 50. The burden of proving foreseeability is on the plaintiff. *Margolese*, 902 F.2d 1578.

Plaintiffs object to the underlined portions of these paragraphs on the ground that it cites unpublished case law, i.e., *Margolese v. Bruce*, from the Ninth Circuit without disclosing the fact that the case is unpublished, neither in any pleadings nor at oral argument.

> ¶ 51. 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.
>
> ¶ 52. Willard cannot satisfy this burden as a matter of law.
>
> ¶ 53. 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); *Boise Joint Venture v. Moore*, 806 P.2d 707, 710 (Or. Ct. App. 1991).

¶ 54. Because the loss claimed by Willard would not be a probable result of the purported breach in the ordinary course of events, Willard cannot recover the requested damages unless Willard can prove that Defendants had actual special knowledge at the time the parties entered into the contracts that it was probable that Willard's claimed loss could occur in the event of a breach.

¶ 55. Willard has failed to meet this burden.

¶ 57. Here, Willard's claimed loss was not foreseeable at the time the parties entered into the contracts.

¶ 58. In fact, Mr. Willard himself testified in his deposition that he only spoke with Tim Herbst several years after the execution of the Willard Lease (in 2008, or possibly 2012). (Willard Deposition at 117, 118:20-25, 119, Exhibit 6 to Motion; Willard Lease, Exhibit 2 to Motion; Willard Guaranty, Exhibit 3 to Motion. Even then, Mr. Willard did not discuss 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.

¶ 59. Thus, Defendants did not have knowledge that such loss or damages would be a probable result of any breach of the Willard Lease 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 that 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.

Plaintiffs object to these paragraphs on the ground that they cite to the unpublished case *Margolese v. Bruce* from the Ninth Circuit without disclosing the fact that the case is unpublished. In fact, Ninth Circuit Rule 36-3(c) prohibits citing to the case in the Ninth Circuit other than by parties to that case.

Plaintiffs further object to these paragraphs on the ground that they address a category of damages that was waived by Mr. Willard.

¶ 60. The arguments in Plaintiffs' Opposition are not persuasive.

¶ 61. Therein, Willard referenced a Lease Subordination, Non-Disturbance and Attornment Agreement (the "Subordination Agreement") and a loan with Telesis Community Credit Union (the "Telesis Loan"), which Willard appears to claim demonstrate the foreseeability of a short sale. (Subordination Agreement, Exhibit 32 to Opposition; Telesis Loan, Exhibit 33 to Opposition).

¶ 61. n. 5. Further, Plaintiffs also appear to blame the short sale on events that clearly would not have been foreseeable at the time of entry into the Willard Lease and Guaranty. Opp. at 9 ("Because the Willard Plaintiffs' real estate agent had been unsuccessful in finding a tenant to lease the Virginia Property and had also not been able to find a buyer willing to offer enough for the Virginia Property to cover the outstanding principal balance owed on the Telesis Loan, on January 14, 2014, the Willard Plaintiffs entered into an agreement with Longley….for Longley to purchase the Virginia Property via short sale.").

¶ 62. However, both the Subordination Agreement and the Telesis Loan were entered into months after the execution of the Willard Lease, meaning that those documents are insufficient as a matter of law to have any bearing on foreseeability at the time of the contract. *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.").

¶ 63. Regardless, nothing about the Subordination Agreement demonstrates that a short sale of the Willard Property would be a probable consequence of a breach. At most, this merely demonstrates that Willard had some financing on the property, the amount of which was not specified. (Subordination Agreement, Exhibit 32 to Opposition). The Subordination Agreement certainly did not give any indication that a short sale was a possibility, much less a probability. *Id*.

¶ 64. General knowledge that a landlord has some financing in place on the leased premises is simply not enough to impose consequential damages on a tenant when the landlord loses the leased property to a foreclosure or short sale. *See generally Margolese*, 902 F.2d at 1578.

¶ 65. Finally, it is important to note that Willard provided no evidence that BHI had any notice whatsoever of the subsequent Telesis Loan, or any information about the terms or this loan. (Opposition).

¶ 66. This is also critical because the Telesis Loan, on which Willard eventually failed to make payments, was an entirely different loan than the loan referenced in the Subordination Agreement. (Subordination Agreement, Exhibit 32 to Opposition; Telesis Loan, Exhibit 33 to Opposition).

¶ 67. Therefore, the Subordination Agreement is even less relevant to the foreseeability of Willard's short sale damages allegedly incurred because Willard failed to pay an entirely different loan, the Telesis Loan. (Opposition at 6).

¶ 68. Willard failed to provide any evidence that the short sale damages were foreseeable at the time of the contract, which is fatal to Willard's request, as the burden of proof belongs to Willard. *See id.*; NRCP 56(e).

¶ 69. 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 demonstrate that Willard is not entitled to recover these damages from Defendants as a matter of law. Accordingly, Willard is not entitled to any of the Short Sale damages identified herein and judgment is entered in Defendants' favor on Willard's request for the Short Sale damages identified herein.

Plaintiffs object to these paragraphs on the ground that they address a category of damages that was waived by Mr. Willard.

¶ 70. While unforeseeability is sufficient to preclude Willard's recovery, this Court also notes that there are additional bars to Willard's recovery.

¶ 71. With respect to the claimed tax consequence damages, Willard sought $2,430,000 for Overland and $3,152,000 for Mr. Willard in purported tax consequences from the short sale of the Willard Property. (FAC ¶ 15).

¶ 72. However, in their Opposition, Plaintiffs admitted that Willard did not pay the taxes that he sought from Defendants as damages, conceding that "Per IRS regulations, since the Willard Plaintiffs' respective total debt was greater than their respective total assets immediately prior to the debt cancellation, these tax liabilities were not reported as income and consequently are no longer being claimed as damages flowing from Defendants' breach in the instant action." (Opposition 10).

¶ 73. Thus, Defendants are entitled to judgment in their favor on Willard's request for these damages.

Plaintiffs object to these paragraphs on the ground that they address a category of damages that was waived by Mr. Willard.

///

¶ 74. However, Willard created a new theory for tax consequence damages for the first time in the Opposition, seeking damages that are not sought in the First Amended Complaint. *Id.*

¶ 75. Specifically, Willard argued that "because the Willard Plaintiffs were forced to give up the Virginia Property via short sale, Willard lost $1,018,200.00 in Capital Loss Carryovers that he had been carrying as an asset and Overland lost $3,671,800.00 in Capital Loss Carryovers that he had been carrying as an asset under the 1031 Exchange through which the Willard Plaintiffs had purchased the Virginia Property." *Id.*

¶ 76. This Court concludes that Willard has not met his burden to prove that he actually incurred these damages. *Mort Wallin of Lake Tahoe, Inc. v. Commercial Cabinet Co.*, 105 Nev. 855, 857, 784 P.2d 954, 955 (1989) ("the party seeking damages has the burden of proving both the fact of damages and the amount thereof."); 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.").

¶ 77. Specifically, these claimed damages do not provide a dollar-for-dollar benefit to Plaintiffs, but instead must be multiplied by the applicable tax rate to arrive at Plaintiffs' actual lost benefit.

¶ 78. Further, it is undisputed that Plaintiffs received debt cancellation from the short sale, which exceeded any actual benefit in capital carryover loss benefits. (Deposition of L. Willard p. 89, Exhibit 6 to Motion).

¶ 79. Therefore, there was no financial detriment to Willard or Overland, because both Willard and Overland enjoyed the benefit of not paying the outstanding debt owed, and Willard has not satisfied his burden to prove otherwise. *Supra* ¶ 76; NRCP 56(e).

¶ 80. Accordingly, Defendants are entitled to judgment in their favor on Willard's request for carryover damages.

Plaintiffs object to these paragraphs on the ground that they address a category of damages that was not at issue in Defendants' Motion and was not addressed by the Court in its oral decision. Plaintiffs further object on the ground that these paragraphs contain conclusions of law that were not reached by the Court.

¶ 81. 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. (FAC ¶

15).

¶ 82. However, nothing in the Willard Lease requires or even contemplates Defendants paying Willard his purported invested earnest money in the event of a breach. (Willard Lease, Exhibit 2 to Motion).

¶ 83. 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.

¶ 84. Thus, Willard is not entitled to recover this money from Defendants as a matter of law, and Defendants are entitled to judgment in their favor on this request.

¶ 85. 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).

¶ 86. However, there is absolutely no indication that Willard actually paid the costs in the Closing Statement provided by Willard. *Mort Wallin*, 105 Nev. at 857, 784 P.2d at 955 ("The party seeking damages has the burden of proving both the fact of damages and the amount thereof."). (Closing Statement, Exhibit 9 to Motion).

¶ 87. According to the Closing Statement, Willard's **lenders** received all of the proceeds from the short sale, while Willard received nothing. *Id*.

¶ 88. Willard's lenders then forgave any remaining debt owed on the Willard Property after the short sale. (Deposition of L. Willard p. 89, Exhibit 6 to Motion).

¶ 89. Therefore, the closing costs for the sale only impacted how much Willard's lenders received in payoff from the purchase price.

¶ 90. Further, the payoff amount made no difference to Willard's damages because the lenders forgave any remaining debt outstanding on the mortgage (and Willard did not claim that debt forgiveness as gross income).

¶ 91. Thus, the Closing Statement only reflects that the lenders were paid the purchase price minus the closing costs, not that Willard actually paid any closing costs—or incurred any other financial consequences from the closing costs since the lenders forgave any outstanding remaining debt owed by Willard.

¶ 92. As Willard did not pay any closing costs or incur financial consequences from the amount of closing costs, Willard is not entitled to recover these costs as a matter of law, and Defendants are entitled to judgment in their favor on this request.

Plaintiffs object to these paragraphs on the ground that they address a category of damages that was waived by Mr. Willard.

> ¶ 95 n. 6. In the Opposition, Plaintiffs do not dispute that the California action was brought in the wrong forum (the Leases each contain a Nevada forum provision), that Defendants obtained a dismissal of most of the claims brought in the California action due to lack of personal jurisdiction, or that Plaintiffs eventually voluntarily dismissed the entire case and then refiled the case in this Court.

Plaintiffs object to this paragraph on the grounds that it presents alleged facts that are not in evidence and conclusions that were not reached by the Court in its oral decision.

> ¶ 96. Regardless, Nevada law expressly precludes Willard from recovering the fees. These attorneys' fees could only be recoverable as litigation fees or as special damages, neither of which applies to this case. *Sandy Valley Associates v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 956, 35 P.3d 964, 969 (2001), *receded from on other grounds by Horgan v. Felton*, 123 Nev. 577, 170 P.3d 982 (2007); *Liu v. Christopher Homes* **[*sic*]**, *LLC*, 130 Nev. ___, ___, 321 P.3d 875, 878 (2014) (noting the general rule that attorneys' fees cannot be awarded absent a statute, rule, or contract provision, and that "as an exception to the general rule, attorney fees may be awarded as special damages in limited circumstances.").

Plaintiffs object to this paragraph on the ground that it misstates Nevada law. *See, e.g., Liu v. Christopher Holmes, LLC*, 130 Nev. ____, ____, 321 P.3d 875 (2014) ("The dissent appears to conclude that because the *Horgan* concurrence did not include a breach of contract claim within its list, it is persuasive authority that attorney fees that arise from a breach of contract cannot be recovered as special damages. We disagree.")

> ¶ 99. Here, to the extent that Willard is seeking the California action fees as a cost of litigation, Willard has not identified any statute, rule, or contract provision that would entitle Willard to fees incurred in the futile and now dismissed [*sic*] Further, even if Willard was somehow able to provide a basis for recovering attorneys' fees in the California action, it is wholly unclear why this Court, as opposed to the court in the California action, should determine the award of attorneys' fees incurred in that action.

Plaintiffs object to this paragraph on the ground that it misstates the record. Plaintiffs clearly identified NRCP 9(g) and supporting case law in their Opposition at 18:6-14 and sections of the Leases that provide for such damages in their Opposition at 19:2-14.

Plaintiffs further object on the ground that this paragraph presents conclusions at law that were not part of the Court's oral decision.

> ¶ 100. Not only is Willard's request for fees in this Court untimely, it would be inappropriate for this Court, rather than the presiding court, to make determinations regarding the reasonableness of the fees. *See* NRCP 54(d)(2).

Plaintiffs object to this paragraph on the ground that presents a legal conclusion that was not part of the Court's oral decision.

> ¶ 103 n. 7. Although Plaintiffs claim that they have adequately pled special damages, that does not change the fact that the damages sought by Plaintiffs do not come within either of these limited categories and therefore are not recoverable by Plaintiffs as special damages.
>
> ¶ 104. Here, no purported breach by Defendants has caused Willard to have to defend himself against a third party's legal action.
>
> ¶ 107. The Nevada Supreme Court has been clear that such fees are only recoverable, if at all, in defending against a third-party action. *Christopher Homes, LLC*, 130 Nev. at ___, 321 P.3d at 875.
>
> ¶ 108. Thus, the first circumstance does not apply.
>
> ¶ 109. Further, the California action had nothing to do with real property claims, much less slander of title claims.
>
> ¶ 110. Thus, the attorneys' fees are not recoverable as special damages.

Plaintiffs object to these paragraphs on the ground that they constitute a gross misrepresentation of the holding in *Christopher Homes*, which in no way limited recovery of attorney fees as special damages to slander of title claims and in fact expressly affirmed that attorney fees are recoverable as special damages if they are the result of a breach of contract. *Christopher Homes* also did not address the viability of recovery of attorney fees as special damages in first-party claims.

> ¶ 110 n 8. Even if Willard's claim was entitled to seek the attorneys' fees in the California action as special damages, "as a practical matter, attorney fees are rarely awarded as damages simply because parties have a difficult time demonstrating that the fees were proximately and necessarily caused by the actions of the opposing party and that the fees were a reasonably 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

> <u>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.</u>

Plaintiffs object to this paragraph on the ground that it misrepresents the holding in the case that it cites. The Court in *Sandy Valley Assocs. v. Sky Ranch Estates*, 117 Nev. 948 (Nev. 2001), expressly stated, "when a party claims it has incurred attorney fees as foreseeable damages arising from tortious conduct or a breach of contract, such fees are considered special damages. They must be pleaded as special damages in the complaint pursuant to NRCP 9(g) and proved by competent evidence just as any other element of damages. The mention of attorney fees in a complaint's general prayer for relief is insufficient to meet this requirement. Finally, when attorney fees are considered as an element of damages, they must be the natural and proximate consequence of the injurious conduct." *Id.* at 956.

> ¶ 111. <u>Finally, nothing in the Willard Lease entitles Willard to recover these damages in circumvention of settled Nevada law. (Willard Lease, Exhibit 2 to Motion).</u>

Plaintiffs object to this paragraph on the ground that it misrepresents the evidence. Specifically, Section 20(b)(v) of the Lease provides that Plaintiffs are entitled "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," [Pl. Opp. Ex. 28 at p. 18.] with the term "Costs" being defined to include "all reasonable costs and expenses incurred by a Person, including without limitation, reasonable attorneys' fees and expenses." [*Id.* at p. 30.]

> ¶ 112. <u>Notwithstanding Plaintiffs' citation to certain lease provisions, this Court is not the appropriate court to determine the reasonableness of and award attorneys' fees incurred in the California action.</u>

Plaintiffs object to this paragraph on the ground that it contains a conclusion of law not reached by the Court in its oral decision.

> ¶ 114. Willard claims that "as a further direct and proximate result of BHI breaching the Willard Lease, Willard filed for bankruptcy protection, incurring $22,623.00 in legal fees and $15,000 in accounting fees in the process." (FAC ¶ 17, on file herein). <u>Willard</u>

is not entitled to these fees as a matter of law.

¶ 115. First, it is undisputed that Willard's bankruptcy was not foreseeable at the time the parties entered into the contracts.

Plaintiffs object to the underlined portions of these paragraphs on the ground that they contain conclusions of law not reached in the Court's oral decision.

¶ 117. If Willard's bankruptcy was not a foreseeable consequence of a breach of the Willard Lease, then any fees incurred "in the process" of Willard filing and pursuing his six-month voluntary bankruptcy are also not foreseeable, and therefore not recoverable by Willard. Footnote 8; Restatement (Second) of Contracts § 351(1) ("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.").

¶ 118. Second, even if the bankruptcy was somehow foreseeable, Willard does not meet any of the requirements to seek his fees purportedly incurred as a result of the bankruptcy. If Willard wanted to recover his fees as a cost of litigation of the bankruptcy, he should have sought them with the bankruptcy court, although the availability of such fees upon a voluntarily dismissed voluntary bankruptcy would be questionable at best. Further, if Willard seeks these fees as special damages, the bankruptcy costs do not fall within the specific categories of damages permitted to be claimed as special damages. *Christopher Homes, LLC*, 130 Nev. at ___, 321 P.3d at 875.

¶ 118 n. 10. While the law cited herein discusses attorneys' fees, Willard appears to claim that his accounting fees were a cost of the bankruptcy litigation. Thus, the analysis is the same for both.

¶ 119. Thus, Willard is not entitled to the attorneys' fees or accounting fees purportedly incurred in the bankruptcy as a matter of law.

Plaintiffs object to these paragraphs on the ground that they grossly misrepresent the holding of *Christopher Homes*. Plaintiffs further object on the ground that these paragraphs contain conclusions of law not reached by the Court in its oral decision.

¶ 124. Thus, the only way that Wooley could recover these consequential damages is by proving that such a loss was foreseeable as a probable result of the breach at the time the parties entered into the Highway 50 Lease. Restatement § 351(1).

Plaintiffs object to this paragraph on the ground that they contain conclusions of law not reached in the Court's oral decision.

A.App.1444

> ¶ 133. Thus, it is undisputed that Defendants did not have reason to foresee this purported loss as a probable result of their alleged breach when the contracts were made, precluding Wooley from recovering any damages relating to the sale of the Baring Property as a matter of law. Restatement (Second) of Contracts § 351(1).

Plaintiffs object to this paragraph on the ground that it misrepresents the evidence. In his deposition, Mr. Wooley did not "admit[] that neither BHI nor Mr. Herbst knew about the cross-collateralization provisions that are apparently contained in Wooley's financing documents" and the Court did not so hold in their oral decision. In fact, in the cited portion of his deposition, Mr. Wooley affirmed his interrogatory response to the question, "Please identify and describe in detail any and all facts demonstrating that BHI knew at the time you and BHI entered into the Highway 50 lease that the Highway 50 property was cross-collateralized with the Baring property," that he was "presently unaware of facts responsive to this request."

> ¶ 133 n. 11. Nor can any argument be made that it is foreseeable, in the ordinary course of events, that a tenant's breach of a lease will result in a landlord having to sell one of the landlord's other properties. *See Margolese*, 902 F.2d at 1578.

Plaintiffs object to this paragraph on the ground that it cites unpublished case law, i.e., *Margolese v. Bruce*, from the Ninth Circuit without disclosing the fact that the case is unpublished, neither in any pleadings nor at oral argument.

> ¶ 134. Indeed, Wooley points to no facts that would contradict the facts proffered by Defendants in support of their Motion or create a genuine issue of material fact that would preclude summary judgment. NRCP 56(e). Defendants are awarded judgment in their favor on Wooley's request.

Plaintiffs object to the underlined portion of this paragraph on the ground that it misrepresents the evidence as well as the burden of proof required under NRCP 56(e). In his deposition, Mr. Wooley did not "admit[] that neither BHI nor Mr. Herbst knew about the cross-collateralization provisions that are apparently contained in Wooley's financing documents" and the Court did not so hold in their oral decision. In fact, in the cited portion of his deposition, Mr. Wooley affirmed his interrogatory response to the question, "Please identify and describe in detail any and all facts demonstrating that BHI knew at the time you and BHI entered into the

Highway 50 lease that the Highway 50 property was cross-collateralized with the Baring property," that he was "presently unaware of facts responsive to this request." Given the fact that Defendants did not submit admissible affidavits attesting to the unforeseen nature of these damages, Plaintiffs had no duty to refute that claim, and Plaintiffs statement that he had no knowledge does not constitute an admission supporting such a claim.

> ¶ 136. As explained *supra*, no rule, statute, or contractual provision entitles Wooley to these fees as a cost of litigating the California action.
>
> ¶ 137. Further, the California action was not within the limited set of actions that would entitle Wooley to seek these fees as special damages.
>
> ¶ 138. Finally, nothing in the Highway 50 Lease entitles Wooley to recover these damages in circumvention of settled Nevada law. (Highway 50 Lease, Exhibit 10 to Motion).

Plaintiffs object to these paragraphs on the same grounds as proffered for paragraphs 96, 100, 107-110, 111, and 112.

II. CONCLUSION

For the foregoing reasons, the Court should reject the objectionable portions of Defendants' Proposed Order as discussed above.

Respectfully submitted,

LAW OFFICES OF BRIAN P. MOQUIN

DATED: January 30, 2017

By:______________________________

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Attorneys for Plaintiffs

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.

LAW OFFICES OF BRIAN P. MOQUIN

DATED: January 30, 2017

By:______________________________

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Nevada that on this date I served a true and correct copy of the foregoing document as follows:

[X] By sending a true and correct copy of the foregoing document by electronic mail to jdesmond@dickinsonwright.com, birvine@dickinsonwright.com, and awebster@dickinsonwright.com.

DATED: January 30, 2017

BRIAN P. MOQUIN

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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 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,

CASE NO. CV14-01712

DEPT. 6

DEFENDANTS/COUNTERCLAIMANTS' RESPONSE TO PLAINTIFFS' OBJECTIONS TO DEFENDANTS' PROPOSED ORDER GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

vs

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

Counter-defendants.

Defendants/Counterclaimants Berry-Hinckley Industries ("BHI") and Jerry Herbst (collectively, "Defendants") hereby bring this Response to Plaintiffs' Objections to Defendants' Proposed Order Granting Partial Summary Judgment in favor of Defendants ("Objections"). This Motion is based upon the following memorandum of points and authorities, all pleadings and papers on file herein, and any other material that this Court may choose to consider.

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs' Objections to the Proposed Order granting partial summary judgment in favor of Defendants are nothing more than a misguided effort to distract from this Court's clear ruling issued after oral argument. Defendants respectfully submit this limited response to briefly correct certain of the inaccuracies in Plaintiffs' Objections:

First, Plaintiffs state that the language in the Proposed Order which addresses Plaintiff Willard's "capital carryover losses" is objectionable "on the ground that [it] address[es] a category of damages that was not at issue in Defendants' Motion and was not addressed by the Court in its oral decision. Plaintiffs further object on the ground that these paragraphs contain conclusions of law that were not reached by the Court." (Objections at 9). However, these damages were expressly addressed in Defendants' Reply in Support of Defendants' Motion after Plaintiffs claimed that category of damages for the first time in their Opposition. (Reply at 7-8). They were also the sole discussion of the Supplement in Support of Defendants' Motion which, as this Court noted, was never opposed by the Plaintiffs. (Supplement, on file herein; Transcript at 9, on file herein). Further, these damages were argued at length at the January 10, 2017 hearing. *Id*. at 9, 19, 41, 43-45, 59, 60. In addition to the reasons set forth in Defendants' unopposed Supplement, which was based upon an expert report to which Plaintiffs did not file a rebuttal, Defendants argued that those purported losses were completely unforeseeable:

> [T]hese damages are even less foreseeable than the tax consequences damages they were seeking before. If you play this out, it's not a probable result of a breach of the lease followed by a threatened foreclosure, followed by a threatened short sale which was, then, completed. And you would have to know about Mr. Willard's accounting and tax treatment over the years. There's no evidence in the record that the Herbsts had any way of knowing that they were carrying these capital loss carryovers as assets. We don't have access to their bank records. We don't have access to their tax returns. We don't have access to their accountants at any point in time prior to the breach….

Id. 59-60. The Court agreed and granted Defendants' Motion, denying all of Plaintiff Willard's "short sale" damages discussed therein, including "tax consequences resulting from the cancelled mortgage debt."[1] *Id*. at 64. As this Court has ruled that the short sale itself was not foreseeable, then any capital carryover losses which allegedly result from that short sale necessarily were also not foreseeable. Certainly, after lengthy discussion at oral argument, had this Court decided to carve out Willard's claimed capital loss carryover damages, this Court would have. And, Plaintiffs made no effort to provide any evidence that these claimed losses were foreseeable at the time of entry into the contracts, or that the losses were actually incurred. NRCP 56(e). Plaintiffs cannot simply arbitrarily delay resolution of those requested damages based upon gossamer threads of whimsy and conjecture.

Second, Plaintiffs state that Defendants purportedly did not disclose "the fact that [*Margolese v. Bruce*] is unpublished, neither in any pleadings nor at oral argument." (Objections at 5, 6, 15). However, Defendants expressly informed this Court that *Margolese* is

---

[1]The only reason these damages were not addressed in Defendants' Motion was because it was a category of damages that Plaintiffs sought for the first time in their Opposition to Defendants' Motion. (Opposition at 10, on file herein; FAC, on file herein).

unpublished during the oral argument. Specifically, Defendants' counsel stated about *Margolese* that "it's an **unpublished** Ninth Circuit disposition for a judge I used to clerk for…." (Transcript at 29, on file herein).

Third, Plaintiffs state that "in his deposition, Mr. Wooley did not 'admit[] that neither BHI nor Mr. Herbst knew about the cross-collateralization provisions that are apparently contained in Wooley's financing documents….'" (Objections at 2). However, when affirming his interrogatory responses, which state that Mr. Wooley was "presently unaware of facts" showing Defendants' knowledge of cross-collateralization, Mr. Wooley also stated, "I don't know why they would even know…. They're not party to getting a loan. I am. They take the check and cash it." (Wooley Deposition at 119, Exhibit 16 to Motion). Both Mr. Wooley's affirmation of his interrogatory response and his additional comments demonstrate that it is undisputed that Defendants did not know of the cross-collateralization at the time of entry into the Highway 50 Lease or any time thereafter, and Mr. Wooley has never propounded any evidence to refute that. NRCP 56(e). And, regardless, the cross-collateralization did not even exist at the time of the execution of the Highway 50 Lease, which is the only time pertinent to a foreseeability analysis. *Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp.*, 98 Nev. 113, 115-16, 642 P.2d 1086, 1087 (1982) ("There can be no recovery for damages that are not reasonably foreseeable at the time of the contract.").

Finally, while this is not material to the outcome of the proposed order, Defendants would like to correct Plaintiffs' false accusation that counsel for Defendants violated WDCR 9. Plaintiffs state that "Plaintiffs would have provided [their] objections to Defendants' counsel, but Defendants filed the proposed order without providing the five (5) day period to Plaintiffs as required by WDCR 9." (Objections at 2). This is inaccurate. On January 10, 2017, this Court requested that Defendants submit a proposed order within 15 days of the January 10 hearing. (Transcript at 68, on file herein). On January 16, 2017 (Martin Luther King Day), the Court Reporter filed the transcript. Shortly thereafter, on January 19, 2017, Defendants submitted the proposed order to Plaintiffs' counsel in compliance with WDCR 9 and copied Ms. Heidi Boe on the email to inform this Court of Defendants' actions. (January 19-25, 2017, email exchange, **Exhibit 1**). Defendants stated to Plaintiffs' counsel:

> Please find attached Defendants' proposed order. Per WDCR 9, "[i]n a non-jury case, where a judge directs an attorney to prepare findings of fact, conclusions of law, and judgment, the attorney shall serve a copy of the proposed document upon counsel for all parties who have appeared at the trial and are affected by the judgment. Five days after service counsel shall submit the same to the court for signature together with proof of such service."
>
> Accordingly, Defendants are serving you with the proposed order by means of this email. Defendants will submit the proposed order to the Court on **January 24, 2017**, to comply with the Court's deadline of submitting the proposed order within 15 days of the hearing.

Id.

Upon receiving this email, Plaintiffs' counsel objected, stating that Plaintiffs must have until January 30, 2017, to file their objections. *Id*. Defendants responded:

> Respectfully, the Court ordered us to provide the proposed order within 15 days of the hearing, which would fall on Jan. 25. We needed the hearing transcript to finalize the order, and we only received the transcript this Tuesday, and completed the proposed order as soon as we could. We don't want to run afoul of the Court's order, so we need to submit the order by Jan. 25. We also need to keep the clock running on Plaintiffs' obligation to provide NRCP 16.1 damages disclosures, which are very long overdue. We would have no opposition to you contacting chambers to request that the Court not sign the order until Jan. 30 if you believe you need additional time to lodge some objection, if you intend to do so.

Id. On January 25, 2017, Defendants submitted the proposed order to the Court, as they informed Plaintiffs' counsel that they would do, and also copied Plaintiffs' counsel. (January 25, 2017, email from M. Reel, **Exhibit 2**). Plaintiffs' counsel informed this Court that Plaintiffs would submit the Plaintiffs' objections and an alternate proposed order that day. (January 19-

25, 2017, email exchange, **Exhibit 1**). However, Plaintiffs did not file their objections until January 30. (Objections, on file herein). Thus, Defendants have amply complied with their WDCR 9 obligations to disclose the proposed order to Plaintiffs, and Plaintiffs did not incur any prejudice whatsoever because Plaintiffs were able to file their proposed objections on January 30—the date they requested—prior to this Court signing Defendants' proposed order.

With respect to Plaintiffs' remaining objections, Defendants submit that those objections are inaccurate and irrelevant, and also misconstrue case law. However, respectfully, the shortcomings of these objections are clear on their face and where, as here, this Court has read the briefs, read the case law, and conducted oral argument, Defendants do not feel it necessary to regurgitate past arguments to respond to Plaintiffs' objections. Should this Court require further comment on these objections, Defendants will immediately oblige.

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 2nd day of February, 2017.

DICKINSON WRIGHT, PLLC

/s/ Brian R. Irvine
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Attorneys for Defendants
Berry Hinckley Industries, and Jerry Herbst

CERTIFICATE OF SERVICE

I certify that I am an employee of 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' RESPONSE TO PLAINTIFFS' OBJECTIONS** 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.

☒ 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 email to the email addresses below.

☐ Federal Express (or other overnight delivery)

addressed as follows:

Brian P. Moquin LAW OFFICES OF BRIAN P. MOQUIN 3287 Ruffino Lane San Jose, California 95148 bmoquin@lawprism.com	David C. O'Mara THE O'MARA LAW FIRM, P.C. 311 E. Liberty Street Reno, Nevada 89501 david@omaralaw.net

DATED this 2nd day of February, 2017.

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

EXHIBIT TABLE

Exhibit	Description	Pages[2]
1	January 19-25, 2017, email exchange	2
2	January 25, 2017, email from M. Reel	24

[2] Exhibit page counts are exclusive of exhibit slip sheets.

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EXHIBIT 1

EXHIBIT 1

Mina Reel

From:	Brian Moquin <bmoquin@lawprism.com>
Sent:	Wednesday, January 25, 2017 9:48 AM
To:	Brian R. Irvine
Cc:	David O'Mara, Esq.; Mina Reel; John P. Desmond; Anjali D. Webster; Boe, Heidi
Subject:	Re: Willard, Wooley et al v. BHI, et al, Case No. CV14-01712

I will have our objections and alternate proposed order to you by early-to-mid-afternoon today.

Brian

On Jan 19, 2017, at 7:20 PM, Brian R. Irvine <BIrvine@dickinson-wright.com> wrote:

David- Respectfully, the Court ordered us to provide the proposed order within 15 days of the hearing, which would fall on Jan. 25. We needed the hearing transcript to finalize the order, and we only received the transcript this Tuesday, and completed the proposed order as soon as we could. We don't want to run afoul of the Court's order, so we need to submit the order by Jan. 25. We also need to keep the clock running on Plaintiffs' obligation to provide NRCP 16.1 damages disclosures, which are very long overdue. We would have no opposition to you contacting chambers to request that the Court not sign the order until Jan. 30 if you believe you need additional time to lodge some objection, if you intend to do so.

