IN THE SUPREME COURT OF THE STATE OF NEVADA

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

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Appellants,

VS.

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

Respondents.

APPENDIX TO APPELLANTS' OPENING BRIEFS

VOLUME 16 OF 19

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	Exhibit 8: Deposition Excerpts of D. Gluhaich		13	2866-2875
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33.	Defendants' Motion for Partial Summary Judgment – Oral Argument Requested	11/15/17	13	2880-2896
	Exhibit 1: Highway 50 Lease		13	2897-2940
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	Exhibit 6: Willard Response to Defendants' Second Set of Interrogatories		13	3006-3014
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	Exhibit 15: December 27, 2016 Email	l	15	3350-3353
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(cont 34)	Exhibit 17: Willard Responses to Defendants' First Set of Requests for Production of Documents 17		15	3382-3391
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37.	Notice of Non-Opposition to Defendants/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich	12/07/17	16	3577-3580
38.	Notice of Non-Opposition to Defendants/Counterclaimants' Motion for Partial Summary Judgment	12/07/17	16	3581-3584
39.	Order Granting Defendants/ Counterclaimants' Motion for Sanctions [Oral Argument Requested]	01/04/18	16	3585-3589
40.	Order Granting Defendants/ Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich	01/04/18	16	3590-3594
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45.	Notice of Entry of Findings of Facts, Conclusions of Law and Order	03/06/18	16	3641-3644
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52.	Willard Plaintiffs' Rule 60(b) Motion for Relief	04/18/18	16	3675-3692
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	Exhibit 10: Email correspondence between Larry Willard and Brian Moquin dated May 23 through May 28, 2018		17	3998-4000
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57.	Opposition to Defendants' Motion to Strike, or in the Alternative, Motion for Leave to File Sur-Reply	06/22/18	18	4037-4053
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65.	Transcript of Proceedings - Hearing on Motion for Partial Summary Judgment	01/10/17	19	4235-4303	
66.	Transcript of Proceedings - Pre-Trial Conference	12/12/17	19	4304-4331	
67.	Transcript of Proceedings - Oral Arguments – Plaintiffs' Rule 60(b) Motion (condensed)	09/04/18	19	4332-4352	
ADDITIONAL DOCUMENTS					
68.	Order Granting Defendants' Motion for Partial Summary Judgment [Oral Argument Requested] ¹	01/04/18	19	4353-4357	

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.

Electronically CV14-01712 2017-12-07 04:45:32 PM Jacqueline Bryant Clerk of the Court 2501 Transaction # 6429615 : pmsewell 1 DICKINSON WRIGHT, PLLC JOHN P. DESMOND Nevada Bar No. 5618 BRIAN R. IRVINE 3 Nevada Bar No. 7758 ANJALI D. WEBSTER 4 Nevada Bar No. 12515 100 West Liberty Street, Suite 940 5 Reno, NV 89501 Tel: (775) 343-7500 6 Fax: (775) 786-0131 Email: Jdesmond@dickinsonwright.com 7 Email: Birvine@dickinsonwright.com Email: Awebster@dickinsonwright.com 8 Attorney for Defendants 9 Berry Hinckley Industries and Jerry Herbst 10 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA 11 IN AND FOR THE COUNTY OF WASHOE 12 13 LARRY J. WILLARD, individually CASE NO. CV14-01712 and as trustee of the Larry James Willard 14 Trust Fund; OVERLAND DEVELOPMENT DEPT. 6 CORPORATION, a California corporation; 15 EDWARD C. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the 16 Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, 17 Plaintiff, 18 VS. 19 BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an 20 individual 21 Defendants. 22 BERRY-HINCKLEY INDUSTRIES, a 23 Nevada corporation; and JERRY HERBST, an individual; 24 Counterclaimants, 25 26 VS 27 28

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A.App.3573 FILED

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

Counter-defendants.

NOTICE OF NON-OPPOSITION TO DEFENDANTS/COUNTERCLAIMANTS' MOTION FOR SANCTIONS

PLEASE TAKE NOTICE that on November 15, 2017, Defendants/Counterclaimants Berry-Hinckley Industries ("BHI") and Jerry Herbst filed Defendants/Counterclaimants' Motion for Sanctions.

- The opposition to the Motion was originally due to be filed on or before December 4, 2017.
- On December 4, 2017, Defendants granted Plaintiffs an extension through December 5, 2017 to file the opposition.
- On December 5, 2017, Defendants granted Plaintiffs an extension through 10:00 a.m. on December 6, 2017 to file the opposition.
- On December 6, 2017, Defendants granted Plaintiffs an extension through 3:00 p.m. on December 6, 2017 to file the opposition, but Defendants declined to provide further extensions so as to allow themselves adequate time to prepare reply briefs and submit the Motion by the December 15, 2017 deadline for the submission of dispositive motions.
- On December 6, 2017 at 3:05 p.m., Plaintiffs filed a Request for Extension of Time to respond to the Motion, seeking an Order from this Court granting Plaintiffs an extension through December 7, 2017 at 4:29 p.m. to file their opposition to the Motion.
- As of the date and time of this filing, this Court has not issued any Order granting Plaintiffs' Request, and Plaintiffs have failed to file any opposition, despite multiple extensions.

1 The deadline for filing an opposition has passed and no opposition has been filed. As 2 such, Defendants/Counterclaimants hereby submit this Notice of Non-Opposition to 3 Defendants/Counterclaimants' Motion for Sanctions. **AFFIRMATION** 4 Pursuant to NRS 239B.030 5 The undersigned does hereby affirm that the preceding document does not contain the 6 social security number of any person. 7 DATED this 7th day of December, 2017. 8 DICKINSON WRIGHT, PLLC 9 10 /s/ Brian R. Irvine JOHN P. DESMOND 11 Nevada Bar No. 5618 12 BRIAN R. IRVINE Nevada Bar No. 7758 13 ANJALI D. WEBSTER Nevada Bar No. 12515 14 100 West Liberty Street, Suite 940 Reno, NV 89501 Tel: (775) 343-7500 15 Fax: (775) 786-0131 Email: Jdesmond@dickinsonwright.com 16 Email: Birvine@dickinsonwright.com Email: Awebster@dickinsonwright.com 17 18 Attorney for Defendants Berry Hinckley Industries and Jerry Herbst 19 20 21 22 23 24 25 26 27 28

1 **CERTIFICATE OF SERVICE** 2 I certify that I am an employee of DICKINSON WRIGHT, PLLC and that on this date, 3 pursuant to NRCP 5(b), I am serving a true and correct copy of the attached NOTICE OF NON-4 **OPPOSITION DEFENDANTS/COUNTERCLAIMANTS'** TO **MOTION FOR** 5 **SANCTIONS** on the parties as set forth below: 6 Placing an original or true copy thereof in a sealed envelope placed for collection and 7 mailing in the United States Mail, Reno, Nevada, postage prepaid, following ordinary 8 business practices 9 Certified Mail, Return Receipt Requested 10 Via E-Mail 11 Placing an original or true copy thereof in a sealed envelope and causing the same to be 12 personally Hand Delivered 13 Federal Express (or other overnight delivery) Electronic Notification 14 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. 15 addressed as follows: 16 Brian P. Moquin David C. O'Mara 17 THE O'MARA LAW FIRM, P.C. LAW OFFICES OF BRIAN P. MOQUIN 3287 Ruffino Lane 311 E. Liberty Street 18 San Jose, California 95148 Reno, Nevada 89501 19 david@omaralaw.net bmoquin@lawprism.com 20 21 DATED this 7th day of December, 2017. 22 /s/ Mina Reel 23 An employee of Dickinson Wright, PLLC 24 25 26 27 28

Electronically CV14-01712 2017-12-07 04:49:21 PM Jacqueline Bryant Clerk of the Court 2501 Transaction # 6429645 : yviloria 1 DICKINSON WRIGHT, PLLC JOHN P. DESMOND 2 Nevada Bar No. 5618 BRIAN R. IRVINE 3 Nevada Bar No. 7758 ANJALI D. WEBSTER 4 Nevada Bar No. 12515 100 West Liberty Street, Suite 940 5 Reno, NV 89501 Tel: (775) 343-7500 6 Fax: (775) 786-0131 Email: Jdesmond@dickinsonwright.com 7 Email: Birvine@dickinsonwright.com Email: Awebster@dickinsonwright.com 8 Attorney for Defendants 9 Berry Hinckley Industries and Jerry Herbst 10 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA 11 IN AND FOR THE COUNTY OF WASHOE 12 13 LARRY J. WILLARD, individually CASE NO. CV14-01712 and as trustee of the Larry James Willard 14 Trust Fund; OVERLAND DEVELOPMENT DEPT. 6 CORPORATION, a California corporation; 15 EDWARD C. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the 16 Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, 17 Plaintiff, 18 VS. 19 BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an 20 individual 21 Defendants. 22 BERRY-HINCKLEY INDUSTRIES, a 23 Nevada corporation; and JERRY HERBST, an individual; 24 Counterclaimants, 25 26 VS 27 28

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

Counter-defendants.

NOTICE OF NON-OPPOSITION TO DEFENDANTS/COUNTERCLAIMANTS' MOTION TO STRIKE AND/OR MOTION IN LIMINE TO EXCLUDE THE EXPERT TESTIMONY OF DANIEL GLUHAICH

PLEASE TAKE NOTICE that on November 14, 2017, Defendants/Counterclaimants Berry-Hinckley Industries ("BHI") and Jerry Herbst filed Defendants/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich.

- The opposition to the Motion was originally due to be filed on or before December 4, 2017.
- On December 4, 2017, Defendants granted Plaintiffs an extension through December 5,
 2017 to file the opposition.
- On December 5, 2017, Defendants granted Plaintiffs an extension through 10:00 a.m. on December 6, 2017 to file the opposition.
- On December 6, 2017, Defendants granted Plaintiffs an extension through 3:00 p.m. on December 6, 2017 to file the opposition, but Defendants declined to provide further extensions so as to allow themselves adequate time to prepare reply briefs and submit the Motion by the December 15, 2017 deadline for the submission of dispositive motions.
- On December 6, 2017 at 3:05 p.m., Plaintiffs filed a Request for Extension of Time to respond to the Motion, seeking an Order from this Court granting Plaintiffs an extension through December 7, 2017 at 4:29 p.m. to file their opposition to the Motion.
- As of the date and time of this filing, this Court has not issued any Order granting Plaintiffs' Request, and Plaintiffs have failed to file any opposition, despite multiple extensions.

1 The deadline for filing an opposition has passed and no opposition has been filed. As 2 such, Defendants/Counterclaimants hereby submit this Notice of Non-Opposition to 3 Defendants/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich. 4 **AFFIRMATION** 5 Pursuant to NRS 239B.030 6 The undersigned does hereby affirm that the preceding document does not contain the 7 social security number of any person. 8 DATED this 7th day of December, 2017. 9 DICKINSON WRIGHT, PLLC 10 11 /s/ Brian R. Irvine JOHN P. DESMOND 12 Nevada Bar No. 5618 BRIAN R. IRVINE 13 Nevada Bar No. 7758 ANJALI D. WEBSTER 14 Nevada Bar No. 12515 100 West Liberty Street, Suite 940 15 Reno, NV 89501 Tel: (775) 343-7500 16 Fax: (775) 786-0131 Email: Jdesmond@dickinsonwright.com 17 Email: Birvine@dickinsonwright.com Email: Awebster@dickinsonwright.com 18 Attorney for Defendants Berry Hinckley Industries and Jerry Herbst 19 20 21 22 23 24 25 26 27 28

1 **CERTIFICATE OF SERVICE** 2 I certify that I am an employee of DICKINSON WRIGHT, PLLC and that on this date, 3 pursuant to NRCP 5(b), I am serving a true and correct copy of the attached **NOTICE OF NON-**4 OPPOSITION TO DEFENDANTS/COUNTERCLAIMANTS' MOTION TO STRIKE 5 AND/OR MOTION IN LIMINE TO EXCLUDE THE EXPERT TESTIMONY OF 6 **DANIEL GLUHAICH** on the parties as set forth below: 7 8 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 9 business practices 10 Certified Mail, Return Receipt Requested 11 Via E-Mail 12 Placing an original or true copy thereof in a sealed envelope and causing the same to be 13 personally Hand Delivered 14 Federal Express (or other overnight delivery) Electronic Notification 15 X By electronic service by filing the foregoing with the Clerk of Court using the E Flex system, which will electronically mail the filing to the following individuals. 16 addressed as follows: 17 David C. O'Mara Brian P. Moquin 18 LAW OFFICES OF BRIAN P. MOQUIN THE O'MARA LAW FIRM, P.C. 19 3287 Ruffino Lane 311 E. Liberty Street Reno, Nevada 89501 San Jose, California 95148 20 bmoquin@lawprism.com david@omaralaw.net 21 22 DATED this 7th day of December, 2017. 23 /s/ Mina Reel 24 An employee of Dickinson Wright, PLLC 25 26 27 28

Electronically CV14-01712 2017-12-07 04:43:09 PM Jacqueline Bryant Clerk of the Court 2501 Transaction # 6429596 : pmsewell 1 DICKINSON WRIGHT, PLLC JOHN P. DESMOND Nevada Bar No. 5618 BRIAN R. IRVINE 3 Nevada Bar No. 7758 ANJALI D. WEBSTER 4 Nevada Bar No. 12515 100 West Liberty Street, Suite 940 5 Reno, NV 89501 Tel: (775) 343-7500 6 Fax: (775) 786-0131 Email: Jdesmond@dickinsonwright.com 7 Email: Birvine@dickinsonwright.com Email: Awebster@dickinsonwright.com 8 Attorney for Defendants 9 Berry Hinckley Industries and Jerry Herbst 10 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA 11 IN AND FOR THE COUNTY OF WASHOE 12 13 LARRY J. WILLARD, individually CASE NO. CV14-01712 and as trustee of the Larry James Willard 14 Trust Fund; OVERLAND DEVELOPMENT DEPT. 6 CORPORATION, a California corporation; 15 EDWARD C. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the 16 Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, 17 Plaintiff, 18 VS. 19 BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an 20 individual 21 Defendants. 22 BERRY-HINCKLEY INDUSTRIES, a 23 Nevada corporation; and JERRY HERBST, an individual; 24 Counterclaimants, 25 26 VS 27 28

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

Counter-defendants.

NOTICE OF NON-OPPOSITION TO DEFENDANTS/COUNTERCLAIMANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

PLEASE TAKE NOTICE that on November 15, 2017, Defendants/Counterclaimants Berry-Hinckley Industries ("BHI") and Jerry Herbst (collectively with BHI, the "Defendants") filed Defendants/Counterclaimants' Motion for Partial Summary Judgment (the "Motion").

- The opposition to the Motion was originally due to be filed on or before December 4, 2017.
- On December 4, 2017, Defendants granted Plaintiffs an extension through December 5,
 2017 to file the opposition.
- On December 5, 2017, Defendants granted Plaintiffs an extension through 10:00 a.m. on December 6, 2017 to file the opposition.
- On December 6, 2017, Defendants granted Plaintiffs an extension through 3:00 p.m. on December 6, 2017 to file the opposition, but Defendants declined to provide further extensions so as to allow themselves adequate time to prepare reply briefs and submit the Motion by the December 15, 2017 deadline for the submission of dispositive motions.
- On December 6, 2017 at 3:05 p.m., Plaintiffs filed a Request for Extension of Time to respond to the Motion, seeking an Order from this Court granting Plaintiffs an extension through December 7, 2017 at 4:29 p.m. to file their opposition to the Motion.
- As of the date and time of this filing, this Court has not issued any Order granting Plaintiffs' Request, and Plaintiffs have failed to file any opposition, despite multiple extensions.