Brian

On Jan 19, 2017, at 5:31 PM, David O'Mara, Esq. <david@omaralaw.net> wrote:

Counsel,

Please recalculate your date for submission. You do not include weekends and must allow three days for the service by email. The date is January 30, 2017.

David

Brian R. Irvine Member

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From: Mina Reel [mailto:MReel@dickinson-wright.com]
Sent: Thursday, January 19, 2017 1:42 PM
To: Brian Moquin <bmoquin@lawprism.com>; David O'Mara, Esq. <david@omaralaw.net>; John P. Desmond <JDesmond@dickinson-wright.com>; Brian R. Irvine <BIrvine@dickinson-wright.com>; Anjali D. Webster <AWebster@dickinson-wright.com>
Cc: Boe, Heidi <Heidi.Boe@washoecourts.us>
Subject: Willard, Wooley et al v. BHI, et al, Case No. CV14-01712

Dear counsel:

Please find attached Defendants' proposed order. Per WDCR 9, "[i]n a non-jury case, where a judge directs an attorney to prepare findings of fact, conclusions of law, and judgment, the attorney shall serve a copy of the proposed document upon counsel for all parties who have appeared at the trial and are affected by the judgment. Five days after service counsel shall submit the same to the court for signature together with proof of such service."

Accordingly, Defendants are serving you with the proposed order by means of this email. Defendants will submit the proposed order to the Court on **January 24, 2017**, to comply with the Court's deadline of submitting the proposed order within 15 days of the hearing.

Thank you,

Mina Reel Legal Secretary

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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.

EXHIBIT 2

EXHIBIT 2

Mina Reel

From: Mina Reel
Sent: Wednesday, January 25, 2017 10:09 AM
To: Boe, Heidi; Brian Moquin; David O'Mara, Esq.
Cc: John P. Desmond; Brian R. Irvine; Anjali D. Webster
Subject: RE: Willard, Wooley v BHI, Case No. CV14-01712
Attachments: RENO-#13011-v1-_PROPOSED__ORDER_GRANTING_PARTIAL_SUMMARY_JUDGMENT_IN_FAV....doc

Dear Ms. Boe:

Please find attached a Proposed Order Granting Defendants' Motion for Partial Summary Judgment, as requested by Judge Simons at the January 10, 2017 hearing.

Thanks!

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Attorney for Defendants
Berry Hinckley Industries and
Jerry Herbst

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

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

Plaintiff,

vs.

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

Defendants.
/

CASE NO. CV14-01712

DEPT. 6

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

Counterclaimants,

vs

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

Counter-defendants.

_______________________________________/

[PROPOSED] ORDER GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

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

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

3. The Motion before this Court is Defendants' Motion for Partial Summary Judgment on certain claims for consequential damages asserted by the Willard Plaintiffs and the Wooley Plaintiffs (the "Motion").

4. Defendants' Motion was fully briefed and submitted on September 19, 2016, and was argued on January 10, 2017, during which time this Court issued its oral ruling from the bench.

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

FINDINGS OF FACT

6. If any findings of fact are properly construed as conclusions of law, they shall be treated as if appropriately identified and designated.

The Willard Lease.

7. 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 to Motion; First Amended Complaint ("FAC") ¶ 9).

8. In 2007, Mr. Herbst entered into a guaranty agreement for the Willard Lease. (Willard Guaranty, Exhibit 3 to Motion; FAC ¶ 11).

9. Willard claims that BHI breached the Willard Lease in 2013.[1] (FAC ¶ 12).

10. In 2013, Mr. Willard filed for bankruptcy. *Id.* ¶ 17.

11. It is undisputed that he voluntarily dismissed the bankruptcy within months of filing it. *Id.*

12. In March 2014, Willard sold the Willard Property in a short sale. *Id.* ¶ 15.

13. As a result of the Defendants' purported breach of the Willard Lease, Willard seeks, among other damages: (1) attorneys' fees allegedly incurred by Willard in an action Plaintiffs brought against Defendants in California in 2013; (2) fees Willard allegedly incurred in his voluntary bankruptcy; and (3) alleged damages related to the short sale of the Willard Property. *Id.* ¶¶ 15, 17, 18.

14. As will be addressed further in this Order, this Court finds that the undisputed facts demonstrate that the damages sought by Willard were not foreseeable at the time the parties entered into the Willard Lease or Willard Guaranty.

The Wooley Leases.

15. In 2005, BHI and Wooley entered into a commercial lease for the lease of property on Highway 50 in Nevada (the "Highway 50 Lease"). (Highway 50 Lease, Exhibit 10 to Motion; FAC ¶ 28).

16. Mr. Herbst entered into a guaranty agreement on the Highway 50 Lease in 2007. (Highway 50 Guaranty, Exhibit 11 to Motion; FAC ¶ 31).

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[1] Whether the Defendants breached the parties' leases is not at issue in the Motion and need not be addressed in this Order.

17. Wooley claims that BHI breached the Highway 50 Lease in 2013. (FAC ¶ 32, on file herein).

18. In 2006, Wooley bought property on Baring Boulevard (the "Baring Property"), and BHI and Wooley entered into a separate lease for that property (the "Baring Lease"). (Baring Purchase Agreement, Exhibit 13 to Motion; Baring Lease, Exhibit 14 to Motion; FAC ¶ 29, on file herein).

19. Upon Wooley's purchase of the Baring Property, Wooley entered into a mortgage loan for the Baring Property, which purportedly contained a clause which "cross-collateralized" the Baring Property and the Highway 50 Property. (Baring Property Loan at 1.7, Exhibit 15 to Motion).

20. It is undisputed that neither BHI nor Mr. Herbst were party to Wooley's mortgage loan, and Wooley has admitted that neither BHI nor Mr. Herbst knew about the cross-collateralization provisions that are apparently contained in Wooley's financing documents. (Deposition of E. Wooley p. 119, 120, Exhibit 16 to Motion).

21. It is also undisputed that Wooley entered into this loan after the parties had entered into the Highway 50 Lease. (Highway 50 Lease, Exhibit 10 to Motion; Baring Property Loan, Exhibit 15 to Motion).

22. In or about December 2009, BHI assigned its interests and obligations in the Baring Lease to Jacksons Food Stores, Inc. (Assignment, Exhibit 17 to Motion).

23. Wooley subsequently sold the Baring Property while Jacksons was still a tenant in the Baring Property. (HUD Statement, Exhibit 18).

24. BHI was not in default of the Baring Lease when Wooley sold the Baring Property. (Deposition of E. Wooley p. 99, 100, Exhibit 16 to Motion).

25. As a result of Defendants' purported breach of the Highway 50 Lease, Wooley seeks, among other damages: (1) purported damages relating to his sale of the Baring Property; and (2) attorneys' fees allegedly incurred by Wooley in an action Plaintiffs brought against Defendants in California in 2013. (FAC).

26. As will be addressed further in this Order, this Court finds that the undisputed facts demonstrate that the damages sought by Wooley were not foreseeable at the time the parties entered into the Highway 50 Lease or Guaranty.

CONCLUSIONS OF LAW

27. If any conclusions of law are properly findings of fact, they shall be treated as if appropriately identified and designated.

Summary Judgment Standard

28. The Nevada Supreme Court has held that "summary 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).

29. 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).

30. "When a motion for summary judgment is made and supported..., an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." NRCP 56(e).

31. Defendants' Motion is for partial adjudication of the case before this Court. "If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear

without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly." NRCP 56(d).

32. 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).

33. Here, however, based upon the undisputed facts before this Court, the damages sought by Plaintiffs can be presumed unforeseeable as a matter of law.

34. 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. Indeed, the Court finds, based upon the deposition transcripts attached to the Motion, that the Plaintiffs admit that Defendants had no reason to foresee the items of damages specified in the Motion.

35. Further, Defendants are entitled to judgment on other bases in addition to the unforeseeable nature of the damages.

36. 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).

Willard's Damages

37. Pertinent to Defendants' Motion, Willard seeks the following damages as a result of Defendants' purported breach of the Willard Lease: (1) "[Willard was] forced to sell the Willard Property in March 2014 in a short sale, thereby losing $4,437,500.00[2] of earnest money

[2]Willard revised this amount to $4,668,738.49 in Plaintiffs' Opposition.

invested in the Willard Property and incurring at least $3,000,000.00 in tax consequences[3] and $549,852.00 in closing costs," (the "Short Sale" damages); (2) "Willard filed for bankruptcy protection, incurring $22,623.00 in legal fees and $15,000 in accounting fees in the process," (the "Bankruptcy" damages); 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" (the "California Action" damages). (FAC ¶¶ 15, 17, 18).

38. Willard is not entitled to these damages as a matter of law. This Court will address each category of requested damages in turn.

(1) Willard is not entitled to the "Short Sale" damages.

39. 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 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).

40. In the Opposition, Willard revised this damages request to no longer seek the tax consequences damages sought in the FAC, and instead seek purported "capital carryover losses" as tax damages.

41. For the reasons set forth herein, Willard is not entitled to any of the Short Sale damages or for the new claim asserted for capital loss carryover damages.

(a) Willard withdrew his claims for most of the Short Sale damages.

42. At the January 10, 2017, hearing, Willard withdrew his claims for the following damages: (1) earnest money invested in the Willard Property; (2) the $2,430,000 for Overland and $3,152,000 for Mr. Willard of purported tax consequences incurred as a result of the short sale; and (3) closing costs. (January 10, 2017, Transcript p. 39-41). Accordingly, Willard is not entitled to those damages as a matter of law.

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[3]Willard has since revised that estimate to be $2,430,000 for Overland and $3,152,000 for Mr. Willard.

43. Thus, at the time of the hearing, the only "Short Sale" damages sought were purported negative tax consequences incurred as a result of the purported loss of capital loss carryovers. *Id.*

(b) The Short Sale damages were not foreseeable at the time of entry into the contracts.

44. Even regardless of Willard's withdrawal of his claims, Willard is not entitled to any of the Short Sale damages as a matter of law.

45. As a threshold matter, this Court finds that none of the Short Sale damages are recoverable, as a matter of law, because the short sale and the resulting claimed damages are not a foreseeable consequence of Defendants' purported breach.

46. "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."[4] Restatement

[4]Plaintiffs' citation to various previsions in the Willard and Highway 50 Leases do not eliminate the requirement under Nevada law that all consequential damages must be foreseeable. Both Plaintiffs have cited to various "remedies" provisions in the Leases that they argue provide "very strong protections for the Lessor in the event of a breach by the Lessee," and argue that those Lease provisions authorize Plaintiffs "to recover 'any and all' damages proximately flowing from a breach." However, Plaintiffs misstate which Lease provisions provide them with remedies against BHI in the event of a breach, and their argument ignores the fundamental requirement under Nevada law that, in order for a plaintiff to recover consequential damages, the plaintiff must prove that the breaching party had reason to foresee, at the time the contract was executed, that those damages would be a probable result of a breach. This is true even in the face of contract provisions that purport to address the issue.

"Foreseeability is a fundamental prerequisite to the recovery of consequential damages for breach of contract." *Basic Capital Management, Inc. v. Dynex Commercial, Inc.*, 348 S.W.3d 894, 901 (Tex. 2011). In fact, the requirement that consequential damages be reasonably foreseeable to the contracting parties at the time of contract formation before they can be recovered can be traced back more than 170 years to the seminal case of *Hadley v. Baxendale*, 9 Exch. 341, 354, 156 Eng. Rep. 145, 151 (1854). And, this requirement clearly remains in place today under Nevada law. *See 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 § 351 at cmt. a. Plaintiffs cannot rely on non-specific language in the remedies portion of the Leases to avoid these requirements when it is abundantly clear that BHI objectively had no reason to believe that it would be responsible for the remote and unforeseeable consequential damages sought by Plaintiffs. If Plaintiffs' position

(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.").

47. 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 § 351 at cmt. a.

48. 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).

49. 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.

50. The burden of proving foreseeability is on the plaintiff. *Margolese*, 902 F.2d 1578.

51. 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.

52. Willard cannot satisfy this burden as a matter of law.

53. 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**

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were accepted, it would obliterate the foreseeability requirement for consequential damages imposed by Nevada law.

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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); *Boise Joint Venture v. Moore*, 806 P.2d 707, 710 (Or. Ct. App. 1991).

54. Because the loss claimed by Willard would not be a probable result of the purported breach in the ordinary course of events, Willard cannot recover the requested damages unless Willard can prove that Defendants had actual special knowledge at the time the parties entered into the contracts that it was probable that Willard's claimed loss could occur in the event of a breach.

55. Willard has failed to meet this burden.

56. It is settled law that foreseeability is measured as of the time the parties enter into a contract. *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.**"); Restatement (Second) of Contracts § 351 at cmt. a.

57. Here, Willard's claimed loss was not foreseeable at the time the parties entered into the contracts.

58. In fact, Mr. Willard himself testified in his deposition that he only spoke with Tim Herbst several years **after** the execution of the Willard Lease (in 2008, or possibly 2012). (Willard Deposition at 117, 118:20-25, 119, Exhibit 6 to Motion; Willard Lease, Exhibit 2 to Motion; Willard Guaranty, Exhibit 3 to Motion. Even then, Mr. Willard did not discuss 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.

59. Thus, Defendants did not have knowledge that such loss or damages would be a probable result of any breach of the Willard Lease 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 that 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.

60. The arguments in Plaintiffs' Opposition are not persuasive.

61. Therein, Willard referenced a Lease Subordination, Non-Disturbance and Attornment Agreement (the "Subordination Agreement") and a loan with Telesis Community Credit Union (the "Telesis Loan"), which Willard appears to claim demonstrate the foreseeability of a short sale.[5] (Subordination Agreement, Exhibit 32 to Opposition; Telesis Loan, Exhibit 33 to Opposition).

62. However, both the Subordination Agreement and the Telesis Loan were entered into months **after** the execution of the Willard Lease, meaning that those documents are insufficient as a matter of law to have any bearing on foreseeability at the time of the contract. *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**.").

63. Regardless, nothing about the Subordination Agreement demonstrates that a short sale of the Willard Property would be a probable consequence of a breach. At most, this merely demonstrates that Willard had **some** financing on the property, the amount of which was not specified. (Subordination Agreement, Exhibit 32 to Opposition). The Subordination Agreement certainly did not give any indication that a short sale was a possibility, much less a probability. *Id.*

64. General knowledge that a landlord has some financing in place on the leased premises is simply not enough to impose consequential damages on a tenant when the landlord

[5]Further, Plaintiffs also appear to blame the short sale on events that clearly would not have been foreseeable at the time of entry into the Willard Lease and Guaranty. Opp. at 9 ("Because the Willard Plaintiffs' real estate agent had been unsuccessful in finding a tenant to lease the Virginia Property and had also not been able to find a buyer willing to offer enough for the Virginia Property to cover the outstanding principal balance owed on the Telesis Loan, on January 14, 2014, the Willard Plaintiffs entered into an agreement with Longley….for Longley to purchase the Virginia Property via short sale.").

loses the leased property to a foreclosure or short sale. *See generally Margolese*, 902 F.2d at 1578.

65. Finally, it is important to note that Willard provided no evidence that BHI had any notice whatsoever of the subsequent Telesis Loan, or any information about the terms or this loan. (Opposition).

66. This is also critical because the Telesis Loan, on which Willard eventually failed to make payments, was an entirely different loan than the loan referenced in the Subordination Agreement. (Subordination Agreement, Exhibit 32 to Opposition; Telesis Loan, Exhibit 33 to Opposition).

67. Therefore, the Subordination Agreement is even less relevant to the foreseeability of Willard's short sale damages allegedly incurred because Willard failed to pay an entirely different loan, the Telesis Loan. (Opposition at 6).

68. Willard failed to provide any evidence that the short sale damages were foreseeable at the time of the contract, which is fatal to Willard's request, as the burden of proof belongs to Willard. *See id.*; NRCP 56(e).

69. 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 demonstrate that Willard is not entitled to recover these damages from Defendants as a matter of law. Accordingly, Willard is not entitled to any of the Short Sale damages identified herein and judgment is entered in Defendants' favor on Willard's request for the Short Sale damages identified herein.

(c) Additional, independent bases also preclude Willard's recovery of the Short Sale damages.

70. While unforeseeability is sufficient to preclude Willard's recovery, this Court also notes that there are additional bars to Willard's recovery.

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(i) Tax consequence damages.

71. With respect to the claimed tax consequence damages, Willard sought $2,430,000 for Overland and $3,152,000 for Mr. Willard in purported tax consequences from the short sale of the Willard Property. (FAC ¶ 15).

72. However, in their Opposition, Plaintiffs admitted that Willard did not pay the taxes that he sought from Defendants as damages, conceding that "Per IRS regulations, since the Willard Plaintiffs' respective total debt was greater than their respective total assets immediately prior to the debt cancellation, these tax liabilities were not reported as income and consequently are no longer being claimed as damages flowing from Defendants' breach in the instant action." (Opposition 10).

73. Thus, Defendants are entitled to judgment in their favor on Willard's request for these damages.

74. However, Willard created a new theory for tax consequence damages for the first time in the Opposition, seeking damages that are not sought in the First Amended Complaint. *Id.*

75. Specifically, Willard argued that "because the Willard Plaintiffs were forced to give up the Virginia Property via short sale, Willard lost $1,018,200.00 in Capital Loss Carryovers that he had been carrying as an asset and Overland lost $3,671,800.00 in Capital Loss Carryovers that he had been carrying as an asset under the 1031 Exchange through which the Willard Plaintiffs had purchased the Virginia Property." *Id.*

76. This Court concludes that Willard has not met his burden to prove that he actually incurred these damages. *Mort Wallin of Lake Tahoe, Inc. v. Commercial Cabinet Co.*, 105 Nev. 855, 857, 784 P.2d 954, 955 (1989) ("the party seeking damages has the burden of proving both the fact of damages and the amount thereof."); 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.").

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77. Specifically, these claimed damages do not provide a dollar-for-dollar benefit to Plaintiffs, but instead must be multiplied by the applicable tax rate to arrive at Plaintiffs' actual lost benefit.

78. Further, it is undisputed that Plaintiffs received debt cancellation from the short sale, which exceeded any actual benefit in capital carryover loss benefits. (Deposition of L. Willard p. 89, Exhibit 6 to Motion).

79. Therefore, there was no financial detriment to Willard or Overland, because both Willard and Overland enjoyed the benefit of not paying the outstanding debt owed, and Willard has not satisfied his burden to prove otherwise. *Supra* ¶ 76; NRCP 56(e).

80. Accordingly, Defendants are entitled to judgment in their favor on Willard's request for carryover damages.

(ii) Earnest money.

81. 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. (FAC ¶ 15).

82. However, nothing in the Willard Lease requires or even contemplates Defendants paying Willard his purported invested earnest money in the event of a breach. (Willard Lease, Exhibit 2 to Motion).

83. 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.

84. Thus, Willard is not entitled to recover this money from Defendants as a matter of law, and Defendants are entitled to judgment in their favor on this request.

(iii) Closing costs.

85. 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).

86. However, there is absolutely no indication that Willard actually paid the costs in the Closing Statement provided by Willard. *Mort Wallin*, 105 Nev. at 857, 784 P.2d at 955 ("The party seeking damages has the burden of proving both the fact of damages and the amount thereof."). (Closing Statement, Exhibit 9 to Motion).

87. According to the Closing Statement, Willard's **lenders** received all of the proceeds from the short sale, while Willard received nothing. *Id.*

88. Willard's lenders then forgave any remaining debt owed on the Willard Property after the short sale. (Deposition of L. Willard p. 89, Exhibit 6 to Motion).

89. Therefore, the closing costs for the sale **only** impacted how much Willard's lenders received in payoff from the purchase price.

90. Further, the payoff amount made no difference to Willard's damages because the lenders forgave any remaining debt outstanding on the mortgage (and Willard did not claim that debt forgiveness as gross income).

91. Thus, the Closing Statement only reflects that the lenders were paid the purchase price minus the closing costs, not that Willard actually paid any closing costs—or incurred any other financial consequences from the closing costs since the lenders forgave any outstanding remaining debt owed by Willard.

92. As Willard did not pay any closing costs or incur financial consequences from the amount of closing costs, Willard is not entitled to recover these costs as a matter of law, and Defendants are entitled to judgment in their favor on this request.

<u>(2) Willard is not entitled to the "California Action" damages.</u>

93. 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).

94. This action was a complaint filed in California against Defendants for breach of the Willard Lease. (Docket Sheet, Exhibit 4 to Motion).

95. The action was dismissed, and there is some dispute as to why it was dismissed.[6]

96. Regardless, Nevada law expressly precludes Willard from recovering the fees. These attorneys' fees could only be recoverable as litigation fees or as special damages, neither of which applies to this case. *Sandy Valley Associates v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 956, 35 P.3d 964, 969 (2001), *receded from on other grounds by Horgan v. Felton*, 123 Nev. 577, 170 P.3d 982 (2007); *Liu v. Christopher Homes, LLC*, 130 Nev. ___, ___, 321 P.3d 875, 878 (2014) (noting the general rule that attorneys' fees cannot be awarded absent a statute, rule, or contract provision, and that "as an exception to the general rule, attorney fees may be awarded as special damages in limited circumstances.").

97. First, "when parties seek attorney fees as a cost of litigation, documentary evidence of the fees is presented to the trial court, generally in a post-trial motion." *Sandy Valley*, 117 Nev. at 956, 35 P.3d at 969.

98. However, "generally, attorney fees are not recoverable absent authority under a statute, rule, or contract." *Christopher Homes*, 130 Nev. at ___, 321 P.3d at 878.

99. Here, to the extent that Willard is seeking the California action fees as a cost of litigation, Willard has not identified any statute, rule, or contract provision that would entitle Willard to fees incurred in the futile and now dismissed Further, even if Willard was somehow able to provide a basis for recovering attorneys' fees in the California action, it is wholly unclear why this Court, as opposed to the court in the California action, should determine the award of attorneys' fees incurred in that action.

100. Not only is Willard's request for fees in this Court untimely, it would be inappropriate for this Court, rather than the presiding court, to make determinations regarding the reasonableness of the fees. *See* NRCP 54(d)(2).

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[6]In the Opposition, Plaintiffs do not dispute that the California action was brought in the wrong forum (the Leases each contain a Nevada forum provision), that Defendants obtained a dismissal of most of the claims brought in the California action due to lack of personal jurisdiction, or that Plaintiffs eventually voluntarily dismissed the entire case and then refiled the case in this Court.

101. Thus, Willard is not entitled to the fees in the California action as a cost of that litigation.

102. Second, "when a party claims it has incurred attorney fees as foreseeable damages arising from tortious conduct or a breach of contract, such fees are considered special damages." *Sandy Valley*, 117 Nev. at 956, 35 P.3d at 969.

103. Special damages can only be sought in a narrow set of circumstances: (1) a party to a contract can seek to recover from a breaching party the attorneys' fees that arise from the breach that caused the former party to accrue attorneys' fees in defending himself against a third party's legal action; and (2) in cases concerning title to real property, attorneys' fees can be allowable as special damages in slander of title actions.[7] *Christopher Homes, LLC*, 130 Nev. at ___, 321 P.3d at 875.

104. Here, no purported breach by Defendants has caused Willard to have to defend himself against a third party's legal action.

105. Rather, Willard seeks attorneys' fees purportedly incurred from **Willard** bringing an improper action against Defendants in California, not a third-party action. (FAC ¶ 18 (Willard "hired an attorney to file suit against BHI and Herbst in Santa Clara County, California, thereby incurring $35,000 in attorney's fees.")).

106. "Attorneys' fees and other expenses of former litigation, particularly suits prosecuted by the plaintiff against the defendant, ordinarily are not recoverable in a subsequent action." Robert Rossi, 1 Attorneys' Fees 8:1 (3d ed.).

107. The Nevada Supreme Court has been clear that such fees are only recoverable, if at all, in defending against a third-party action. *Christopher Homes, LLC*, 130 Nev. at ___, 321 P.3d at 875.

108. Thus, the first circumstance does not apply.

[7]Although Plaintiffs claim that they have adequately pled special damages, that does not change the fact that the damages sought by Plaintiffs do not come within either of these limited categories and therefore are not recoverable by Plaintiffs as special damages.

109. Further, the California action had nothing to do with real property claims, much less slander of title claims.

110. Thus, the attorneys' fees are not recoverable as special damages.[8]

111. Finally, nothing in the Willard Lease entitles Willard to recover these damages in circumvention of settled Nevada law.[9] (Willard Lease, Exhibit 2 to Motion).

112. Notwithstanding Plaintiffs' citation to certain lease provisions, this Court is not the appropriate court to determine the reasonableness of and award attorneys' fees incurred in the California action.

113. Accordingly, because Willard is not entitled to recover the attorneys' fees allegedly incurred in the California action as either a cost of that litigation or as special damages, Defendants are entitled to judgment in their favor on Willard's request for attorneys' fees incurred in the California action.

(3) Willard is not entitled to the "Bankruptcy" damages.

114. Willard claims that "as a further direct and proximate result of BHI breaching the Willard Lease, Willard filed for bankruptcy protection, incurring $22,623.00 in legal fees and $15,000 in accounting fees in the process." (FAC ¶ 17, on file herein). Willard is not entitled to these fees as a matter of law.

115. First, it is undisputed that Willard's bankruptcy was not foreseeable at the time the parties entered into the contracts.

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[8] Even if Willard's claim was entitled to seek the attorneys' fees in the California action as special damages, "as a practical matter, attorney fees are rarely awarded as damages simply because parties have a difficult time demonstrating that the fees were proximately and necessarily caused by the actions of the opposing party and that the fees were a reasonably 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.

[9] *See* n.4.

116. Willard expressly admitted in his deposition that he never had any discussions with Defendants that a breach of the lease could result in him filing bankruptcy. (Deposition of L. Willard p. 115, Exhibit 6 to Motion).

117. If Willard's bankruptcy was not a foreseeable consequence of a breach of the Willard Lease, then any fees incurred "in the process" of Willard filing and pursuing his six-month voluntary bankruptcy are also not foreseeable, and therefore not recoverable by Willard. Footnote 8; Restatement (Second) of Contracts § 351(1) ("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.").

118. Second, even if the bankruptcy was somehow foreseeable, Willard does not meet any of the requirements to seek his fees purportedly incurred as a result of the bankruptcy.[10] If Willard wanted to recover his fees as a cost of litigation of the bankruptcy, he should have sought them with the bankruptcy court, although the availability of such fees upon a voluntarily dismissed voluntary bankruptcy would be questionable at best. Further, if Willard seeks these fees as special damages, the bankruptcy costs do not fall within the specific categories of damages permitted to be claimed as special damages. *Christopher Homes, LLC*, 130 Nev. at ___, 321 P.3d at 875.

119. Thus, Willard is not entitled to the attorneys' fees or accounting fees purportedly incurred in the bankruptcy as a matter of law.

Wooley's Damages

120. Wooley also seeks consequential damages, claiming that as a result of Defendants' purported breach of the Highway 50 Lease: (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

[10]While the law cited herein discusses attorneys' fees, Willard appears to claim that his accounting fees were a cost of the bankruptcy litigation. Thus, the analysis is the same for both.

[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).

121. As will be discussed herein, Wooley is not entitled to these damages as a matter of law.

(1) Wooley is not entitled to the Baring Property damages.

122. 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, Defendants' purported breach of the Highway 50 Lease forced Wooley to sell the Baring Property "at a loss" and caused Wooley to incur tax liabilities. (FAC).

123. Nothing in the Highway 50 Lease mentioned that a consequence for a breach was that BHI would be liable for damages incurred with respect to selling one of Wooley's **other** properties, the Baring Property. (Exhibit 10 to Motion).

124. Thus, the only way that Wooley could recover these consequential damages is by proving that such a loss was foreseeable as a probable result of the breach at the time the parties entered into the Highway 50 Lease. Restatement § 351(1).

125. The undisputed facts show that Wooley failed to satisfy this burden as a matter of law.

126. First, it would be impossible for anyone to know at the time of execution of the Highway 50 Lease that the Highway 50 and Baring Properties were cross-collateralized, or that breach of the Highway 50 Lease could impact the Baring Property, because Wooley did not even enter into the Baring Property loan until **after** the execution of the Highway 50 Lease. (Highway 50 Lease, Exhibit 10 to Motion; Baring Loan, Exhibit 15 to Motion).

127. The Baring cross-collateralization language is found in the **July 18, 2006**, Baring Property Loan, which was executed after the **December 2005** Highway 50 Lease. (Highway 50 Lease, Exhibit 10 to Motion; Baring Loan at 1.7, Exhibit 15 to Motion).

128. Because foreseeability is measured at the time of entry into a contract, this precludes Wooley from claiming foreseeability as a matter of law. Restatement (Second) of Contracts § 351 at cmt. a.

129. Second, regardless, it is undisputed that Defendants did not know about the Highway 50 Property being cross-collateralized with the Baring Property.

130. In written discovery, Defendants asked Wooley to "please identify and describe in detail any and all facts demonstrating that BHI knew at the time [Wooley] and BHI entered into the Highway 50 Lease that the Highway 50 property was cross-collateralized with the Baring Property." (Wooley Responses to Interrogatories at 3, Exhibit 23 to Motion).In response, Wooley stated that Wooley "is presently unaware of facts responsive to this request," and reserved the right to amend the response. *Id.*

131. Mr. Wooley agreed with this interrogatory response during his deposition, and elaborated "I don't know why they would even know.... They're not party to getting a loan. I am. They take the check and cash it." (Deposition of E. Wooley p. 119, Exhibit 16 to Motion).

132. Defendants also asked Wooley to "please identify and describe in detail any and all facts demonstrating that Jerry Herbst at the time [Wooley] and BHI entered into the Highway 50 lease that the Highway 50 property was cross-collateralized with the Baring Property." (Wooley Responses to Interrogatories at 4, Exhibit 23 to Motion). In response, Wooley stated that Wooley "is presently unaware of facts responsive to this request," and reserved the right to amend the response. *Id.* Wooley agreed with this answer at his deposition. (Deposition of E. Wooley p. 120, Exhibit 16 to Motion).

133. Thus, it is undisputed that Defendants did not have reason to foresee this purported loss as a probable result of their alleged breach when the contracts were made,

precluding Wooley from recovering any damages relating to the sale of the Baring Property as a matter of law.[11] Restatement (Second) of Contracts § 351(1).

134. Indeed, Wooley points to no facts that would contradict the facts proffered by Defendants in support of their Motion or create a genuine issue of material fact that would preclude summary judgment. NRCP 56(e). Defendants are awarded judgment in their favor on Wooley's request.

(2) Wooley is not entitled to the California Action damages.

135. Wooley claims that as a result of Defendants' purported breach, 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 ¶ 42, on file herein). This is the same California action as that pursued by Willard.

136. As explained *supra*, no rule, statute, or contractual provision entitles Wooley to these fees as a cost of litigating the California action.

137. Further, the California action was not within the limited set of actions that would entitle Wooley to seek these fees as special damages.

138. Finally, nothing in the Highway 50 Lease entitles Wooley to recover these damages in circumvention of settled Nevada law.[12] (Highway 50 Lease, Exhibit 10 to Motion).

139. Thus, Wooley is not entitled to these fees as a matter of law, and Defendants are entitled to judgment in their favor on this request.

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[11] Nor can any argument be made that it is foreseeable, in the ordinary course of events, that a tenant's breach of a lease will result in a landlord having to sell one of the landlord's other properties. *See Margolese*, 902 F.2d at 1578.

[12] *See* n.4.

ORDER

Defendants' Motion for Partial Summary Judgment is **GRANTED** in its entirety. Plaintiffs are not entitled to recover the following as a matter of law: (1) Willard's "short sale" damages, including tax consequences, closing costs, earnest money, and Willard's new claim for capital carryover losses; (2) Willard's attorneys' fees incurred in the California action; (3) Willard's attorneys' and accounting fees incurred in the bankruptcy; (4) Wooley's "Baring Property" damages, including tax consequences and purported lost monies as a result of the sale; and (5) Wooley's attorneys' fees incurred in the California action.

DATED this ______day of January, 2017.

IT IS SO ORDERED.

____
The Honorable Judge Simons

Respectfully submitted by:

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/s/ Brian R. Irvine
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

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

CASE NO. CV14-01712

DEPT. 6

STIPULATION AND ~~[PROPOSED]~~ ORDER TO CONTINUE TRIAL

(THIRD REQUEST)

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

Counter-defendants.

_______________________________________/

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 May 1, 2017, and to re-set certain discovery and related deadlines to comport with the new trial date set by the Court.

RECITALS

1. The deadline for the disclosure of initial expert witnesses in this case was December 2, 2016.

2. On December 2, 2016, Defendants disclosed Michelle Salazar as an expert on certain of Plaintiffs' claimed categories and computations of damages. Defendants' disclosure of Ms. Salazar fully-complied with the requirements of NRCP 16.1 and NRCP 26, including disclosure of: (a) Ms. Salazar's signed written report containing a complete statement of all opinions to be expressed and the basis and reasons therefor, the data or other information considered by the witness in forming the opinions, and any exhibits to be used as a summary of or support for the opinions; and (b) the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years, the compensation to be paid for the study and testimony, and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

3. Plaintiffs did not disclose any expert to rebut Ms. Salazar's opinions by the January 3, 2017 deadline for disclosing rebuttal experts.

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

5. Because Plaintiffs' disclosure of Mr. Gluhaich did not include a summary of the facts and opinions to which the witness is expected to testify as required by NRCP 16.1(a)(2)(B), Defendants have been unable to conduct a meaningful deposition of Mr. Gluhaich or to retain experts to rebut Mr. Gluhaich's opinions, because those opinions remain unknown to Defendants.

6. Following receipt of Plaintiffs' supplemental disclosure of Mr. Gluhaich, if any, which includes a summary of the facts and opinions to which the witness is expected to testify as required by NRCP 16.1(a)(2)(B), Defendants intend to depose Mr. Gluhaich and retain experts to rebut his opinions.

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

8. Upon receipt of Plaintiffs' NRCP 16.1 damages disclosure, Defendants intend to have Michelle Salazar supplement her initial expert report to include any opinions about any new or revised damages claims or calculations submitted by Plaintiffs, and Defendants may also need to

conduct additional fact discovery on any new or revised damages claims or calculations submitted by Plaintiffs.

9. Discovery in this matter currently is scheduled to close on March 2, 2017, and dispositive motions must be filed and submitted for decision no later than March 31, 2017.

10. Because Plaintiffs have not yet provided a complete NRCP 16.1 damages disclosure, Defendants will not be able to complete necessary fact discovery on Plaintiffs' damages, or to disclose an updated expert report of Michelle Salazar within the time currently allowed for discovery. And, because Plaintiffs have not yet provided an expert disclosure of Mr. Gluhaich that includes a summary of the facts and opinions to which the witness is expected to testify as required by NRCP 16.1(a)(2)(B), Defendants will be unable to complete the deposition of Mr. Gluhaich or to retain and disclose experts to rebut Mr. Gluhaich's opinions within the time currently allowed for discovery.

11. Moreover, any further extension of the discovery deadlines would prevent the parties from being able to file and submit dispositive motions by March 31, 2017 so such motions can be appropriately considered and decided by the Court prior to trial.

12. Therefore, the parties agree that the current trial date of May 1, 2017 must be vacated and rescheduled.

13. The parties recognize that this Court has ordered that no further continuances be granted, but in light of the foregoing, agree and stipulate that a brief additional continuance of six months is necessary, and hereby request a continuance of the current trial date and certain discovery deadlines. Undersigned counsel certifies that their respective clients have been advised that a stipulation for continuance is to be submitted on their behalf and that the parties have no objection thereto.

STIPULATION

Based upon the foregoing, the parties hereby stipulate and agree that should this Court enter an order:

1. Vacating the current trial date of May 1, 2017;

2. Vacating the pretrial conference set for March 14, 2017 at 1:30 p.m.;

3. Requiring the Parties agree to appear and reschedule the trial and pretrial conference within five (5) days of the date of this Court's Order approving the Parties' stipulation; and

4. Requiring Plaintiffs to serve Defendants with an updated initial expert disclosure of Dan Gluhaich that is fully-compliant with NRCP 16.1 and NRCP 26 within thirty (30) days of the date of the Order approving this Stipulation.

The parties further stipulate and agree that:

1. The discovery deadline shall be extended until seventy-five (75) days before the first day of the rescheduled trial; provided, however, that if the 75th day before trial falls on a weekend or holiday, the deadline shall be the following judicial day;

2. The deadline to serve, file, and submit for decision any dispositive motions shall be extended until forty-five (45) days before the first day of the rescheduled trial; provided, however, that if the 45th day before trial falls on a weekend or holiday, the deadline shall be the following judicial day.

3. The deadline for Defendants to serve a supplemental expert disclosure of Michelle Salazar providing any opinions about any new or revised damages claims or calculations submitted by Plaintiffs shall be extended until sixty (60) days before the close of discovery; provided, however, that if the 60th day before the close of discovery falls on a weekend or holiday, the deadline shall be the following judicial day.

4. The deadline for Plaintiffs to disclose any rebuttal experts to the expert report of Michelle Salazar, as supplemented, shall be extended until thirty (30) days following Defendants' service of the supplemental expert report of Ms. Salazar.

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5. The deadline for Defendants to serve any rebuttal expert disclosures shall be extended until forty-five (45) days after Plaintiffs serve Defendants with an updated initial expert disclosure of Dan Gluhaich that is fully-compliant with NRCP 16.1 and NRCP 26..

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 9th day of February, 2017.

Attorneys for Plaintiffs

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Dated this 9 day of February, 2017.

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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.

IT IS FURTHER ORDERED that the discovery deadline shall be extended until 75 days before the first day of the rescheduled trial; provided, however, that if the 75th 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 45 days before the first day of the rescheduled trial; provided, however, that if the 45th day before trial falls on a weekend or holiday, the deadline shall be the following judicial day.

IT IS FURTHER ORDERED that the deadline for Defendants to serve a supplemental expert disclosure of Michelle Salazar providing any opinions about any new or revised damages claims or calculations submitted by Plaintiffs shall be extended until ninety (60) days before the close of discovery; provided, however, that if the 60th day before the close of discovery falls on a weekend or holiday, the deadline shall be the following judicial day.

IT IS FURTHER ORDERED that the deadline for Plaintiffs to disclose any rebuttal experts to the expert report of Michelle Salazar, as supplemented, shall be extended until thirty (30) days following Defendants' service of the supplemental expert report of Ms. Salazar.

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IT IS FURTHER ORDERED that the deadline for Defendants to serve any rebuttal expert disclosures shall be extended until forty-five (45) days after Plaintiffs serve Defendants with an updated initial expert disclosure of Dan Gluhaich that is fully-compliant with NRCP 16.1 and NRCP 26.

IT IS SO ORDERED.

DATED this 9 day of Feb, 2017.

DISTRICT COURT JUDGE

Respectfully submitted by:

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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 [PROPOSED] ORDER TO CONTINUE TRIAL (THIRD 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 9th day of February, 2017.

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

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

Plaintiff,

vs.

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

Defendants.

_______________________________________/

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

Counterclaimants,

vs

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

Counter-defendants.

_______________________________________/

CASE NO. CV14-01712

DEPT. 6

ORDER GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

ORDER GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

Plaintiffs in this matter are Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund; Overland Development Corporation, a California corporation (collectively, "Willard"); Edward E. Wooley and Judith A. Wooley, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000 (collectively, "Wooley"). Willard is also counter-defendants in this matter. Defendants/counter-claimants in this matter are Berry-Hinckley Industries ("BHI") and Jerry Herbst (collectively, "Defendants"). This case arises out of a purported breach of commercial lease agreements by the Defendants. *First Amended Complaint* ("FAC") on file herein. Both Willard and Wooley seek damages as a result of the purported breach. Id.

As a result of the Defendants' purported breach of the Willard Lease, Willard seeks, among other damages: (1) attorneys' fees allegedly incurred by Willard in an action Plaintiffs brought against Defendants in California in 2013; (2) fees Willard allegedly incurred in his voluntary bankruptcy; and (3) alleged damages related to the short sale of the Willard Property. (FAC, ¶¶ 15, 17, 18). As a result of Defendants' purported breach of the Highway 50 Lease, Wooley seeks, among other damages: (1) purported damages relating to his sale of the Baring Property; and (2) attorneys' fees allegedly incurred by Wooley in an action Plaintiffs brought against Defendants in California in 2013. (FAC, ¶¶ 34, 39-42).

The Motion before this Court is Defendants' Motion for Partial Summary Judgment on certain claims for consequential damages asserted by the Willard Plaintiffs and the Wooley Plaintiffs (the "Motion"). Defendants' Motion was fully briefed and submitted on September 19, 2016, and was argued on January 10, 2017. Willard, through his counsel Brian Moquin, withdrew the following categories of damages at oral argument on the instant Motion: (1) all costs, including closing costs and earnest money, associated with the short sale of the Willard Property; and, (2) any claim for direct tax consequences resulting from the cancelled mortgage debt. *Transcript of Proceeding* – Hrg. Mtn. Partial Summary Judgment, filed January 16, 2017, pp. 39-41; *Opposition*, p. 10.

At oral argument, this Court issued its ruling from the bench and directed preparation of a proposed order. The Court has considered the proposed order along with Plaintiffs' Objections to Defendants' Proposed Order Granting Partial Summary Judgment in Favor of Defendants and Defendants/Counterclaimants' Response to Plaintiffs' Objections to Defendants' Proposed Order Granting Partial Summary Judgment in Favor of Defendants. This Court, having considered the briefing and the arguments of counsel, and being otherwise fully advised, and GOOD CAUSE APPEARING, hereby finds and concludes as follows:

FINDINGS OF UNDISPUTED MATERIAL FACT

The Willard Lease.

1. In 2005, Willard and BHI entered into a commercial lease (the "Willard Lease") for the lease of real property on South Virginia Street in Reno, Nevada (the "Willard Property"). (Willard Lease, Exhibit 2 to Motion; First Amended Complaint ("FAC") ¶ 9).

2. In 2007, Mr. Herbst entered into a guaranty agreement for the Willard Lease. (Willard Guaranty, Exhibit 3 to Motion; FAC ¶ 11).

3. Willard claims that BHI breached the Willard Lease in 2013.[1] (FAC ¶ 12).

4. In 2013, Mr. Willard filed for bankruptcy. *Id.* ¶ 17.

5. It is undisputed Mr. Willard voluntarily dismissed the bankruptcy within months of filing it. *Id.*

6. In March 2014, Willard sold the Willard Property in a short sale. *Id.* ¶ 15.

7. Willard's lenders forgave any remaining debt owed on the Willard Property after the short sale. (Deposition of L. Willard, p. 89, Exhibit 6 to Motion).

8. The Willard Plaintiffs raise, for the first time in their Opposition, a claim for lost "capital loss carryovers" as a result of the short sale. *Opposition*, p. 10. The Court considers this a tax consequence.

9. Defendants had no knowledge that their failure to pay rent under the terms of the Willard Lease would cause Mr. Willard to file voluntary bankruptcy or sell the Willard Property in a short sale. (Deposition of L. Willard, p. 115, Exhibit 6 to Motion).

10. The damages sought by Willard were not foreseeable at the time the parties entered into the Willard Lease or Willard Guaranty.

<u>The Wooley Leases</u>.

11. In 2005, BHI and Wooley entered into a commercial lease for the lease of property on Highway 50 in Nevada (the "Highway 50 Lease"). (Highway 50 Lease, Exhibit 10 to Motion; FAC ¶ 28).

12. Mr. Herbst executed a guaranty agreement on the Highway 50 Lease in 2007. (Highway 50 Guaranty, Exhibit 11 to Motion; FAC ¶ 31).

13. Wooley claims that BHI breached the Highway 50 Lease in 2013. (FAC ¶ 32, on file herein).

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[1] Whether the Defendants breached the parties' leases is not at issue in this Motion and is not addressed in this Order.

14. In 2006, Wooley bought property on Baring Boulevard (the "Baring Property"), and BHI and Wooley entered into a separate lease for that property (the "Baring Lease"). (Baring Purchase Agreement, Exhibit 13 to Motion; Baring Lease, Exhibit 14 to Motion; FAC ¶ 29, on file herein).

15. Upon Wooley's purchase of the Baring Property, Wooley entered into a mortgage loan for the Baring Property, which purportedly contained a clause that "cross-collateralized" the Baring Property and the Highway 50 Property. (Baring Deed of Trust at 1.7, Exhibit 15 to Motion).

16. Neither BHI nor Mr. Herbst were party to Wooley's mortgage loan.

17. BHI or Mr. Herbst had no knowledge about the cross-collateralization provisions apparently contained in Wooley's financing documents. (Deposition of E. Wooley, pp. 119, 120, Exhibit 16 to Motion).

18. Wooley admits BHI and Mr. Herbst would have no reason to know of the cross-collateralization provision. Id.

19. Wooley entered into the loan after the parties had entered into the Highway 50 Lease. (Highway 50 Lease, Exhibit 10 to Motion; Baring Property Loan, Exhibit 15 to Motion).

20. In or about December 2009, BHI assigned its interests and obligations in the Baring Lease to Jacksons Food Stores, Inc. (Assignment, Exhibit 17 to Motion).

21. Wooley subsequently sold the Baring Property while Jacksons was still a tenant in the Baring Property. (HUD Statement, Exhibit 18).

22. BHI was not in default of the Baring Lease when Wooley sold the Baring Property. (Deposition of E. Wooley, pp. 99, 100, Exhibit 16 to Motion).

23. The damages sought by Wooley were not foreseeable at the time the parties entered into the Highway 50 Lease or Guaranty.

24. Should any of the following conclusions of law constitute findings of fact, they shall be incorporated herein as if set forth in full.

CONCLUSIONS OF LAW

1. Should any of the foregoing findings of fact constitute conclusions of law, they shall be incorporated herein as if set forth in full.

Summary Judgment Standard

2. "Summary 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).

3. 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).

4. "When a motion for summary judgment is made and supported..., an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." NRCP 56(e).

5. Plaintiffs are the nonmoving party and bear the ultimate burden of persuasion at trial. "If the nonmoving party will bear the burden of persuasion at trial, the party moving for summary judgment may satisfy the burden of production by either (1) submitting evidence that negates an essential element of the nonmoving party's claim, or (2) pointing out... that there is an absence of evidence to support the nonmoving party's case. In such instances, in order to defeat summary judgment, **the nonmoving party must transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of**

material fact." *Cuzze v. University and Comm. College System of Nev.*, 123 Nev. 598, 602-03, 172 P.3d 131, 134 (2007) (emphasis added) (internal quotations omitted).

6. Defendants' Motion is for partial adjudication of the case before this Court. "If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly." NRCP 56(d).

7. Foreseeability ordinarily "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).

8. The damages sought by Plaintiffs were unforeseeable.

9. Summary judgment on Plaintiffs' request for consequential damages is legally 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).

WILLARD'S DAMAGES

10. Willard seeks the following damages as a result of Defendants' purported breach of the Willard Lease: (1) "[Willard was] forced to sell the Willard Property in

March 2014 in a short sale, thereby losing \$4,437,500.00[2] of earnest money invested in the Willard Property and incurring at least \$3,000,000.00 in tax consequences[3] and \$549,852.00 in closing costs," (the "Short Sale" damages); (2) "Willard filed for bankruptcy protection, incurring \$22,623.00 in legal fees and \$15,000 in accounting fees in the process," (the "Bankruptcy" damages); 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" (the "California Action" damages). (FAC ¶¶ 15, 17, 18).

(1) Willard is not entitled to the "Short Sale" damages.

11. Willard seeks three categories of Short Sale damages he claims he incurred by being "forced to sell the Willard Property in March 2014 in a short sale" as a result 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).

12. In his Opposition, Willard deleted the tax consequence damages from his request in the FAC. Instead, he seeks purported "capital carryover losses" as tax damages.

(a) Willard withdrew his claims for most of the Short Sale damages.

13. Willard withdrew his claims for the following damages: (1) earnest money invested in the Willard Property; (2) the \$2,430,000 for Overland and \$3,152,000 for Mr. Willard of purported tax consequences incurred as a result of the short sale; and (3) closing costs. (January 10, 2017, Transcript p. 39-41). Accordingly, Willard is precluded from recovering those damages as a matter of law, based on his withdrawal and substantive law.

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[2]Willard revised this amount to \$4,668,738.49 in Plaintiffs' Opposition.

[3]Willard has since revised that estimate to be \$2,430,000 for Overland and \$3,152,000 for Mr. Willard.

<u>(b) The Short Sale damages were not foreseeable at the time of entry into the contracts</u>.

14. No Short Sale damages are recoverable, as a matter of law, because the short sale and the resulting claimed damages were not a foreseeable consequence of Defendants' purported breach.

15. "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."[4] 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.").

16. 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 § 351 at cmt. a; <u>and see</u>, *Hilton Hotels Corp.*, 98 Nev. at 115 (same); *Basic Capital Management, Inc. v. Dynex Commercial, Inc.*, 348 S.W.3d 894, 901 (Tex. 2011) ("Foreseeability is a fundamental prerequisite to the recovery of consequential damages for breach of contract.").

17. 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); *Boise Joint Venture v. Moore*, 106 Or. App. 83, 806 P.2d 707 (1991) (lessee not liable for lost equity arising from foreclosure sale of lessor's property because lessor failed to prove when parties contracted to

[4] The Court finds Plaintiffs misstate which Lease provisions provide them with remedies against BHI in the event of a breach, and their argument ignores the fundamental requirement under Nevada law that, in order for a plaintiff to recover consequential damages, the plaintiff must prove that the breaching party had reason to foresee, at the time the contract was executed, that those damages would be a probable result of a breach. This is true even in the face of contract provisions that purport to address the issue. *Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp.*, 98 Nev. 113, 115, 642 P.2d 1086, 1087 (1982) (even where written contract exists, damages must still be foreseeable).

lease property, they contemplated lessee would be liable for repayment of equity); see also *P.S.G. Ltd. P'ship v. August Income/Growth Fund VII*, 115 N.M. 579, 585, 855 P.2d 1043, 1049-50 (1993) (consequential damages unforeseeable for failure of tenant to pay rent where lease did not include provision for tenant to make mortgage payments).

18. 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.

19. The burden of proving foreseeability is on the non-breaching party seeking the consequential damages. *Mahmood v. Ross*, 990 P.2d 933, 382 Utah Adv. Rep. 3 (1999).

20. 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 in order to recover said Short Sale damages.

21. Willard cannot satisfy his burden as a matter of law.

22. A foreclosure sale of a landlord's property generally does not occur in the ordinary course of events of a tenant's breach. *P.S.G. Ltd. P'ship*, 855 P.2d at 1049-50 (absent an express or implied term of the lease, foreclosure damages were not consequential damages); see also Restatement (Second) of Contracts § 351, cmt. a.; *Boise Joint Venture*, 806 P.2d at 710; *Enak Realty Corp. v. City of New York*, 109 A.D.2d 814 (N.Y. Sup. 1985)

23. Because the loss claimed by Willard is not a probable result of the purported breach in the ordinary course of events, Willard cannot recover the requested damages unless Willard can prove that Defendants had actual special

knowledge at the time the parties entered into the contracts that it was probable that Willard's claimed loss could occur in the event of a breach.

24. Willard has failed to meet this burden.

25. Foreseeability is measured as of the time the parties enter into a contract. *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**."); Restatement (Second) of Contracts § 351 at cmt. a.

26. Willard has presented no evidence in opposition that Willard's claimed loss was foreseeable at the time the parties entered into the contracts.

27. Mr. Willard only spoke with Tim Herbst several years **after** the execution of the Willard Lease (in 2008, or possibly 2012). (Willard Deposition at 117, 118:20-25, 119, Exhibit 6 to Motion); Willard Lease, Exhibit 2 to Motion; Willard Guaranty, Exhibit 3 to Motion. Even then, Mr. Willard did not discuss the possibility, much less probability, of a forced sale. *Id.*; Restatement (Second) of Contracts § 351 at cmt. a.

28. There is no evidence Mr. Willard spoke with any other representative of Defendants about a forced sale.

29. Defendants did not have knowledge that such loss or damages would be a probable result of any breach of the Willard Lease at the time of entry into the contracts. Nor were there any objective indicia that the loss would be foreseeable. In other words, Willard has presented no evidence Defendants had 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. *See generally, Boise Joint Venture v. Moore*, 806 P.2d 707, 710 (1991).

30. The various provisions in the Willard and Highway 50 Leases do not eliminate the requirement under Nevada law that all consequential damages must be foreseeable. The notion the "remedies" provisions in the Leases provide "very strong protections for the Lessor in the event of a breach by the Lessee," and permit Plaintiffs

to "to recover 'any and all' damages proximately flowing from a breach" is contrary to law. See, *Opposition,* pp. 14-16.

31. Damages must be foreseeable, even in the face of contract provisions that purport to address the issue. *Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp.*, 98 Nev. 113, 115, 642 P.2d 1086, 1087 (1982) (even where written contract exists, damages must still be foreseeable).

32. Plaintiffs reference a Lease Subordination, Non-Disturbance and Attornment Agreement (the "Subordination Agreement") and a loan with Telesis Community Credit Union (the "Telesis Loan"), which Willard claims demonstrates the foreseeability of a short sale. (Subordination Agreement, Exhibit 32 to Opposition; Telesis Loan, Exhibit 33 to Opposition).

33. The Subordination Agreement and the Telesis Loan were entered into months **after** the execution of the Willard Lease, meaning that those documents are insufficient as a matter of law to have any bearing on foreseeability at the time of the contract. *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**.") (emphasis added).

34. Nothing in the Subordination Agreement demonstrates that a short sale of the Willard Property would be a probable consequence of a breach. At most, this merely demonstrates that Willard had **some** financing on the property, the amount of which was not specified. (Subordination Agreement, Exhibit 32 to Opposition). The Subordination Agreement did not give Defendants any indication that a short sale was a possibility or a probability. *Id.*

35. General knowledge that a landlord has some financing in place on the leased premises is insufficient to impose consequential damages on a tenant when the landlord loses the leased property to a foreclosure or short sale. *See generally, Boise Joint Venture v. Moore*, 806 P.2d 707, 710 (1991).

36. Willard presents no evidence that BHI had any notice whatsoever of the subsequent Telesis Loan, or any information about the terms of this loan. *Opposition*, generally.

37. The Telesis Loan, on which Willard eventually failed to make payments, was an entirely different loan than the loan referenced in the Subordination Agreement. (Subordination Agreement, Exhibit 32 to Opposition; Telesis Loan, Exhibit 33 to Opposition).

38. The Subordination Agreement is not relevant to the foreseeability of Willard's alleged short sale damages because Willard failed to pay an entirely separate loan. *Opposition*, p. 6.

39. Willard failed to provide any evidence that the short sale damages were foreseeable at the time of the contract, which is fatal to Willard's request, as the burden of proof belongs to Willard. *See Cuzze*, 123 Nev. at 602-03; NRCP 56(e).

40. 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, Willard is not entitled to recover these damages from Defendants as a matter of law. Willard is not entitled to any of the Short Sale damages identified herein and summary judgment should be entered in Defendants' favor on Willard's request for the Short Sale damages identified herein.

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(c) Additional, independent bases also preclude Willard's recovery of the Short Sale damages.

41. In addition to unforeseeability, there are additional bars to Willard's recovery.

(i) Tax consequence damages.[5]

42. Willard sought $2,430,000 for Overland and $3,152,000 for Mr. Willard in purported tax consequences from the short sale of the Willard Property. (FAC ¶ 15).

43. Plaintiffs, however, admit that Willard did not pay the taxes sought from Defendants as damages, conceding that "Per IRS regulations, since the Willard Plaintiffs' respective total debt was greater than their respective total assets immediately prior to the debt cancellation, these tax liabilities were not reported as income and consequently are no longer being claimed as damages flowing from Defendants' breach in the instant action." *Opposition*, p. 10.

44. Summary 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).

45. Since no genuine issue of material fact remains that Willard did not pay taxes as damages, the Court concludes Defendants are entitled to judgment in their favor on Willard's request for tax consequence damages.

(ii) Earnest money.

46. Willard claims he incurred "$4,437,500.00 of earnest money invested in the Willard Property" as a result of the purported forced sale. (FAC ¶ 15).

[5] Tax consequences may be positive or negative consequences, including capital carryover loss benefits.

47. However, nothing in the Willard Lease contemplates or requires that Defendants pay Willard his purported invested earnest money in the event of a breach. (Willard Lease, Exhibit 2 to Motion).

48. Courts have found that lost equity or investment resulting from a foreclosure sale are unforeseeable damages, unless there is an express agreement that the tenant is responsible for such damages. See *Boise Joint Venture v. Moore*, 106 Or. App. 83, 806 P.2d 707 (1991) (lessee not liable for lost equity arising from foreclosure sale of lessor's property because lessor failed to prove the contract contemplated lessee would be liable for repayment of loss of equity).

49. Willard has not set forth any evidence demonstrating that Defendants agreed to be responsible for Willard's lost earnest money in the event of a forced sale.

50. No genuine issue of material fact remains and Defendants are entitled to judgment as a matter of law on Willard's request for earnest money.

(iii) Closing costs.

51. Willard claims to have incurred "$549,852 in closing costs" as a result of the purported forced sale. (FAC ¶ 15).

52. However, Willard has provided no evidence he actually paid the costs in the Closing Statement he provided. See *Mort Wallin*, 105 Nev. at 857, 784 P.2d at 955 ("The party seeking damages has the burden of proving both the fact of damages and the amount thereof."). (Closing Statement, Exhibit 9 to Motion).

53. According to the Closing Statement, Willard's **lenders** received all of the proceeds from the short sale, while Willard received nothing. *Id.*

54. Willard's lenders then forgave any remaining debt owed on the Willard Property after the short sale. (Deposition of L. Willard p. 89, Exhibit 6 to Motion).[6]

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[6] The closing costs for the sale only impacted how much Willard's lenders received in payoff from the purchase price.

55. Further, the payoff amount made no difference to Willard's damages because the lenders forgave any remaining debt outstanding on the mortgage and Willard did not claim that debt forgiveness as gross income. *Id.*

56. Thus, the Closing Statement only reflects that the lenders were paid the purchase price minus the closing costs, not that Willard actually paid any closing costs—or incurred any other financial consequences from the closing costs, since the lenders forgave any outstanding remaining debt owed by Willard. *Id.*

57. As Willard has not set forth any evidence demonstrating he paid closing costs or incurred financial consequences from the amount of closing costs, no genuine issue of fact remains, Willard is not entitled to recover these costs as a matter of law, and Defendants are entitled to judgment in their favor on this request.

(2) Willard is not entitled to the "California Action" damages.

58. 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).

59. The complaint filed in California against Defendants asserted breach of the Willard Lease. (Docket Sheet, Exhibit 4 to Motion).

60. The action was dismissed. There is some dispute regarding the basis for dismissal. However, this is not relevant to the instant Motion.

61. Nevada law expressly precludes Willard from recovering the fees. These attorneys' fees could only be recoverable as litigation fees or as special damages, neither of which applies to this case. *Sandy Valley Associates v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 956, 35 P.3d 964, 969 (2001), *receded from on other grounds by Horgan v. Felton*, 123 Nev. 577, 170 P.3d 982 (2007); *Liu v. Christopher Homes, LLC*, 130 Nev. ___, ___, 321 P.3d 875, 878 (2014) (noting the general rule that attorneys' fees cannot be awarded absent a statute, rule, or contract provision,

and that "as an exception to the general rule, attorney fees may be awarded as special damages in limited circumstances.").

62. First, "when parties seek attorney fees as a cost of litigation, documentary evidence of the fees is presented to the trial court, generally in a post-trial motion." *Sandy Valley*, 117 Nev. at 956, 35 P.3d at 969.

63. However, "generally, attorney fees are not recoverable absent authority under a statute, rule, or contract." *Christopher Homes*, 130 Nev. at ___, 321 P.3d at 878.

64. Here, to the extent that Willard seeks the California action fees as a cost of litigation, Willard has not identified any statute, rule, or contract provision that would entitle Willard to fees incurred in the futile and now-dismissed California action. Further, even if Willard provided this Court a basis for recovering attorney's fees in the California action, the Court finds the California court is the suitable forum to determine an award of attorney's fees and costs incurred in that action.

65. Willard is not entitled to the fees incurred in the California action as a cost or as damages in this case.

66. Second, "when a party claims it has incurred attorney fees as foreseeable damages arising from tortious conduct or a breach of contract, such fees are considered special damages." *Sandy Valley*, 117 Nev. at 956, 35 P.3d at 969.

67. Special damages can only be sought in a narrow set of circumstances: (1) a party to a contract can seek to recover from a breaching party the attorneys' fees that arise from the breach that caused the former party to accrue attorneys' fees in defending himself against a third party's legal action; and (2) in cases concerning title to real property, attorneys' fees can be allowable as special damages in slander of title actions. *Christopher Homes, LLC*, 130 Nev. at ___, 321 P.3d at 875.

68. Here, no purported breach by Defendants caused Willard to defend himself against a third party's legal action.

69. Rather, Willard seeks attorneys' fees purportedly incurred from **Willard** bringing an action against Defendants in California, not a third-party action. (FAC ¶ 18 (Willard "hired an attorney to file suit against BHI and Herbst in Santa Clara County, California, thereby incurring $35,000 in attorney's fees.")).

70. "Attorneys' fees and other expenses of former litigation, particularly suits prosecuted by the plaintiff against the defendant, ordinarily are not recoverable in a subsequent action." Robert Rossi, 1 Attorneys' Fees 8:1 (3d ed.).

71. Nevada authority is unequivocally clear that such fees are only recoverable, if at all, in defending against a third-party action. *Christopher Homes, LLC*, 130 Nev. at ___, 321 P.3d at 875. Therefore, the first circumstance does not apply.

72. Second, the California action did not involve real property claims, much less slander of title claims. Therefore, the second circumstance does not apply.

73. As such, the attorneys' fees are not recoverable as special damages. <u>See</u> *Sandy Valley*, 117 Nev. at 957, 35 P.3d at 969-70 (holding that because lawsuits are possible when disputes arise, the mere fact a party is forced to file or defend a suit is an insufficient basis to award attorney's fees as damages).

74. Finally, nothing in the Willard Lease permits Willard to recover these damages in circumvention of settled Nevada law. (Willard Lease, Exhibit 2 to Motion).

75. Because Willard is not entitled to recover the attorneys' fees allegedly incurred in the California action as either a cost of that litigation or as special damages, Defendants are entitled to judgment as a matter of law on Willard's request for attorneys' fees incurred in the California action.