1 The deadline for filing an opposition has passed and no opposition has been filed. As 2 such, Defendants/Counterclaimants hereby submit this Notice of Non-Opposition to 3 Defendants/Counterclaimants' Motion for Partial Summary Judgment. **AFFIRMATION** 4 Pursuant to NRS 239B.030 5 The undersigned does hereby affirm that the preceding document does not contain the 6 social security number of any person. 7 DATED this 7th day of December, 2017. 8 DICKINSON WRIGHT, PLLC 9 /s/ Brian R. Irvine 10 JOHN P. DESMOND Nevada Bar No. 5618 11 BRIAN R. IRVINE Nevada Bar No. 7758 12 ANJALI D. WEBSTER Nevada Bar No. 12515 13 100 West Liberty Street, Suite 940 Reno, NV 89501 14 Tel: (775) 343-7500 Fax: (775) 786-0131 15 Email: Jdesmond@dickinsonwright.com Email: Birvine@dickinsonwright.com 16 Email: Awebster@dickinsonwright.com 17 Attorney for Defendants Berry Hinckley Industries and Jerry Herbst 18 19 20 21 22 23 24 25 26 27 28

1 **CERTIFICATE OF SERVICE** 2 I certify that I am an employee of DICKINSON WRIGHT, PLLC and that on this date, 3 pursuant to NRCP 5(b), I am serving a true and correct copy of the attached **NOTICE OF NON-**4 OPPOSITION TO DEFENDANTS/COUNTERCLAIMANTS' MOTION FOR PARTIAL 5 **SUMMARY JUDGMENT** on the parties as set forth below: 6 Placing an original or true copy thereof in a sealed envelope placed for collection and 7 mailing in the United States Mail, Reno, Nevada, postage prepaid, following ordinary 8 business practices 9 Certified Mail, Return Receipt Requested 10 Via E-Mail 11 Placing an original or true copy thereof in a sealed envelope and causing the same to be 12 personally Hand Delivered 13 Federal Express (or other overnight delivery) Electronic Notification 14 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. 15 addressed as follows: 16 Brian P. Moquin David C. O'Mara 17 LAW OFFICES OF BRIAN P. MOQUIN THE O'MARA LAW FIRM, P.C. 3287 Ruffino Lane 311 E. Liberty Street 18 San Jose, California 95148 Reno, Nevada 89501 19 david@omaralaw.net bmoquin@lawprism.com 20 21 DATED this 7th day of December, 2017. 22 /s/ Mina Reel 23 An employee of Dickinson Wright, PLLC 24 25 26 27 28

A.App.3585
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CV14-01712
2018-01-04 05:30:42 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6466861

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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,

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,

٧S

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

Counter-defendants.

Case No. CV14-01712

Dept. No. 6

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

ORDER GRANTING DEFENDANTS'/ COUNTERCLAIMANTS' MOTION FOR SANCTIONS

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

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

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

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

Plaintiffs once again failed to respond to the *Motion* or request an extension.

Defendants then filed a second *Notice* of *Non-Opposition* to *Defendants'/Counterclaimants' Motion for Sanctions* ("Second Notice of Non-Opposition") and subsequent request for submission on December 18, 2017.

Under DCR 13(3), the failure of an opposing party to serve and file a written opposition may be construed as an admission that the motion is meritorious and consent to granting the same. DCR 13(3). Thus, the Court finds Plaintiffs' failure to file an opposition to Defendants' *Motion* constitutes both an admission that the *Motion* is meritorious and Plaintiffs' consent to granting said motion.

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

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

Accordingly, and good cause appearing therefor,

IT IS HEREBY ORDERED AND DECREED:

- Defendants'/Counterclaimants' Motion for Sanctions [Oral Argument Requested] is GRANTED.
- Defendants/Counterclaimants' Motion to Exceed Page Limit on Defendants/Counterclaimants' Motion for Sanctions is GRANTED.
- 3. Defendants shall submit a Proposed Order granting

 Defendants'/Counterclaimants' Motion for Sanctions, including factual and legal analysis and discussion, to Department 6 within twenty (20) days of the date of this Order in accordance with WDCR 9.

Dated this _____ day of January, 2018.



CERTIFICATE OF SERVICE I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 40 day of January, 2018, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following: BRIAN IRVINE, ESQ. JOHN P. DESMOND, ESQ. ANJALI D. WEBSTER, ESQ. BRIAN MOQUIN, ESQ. DAVID O'MARA, ESQ. And, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows: their Bre

A.App.3590
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Jacqueline Bryant
Clerk of the Court
Transaction # 6466778

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27 28 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

Case No. CV14-01712

Dept. No. 6

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

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

EDWARD C. WOOLEY AND JUDITH A WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,

Plaintiffs,

VS.

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

Defendants.

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

Counterclaimants,

VS

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

Counter-defendants.

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

Before this Court is *Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* ("Motion to Strike"), filed

November 14, 2017 by Defendants/Counterclaimants BERRY-HINCKLEY INDUSTRIES

("Berry-Hinckley") and JERRY HERBST ("Mr. Herbst") (collectively, "Defendants") by and through their counsel Brian Irvine, Esq. Also on November 14, 2017, Defendants filed a *Motion to Exceed Page Limit* in conjunction with their *Motion to Strike*. Plaintiffs LARRY J.

WILLARD, OVERLAND DEVELOPMENT CORPORATION, EDWARD C. WOOLEY and JUDITH WOOLEY (collectively, "Plaintiffs" unless individually referenced) failed to file an opposition to the *Motion to Strike*. As a result, Defendants filed a *Notice of Non-Opposition to Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* ("Notice of Non-Opposition") on December 7, 2017 and submitted the matter for decision thereafter.

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

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

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

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

Under DCR 13(3), the failure of an opposing party to serve and file a written opposition may be construed as an admission that the motion is meritorious and consent to granting the same. DCR 13(3). Thus, the Court finds Plaintiffs' failure to file an opposition to Defendants' *Motion to Strike* constitutes both an admission that the *Motion to Strike* is meritorious and Plaintiffs' consent to granting said motion. In addition, the Court finds Defendants' *Motion to Strike* has merit. As such, the Court finds both the *Motion to Strike* and the *Motion to Exceed Page Limit* are granted.

Accordingly, and good cause appearing therefor,

IT IS HEREBY ORDERED AND DECREED:

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

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

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

Dated this ____ day of January, 2018.

DISTRICT JUDGE

CERTIFICATE OF SERVICE I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 40 day of January, 2018, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following: BRIAN IRVINE, ESQ. JOHN P. DESMOND, ESQ. ANJALI D. WEBSTER, ESQ. BRIAN MOQUIN, ESQ. DAVID O'MARA, ESQ. And, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows: Hadi Bre

FILED Electronically CV14-01712 2018-01-05 01:43:22 PM Jacqueline Bryant Clerk of the Court 2540 Transaction # 6468348 1 **DICKINSON WRIGHT** JOHN P. DESMOND 2 Nevada Bar No. 5618 BRIAN R. IRVINE 3 Nevada Bar No. 7758 ANJALI D. WEBSTER 4 Nevada Bar No. 12515 100 West Liberty Street, Suite 940 5 Reno, NV 89501 Tel: (775) 343-7500 6 Fax: (775) 786-0131 Email: Jdesmond@dickinsonwright.com 7 Email: Birvine@dickinsonwright.com Email: Awebster@dickinsonwright.com 8 Attorney for Defendants 9 Berry Hinckley Industries, and Jerry Herbst 10 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA 11 IN AND FOR THE COUNTY OF WASHOE 12 13 LARRY J. WILLARD, individually and as CASE NO. CV14-01712 trustee of the Larry James Willard Trust Fund: 14 OVERLAND DEVELOPMENT DEPT. 6 CORPORATION, a California corporation; 15 EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the 16 Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, 17 18 Plaintiff. NOTICE OF ENTRY OF ORDER VS. 19 BERRY-HINCKLEY INDUSTRIES, a Nevada 20 corporation; and JERRY HERBST, an Individual; 21 Defendants. 22 23 BERRY-HINCKLEY INDUSTRIES, a 24 Nevada corporation; and JERRY HERBST, an individual; 25 Counterclaimants, 26 VS 27 28 Page 1 of 4

A.App.3595

A.App.3595

LARRY J. WILLARD, individually and as 1 trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT 2 CORPORATION, a California corporation; 3 Counter-defendants. 4 5 PLEASE TAKE NOTICE that on January 4, 2018, an Order Granting Defendants' 6 Motion for Partial Summary Judgment [Oral Argument Requested]. A true and correct copy of 7 the Order is attached hereto as Exhibit 1. 8 9 **AFFIRMATION** Pursuant to NRS 239B.030 10 The undersigned does hereby affirm that the preceding document does not contain the 11 social security number of any person. 12 13 DATED this 5th day of January, 2018. 14 **DICKINSON WRIGHT** 15 16 /s/ Brian R. Irvine DICKINSON WRIGHT 17 JOHN P. DESMOND Nevada Bar No. 5618 18 BRIAN R. IRVINE Nevada Bar No. 7758 19 ANJALI D. WEBSTER Nevada Bar No. 12515 100 West Liberty Street, Suite 940 20 Reno, NV 89501 21 Email: Jdesmond@dickinsonwright.com Email: Birvine@dickinsonwright.com Email: Awebster@dickinsonwright.com 22 23 Attorney for Defendants Berry Hinckley Industries, and Jerry Herbst 24 25 26 27 28 Page 2 of 4

1 **CERTIFICATE OF SERVICE** 2 I certify that I am an employee of DICKINSON WRIGHT, and that on this date, pursuant 3 to NRCP 5(b); I am serving a true and correct copy of the attached NOTICE OF ENTRY OF 4 ORDER on the parties through the Second Judicial District Court's EFlex filing system to the 5 following: 6 David C. O'Mara Brian P. Moquin 7 LAW OFFICES OF BRIAN P. MOQUIN THE O'MARA LAW FIRM 3287 Ruffino Lane 311 E. Liberty Street 8 Reno, Nevada 89501 San Jose, California 95148 9 DATED this 5th day of January, 2018. 10 /s/ Cindy S. Grinstead 11 An employee of DICKINSON WRIGHT 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 Page 3 of 4

EXHIBIT LIST

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

¹ Exhibit page count is exclusive of exhibit slip sheet,

FILED Electronically CV14-01712 2018-01-05 01:39:14 PM Jacqueline Bryan Clerk of the Cour 2540 Transaction # 6468**3**37 1 **DICKINSON WRIGHT** JOHN P. DESMOND 2 Nevada Bar No. 5618 BRIAN R. IRVINE 3 Nevada Bar No. 7758 ANJALI D. WEBSTER 4 Nevada Bar No. 12515 100 West Liberty Street, Suite 940 5 Reno, NV 89501 Tel: (775) 343-7500 6 Fax: (775) 786-0131 Email: Jdesmond@dickinsonwright.com 7 Email: Birvine@dickinsonwright.com Email: Awebster@dickinsonwright.com 8 Attorney for Defendants 9 Berry Hinckley Industries, and Jerry Herbst 10 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA 11 IN AND FOR THE COUNTY OF WASHOE 12 13 LARRY J. WILLARD, individually and as CASE NO. CV14-01712 trustee of the Larry James Willard Trust Fund; 14 DEPT. 6 OVERLAND DEVELOPMENT CORPORATION, a California corporation; 15 EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the 16 Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, 17 18 NOTICE OF ENTRY OF ORDER Plaintiff. 19 BERRY-HINCKLEY INDUSTRIES, a Nevada 20 corporation; and JERRY HERBST, an Individual; 21 Defendants. 22 23 BERRY-HINCKLEY INDUSTRIES, a 24 Nevada corporation; and JERRY HERBST, an individual; 25 Counterclaimants, 26 VS 27 28 Page 1 of 4

A.App.3599

A.App.3599

LARRY J. WILLARD, individually and as 1 trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT 2 CORPORATION, a California corporation; 3 Counter-defendants. 4 5 PLEASE TAKE NOTICE that on January 4, 2018, an Order Granting 6 Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert 7 Testimony of Daniel Gluhaich was entered. A true and correct copy of the Order is attached 8 hereto as Exhibit 1. 9 10 **AFFIRMATION** Pursuant to NRS 239B.030 11 The undersigned does hereby affirm that the preceding document does not contain the 12 13 social security number of any person. 14 DATED this 5th day of January, 2018. 15 **DICKINSON WRIGHT** 16 17 /s/ Brian R. Irvine DICKINSON WRIGHT 18 JOHN P. DESMOND Nevada Bar No. 5618 19 BRIAN R. IRVINE Nevada Bar No. 7758 20 ANJALI D. WEBSTER Nevada Bar No. 12515 21 100 West Liberty Street, Suite 940 Reno, NV 89501 22 Email: Jdesmond@dickinsonwright.com Email: Birvine@dickinsonwright.com 23 Email: Awebster@dickinsonwright.com 24 Attorney for Defendants Berry Hinckley Industries, and Jerry Herbst 25 26 27 28 Page 2 of 4

A.App.3600

A.App.3601

1 **CERTIFICATE OF SERVICE** 2 I certify that I am an employee of DICKINSON WRIGHT, and that on this date, pursuant 3 to NRCP 5(b); I am serving a true and correct copy of the attached NOTICE OF ENTRY OF 4 ORDER on the parties through the Second Judicial District Court's EFlex filing system to the 5 following: 6 Brian P. Moquin David C. O'Mara 7 LAW OFFICES OF BRIAN P. MOQUIN THE O'MARA LAW FIRM 3287 Ruffino Lane 311 E. Liberty Street 8 Reno, Nevada 89501 San Jose, California 95148 9 DATED this 5th day of January, 2018. 10 /s/ Cindy S. Grinstead 11 An employee of DICKINSON WRIGHT 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 Page 3 of 4

EXHIBIT LIST

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

¹ Exhibit page count is exclusive of exhibit slip sheet.

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FILED Electronically CV14-01712 2018-01-05 01:46:18 PM Jacqueline Bryant Clerk of the Court 2540 Transaction # 6468357 1 **DICKINSON WRIGHT** JOHN P. DESMOND 2 Nevada Bar No. 5618 BRIAN R. IRVINE 3 Nevada Bar No. 7758 ANJALI D. WEBSTER 4 Nevada Bar No. 12515 100 West Liberty Street, Suite 940 5 Reno, NV 89501 Tel: (775) 343-7500 6 Fax: (775) 786-0131 Email: Jdesmond@dickinsonwright.com 7 Email: Birvine@dickinsonwright.com Email: Awebster@dickinsonwright.com 8 Attorney for Defendants 9 Berry Hinckley Industries, and Jerry Herbst 10 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA 11 IN AND FOR THE COUNTY OF WASHOE 12 13 LARRY J. WILLARD, individually and as CASE NO. CV14-01712 trustee of the Larry James Willard Trust Fund; 14 OVERLAND DEVELOPMENT DEPT. 6 CORPORATION, a California corporation; 15 EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the 16 Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, 17 18 Plaintiff. NOTICE OF ENTRY OF ORDER 19 BERRY-HINCKLEY INDUSTRIES, a Nevada 20 corporation; and JERRY HERBST, an Individual: 21 Defendants. 22 23 BERRY-HINCKLEY INDUSTRIES, a 24 Nevada corporation; and JERRY HERBST, an individual; 25 Counterclaimants, 26 VS 27 28 Page 1 of 4

A.App.3603

A.App.3603

LARRY J. WILLARD, individually and as 1 trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT 2 CORPORATION, a California corporation; 3 Counter-defendants. 4 5 PLEASE TAKE NOTICE that on January 4, 2018, an Order Granting 6 Defendants'/Counterclaimants' Motion for Sanctions [Oral Argument Requested]. A true and 7 correct copy of the Order is attached hereto as Exhibit 1. 8 9 <u>AFFIRMATION</u> Pursuant to NRS 239B.030 10 The undersigned does hereby affirm that the preceding document does not contain the 11 social security number of any person. 12 13 DATED this 5th day of January, 2018. 14 **DICKINSON WRIGHT** 15 /s/ Brian R. Irvine 16 DICKINSON WRIGHT 17 JOHN P. DESMOND Nevada Bar No. 5618 18 BRIAN R. IRVINE Nevada Bar No. 7758 19 ANJALI D. WEBSTER Nevada Bar No. 12515 20 100 West Liberty Street, Suite 940 Reno, NV 89501 21 Email: Jdesmond@dickinsonwright.com Email: Birvine@dickinsonwright.com 22 Email: Awebster@dickinsonwright.com 23 Attorney for Defendants Berry Hinckley Industries, and Jerry Herbst 24 25 26 27 28 Page 2 of 4

1 **CERTIFICATE OF SERVICE** 2 I certify that I am an employee of DICKINSON WRIGHT, and that on this date, pursuant 3 to NRCP 5(b); I am serving a true and correct copy of the attached NOTICE OF ENTRY OF 4 ORDER on the parties through the Second Judicial District Court's EFlex filing system to the 5 following: 6 Brian P. Moquin David C. O'Mara 7 LAW OFFICES OF BRIAN P. MOQUIN THE O'MARA LAW FIRM 3287 Ruffino Lane 311 E. Liberty Street 8 San Jose, California 95148 Reno, Nevada 89501 9 DATED this 5th day of January, 2018. 10 /s/ Cindy S. Grinstead 11 An employee of DICKINSON WRIGHT 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 Page 3 of 4

A.App.3605

EXHIBIT LIST

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

¹ Exhibit page count is exclusive of exhibit slip sheet.