<u>(3) Willard is not entitled to the "Bankruptcy" damages</u>.

76. Willard claims that "as a further direct and proximate result of BHI breaching the Willard Lease, Willard filed for bankruptcy protection, incurring $22,623.00 in legal fees and $15,000 in accounting fees in the process." (FAC ¶ 17, on file herein). Willard is not entitled to these fees as a matter of law.

77. It is undisputed that Willard's bankruptcy was not foreseeable at the time the parties entered into the contracts.

78. Willard expressly admitted in his deposition that he never had any discussions with Defendants that a breach of the lease could result in him filing bankruptcy. (Deposition of L. Willard p. 115, Exhibit 6 to Motion).

79. Because Willard's bankruptcy was not a foreseeable consequence of a breach of the Willard Lease, then any fees[7] incurred in the process of Willard filing for and pursuing his six-month voluntary bankruptcy are also not foreseeable, and therefore not recoverable by Willard. Restatement (Second) of Contracts § 351(1) ("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.").

80. Willard is not entitled to the attorneys' fees or accounting fees purportedly incurred in the bankruptcy as a matter of law.

WOOLEY'S DAMAGES

81. Wooley also seeks consequential damages, claiming as a result of Defendants' purported breach of the Highway 50 Lease: (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).

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[7]While the law cited herein discusses attorneys' fees, Willard appears to claim that his accounting fees were a cost of the bankruptcy litigation. Thus, the analysis is the same for both.

(1) Wooley is not entitled to the Baring Property damages.

82. 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, Defendants' purported breach of the Highway 50 Lease forced Wooley to sell the Baring Property "at a loss" and caused Wooley to incur tax liabilities. (FAC).

83. The Highway 50 Lease does not provide that a consequence of a breach is liability for damages incurred with respect to selling one of Wooley's **other** properties, the Baring Property. (Exhibit 10 to Motion).

84. The only ground on which Wooley could recover these consequential damages is by establishing that such a loss was foreseeable as a probable result of the breach at the time the parties entered into the Highway 50 Lease. Restatement § 351(1).

85. In written discovery, Defendants asked Wooley to "please identify and describe in detail any and all facts demonstrating that BHI knew at the time [Wooley] and BHI entered into the Highway 50 Lease that the Highway 50 property was cross-collateralized with the Baring Property." (Wooley Responses to Interrogatories at 3, Exhibit 23 to Motion). Wooley's response to that interrogatory stated that Wooley "is presently unaware of facts responsive to this request," and reserved the right to amend the response. *Id.*

86. Mr. Wooley agreed with this interrogatory response during his deposition, and elaborated as follows: "I don't know why they would even know.... They're not party to getting a loan. I am. They take the check and cash it." (Deposition of E. Wooley p. 119, Exhibit 16 to Motion).

87. Defendants also asked Wooley to "please identify and describe in detail any and all facts demonstrating that Jerry Herbst at the time [Wooley] and BHI entered into the Highway 50 lease [knew] that the Highway 50 property was cross-collateralized

with the Baring Property." (Wooley Responses to Interrogatories at 4, Exhibit 23 to Motion). Wooley's response to that interrogatory stated that Wooley "is presently unaware of facts responsive to this request," and reserved the right to amend the response. *Id.* Wooley agreed with this answer at his deposition. (Deposition of E. Wooley p. 120, Exhibit 16 to Motion).

88. Wooley has failed to present evidence that Defendants knew at the time of execution of the Highway 50 Lease that the Highway 50 and Baring Properties were cross-collateralized or that breach of the Highway 50 Lease could impact the Baring Property, because Wooley did not enter into the Baring Property loan until **after** the execution of the Highway 50 Lease. (Highway 50 Lease, Exhibit 10 to Motion; Baring Loan, Exhibit 15 to Motion).

89. The Baring cross-collateralization language is found in the **July 18, 2006** Baring Property Loan, which was executed after the **December 2005** Highway 50 Lease. (Highway 50 Lease, Exhibit 10 to Motion; Baring Loan at 1.7, Exhibit 15 to Motion).

90. Because foreseeability is measured at the time of entry into a contract, Wooley is precluded from claiming foreseeability as a matter of law. Restatement (Second) of Contracts § 351 at cmt. a.

91. It is undisputed that Defendants did not know that the Highway 50 Property was cross-collateralized with the Baring Property.

92. Moreover, courts have held it is not foreseeable, in the ordinary course of events, that a tenant's breach of a lease will result in a landlord having to sell one of the landlord's other properties. *See P.S.G. Ltd. P'ship v. August Income/Growth Fund VII*, 115 N.M. 579, 585, 855 P.2d 1043, 1049-50 (1993); *and see* Restatement (Second) of Contracts § 351(1).

93. Wooley has failed to set forth any evidence Defendants knew or had reason to foresee this purported loss was a probable result of their alleged breach when the contracts were made.

94. The Court finds no genuine issue of material fact remains on this issue and Defendants are entitled to judgment in their favor as a matter of law precluding Wooley's claim for damages arising out of the sale of the Baring Property.

(2) Wooley is not entitled to the California Action damages.

95. Wooley claims that as a result of Defendants' purported breach, 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 ¶ 42, on file herein). This is the same California action as that pursued by Willard.

96. No rule, statute, or contractual provision entitles Wooley to these fees as a cost of litigating the California action. See *Liu v. Christopher Homes, LLC*, 130 Nev. ___, ___, 321 P.3d 875, 878 (2014) (noting the general rule that attorneys' fees cannot be awarded absent a statute, rule, or contract provision, and that "as an exception to the general rule, attorney fees may be awarded as special damages in limited circumstances.").

97. The California action was not within the limited set of actions that would entitle Wooley to seek these fees as special damages. *Id.*

98. Nothing in the Highway 50 Lease entitles Wooley to recover these damages in circumvention of settled Nevada law. (Highway 50 Lease, Exhibit 10 to Motion).

99. Wooley is not entitled to these fees as a matter of law, and Defendants are entitled to judgment on this damage claim.

/ / /

/ / /

/ / /

ORDER

Accordingly, and good cause appearing therefor,

IT IS HEREBY ORDERED Defendants' *Motion for Partial Summary Judgment* is **GRANTED**. Plaintiffs are not entitled to recover the following as a matter of law:

(1) Willard's "short sale" damages, including tax consequences, closing costs, and earnest money;

(2) Willard's attorneys' fees incurred in the California action;

(3) Willard's attorneys' and accounting fees incurred in the bankruptcy;

(4) Wooley's "Baring Property" damages, including tax consequences and purported lost monies as a result of the sale; and,

(5) Wooley's attorneys' fees incurred in the California action.

IT IS FURTHER ORDERED Plaintiffs shall serve, within fifteen (15) days of entry of this order, an updated NRCP 16.1 damage disclosure.

DATED this 30th day of May, 2017.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 30th day of May, 2017, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

DAVID O'MARA, ESQ.
BRIAN IRVINE, ESQ.
ANJALI WEBSTER, ESQ.
BRIAN MOQUIN, ESQ.
JOHN DESMOND, ESQ.

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

2540
DICKINSON WRIGHT
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
ANJALI D. WEBSTER
Nevada Bar No. 12515
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Email: Awebster@dickinsonwright.com

Attorney for Defendants
Berry Hinckley Industries, and
Jerry Herbst

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

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

Plaintiff,

vs.

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

Defendants.
_______________________________________/

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

Counterclaimants,

vs

CASE NO. CV14-01712

DEPT. 6

<u>NOTICE OF ENTRY OF ORDER</u>

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

Counter-defendants.

_______________________________________/

PLEASE TAKE NOTICE that on May 30, 2017, an Order Granting Partial Summary Judgment in Favor of Defendants was entered. A true and correct copy of the Order is attached hereto as **Exhibit 1**.

AFFIRMATION
Pursuant to NRS 239B.030

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

DATED this 31st day of May, 2017.

DICKINSON WRIGHT

/s/ Anjali D. Webster

DICKINSON WRIGHT
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
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Email: Awebster@dickinsonwright.com

Attorney for Defendants Berry Hinckley Industries, and Jerry Herbst

CERTIFICATE OF SERVICE

I certify that I am an employee of DICKINSON WRIGHT, and that on this date, pursuant to NRCP 5(b); I am serving a true and correct copy of the attached **NOTICE OF ENTRY OF ORDER** on the parties 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)

__X__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)

___X__EM/ECF Electronic Notification

Addressed as follows:

Brian P. Moquin LAW OFFICES OF BRIAN P. MOQUIN 3287 Ruffino Lane San Jose, California 95148	David C. O'Mara THE O'MARA LAW FIRM 311 E. Liberty Street Reno, Nevada 89501

DATED this 31st day of May, 2017

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

EXHIBIT LIST

Exhibit	Description	Pages[1]
1	May 30, 2017, Order	23

[1] Exhibit Page counts are exclusive of exhibit slip sheets.

A.App.1522

F I L E D
Electronically
CV14-01712
2017-05-31 11:08:18 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 6124745

EXHIBIT 1

EXHIBIT 1

FILED
Electronically
CV14-01712
2017-05-30 04:41:48 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6123806

CODE: 3060

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

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

Plaintiff,

vs.

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

Defendants.
_________________________________/

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

Counterclaimants,

vs

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

Counter-defendants.
_________________________________/

CASE NO. CV14-01712

DEPT. 6

ORDER GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

ORDER GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

Plaintiffs in this matter are Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund; Overland Development Corporation, a California corporation (collectively, "Willard"); Edward E. Wooley and Judith A. Wooley, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000 (collectively, "Wooley"). Willard is also counter-defendants in this matter. Defendants/counter-claimants in this matter are Berry-Hinckley Industries ("BHI") and Jerry Herbst (collectively, "Defendants"). This case arises out of a purported breach of commercial lease agreements by the Defendants. *First Amended Complaint* ("FAC") on file herein. Both Willard and Wooley seek damages as a result of the purported breach. Id.

As a result of the Defendants' purported breach of the Willard Lease, Willard seeks, among other damages: (1) attorneys' fees allegedly incurred by Willard in an action Plaintiffs brought against Defendants in California in 2013; (2) fees Willard allegedly incurred in his voluntary bankruptcy; and (3) alleged damages related to the short sale of the Willard Property. (FAC, ¶¶ 15, 17, 18). As a result of Defendants' purported breach of the Highway 50 Lease, Wooley seeks, among other damages: (1) purported damages relating to his sale of the Baring Property; and (2) attorneys' fees allegedly incurred by Wooley in an action Plaintiffs brought against Defendants in California in 2013. (FAC, ¶¶ 34, 39-42).

The Motion before this Court is Defendants' Motion for Partial Summary Judgment on certain claims for consequential damages asserted by the Willard Plaintiffs and the Wooley Plaintiffs (the "Motion"). Defendants' Motion was fully briefed and submitted on September 19, 2016, and was argued on January 10, 2017. Willard, through his counsel Brian Moquin, withdrew the following categories of damages at oral argument on the instant Motion: (1) all costs, including closing costs and earnest money, associated with the short sale of the Willard Property; and, (2) any claim for direct tax consequences resulting from the cancelled mortgage debt. *Transcript of Proceeding* – Hrg. Mtn. Partial Summary Judgment, filed January 16, 2017, pp. 39-41; *Opposition*, p. 10.

At oral argument, this Court issued its ruling from the bench and directed preparation of a proposed order. The Court has considered the proposed order along with Plaintiffs' Objections to Defendants' Proposed Order Granting Partial Summary Judgment in Favor of Defendants and Defendants/Counterclaimants' Response to Plaintiffs' Objections to Defendants' Proposed Order Granting Partial Summary Judgment in Favor of Defendants. This Court, having considered the briefing and the arguments of counsel, and being otherwise fully advised, and GOOD CAUSE APPEARING, hereby finds and concludes as follows:

FINDINGS OF UNDISPUTED MATERIAL FACT

The Willard Lease.

1. In 2005, Willard and BHI entered into a commercial lease (the "Willard Lease") for the lease of real property on South Virginia Street in Reno, Nevada (the "Willard Property"). (Willard Lease, Exhibit 2 to Motion; First Amended Complaint ("FAC") ¶ 9).

2. In 2007, Mr. Herbst entered into a guaranty agreement for the Willard Lease. (Willard Guaranty, Exhibit 3 to Motion; FAC ¶ 11).

3. Willard claims that BHI breached the Willard Lease in 2013.[1] (FAC ¶ 12).

4. In 2013, Mr. Willard filed for bankruptcy. *Id.* ¶ 17.

5. It is undisputed Mr. Willard voluntarily dismissed the bankruptcy within months of filing it. *Id.*

6. In March 2014, Willard sold the Willard Property in a short sale. *Id.* ¶ 15.

7. Willard's lenders forgave any remaining debt owed on the Willard Property after the short sale. (Deposition of L. Willard, p. 89, Exhibit 6 to Motion).

8. The Willard Plaintiffs raise, for the first time in their Opposition, a claim for lost "capital loss carryovers" as a result of the short sale. *Opposition*, p. 10. The Court considers this a tax consequence.

9. Defendants had no knowledge that their failure to pay rent under the terms of the Willard Lease would cause Mr. Willard to file voluntary bankruptcy or sell the Willard Property in a short sale. (Deposition of L. Willard, p. 115, Exhibit 6 to Motion).

10. The damages sought by Willard were not foreseeable at the time the parties entered into the Willard Lease or Willard Guaranty.

The Wooley Leases.

11. In 2005, BHI and Wooley entered into a commercial lease for the lease of property on Highway 50 in Nevada (the "Highway 50 Lease"). (Highway 50 Lease, Exhibit 10 to Motion; FAC ¶ 28).

12. Mr. Herbst executed a guaranty agreement on the Highway 50 Lease in 2007. (Highway 50 Guaranty, Exhibit 11 to Motion; FAC ¶ 31).

13. Wooley claims that BHI breached the Highway 50 Lease in 2013. (FAC ¶ 32, on file herein).

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[1] Whether the Defendants breached the parties' leases is not at issue in this Motion and is not addressed in this Order.

14. In 2006, Wooley bought property on Baring Boulevard (the "Baring Property"), and BHI and Wooley entered into a separate lease for that property (the "Baring Lease"). (Baring Purchase Agreement, Exhibit 13 to Motion; Baring Lease, Exhibit 14 to Motion; FAC ¶ 29, on file herein).

15. Upon Wooley's purchase of the Baring Property, Wooley entered into a mortgage loan for the Baring Property, which purportedly contained a clause that "cross-collateralized" the Baring Property and the Highway 50 Property. (Baring Deed of Trust at 1.7, Exhibit 15 to Motion).

16. Neither BHI nor Mr. Herbst were party to Wooley's mortgage loan.

17. BHI or Mr. Herbst had no knowledge about the cross-collateralization provisions apparently contained in Wooley's financing documents. (Deposition of E. Wooley, pp. 119, 120, Exhibit 16 to Motion).

18. Wooley admits BHI and Mr. Herbst would have no reason to know of the cross-collateralization provision. Id.

19. Wooley entered into the loan after the parties had entered into the Highway 50 Lease. (Highway 50 Lease, Exhibit 10 to Motion; Baring Property Loan, Exhibit 15 to Motion).

20. In or about December 2009, BHI assigned its interests and obligations in the Baring Lease to Jacksons Food Stores, Inc. (Assignment, Exhibit 17 to Motion).

21. Wooley subsequently sold the Baring Property while Jacksons was still a tenant in the Baring Property. (HUD Statement, Exhibit 18).

22. BHI was not in default of the Baring Lease when Wooley sold the Baring Property. (Deposition of E. Wooley, pp. 99, 100, Exhibit 16 to Motion).

23. The damages sought by Wooley were not foreseeable at the time the parties entered into the Highway 50 Lease or Guaranty.

24. Should any of the following conclusions of law constitute findings of fact, they shall be incorporated herein as if set forth in full.

CONCLUSIONS OF LAW

1. Should any of the foregoing findings of fact constitute conclusions of law, they shall be incorporated herein as if set forth in full.

Summary Judgment Standard

2. "Summary 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).

3. 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).

4. "When a motion for summary judgment is made and supported..., an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." NRCP 56(e).

5. Plaintiffs are the nonmoving party and bear the ultimate burden of persuasion at trial. "If the nonmoving party will bear the burden of persuasion at trial, the party moving for summary judgment may satisfy the burden of production by either (1) submitting evidence that negates an essential element of the nonmoving party's claim, or (2) pointing out... that there is an absence of evidence to support the nonmoving party's case. In such instances, in order to defeat summary judgment, **the nonmoving party must transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of**

material fact." *Cuzze v. University and Comm. College System of Nev.*, 123 Nev. 598, 602-03, 172 P.3d 131, 134 (2007) (emphasis added) (internal quotations omitted).

6. Defendants' Motion is for partial adjudication of the case before this Court. "If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly." NRCP 56(d).

7. Foreseeability ordinarily "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).

8. The damages sought by Plaintiffs were unforeseeable.

9. Summary judgment on Plaintiffs' request for consequential damages is legally 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).

<u>WILLARD'S DAMAGES</u>

10. Willard seeks the following damages as a result of Defendants' purported breach of the Willard Lease: (1) "[Willard was] forced to sell the Willard Property in

March 2014 in a short sale, thereby losing $4,437,500.00[2] of earnest money invested in the Willard Property and incurring at least $3,000,000.00 in tax consequences[3] and $549,852.00 in closing costs," (the "Short Sale" damages); (2) "Willard filed for bankruptcy protection, incurring $22,623.00 in legal fees and $15,000 in accounting fees in the process," (the "Bankruptcy" damages); 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" (the "California Action" damages). (FAC ¶¶ 15, 17, 18).

(1) Willard is not entitled to the "Short Sale" damages.

11. Willard seeks three categories of Short Sale damages he claims he incurred by being "forced to sell the Willard Property in March 2014 in a short sale" as a result 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).

12. In his Opposition, Willard deleted the tax consequence damages from his request in the FAC. Instead, he seeks purported "capital carryover losses" as tax damages.

(a) Willard withdrew his claims for most of the Short Sale damages.

13. Willard withdrew his claims for the following damages: (1) earnest money invested in the Willard Property; (2) the $2,430,000 for Overland and $3,152,000 for Mr. Willard of purported tax consequences incurred as a result of the short sale; and (3) closing costs. (January 10, 2017, Transcript p. 39-41). Accordingly, Willard is precluded from recovering those damages as a matter of law, based on his withdrawal and substantive law.

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[2]Willard revised this amount to $4,668,738.49 in Plaintiffs' Opposition.

[3]Willard has since revised that estimate to be $2,430,000 for Overland and $3,152,000 for Mr. Willard.

<u>(b) The Short Sale damages were not foreseeable at the time of entry into the contracts.</u>

14. No Short Sale damages are recoverable, as a matter of law, because the short sale and the resulting claimed damages were not a foreseeable consequence of Defendants' purported breach.

15. "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."[4] 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.").

16. 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 § 351 at cmt. a; <u>and see</u>, *Hilton Hotels Corp.*, 98 Nev. at 115 (same); *Basic Capital Management, Inc. v. Dynex Commercial, Inc.*, 348 S.W.3d 894, 901 (Tex. 2011) ("Foreseeability is a fundamental prerequisite to the recovery of consequential damages for breach of contract.").

17. 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); *Boise Joint Venture v. Moore*, 106 Or. App. 83, 806 P.2d 707 (1991) (lessee not liable for lost equity arising from foreclosure sale of lessor's property because lessor failed to prove when parties contracted to

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[4] The Court finds Plaintiffs misstate which Lease provisions provide them with remedies against BHI in the event of a breach, and their argument ignores the fundamental requirement under Nevada law that, in order for a plaintiff to recover consequential damages, the plaintiff must prove that the breaching party had reason to foresee, at the time the contract was executed, that those damages would be a probable result of a breach. This is true even in the face of contract provisions that purport to address the issue. *Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp.*, 98 Nev. 113, 115, 642 P.2d 1086, 1087 (1982) (even where written contract exists, damages must still be foreseeable).

lease property, they contemplated lessee would be liable for repayment of equity); see also *P.S.G. Ltd. P'ship v. August Income/Growth Fund VII*, 115 N.M. 579, 585, 855 P.2d 1043, 1049-50 (1993) (consequential damages unforeseeable for failure of tenant to pay rent where lease did not include provision for tenant to make mortgage payments).

18. 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.

19. The burden of proving foreseeability is on the non-breaching party seeking the consequential damages. *Mahmood v. Ross*, 990 P.2d 933, 382 Utah Adv. Rep. 3 (1999).

20. 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 in order to recover said Short Sale damages.

21. Willard cannot satisfy his burden as a matter of law.

22. A foreclosure sale of a landlord's property generally does not occur in the ordinary course of events of a tenant's breach. *P.S.G. Ltd. P'ship*, 855 P.2d at 1049-50 (absent an express or implied term of the lease, foreclosure damages were not consequential damages); see also Restatement (Second) of Contracts § 351, cmt. a.; *Boise Joint Venture*, 806 P.2d at 710; *Enak Realty Corp. v. City of New York*, 109 A.D.2d 814 (N.Y. Sup. 1985)

23. Because the loss claimed by Willard is not a probable result of the purported breach in the ordinary course of events, Willard cannot recover the requested damages unless Willard can prove that Defendants had actual special

knowledge at the time the parties entered into the contracts that it was probable that Willard's claimed loss could occur in the event of a breach.

24. Willard has failed to meet this burden.

25. Foreseeability is measured as of the time the parties enter into a contract. *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**."); Restatement (Second) of Contracts § 351 at cmt. a.

26. Willard has presented no evidence in opposition that Willard's claimed loss was foreseeable at the time the parties entered into the contracts.

27. Mr. Willard only spoke with Tim Herbst several years **after** the execution of the Willard Lease (in 2008, or possibly 2012). (Willard Deposition at 117, 118:20-25, 119, Exhibit 6 to Motion); Willard Lease, Exhibit 2 to Motion; Willard Guaranty, Exhibit 3 to Motion. Even then, Mr. Willard did not discuss the possibility, much less probability, of a forced sale. *Id.*; Restatement (Second) of Contracts § 351 at cmt. a.

28. There is no evidence Mr. Willard spoke with any other representative of Defendants about a forced sale.

29. Defendants did not have knowledge that such loss or damages would be a probable result of any breach of the Willard Lease at the time of entry into the contracts. Nor were there any objective indicia that the loss would be foreseeable. In other words, Willard has presented no evidence Defendants had 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. *See generally, Boise Joint Venture v. Moore*, 806 P.2d 707, 710 (1991).

30. The various provisions in the Willard and Highway 50 Leases do not eliminate the requirement under Nevada law that all consequential damages must be foreseeable. The notion the "remedies" provisions in the Leases provide "very strong protections for the Lessor in the event of a breach by the Lessee," and permit Plaintiffs

to "to recover 'any and all' damages proximately flowing from a breach" is contrary to law. <u>See</u>, *Opposition*, pp. 14-16.

31. Damages must be foreseeable, even in the face of contract provisions that purport to address the issue. *Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp.*, 98 Nev. 113, 115, 642 P.2d 1086, 1087 (1982) (even where written contract exists, damages must still be foreseeable).

32. Plaintiffs reference a Lease Subordination, Non-Disturbance and Attornment Agreement (the "Subordination Agreement") and a loan with Telesis Community Credit Union (the "Telesis Loan"), which Willard claims demonstrates the foreseeability of a short sale. (Subordination Agreement, Exhibit 32 to Opposition; Telesis Loan, Exhibit 33 to Opposition).

33. The Subordination Agreement and the Telesis Loan were entered into months **after** the execution of the Willard Lease, meaning that those documents are insufficient as a matter of law to have any bearing on foreseeability at the time of the contract. *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**.") (emphasis added).

34. Nothing in the Subordination Agreement demonstrates that a short sale of the Willard Property would be a probable consequence of a breach. At most, this merely demonstrates that Willard had **some** financing on the property, the amount of which was not specified. (Subordination Agreement, Exhibit 32 to Opposition). The Subordination Agreement did not give Defendants any indication that a short sale was a possibility or a probability. *Id.*

35. General knowledge that a landlord has some financing in place on the leased premises is insufficient to impose consequential damages on a tenant when the landlord loses the leased property to a foreclosure or short sale. *See generally, Boise Joint Venture v. Moore*, 806 P.2d 707, 710 (1991).

36. Willard presents no evidence that BHI had any notice whatsoever of the subsequent Telesis Loan, or any information about the terms of this loan. *Opposition*, generally.

37. The Telesis Loan, on which Willard eventually failed to make payments, was an entirely different loan than the loan referenced in the Subordination Agreement. (Subordination Agreement, Exhibit 32 to Opposition; Telesis Loan, Exhibit 33 to Opposition).

38. The Subordination Agreement is not relevant to the foreseeability of Willard's alleged short sale damages because Willard failed to pay an entirely separate loan. *Opposition*, p. 6.

39. Willard failed to provide any evidence that the short sale damages were foreseeable at the time of the contract, which is fatal to Willard's request, as the burden of proof belongs to Willard. *See Cuzze*, 123 Nev. at 602-03; NRCP 56(e).

40. 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, Willard is not entitled to recover these damages from Defendants as a matter of law. Willard is not entitled to any of the Short Sale damages identified herein and summary judgment should be entered in Defendants' favor on Willard's request for the Short Sale damages identified herein.

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<u>(c) Additional, independent bases also preclude Willard's recovery of the Short Sale damages</u>.

41. In addition to unforeseeability, there are additional bars to Willard's recovery.

<u>(i) Tax consequence damages</u>.[5]

42. Willard sought $2,430,000 for Overland and $3,152,000 for Mr. Willard in purported tax consequences from the short sale of the Willard Property. (FAC ¶ 15).

43. Plaintiffs, however, admit that Willard did not pay the taxes sought from Defendants as damages, conceding that "Per IRS regulations, since the Willard Plaintiffs' respective total debt was greater than their respective total assets immediately prior to the debt cancellation, these tax liabilities were not reported as income and consequently are no longer being claimed as damages flowing from Defendants' breach in the instant action." *Opposition*, p. 10.

44. Summary 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).

45. Since no genuine issue of material fact remains that Willard did not pay taxes as damages, the Court concludes Defendants are entitled to judgment in their favor on Willard's request for tax consequence damages.

<u>(ii) Earnest money</u>.

46. Willard claims he incurred "$4,437,500.00 of earnest money invested in the Willard Property" as a result of the purported forced sale. (FAC ¶ 15).

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[5] Tax consequences may be positive or negative consequences, including capital carryover loss benefits.

47. However, nothing in the Willard Lease contemplates or requires that Defendants pay Willard his purported invested earnest money in the event of a breach. (Willard Lease, Exhibit 2 to Motion).

48. Courts have found that lost equity or investment resulting from a foreclosure sale are unforeseeable damages, unless there is an express agreement that the tenant is responsible for such damages. See *Boise Joint Venture v. Moore*, 106 Or. App. 83, 806 P.2d 707 (1991) (lessee not liable for lost equity arising from foreclosure sale of lessor's property because lessor failed to prove the contract contemplated lessee would be liable for repayment of loss of equity).

49. Willard has not set forth any evidence demonstrating that Defendants agreed to be responsible for Willard's lost earnest money in the event of a forced sale.

50. No genuine issue of material fact remains and Defendants are entitled to judgment as a matter of law on Willard's request for earnest money.

(iii) Closing costs.

51. Willard claims to have incurred "$549,852 in closing costs" as a result of the purported forced sale. (FAC ¶ 15).

52. However, Willard has provided no evidence he actually paid the costs in the Closing Statement he provided. See *Mort Wallin*, 105 Nev. at 857, 784 P.2d at 955 ("The party seeking damages has the burden of proving both the fact of damages and the amount thereof."). (Closing Statement, Exhibit 9 to Motion).

53. According to the Closing Statement, Willard's **lenders** received all of the proceeds from the short sale, while Willard received nothing. *Id.*

54. Willard's lenders then forgave any remaining debt owed on the Willard Property after the short sale. (Deposition of L. Willard p. 89, Exhibit 6 to Motion).[6]

[6] The closing costs for the sale only impacted how much Willard's lenders received in payoff from the purchase price.

55. Further, the payoff amount made no difference to Willard's damages because the lenders forgave any remaining debt outstanding on the mortgage and Willard did not claim that debt forgiveness as gross income. *Id.*

56. Thus, the Closing Statement only reflects that the lenders were paid the purchase price minus the closing costs, not that Willard actually paid any closing costs—or incurred any other financial consequences from the closing costs, since the lenders forgave any outstanding remaining debt owed by Willard. *Id.*

57. As Willard has not set forth any evidence demonstrating he paid closing costs or incurred financial consequences from the amount of closing costs, no genuine issue of fact remains, Willard is not entitled to recover these costs as a matter of law, and Defendants are entitled to judgment in their favor on this request.

(2) Willard is not entitled to the "California Action" damages.

58. 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).

59. The complaint filed in California against Defendants asserted breach of the Willard Lease. (Docket Sheet, Exhibit 4 to Motion).

60. The action was dismissed. There is some dispute regarding the basis for dismissal. However, this is not relevant to the instant Motion.

61. Nevada law expressly precludes Willard from recovering the fees. These attorneys' fees could only be recoverable as litigation fees or as special damages, neither of which applies to this case. *Sandy Valley Associates v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 956, 35 P.3d 964, 969 (2001), *receded from on other grounds by Horgan v. Felton*, 123 Nev. 577, 170 P.3d 982 (2007); *Liu v. Christopher Homes, LLC*, 130 Nev. ___, ___, 321 P.3d 875, 878 (2014) (noting the general rule that attorneys' fees cannot be awarded absent a statute, rule, or contract provision,

and that "as an exception to the general rule, attorney fees may be awarded as special damages in limited circumstances.").

62. First, "when parties seek attorney fees as a cost of litigation, documentary evidence of the fees is presented to the trial court, generally in a post-trial motion." *Sandy Valley*, 117 Nev. at 956, 35 P.3d at 969.

63. However, "generally, attorney fees are not recoverable absent authority under a statute, rule, or contract." *Christopher Homes*, 130 Nev. at ___, 321 P.3d at 878.

64. Here, to the extent that Willard seeks the California action fees as a cost of litigation, Willard has not identified any statute, rule, or contract provision that would entitle Willard to fees incurred in the futile and now-dismissed California action. Further, even if Willard provided this Court a basis for recovering attorney's fees in the California action, the Court finds the California court is the suitable forum to determine an award of attorney's fees and costs incurred in that action.

65. Willard is not entitled to the fees incurred in the California action as a cost or as damages in this case.

66. Second, "when a party claims it has incurred attorney fees as foreseeable damages arising from tortious conduct or a breach of contract, such fees are considered special damages." *Sandy Valley*, 117 Nev. at 956, 35 P.3d at 969.

67. Special damages can only be sought in a narrow set of circumstances: (1) a party to a contract can seek to recover from a breaching party the attorneys' fees that arise from the breach that caused the former party to accrue attorneys' fees in defending himself against a third party's legal action; and (2) in cases concerning title to real property, attorneys' fees can be allowable as special damages in slander of title actions. *Christopher Homes, LLC*, 130 Nev. at ___, 321 P.3d at 875.

68. Here, no purported breach by Defendants caused Willard to defend himself against a third party's legal action.

69. Rather, Willard seeks attorneys' fees purportedly incurred from **Willard** bringing an action against Defendants in California, not a third-party action. (FAC ¶ 18 (Willard "hired an attorney to file suit against BHI and Herbst in Santa Clara County, California, thereby incurring $35,000 in attorney's fees.")).