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FILED Electronically CV14-01712 2018-03-06 04:22:28 PM Jacqueline Bryant Clerk of the Court 3060 1 Transaction # 6564287 DICKINSON WRIGHT JOHN P. DESMOND 2 Nevada Bar No. 5618 BRIAN R. IRVINE 3 Nevada Bar No. 7758 ANJALI D. WEBSTER 4 Nevada Bar No. 12515 100 West Liberty Street, Suite 940 5 Reno, NV 89501 Tel: (775) 343-7500 6 Fax: (775) 786-0131 Email: Jdesmond@dickinsonwright.com 7 Email: Birvine@dickinsonwright.com Email: Awebster@dickinsonwright.com 8 Attorney for Defendants 9 Berry Hinckley Industries, and Jerry Herbst 10 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA 11 IN AND FOR THE COUNTY OF WASHOE 12 13 LARRY J. WILLARD, individually and as CASE NO. CV14-01712 trustee of the Larry James Willard Trust Fund; 14 OVERLAND DEVELOPMENT DEPT. 6 CORPORATION, a California corporation; 15 EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the 16 Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, 17 18 Plaintiff, VS. 19 BERRY-HINCKLEY INDUSTRIES, a Nevada 20 corporation; and JERRY HERBST, an Individual; 21 Defendants. 22 23 BERRY-HINCKLEY INDUSTRIES, a 24 Nevada corporation; and JERRY HERBST, an individual; 25 Counterclaimants, 26 vs 27 28 Page 1 of 34

A.App.3607

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

Counter-defendants.

#PROPOSED | FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON DEFENDANTS' MOTION FOR SANCTIONS

- 1. Plaintiffs in this matter are Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund; Overland Development Corporation, a California corporation (collectively, "Willard" or the "Willard Plaintiffs"); Edward E. Wooley and Judith A. Wooley, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000 (collectively, "Wooley"). The Willard Plaintiffs are also counter-defendants in this matter.
- 2. Plaintiffs' counsel are Brian Moquin, a California attorney who has been admitted to practice in Nevada *pro hac vice*, and David O'Mara of the O'Mara Law Firm, P.C., who is serving as local counsel.
- 3. Defendants/counter-claimants in this matter are Berry-Hinckley Industries ("BHI") and Jerry Herbst (collectively, "Defendants").
- 4. The Motion before this Court is Defendants' Motion for Sanctions, wherein Defendants sought, in pertinent part, dismissal with prejudice of this action pursuant to NRCP 16.1(e)(3), NRCP 37(b)(2), NRCP 41(b), and *Blanco v. Blanco*, 129 Nev. ____, 311 P.3d 1170. (Defendants' Motion).
- 5. Defendants' Motion was filed on November 15, 2017. Plaintiffs did not file an Opposition, despite Defendants and this Court granting several extensions. Defendants' Motion was submitted to this Court on December 18, 2017.

Page 2 of 34

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

FINDINGS OF FACT

Plaintiffs' Complaint

- 7. On August 8, 2014, Plaintiffs commenced this action against Defendants, filing a joint complaint against them. (Complaint).¹
- 8. Willard sought the following damages against Defendants for an alleged breach of the lease between Willard and BHI: (1) "rental income" for \$19,443,836.94, discounted by 4% per the lease to \$15,741,360.75 as of March 1, 2013; and (2) certain property-related damages, such as insurance and installation of a security fence. (First Amended Complaint ("FAC")).
- 9. Willard had also sought several other categories of damages which have since been dismissed or withdrawn. (May 30, 2017, Order).
- 10. Wooley sought the following damages against Defendants for an alleged breach of the lease between Wooley and BHI: (1) "rental income in the amount of \$4,420,244.00 that [Wooley] otherwise would have received," discounted by a rate of 4% as specified in the Wooley Lease to \$3,323,543.90 as of March 1, 2013; (2) a "diminution in value in an amount to be proven at trial but which is at least \$2,000,000"; (3) property taxes in the amount of \$1,500; (4) insurance for \$3,840; (5) maintenance costs of \$4,000; (6) management costs of \$2,500; and (7) security deposit from subtenant for \$2,485.00. (FAC).
- 11. Wooley had also sought several other categories of damages which have since been dismissed or withdrawn. (May 30, 2017, Order).

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

Plaintiffs' Initial Disclosures

- 12. On December 12, 2014, Plaintiffs provided their initial disclosures. (Exhibit 1 to Defendants' Motion for Sanctions).
- 13. However, while Plaintiffs disclosed anticipated witnesses and documents, they did not provide any computation of their claimed damages, notwithstanding the express requirement to do so set forth in NRCP 16.1(a)(1)(C).

Defendants' February 12, 2015, Letter

- 14. On February 12, 2015, Defendants wrote to Plaintiffs regarding the deficiencies in their initial disclosures, and informing them that the disclosures did not include the damages computations required by the Nevada Rules of Civil Procedure. (Exhibit 4 to Defendants' Motion for Sanctions).
- 15. Defendants advised Plaintiffs that their failure to timely comply would result in Defendants seeking sanctions. *Id.*
- 16. However, Plaintiffs did not comply with their NRCP 16.1 obligations upon receipt of this letter or any time thereafter.

Plaintiffs' Interrogatory Responses

- 17. In April of 2015, Defendants served Plaintiffs with written discovery. (June 23, 2015, Motion to Compel).
- 18. Defendants had not received any NRCP 16.1 damages disclosures from Plaintiffs, and asked Plaintiffs in separate interrogatories to "[p]lease explain in detail how the damages...alleged in your Amended Complaint were calculated." (Plaintiffs' Interrogatory Responses, Exhibits 5 and 6 to Defendants' Motion for Sanctions).
- 19. Plaintiffs did not respond, even after Defendants granted them multiple extensions, requiring Defendants to file a motion to compel. (June 23, 2015, Motion to Compel).

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from this Court to do so.

discovery obligations and Court orders.

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conference before this Court to provide Defendants with discovery responses to Defendants' outstanding discovery requests in advance of the parties' depositions scheduled to begin on

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

August 20, 2015. (Exhibit 7 to Defendants' Motion for Sanctions).

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

This Court granted the Motion to Compel, which Plaintiffs failed to oppose.

Only then did Plaintiffs respond, and, in pertinent part, simply repeated the

Notably, these Court-ordered responses were the last time Plaintiffs provided

Plaintiffs did not pay Defendants' reasonable expenses, despite the direct order

Further, the fact that the Court imposed monetary sanctions on Plaintiffs in 2015

On August 28, 2015, Defendants wrote to Plaintiffs, referencing Plaintiffs'

Therein, this Court ordered, in pertinent part, that Plaintiffs shall pay Defendants' reasonable

allegations in their Complaint when discussing their damages. (Plaintiffs' Interrogatory

anything that even came close to a damages disclosure until October of 2017, and even these

clearly did not deter any of their subsequent conduct in continuing to fail to comply with their

continued failure to comply with discovery obligations and resulting prejudice to Defendants,

and noting that Plaintiffs had also yet to comply with the promise they made during a status

expenses incurred in making the motion, including attorneys' fees. (July 1, 2015, Order).

Responses, Exhibits 5 and 6 to Defendants' Motion for Sanctions).

did not comply with the requirements of NRCP 16.1.

continuance of the trial date and an extension of all discovery deadlines. (September 3, 2015, Stipulation and Order).

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

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

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

- 28. On April 20, 2016, Defendants continued to request the information that they sought in their March 2016 letters, noting that Plaintiffs had promised to provide the documents but they had not done so. (Exhibit 10 to Defendants' Motion).
- 29. Defendants again requested Plaintiffs' NRCP 16.1 damages calculations, noting that "this is an issue which we have raised on multiple occasions." *Id*.
 - 30. Yet again, Plaintiffs did not provide their NRCP 16.1 calculations.
- 31. Defendants also stated that "[y]our clients' failure to provide us with the discovery documents ha[s] prejudiced our ability to prepare a defense on behalf of our clients. Without such documents, we cannot depose several witnesses, and our experts are unable to complete their opinions. This also jeopardizes our ability to submit dispositive motions with complete information in time for the Court to fully consider those motions." *Id*.
- 32. Due to Plaintiffs continued failure to meet discovery obligations, the parties agreed to continue the trial date for a second time. The agreed-upon basis for a continuance was that Plaintiffs needed to provide Defendants with documents and information, and also needed to provide "Plaintiffs' NRCP 16.1 damages calculations." (May 2, 2016, Stipulation and Order). This Court signed the Order, adding that "no further continuances will be granted." *Id*.
- 33. Following the second continuance, trial was scheduled for May 2, 2017, and discovery was set to close on March 2, 2017.

<u>Plaintiffs' Unsuccessful Purported Disclosure of Daniel Gluhaich as a Non-Retained Expert Witness</u>

- 34. On December 2, 2016, Plaintiffs purported to disclose Daniel Gluhaich as a non-retained expert. (Exhibit 11 to Defendants' Motion).
- 35. However, while Plaintiffs' disclosure generally referenced the categories as to which Mr. Gluhaich was expected to testify, Plaintiffs did not provide "a summary of the facts

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

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

The Parties' December 2016 Correspondence

- 38. On December 9, 2016, Defendants' counsel wrote that Defendants did not receive the amended disclosure, or dates pursuant to which Defendants could depose Mr. Gluhaich. (Exhibit 13 to Defendants' Motion). Defendants advised Plaintiffs' counsel that "[o]bviously, we will be prejudiced by further delay in learning all of the expert opinion testimony that plaintiffs intent to present at trial. Please provide that information immediately." *Id*.
- 39. Defendants also addressed Plaintiffs' continued failure to provide their NRCP 16.1 damages. *Id.* On December 5, 2016, Wooley had provided a spreadsheet of damages expressly "for use in the ongoing informal settlement negotiations between Tim Herbst and Ed Wooley," and asked Defendants' counsel to "forward...to Tim Herbst as [Defendants' counsel saw] fit." (Exhibit 12 to Defendants' Motion). Plaintiffs' counsel also stated that he would "be

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

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

- 40. On December 23, 2016, Defendants' counsel discussed with Plaintiffs' counsel Plaintiffs' continued failure to properly disclose Mr. Gluhaich or even work with Defendants on expert deposition dates, even though Defendants had provided Plaintiffs an extension. (Exhibit 14 to Defendants' Motion).
- 41. Defendants also stated that this conduct was prejudicing Defendants and making it impossible for Defendants to comply with discovery deadlines for rebuttal experts. *Id*.
- 42. Next, Defendants expressed their concerns to Wooley that the damages spreadsheet recently provided for settlement purposes only, which Defendants could not share with their expert or use to prepare any defenses, contained a "new damages model that Plaintiffs had never before utilized in the case," and prejudiced Defendants in that they were unable to conduct discovery about this new computation of damages or the methodology used to arrive at the purported numbers in the Wooley settlement-only spreadsheet. *Id*.
- 43. Defendants concluded that "[w]e still have never received an NRCP 16.1 damages computation from either set of Plaintiffs, despite numerous demands. Please ensure that Plaintiffs meet their obligations to provide such computations immediately, or we will seek to preclude Plaintiffs from seeking any non-disclosed damages at trial, including those contained in the Wooley spreadsheet you sent me on December 5." *Id.* Defendants also added that they reserved the right to provide Plaintiffs' damages disclosure to their expert so that she could provide new opinions about any new damages model. *Id.*
- 44. On December 27, 2016, Plaintiffs' counsel responded. (Exhibit 15 to Defendants' Motion). Plaintiffs did not address their failure to provide their damages disclosures in any way, nor did they provide an expert disclosure of Mr. Gluhaich compliant

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

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

This Court's January 10, 2017, Hearing

- 46. On January 10, 2017, this Court held a hearing on Defendants' motion for partial summary judgment on Plaintiffs' overreaching consequential damages, which Messrs. Willard and Wooley personally attended. (January 10, 2017, transcript).
- 47. At the hearing, in pertinent part, Defendants' counsel informed this Court that Defendants had never received a damages computation from the Plaintiffs pursuant to NRCP 16.1, despite Defendants' many demands. *Id.* at 18. Plaintiffs' counsel attempted to claim that Plaintiffs' interrogatory responses satisfied Plaintiffs' requirements. *Id.* at 42-43. But Plaintiffs' counsel admitted, in open court, that "with respect to Willard, they do not" have an up-to-date, clear picture of Plaintiffs' damages claims. *Id.*
- 48. Plaintiffs' counsel also represented to this Court that Wooley's damages disclosures to Defendants were complete and up-to-date. *Id.* This was a misrepresentation, as Wooley had never provided Defendants with any NRCP 16.1 damages disclosures, and certainly had not provided any updated disclosures since the court-ordered discovery response in July of 2015. Further, the December 2016 damages spreadsheet was for use in settlement negotiations only per Wooley's counsel's own words, and therefore was not a disclosure in this litigation that could be utilized as contemplated by the Nevada Rules of Civil Procedure. (Exhibit 12 to Defendants' Motion). Defendants' counsel apprised this Court of this fact during the hearing. (January 10, 2017, transcript).