70. "Attorneys' fees and other expenses of former litigation, particularly suits prosecuted by the plaintiff against the defendant, ordinarily are not recoverable in a subsequent action." Robert Rossi, 1 Attorneys' Fees 8:1 (3d ed.).

71. Nevada authority is unequivocally clear that such fees are only recoverable, if at all, in defending against a third-party action. *Christopher Homes, LLC*, 130 Nev. at ___, 321 P.3d at 875. Therefore, the first circumstance does not apply.

72. Second, the California action did not involve real property claims, much less slander of title claims. Therefore, the second circumstance does not apply.

73. As such, the attorneys' fees are not recoverable as special damages. See *Sandy Valley*, 117 Nev. at 957, 35 P.3d at 969-70 (holding that because lawsuits are possible when disputes arise, the mere fact a party is forced to file or defend a suit is an insufficient basis to award attorney's fees as damages).

74. Finally, nothing in the Willard Lease permits Willard to recover these damages in circumvention of settled Nevada law. (Willard Lease, Exhibit 2 to Motion).

75. Because Willard is not entitled to recover the attorneys' fees allegedly incurred in the California action as either a cost of that litigation or as special damages, Defendants are entitled to judgment as a matter of law on Willard's request for attorneys' fees incurred in the California action.

(3) Willard is not entitled to the "Bankruptcy" damages.

76. Willard claims that "as a further direct and proximate result of BHI breaching the Willard Lease, Willard filed for bankruptcy protection, incurring $22,623.00 in legal fees and $15,000 in accounting fees in the process." (FAC ¶ 17, on file herein). Willard is not entitled to these fees as a matter of law.

77. It is undisputed that Willard's bankruptcy was not foreseeable at the time the parties entered into the contracts.

78. Willard expressly admitted in his deposition that he never had any discussions with Defendants that a breach of the lease could result in him filing bankruptcy. (Deposition of L. Willard p. 115, Exhibit 6 to Motion).

79. Because Willard's bankruptcy was not a foreseeable consequence of a breach of the Willard Lease, then any fees[7] incurred in the process of Willard filing for and pursuing his six-month voluntary bankruptcy are also not foreseeable, and therefore not recoverable by Willard. Restatement (Second) of Contracts § 351(1) ("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.").

80. Willard is not entitled to the attorneys' fees or accounting fees purportedly incurred in the bankruptcy as a matter of law.

WOOLEY'S DAMAGES

81. Wooley also seeks consequential damages, claiming as a result of Defendants' purported breach of the Highway 50 Lease: (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).

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[7]While the law cited herein discusses attorneys' fees, Willard appears to claim that his accounting fees were a cost of the bankruptcy litigation. Thus, the analysis is the same for both.

(1) Wooley is not entitled to the Baring Property damages.

82. 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, Defendants' purported breach of the Highway 50 Lease forced Wooley to sell the Baring Property "at a loss" and caused Wooley to incur tax liabilities. (FAC).

83. The Highway 50 Lease does not provide that a consequence of a breach is liability for damages incurred with respect to selling one of Wooley's **other** properties, the Baring Property. (Exhibit 10 to Motion).

84. The only ground on which Wooley could recover these consequential damages is by establishing that such a loss was foreseeable as a probable result of the breach at the time the parties entered into the Highway 50 Lease. Restatement § 351(1).

85. In written discovery, Defendants asked Wooley to "please identify and describe in detail any and all facts demonstrating that BHI knew at the time [Wooley] and BHI entered into the Highway 50 Lease that the Highway 50 property was cross-collateralized with the Baring Property." (Wooley Responses to Interrogatories at 3, Exhibit 23 to Motion). Wooley's response to that interrogatory stated that Wooley "is presently unaware of facts responsive to this request," and reserved the right to amend the response. *Id.*

86. Mr. Wooley agreed with this interrogatory response during his deposition, and elaborated as follows: "I don't know why they would even know.... They're not party to getting a loan. I am. They take the check and cash it." (Deposition of E. Wooley p. 119, Exhibit 16 to Motion).

87. Defendants also asked Wooley to "please identify and describe in detail any and all facts demonstrating that Jerry Herbst at the time [Wooley] and BHI entered into the Highway 50 lease [knew] that the Highway 50 property was cross-collateralized

with the Baring Property." (Wooley Responses to Interrogatories at 4, Exhibit 23 to Motion). Wooley's response to that interrogatory stated that Wooley "is presently unaware of facts responsive to this request," and reserved the right to amend the response. *Id.* Wooley agreed with this answer at his deposition. (Deposition of E. Wooley p. 120, Exhibit 16 to Motion).

88. Wooley has failed to present evidence that Defendants knew at the time of execution of the Highway 50 Lease that the Highway 50 and Baring Properties were cross-collateralized or that breach of the Highway 50 Lease could impact the Baring Property, because Wooley did not enter into the Baring Property loan until **after** the execution of the Highway 50 Lease. (Highway 50 Lease, Exhibit 10 to Motion; Baring Loan, Exhibit 15 to Motion).

89. The Baring cross-collateralization language is found in the **July 18, 2006** Baring Property Loan, which was executed after the **December 2005** Highway 50 Lease. (Highway 50 Lease, Exhibit 10 to Motion; Baring Loan at 1.7, Exhibit 15 to Motion).

90. Because foreseeability is measured at the time of entry into a contract, Wooley is precluded from claiming foreseeability as a matter of law. Restatement (Second) of Contracts § 351 at cmt. a.

91. It is undisputed that Defendants did not know that the Highway 50 Property was cross-collateralized with the Baring Property.

92. Moreover, courts have held it is not foreseeable, in the ordinary course of events, that a tenant's breach of a lease will result in a landlord having to sell one of the landlord's other properties. *See P.S.G. Ltd. P'ship v. August Income/Growth Fund VII*, 115 N.M. 579, 585, 855 P.2d 1043, 1049-50 (1993); *and see* Restatement (Second) of Contracts § 351(1).

93. Wooley has failed to set forth any evidence Defendants knew or had reason to foresee this purported loss was a probable result of their alleged breach when the contracts were made.

94. The Court finds no genuine issue of material fact remains on this issue and Defendants are entitled to judgment in their favor as a matter of law precluding Wooley's claim for damages arising out of the sale of the Baring Property.

(2) Wooley is not entitled to the California Action damages.

95. Wooley claims that as a result of Defendants' purported breach, 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 ¶ 42, on file herein). This is the same California action as that pursued by Willard.

96. No rule, statute, or contractual provision entitles Wooley to these fees as a cost of litigating the California action. See *Liu v. Christopher Homes, LLC*, 130 Nev. ___, ___, 321 P.3d 875, 878 (2014) (noting the general rule that attorneys' fees cannot be awarded absent a statute, rule, or contract provision, and that "as an exception to the general rule, attorney fees may be awarded as special damages in limited circumstances.").

97. The California action was not within the limited set of actions that would entitle Wooley to seek these fees as special damages. *Id.*

98. Nothing in the Highway 50 Lease entitles Wooley to recover these damages in circumvention of settled Nevada law. (Highway 50 Lease, Exhibit 10 to Motion).

99. Wooley is not entitled to these fees as a matter of law, and Defendants are entitled to judgment on this damage claim.

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ORDER

Accordingly, and good cause appearing therefor,

IT IS HEREBY ORDERED Defendants' *Motion for Partial Summary Judgment* is **GRANTED**. Plaintiffs are not entitled to recover the following as a matter of law:

(1) Willard's "short sale" damages, including tax consequences, closing costs, and earnest money;

(2) Willard's attorneys' fees incurred in the California action;

(3) Willard's attorneys' and accounting fees incurred in the bankruptcy;

(4) Wooley's "Baring Property" damages, including tax consequences and purported lost monies as a result of the sale; and,

(5) Wooley's attorneys' fees incurred in the California action.

IT IS FURTHER ORDERED Plaintiffs shall serve, within fifteen (15) days of entry of this order, an updated NRCP 16.1 damage disclosure.

DATED this 30th day of May, 2017.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 30th day of May, 2017, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

DAVID O'MARA, ESQ.
BRIAN IRVINE, ESQ.
ANJALI WEBSTER, ESQ.
BRIAN MOQUIN, ESQ.
JOHN DESMOND, ESQ.

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

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,

NO. 77780

Appellants,

vs.

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

Respondents.

______________________________________/

APPENDIX TO APPELLANTS' OPENING BRIEFS

VOLUME 7 OF 19

Submitted for all appellants by:

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LARRY J. WILLARD, et al.

CHRONOLOGICAL INDEX TO APPELLANTS' APPENDIX

NO.	DOCUMENT	DATE	VOL.	PAGE NO.
(cont 30)	Exhibit 45: *Lease Termination Agreement* dated January 25, 2006 by Land Venture Partners, LLC and Berry-Hinckley Industries regarding the Virginia Property, recorded February 24, 2006 in the Washoe Country Recorder's Office as Doc. No. 3353288		10	2214-2218
	Exhibit 46: *Grant, Bargain and Sale Deed* by and between Land Venture Partners, LLC and P.A. Morabito & Co., Limited dated February 23, 2006 regarding the Virginia Property, recorded February 24, 2006 in the Washoe County Recorder's Office as Doc. No. 3353289		10	2219-2224
	Exhibit 47: *Grant, Bargain and Sale Deed* by and between P.A. Morabito & Co., Limited and the Willard Plaintiffs dated January 20, 2006 regarding the Virginia Property, recorded February 24, 2006 in the Washoe County Recorder's Office as Doc. No. 3353290		10	2225-2230
	Exhibit 48: *Deed of Trust, Fixture Filing and Security Agreement* by and between the Willard Plaintiffs and South Valley National Bank dated February 21, 2006 regarding the Virginia Property, recorded February 24, 2006 in the Washoe County Recorder's Office as Doc. No. 3353292		10	2231-2248
	Exhibit 49: Proposed *First Amendment to Lease Agreement* regarding the Virginia Property sent to the Willard Plaintiffs in October 2006		10	2249-2251

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

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

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

AFFIDAVIT OF BRIAN P. MOQUIN

I, Brian P. Moquin, declare:

1. I am an attorney licensed to practice law in the State of California and admitted *pro hac vice* to this Court to represent the plaintiffs in the above-captioned matter. I am over the age of eighteen years and am otherwise *sui juris*. I have personal knowledge of the following facts, and if called and sworn as a witness I could and would testify to the veracity thereof.

2. Plaintiffs Larry J. Willard ("Willard") and Overland Development Corporation ("Overland") seek recovery of damages sustained by virtue of the breach of a long-term corporate lease (the "Virginia Lease") on a commercial property they owned located at 7695/7699 S. Virginia Street, Reno, Nevada (the "Virginia Property") by defendant Berry-Hinckley Industries ("BHI") and breach by defendant Jerry Herbst ("Herbst") of the personal guaranty (the "Herbst Guaranty") securing BHI's payment and performance under the Virginia Lease

3. Attached hereto as Exhibit 36 is a true and correct copy of the spreadsheet (the "damages spreadsheet") that Willard and I collaborated on to compute the damages due and owing by virtue of the breach of the Virginia Lease and the Herbst Guaranty. The damages spreadsheet was created using Apple's Numbers application, which is similar in nature to Microsoft Excel.

4. Table I ("Computation Parameters") of the damages spreadsheet contains values used in formulae within the spreadsheet to calculate damage amounts. [Ex. 36.1]

a. The value in the row of Table I marked *1 ("Interest Rate upon Default") was obtained from the Virginia Lease. [Ex 2.30 at "Default Rate."]

b. The value in row *2 ("Discount Rate") was obtained from the formula specified in the Virginia Lease for computing accelerated rent damages. [Ex. 2.17 at § 20(B)(i)(iv).]

c. The value in row *3 ("Interest Through Date") represents the date through which interest on damages was calculated.

d. The values in rows *4 ("Lease Term Start") and *5 ("Lease Term End") were obtained from the Virginia Lease, which as a temporal range denote the "Lease Term." [Ex. 2.1 at § 3.]

e. The value in row *6 ("Date of Abandonment") is the undisputed date on which BHI abandoned the Virginia Property. [Decl. Larry J. Willard at ¶ 45.]

f. The value in row *7 ("Fair Market Value with Lease") was obtained from the 2008 appraisal of the Virginia Property prepared by CB Richard Ellis as corroborated by the expert opinion of Daniel Gluhaich. [Ex. 9.1; Decl. Daniel Gluhaich at ¶¶ 5–9.]

g. The value in row *8 ("Fair Market Value without Lease") was obtained from the appraisal prepared by David A. Stefan (the "2014 Appraisal") as corroborated by the expert opinion of Daniel Gluhaich. [Ex. 31.5; Decl. Gluhaich at ¶¶ 15–16.]

h. The value in row *9 ("Fair Rental Value") was obtained from the 2014 Appraisal as corroborated by the expert opinion of Daniel Gluhaich. [Ex. 31.51; Decl. Gluhaich at ¶¶ 17–18.]

5. Table II ("Expenses") of the damages spreadsheet lists recoverable expenses incurred by Willard and Overland as a result of Defendants' breaches.

a. The data appearing in row *1 was obtained from the invoice from Greg Breen. [Ex. 14.]

b. The data appearing in row *2 was obtained from the invoice from Tholl Fence. [Ex. 17.]

c. The data appearing in row *3 was obtained from the invoices from Berkshire Hathaway. [Ex. 34.]

d. The data appearing in rows *4, and *7 through *18 was obtained from the invoices from the City of Reno. [Ex. 35.]

e. The data appearing in row *5 was obtained from the invoice from Santiago Landscape and Maintenance. [Ex. 30.]

f. The data appearing in row *6 was obtained from the invoices from

Nevada Energy. [Ex. 33.]

g. Interest at the Default Rate (Table I at *1) for each line item was applied from the date on which each expense item was incurred.

6. With respect to the calculation of the amount of accelerated rent damages due and owing for the remainder of the lease term following Defendants' breaches, we used the method specified in the Virginia Lease, which states that Lessor shall be entitled to recover 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%)." [Ex. 2.17 at §20(B)(i)(iv).]

7. The "net present value" of future periodic income is the sum of all future payments reduced by a "discount rate" to remove the compound interest that would have accrued had the future payments been received and invested, resulting in the "present value" of such future payments.

8. Table III ("Present Value of Future Rent") of the damages spreadsheet contains an amortized computation of the net present value of rent payments from the date of BHI's breach of the Virginia Lease through the end of the Lease Term, per the formula specified in the Virginia Lease. [Ex. 2.17 at § 20(B)(i)(iv).] The "Rent Due" column contains the amount of rent due for month listed in the "Month" column. Rows *2 through *13 identify the months in which the 2% annual Rent Adjustment [Ex. 2.2 at § 4(B)] to the Base Month Rental [*Id.* at § 4(A)] have applied. The "Net Present Value (Running Total)" column shows the running total of the results of calculating the net present value of future rent payments from the date of the breach through any given month, calculated using the Apple Numbers application's built-in NPV (i.e., "Net Present Value") function with a discount rate of 4% per annum [Table I at *2]. To confirm the results, I had an associate who is an attorney and a Certified Public Accountant verify that the calculation of the net present value of future rent was correct.

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9. Table IV (“Present Value of Fair Rental Value”) of the damages spreadsheet contains an amortized computation of the net present value of the fair rental value of the Virginia Property for the period starting one year after BHI’s abandonment through the end of the Lease Term, per the formula specified in the Virginia Lease. [Ex. 2.17 at § 20(B)(i)(iv).] Row *2 indicates the row at which the net present value of the fair rental value starts to be applied, with all prior rows representing months for which the formula specified in the Virginia Lease provides for the full amount of discounted future rent to be recovered. The “Net Present Value (“Running Total”)” column shows the running total of the results of calculating the net present value of the fair rental value from one year following the date of abandonment through any given month, calculated using the Apple Numbers application’s built-in NPV function with a discount rate of 4% per annum.

10. Table V (“Accelerated Rent Damages”) of the damages spreadsheet shows the calculation of the total accelerated rent damages recoverable per the formula specified in the Virginia Lease. [Ex. 2.17 at § 20(B)(i)(iv).] The total was obtained by taking the net present value of future rent computed in Table III and subtracting the net present value of fair rental value for the period one year following abandonment of the Virginia Property through the end of the Lease Term.

11. Table VI (“Diminution in Value”) of the damages spreadsheet shows the calculation of the damages arising from diminution in value of the Virginia Property due to Defendants’ breaches. The total was obtained by taking the fair market value of the Virginia Property with the lease in place [Table I at * 7] and subtracting the fair market value of the Virginia Property without the lease [Table I at *8].

12. Table VII (“Total Damages”) of the damages spreadsheet provides a summary of all damages due and owing as a result of Defendants’ breaches.

a. Rows *1, *3, and *5 contain the amount of unpaid rent due and owing for March, April, and May 2013, respectively, while rows *2, *4, and *6 contain the late payment charges for each month of unpaid rent, as provided for under the Virginia Lease. [Ex. 2.2–2.3 at § 4(E).]

b. Interest at the Default Rate has not been applied to the late payment charges.

c. Row *7 contains the total for accelerated rent damages computed in Table V.

d. Row *8 contains the total for damages arising from diminution in value computed in Table VI.

e. Row *9 contains the total for expenses computed in Table II.

f. Interest at the Default Rate [Table I at •1] was applied as provided for in the Virginia Lease from the date on which each item of damage was actually incurred through the date specified in Table I at *3.

13. Table VIII ("Interest Accrual Rate") of the damages spreadsheet shows the rate of accrual of interest on the damages due and owing as a result of Defendants' breaches. The interest per day was calculated by taking the total interest accrued through October 16, 2017 and subtracting the total interest accrued through the previous day. The interest per month was calculated by multiplying the interest per day value by 365 and then dividing by 12. The interest per year was calculated multiplying the interest per day value by 365.

I swear under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed this 16th day of October 2017.

BRIAN P. MOQUIN

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.

LAW OFFICES OF BRIAN P. MOQUIN

DATED: October 18, 2017 By:______________________________

BRIAN P. MOQUIN
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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Nevada that on this date I served a true and correct copy of the foregoing document as follows:

[X] By sending a true and correct copy of the foregoing document by electronic mail to jdesmond@dickinsonwright.com, birvine@dickinsonwright.com, and awebster@dickinsonwright.com.

DATED: October 18, 2017

BRIAN P. MOQUIN

28

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

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

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

AFFIDAVIT OF DANIEL GLUHAICH

I, Daniel Gluhaich, declare:

1. I am a resident of the State of California over the age of eighteen years. I have personal knowledge of the following facts, and if called and sworn as a witness could and would testify to the veracity thereof. I have been designated as an expert witness for the plaintiffs in the above-captioned matter.

2. I have been a real estate agent licensed by the State of California since 1987. I have been a real estate broker licensed by the State of Nevada since 2001. To date I have closed over $1 billion worth of real estate transactions and over 1,200 escrows. I specialize in transactions involving commercial and industrial properties and also have extensive experience in real estate development. I have experience as an expert witness regarding market value and diminution in value of commercial properties, most recently in *Bridge Group Investments, LLC v. Big Dollar Stores, LLC, et al.,* Clark County District Court Case No. A-14-711763-B.

3. In Summer 2005, Plaintiff Larry J. Willard ("Willard") approached me stating that he was looking for another property to purchase as part of a "1031 Exchange," since I had found a purchaser for a property he owned in Las Vegas and the funds from that sale were sitting in an escrow exchange account.

4. I was the broker of record for Willard and Plaintiff Overland Development Corporation ("Overland") in their purchase of the property located at 7695 and 7699 South Virginia Avenue, Reno, Nevada ("the Virginia Property") on February 24, 2006. I also assisted Willard in obtaining financing to purchase the Virginia Property and reviewed the Triple-Net lease-back provisions of the Purchase and Sale Agreement attached hereto as Exhibit 1 as well as the Lease Agreement (the "Virginia Lease") entered into by Berry-Hinckley Industries ("BHI") attached hereto as Exhibit 2.

5. In May 2008, Sean T. Higgins, General Counsel for Terrible Herbst, Inc., sent me correspondence stating that BHI intended to cease operations and rental payments on the Virginia Property as of July 1, 2008 and offered to buy out the remaining lease term. I forwarded this correspondence to Willard who felt that BHI's offer was unacceptable. In light of

Willard's refusal to accept BHI's offer, after several months of unfruitful negotiation, BHI decided not to breach the Virginia Lease in 2008 after all. However, due to BHI's threat, Willard instructed me to list the Virginia Property for sale. As part of that effort, in September 2008 Willard commissioned an appraisal of the Virginia Property (the "2008 Appraisal") from CB Richard Ellis ("CBRE"), a copy of which was sent directly to me by Jason Buckholz of CBRE on October 17, 2008. A true and correct copy of the 2008 Appraisal is attached hereto as Exhibit 9.

6. The 2008 Appraisal analyzed the Virginia Property's value as of October 1, 2008 based on two approaches: a sales comparison approach and an income capitalization approach. [Ex. 9.56.]

7. The sales comparison approach looks at sales of comparable properties and analyzed particular metrics, such as price per square foot, after adjusting for differences between properties. Using this approach, CBRE concluded that the Virginia Property's market value was $20,000,000.00. [Ex. 9.57–9.62.]

8. The income capitalization approach assesses a property's value based on its income-producing capabilities. Using this approach, CBRE analyzed the Virginia Property's value based on the income generated by the BHI lease. Using this approach, CBRE concluded that the Virginia Property's market value was $19,700,000.00. [Ex. 9.63–9.72.]

9. In my opinion, the 2008 Appraisal presents a thorough, detailed, professional, and highly compelling analysis of the market value of the Virginia Property as leased. I believe that CBRE's conclusion that the market value of the Virginia Property as leased was $19,700,000.00 as of October 1, 2007 is well supported both by the facts and analyses included in the 2008 Appraisal and by my personal knowledge of the commercial real estate market in Northern Nevada. Based on my knowledge of the market and my experience in listing the Virginia Property, my professional opinion is that the fair market value of the Virginia Property immediately prior to BHI's breach of the Virginia Lease on June 1, 2013 was $19,700,000.00.

10. Based on the conclusions of the 2008 Appraisal as well as my knowledge of the commercial real estate market in Northern Nevada, in February 2009 I listed the Virginia

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Property for sale on behalf of Willard and Overland for $23,950,000.00. The property failed to elicit any offers at that price.

11. In March 2013, Willard contacted me to relate that BHI had breached the Virginia Lease. I explained to him that the market value of the property as well as the possibility of finding a replacement tenant would decrease dramatically were the property to "go dark," i.e., to cease operations. Consequently, Willard instructed me to redouble my efforts to find a buyer or replacement tenant for the Virginia Property as well as to negotiate with BHI for BHI to maintain operations at the Virginia Property until a buyer or a new tenant could be found.

12. In early June 2013, Willard contacted me and told me that BHI had vacated the Virginia Property. Willard also told me that he had visited the Virginia Property at the end of May 2013 and had discovered that it was not fully operational and was in bad shape. Sometime thereafter, I personally visited the Virginia Property and saw firsthand that BHI had left the Virginia Property in a disheveled and non-operational state.

13. In July 2013, I received an e-mail from Richard Miller expressing interest in renting the car wash portion of the Virginia Property and requesting permission to do a walk-through inspection, which permission was granted. On August 6, 2013, I received an e-mail from Richard Miller describing his observations during his inspection. In that e-mail, he described the property as "run-down and tired" and "a dirty mess through and through" and identified specific aspects of the car wash portion of the Virginia Property that rendered it non-operational and in need of substantial repair. A true and correct copy of the August 6, 2013 e-mail message is attached hereto as Exhibit 37.

14. I assisted Willard in negotiating with the lender who had financed Willard's purchase of the Virginia Property. I also found a potential purchaser, Longley Partners, LLC, who offered $3,500,000.00 to purchase the Virginia Property. I personally assisted in negotiating this offer up to its final value of $4,050,354.68 and in convincing the lender to accept the offer via a short sale. I was the broker of record for Willard and Overland in the short sale. A true and correct copy of the Seller's Final Closing Statement is attached hereto as Exhibit 32.

15. On January 29, 2014, as part of their efforts to secure financing for purchase of the Virginia Property, Longley Partners, LLC through Heritage Bank of Nevada commissioned an "as-is" appraisal of the Virginia Property (the "2014 Appraisal") from David A. Stefan. The 2014 Appraisal was issued on February 11, 2014. A true and correct copy of the 2014 Appraisal that I received directly from Rob Cashell, Managing Member of Longley Partners, LLC, is attached hereto as Exhibit 31.

16. The 2014 Appraisal used three approaches in determining market value: a cost approach, an income approach, and a sales comparison approach. It concluded that the fair market value of the Virginia Property "as-is" was $4,270,000.00. [Ex. 31.5.] Based on my review of the 2014 Appraisal, my experience in marketing the Virginia Property following the breach of the Virginia Lease by BHI, and my knowledge of the commercial real estate market in Northern Nevada, I believe the "as-is" fair market value figure of $4,270,000.00 to be accurate and well supported.

17. The 2014 Appraisal found the fair rental value of the convenience store portion of the Virginia Property to be $10,420.00 per month. [Ex. 31.42.] It found the fair rental value of the fast food area to be $4,620.00 per month. [Ex. 31.44.] It found the fair rental value for poker machines to be $7,800.00 per month. [Ex. 31.45.] It found the fair rental value of the car wash to be $6,248.00 per month. [Ex. 31.47.] It found the fair rental value of the mini lube facility to be $5,968.00 per month. [Ex. 31.49.] And it found the fair rental value of the office building portion of the Virginia Property to be $3,150.00 per month. [Ex. 31.51.] In sum, the 2014 Appraisal found the fair rental value of the entire Virginia Property to be $38,206.00 per month. [*Id.*]

18. Based on my personal knowledge of the offers received from parties interested in leasing portions of the Virginia Property prior to the short sale, my review of the 2014 Appraisal, and my knowledge of the commercial real estate market in Northern Nevada, my professional opinion is that the fair rental value figure of $38,208.00 per month as determined in the 2014 Appraisal is accurate and well supported.

19. On February 28, 2014, I received an e-mail from Rob Cashell which included an

attached proposal from L.A. Perks, a construction company specializing in petroleum and fuel services. The L.A. Perks proposal quoted a total cost of $190,941.00 to repair and render operational the gas station portion of the Virginia Property. A true and correct copy of the e-mail message and the accompanying proposal from L.A. Perks is attached hereto as Exhibit 38.

20. A true and correct copy of the sales brochure for the Virginia Property that I had prepared for marketing purposes in 2012 is attached hereto as Exhibit 52.

I swear under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed this 16th day of October 2017.

DANIEL GLUHAICH

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.

LAW OFFICES OF BRIAN P. MOQUIN

DATED: October 18, 2017

By:______________________________

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Nevada that on this date I served a true and correct copy of the foregoing document as follows:

[X] By sending a true and correct copy of the foregoing document by electronic mail to jdesmond@dickinsonwright.com, birvine@dickinsonwright.com, and awebster@dickinsonwright.com.

DATED: October 18, 2017

BRIAN P. MOQUIN

1030

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

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

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

AFFIDAVIT OF LARRY J. WILLARD

I, Larry J. Willard, declare:

1. I am a named plaintiff in the above-captioned matter. I am over the age of eighteen years and am otherwise *sui juris*. I have personal knowledge of the following facts and of the documents referenced herein, and if called and sworn as a witness I could and would testify to the veracity thereof.

2. I am the President and sole shareholder of named plaintiff Overland Development Corporation ("Overland") (collectively, "we" or "us").

3. On November 18, 2005, as part of a property exchange pursuant to 26 U.S.C. § 1031 (a "1031 Exchange"), we entered into a Purchase and Sale Agreement with P.A. Morabito & Co, Limited to purchase a commercial property located at 7695 and 7699 South Virginia Street, Reno, Nevada (the "Virginia Property"). A true and correct copy of the Purchase and Sale Agreement is attached hereto as Exhibit 1.

4. The Purchase and Sale Agreement contained a lease-back provision under which the seller would lease back the Virginia Property for a period of twenty years from January 2006 until January 2026 (the "Lease Term") at a base annual rental rate of $1,464,375.00 increasing by two percent per year. [Ex. 1.1 at § D.]

5. On December 2, 2005, Defendant Berry-Hinckley Industries ("BHI") executed a Lease Agreement (the "Virginia Lease") with us containing the terms mentioned above, a true and correct copy of which is attached hereto as Exhibit 2.

6. On February 21, 2006, BHI and I executed a Subordination, Attornment and Nondisturbance Agreement (the "Subordination Agreement"), recorded as Doc. No. 3353293 in the Washoe County Recorder's Office. A true and correct copy of this document is attached hereto as Exhibit 3.

7. In the Subordination Agreement, BHI expressly confirmed that the Virginia Lease ran until January 2026. [Ex. 3.2 at § 1.1; Ex. 3.11 at § 2.4; Ex. 3.14.]

8. On February 17, 2007, counsel for defendant Jerry Herbst ("Herbst") sent an offer letter to myself and other landlords indicating that Herbst intended to acquire BHI's convenience

store assets, which included the lease of the Virginia Property. A true and correct copy of the February 17, 2007 offer letter is attached hereto as Exhibit 4.

9. In the offer letter, Herbst offered to personally guarantee BHI's payments and performance under the Virginia Lease if we agreed to amend the Virginia Lease. [Ex. 4.1–4.3.] Included with the offer letter was a statement from Johnson Jacobson Wilcox dated January 31, 2007 attesting to the fact that Herbst's net worth was in excess of $200 million. [Ex. 4.4.]

10. On or about March 8, 2007, I executed the Landlord's Estoppel Certificate that had been requested by Herbst in his offer letter and returned it to Herbst. In paragraph 3 thereof, I certified that the Lease Term ran from January 2006 until January 2026. A true and correct copy of the Landlord's Estoppel Certificate is attached hereto as Exhibit 5.

11. On March 9, 2007, based on the representations as to Herbst's net worth and the offer by Herbst to personally guarantee BHI's payments and performance under the Virginia Lease, we accepted Herbst's offer and executed an Amendment to the Virginia Lease, which modified certain provisions of the original Virginia Lease but did not change the Lease Term nor did it substantively modify the remedies available to us in the event of a breach. A true and correct copy of the Amendment to Lease Agreement is attached hereto as Exhibit 6.

12. Also on March 9, 2007, Herbst executed a Guaranty Agreement (the "Personal Guaranty") ensuring BHI's payment and performance under the Virginia Lease. A true and correct copy of the Personal Guaranty is attached hereto as Exhibit 7.

13. On or about May 18, 2008, Sean Higgins, General Counsel for Terrible Herbst, Inc., sent a buyout offer to our real estate broker, Daniel Gluhaich ("Gluhaich"), who forwarded the offer to me. BHI's buyout offer contained terms of a proposed buyout by BHI of the Virginia Lease. I found the terms unacceptable, and after several months of fruitless negotiations, BHI decided not to walk away from the Virginia Lease after all. A true and correct copy of the buyout offer is attached hereto as Exhibit 8.

14. Included with BHI's buyout offer was a copy of the Virginia Lease confirming that the Lease Term ran from January 2006 through January 2026. [Ex. 8.18.]

15. In September 2008, due to BHI having threatened to walk away from the Virginia

Lease, I commissioned CB Richard Ellis to conduct an appraisal of the Virginia Property (the "2008 Appraisal"). The appraisal was issued on October 16, 2008 and concluded that the fair market value of the Virginia Property as leased was $19,700,000.00. A true and correct copy of the 2008 Appraisal is attached hereto as Exhibit 9.

16. On March 1, 2013, without providing any notice, BHI defaulted on the Virginia Lease by not sending the rent payment for March 2013.

17. On March 10, 2013, having still not received the monthly rental payment from BHI, I called BHI's finance department and I was told that BHI was no longer going to pay rent. I immediately retained counsel who sent a letter to Herbst on March 12, 2013 demanding payment of the March 2013 rent. A true and correct copy of that letter is attached hereto as Exhibit 10.

18. I also immediately contacted Gluhaich and had him engage in efforts to sell the Virginia Property and/or find a new tenant.

19. On March 18, 2013, counsel for BHI and Herbst responded to my counsel's letter with an unacceptable settlement offer that in no way indicated that BHI and Herbst intended to cure the breach nor honor the Personal Guaranty. A true and correct copy of that letter is attached hereto as Exhibit 11.

20. On April 12, 2013, counsel for BHI and Herbst sent a letter to our attorney indicating that BHI did not intend to cure the breach and planned to vacate the Virginia Property on April 30, 2013. A true and correct copy of that letter is attached hereto as Exhibit 12.

21. Shortly thereafter, in an effort to mitigate damages, I appealed to BHI through Gluhaich to remain on the Virginia Property until we were able to find a buyer or a new tenant so that the Virginia Property would retain its value. Consequently, we entered into an interim "Operation and Management Agreement" with BHI, effective May 1, 2013, under which BHI agreed to continue active operations on the Virginia Property. I agreed to this Operation and Management Agreement because I knew that the amount of rent at issue, which at that point was $140,175.55 per month, would be difficult to obtain from a new tenant if the Virginia Property were to "go dark," and the market value for which it could be sold would likewise be

significantly reduced. Herbst did not sign the Operation and Management Agreement nor is there any mention within it of the Personal Guaranty. A true and correct copy of the Operation and Management Agreement is attached hereto as Exhibit 13.

22. In May 2013, I hired consultant Greg Breen ("Breen") to accompany me to the Virginia Property to assess its condition and provide guidance regarding mitigation of damages. From 2004 until Herbst purchased BHI in July 2008, Breen was employed as the Senior Vice President of Operations and General Manager for BHI and worked out of the Virginia Property. I visited the Virginia Property on May 26, 2013 and Breen accompanied me there on May 27, 2013. Breen and I discovered that the Virginia Property was in a shambles and was barely operating. For example, all signage had been removed, there were severe maintenance issues, the grass had not been cut, and the front door had been broken and was half boarded up. The quick lube facility was a mess and was not operational; several employees told us that they did not have enough supplies to conduct operations. The point-of-sale computer and the controller were both missing from the car wash rendering it inoperable, and there were no staff in the car wash. The convenience store was in the final stage of being shut down, with shelves left bare and inventory being moved or sold through. Subsequently, Breen provided me with an estimate of the maximum fair rental value of the Virginia Property that could reasonably be obtained assuming it was repaired to an operational status. I paid Breen $2,500.00 for his services. A true and correct copy of the invoice from Breen dated May 31, 2013 is attached hereto as Exhibit 14.

23. During my visit to the Virginia Property in May 2013, I took photographs of the Virginia Property. True and correct copies of these photographs are attached hereto as Exhibit 15.

24. For comparison, true and correct copies of photographs that I retrieved from Google Historical Street View which were taken in September 2012 are attached hereto as Exhibit 16.

25. Exhibit 15.1 is a photograph I took of the inside of the convenience store which shows that the store was not fully stocked as some of the shelves were completely empty.

26. Exhibit 15.2 is a photograph I took showing unrepaired damage to a cupboard door in the convenience store.

27. Exhibit 15.3 is a photograph I took evidencing the fact that the car wash was not operating is evidenced by the fact that the doors were closed. In addition, the point-of-sale computer and controller which ran the entire car wash were missing.

28. Exhibit 15.4 is a photograph I took showing that the advertising shield that was previously displayed on the building has been removed.

29. Exhibit 15.5 is a photograph I took showing that an advertising sign has been removed. Compare with Exhibit 16.4 taken by Google Historical Street View in September 2012.

30. Exhibit 15.6 is a photograph I took showing that the grass was not been maintained. In addition, the corner banner advertisement has been removed. Compare with Exhibit 14.1 taken by Google Historical Street View in September 2012.

31. Exhibit 15.7 is a photograph I took showing that the banner advertisement has been removed. In addition, the banner advertisement that used to appear above on the side of the roof covering the gas station islands has also been removed.

32. Exhibit 15.8 is a photograph I took showing that banner advertisements have been removed both from the side of the roof overhang and the left-facing wall of the building. In addition, no advertisements nor any inventory is present on or in front of the store windows. Compare with Exhibit 16.2 taken by Google Historical Street View in September 2012.

33. Exhibit 15.9 is a photograph I took showing that the banner advertisements have been removed from the stand-alone displays and that the banner advertisements have been ripped off the sides of the roof overhang. Compare with Exhibit 16.5 taken by Google Historical Street View in September 2012.

34. Exhibit 15.10 is a photograph I took showing that the sign advertising "Terrible's" was flipped over so as to be effectively missing from the main plaza display. Compare with Exhibit 16.3 taken in September 2012 by Google Historical Street View.

35. Exhibit 15.11 is a photograph I took showing the fact that the front door to the

convenience store has been boarded up as well as the lack of advertising and merchandise on and in front of the main windows of the convenience store. Compare with Exhibit 16.5 taken in September 2012 by Google Historical Street View.

36. Exhibit 15.12 is a photograph I took showing the lack of advertising and merchandise on and in front of the main windows of the convenience store as well as the fact that the front door to the convenience store has been boarded up. In addition, signs that used to appear above the front door have been removed. Compare with Exhibit 16.5 taken in September 2012 by Google Historical Street View.

37. Exhibit 15.13 is a photograph I took showing the fact that the front door to the convenience store was broken and subsequently boarded up is evident. This damage was never repaired by BHI. Compare with Exhibit 16.5 taken in September 2012 by Google Historical Street View.

38. Exhibit 15.14 is a photograph I took showing the corroded condition of chemical holding tanks.

39. Exhibit 15.15 is a photograph I took showing the lack of landscape maintenance as well as the complete destruction of an awning, with wire hangers inexplicably being placed from its support.

40. Exhibit 15.16 is a photograph I took showing the destruction of additional awnings, the lack of landscape maintenance, the inexplicable presence of wire hangers, and damage to a tile adornment.

41. Exhibit 15.17 is a photograph I took showing the destruction of another awning.

42. Exhibit 15.18 is a photograph I took showing the lack of landscape maintenance, with weeds and litter being rampant throughout.

43. Exhibit 15.19 is a photograph I took inside the quick lube facility. The lack of inventory is evident. The employee pictured in the photograph stated that the facility was not operational due to the fact that they did not have inventory with which to service customers.

44. Exhibit 15.20 is a photograph I took inside the quick lube facility showing empty shelves where inventory would normally appear were the facility operational.

45. On June 1, 2013, BHI vacated the Virginia Property having paid no rent whatsoever since February 1, 2013 and leaving the Virginia Property in utter disarray. Under the terms of the Operation and Management Agreement, BHI had until July 20, 2013 to provide us with a profit and loss statement certified by an officer of BHI with accompanying documentation and to remit net profits earned during May 2013 less a $10,000.00 “Fee,” or, if net profits were less than $10,000.00, to make a demand with documentation certified by an officer of BHI for the absolute value of net profits minus the $10,000.00 fee. [Ex. 13.2 at § 4.]

46. On June 4, 2013, we hired Tholl Fence to install a security fence around the Virginia Property, which BHI had abandoned four days earlier and had left in disarray. We paid Tholl Fence $2,668.62 to install this security fence. A true and correct copy of the invoice is attached hereto as Exhibit 17.

47. On June 18, 2013, because I had been served with a notice of foreclosure on the Virginia Property due to the fact that BHI had failed to pay rent since March 2013 while I still was liable for $87,087 per month in mortgage payments which I could not afford to pay due to the loss of income occasioned by BHI’s breach, I filed a Chapter 11 bankruptcy petition. A true and correct copy of the Notice of Bankruptcy Case Filing is attached hereto as Exhibit 18.

48. On July 18, 2013, the National Credit Union Administration Board (“NCUAB”) acting as liquidating agent for Telesis Community Credit Union with whom I had financed purchase of the Virginia Property filed a motion in bankruptcy court to terminate the automatic stay. A true and correct copy of this motion and accompanying declaration is attached hereto as Exhibit 19.

49. On August 9, 2013, the bankruptcy court granted NCUAB’s motion. A true and correct copy of the court’s order is attached hereto as Exhibit 20.

50. Also on August 9, 2013, my bankruptcy attorney filed a motion to dismiss my bankruptcy case. A true and correct copy of this motion and accompany declaration is attached hereto as Exhibit 21.

51. On August 27, 2013, BHI filed a Proof of Claim in my bankruptcy case claiming they were entitled to $65,976.20 as a result of the Operation and Management Agreement. The

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Proof of Claim was attested to by John P. Desmond, Esq. as “the creditor’s authorized agent.” Attached to the Proof of Claim were two exhibits, the first being a copy of the Operation and Management Agreement and the second purporting to be BHI’s Profit and Loss report “For the Five Months Ending May 31, 2013.” A true and correct copy of the Proof of Claim and accompanying exhibits is attached hereto as Exhibit 22.

52. On September 5, 2013, my bankruptcy attorney filed an Objection to Claim regarding BHI’s Proof of Claim, objecting on the grounds including that the debtor is excused from payment as a consequence of claimant’s material breach and the claim is based on erroneous accounting. A true and correct copy of the Objection to Claim is attached hereto as Exhibit 23.

53. In the Profit and Loss report submitted in support of BHI’s Proof of Claim, BHI claims to have paid real estate taxes on the Virginia Property totaling $4,148.14 (comprised of $1096.10 from the convenience store [Ex. 22.10], $1,212.16 from the quick lube facility [Ex. 22.11], and $1,839.88 from the car wash [Ex. 22.12]) during the period in which the Operation and Management Agreement was in effect.

54. On August 12, 2013, Stewart Title Company released an original preliminary report regarding the Virginia Property as part of an application to obtain title insurance. A true and correct copy of the original preliminary report is attached hereto as Exhibit 24.

55. In their original preliminary report, Stewart Title Company notes that property taxes on the Virginia Property for fiscal year 2012 to 2013 are delinquent in the amount of $12,804.28. [Ex. 24.4 at ¶ 5.]

56. On January 13, 2014, Stewart Title Company released an updated preliminary report regarding the Virginia Property as part of an application to obtain title insurance. A true and correct copy of the updated preliminary report is attached hereto as Exhibit 25.

57. In their updated preliminary report, Stewart Title Company notes that property taxes on the Virginia Property for fiscal year 2012 to 2013 were delinquent in the amount of $13,293.61. [Ex. 25.4 at ¶ 5.]

58. In partial compliance with Section 28 of the Virginia Lease, BHI provided us

with an unaudited financial statement regarding their operations during 2012 at the Virginia Property. A true and correct copy of this financial statement is attached hereto as Exhibit 26.

59. The billing detail records from the Washoe County Treasurer's website regarding payment of property taxes for the Virginia Property in 2012 shows that the last of four installments of 2012 property taxes was not paid until March 6, 2014, the date on which the Virginia Property was sold via a short sale. A true and correct copy of the billing detail records from the Washoe County Treasurer's website is attached hereto as Exhibit 27.

60. The billing detail records from the Washoe County Treasurer's website regarding payment of property taxes for the Virginia Property in 2013 shows that no payments were made until March 6, 2014. A true and correct copy of the billing detail records from the Washoe County Treasurer's website is attached hereto as Exhibit 28.

61. On September 30, 2013, the bankruptcy court granted my motion to dismiss my bankruptcy case. A true and correct copy of the court's Order of Case Dismissal is attached hereto as Exhibit 29.

62. In October 2013, I hired Santiago Landscape & Maintenance to clean up the Virginia Property. On October 24, 2013, they sent me an invoice in the amount of $1,000.00 for their work pruning trees, trimming shrubs, removing weeds, mowing grass, and clearing refuse from the premises. I paid this invoice. A true and correct copy of the invoice is attached hereto as Exhibit 30.

63. On February 10, 2014, as part of their efforts to obtain financing for purchase of the Virginia Property via a short sale, Longley Partners, LLC through Heritage Bank of Nevada commissioned an appraisal of the Virginia Property to assess its "as is" value (the "2014 Appraisal"). In this appraisal, the "as is" appraised value of the Virginia Property was determined to be $4,270,000.00. A true and correct copy of the 2014 Appraisal is attached hereto as Exhibit 31.

64. On March 6, 2014, the Virginia Property was sold via a short sale for a total of $4,050,354.68. Of that amount, $65,936.98 went to pay the outstanding 2012 and 2013 Washoe County property taxes that had not been paid by BHI. A true and correct copy of the Seller's

Final Closing Statement is attached hereto as Exhibit 32.

65. On November 6, 2013, we received a utility bill from NV Energy for $10,393.35 in charges stemming from gas and electricity usage on the Virginia Property since the date BHI abandoned it. We remain liable for this bill. A true and correct copy of this NV Energy bill is attached hereto as Exhibit 33.

66. In violation of their duty under the Virginia Lease and without providing the required thirty-day notice to us that they were terminating their insurance coverage on the property, BHI allowed insurance on the Virginia Property to lapse. [Ex. 2.5–2.8.] Consequently, starting in June 2013, we paid a total of $7,206.00 to Berkshire Hathaway to maintain insurance on the Virginia Property for the period June 1, 2013 through June 1, 2014. True and correct copies of the insurance policy invoices are attached hereto as Exhibit 34.

67. From September 6, 2013 through May 26, 2015, counsel for BHI and Herbst periodically forwarded to our attorneys various Notices of Violation issued by the City of Reno. Without exception, the violations were issued due to weeds and rubbish on the Virginia Property. BHI and Herbst expressly refused to take responsibility for payment of these fines, and consequently the fines remain outstanding. The total of all fines received to date from the City of Reno is $3,265.00. A true and correct copy of the Notices of Violation and correspondence from counsel for BHI and Herbst regarding them is attached hereto as Exhibit 35.

68. My counsel and I collaborated to create a spreadsheet (the "damages spreadsheet") summarizing the damages sustained as a result of BHI and Herbst's breaches of the Virginia Lease and Personal Guaranty. A true and correct copy of the damages spreadsheet is attached hereto as Exhibit 36.

69. As shown in Table II ("Expenses") of the damages spreadsheet, we incurred a total of $27,032.97 in compensable expenses as a direct result of BHI and Herbst's breaches. [Ex. 36.1.] With interest applied from the date on which each line item of damage was incurred, and applying late payment charges as authorized by the Virginia Lease, as of October 16, 2017 the total damages for expenses is $48,097.79. [*Id.*]

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70. Table III ("Present Value of Future Rent") and Table IV ("Present Value of Fair Rental Value") of the damages spreadsheet [Ex. 36.2–36.5] show the amortized calculation of salient values required under the Virginia Lease for determining the amount of accelerated rent due in the event of a default. [Ex. 2.17 at § 20(B)(i)(iv).] Applying the specified discount rate of 4%, the net present value of future rent from June 1, 2013 through the end of the Lease Term, including 2% increases per annum as specified in the Virginia Lease [Ex. 2.2 at § 4(B)] is $18,633,372.30. [Ex. 36.5.] The fair rental value of the Virginia Property of $38,206.00 was obtained from the 2014 Appraisal as corroborated by the expert opinion of Daniel Gluhaich. [Ex. 31.51; Decl. Daniel Gluhaich at ¶¶ 17, 18.] The net present value of the fair rental value of the Virginia Property after one year following the breach using a discount rate of 4% through the end of the Lease Term is $4,078,508.33. [Ex 36.5.] Table V ("Accelerated Rent Damages") of the damages spreadsheet shows the calculation of accelerated rent damages due and owing, which was calculated by subtracting the net present value of the fair rental value of the Virginia Property after one year following the breach from the net present value of future rent from June 1, 2013 through the end of the Lease Term, yielding a total of $14,554,863.98. [*Id*.]

71. Table VI ("Diminution in Value") of the damages spreadsheet shows the calculation of the losses we incurred as a result of BHI and Herbst's breaches having resulted in a decrease in the value of the Virginia Property. Using the fair market value of the Virginia Property with the lease of $19,700,000.00 as determined in the 2008 Appraisal as corroborated by the expert opinion of Daniel Gluhaich [Ex. 9.1; Decl. Gluhaich at ¶¶ 5–9] and subtracting the fair market value of the Virginia Property without the lease of $4,270,000.00 as determined in the 2014 Appraisal as corroborated by the expert opinion of Daniel Gluhaich [Ex. 31.3; Decl. Gluhaich at ¶¶ 15, 16] yields a total for diminution in value damages of $15,430,000.00.

72. Table VII ("Total Damages") of the damages spreadsheet summarizes the damages incurred as a result of BHI and Herbst's breaches, including amounts for unpaid rent for March, April, and May 2013 as well as 5% late payment charges for those months as authorized under the Virginia Lease. [Ex. 2.2–2.3 at § 4(E).] Before interest our damages total $30,453,449.93. With interest being applied from the respective dates on which each item of

damage was incurred as authorized under the Virginia Lease, the total damages incurred and due and owing from Defendants as of October 16, 2017 is $54,448,348.10. [Ex. 36.6.]

73. As shown in Table VIII ("Interest Accrual Rate") of the damages spreadsheet, interest on the total damages due and owing from Defendants is accruing at a rate of $15,007.77 per day. [Ex. 36.6.]

74. In addition to the damages shown in the damages spreadsheet, we have incurred significant attorney's fees and costs in this matter. The amount of attorney's fees and costs that we have incurred in the instant matter is ongoing and will be pursued through a separate motion.

75. Attached hereto as Exhibit 39 is a true and correct copy of the Deed by and between Longley Center Partnership and Longley Center Partners, L.L.C. dated January 1, 2004 regarding the Virginia Property, recorded April 1, 2004 in the Washoe County Recorder's Office as Doc. No. 3016371.

76. Attached hereto as Exhibit 40 is a true and correct copy of the Grant, Bargain and Sale Deed by and between Longley Center Partners, L.L.C. and P.A. Morabito & Co., Limited dated October 4, 2005 regarding the Virginia Property, recorded October 13, 2005 in the Washoe County Recorder's Office as Doc. No. 3291753.

77. Attached hereto as Exhibit 41 is a true and correct copy of the Grant, Bargain and Sale Deed by and between P.A. Morabito & Co., Limited and Land Venture Partners, LLC dated September 30, 2005 regarding the Virginia Property, recorded October 13, 2005 in the Washoe County Recorder's Office as Doc. No. 3291760.

78. Attached hereto as Exhibit 42 is a true and correct copy of the Memorandum of Lease dated September 30, 2005 by Berry-Hinckley Industries regarding the Virginia Property, recorded October 13, 2005 in the Washoe County Recorder's Office as Doc. No. 3291761.

79. Attached hereto as Exhibit 43 is a true and correct copy of the Subordination, Non-Disturbance and Attornment Agreement and Estoppel Certificate by and between Land Venture Partners, LLC, Berry-Hinckley Industries, and M&I Marshall & Isley Bank dated October 3, 2005 regarding the Virginia Property, recorded October 13, 2005 in the Washoe County Recorder's Office as Doc. No. 3291766.

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80. Attached hereto as Exhibit 44 is a true and correct copy of the Memorandum of Lease with Options to Extend dated December 1, 2005 by Winner's Gaming, Inc. regarding the Virginia Property, recorded December 14, 2005 in the Washoe County Recorder's Office as Doc. No. 3323645.

81. Attached hereto as Exhibit 45 is a true and correct copy of the Lease Termination Agreement dated January 25, 2006 by Land Venture Partners LLC and Berry-Hinckley Industries regarding the Virginia Property, recorded February 24, 2006 in the Washoe County Recorder's Office as Doc. No. 3353288.

82. Attached hereto as Exhibit 46 is a true and correct copy of the Grant, Bargain and Sale Deed by and between Land Venture Partners, LLC and P.A. Morabito & Co., Limited dated February 23, 2006 regarding the Virginia Property, recorded February 24, 2006 in the Washoe County Recorder's Office as Doc. No. 3353289.

83. Attached hereto as Exhibit 47 is a true and correct copy of the Grant, Bargain and Sale Deed by and between P.A. Morabito & Co., Limited and the Willard Plaintiffs dated January 20, 2006 regarding the Virginia Property, recorded February 24, 2006 in the Washoe County Recorder's Office as Doc. No. 3353290.

84. Attached hereto as Exhibit 48 is a true and correct copy of the Deed of Trust, Fixture Filing and Security Agreement by and between the Willard Plaintiffs and South Valley National Bank dated February 21, 2006 regarding the Virginia Property, recorded February 24, 2006 in the Washoe County Recorder's Office as Doc. No. 3353292.

85. Attached hereto as Exhibit 49 is a proposed First Amendment to Lease Agreement regarding the Virginia Property that I received from BHI in October 2006. This proposed Amendment was never effected.

86. Attached hereto as Exhibit 50 is a true and correct copy of the Assignment of Entitlements, Contracts, Rents and Revenues by and between Berry-Hinckley Industries and First National Bank of Nevada dated June 29, 2007 regarding the Virginia Property, recorded February 24, 2006 in the Washoe County Recorder's Office as Doc. No. 3551284.

87. Attached hereto as Exhibit 51 is a true and correct copy of the UCC Financing

Statement regarding the Virginia Property, recorded July 5, 2007 in the Washoe County Recorder's Office as Doc. No. 3551285.

I swear under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed this 16th day of October 2017.

LARRY J. WILLARD

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.

LAW OFFICES OF BRIAN P. MOQUIN

DATED: October 18, 2017

By:________________________________

BRIAN P. MOQUIN
Admitted *Pro Hac Vice*
California Bar No. 257583
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(408) 300-0022
(408) 843-1678 (facsimile)

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Nevada that on this date I served a true and correct copy of the foregoing document as follows:

[X] By sending a true and correct copy of the foregoing document by electronic mail to jdesmond@dickinsonwright.com, birvine@dickinsonwright.com, and awebster@dickinsonwright.com.

DATED: October 18, 2017

BRIAN P. MOQUIN

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$2160

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

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD C. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, Plaintiffs, v. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; JERRY HERBST, an individual; and JH, INC., a Nevada corporation, Defendants.	Case No. CV14-01712 Dept. 6 **MOTION FOR SUMMARY JUDGMENT OF PLAINTIFFS LARRY J. WILLARD AND OVERLAND DEVELOPMENT CORPORATION**
AND RELATED COUNTERCLAIM	

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I.

INTRODUCTION

Plaintiffs LARRY J. WILLARD ("Willard") and OVERLAND DEVELOPMENT CORPORATION ("Overland") (collectively, "the Willard Plaintiffs") move for summary judgment on Counts 1 and 2 of the First Amended Complaint filed on January 21, 2015, which seek, respectively, to recover damages incurred as a result of the breach of a long-term corporate lease agreement by defendant BERRY-HINCKLEY INDUSTRIES ("BHI") and as a result of the subsequent breach of the personal guaranty of BHI's payment and performance under the lease agreement by defendant Jerry Herbst ("Herbst") (BHI and Herbst collectively referred to herein as "Defendants").

The Willard Plaintiffs also move for summary judgment on the Counterclaim against them filed by Defendants on April 21, 2015. The integral relationship between Defendants' counterclaim against the Willard Plaintiffs and the Willard Plaintiffs' claims against Defendants warrants addressing both in a single motion. Summary judgment is proper since the plain terms of the underlying documents impose unequivocal payment obligations on Defendants and Defendants without question are in default of these obligations.

Accordingly, with respect to the First Amended Complaint, the Willard Plaintiffs request that the Court enter summary judgment in their favor and against Defendants, jointly and severally, for the amount of actual damages immediately due and owing to the Willard Plaintiffs. The Willard Plaintiffs further request that the Court enter summary judgment in their favor regarding Defendants' Counterclaim.

This motion is made pursuant to NRCP 56, the attached memorandum of points and authorities and exhibits thereto, the affidavit of Larry J. Willard, the affidavit of Daniel Gluhaich, the affidavit of Brian P. Moquin, all pleadings and papers in the record, and upon such further evidence and argument that may be presented in reply and at the hearing on the motion.

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II.

UNDISPUTED MATERIAL FACTS

On November 18, 2005, as part of a property exchange pursuant to 26 U.S.C. § 1031 (a "1031 Exchange"), the Willard Plaintiffs entered into a Purchase and Sale Agreement to purchase a commercial property located at 7695 and 7699 South Virginia Street, Reno, Nevada (the "Virginia Property"). [Decl. Larry J. Willard at ¶ 3; Ex. 1.] The Purchase and Sale Agreement contained a lease-back provision under which the seller would lease back the Virginia Property for a period of twenty years from January 2006 until January 2026 (the "Lease Term" at a base annual rental rate of $1,464,375.00 with the annual rental rate increasing by two percent per year. [Decl. Willard at ¶ 4; Ex. 1.1 at ¶ D.]

On December 2, 2005, BHI and the Willard Plaintiffs executed a Lease Agreement (the "Virginia Lease") on the Virginia Property containing the lease terms from the Purchase and Sale Agreement. [Decl. Willard at ¶ 5; Ex. 2.]

On February 21, 2006, BHI and the Willard Plaintiffs executed a Subordination, Attornment and Nondisturbance Agreement in which BHI expressly confirmed that the Virginia Lease ran until January 2026. [Decl. Willard at ¶¶ 6, 7; Ex. 3.2 at § 1.1; Ex. 3.11 at § 2.4; Ex. 3.14.]

On February 17, 2007, counsel for Herbst sent an offer letter to Willard and other landlords indicating that Herbst intended to acquire BHI's convenience store assets, which included the lease of the Virginia Property. [Decl. Willard at ¶ 8; Ex. 4.] In the offer letter, Herbst offered to personally guarantee BHI's payments and performance under the Virginia Lease in return for amending certain terms in the Virginia Lease. [Decl. Willard at ¶ 9; Ex. 4.1–4.3.]

On or about March 8, 2007, Willard executed the Landlord's Estoppel Certificate that had been requested by Herbst in his offer letter and returned it to Herbst. In paragraph 3 thereof, Willard certified that the Lease Term ran from January 2006 until January 2026. [Decl. Willard at ¶ 10; Ex. 5.]

On March 9, 2007, the Willard Plaintiffs executed an Amendment to the Virginia Lease

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(the “Amended Lease”), which modified certain terms of the original Virginia Lease but did not change the Lease Term and did not substantively modify the remedies available in the event of a breach. [Decl. Willard at ¶ 11; Ex. 6.]

Also on March 9, 2007, Herbst executed a Guaranty Agreement (the “Personal Guaranty”) ensuring BHI’s payment and performance under the Virginia Lease. [Decl. Willard at ¶ 12; Ex. 7.]

On or about May 18, 2008, Sean Higgins, General Counsel for Terrible Herbst, Inc., sent a buyout offer to the Willard Plaintiffs’ real estate broker, Daniel Gluhaich (“Gluhaich”), who forwarded the offer to Willard. BHI’s buyout offer contained terms of a proposed buyout by BHI of the Virginia Lease. [Decl. Willard at ¶ 13; Ex. 8.] Included with BHI’s buyout offer was a copy of the Virginia Lease confirming that the Lease Term ran from January 2006 through January 2026. [Decl. Willard at ¶ 14; Ex. 8.18.]

In September 2008, due to BHI having threatened to walk away from the Virginia Lease, Willard commissioned CB Richard Ellis to conduct an appraisal of the Virginia Property (the “2008 Appraisal”). The appraisal was issued on October 16, 2008 and concluded that the fair market value of the Virginia Property as leased was $19,700,000.00. [Decl. Willard at ¶ 15; Ex. 9.]

On March 1, 2013, without providing any notice, BHI defaulted on the Virginia Lease by not sending the rent payment for March 2013.

On March 10, 2013, having still not received the monthly rental payment from BHI, Willard called BHI’s finance department and was told that BHI was no longer going to pay rent. Willard immediately retained counsel who sent a letter to Herbst on March 12, 2013 demanding payment of the March 2013 rent. [Decl. Willard at ¶¶ 16–17; Ex. 10.] Willard also immediately contacted Gluhaich and had him engage in efforts to sell the Virginia Property and/or find a new tenant. [Decl. Willard at ¶ 18.]

On March 18, 2013, counsel for BHI and Herbst responded to Willard’s counsel’s letter with an unacceptable settlement offer that in no way indicated that BHI and Herbst intended to cure the breach nor honor the Personal Guaranty. [Decl. Willard at ¶ 19; Ex. 11.]

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On April 12, 2013, counsel for BHI and Herbst sent a letter to Willard's attorney indicating that BHI did not intend to cure the breach and planned to vacate the Virginia Property on April 30, 2013. [Decl. Willard at ¶ 20; Ex. 12.]

Shortly thereafter, Willard appealed to BHI through Gluhaich to remain on the Virginia Property until Willard was able to find a buyer or a new tenant so that the Virginia Property would retain its value. Consequently, BHI and the Willard Plaintiffs entered into an interim "Operation and Management Agreement" with BHI, effective May 1, 2013, under which BHI agreed to continue active operations on the Virginia Property. Willard agreed to this Operation and Management Agreement because Willard knew that the amount of rent at issue, which at that point was $140,175.55 per month, would be difficult to obtain from a new tenant if the Virginia Property were to "go dark." Herbst did not sign the Operation and Management Agreement nor is there any mention within it of the Personal Guaranty. [Decl. Willard at ¶ 21; Ex. 13.]

Willard hired consultant Greg Breen ("Breen") to accompany him to the Virginia Property to assess its condition and provide guidance regarding mitigation of damages. From 2004 until Herbst purchased BHI in July 2008, Breen was the Senior Vice President of Operations and General Manager for BHI and his office was located on the Virginia Property. Willard visited the Virginia Property on May 26, 2013 and Breen accompanied Willard there on May 27, 2013. They discovered that the Virginia Property was in a shambles and was barely operating. For example, all signage had been removed, there were severe maintenance issues, the grass had not been cut, and the front door had been broken and was half boarded up. The quick lube facility was a mess and was not operational; several employees told us that they did not have enough supplies to conduct operations. The point-of-sale computer and the controller were both missing from the car wash rendering it inoperable, and there were no staff in the car wash. The convenience store was in the final stage of being shut down, with shelves left bare and inventory being moved or sold through. Subsequently, Breen provided Willard with an assessment of the fair rental value of the Virginia Property assuming it was made operational. Willard paid Breen $2,500.00 for his services. [Decl. Willard at ¶ 22; Ex. 14.]

During his visit to the Virginia Property in May 2013, Willard took photographs of the Virginia Property. These photographs confirm that as of May 27, 2013, the Virginia Property was not fully operational, all signage had been removed, the grounds had not been maintained, and aspects of the premises were in need of repair, including the front door. [Decl. Willard at ¶¶ 23–44; Exs. 15, 16.]

On June 1, 2013, BHI vacated the Virginia Property having paid no rent whatsoever since February 1, 2013. Under the terms of the Operation and Management Agreement, BHI had until July 20, 2013 to provide the Willard Plaintiffs with a profit and loss statement certified by an officer of BHI with accompanying documentation and to remit net profits earned during May 2013 minus a $10,000.00 "fee." [Decl. Willard at ¶ 45; Ex. 13.2 at § 4.]