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

The February 9, 2017, Stipulation and Order

- In spite of the rapidly impending trial date (at the time, May 2, 2017) and close 50. of discovery (at the time, March 2, 2017), Plaintiffs did not provide Defendants with any damages disclosures or otherwise supplement or update their discovery responses in any way. Nor did Plaintiffs supplement their improper disclosure of Mr. Gluhaich or properly disclose any expert.
- On February 3, 2017, Defendants wrote Plaintiffs, prefacing their letter by 51. stating that "as of the date of this letter, we have less than thirty (30) days to complete discovery, less than sixty (60) days to fully-brief and submit dispositive motions to the Court for decision and less than three months until the current trial date." (Exhibit 16 to Defendants' Motion). Defendants wrote this letter to inform Plaintiffs that because of their failure to comply with their obligations, Defendants would not be able to timely complete discovery or submit dispositive motions, all to Defendants' prejudice, and to inform Plaintiffs that their conduct necessitated yet another continuance of the trial date. Id.
- In the letter, Defendants first addressed Plaintiffs' obstinate refusal to comply 52. with expert disclosure requirements. Id. Defendants reminded Plaintiffs that Plaintiffs "were indisputably aware of the fact that Plaintiffs' disclosures did not comply with the Nevada Rules of Civil Procedure at the time [they] served the deficient disclosure or immediately thereafter, as demonstrated by [the parties'] December 5, 2016, telephonic conversation." Id. However, despite Defendants having granted Plaintiffs an extension, Plaintiffs had not even attempted to comply with the Nevada Rules of Civil Procedure more than two months after the deadline, "without any justification whatsoever." Id.
- Defendants further informed Plaintiffs that their "failure to comply with the 53. Nevada Rules of Civil Procedure in the first instance, or to rectify their failure by providing an

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

- 54. Defendants also addressed Plaintiffs' continued failure to provide Defendants with an NRCP 16.1 damages computation. *Id.* Defendants stated that it would be "patently prejudicial to Defendants to receive Plaintiffs' damages model within mere days of the close of discovery," and it would be impossible for Defendants' expert to opine on any new damages theories under the current discovery deadlines if Plaintiffs were to seek any additional or different types of damages. *Id.*
- 55. Finally, Defendants requested that Plaintiffs also provide other outstanding discovery, stating that Plaintiffs "have been promising to disclose these documents for more than 10 months, but have yet to do so." *Id*.
- 56. Based on these issues, Defendants asked for a continuance of the trial date so that Plaintiffs could comply with their obligations such that Defendants could receive time to prepare their defenses in the timeline entitled to them by the Nevada Rules of Civil Procedure and the parties' agreements. *Id.*
- 57. Plaintiffs agreed to a third trial continuance, and on February 9, 2017, the parties signed a stipulation which contained several express recitals and stipulations regarding Plaintiffs' ongoing failure to comply with discovery obligations.
- 58. First, Plaintiffs agreed that they never properly disclosed Mr. Gluhaich and that this conduct had been prejudicial to Defendants:
 - 4. On December 2, 2016, Plaintiffs disclosed Dan Gluhaich as a non-retained expert. Plaintiffs' disclosure of Mr. Gluhaich indicated that Mr. Gluhaich would offer testimony regarding twelve separate subject matters and included Mr. Gluhaich's resume, but did not include "a summary of the facts and opinions to which the witness is expected to testify" as required by NRCP 16.1(a)(2)(B).

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

(February 9, 2017, Stipulation and Order).

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

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1 2	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.
$\begin{bmatrix} 2 \\ 3 \end{bmatrix}$	10. Because Plaintiffs have not yet provided a
4	complete NRCP 16.1 damages disclosure, Defendants will not be able to complete necessary fact discovery on Plaintiffs' damages,
5	or to disclose an updated expert report of Michelle Salazar within the time currently allowed for discovery
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7	Id.60. Plaintiffs stipulated that this Court should enter an order which, in pertinent part,
8	requires "Plaintiffs to serve Defendants with an updated initial expert disclosure of Dan
	Gluhaich that is fully-compliant with NRCP 16.1 and NRCP 26 within thirty (30) days of the
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10	date of the Order approving this Stipulation." <i>Id</i> .
11	61. Plaintiffs also stipulated to other pertinent deadlines:
12 13	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
14	submitted by Plaintiffs shall be extended until sixty (60) days before the close of discovery
15	5. The deadline for Defendants to serve any rebuttal expert disclosures shall be extended until forty-five (45) days
16	after Plaintiffs serve Defendants with an updated initial expert disclosure of Dan Gluhaich that is fully-compliant with NRCP
17	16.1 and NRCP 26.
18	Id.
19	62. The Stipulation also included a certification from counsel that "[u]ndersigned
20	counsel certifies that their respective clients have been advised that a stipulation for continuance
21	is to be submitted on their behalf and that the parties have no objection thereto." <i>Id</i> .
22	63. This Court entered an Order consistent with the stipulation on February 9, 2017
23	Id.
24	64. However, Plaintiffs did nothing as required by the Stipulation since the entry of
25	this Order or the stipulation of the parties to rectify their failure to meet their outstanding
26	discovery obligations.
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65. The parties set a trial date of January 29, 2018, meaning that, per the Stipulation and Order, discovery was set to close on November 15, 2017.

This Court's May 30, 2017, Order

- 66. On May 30, 2017, this Court entered an Order granting Defendants' motion for partial summary judgment. (Order).
- In pertinent part, this Court stated that "[i]t is further ordered Plaintiffs shall 67. serve, within fifteen (15) days of entry of this order, an updated NRCP 16.1 damage disclosure." Id.
- 68. Again, Plaintiffs completely ignored the requirements and obligations imposed by this order. They have failed to both properly disclose Mr. Gluhaich or to provide damages computations, despite the express requirements of the NRCP and this Court's Orders.

Plaintiffs' Motions for Summary Judgment

- After three years of obstinate refusal to provide Defendants with an NRCP 16.1 69. damages calculation or to supplement any damages calculations, and after nearly one year of refusing to comply with the requirements to properly disclose an expert, Plaintiffs filed motions for summary judgment in which they requested brand new, never-disclosed types, categories, and amounts of damages with only four weeks remaining in discovery. (Motions for Summary Judgment).
- Further, their calculations were based upon opinions of Mr. Gluhaich, an expert 70. witness who was never properly disclosed, and who primarily based his opinions on appraisals that were also never disclosed. Id.
- These Motions were filed with only four weeks remaining in discovery—putting 71. Defendants in the exact same predicament that they were placed in February of 2017— Defendants could not engage in the discovery (fact and expert) necessary to adequately respond to Plaintiffs' brand new information, untimely disclosures, and new requests for relief. (Exhibit 16 to Defendants' Motion; February 9, 2017, Stipulation and Order).

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

Willard's Motion

- In Willard's Motion, Willard sought more than triple the amount of damages 73. (nearly \$40 million more) than he sought in the complaint and ostensibly throughout this case.
- Willard also had a brand new, different basis for his claimed "rent" damages: the 74. liquidated damages provision in the Lease. Unlike the damages sought in his Complaint, the liquidated damages clause contains a variable—reasonable rental value—that would necessarily require Willard to provide expert opinion to support his request and meet his burden of proof. (Willard Lease; Willard Motion).
- Willard also had a brand new claim for diminution in value damages that would 75. also require Willard to offer expert opinions to meet his burden of proof. (Willard's Motion for Summary Judgment).
 - Default interest was a brand new component of Willard's claimed damages. Id. 76.
- The property-related damages now had a different purported value and amount. 77. Id.
- Willard's damages were based upon the opinions of Mr. Gluhaich, an 78. undisclosed expert witness, and therefore Defendants did not have the chance to explore Mr. Gluhaich's opinions or rebut them as they are expressly entitled to do under Nevada law. Id.
- Willard and his purported expert witness relied upon appraisals from 2008 and 79. 2014 which were never disclosed in this litigation, despite Willard's NRCP 16.1 and NRCP 26(e) obligations and affirmative discovery requests served by Defendants. See also (Exhibit 17 to Defendants' Motion ("Please produce any and all appraisals for the Property from January 1, 2012 through present.")).

Wooley's Motion

- 80. Wooley sought nearly double the amount of damages that he sought in his complaint and ostensibly throughout this case. (Wooley Motion).
- 81. Wooley used different bases for his claimed "rent" damages. Unlike the damages sought in his Complaint, the liquidated damages clause contains a variable—reasonable rental value—that would necessarily require Wooley to introduce an expert opinion to meet his burden of proof, which Defendants would be entitled to rebut under Nevada law. (*Id.*; Exhibit 19 to Defendants' Motion). Wooley's basis for these damages was also different because Mr. Wooley had testified at his deposition that he had not yet terminated the lease and that it was ongoing, yet termination is a prerequisite to utilizing the liquidated damages formula per the parties' lease. (Exhibit 18 to Defendants' Motion; Exhibit 19 to Defendants' Motion). Thus, Wooley was proceeding on an entirely new theory.
- 82. Default interest was also a brand new component of Wooley's claimed damages. (Wooley Motion).
- 83. The property-related damages were based in part upon new damages and documents that were not disclosed to Defendants. *Id.*
- 84. Wooley's damages were based upon the opinions of Mr. Gluhaich, an undisclosed expert, and therefore Defendants did not have the chance to explore Mr. Gluhaich's opinions or rebut them as they were entitled to do. *Id.*; (February 9, 2017, Stipulation and Order).
- 85. Wooley and his purported expert relied upon an appraisal to establish "value" that was not previously disclosed in this litigation, despite Wooley's NRCP 16.1 and NRCP 26(e) obligations. (Exhibit 18 to Defendants' Motion (wherein Wooley stated that he had an appraisal performed when he bought the property, but had not produced that to his lawyer)).

Timing of the Motions

- 86. At this point in discovery, Defendants had obviously only been able to prepare defenses to the claimed bases for damages that Plaintiffs asserted in the Complaint and Interrogatory responses, not Plaintiffs' brand new, previously undisclosed, bases for damages.
- 87. This timing of these Motions undeniably deprived Defendants of the process that the parties expressly agreed was necessary to rebut any properly-disclosed expert opinions or properly-disclosed NRCP 16.1 damages calculations, as ordered by this Court. (February 9, 2017, Stipulation and Order).
- 88. Indeed, the conduct discussed herein is part of a larger pattern of Plaintiffs to ignore their discovery obligations. Defendants have been forced to file two motions to compel and a motion for contempt and sanctions, simply to have Plaintiffs comply with their discovery obligations.
- 89. Defendants have been required repeatedly to go to extraordinary lengths to attempt to force Plaintiffs to comply with basic obligations and deadlines imposed by the NRCP. (Exhibits 20-23 to Defendants' Motion).
- 90. This Court has also issued several Orders requiring Plaintiffs to meet their discovery obligations, but Plaintiffs have blatantly ignored those Orders.
- 91. Plaintiffs never submitted their Motions for Summary Judgment by the December 15, 2017 deadline to submit dispositive motions, or any time thereafter.

This Court's December 12, 2017, Hearing

- 92. On November 15, 2017, Defendants filed, *inter alia*, Defendants' Motion for Sanctions.³
- 93. Therein, Defendants requested that this Court dismiss Plaintiffs' case with prejudice as a sanction for Plaintiffs' discovery violations.

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

- On December 6, 2017, Plaintiffs' filed a Request for a Brief Extension of Time to Respond to Defendants' Three Pending Motions, and to Extend the Deadline for Submission
- At the Pre-Trial Status Conference on December 12, 2017, this Court granted Plaintiffs' Request for Extension and directed Plaintiffs to respond no later than Monday, December 18, 2017, at 10 AM.4 This Court further directed Defendants to reply no later than January 8, 2018, and set the parties' Motions for oral argument on January 12, 2018.
- This Court also admonished Plaintiffs that "you need to know going into these oppositions, that I'm very seriously considering granting all of it." (December 12, 2017,
- This Court also admonished Plaintiffs that "you know going into this motion for sanctions that you're—I haven't decided it, but I need to see compelling opposition not to grant
- However, Plaintiffs did not file any opposition to Defendants' Motions by December 18 or any time thereafter, nor did Plaintiffs request any further extension. In fact, this Court and Defendants' counsel have not heard anything from Plaintiffs or their counsel since
- Defendants filed a notice of non-opposition to their Motions and request for submission of their Motions on December 18.

CONCLUSIONS OF LAW

Legal standard

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

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

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

If an attorney fails to reasonably comply with **any** provision in [NRCP 16.1], or if an attorney or a party fails to comply with an **order** entered pursuant to [NRCP 16.1(d)], the court, upon motion or upon its own initiative, **shall** impose upon a party or a party's attorney, or both, appropriate sanctions in regard to the failure(s) as are just, including the following:

- (A) Any of the sanctions available pursuant to Rule 37(b)(2) and Rule 37(f);
- (B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).

(Emphases added).

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

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

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

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

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

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

Plaintiffs' Conduct Demands Dismissal with Prejudice

- 111. When considering the issuance of dismissal with prejudice as a sanction, the Nevada Supreme Court has held that "[p]rocedural due process considerations require that such case-concluding discovery sanctions be just and that they relate to the claims at issue in the violated discovery order." *Blanco*, 129 Nev. at , 311 P.3d at 1174.
- 112. Further, the Court must consider pertinent factors, including the extent of the offending party's willfulness, whether the non-offending party would be prejudiced by imposition of a lesser sanction, whether dismissal is too severe for the particular discovery abuse, the feasibility and fairness of less severe sanctions, the policy favoring adjudication of cases on their merits, and the need for deterring similar abusive conduct. *Id.* Dismissal should only occur in the most extreme of cases. *Id.*
- 113. However, district courts are not required to consider every factor, so long as the district court's analysis is thoughtfully performed. *See generally Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990).
- 114. Here, the factors readily demonstrate that dismissal with prejudice is warranted, and that there is no due process violation in so doing.

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

- 115. It must be emphasized as a threshold matter that Plaintiffs never opposed Defendants' Motion.
- 116. Under DCR 13(3), the failure of an opposing party to serve and file a written opposition may be construed as an admission that the motion is meritorious and consent to granting the same.
- 117. Thus, this Court finds that Plaintiffs' failure to file an opposition constitutes both an admission that the Motion is meritorious and Plaintiffs' consent to granting Defendants' Motion.
- 118. However, separate from this consideration, good cause exists to dismiss this case.

- 119. Plaintiffs' failure to provide damages disclosures are so central to this litigation, and to Defendants' rights and ability to defend this case, that dismissal of the entire case is necessary.
- 120. Plaintiffs have also completely failed to properly disclose an expert witness, waiting instead until the virtual end of discovery to attempt to utilize an undisclosed expert witness to support their Motions for Summary Judgment without complying with the requirements of the Nevada Rules of Civil Procedure, when it was too late for Defendants to disclose rebuttal expert testimony or otherwise defend against Plaintiffs' claims for damages.
- 121. Plaintiffs have also ignored or failed to comply with multiple separate discovery obligations throughout this case, forcing Defendants to repeatedly file motions to compel, and necessitating that the trial and discovery deadlines be extended on three occasions to accommodate for Plaintiffs' continued noncompliance.
- 122. Further, Plaintiffs have ignored this Court's express admonition to Plaintiffs that this Court was "seriously considering" dismissal and that Plaintiff's Oppositions would need to be "compelling." Plaintiffs did not even attempt to file oppositions, even after this warning.
- 123. Indeed, Plaintiffs have exhibited complete disregard for this Court's Orders, deadlines imposed by this Court, and the judicial process in general.

Plaintiffs' violations are willful

- 124. Plaintiffs' violations are willful. In addition to the plain language of NRCP 16.1, Plaintiffs have been on direct notice for three years that they have not complied with NRCP 16.1(a)(1)(C), yet have not attempted to rectify their wrongdoing. *Supra*.
- 125. This Court has ordered Plaintiffs to provide their damages disclosures, but Plaintiffs blatantly disregarded these orders. (January 10, 2017, Transcript at 68; May 30, 2017, Order); see also Perez v. Siragusa, 2008 WL 2704402, at *4 (E.D.N.Y. July 3, 2008) (dismissal under FRCP 37 and 41, noting that "[n]on-compliance with discovery orders will be deemed

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

- 126. Plaintiffs acknowledged in two stipulations that they have not complied with NRCP 16.1, yet have not even attempted to do so, despite promising and being ordered to comply. *See, e.g.*, (January 10, 2017, Transcript (for Willard); February 9, 2017, Stipulation and Order; May 2, 2016, Stipulation and Order).
- 127. Further, Wooley misrepresented to this Court that he had provided complete and up-to-date disclosures to Defendants when he had not. (January 10, 2017, Transcript). If anything, Wooley had only provided a spreadsheet that was, per Wooley's own words, for use in "settlement negotiations." *See* NRS 48.105(1). Defendants have informed Wooley repeatedly, including in open court, that this document provided for settlement negotiations does not equate to a disclosure, and Plaintiffs have never authorized Defendants to use that spreadsheet for litigation purposes in any manner. *See, e.g.*, (January 10, 2017, Transcript 62).
- 128. Plaintiffs' bad faith motives in waiting to ambush Defendants are also plainly evidenced by their eleventh-hour Motions requesting brand-new, different, categories and amounts of damages for double and triple what was originally sought, while such alleged damages were based upon information that has been in Plaintiffs' possession for the entire pendency of this case. Plaintiffs' strategic decision to only disclose their damages in their Motions for Summary Judgment prejudiced Defendants by depriving them of the opportunity to defend against damages that had never been previously disclosed.
- 129. Plaintiffs' failure to properly disclose an expert witness is similarly willful. Plaintiffs acknowledged immediately after the initial purported "disclosure" that the disclosure did not comply with Nevada law. *See* (December 5, 2016, email (three days after disclosures due) (wherein Plaintiffs' counsel stated that "[Defendants] agreed to allow Plaintiffs to provide an amended witness disclosure by mid-afternoon Thursday, December 8, 2016 to include the facts and conclusions to which Mr. Gluhaich will be testifying...."), Exhibit 12 to Defendants' Motion; Exhibits 14 and to Defendants' Motion).

- 130. Plaintiffs agreed that they failed to comply with NRCP 16.1(a)(2)(B) and agreed to the entry of a Court order requiring them to properly disclose an expert by March 11, 2017. (February 9, 2017, Stipulation and Order).
- 131. Yet, Plaintiffs did not even attempt to provide a proper disclosure of Mr. Gluhaich at any time in 2017.
- 132. Then, on October 17 and 18, 2017, less than four weeks prior to the close of discovery, Plaintiffs filed Motions for Summary Judgment, referring to Mr. Gluhaich as their "designated expert," (Willard Motion at 19-20; Wooley Motion at 12-13), without even acknowledging their noncompliance, much less providing justification for it.
- 133. Further, even a cursory review of Mr. Gluhaich's Affidavits in support of the Motions demonstrates that the purported facts and opinions that he provided could have been timely disclosed in December of 2016, further demonstrating that there was no justification other than willful noncompliance. (Gluhaich Affidavit re: Willard (relying exclusively on events that occurred in 2014 or earlier); Gluhaich Affidavit re: Wooley (relying exclusively on events that occurred in 2015 or earlier)).
- 134. These Motions and Mr. Gluhaich's Affidavits were filed at a point in the case where it was too late for Defendants to properly explore or rebut Mr. Gluhaich's conclusions and the bases therefor, a fact that Plaintiffs acknowledged in February with approximately four weeks left in discovery. (February 9, 2017, Stipulation and Order).
- 135. In addition, it is clear that Plaintiffs' failure to disclose the appraisals upon which many of their calculations were based was also willful.
- 136. With respect to Willard, Willard relies upon an appraisal from 2008 to determine the purported "original" fair market value of the property. (Willard Motion at 19). According to Willard, this appraisal was "commissioned in 2008 by the Willard Plaintiffs." *Id.* Indeed, Mr. Gluhaich avers that "in September 2008 Willard commissioned an appraisal of the Virginia Property...from CB Richard Ellis..., a copy of which was sent directly to me by Jason Buckholz of CBRE on October 17, 2008." (Gluhaich Aff. re: Willard ¶5). Willard also relies

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

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

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

- 139. Finally, as noted, this is part of a larger pattern and practice by Plaintiffs to disregard their discovery obligations at every point in this litigation. (Motions to Compel).
- 140. Indeed, Plaintiffs completely failed to even respond to Defendants' Motion for Sanctions, even when this Court gave them an additional extension and expressly warned them, in open court, that "you need to know going into these oppositions, that I'm very seriously considering granting all of it," and "you know going into this motion for sanctions that you're—I haven't decided it, but I need to see compelling opposition not to grant it." (December 12, 2017, transcript).

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

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

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

- 142. In fact, this is Plaintiffs' second case against Defendants based on the same set of facts.
- 143. Plaintiffs attempted to prosecute this case against Defendants in California, which was dismissed for a lack of personal jurisdiction.
- 144. Defendants are entitled to resolution, not to Plaintiffs languidly holding Defendants in litigation while simultaneously failing to meet their obligations under the NRCP to provide threshold information necessary to defend this case and to comply with the other obligations imposed by the NRCP.
- 145. Further, Plaintiffs' collective new requests and bases are not harmless additions: they would require Defendants to engage in additional fact discovery, retain direct and rebuttal experts, take depositions, re-open the briefing schedule, and again delay the trial for tasks that could, and should, have been accomplished during a discovery period that was already extended three times to account for Plaintiffs' continued noncompliance.

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

- 146. Plaintiffs' damages disclosures are central to this case, and dismissal is not too severe for Plaintiffs' repeated and willful noncompliance with Court orders and with Nevada law.
- 147. The Plaintiffs have been sanctioned for other discovery violations, (Order Granting Motion to Compel), yet remain undeterred, demonstrating that less severe sanctions have had no effect on Plaintiffs' recalcitrant conduct.
- 148. For example, in the context of granting Defendants' Motion to Compel Discovery Responses, this Court ordered Plaintiffs to pay Defendants' reasonable expenses incurred in making the motion, including attorneys' fees. (July 1, 2015, Order).

- 149. Not only have Plaintiffs not ever paid these expenses, but it is incontrovertible that this Court's imposition of monetary sanctions on Plaintiffs in 2015 had absolutely no deterrent effect on Plaintiffs' conduct, as Plaintiffs continued to commit discovery violations and continued to violate and ignore this Court's orders well after the issuance of the July 1, 2015, Order, completely undeterred by the imposition of monetary sanctions.
- 150. Further, Plaintiffs' conduct has already caused three continuances of the trial date, all to accommodate for Plaintiffs' continued disregard for Nevada discovery procedure. (Stipulations and Orders).
- 151. Given that this Court has already issued lesser sanctions, ordered continuances, and given Plaintiffs repeated admonitions about complying with deadlines and their NRCP obligations, all to no avail, it is clear that lesser sanctions have had no effect on Plaintiffs' conduct, and the issuance of lesser sanctions would only serve to encourage Plaintiffs' misconduct.
- 152. The fact that this Court granted Plaintiffs an additional extension to oppose Defendants' Motions, including their Motion for Sanctions, and Plaintiffs failed to do so without any excuse whatsoever further demonstrates that this Court's orders, and any lesser sanctions, have no effect on Plaintiffs' conduct. Given Plaintiffs' repeated failure to heed the court's warnings in the past, issuing additional warnings would be futile.
- 153. Nor would a less severe sanction be fair to Defendants, who have been continually prejudiced by Plaintiffs' willful disregard of their obligations despite their continued efforts to work with Plaintiffs and provide extensions to Plaintiffs.
- party cannot seek to avoid a dismissal based on arguments that his or her attorney's acts or omissions led to the dismissal." *Huckabay Props v. NC Auto Parts*, 130 Nev. ____, 322 P.3d 429, 432 (2014) (also discussing that "[t]he United States Supreme Court has recognized that when an action is dismissed for failure to comply with court rules, the litigant cannot seek a do-over of their dismissed action based on arguments that dismissal is too harsh a penalty for

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

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

- 155. Although there is a policy favoring adjudication on the merits, Plaintiffs themselves have frustrated this policy by refusing to provide Defendants with their damages calculations or proper expert disclosures. Defendants have not frustrated this policy; instead, the record is clear that Defendants, and this Court, have repeatedly attempted to force Plaintiffs to comply with basic discovery obligations, to no avail.
- 156. Indeed, Defendants have served multiple rounds of written discovery upon Plaintiffs, in an attempt to obtain basic information on Plaintiffs' damages; have taken multiple depositions, and have been requesting compliant disclosures throughout this case so that they can address the merits. (Exhibits 24-35 of Defendants' Motion).
- 157. Plaintiffs should not be permitted to hide behind the policy of adjudicating cases on the merits when it is they who have frustrated this policy throughout the litigation. Defendants cannot reach the merits when they must spend the entire case asking Plaintiffs for threshold information and receiving no meaningful responses.
- 158. As the Nevada Supreme Court has held, the policy favoring adjudication on the merits "is not boundless and must be weighed against other policy considerations, including the public's interest in expeditious...resolution, which coincides with the parties' interests in bringing litigation to a final and stable judgment, prejudice to the opposing party; and

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

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

Dismissal is required to deter similar abusive conduct

- 160. The need to deter similar abusive conduct also weighs heavily in favor of dismissal.
 - 161. The discovery rules are in place for a reason, and are mandatory.
 - 162. Compliance with this Court's Orders is also mandatory.
- 163. Yet, Plaintiffs have completely ignored multiple Orders from this Court, deadlines imposed by this Court, and their obligations pursuant to the Nevada Rules of Civil Procedure.
- 164. Plaintiffs have received multiple opportunities and extensions to rectify their noncompliance, but have not even attempted to do so.
- 165. If Plaintiffs are permitted to continue prosecuting this case without severe consequences, then this type of abusive litigation practice will continue to the prejudice of defending parties and will make a mockery of the Nevada Rules of Civil Procedure and court orders. *Cf. generally Foster*, 126 Nev. at 66, 227 P.3d at 1049 (noting that "[i]n light of appellants' repeated and continued abuses, the policy of adjudicating cases on the merits would not have been furthered in this case, and the ultimate sanctions were necessary to demonstrate to future litigants that they are not free to act with wayward disregard of a court's orders."); *see also Langermann v. Prop. & Cas. Ins. Co.*, 2015 WL 4714512 at *5 (D. Nev. 2015) (failing "to

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

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

Dismissal would not violate Plaintiffs' due process rights

- 167. There is also no issue of due process deprivation upon dismissal.
- 168. Plaintiffs' response to Defendants' Motions, including Defendants' Motion for Sanctions, was originally due on December 4, 2017.
- 169. There is no dispute that Plaintiffs were served with the Motions. (December 12, 2017, transcript).
- 170. Through extensions granted by Defendants, and ultimately this Court, Plaintiffs were given until December 18, 2017, to file Oppositions. *Id*.
- 171. Defendants were expressly warned that this Court was seriously considering dismissal, and that Plaintiffs' oppositions needed to be "compelling." *Id*.
- 172. However, Plaintiffs did not file any Opposition by that time or any time thereafter; nor did Plaintiffs request another extension.
- 173. Thus, Plaintiffs, in voluntarily choosing to not respond to Defendants' Motions, are not being deprived of any due process. *See* DCR 13(3); *Huckabay*, 130 Nev. at ____, 322 P.3d at 436. No evidentiary hearing was needed. *See Nevada Power Co. v. Fluor Illinois*, 108 Nev. 638 (1992) ("If a party against whom dismissal may be imposed raises a question of fact as to any of [the] factors [for dismissal], the court must allow the parties to address the relevant factors in an evidentiary hearing.").
- 174. Indeed, this Court held a hearing on December 12, 2017, which was attended by both of Plaintiffs' counsel. As Plaintiffs have not filed anything with this Court since that hearing, or otherwise provided any new information, there would be nothing new to discuss at another hearing. *See* DCR 13(3).

A.App.3639

1 **ORDER** 2 Defendants' Motion for Sanctions is GRANTED. 3 Plaintiffs' claims against Defendants are DISMISSED WITH PREJUDICE. 4 DATED this Ut day of March, 2018. 5 6 7 COURT JUDGE 8 Respectfully submitted by: 9 DICKINSON WRIGHT, PLLC 10 11 12 /s/ Brian R. Irvine JOHN P. DESMOND 13 Nevada Bar No. 5618 BRIAN R. IRVINE 14 Nevada Bar No. 7758 ANJALI D. WEBSTER 15 Nevada Bar No. 11525 100 West Liberty Street, Suite 940 16 Reno, NV 89501 Tel: (775) 343-7500 17 Fax: (775) 786-0131 Email: <u>Jdesmond@dickinsonwright.com</u> 18 Email: Birvine@dickinsonwright.com Email: Awebster@dickinsonwright.com 19 Attorneys for Defendants 20 Berry Hinckley Industries, and Jerry Herbst 21 22 23 24 25 26 27 28 Page 33 of 34

CERTIFICATE OF SERVICE I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the <u>if</u> day of March, 2018, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following: BRIAN IRVINE, ESQ. DAVID O'MARA, ESQ. BRIAN MOQUIN, ESQ. JOHN DESMOND, ESQ. ANJALI WEBSTER, ESQ. And, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows:

Electronically CV14-01712 2018-03-06 05:45:12 PM Jacqueline Bryant Clerk of the Court 2540 Transaction # 6564488 1 **DICKINSON WRIGHT** JOHN P. DESMOND 2 Nevada Bar No. 5618 BRIAN R. IRVINE 3 Nevada Bar No. 7758 ANJALI D. WEBSTER 4 Nevada Bar No. 12515 100 West Liberty Street, Suite 940 5 Reno, NV 89501 Tel: (775) 343-7500 6 Fax: (775) 786-0131 Email: Jdesmond@dickinsonwright.com 7 Email: Birvine@dickinsonwright.com Email: Awebster@dickinsonwright.com 8 Attorney for Defendants 9 Berry Hinckley Industries, and Jerry Herbst 10 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA 11 IN AND FOR THE COUNTY OF WASHOE 12 13 LARRY J. WILLARD, individually and as CASE NO. CV14-01712 trustee of the Larry James Willard Trust Fund; 14 OVERLAND DEVELOPMENT DEPT. 6 CORPORATION, a California corporation: 15 EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the 16 Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, 17 18 Plaintiff. NOTICE OF ENTRY OF FINDINGS OF FACTS, CONCLUSIONS OF LAW VS. 19 AND ORDER BERRY-HINCKLEY INDUSTRIES, a Nevada 20 corporation; and JERRY HERBST, an Individual: 21 Defendants. 22 23 BERRY-HINCKLEY INDUSTRIES, a 24 Nevada corporation; and JERRY HERBST, an individual; 25 Counterclaimants. 26 VS 27 28 Page 1 of 4

A.App.3641

A.App.3641 FILED

LARRY J. WILLARD, individually and as 1 trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT 2 CORPORATION, a California corporation; 3 Counter-defendants. 4 5 PLEASE TAKE NOTICE that on March 6, 2018, this Court entered its Findings of 6 Facts, Conclusions of Law and Order on Defendant's Motion for Sanctions ("Findings and 7 Conclusions"). A true and correct copy of the Findings and Conclusions is attached hereto as 8 Exhibit 1. 9 10 **AFFIRMATION** Pursuant to NRS 239B.030 11 12 The undersigned does hereby affirm that the preceding document does not contain the 13 social security number of any person. 14 DATED this 6th day of March, 2018. 15 **DICKINSON WRIGHT** 16 17 _/s/ Brian R. Irvine DICKINSON WRIGHT 18 JOHN P. DESMOND Nevada Bar No. 5618 19 BRIAN R. IRVINE Nevada Bar No. 7758 20 ANJALI D. WEBSTER Nevada Bar No. 12515 21 100 West Liberty Street, Suite 940 Reno, NV 89501 22 Email: Jdesmond@dickinsonwright.com Email: Birvine@dickinsonwright.com 23 Email: Awebster@dickinsonwright.com 24 Attorney for Defendants Berry Hinckley Industries, and Jerry Herbst 25 26 27 28 Page 2 of 4

1 **CERTIFICATE OF SERVICE** 2 I certify that I am an employee of DICKINSON WRIGHT, and that on this date, pursuant 3 to NRCP 5(b); I am serving a true and correct copy of the attached **NOTICE OF ENTRY OF** 4 FINDINGS OF FACTS, CONCLUSIONS OF LAW AND ORDER on the parties through the 5 Second Judicial District Court's EFlex filing system to the following: 6 David C. O'Mara Brian P. Moquin 7 LAW OFFICES OF BRIAN P. MOQUIN THE O'MARA LAW FIRM 3287 Ruffino Lane 311 E. Liberty Street 8 San Jose, California 95148 Reno, Nevada 89501 9 DATED this 6th day of March, 2018. 10 /s/ Mina Reel 11 An employee of DICKINSON WRIGHT 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 Page 3 of 4

EXHIBIT LIST

Exhibit	Description	Pages ¹
1	Findings of Fact, Conclusions of Law and Order on Defendant's Motion for Sanctions	34

¹ Exhibit page count is exclusive of exhibit slip sheet.