On June 4, 2013, the Willard Plaintiffs hired Tholl Fence to install a security fence around the Virginia Property, which BHI had abandoned four days earlier and had left in shambles. Willard paid Tholl Fence $2,668.62 to install this security fence. [Decl. Willard at ¶ 46; Ex. 17.]

On June 18, 2013, because Willard had been served with a notice of foreclosure on the Virginia Property, he filed a Chapter 11 bankruptcy petition. [Decl. Willard at ¶ 47; Ex. 18.]

On July 18, 2013, the National Credit Union Administration Board ("NCUAB") acting as liquidating agent for Telesis Community Credit Union with whom the Willard Plaintiffs had financed purchase of the Virginia Property filed a motion in bankruptcy court to terminate the automatic stay. [Decl. Willard at ¶ 48; Ex. 19.] On August 9, 2013, the bankruptcy court granted NCUAB's motion. [Decl. Willard at ¶ 49; Ex. 20.] Consequently, Willard filed a motion to dismiss his bankruptcy case. [Decl. Willard at ¶ 50; Ex. 21.]

On August 27, 2013, BHI filed a Proof of Claim in Willard' bankruptcy case claiming they were entitled to $65,976.20 as a result of the Operation and Management Agreement. The Proof of Claim was attested to under penalty of perjury by John P. Desmond, Esq., shareholder of Gordon Silver, as "the creditor's authorized agent." Attached to the Proof of Claim were two exhibits, the first being a copy of the Operation and Management Agreement and the second purporting to be BHI's Profit and Loss report "For the Five Months Ending May 31, 2013."

[Decl. Willard at ¶ 51; Ex. 22.]

On September 5, 2013, Willard's bankruptcy attorney filed an Objection to Claim regarding BHI's Proof of Claim, objecting on the grounds that, *inter alia*, the debtor is excused from payment as a consequence of claimant's material breach and the claim is based on erroneous accounting. [Decl. Willard at ¶ 52; Ex. 23.]

On September 30, 2013, the bankruptcy court granted Willard's motion to dismiss his bankruptcy case. [Decl. Willard at ¶ 61; Ex. 29.]

In October 2013, Willard paid $1,000.00 to Santiago Landscape & Maintenance to clean up the Virginia Property. [Decl. Willard at ¶ 62; Ex. 30.]

On February 10, 2014, as part of their efforts to obtain financing for purchase of the Virginia Property via a short sale, Longley Partners, LLC through Heritage Bank of Nevada commissioned an appraisal of the Virginia Property to assess its "as is" value (the "2014 Appraisal"). In this appraisal, the "as is" appraised value of the Virginia Property was determined to be $4,270,000.00. [Decl. Willard at ¶ 63; Ex. 31.]

On March 6, 2014, the Virginia Property was sold via a short sale for a total of $4,050,354.68. Of that amount, $65,936.98 went to pay the outstanding 2012 and 2013 Washoe County property taxes that had not been paid by BHI. [Decl. Willard at ¶ 64; Ex. 32.]

On November 6, 2013, the Willard Plaintiffs received a utility bill from Nevada Energy for $10,393.35 in charges stemming from gas and electricity usage on the Virginia Property since the date BHI abandoned it. [Decl. Willard at ¶ 65; Ex. 33.]

In violation of their duty under the Virginia Lease, BHI allowed insurance on the Virginia Property to lapse. [Ex. 2.5–2.8.] Consequently, starting in June 2013, the Willard Plaintiffs paid a total of $7,206.00 to maintain insurance on the Virginia Property for the period June 1, 2013 through June 1, 2014. [Decl. Willard at ¶ 66; Ex. 34.]

From September 6, 2013 through May 26, 2015, counsel for Defendants periodically forwarded to the Willard Plaintiffs' attorneys various Notices of Violation issued by the City of Reno. Without exception, the violations alleged were issued as a result of weeds and rubbish on the Virginia Property. BHI and Herbst expressly refused to take responsibility for payment of

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these fines, and consequently they remain outstanding. [Decl. Willard at ¶ 67; Ex. 35.]

III.

ARGUMENT

A. LEGAL STANDARD

1. <u>Summary Judgment.</u>

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the Court demonstrate that no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 713, 57 P.3d 82, 87 (2002). Substantive law controls whether factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine issue of material fact is one where the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Valley Bank v. Marble*, 105 Nev. 366, 367, 775 P.2d 1278, 1282 (1989).

The Nevada Supreme Court has held that the non-moving party may not defeat a motion for summary judgment by relying "on gossamer threads of whimsy, speculation and conjecture." *Wood v. Safeway*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005). When a motion for summary judgment is made and supported as required by NRCP 56, the non-moving party must not rest upon general allegations and conclusions, but must by affidavit or otherwise set forth specific facts demonstrating the existence of a genuine factual issue. *Id.*

The pleadings and proof offered in a motion for summary judgment are construed in the light most favorable to the non-moving party. *Hoopes v. Hammargren*, 102 Nev. 425, 429, 725 P.2d 238, 241 (1986). However, the non-moving party still "bears the burden to 'do more than simply show that there is some metaphysical doubt' as to the operative facts in order to avoid summary judgment being entered." *Wood*, *supra*, 121 Nev. at 732, 121 P.3d at 1031. "To successfully defend against a summary judgment motion, 'the nonmoving party must transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact.'" *Torrealba v. Kesmetis*, 124 Nev. 95, 100, 178 P.3d 716, 720

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(2008) (*quoting Cuzze v. Univ. & Cmty. Coll. Sys. of Nev*., 123 Nev. 598, 72 P.3d 131 (2007)).

2. Interpretation of contract terms.

Under Nevada law, there is no right to interpret an agreement as meaning something different from what the parties intended as expressed by the language they saw fit to employ. *Reno Club, Inc. v. Young Investment Co*., 64 Nev. 312, 324, 182 P.2d 1011, 1017 (1947). When the contract at issue is clear on its face, the Court must enforce the contract as it is written. *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 776, 121 P.3d 599, 603 (2005). "The court has no authority to alter the terms of an unambiguous contract." *Id.*; *see also Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 281, 21 P.3d 16, 21 (2001) (stating that courts are not free to modify or vary the terms of an unambiguous contract). Where a contact is unambiguous, parole evidence may not be introduced to interpret the agreement of the parties. *See Margrave v. Dermody Props*., 110 Nev. 824, 829, 878 P.2d 291, 294 (1994), *citing Farmers Ins. Exch. v. Young*, 108 Nev. 328, 333 n.3, 832 P.2d 376 (1992); *Canfield v. Gill*, 101 Nev. 170, 171 n.1, 693 P.2d 1259 (1985).

3. Interpretation of express indemnity provisions.

An indemnity provision must be interpreted by the Court as a matter of law so long as extrinsic evidence is not required to interpret the indemnity language. *Continental-Heller Corp. v. Amtech Mechanical Services, Inc.,* 53 Cal.App.4th 500, 504, 61 Cal.Rptr.2d 668, 670 (1997). Contractual, or express, indemnity arises when two parties agree, pursuant to a contractual provision, that one party will reimburse the second party for liability from the first party's actions. *See George L. Brown Ins. Agency, Inc. v. Star Ins. Co. ("George L. Brown")*, 126 Nev. 316, 237 P.3d 92, 96 (2010); *Continental Casualty Co. v. Farnow*, 79 Nev. 428, 386 P.2d 90 (1963).

Where the parties have expressly contracted with respect to the duty to indemnify, the extent of that duty must be determined from the contract. *See George L. Brown, supra*, 126 Nev. at 316. Thus, the contract should be read as a whole and given a construction that will accomplish the object of providing indemnity for the losses covered by the contract. *American Excess Inc. Co. v. MGM Grand Hotels, Inc.*, 102 Nev. 601, 604, 729 P.2d 1352 (1986); *National*

Union Fire Ins. v. Reno's Exec. Air, 100 Nev. 360, 682 P.2d 1380 (1984).

B. DEFENDANTS' COUNTERCLAIM

1. Allegations in the Counterclaim.

BHI's Counterclaim against the Willard Plaintiffs alleges two causes of action, both stemming from the Operating Agreement entered into between BHI and the Willard Plaintiffs on May 1, 2013. In Count 1 ("Breach of Contract"), Defendants assert that "BHI performed under the terms of the Operation Agreement" [Def. Counterclaim at p. 12, ¶ 16] and allege that the Willard Plaintiffs have breached the Operation and Management Agreement by failing to pay to BHI the negative Net Profits earned by BHI during May 2013 plus the $10,000.00 "Fee" as required by Section 4 of the Operation and Management Agreement. [*Id.* at ¶¶ 17, 18.] In Count 2 ("Declaratory Relief"), Defendants seek a judicial declaration that BHI and Herbst are not responsible for any of the rental payments the Willard Plaintiffs claim were incurred during May 2013. Defendants also seek attorney fees and costs, citing the indemnification clause in the Operation and Management Agreement.

2. Terms of the Operation and Management Agreement.

In April 2013, in an effort to mitigate damages, Willard negotiated with BHI for BHI to continue their operations on the Virginia Property until a buyer or a new tenant was found so that the premises would retain its value. [Decl. Willard at ¶ 21.] Willard recognized that it would be difficult to find a new tenant willing to pay the $140,175.55 per month—the amount of BHI's monthly rent at that time—were the Virginia Property to "go dark." [*Id.*] Consequently, the parties entered into an Operation and Management Agreement under which, in return for maintaining "continuous operation" of the Virginia Property and paying to the Willard Plaintiffs the Net Profits earned through continued operation, BHI would have no obligation to pay rent but instead would be entitled to a "Fee" of $10,000.00 per month from the Willard Plaintiffs, which was to be deducted from the Net Profits for the month. If the balance owed was negative, BHI would be entitled to payment of the negative balance from the Willard Plaintiffs. BHI was required to tender an accounting and documentation certified by an officer of BHI to be accurate within fifty days from the end of each month of continued operation. [Ex. 13.2 at §§ 4, 5.]

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Except as otherwise provided for under the Operation and Management Agreement, BHI's use and occupancy of the Virginia Premises was to be on the same terms and provisions as set forth in the Virginia Lease. [Ex. 13.4 at § 10.]

3. BHI's numerous breaches of the Operation and Management Agreement.

A "material breach" is defined as "a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract." 23 Richard A. Lord, *Williston on Contracts* § 63:3 (4th ed.) (citing *Lauderdale County School Dist. v. Enterprise Consol. School Dist.,* 24 F.3d 671 (5th Cir. 1994); *Horton v. Horton*, 487 S.E.2d 200 (Va. 1997)). Moreover, a breach is "material" if the breach is "such that upon a reasonable interpretation of the contract, the parties considered the breach as vital to the existence of the contract." *Id. See also Stone Forest Industries. Inc. v. U.S.,* 973 F.2d 1548, 1550-51 (Fed. Cir. 1992) (stating that a material breach of contract "depends on the nature and effect of the violation in light of how the particular contract was viewed, bargained for, entered into, and performed by the parties"). Finally, "[t]he importance or materiality of contract terms must be assessed in context and in light of the expectations of the parties at the time the original contract was formed." *Interbank Investments v. Vail Valley Consolidated Water District*, 12 P.3d 1224, 1229 (Col. Ct. App. 2000).

An implied covenant of good faith and fair dealing exists in every Nevada contract and essentially forbids arbitrary, unfair acts by one party that disadvantage the other. *See Consolidated Generator v. Cummins Engine,* 114 Nev. 1304, 1311, 971 P.2d 1251, 1256 (1998); *Overhead Door Co. v. Overhead Door Corp.,* 103 Nev. 126, 128, 734 P.2d 1233, 1235 (1987).

As shown below, BHI failed to fulfill their obligations under the Operation and Management Agreement to maintain continuous operations at the Virginia Property, failed to maintain and repair the Virginia Property, undermined the ability of the operation to make a profit by removing all signage, failed to timely provide documentation of Net Profits, failed to provide certified documentation of Net Profits, and tendered a facially fraudulent accounting statement of Net Profits.

a. BHI failed to continuously operate the Virginia Property.

BHI's assertion in their counterclaim that BHI "performed under the terms of the Operation Agreement" is false. [Def. Counterclaim at p. 12, ¶ 16.] The Operation and Management Agreement was conditioned upon BHI maintaining continuous operation of the Virginia Property through the entire month of May 2013, but as of May 26, 2013 and very likely earlier, the car wash and quick lube facilities were not operational, the convenience store was not fully stocked and was in the final stage of being shut down, all signage had been removed from the premises, and maintenance, upkeep and repairs had been wholly neglected, perhaps most outrageously evidenced by the fact that half of the front door to the convenience store had been broken and simply boarded up rather than fixed. [Decl. Willard at ¶¶ 22–44; Exs. 15, 16.] BHI's failure to operate the Virginia Property continuously for the entire month of May 2013 constitutes a material failure of consideration upon which BHI's duty to pay rent had been expressly conditioned. [Ex. 13.3 at ¶ 5.]

b. BHI failed to maintain and repair the Virginia Property.

Furthermore, under Section 13 of the Virginia Lease as incorporated by reference in Section 10 of the Operation and Management Agreement, BHI was required to keep "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 . . . doors, . . . mechanical equipment, . . . mowing of lawns and care, weeding and replacement of plantings . . . removal of trash, maintenance of . . . signage on Property. . ." [Ex. 2.11 at § 13.] BHI breached these requirements by, for example, failing to repair the front door to the convenience store [Decl. Willard at ¶¶ 36, 37; Ex. 15.12–15.13.], failing to maintain and/or repair the mechanical equipment that ran the car wash [Decl. Willard at ¶ 22; Decl. Gluhaich at ¶ 13; Ex. 37], failing to mow the lawns and remove weeds [Decl. Willard at ¶¶ 30, 39, 42; Exs. 15.6, 15.15, 15.18], failing to remove trash from the premises [Decl. Willard at ¶¶ 42, 67; Exs. 15.18, 35], failing to maintain signage [Decl. Willard at ¶¶ 28–36; Exs. 15.4–15.12], and failing to fix numerous awnings that had been destroyed [Decl. Willard at ¶¶ 39–41; Ex. 15.15–15.17].

c. BHI removed all signage from the Virginia Property.

On top of BHI failing to keep the car wash and quick lube facility operational and the convenience store fully operational for the entire month of May 2013, BHI removing all signage from the Virginia Property constitutes bad faith failure to perform under the Operation and Management Agreement, especially in light of the fact that the Willard Plaintiffs were entitled to payment of the Net Profits earned from BHI's operation which were indisputably undermined by the removal of all signage from the premises.

d. BHI failed to timely provide certified documentation of Net Profits.

In addition, BHI failed to comply with the requirements of the Operation and Management Agreement to provide an accounting and documentation in support thereof certified by an officer of BHI and to do so by July 20, 2013. [Ex. 13.2 at § 4.] The only documentation ever provided to the Willard Plaintiffs regarding BHI's Net Profits for May 2013 was an exhibit attached to BHI's proof of claim for $65,965.20 filed on August 27, 2013 in Willard's bankruptcy case, the exhibit purporting to be a Profit and Loss Statement "For the Five Months Ending May 31, 2013" alleging total negative net profits of $55,965.20. [Ex. 22.9–22.12.] However, the Profit and Loss Statement was not certified by an officer of BHI, was not tendered by July 20, 2013, did not purport to be an accounting of the net profits just for May 2013, and contained fraudulent expense claims. BHI may argue that the automatic stay imposed by Willard's bankruptcy petition precluded tendering their accounting for May 2013 by the deadline, but Overland was also a party to the Operation and Management Agreement, had not filed for bankruptcy protection, and the automatic stay was never expanded to apply to Overland.

e. BHI tendered a provably false accounting of Net Profits.

Moreover, BHI failed to tender an accounting for the month of May 2013, instead submitting a Profit and Loss Statement "For the Five Months Ending May 31, 2013." Regardless of whether or not the Profit and Loss Statement was mislabeled and was meant to constitute an accounting solely for the month of May 2013, it is undisputed that BHI paid no property taxes on the Virginia Property for the last quarter of 2012 onward. [Decl. Willard at ¶¶ 55, 57, 59, 60, 64; Exs. 24.4 at ¶ 5, 25.4 at ¶ 5, 27, 28, 32.] However, in the Profit and Loss

Statement, BHI seeks $4,148.14 for "Real Estate Tax" expenses that were not paid by BHI. [Decl. Willard at ¶ 53; Ex. 22.10–22.12.]

Other evidence of fraudulent accounting is manifest in the Profit and Loss Statement. For example, BHI claims $228.00 in expenses for purchase of smog certificates and yet the income from "Lube Sales – Emissions" is zero. [Ex. 22.11.]

BHI also claims $10,428.26 in expenses for purchase of bulk oil and filters with oil sales being $15,665.86. [*Id.*] However, in December 2012, BHI purchased $6,541.74 in bulk oil and filters and had oil sales of $31,020.62. [Decl. Willard at ¶ 58; Ex. 26.3.] Hence, BHI claims to have incurred 59% more in expenses in May 2013 while sales were 50% lower.

BHI also claims to have incurred a total of $12,362.14 for "Repair and Maintenance" of the convenience store [Ex. 22.10.] However, BHI reported expenses for "Repair and Maintenance" totaling $25,349.94 for the entire year of 2012. [Ex. 26.2] Hence, BHI claims to have incurred expenses for "Repair and Maintenance" for the *single month* of May 2013 that were 49% of the total expenses for "Repair and Maintenance" incurred by BHI over *twelve months* during 2012.

In the Profit and Loss Statement, BHI claims to have earned $49,869.65 in "C-Store Sales," but spent $50,684.08 in "C-Store Purchases." [Ex. 22.10.] In other words, in terms of operation of the convenience store during May 2013, just considering merchandise sales and purchases BHI claims to have incurred a net loss of $814.43—a *negative* 1.6% gross margin. In contrast, for December 2012 BHI reported "C-Store Sales" of $68,314.69 with "C-Store Purchases" of $51,392.89—a 24.8% gross margin. [Ex. 26.2.] For the entire year of 2012, BHI reported "C-Store Sales" of $883,737.96 with "C-Store Purchases" of $654,323.90—a 26% gross margin. [*Id.*] At the very least, BHI's claim in the Profit and Loss Statement manifests bad faith.

Consequently, in light of BHI's numerous material breaches of the Operation and Management Agreement, BHI's bad faith conduct, BHI having seriously undermined the Willard Plaintiffs' attempt to mitigate damages, and BHI's fraudulent claims, the Willard Plaintiffs are entitled to judgment on all Counts of Defendants' Counterclaim as a matter of law.

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C. BHI BREACHED THE VIRGINIA LEASE

To prevail on a breach of contract claim, a plaintiff must establish that (A) a valid contract existed between plaintiff and defendant, (B) the plaintiff performed or was excused from performance, (C) the defendant breached, and (D) plaintiff sustained damages as a result of the breach. *Nev. Contract Servs., Inc. v. Squirrel Companies, Inc.*, 119 Nev. 157, 161, 68 P.3d 896, 899 (2003); *see also Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000) ("[a] breach of contract may be said to be a material failure of performance of a duty arising under or imposed by agreement").

Here, in pertinent part, Section 4(D) of the Virginia Lease states:

> 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.

[Ex. 2.2 at § 4(D).] Furthermore, in pertinent part, Section 7 of the Virginia Lease states:

> 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.

[Ex. 2.4 at § 7.] It is undisputed that BHI was obligated under the Virginia Lease to make monthly payments to the Willard Plaintiffs but failed to do so beginning on March 1, 2013 and continuing to the present date. [Decl. Willard at ¶¶ 16–20; Exs. 10–12.] It is further undisputed that despite Plaintiffs' demands, BHI made no further payments as required under the Virginia Lease.

Consequently, it is undisputed that BHI breached the Virginia Lease.

D. HERBST BREACHED THE PERSONAL GUARANTY

Under Nevada law, an "unconditional" guaranty is enforceable by its terms. *See Daly v. Del E. Webb Corp.,* 96 Nev. 359, 361, 609 P.2d 319, 320 (1980); *Owens-Corning Fiberglass Corp. v. Texas Comm. Bank Nat'l Ass'n*, 104 Nev. 556, 558-59, 763 P.2d 335, 336 (1988). Specifically, an "absolute guaranty is one which is conditioned solely upon the event of default by the principal obligor of fulfillment of the duty the performance of which is guaranteed." *Id.*

Under the Personal Guaranty, Herbst "unconditionally, absolutely and irrevocably guarantees the timely payment and performance of each of BHI's obligations arising out of and under the Lease. . . . The Guarantor's guaranty made hereby is a guaranty of timely payment and performance of the Guaranteed Obligations and note merely of collectability or enforceability of such obligations." [Ex. 7.1 at ¶ 1.] The Personal Guaranty further provides that Defendant "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, . . . the Guarantor will be directly responsible for the full extent of any unsatisfied Guaranteed Obligations." [*Id*.] The Personal Guaranty further provides that, "This agreement is an unconditional, absolute, present and continuing guaranty of payment and performance . . ." [*Id*.]

Furthermore, the Personal Guaranty provides:

> [T]he 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; [* * *] (vi) any transfer of the assets of Lessor to, or any consolidation or merger of the Lessor with or into, any other entity; [* * *]. 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.

[Ex. 7.1–7.2 at ¶ 2.] The Operation and Management Agreement did not alter the Personal Guaranty. [Decl. Willard at ¶ 21; Ex. 13.] The Amended Lease also had no effect on the Personal Guaranty. [Decl. Willard at ¶ 11; Ex. 6.]

It is undisputed that Herbst was notified of BHI's breach of the Virginia Lease but failed to meet his obligations under the Personal Guaranty. [Decl. Willard at ¶¶ 16–20; Exs. 10–12.]

Consequently, it is beyond dispute that Herbst breached the Personal Guaranty and is absolutely liable to the Virginia Plaintiffs for damages.

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E. BHI AND HERBST ARE LIABLE FOR DAMAGES

"It is fundamental that contract damages are prospective in nature and are intended to place the nonbreaching party in as good a position as if the contract had been performed." *Colo. Environments, Inc. v. Valley Grading Corp.*, 105 Nev. 464, 470, 779 P.2d 80, 84 (1989); *Eaton v. J. H., Inc.,* 94 Nev. 446, 460, 581 P.2d 14, 16 (1978) ("The goal of a damage award for breach of contract is that 'the breaching party must place the nonbreaching party in as good a position as if the contract were performed.'").

By virtue of BHI's breach of the Virginia Lease and the breach by Herbst of the Personal Guaranty, the Willard Plaintiffs incurred significant damages for which Defendants are jointly and severally liable. The affidavits and exhibits attached hereto and submitted herewith properly evidence the amount of Defendants' liabilities to the Willard Plaintiffs sufficient to support summary judgment on the issue of damages. *GM Dev. Co. v. Community Am. Mortgage Corp.*, 165 Ariz. 1, 5-6, 795 P.2d 827, 831-32 (App. 1990) (awarding summary judgment against lessee and guarantor where landlord's affidavit recited that it was made on personal knowledge and business records and calculated the amount due and owing). These damages fall into four categories: breach-induced expenses, unpaid rent, accelerated rent, and diminution in value. Each category of damages is addressed below.

1. <u>Breach-induced expenses.</u>

The Willard Plaintiffs incurred expenses as a result of Defendants' breaches totaling $27,032.97, not including attorney fees and costs incurred in the instant matter. [Decl. Willard at ¶¶ 69, 74.] These expenses are comprised of the following:

- $2,500.00 paid to Greg Breen to assess the condition of the Virginia Property and provide guidance regarding mitigation of damages caused by BHI's breach [*Id.* at ¶ 22; Ex. 14]. The Willard Plaintiffs are entitled to damages for this expense by virtue of the Virginia Lease, which allows recovery of "costs of operating the Property until relet." [Ex. 2.17 at § 20(B)(i)(v).]
- $2,668.62 paid to Tholl Fence [Decl. Willard at ¶ 46; Ex. 17]. The Willard Plaintiffs are entitled to damages for this expense by virtue of the Virginia Lease, which allows recovery of "costs of operating the Property until relet." [Ex. 2.17 at § 20(B)(i)(v).]

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- $7,206.00 paid to Berkshire Hathaway to obtain insurance on the Virginia Property [Decl. Willard at ¶ 66; Ex. 34]. The Virginia Lease required BHI to maintain, at its sole expense, insurance on the Virginia Property and insurance related to its operations on the Virginia Property "throughout the Lease Term." [Ex. 2.5–2.8 at § 10.] In the event that BHI failed to comply with the insurance-related terms of the Virginia Lease, the Willard Plaintiffs are "entitled to procure such insurance" and "[a]ny sums expended by Lessor in procuring such insurance shall be Additional Rent 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 . . ." [Ex. 2.8 at ¶ 2; *see also* Ex. 2.4 at § 7.]
- $1,000.00 paid to Santiago Landscape for their work pruning trees, trimming shrubs, removing weeds, mowing grass, and clearing refuse from the Virginia Property [Decl. Willard at ¶ 62; Ex. 30]. The Virginia Lease required BHI, at its sole cost and expense, to handle these maintenance activities. [Ex. 2.11 at § 13.]
- $10,393.35 in utility costs incurred from NV Energy [Decl. Willard at ¶ 65; Ex. 33]. The Virginia Lease required BHI to pay all charges for utility services supplied to the Virginia Property during the Lease Term. Expenses incurred by the Willard Plaintiffs due to failure of BHI to pay utility charges are deemed Additional Rent, with the Willard Plaintiffs having the same rights and remedies as for a failure to pay Base Annual Rent. [Ex. 2.5 at § 9.] The Willard Plaintiffs are further entitled to compensation for this expense by virtue of the Virginia Lease, which allows recovery of "costs of operating the Property until relet." [Ex. 2.17 at § 20(B)(i)(v).]
- A total of $3,265.00 for fines imposed by the City of Reno for the unmaintained and non-Code-compliant condition in which BHI left the Virginia Property [Decl. Willard at ¶ 67; Ex. 35]. BHI expressly indemnified the Willard Plaintiffs against any losses caused by, incurred or resulting from BHI's breach of, default under, or failure to perform any term or provision of the Virginia Lease, including losses in the form of fines, penalties, and interest. [Ex. 2.14 at § 15; Ex. 2.33 at def. of "Losses."]

The Virginia Lease imposes a late payment charge of 5% for failure to pay within ten days any payment required under its terms. [Ex. 2.3–2.4 at § 4.] The Virginia Lease also imposes interest at the "Default Rate" of 18% on any payments required under its terms that are not paid within ten days. [*Id.*] With the late payment charges and interest are applied, as of October 16, 2017 the total damages for expenses is $48,097.79. [Decl. Willard at ¶¶ 68, 69; Decl. Moquin at ¶¶ 3–5; Ex. 36.1 at Table II.]

2. Damages for unpaid rent.

BHI ceased paying rent under the Virginia Lease on March 1, 2013 but did not vacate the premises until June 1, 2013. The Operation and Management Agreement was to allow BHI to avoid rent obligations for May 2013 in return for maintaining continuous operations on the Virginia Property and paying the Net Profits earned through such operation to the Virginia Plaintiffs, but, as discussed above, BHI not only failed to keep the Virginia Property operational for the entire month of May 2013, they also blatantly undermined operational earnings and overstated expenses. Consequently, by virtue of these material breaches, fraudulent accounting, and bad faith conduct, all of which go to the purpose of the Operation and Management Agreement, BHI should be held liable for rent for May 2013 in addition to being indisputably liable for rent for March and April 2013.

Monthly rent for each of the months of March, April, and May 2013 was $140,175.55, which sums to $420,526.65. The Virginia Lease imposes a late payment charge of 5% for failure to pay within ten days any payment required under its terms. [Ex. 2.3–2.4 at § 4.] The late payment charge for each of the months of March, April, and May 2013 is $7,008.78, which sums to $21,026.34. The Virginia Lease also imposes interest on Rental payments not received within ten days of being due at a Default Rate of 18%. [*Id.*; Ex. 2.17 at § 20(B)(i)(iii).] Applying interest from the due dates of each unpaid monthly rental payment, and including the late payment charges, as of October 16, 2017, total damages for unpaid rent is $785,670.52. [Decl. Willard at ¶ 72; Decl. Moquin at ¶ 12(a); Ex. 36.5 at Table VII.]

3. Accelerated rent damages.

The Virginia Lease provides that in the event of a default, the Virginia Plaintiffs are entitled to damages for accelerated rent, the amount thereof being "the present value of the balance of the Base Annual Rental for the remainder of the Lease Term using a discount rate of

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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%)." [Ex. 2.17 at § 20(B)(i)(iv).] Applying the specified discount rate of 4%, the net present value of future rent from June 1, 2013 through the end of the Lease Term, including 2% increases per annum as specified in the Virginia Lease [Ex. 2.2 at § 4(B)] is $18,633,372.30. [Decl. Willard at ¶ 70; Decl. Moquin at ¶ 8; Ex. 36.2–36.5 at Table III.] The fair rental value of the Virginia Property is $38,206.00 per month. [Decl. Gluhaich at ¶¶ 15–18; Decl. Willard at ¶ 70; Ex. 31.51.] The net present value of the fair rental value applied for the period one year following repossession of the Virginia Property through the end of the Lease Term is $4,078,503.33. [Decl. Willard at ¶ 70; Decl. Moquin at ¶ 9; Ex. 36.2–36.5 at Table IV.] Hence, the amount of accelerated rent damages is $14,554,863.98. Including interest at the Default Rate as authorized by Section 4 of the Willard Lease, as of October 16, 2017, total damages for accelerated rent is $26,024,894.31. [*Id.*]

4. <u>Damages for diminution in value.</u>

Under Nevada law, a landlord can recover damages for the diminution in value of a property due to a tenant's beach of a lease. *Hornwood v. Smith's Food King No. 1 ("Hornwood I")*, 105 Nev. 188, 190, 772 P.2d 1284, 1286 (1989), *aff'd*, *Hornwood v. Smith's Food King No. 1 ("Hornwood II"),* 107 Nev. 80, 807 P.2d 208 (1991). Damages for diminution in value are measured by "the difference between the 'present worth of the property with the lease less the present worth of the property without the lease.'" *Hornwood II*, 107 Nev. at 84 (*citing Washington Trust Bank v. Circle K Corp.*, 15 Wash.App. 89, 546 P.2d 1249 (1976)). In the instant case, BHI expressly indemnified the Willard Plaintiffs against losses in the form of diminution in value in the event that BHI defaulted or otherwise breached the Virginia Lease. [Ex. 2.14 at § 15; Ex. 2.33 at def. of "Losses."]

The fair market value of the Virginia Property with the lease was determined to be $19,700,000.00 through an appraisal commissioned in 2008 by the Willard Plaintiffs that was prepared by CB Richard Ellis. [Decl. Willard at ¶ 15; Decl. Gluhaich at ¶¶ 5–9; Ex. 9.] Based on his knowledge of the market and his experience in marketing the Virginia Property, the

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Willard Plaintiffs' designated expert Daniel Gluhaich found the fair market value of the Virginia Property immediately prior to BHI's breach of the Virginia Lease on June 1, 2013 to be $19,700,000.00. [Decl. Gluhaich at ¶ 9.]

The fair market value of the Virginia Property without the lease was determined to be $4,270,000.00 through an appraisal commissioned in 2014 by Longley Partners, LLC (the "2014 Appraisal"). [Decl. Willard at ¶ 63; Decl. Gluhaich at ¶¶ 15–16; Ex. 31.] Based on his review of the 2014 Appraisal, his experience in marketing the Virginia Property, and his knowledge of the real estate market in Northern Nevada, the Willard Plaintiffs' designated expert Daniel Gluhaich found the fair market value of the Virginia Property without the lease following BHI's breach of the Virginia Lease to be $4,270,000.00. [Decl. Gluhaich at ¶ 16.]