Electronically CV14-01712 2018-03-09 11:36:20 AM Jacqueline Bryant Clerk of the Court Transaction # 6569817 : csulezic 1 3870 DICKINSON WRIGHT, PLLC 2 JOHN P. DESMOND Nevada Bar No. 5618 3 BRIAN R. IRVINE Nevada Bar No. 7758 4 ANJALI D. WEBSTER Nevada Bar No. 12515 5 100 West Liberty Street, Suite 940 Reno, NV 89501 6 Tel: (775) 343-7500 Fax: (775) 786-0131 7 Email: Jdesmond@dickinsonwright.com Email: Birvine@dickinsonwright.com 8 Email: Awebster@dickinsonwright.com 9 Attorney for Defendants Berry Hinckley Industries and 10 Jerry Herbst 11 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA 12 IN AND FOR THE COUNTY OF WASHOE 13 LARRY J. WILLARD, individually CASE NO. CV14-01712 14 and as trustee of the Larry James Willard Trust Fund: OVERLAND DEVELOPMENT DEPT. 6 15 CORPORATION, a California corporation; EDWARD C. WOOLEY AND JUDITH A. 16 WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley 17 Intervivos Revocable Trust 2000, 18 Plaintiff, VS. 19 BERRY-HINCKLEY INDUSTRIES, a 20 Nevada corporation; and JERRY HERBST, an individual 21 Defendants. 22 23 BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, 24 an individual: 25 Counterclaimants, 26 VS 27

Page **1** of **5**

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

Counter-defendants.

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REQUEST FOR ENTRY OF JUDGMENT

Defendants/Counterclaimants Berry-Hinckley Industries ("BHI") and Jerry Herbst (collectively the "Defendants") by and through their counsel of record, Dickinson Wright, PLLC, respectfully request that this Court enter final judgment in this case pursuant to NRCP 58(a)(2).

This Court entered its March 6, 2018 Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions, which dismissed all claims asserted by Plaintiffs Larry J. Willard, individually and as trustee of the Larry James Willard Trust ("Willard"); Overland Development Corporation, a California corporation ("Overland" and collectively with Willard the "Willard plaintiffs"); and Edward C. Wooley and Judith A. Wooley, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, with prejudice.

Following entry of this Court's March 6, 2018 Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions, the only remaining claims in this action are Defendants' counterclaims asserted against the Willard Plaintiffs. (April 21, 2015, Defendants' Amended Answer to Plaintiffs' Amended Complaint and Counterclaim, on file herein (the "Counterclaim")). Given this Court's dismissal of Plaintiffs' claims, Defendants decided not to prosecute the Counterclaim and filed their Motion to Dismiss Counterclaims on March 8, 2018 (the "Motion to Dismiss").

Assuming that this Court grants the Motion to Dismiss, all claims of all parties will have been dismissed. Accordingly, Defendants respectfully request that this Court enter final judgment in this case pursuant to NRCP 58(a)(2), which provides "upon a decision by the court

1	granting other relief, or upon a special verdict or a general verdict accompanied by answers to			
2	interrogatories, the court shall promptly approve the form and sign the judgment, and the			
3	judgment shall be filed by the clerk." As this Court has issued orders dismissing all of the			
4	parties' respective claims, it is appropriate that this Court enter a judgment adjudicating all the			
5	rights and liabilities of all the parties. A proposed Judgment is attached hereto as Exhibit 1 .			
6	AFFIRMATION			
7	Pursuant to NRS 239B.030			
8	The undersigned does hereby affirm that the preceding document does not contain the			
9	social security number of any person.			
10	DATED this 9th day of March, 2018.			
11	DICKINSON WRIGHT, PLLC			
12				
13	/s/ Brian R. Irvine			
14	JOHN P. DESMOND Nevada Bar No. 5618			
15	BRIAN R. IRVINE Nevada Bar No. 7758			
16	ANJALI D. WEBSTER			
	Nevada Bar No. 12515 100 West Liberty Street, Suite 940			
17	Reno, NV 89501 Tel: (775) 343-7500			
18	Fax: (775) 786-0131 Email: Jdesmond@dickinsonwright.com			
19	Email: Birvine@dickinsonwright.com			
20	Email: Awebster@dickinsonwright.com			
21	Attorney for Defendants Berry Hinckley Industries and			
22	Jerry Herbst			
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1 **CERTIFICATE OF SERVICE** 2 I certify that I am an employee of DICKINSON WRIGHT, PLLC and that on this date, 3 pursuant to NRCP 5(b), I am serving a true and correct copy of the attached **REQUEST FOR** 4 **ENTRY OF JUDGMENT** on the parties as set forth below: 5 Placing an original or true copy thereof in a sealed envelope placed for collection and 6 mailing in the United States Mail, Reno, Nevada, postage prepaid, following ordinary business practices 7 8 Certified Mail, Return Receipt Requested 9 Via E-Mail 10 Placing an original or true copy thereof in a sealed envelope and causing the same to be personally Hand Delivered 11 12 Federal Express (or other overnight delivery) Electronic Notification 13 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. 14 addressed as follows: 15 16 Brian P. Moquin David C. O'Mara LAW OFFICES OF BRIAN P. MOQUIN THE O'MARA LAW FIRM, P.C. 17 3287 Ruffino Lane 311 E. Liberty Street Reno, Nevada 89501 San Jose, California 95148 18 bmoquin@lawprism.com david@omaralaw.net 19 20 DATED this 9th day of March, 2018. 21 22 /s/ Mina Reel An employee of Dickinson Wright, PLLC 23 24 25 26 27 28

EXHIBIT TABLE

2	Exhibit	Description	Pages ¹
3	1	[PROPOSED] Judgment	3
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¹ Exhibit Page counts are exclusive of exhibit slip sheets.

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EXHIBIT 1

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13 LAR and a Trus COF EDV WOO Edw Inter 18 vs. BER Neva indiv 22 23 BER Neva an in in 25 26 vs	IN THE SECOND JUDICIAL DISTRIC	Γ COURT OF THE STATE OF NEVADA
14 LAR and a Trus COR EDV WOO Edw Inter 18 vs. 19 BER Neva indiv 22 23 BER Neva an in 25 26 vs	IN AND FOR THE C	OUNTY OF WASHOE
14 and a Trus COR EDV WOO Edw Inter 18 vs. 19 BER Neva indiv 22 ——————————————————————————————————		
15 COR EDV WOO Edw Inter 18 vs. 19 BER Neva indiv 22 BER Neva 24 an in 25 26 vs	ARRY J. WILLARD, individually d as trustee of the Larry James Willard	CASE NO. CV14-01712
16 EDV WOO Edw Inter 18 vs. 19 BER Neva 21 22 23 BER Neva 24 an in 25 vs	ust Fund; OVERLAND DEVELOPMENT DRPORATION, a California corporation;	DEPT. 6
17 Edw Inter	OWARD C. WOOLEY AND JUDITH A.	
18 vs. 19 BER Neva indiv 21 BER Neva 22 BER Neva 24 an in	OOLEY, individually and as trustees of the ward C. Wooley and Judith A. Wooley	
19 vs. BER Neva indiv 22 23 BER Neva 24 an in 25 26 vs	ervivos Revocable Trust 2000,	
19 BER Neva indiv 21 BER Neva 22 BER Neva 24 an in 25 Vs	Plaintiff,	
20 Neva indiv 21 22 23 BER Neva an in 25 26 Vs		
21 indiv 22 ——————————————————————————————————	ERRY-HINCKLEY INDUSTRIES, a evada corporation; and JERRY HERBST, an	
22 BER Neva an in 25 26 vs	lividual	
23 BER Neva an in 25 vs	Defendants.	
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24 an in 25 26 vs	ERRY-HINCKLEY INDUSTRIES, a	
26 vs	evada corporation; and JERRY HERBST, individual;	
vs	Counterclaimants,	
<i>4</i> /		
28		
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1 LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; 2 OVERLAND DEVELOPMENT CORPORATION, a California corporation; 3 Counter-defendants. 4 5 [PROPOSED] JUDGMENT 6 This action, having come before this Court, the Honorable Lynne K. Simons presiding, 7 and all of the claims of Plaintiffs Larry J. Willard, individually and as trustee of the Larry James 8 Willard Trust; Overland Development Corporation, a California corporation; and Edward C. 9 Wooley and Judith A. Wooley, individually and as trustees of the Edward C. Wooley and Judith 10 A. Wooley Intervivos Revocable Trust 2000, having been dismissed by this Court with 11 prejudice in its Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for 12 Sanctions filed herein on March 6, 2018, and all of the counterclaims of Defendants Berry-13 Hinckley Industries ("BHI") and Jerry Herbst having been dismissed by this Court in its Order 14 granting Defendants' Motion for voluntary dismissal filed herein on 15 , 2018, 16 IT IS ORDERED AND ADJUDGED that Judgment is entered in favor of Defendants 17 and against Plaintiffs on all of Plaintiffs' claims and that such claims are dismissed with 18 prejudice. 19 20 21 22 23 24 25 26 /// 27 28

1	IT IS FURTHER ORDERED A	ND ADJUDGED that Defendants' counterclaims are
2	dismissed without prejudice.	
3		
4	DATED this day of	, 2018.
5		
6		DISTRICT COURT JUDGE
7		DISTRICT COURT JUDGE
8	Respectfully submitted by:	
9	DICKINSON WRIGHT, PLLC	
10		
11	/ / D : D I :	
12	JOHN P. DESMOND	
13	Nevada Bar No. 5618 BRIAN R. IRVINE	
14	Nevada Bar No. 7758 ANJALI D. WEBSTER	
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19	Attorneys for Defendants	
20	Berry Hinckley Industries, and Jerry Herbst	
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		Page 3 of 3

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 16 OF 19

Submitted for all appellants by:

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ATTORNEYS FOR APPELLANTS LARRY J. WILLARD, et al.

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	Exhibit 43: 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		10	2199-2209
	Exhibit 44: 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		10	2210-2213

<u>NO.</u>	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: <i>Grant, Bargain and Sale Deed</i> 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: <i>Grant, Bargain and Sale Deed</i> 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 <i>First Amendment to Lease Agreement</i> regarding the Virginia Property sent to the Willard Plaintiffs in October 2006		10	2249-2251

<u>NO.</u>	DOCUMENT	DATE	VOL.	PAGE NO.
(cont 30)	Exhibit 50: 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		10	2252-2264
	Exhibit 51: <i>UCC Financing</i> Statement regarding the Virginia Property, recorded July 5, 2007 in the Washoe County Recorder's Office as Doc. No 3551285		10	2265-2272
	Exhibit 52: Sales brochure for the Virginia Property prepared by Daniel Gluhaich for marketing purposes in 2012		10	2273-2283
31.	Defendants'/Counterclaimants' Opposition to Larry Willard and Overland Development Corporation's Motion for Summary Judgment – Oral Arguments Requested	11/13/17	10	2284-2327
	Exhibit 1: Declaration of Brian R. Irvine		10	2328-2334
	Exhibit 2: December 12, 2014, Plaintiffs Initial Disclosures		10	2335-2342
	Exhibit 3: February 12, 2015 Letter		10	2343-2345
	Exhibit 4: Willard July 2015 Interrogatory Responses, First Set		10	2346-2357
	Exhibit 5: August 28, 2015, Letter		11	2358-2369
	Exhibit 6: March 3, 2016, Letter		11	2370-2458
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	Exhibit 16: April 1, 2016 Email		12	2642-2644
	Exhibit 17: May 3, 2016 Email		12	2645-2646
	Exhibit 18: June 21, 2016 Email Exchange		12	2647-2653
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	Exhibit 20: Defendants' First Set of Interrogatories on Willard		12	2671-2680
	Exhibit 21: Defendants' Second Set of Interrogatories on Willard		12	2681-2691
	Exhibit 22: Defendants' First Requests for Production on Willard		12	2692-2669
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	Exhibit 24: Defendants' Third Request for Production on Willard		12	2708-2713
	Exhibit 25: Defendants Requests for Admission to Willard		12	2714-2719
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57.	Opposition to Defendants' Motion to Strike, or in the Alternative, Motion for Leave to File Sur-Reply	06/22/18	18	4037-4053
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59.	Order Denying Plaintiffs' Rule 60(b) Motion for Relief	11/30/18	18	4061-4092
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63.	Notice of Appeal	12/28/18	18	4141-4144
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	Exhibit 2: Order Denying Plaintiffs' Rule 60(b) Motion for Relief, entered November 30, 2018		18	4180-4212
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68.	Order Granting Defendants' Motion for Partial Summary Judgment [Oral Argument Requested] ¹	01/04/18	19	4353-4357

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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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

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Local Counsel 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.

AND RELATED COUNTERCLAIM

Case No. CV14-01712

Dept. 6

NOTICE OF WITHDRAWAL OF LOCAL COUNSEL

David C. O'Mara, Esq., of The O'Mara Law Firm, P.C. hereby withdraws as local counsel for all Plaintiffs. Counsel has had no contact with lead counsel Mr. Moquin for many months with a total failure just prior to the Court's first decisions being filed in this case. Mr. Moquin was unresponsive during the time in which this Court was deciding the pending motions, even after counsel begged him for a response to be filed with the Court and was told he would provide such response.

Undersigned Counsel was retained solely as local counsel, and provided Mr. Moquin with the necessary information related to the Court's filing requirement and timelines.

Undersigned Counsel was retained only to provide services as directed by Mr. Moquin, and would be relieved of services if Mr. Moquin was removed. Clients have relieved Mr. Moquin as counsel, and thus, this Court should revoke his pro hac admissions. 3 All future correspondence and pleadings should be sent to Mr. Ed Wooley at his last 4 known address of 1172 Via Casa Palerno, Henderson, Nevada 89011, and Larry Willard at his 5 last known address 826 Vanderbilt Place, San Diego California 92103. 7 AFFIRMATION (Pursuant to NRS 239B.030) 8 The undersigned does hereby affirm that the preceding document filed in the above 9 referenced matter does not contain the social security number of any person. 11 THE O'MARA LAW FIRM, P.C. DATED: March 15, 2018 12 13 /s/ David C. O'Mara 14 DAVID C. O'MARA, ESQ 15 16 17 18 19 20 21 22 23 24 25 26 27 28

CERTIFICATE OF SERVICE

1 I hereby certify that I am an employee of The O'Mara Law Firm, P.C., 311 E. Liberty 2 Street, Reno, Nevada 89501, and on this date I served a true and correct copy of the foregoing 3 4 document on all parties to this action by: 5 Depositing in a sealed envelope placed for collection and mailing in the United States Mail, at Reno, Nevada, following ordinary business practices 6 Personal Delivery 7 Facsimile 8 Federal Express or other overnight delivery 9 Messenger Service 10 Certified Mail with Return Receipt Requested 11 Electronically through the Court's ECF system 12 addressed as follows: 13 DICKSON WRIGHT Ed Wooley John P. Desmond 1173 Via Casa Palerno Brian R. Irvine 15 Henderson, Nevada 89011 Anjali D. Webstaer 100 West Liberty Street, Ste 940 Reno, NV 89501 idesmond@dickinsonwright.com birvine@dickinsonwright.com awebster@dickinsonwright.com 18 Larry Willard LAW OFFICES OF BRIAN P. MOQUIN 826 Vanderbilt Place 19 Brian P. Moquin, Esq. San Diego California 92103 3278 Ruffino Lane 20 San Jose, CA 95148 21 DATED: March 15, 2018 /s/ Valerie Weis 22 VALERIE WEIS 23 24 25 26 27

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A.App.3657 Electronically CV14-01712 2018-03-26 04:15:41 PM 1 CODE: 2520 Jacqueline Bryant Clerk of the Court Richard D. Williamson, Esq., SBN 9932 Transaction # 6596669 : pmsewell Jonathan Joel Tew, Esq., SBN 11874 2 ROBERTSON, JOHNSON, MILLER & WILLIAMSON 3 50 West Liberty Street, Suite 600 Reno, Nevada 89501 Telephone: (775) 329-5600 4 Facsimile: (775) 348-8300 5 Attorneys for Plaintiffs/Counterdefendants 6 7 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE 8 LARRY J. WILLARD, individually and as 9 Trustee of the Larry James Willard Trust Fund; Case No. CV14-01712 OVERLAND DEVELOPMENT 10 CORPORATION, a California corporation; Dept. No. 6 EDWARD E. WOOLEY AND JUDITH A. 11 WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley 12 Intervivos Revocable Trust 2000, 13 Plaintiffs. 14 VS. 15 BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an 16 individual 17 Defendants. 18 BERRY-HINCKLEY INDUSTRIES a Nevada 19 corporation; and JERRY HERBST, an individual. 20 21 Counterclaimants, 22 VS. LARRY J. WILLARD, individually and as 23 Trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT 24 CORPORATION, a California corporation, 25 Counterdefendants.