Accordingly, the diminution in value damages sustained by the Willard Plaintiffs due to BHI's breach of the Virginia Lease are $15,430,000.00. [Decl. Willard at ¶ 71; Decl. Moquin at ¶¶ 11, 12(d), 12(f).] With interest applied at the Default Rate as authorized under the Virginia Lease, as of October 16, 2017, the total for diminution in value is $27,589.685.48. [*Id.*; Ex. 36.6.]

5. <u>Summary of damages.</u>

The damages caused by Defendants' breaches of the Virginia Lease and Personal Guaranty to which the Willard Plaintiffs are entitled are summarized including interest accrued through October 16, 2017 as follows:

DESCRIPTION	AMOUNT	INTEREST	TOTAL
Unpaid Rent, March 2013	$ 140,175.55	$ 116,825.76	$ 257,001.31
Late Payment Charge, March 2013	7,008.78		7,008.78
Unpaid Rent, April 2013	140,175.55	114,682.80	254,858.35
Late Payment Charge, April 2013	7,008.78		7,008.78
Unpaid Rent, May 2013	140,175.55	112,608.97	252,784.52
Late Payment Charge, May 2013	7,008.78		7,008.78
Accelerated Rent Damages	14,554,863.98	11,470,030.34	26,024,894.31
Diminution in Value	15,430,000.00	12,159,685.48	27,589,685.48
Expenses	28,384.62	19,505.52	48,097.79
TOTALS:	$ 30,454,801.58	$ 23,993,546.52	**$ 54,448,348.10**

[Decl. Willard at ¶ 72; Decl. Moquin at ¶ 12; Ex. 36.6 at Table VII.]

Interest is accruing at a rate of $15,007.77 per day. [Decl. Willard at ¶ 73; Decl. Moquin at ¶ 13; Ex. 36.6 at Table VIII.]

IV.

CONCLUSION

Based on the foregoing, the Willard Plaintiffs respectfully request that the Court grant summary judgment in their favor on all Counts of Defendants' Counterclaim. The Willard Plaintiffs further request that the Court grant summary judgment with respect to the issue of liability of defendant Berry-Hinckley Industries for breach of the Virginia Lease and with respect to the issue of liability of defendant Jerry Herbst for breach of the Personal Guaranty and award the Willard Plaintiffs damages in the amount of $54,448,348.10 plus additional interest of $15,007.77 per day for every day after October 16, 2017 through entry of judgment.

Respectfully submitted,

LAW OFFICES OF BRIAN P. MOQUIN

DATED: October 17, 2017 By:________________________________

BRIAN P. MOQUIN

Attorneys for Plaintiffs
LARRY J. WILLARD and
OVERLAND DEVELOPMENT CORPORATION

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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.

LAW OFFICES OF BRIAN P. MOQUIN

DATED: October 18, 2017

By:______________________

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Nevada that on this date I served a true and correct copy of the foregoing document as follows:

[X] By sending a true and correct copy of the foregoing document by electronic mail to jdesmond@dickinsonwright.com, birvine@dickinsonwright.com, and awebster@dickinsonwright.com.

DATED: October 18, 2017

BRIAN P. MOQUIN

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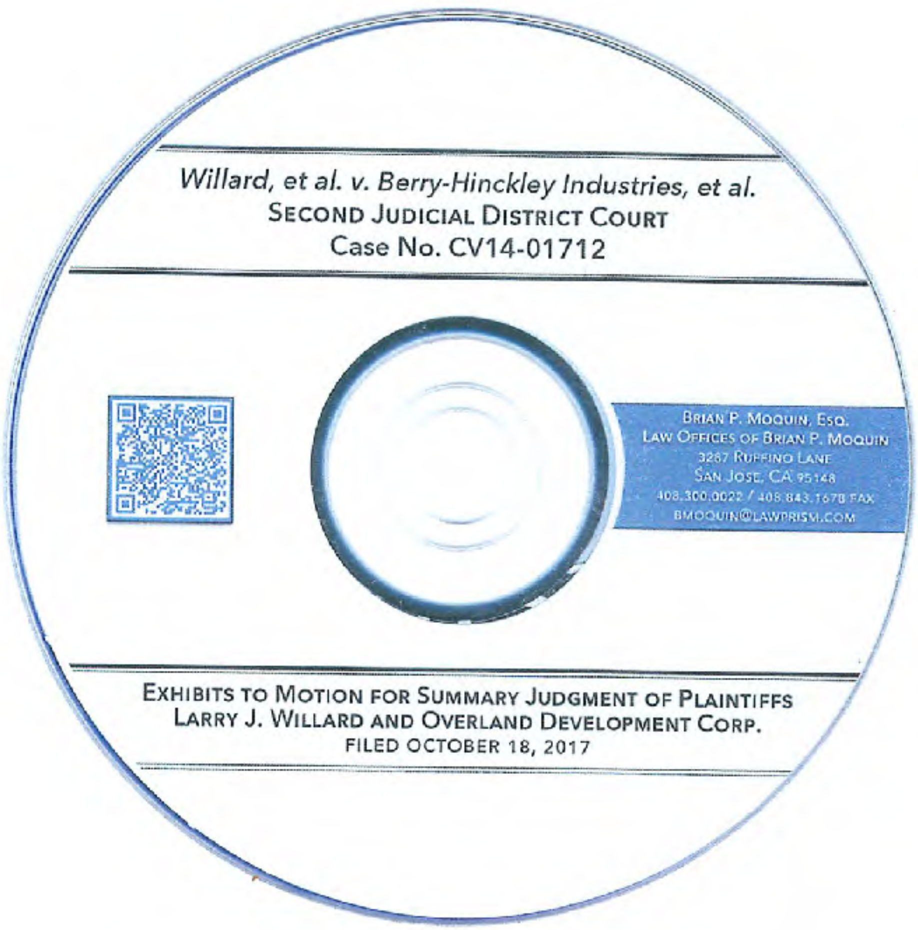
IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

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

CONTENTS OF DVD OF EXHIBITS (FILED MANUALLY)

Because the combined size of the fifty-two exhibits in support of the instant Motion for Summary Judgment exceeds the eFlex hard limit of 100 MB for electronic submissions, per the instructions of the Clerk of Court, the exhibits have been submitted manually on a DVD-R disc, a scan of which and the list of contents thereof are shown below.



FILENAME	*FILE SIZE*
20171018-005 Willard v Herbst - Willard MSJ - Index of Exhibits.pdf	206,907
20171018-006 Willard v Herbst - Willard MSJ - Exhibit 01.pdf	1,128,756
20171018-007 Willard v Herbst - Willard MSJ - Exhibit 02.pdf	4,642,758
20171018-008 Willard v Herbst - Willard MSJ - Exhibit 03.pdf	1,368,497
20171018-009 Willard v Herbst - Willard MSJ - Exhibit 04.pdf	4,859,096
20171018-010 Willard v Herbst - Willard MSJ - Exhibit 05.pdf	520,769

FILENAME	*FILE SIZE*
20171018-011 Willard v Herbst - Willard MSJ - Exhibit 06.pdf	1,155,169
20171018-012 Willard v Herbst - Willard MSJ - Exhibit 07.pdf	872,310
20171018-013 Willard v Herbst - Willard MSJ - Exhibit 08.pdf	7,326,505
20171018-014 Willard v Herbst - Willard MSJ - Exhibit 09.pdf	42,250,567
20171018-015 Willard v Herbst - Willard MSJ - Exhibit 10.pdf	798,735
20171018-016 Willard v Herbst - Willard MSJ - Exhibit 11.pdf	1,610,687
20171018-017 Willard v Herbst - Willard MSJ - Exhibit 12.pdf	564,892
20171018-018 Willard v Herbst - Willard MSJ - Exhibit 13.pdf	5,694,460
20171018-019 Willard v Herbst - Willard MSJ - Exhibit 14.pdf	528,910
20171018-020 Willard v Herbst - Willard MSJ - Exhibit 15.pdf	30,986,749
20171018-021 Willard v Herbst - Willard MSJ - Exhibit 16.pdf	8,252,551
20171018-022 Willard v Herbst - Willard MSJ - Exhibit 17.pdf	896,842
20171018-023 Willard v Herbst - Willard MSJ - Exhibit 18.pdf	495,078
20171018-024 Willard v Herbst - Willard MSJ - Exhibit 19.pdf	3,751,164
20171018-025 Willard v Herbst - Willard MSJ - Exhibit 20.pdf	558,844
20171018-026 Willard v Herbst - Willard MSJ - Exhibit 21.pdf	498,224
20171018-027 Willard v Herbst - Willard MSJ - Exhibit 22.pdf	7,467,818
20171018-028 Willard v Herbst - Willard MSJ - Exhibit 23.pdf	2,067,900
20171018-029 Willard v Herbst - Willard MSJ - Exhibit 24.pdf	1,809,853
20171018-030 Willard v Herbst - Willard MSJ - Exhibit 25.pdf	768,269
20171018-031 Willard v Herbst - Willard MSJ - Exhibit 26.pdf	3,530,861
20171018-032 Willard v Herbst - Willard MSJ - Exhibit 27.pdf	917,265
20171018-033 Willard v Herbst - Willard MSJ - Exhibit 28.pdf	892,664
20171018-034 Willard v Herbst - Willard MSJ - Exhibit 29.pdf	569,967
20171018-035 Willard v Herbst - Willard MSJ - Exhibit 30.pdf	513,131
20171018-036 Willard v Herbst - Willard MSJ - Exhibit 31.pdf	3,519,595
20171018-037 Willard v Herbst - Willard MSJ - Exhibit 32.pdf	1,042,557

FILENAME	*FILE SIZE*
20171018-038 Willard v Herbst - Willard MSJ - Exhibit 33.pdf	1,806,362
20171018-039 Willard v Herbst - Willard MSJ - Exhibit 34.pdf	9,081,607
20171018-040 Willard v Herbst - Willard MSJ - Exhibit 35.pdf	11,901,440
20171018-041 Willard v Herbst - Willard MSJ - Exhibit 36.pdf	543,926
20171018-042 Willard v Herbst - Willard MSJ - Exhibit 37.pdf	598,088
20171018-043 Willard v Herbst - Willard MSJ - Exhibit 38.pdf	635,583
20171018-044 Willard v Herbst - Willard MSJ - Exhibit 39.pdf	843,377
20171018-045 Willard v Herbst - Willard MSJ - Exhibit 40.pdf	705,160
20171018-046 Willard v Herbst - Willard MSJ - Exhibit 41.pdf	725,928
20171018-047 Willard v Herbst - Willard MSJ - Exhibit 42.pdf	660,749
20171018-048 Willard v Herbst - Willard MSJ - Exhibit 43.pdf	1,043,210
20171018-049 Willard v Herbst - Willard MSJ - Exhibit 44.pdf	632,755
20171018-050 Willard v Herbst - Willard MSJ - Exhibit 45.pdf	659,865
20171018-051 Willard v Herbst - Willard MSJ - Exhibit 46.pdf	720,606
20171018-052 Willard v Herbst - Willard MSJ - Exhibit 47.pdf	662,252
20171018-053 Willard v Herbst - Willard MSJ - Exhibit 49.pdf	1,909,343
20171018-054 Willard v Herbst - Willard MSJ - Exhibit 49.pdf	1,334,864
20171018-055 Willard v Herbst - Willard MSJ - Exhibit 50.pdf	1,324,302
20171018-056 Willard v Herbst - Willard MSJ - Exhibit 51.pdf	896,727
20171018-057 Willard v Herbst - Willard MSJ - Exhibit 52.pdf	2,524,134

A.App.1612

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.

LAW OFFICES OF BRIAN P. MOQUIN

DATED: October 18, 2017

By:______________________

BRIAN P. MOQUIN
Admitted *Pro Hac Vice*
California Bar No. 257583
3287 Ruffino Lane
San Jose, CA 95148
(408) 300-0022
(408) 843-1678 (facsimile)

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Nevada that on this date I served a true and correct copy of the foregoing document as follows:

[X] By sending a true and correct copy of the foregoing document and contents of the DVD described therein by electronic mail to jdesmond@dickinsonwright.com, birvine@dickinsonwright.com, and awebster@dickinsonwright.com.

DATED: October 18, 2017

BRIAN P. MOQUIN

3373

THE O'MARA LAW FIRM, P.C.
DAVID C. O'MARA, ESQ.
NEVADA BAR NO. 8599
311 East Liberty Street
Reno, Nevada 89501
Telephone: 775/323-1321
Fax: 775/323-4082

LAW OFFICES OF BRIAN P. MOQUIN
BRIAN P. MOQUIN, ESQ.
Admitted *Pro Hac Vice*
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San Jose, CA 95148
Telephone: 408.300.0022
Fax: 408.843.1678
bmoquin@lawprism.com

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

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

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

INDEX OF EXHIBITS

A.App.1619

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.

LAW OFFICES OF BRIAN P. MOQUIN

DATED: October 18, 2017

By:______________________

BRIAN P. MOQUIN
Admitted *Pro Hac Vice*
California Bar No. 257583
3287 Ruffino Lane
San Jose, CA 95148
(408) 300-0022
(408) 843-1678 (facsimile)

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Nevada that on this date I served a true and correct copy of the foregoing document as follows:

[X] By sending a true and correct copy of the foregoing document by electronic mail to jdesmond@dickinsonwright.com, birvine@dickinsonwright.com, and awebster@dickinsonwright.com.

DATED: October 18, 2017

BRIAN P. MOQUIN

Exhibit 1

Exhibit 1

PURCHASE AND SALE AGREEMENT

This **PURCHASE AND SALE AGREEMENT** ("**Agreement**") is made and entered into effective as of November 18, 2005 ("**Effective Date**") between and among **P. A. MORABITO & CO., LIMITED.**, a Nevada corporation having an address at 425 Maestro Drive, Reno, Nevada ("**Seller**") and **LARRY WILLARD**, an individual having an address at ______________ ("**Buyer**").

RECITALS

is under contract to purchase

A. Seller ~~owns a portion of~~ the real property located at 7695 and 7699 S. Virginia, Reno, Nevada. Consisting of approximately 41,000 square feet ("**Property**"), as more particularly described in **Exhibit "A"**.

B. The Property will be owned by Buyer, but the business operations at the Property and the gaming machines at the Property will remain the property of the Seller or licensed operator, as the case may be.

C. The Seller will be the "**Lessee**", and Buyer shall be the "**Lessor**" at the Property.

D. Seller desires to lease-back the Property pursuant to a lease in substantially the form attached hereto as **Exhibit "B"** ("**Lease**"). The Lease shall be signed at the closing of this matter. The parties desire to lease with an initial rent term of twenty (20) years, with two (2) five (5) years options to extend the Lease. The initial annual rent shall be **ONE MILLION FOUR HUNDRED SIXTY-FOUR THOUSAND THREE HUNDRED SEVENTY-FIVE DOLLARS PER ANNUM ($1,464,375)**. Lease payments shall commence on Closing. Thereafter, rent payments under the Lease shall be made monthly on the first day of each month. If the first lease payment is not on the first of each month, the payment shall be prorated. The minimum rent shall be adjusted upward by two (2) percent compounded annually, on the anniversary date of the first lease payment date under the Lease during each year of the initial and extended terms of the Lease. Buyer and Seller acknowledge that the Lease is a NNN Lease, and Seller as Lessee shall be responsible for all liens and encumbrances. No security deposit from Seller as Lessee to Buyer as Lessor shall be required.

NOW, THEREFORE, in consideration of the mutual promises, and subject to the conditions set forth below, the parties now agree as follows:

1. **Purchase Price**. The total purchase price to be paid by Buyer to Seller for the purchase of the Property shall be the sum of **SEVENTEEN MILLION SEVEN HUNDRED FIFTY THOUSAND DOLLARS ($17,750,000)** ("**Purchase Price**"). The provisions of this Agreement shall constitute joint instructions to the Escrow Holder (as defined below).

1.1 **Payment of Deposit**. Upon execution of this Agreement, Buyer will make an initial deposit of **TWO HUNDRED FIFTY THOUSAND DOLLARS ($250,000.00)** in cash or certified funds, payable in the form of a certified check or wire transfer, with the Escrow Holder. Any and all fees due by Buyer shall be payable from this Initial Payment ("**Initial Payment**")

1.2 **Payment of Balance of Purchase Price**. At Closing, Buyer shall pay in cash or certified funds, payable in the form of a certified check or wire transfer, the balance of the purchase price (such balance being **SEVENTEEN MILLION FIVE HUNDRED THOUSAND DOLLARS ($17,500,000)**, subject to adjustments as set forth herein.

2. **CLOSING; ESCROW HOLDER.**

2.1 **Escrow Holder; Deposit; Closing Date**. Escrow Holder shall cause, at Buyer's expense, a current commitment for title insurance ("**Title Commitment**") concerning the Property to be issued by First American Title Company. Terri Hovdestad, Escrow Officer, First American Title Insurance Company, 1 First American Way, Santa Ana, CA 92707, 714-800-3167 shall serve as title agent and "**Escrow Holder**" for this transaction. Buyer and Seller shall share equally all reasonable and customary escrow fees and charges. The Closing shall occur no later than 01/16/2006. Promptly after mutual execution of this Agreement, Buyer and Seller shall open an escrow with Escrow Holder, and shall execute such instructions, as Escrow Holder may request which are not inconsistent with the provisions of this Agreement. Escrow Holder is hereby authorized and instructed to conduct the escrow in accordance with this Agreement, applicable law and custom and practice of the community in which Escrow Holder is located, including any reporting requirements of the Internal Revenue Code.

2.2 **Documents Required at or before Closing**. Seller shall deliver to Escrow Holder in time for delivery to Buyer at the Closing, an original ink signed deed duly executed by the appropriate party and in recordable form, conveying fee title to the Property to Buyer.

2.3 **Other Obligations at Closing**. At Closing, the parties shall execute and deliver to one another all documents set forth in this Agreement, and, in addition, such other documents as may be necessary or appropriate to accomplish in a complete and proper manner the transaction contemplated by this Agreement.

3. **TITLE REPORT; TITLE**. Seller will provide Buyer with a preliminary title report on the Property ("**Property Title Report**"), together with full legible copies of all exceptions in the Report upon opening of escrow. Seller, at its expense, shall provide or cause to be provided, good, valid and marketable title to free and clear of all liens and in a form acceptable to Buyer, as evidenced by Escrow Holder's ALTA standard policy of title insurance in the amount of the Purchase Price, showing title in the Property vested in Buyer.

4. **CLOSING COSTS.** All State, County and City transfer taxes and/or documentary transfer taxes, premium for the policy of title insurance, and all other costs and expenses of escrow including escrow fees and recording fees shall be according to the County custom of the Property's jurisdiction.

5. **BUYER'S AND SELLER'S CONDITIONS TO CLOSING.**

5.1 **Buyer's Conditions to Closing.** Buyer's obligation to close shall be conditioned on the satisfaction of only the following conditions at Closing. Buyer's review and all inspections are at Buyer's sole cost and expense. All documentation, including but not limited to reports and records supplied by Seller and Buyer's review and inspection and copying shall be strictly confidential and distribution shall be limited to Buyer's agents and representatives, legal and financial advisors, and/or third parties with an economic interest in the transaction.

A. **Due Diligence Period.** The "**Due Diligence Period**" for review of all documents shall expire within five days of mutual execution of this Agreement by Buyer and Seller. Buyer's acknowledges receipt of the (i) preliminary title report; (ii) survey; and (iii) phase I environmental report concurrent with the execution of this Agreement. No other diligence is due from Seller to Buyer.

B. **Financial Ability.** Buyer shall provide, upon Seller's request, written evidence from Buyer's lender or another financial institution and/or Qualified Intermediary with knowledge of Buyer's ability to purchase this Property.

C. **Deeds and Title Insurance on Property.** Buyer's receipt of Title Insurance on the Property as specified in Section 3 above.

D. **Performance by Seller.** On or before the Closing Date, Seller will have performed, satisfied and complied in all material respects with all covenants, agreements and conditions required of any of them by this Agreement.

E. **Accuracy of Seller's Warranties.** Except as otherwise permitted by this Agreement, all warranties by Seller in this Agreement, or in any written document that will be delivered to Buyer by any of them under this Agreement, must be true in all material respects on the Closing Date as though made at that time.

5.2 **Seller's Condition to Closing.** Seller's obligation to close shall be conditioned on the satisfaction of the following conditions precedent in favor of Seller at Closing:

A. **Performance by Buyer.** On or before the Closing Date, Buyer will have performed, satisfied and complied in all material respects with all covenants, agreements and conditions required by this Agreement.

6. **REPRESENTATIONS AND WARRANTIES OF SELLER.** As a material inducement to Buyer to enter into this Agreement and to consummate the transactions contemplated hereby, Seller makes the following representations and warranties to Buyer:

6.1 **Organization and Qualification.** Seller is a validly existing corporation and in good standing under the laws of the State of Nevada, and is qualified to do business in the State of Nevada and has the power and authority to lease and operate its business at the Property.

6.2 **Authority Relative to this Agreement**. Seller has the power and authority to enter into this Agreement and this Agreement and all agreements, instruments of transfer, documents and deeds to be executed in connection with the Closing of this transaction, have been or will be, as applicable, duly executed and delivered by Seller and constitute valid and binding obligations of Seller, enforceable against Seller, in accordance with their terms. Seller has the right, power, legal capacity and authority to enter into and perform its respective obligations under this Agreement, and except as otherwise provided for or disclosed in this Agreement, no approvals or consents of any persons other than Seller are required. The execution and delivery of this Agreement by Seller has been duly authorized by all necessary action on the part of Seller.

6.3 **Title to Assets and the Property**. Except as otherwise provided for or disclosed in this Agreement, Seller has, or will cause to be conveyed to Buyer, at the time of the Closing, good and marketable title to the Property. The Property will be as of the Closing Date free and clear of mortgages, liens, mechanics' or materialmen's lien rights, pledges, charges, monetary encumbrances (other than bonds or improvement assessments as provided elsewhere in this Agreement), equities and claims.

6.4 **Buyer's Acceptance of the Property.** Buyer represents to Seller that it has made a visual inspection of the Property. Buyer acknowledges that it has the obligation to conduct studies and investigations of the Property, at its sole cost and expense, for the purposes of becoming familiar with the condition of the Property to the extent it deems necessary. Purchaser acknowledges and agrees that it has been or will, prior to the expiration of the Due Diligence Period, be given a full opportunity to inspect and investigate every aspect of the Real Property and Purchaser's desired development and use of the Real Property. Purchaser specifically acknowledges and agrees that the Real Property is being sold by Seller on an "**AS IS WITH ALL FAULTS**" basis and in its condition as of the date of this Agreement and as of the Closing Date, except as expressly set forth in this Agreement. Except as expressly set forth in this Agreement, no representations or warranties have been made or are made and no responsibility has been or is assumed by Seller or by any member, manager, agent, attorney, or representative of Seller acting or purporting to act on behalf of Seller as to any matters concerning the Property or Project. Purchaser acknowledges that it is not relying upon any statement or representation by Seller unless such statement or representation is specifically embodied in this Agreement.

6.5 **Due Diligence Materials.** Buyer acknowledges that Seller makes no representation or warranty about the completeness, accuracy or veracity of any due diligence materials provided by Seller to Buyer.

6.6 **Litigation**. There is no pending, or, to the best of Seller's knowledge, threatened, suit action, arbitration, or legal, administrative, or other proceeding, or governmental investigation against or affecting the Property.

6.7 **Compliance with Laws and Regulations**. To Seller's present knowledge, the Property is in compliance with all material requirements of law, Federal, State and local, and all material requirements of all governmental bodies or agencies having jurisdiction over the Property. The Seller has not received any notice, not heretofore complied with, from any Federal, State or municipal authority or any insurance or inspection body that the Property fails to comply with any applicable law, ordinance, regulation, building or zoning law, or requirement of any public body or authority.

6.8 **Valid and Binding Agreement**. The representations, warranties, and covenants made under this Agreement constitute valid and binding obligations of Seller and are enforceable against Seller.

7. **REPRESENTATIONS AND WARRANTIES OF BUYER**. As a material inducement to Seller to enter into this Agreement and to consummate the transactions contemplated hereby, Buyer makes the following representations and warranties to Seller:

7.1 **Organization and Qualification**. Buyer has the power and authority to enter into this Agreement and to own the Property.

7.2 **Authority Relative to this Agreement**. This Agreement and all agreements, instruments of transfer, documents and deeds to be executed in connection with the closing of this transaction, have been or will be, as applicable, duly executed and delivered by Buyer and constitute valid and binding obligations of Buyer, enforceable against Buyer, in accordance with their terms.

7.3 **Valid and Binding Agreement**. The representations, warranties, and covenants made under this Agreement constitute valid and binding obligations of Buyer and are enforceable against Buyer.

8. **CONFIDENTIALITY**. Buyer and Seller shall keep this Agreement and any and all information, materials and documentation, including but not limited to financial statements, reports, records and asset lists, and information submitted by any party hereto to the other, whether submitted pursuant to the terms of this Agreement, or otherwise, or otherwise discovered in furtherance of this Agreement, confidential and make no public announcement of its content, nor shall either party divulge, communicate, disclose or use to the detriment of the other party, or for the benefit of any other person or persons, such information, documents or materials in any manner nor use such information or materials for any purposes other than as set forth in this Agreement. Disclosure to each party's respective agents, representatives, attorneys, accountants, lenders and/or third parties with an economic interest in the transaction is exempt.

9. **ADDITIONAL AGREEMENTS.**

9.1 **Fees and Expenses**. Buyer, on the one side, and Seller, on the other side, shall each bear their own expenses for legal and accounting fees, costs and expenses incurred in negotiating and preparing this Agreement, negotiating and preparing all of the other paperwork in connection with this Agreement, and carrying out the transactions contemplated by this Agreement.

9.2 **Broker's Fees**. The Buyer is represented by Sperry Van Ness ("**Sperry Van Ness**"). Seller will pay a commission amount equal to $350,000 to Sperry Van Ness at Closing and Seller will be solely responsible for payment of such fee. Buyer will not be responsible for payment of any fee or commission to Sperry Van Ness.

9.3 **Further Acts**. The parties agree to execute and deliver all documents and perform all further acts that may be reasonably necessary to carry out the provisions of this Agreement and to cooperate with each other in connection with the foregoing.

9.4 **Controlling Law**. This Agreement and all questions relating to its validity, interpretation, performance and enforcement (including, without limitation, provisions concerning limitations of actions), shall be governed by and construed in accordance with the laws of State of Nevada.

9.5 **Attorneys' Fees and Costs**. If any party hereto institutes any legal action or proceeding arising out of or related to this Agreement the prevailing party shall be entitled to reasonable attorneys' fees and expenses, and all other recoverable costs and damages, including any and all such costs on appeal.

9.6 **Parties in Interest**. This Agreement shall be binding upon and inure solely to the benefit of each party hereto and their respective successors and permitted assigns, and nothing in this Agreement, express or implied, is intended to confer upon any other person any right or remedies of any nature whatsoever under or by reason of this Agreement.

9.7 **Assignment**. This Agreement (including the other documents and instruments referred to herein) may not be assigned without the written consent of each other party hereto, which consent shall not be unreasonably withheld.

9.8 **Provisions Separable**. The provisions of this Agreement are independent of and separable from each other, and no provision shall be affected or rendered invalid or unenforceable by virtue of the fact that for any reason any other or others of them may be invalid or unenforceable in whole or in part.

9.9 **Integration**. This Agreement contains the entire understanding among the parties hereto with respect to the subject matter hereof, and except as herein contained supersedes all prior and contemporaneous agreements and understandings, inducements or conditions, express or implied, oral or written. This Agreement may not be modified or amended other than by an agreement in writing signed by each of the parties named on the first page of this Agreement.

9.10 **Time is of Essence**. Time is of the essence of this Agreement, all documents and all transactions contemplated herein.

9.11 **Notices.** All notices, requests, demands and other communications required or permitted under this Agreement shall be in writing and shall be deemed to have been duly given, made and received only when (1) delivered (personally, by courier service such as Federal Express, or by other messenger); (2) if transmitted by facsimile transmission, then on the date of transmission as confirmed by the facsimile equipment the recipient location; provided that if transmission is after 5:00 p.m. on any day, then notice shall not be deemed given until the following business day; or (3) or the date mailed, when deposited in the United States mails, certified mail, postage prepaid, return receipt requested, addressed as set forth below:

TO: **Seller:**

Paul Morabito
668 North Pacific Coast Highway, Suite 517
Laguna Beach, California 92651
P: (949) 464-9251
F: (949) 464-9261

with a copy to:

Sujata Yalamanchili, Esq.
Hodgson Russ LLP
One M&T Plaza, Suite 2000
Buffalo, New York 14202
P: (716) 848-1657
F: (716) 849-0349

TO: **Buyer:**

Larry Willard
c/o Dan Gluhaich/Intero Real Estate
175 E. Main Street, Suite 130
Morgan Hill, California
P: (408) 201-0120

Notice by mail shall be by airmail if posted outside of the continental United States. Any party may alter the address to which communications or copies are to be sent by giving notice of such change of address in conformity with the provisions of this Section for the giving of notice.

9.12 **Execution in Counterparts and Via Facsimile**. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original as against any party whose signature appears thereon, and all of which shall together constitute one and the same instrument. This Agreement shall become binding when one or more counterparts hereof, individually or taken together, bear the signatures of all of the parties reflected hereon as the signatories. A signature on this Agreement sent via facsimile shall be deemed an original signature for the purposes of enforcement.

9.13 **Section Headings**. The section headings in this Agreement are for convenience only; they form no part of this Agreement and shall not affect their interpretation.

9.14 **Number of Days**. In computing the number of days for purposes of this Agreement, all days shall be counted including Saturdays, Sundays and holidays; provided, however, that if the final day of any time period falls on a Saturday, Sunday or holiday on which federal banks are or may elect to be closed, then the final day shall be deemed to be the next day which is not a Saturday, Sunday or such holiday.

9.15 **Construction of Agreement**. This Agreement has been prepared, and negotiations in connection with it have been conducted, by the joint efforts of Seller and Buyer. This Agreement is to be construed simply and fairly, and not strictly for or against any of the parties.

9.16 **Further Acts**. The parties agree to execute and deliver all documents and perform all further acts that may be reasonably necessary to carry out the provisions of this Agreement.

9.17 **Tax Deferred Exchange**. Seller and Buyer are aware and acknowledge that Buyer may be purchasing the Property and Seller may be selling the Property as part of a transaction to qualify as a tax-deferred exchange pursuant to section 1031 of the Internal Revenue Code of 1986, as amended. Buyer and Seller agree to use their best efforts and cooperate in completing any such exchange, including executing and acknowledging all documents reasonably requested by the other party (subject to the reasonable approval of the parties' respective counsel), at no additional liability or cost to the other party. Buyer and Seller shall indemnify and hold one another harmless from any and all claims, liabilities, and costs resulting from each such party's exchange transaction. Seller makes no legal or tax representations regarding Buyer's exchange.

[SIGNATURES APPEAR ON THE FOLLOWING PAGE]

IN WITNESS WHEREOF, the parties have executed this Agreement effective as of the date first written above.

SELLER:

P. A. MORABITO & CO., LIMITED,
a Nevada corporation

By: Paul Morabito /PM 11/21/05
Paul Morabito
President

BUYER:

Larry Willard
Larry Willard
11/19/05

EXHIBIT "A"
LEGAL DESCRIPTION