NOTICE OF APPEARANCE

2728

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1 TO THE CLERK OF THE COURT, ALL PARTIES, AND THEIR ATTORNEYS 2 OF RECORD HEREIN PLEASE TAKE NOTICE: Plaintiffs / Counterdefendants LARRY J. WILLARD, individually and as Trustee of the 3 Larry James Willard Trust Fund, and OVERLAND DEVELOPMENT CORPORATION have 4 5 retained the law firm of Robertson, Johnson, Miller & Williamson to represent them as counsel 6 of record in this action. Richard D. Williamson, Esq. and Jonathan Joel Tew, Esq. hereby 7 enter their appearance in this action on behalf of the above-named Plaintiffs / Counterdefendants. Please serve copies of all filings, briefs, motions, orders, correspondence and other papers 8 9 to those Plaintiffs' attorneys at the following address: Richard D. Williamson, Esq. 10 Jonathan Joel Tew, Esq. 11 ROBERTSON, JOHNSON, MILLER & WILLIAMSON 50 West Liberty Street, Suite 600 12 Reno, Nevada 89501 Telephone No.: (775) 329-5600 13 Facsimile No.: (775) 348-8300 rich@nvlawyers.com 14 jon@nvlawyers.com 15 16 **AFFIRMATION** 17 Pursuant to NRS § 239B.030, the undersigned does hereby affirm that the preceding 18 document does not contain the social security number of any person. 19 DATED this 26th day of March, 2018. 20 ROBERTSON, JOHNSON, MILLER & WILLIAMSON 21 22 By: /s/ Richard D. Williamson Richard D. Williamson, Esq. 23 Jonathan Joel Tew, Esq. Attorneys for Plaintiffs and Counterdefendants 24 Larry J. Willard, individually and as Trustee of the Larry James Willard Trust Fund, & 25 Overland Development Corporation 26 27 28

1 **CERTIFICATE OF SERVICE** 2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of Robertson, Johnson, 3 Miller & Williamson, 50 West Liberty Street, Suite 600, Reno, Nevada 89501, over the age of 18, and not a party within this action. I further certify that on the 26th day of March, 2018, I 4 electronically filed the foregoing **NOTICE OF APPEARANCE** with the Clerk of the Court by 5 using the ECF system which served the following parties electronically: 6 John P. Desmond, Esq. 7 Brian R. Irvine, Esq. 8 Anjali D. Webster, Esq. Dickinson Wright 9 100 West Liberty Street, Suite 940 Reno, NV 89501 10 Attorneys for Defendants/Counterclaimants 11 /s/ Kimberlee A. Hill 12 An Employee of Robertson, Johnson, Miller & Williamson 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

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Richard D. Williamson, Esq., SBN 9932 Jonathan Joel Tew, Esq., SBN 11874

ROBERTSON, JOHNSON, MILLER & WILLIAMSON

3 | 50 West Liberty Street, Suite 600

Reno, Nevada 89501

4 Telephone: (775) 329-5600 Facsimile: (775) 348-8300

5 || Attorneys for Plaintiffs/Counterdefendants

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

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

Plaintiffs.

14 ||

VS.

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

Defendants.

AND ALL RELATED MATTERS.

Case No. CV14-01712

Dept. No. 6

OPPOSITION TO REQUEST FOR ENTRY OF JUDGMENT

Plaintiffs Larry J. Willard, individually and as Trustee of the Larry James Willard Trust Fund ("Mr. Willard") and Overland Development Corporation ("Overland") (collectively, the "Willard Plaintiffs") hereby oppose the Defendants/Counterclaimants' Request for Entry of Judgment, filed on March 9, 2018. This opposition is supported by the following Memorandum of Points and Authorities, all papers and pleadings on file herein, and any oral argument that this Court may choose to hear.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Plaintiffs' former counsel, Brian Moquin, admittedly failed to respond to this Honorable Court's orders and delayed prosecution of this case. No one is more prejudiced by Mr. Moquin's failures than Mr. Willard and Overland. Therefore, Mr. Willard and Overland have retained new counsel to pursue this case in an appropriate manner. To that end, the Willard Plaintiffs are preparing a motion for relief under NRCP 60(b). If granted, this motion would set aside at least three orders: (1) the Order Granting Defendants'/Counterclaimants' Motion for Sanctions, (2) the Order Granting Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich, and (3) the Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions.

As the Court will see, the motion for relief should be granted as Brian Moquin's legal and psychological struggles unfairly prejudiced the Willard Plaintiffs. Now that they are aware of Mr. Moquin's infirmities, the Willard Plaintiffs deserve the chance to pursue their claims on the merits, rather than endure a forfeiture of their substantial damages as a result of their former attorney's personal demons.

With the help of new counsel, the Willard Plaintiffs intend to diligently prosecute this case to a conclusion on the merits. Once the Court has had the opportunity to review the Willard Plaintiffs' forthcoming motion for relief, it should set aside its prior orders and allow the case to proceed. Therefore, the Court should withhold any decision on Defendants/Counterclaimants' Request for Entry of Judgment until the Court has had the opportunity to review and consider the Willard Plaintiffs' forthcoming Rule 60(b) Motion for Relief.

II. LEGAL ANALYSIS

The Court should deny the Defendants/Counterclaimants' Request for Entry of Judgment for at least three reasons. First, under NRCP 54(b), the Court's prior orders may be revised. Second, the cumbersome nature of a <u>Huneycutt</u> motion and the Court's interests in judicial economy all favor staying entry of a judgment until after the Court has had an opportunity to consider the Willard Plaintiffs' Rule 60(b) motion. Third, the equitable and remedial aspects of

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a Rule 60(b) motion further support the fact that the Court should not enter a final judgment until it has had an opportunity to review the propriety of its prior orders, which were entered without the benefit of any opposition.

Α. The Court Can and Should Revise Its Prior Orders

Defendants/Counterclaimants seek judgment under NRCP 58(a)(2). (3/9/18 Request at 2:25-3:3.) Yet, that rule expressly cautions that it is "[s]ubject to the provisions of Rule 54(b)...." NRCP 58(a). According to Rule 54(b), "any order or other form of decision, however designated, which adjudicates the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the rights and liabilities of all the parties." As the Defendants/Counterclaimants admit, they still have claims currently pending against the Willard Plaintiffs. Moreover, as the Court is now aware, the Willard Plaintiffs intend to file a Rule 60(b) motion for relief. Thus, not all claims are adjudicated.

As numerous claims and issues remain adjudicated, the Court can and should revise its prior orders pursuant to NRCP 54(b) and NRCP 60(b). Therefore, at this stage, a judgment under NRCP 58(a)(2) is premature. Instead, the Court should deny the Defendants' request.

В. The Defendants' Request Would Require the Court and the Parties to **Engage in Duplicate Efforts and Unnecessary Work**

As the Court is well aware, judicial resources are scarce and all parties should strive to pursue the just, speedy, and inexpensive determination of every action consistent with NRCP 1. The request for entry of judgment would do just the opposite.

As the Court is now aware, the Willard Plaintiffs intend to file a motion for relief. If the Court enters a judgment, however, then the Willard Plaintiffs must also file an appeal of that judgment within thirty days.

Unfortunately, an appeal divests this Court of jurisdiction to act. Foster v. Dingwall, 126 Nev. 49, 52, 228 P.3d 453, 454-55 (2010). If the Court were then inclined to entertain the forthcoming Rule 60 motion, the parties would have to seek a remand from the Nevada Supreme Court based on the procedure outlined in Huneycutt v. Huneycutt, 94 Nev. 79, 575 P.2d 585

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Robertson, Johnson,

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

(1978). See, e.g., Foster, 126 Nev. at 51, 228 P.3d at 454. Only after such a remand would this Court be able to rule on the forthcoming Rule 60 motion.

By contrast, waiting to enter judgment is more efficient and cost-effective for both parties and the Court as it avoids such needless procedural steps. Instead, the Court can simply rule on the Rule 60 motion and either avoid judgment altogether or allow the parties to engage in one, consolidated appeal of all issues. Therefore, to preserve judicial economy and honor the mandates of Rule 1, the Court should deny the request for entry of judgment and stay any further rulings until the parties have fully briefed and submitted the Willard Plaintiffs' Rule 60 motion.

C. Equity, Public Policy, and Fairness Also Favor Granting the Willard Plaintiffs' Their Day in Court

"The salutary purpose of Rule 60(b) is to redress any injustices that may have resulted because of excusable neglect." Nev. Indus. Dev. v. Benedetti, 103 Nev. 360, 364, 741 P.2d 802, 805 (1987). "Rule 60 should be liberally construed to effectuate that purpose." Id. Rule 60(b) "guides the balance between the overriding judicial goal of deciding cases correctly, on the basis of their legal and factual merits, with the interest of both litigants and the courts in the finality of judgments." TCI Grp. Life Ins. Plan v. Knoebber, 244 F.3d 691, 695 (9th Cir. 2001).

Under Nevada law, where an attorney's mental illness causes procedural harm to his client, Rule 60 justifies granting relief to the client. See Passarelli v. J. Mar Dev., 102 Nev. 283, 720 P.2d 1221 (1986). Further, a heightened standard of review applies to case-terminating sanctions. Young v. Johnny Ribeiro Bldg., 106 Nev. 88, 92-93, 787 P.2d 777 (1990).

Moreover, the orders subject to the Rule 60 motion were entered pursuant to DCR 13(3) without the benefit of any opposition from the Plaintiffs. Thus, they are analogous to a default judgment. Default judgments are disfavored. TCI Grp. Life Ins. Plan, 244 F.3d at 693.

The Willard Plaintiffs are simply asking the Court to delay entry of a judgment until it can hear their Rule 60 motion. Defendants/Counterclaimants are understandably anxious to dispose of the case against them. Yet, the Court should carefully weigh all of the circumstances that gave rise to its sanctions orders. It should resist the Defendants/Counterclaimants' rush to judgment. Delay in the resolution of a case is not generally considered substantial prejudice.

1 Lemoge v. United States, 587 F.3d 1188, 1196 (9th Cir. 2009). Therefore, the Court should deny 2 the request for entry of judgment and allow the parties to brief the Willard Plaintiffs' motion for 3 relief under NRCP 60(b). III. **CONCLUSION** 4 5 There is no good cause to enter judgment at this time. Rather, justice requires that the Court wait and analyze the bases for the Willard Plaintiffs' Rule 60 motion. After reviewing that 6 7 motion, the Court should allow the parties to finally proceed to a trial on the merits. Therefore, 8 the Court should deny the Defendants/Counterclaimants' Request for Entry of Judgment. 9 **Affirmation** Pursuant to NRS § 239B.030, the undersigned does hereby affirm that the preceding 10 11 document does not contain the social security number of any person. DATED this 26th day of March, 2018. 12 ROBERTSON, JOHNSON, 13 MILLER & WILLIAMSON 50 West Liberty Street, Suite 600 14 Reno, Nevada 89501 15 By: <u>/s/ Richard D. Williamson</u> 16 Richard D. Williamson, Esq. Jonathan J. Tew, Esq. 17 Attorneys for Plaintiffs and Counterdefendants Larry J. Willard, individually and as Trustee of 18 the Larry James Willard Trust Fund, & Overland Development Corporation 19 20 21 22 23 24 25 26 27 28

CERTIFICATE OF SERVICE

2	Pursuant to NRCP 5(b), I hereby certify that I am an employee of Robertson, Johnson,
3	Miller & Williamson, 50 West Liberty Street, Suite 600, Reno, Nevada 89501, over the age
4	of 18, and not a party within this action. I further certify that on the 26th day of March, 2018, I
5	electronically filed the foregoing OPPOSITION TO REQUEST FOR ENTRY OF
6	JUDGMENT with the Clerk of the Court by using the ECF system which served the following
7	parties electronically:
8	John P. Desmond, Esq. Brian R. Irvine, Esq.
9	Anjali D. Webster, Esq.
10	Dickinson Wright 100 West Liberty Street, Suite 940
11	Reno, NV 89501 Attorneys for Defendants/Counterclaimants
12	/s/ Kimberlee A. Hill
13	An Employee of Robertson, Johnson, Miller & Williamson
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A.App.3666 FILED Electronically CV14-01712 2018-03-27 03:08:17 PM Jacqueline Bryant Clerk of the Court Transaction # 6598618 : pmsewell 3795 1 DICKINSON WRIGHT, PLLC 2 JOHN P. DESMOND Nevada Bar No. 5618 3 BRIAN R. IRVINE Nevada Bar No. 7758 4 ANJALI D. WEBSTER Nevada Bar No. 12515 5 100 West Liberty Street, Suite 940 Reno, NV 89501 6 Tel: (775) 343-7500 Fax: (775) 786-0131 7 Email: Jdesmond@dickinsonwright.com Email: Birvine@dickinsonwright.com 8 Email: Awebster@dickinsonwright.com 9 Attorney for Defendants Berry Hinckley Industries and 10 Jerry Herbst 11 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA 12 IN AND FOR THE COUNTY OF WASHOE 13 LARRY J. WILLARD, individually CASE NO. CV14-01712 14 and as trustee of the Larry James Willard Trust Fund: OVERLAND DEVELOPMENT DEPT. 6 15 CORPORATION, a California corporation; EDWARD C. WOOLEY AND JUDITH A. 16 WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley 17 Intervivos Revocable Trust 2000, 18 Plaintiff, VS. 19 BERRY-HINCKLEY INDUSTRIES, a 20 Nevada corporation; and JERRY HERBST, an individual 21 Defendants. 22 23 BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, 24 an individual: 25 Counterclaimants, 26 VS 27 28

Page **1** of **6**

A.App.3666

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

Counter-defendants.

REPLY IN SUPPORT OF REQUEST FOR ENTRY OF JUDGMENT

Defendants/Counterclaimants Berry-Hinckley Industries ("BHI") and Jerry Herbst (collectively the "Defendants") by and through their counsel of record, Dickinson Wright, PLLC, respectfully submit this Reply in support of their Request for Entry of Judgment pursuant to NRCP 58(a)(2).

FACTUAL BACKGROUND AND LEGAL ANALYSIS

Defendants request entry of final judgment pursuant to NRCP 58(a)(2), which provides that "upon a decision by the court granting other relief ... the court shall promptly approve the form and sign the judgment, and the judgment shall be filed by the clerk." (emphasis added). Here, this Court issued its Order Granting Defendants'/Counterclaimants' Motion for Sanctions on January 4, 2018, ruling that the Motion for Sanctions was granted: (1) pursuant to DCR 13(3), because Plaintiffs had failed to oppose the Motion for Sanctions; and (2) pursuant to NRCP 16.1(e)(3), NRCP 37(b)(2), NRCP 41(b) and *Blanco v. Blanco*, 129 Nev. Adv. Op. 77, 311 P.2d 1170, because the Motion for Sanctions had "merit due to Plaintiffs' egregious discovery violations throughout the pendency of this litigation and repeated failure to comply with this Court's orders."

This Court then issued its Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions on March 6, 2018, dismissing all of Plaintiffs' claims in this action. The only reason that the Court's March 6, 2018 Order dismissing all of Plaintiffs' claims did not include a final judgment was that Defendants' counterclaims remained at that time. Defendants filed a Motion to Dismiss those counterclaims on March 8, 2018, which was submitted to this Court for decision as unopposed on March 27, 2018. Thus, assuming that this

Court enters an order granting Defendants' unopposed Motion to Dismiss their counterclaims, all of the claims of all of the parties to this action will have been dismissed, and Defendants are entitled to entry of final judgment pursuant to NRCP 58(a)(2) and NRCP 54(b).

Plaintiffs, through new counsel, have now opposed the entry of final judgment so that they can prepare and file a motion to set aside this Court's: (1) January 4, 2018 Order Granting Defendants' Motion for Sanctions; (2) January 4, 2018 Order Granting Defendants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich; and (3) March 6, 2018 Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions pursuant to NRCP 60(b). Plaintiffs provide no timeline for the filing of their Rule 60 motion, yet suggest that Defendants' request for entry of judgment is a "rush to judgment" and ask Defendants and this Court simply to wait for them to file the Rule 60 motion, which they have six months to file pursuant to the Rule.

With all due respect to Plaintiffs' new counsel, who has not been involved in the case, Defendants are in no way rushing to a judgment. Plaintiffs have continually refused to comply with basic discovery obligations and this Court's Orders for several years, which has caused numerous delays to the resolution of this action. Specifically, Plaintiffs have:

- Failed to provide any damages calculations pursuant to NRCP 16.1(a)(1)(C), despite their obligation to do so under the Rule and despite Defendants' written discovery seeking such information and despite Defendants' numerous attempts to demand compliance (See March 6, 2018 Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions at ¶12-18, 29-31, 39, 42-44, 47-48, 50-54);
- Admittedly failed to provide an expert disclosure of Daniel Gluhaich that complied with NRCP 16.1(a)(2)(B), and failed to ever correct the non-compliant expert disclosure despite multiple efforts from Defendants to force compliance (*Id.* at ¶¶34-38, 40-41, 45, 50-54); and
- Refused to comply with this Court's Orders requiring damages disclosures or a compliant expert disclosure (*Id.* at ¶¶19-24, 49, 63-64).

Plaintiffs' abuses of the discovery and litigation process are neither isolated nor only recent. These abuses date back more than three years and have been ubiquitous throughout the

pendency of this case. They have resulted in three separate continuances of the trial date. *Id.* at ¶¶25-26, 31-32, 56-63. And, Plaintiffs have been represented by not just one, but two separate attorneys, one of which is located in Reno and is certainly familiar with his clients' obligations to follow the Rules of Civil Procedure and to comply with this Court's Orders. Even if one of Plaintiffs' attorneys was having personal problems that contributed to the above-referenced failures, it does not provide a remedy for Plaintiffs under Rule 60 or any reason to delay entry of judgment.

This Court has already ruled that both the Motion for Sanctions and the Motion to Strike/Motion in Limine were meritorious, and this Court should not delay entry of judgment to allow Plaintiffs to re-litigate these issues. *See* January 4, 2018 Order Granting Defendants' Motion for Sanctions; January 4, 2018 Order Granting Defendants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich; March 6, 2018 Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions; *see also* Transcript of December 12, 2017 hearing at pp. 19 (where the Court warned Plaintiffs that "you need to know going into these oppositions, that I'm very seriously considering granting all of it") and at p. 26 (where the Court warned Plaintiffs that "And you know going into this motion for sanctions that you're -- I haven't decided it, but I need to see compelling opposition not to grant it.").

The bar against relitigation of already-decided issues that exists under Nevada law is, in essence, "an entitlement not to stand trial or face the other burdens of litigation" and "should be resolved at the earliest possible stage in litigation." *Butler v. Bayer*, 123 Nev. 450, 458, 168 P.3d 1055, 1061 (2007) (internal quotations omitted). This Court should not delay entry of judgment while Plaintiffs prepare and file a Rule 60 motion at their convenience. Judgment should be entered now, as required under NRCP 58(a)(2), as all of the claims of all parties are

resolved. See NRCP 54(b). Moreover, entry of judgment will not in any way preclude Plaintiffs 1 2 from bringing their contemplated Rule 60 motion.¹ **AFFIRMATION** 3 Pursuant to NRS 239B.030 4 The undersigned does hereby affirm that the preceding document does not contain the 5 social security number of any person. 6 DATED this 27th day of March, 2018. 7 8 **DICKINSON WRIGHT** 9 /s/ Brian R. Irvine 10 DICKINSON WRIGHT JOHN P. DESMOND 11 Nevada Bar No. 5618 BRIAN R. IRVINE 12 Nevada Bar No. 7758 ANJALI D. WEBSTER 13 Nevada Bar No. 12515 100 West Liberty Street, Suite 940 14 Reno, NV 89501 Email: Jdesmond@dickinsonwright.com 15 Email: Birvine@dickinsonwright.com Email: Awebster@dickinsonwright.com 16 Attorneys for Defendants Berry-Hinckley 17 Industries and Jerry Herbst 18 19 20 21 22 23 24 ¹ Plaintiffs argue that "an appeal divests this Court of jurisdiction to act" on a Rule 60 motion. 25 This is an incorrect (or at least incomplete) statement of the law. After the filing of a notice of appeal, the district court retains jurisdiction over Rule 60 motions and can "direct briefing on 26 the motion, hold a hearing regarding the motion, and enter an order denying the motion, but lacks jurisdiction to enter an order granting such a motion." Foster v. Dingwall, 126 Nev. 49, 27 52-53, 228 P.3d 453, 455 (2010). 28

1 **CERTIFICATE OF SERVICE** 2 I certify that I am an employee of DICKINSON WRIGHT, PLLC and that on this date, 3 pursuant to NRCP 5(b), I am serving a true and correct copy of the attached REPLY IN 4 **SUPPORT OF REQUEST FOR ENTRY OF JUDGMENT** on the parties as set forth below: 5 Placing an original or true copy thereof in a sealed envelope placed for collection and 6 mailing in the United States Mail, Reno, Nevada, postage prepaid, following ordinary business practices 7 8 Certified Mail, Return Receipt Requested 9 Via E-Mail 10 Placing an original or true copy thereof in a sealed envelope and causing the same to be personally Hand Delivered 11 12 Federal Express (or other overnight delivery) Electronic Notification 13 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. 14 addressed as follows: 15 16 Richard D. Williamson, Esq. Jonathan Joel Tew, Esq. 17 ROBERTSON, JOHNSON, MILLER & WILLIAMSON 18 50 West Liberty Street, Suite 600 Reno, Nevada 89501 19 Attorneys for Plaintiffs/Counterdefendants 20 DATED this 27th day of March, 2018. 21 22 /s/ Mina Reel 23 An employee of Dickinson Wright, PLLC 24 25 26 27 28

CV14-0171 2018-04-13 11:09:14 AM Jacqueline Bryant Clerk of the Court Transaction # 6628496 1 3105 DICKINSON WRIGHT, PLLC 2 JOHN P. DESMOND Nevada Bar No. 5618 3 BRIAN R. IRVINE Nevada Bar No. 7758 4 ANJALI D. WEBSTER Nevada Bar No. 12515 5 100 West Liberty Street, Suite 940 Reno, NV 89501 6 Tel: (775) 343-7500 Fax: (775) 786-0131 7 Email: <u>Jdesmond@dickinsonwright.com</u> Email: Birvine@dickinsonwright.com 8 Email: Awebster@dickinsonwright.com 9 Attorney for Defendants Berry Hinckley Industries and 10 Jerry Herbst IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA 11 12 IN AND FOR THE COUNTY OF WASHOE 13 CASE NO. CV14-01712 LARRY J. WILLARD, individually 14 and as trustee of the Larry James Willard DEPT. 6 Trust Fund; OVERLAND DEVELOPMENT 15 CORPORATION, a California corporation; EDWARD C. WOOLEY AND JUDITH A. 16 WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley 17 Intervivos Revocable Trust 2000, 18 Plaintiff, VS. 19 BERRY-HINCKLEY INDUSTRIES, a 20 Nevada corporation; and JERRY HERBST, an individual 21 Defendants. 22 23 BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, 24 an individual; 25 Counterclaimants, 26 VS 27 28 Page 1 of 3

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Electronically

LARRY J. WILLARD, individually and as

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

Counter-defendants.

[PROPOSED] ORDER GRANTING DEFENDANTS/COUNTERCLAIMANTS' MOTION TO DISMISS COUNTERCLAIMS

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

Under DCR 13(3), the failure of an opposing party to serve and file a written opposition may be construed as an admission that the motion is meritorious and consent to granting the same. DCR 13(3). Thus, the Court finds that Plaintiffs' failure to file an opposition to Defendants' Motion constitutes both an admission that the Motion is meritorious and Plaintiffs' consent to granting said Motion.

Page 2 of 3

Accordingly, and good cause appearing therefor, 1 IT IS HEREBY ORDERED that Defendants' Motion to Dismiss Counterclaims is 2 DATED this 13th day of Whareh, 2018. granted. 3 4 5 6 7 8 Respectfully submitted by: 9 DICKINSON WRIGHT, PLLC 10 11 12 /s/ Brian R. Irvine JOHN P. DESMOND 13 Nevada Bar No. 5618 BRIAN R. IRVINE 14 Nevada Bar No. 7758 ANJALI D. WEBSTER 15 Nevada Bar No. 11525 100 West Liberty Street, Suite 940 16 Reno, NV 89501 Tel: (775) 343-7500 Fax: (775) 786-0131 17 Email: Jdesmond@dickinsonwright.com 18 Email: Birvine@dickinsonwright.com Email: Awebster@dickinsonwright.com 19 Attorneys for Defendants 20 Berry Hinckley Industries, and Jerry Herbst 21 22 23 24 25 26 27 28 Page 3 of 3

A.App.3675 Electronically CV14-01712 2018-04-18 02:59:37 PM Jacqueline Bryant Clerk of the Court Transaction # 6636476 : vviloria

1 **CODE: 2490** Richard D. Williamson, Esq., SBN 9932 Jonathan Joel Tew, Esq., SBN 11874 2 ROBERTSON, JOHNSON, MILLER & WILLIAMSON 3 50 West Liberty Street, Suite 600 Reno, Nevada 89501 Telephone: (775) 329-5600 4 Facsimile: (775) 348-8300 Attorneys for Plaintiffs/Counterdefendants 5

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

Case No. CV14-01712

Dept. No. 6

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LARRY J. WILLARD, individually and as 9 Trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT 10 CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. 11 WOOLEY, individually and as trustees of the

Edward C. Wooley and Judith A. Wooley 12 Intervivos Revocable Trust 2000,

Plaintiffs.

VS.

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

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

Counterclaimants,

Defendants.

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VS.

LARRY J. WILLARD, individually and as 23 Trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT 24

CORPORATION, a California corporation,

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Counterdefendants.

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WILLARD PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF

Robertson, Johnson, Miller & Williamson 50 West Liberty Street,

Suite 600 Reno, Nevada 89501

A.App.3675

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

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Plaintiffs Larry J. Willard, individually and as Trustee of the Larry James Willard Trust Fund ("Mr. Willard") and Overland Development Corporation ("Overland") (collectively, the "Willard Plaintiffs") humbly beseech this Court to set aside its Order Granting Defendants'/Counterclaimants' Motion its Order Granting for Sanctions, Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich, and its Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions (the "Sanctions Order") because the Willard Plaintiffs did not willfully violate any court orders or discovery deadlines. Rather, their prior attorney, Brian Moquin, failed to properly prosecute this case due to a serious mental illness and a personal life that was apparently in shambles. Plaintiffs and Defendants are all victims of prior counsel's illness. Understanding this truth, Mr. Willard and the Willard Plaintiffs are willing to cooperate with Defendants to alleviate any material prejudice that these events may have caused and ask the Court to allow this case to proceed on the merits.

The Defendants/Counterclaimants' Motion for Sanctions, Opposition to Plaintiffs' Motion for Summary Judgment, and other recent filings were understandably based upon the assumption that Plaintiffs willfully and deliberately waited until shortly before the close of discovery to produce expert reports and damage calculations. The unfortunate truth, however, is that those failures were not part of some intentional scheme. They were due to the intertwined facts that the Plaintiffs' former lawyer was suffering from an emotional and psychological breakdown. As a result, his law practice and the Plaintiffs' case, were in total disarray.

Although Plaintiffs and Defendants may disagree on the facts of this case, the applicable law, and the overall equities, the Plaintiffs cannot blame the Defendants for the current procedural state of the case. As with almost all litigants, the Plaintiffs relied on their lead counsel, Mr. Moquin, to meet court deadlines, comply with court orders, respond to the Defendants, decide overall case strategies, and otherwise direct the prosecution of this case. Plaintiffs reasonably expected that Mr. Moquin would comply with his legal and ethical duties.

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Mr. Moquin also repeatedly assured Mr. Willard that the case was proceeding fine, and that his concerns would be easily rectified. Unfortunately, the Plaintiffs misplaced their trust.

The Willard Plaintiffs stand ready, willing, and able to provide the Defendants with whatever discovery responses they need and will stipulate to any extensions of time that are necessary to allow the Defendants to complete their investigations and expert assessments of the Willard Plaintiffs' damages. For these reasons, the Court should set aside the Sanctions Order and allow this case to proceed toward a trial on the merits.

II. STATEMENT OF FACTS

In order to justify Rule 60(b) relief, the moving party must demonstrate both excusable neglect and a meritorious claim or defense. The Willard Plaintiffs will first present facts showing that they undoubtedly have a meritorious claim and then subsequently provide facts to demonstrate their experience with prior counsel and the resulting excusable neglect.

A. Background Regarding the Lease and the Defendants' Breach

- 1. On November 18, 2005, the Willard Plaintiffs entered into a Purchase and Sale Agreement with P.A. Morabito and Co. Limited to purchase a commercial property located at 7695 and 7699 South Virginia Avenue, Reno, Nevada (the "Virginia Property") for a total purchase price of \$17,750,000.00. (See the Declaration of Larry J. Willard, attached hereto as Ex. 1, at ¶ 3.)
- 2. Mr. Willard paid a total of \$4,668,738.49 in earnest money for the Virginia Property, and borrowed \$13,250,000.00 from South Valley National Bank ("South Valley") to pay the balance of the purchase price. ($\underline{\text{Id.}}$ at \P 4.)
- 3. 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 (20) years at a base annual rental rate of \$1,464,375.00 with the annual rent increasing by two percent per year compounded annually. (Id. at \P 6.)
- 4. On December 2, 2005, Defendant Berry-Hinkley Industries ("BHI"), Overland, and Mr. Willard entered into a lease agreement (the "Virginia Lease") containing the lease-back provision mentioned above. (\underline{Id} at \P 7.)

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16.	On March	10, 2013,	BHI's	finance	department	disclosed	to	Mr.	Willard	that	it
would no long	er pay any r	ent. (<u>Id.</u> at	¶ 20.)								

- 17. On April 12, 2013, BHI and Herbst's counsel sent a letter indicating that BHI did not intend to cure the breach of the Virginia Lease and instead planned to vacate the Virginia Property on April 30, 2013. (<u>Id.</u> at ¶ 21.)
- 18. Under the Virginia Lease, upon BHI's breach, the rent due rent was accelerated. (Id. at ¶ 23.)
 - 19. The amount owed, to date, exceeds \$15,000,000.00. (<u>Id.</u> at ¶ 24.)
- 20. Mr. Herbst fully guaranteed the Virginia Lease. Due to BHI's breach, he is also liable for an amount in excess of \$15,000,000.00. (Id. at ¶ 25.)
- 21. Despite BHI and Mr. Herbst's liability, the Willard Plaintiffs recognized they would have to mitigate their damages immediately.
- 22. The Willard Plaintiffs knew that because of their obligation to pay \$87,077.52 per month to the Loan Servicing Agency, they could lose the Virginia Property due to BHI's sudden decision to breach the Lease and no longer pay the approximately \$140,000.00 in rent that the Willard Plaintiffs used to service the loan. (\underline{Id} at ¶ 27.)
- 23. Mr. Willard coordinated with BHI to remain on the Virginia Property until he could find a replacement tenant. ($\underline{\text{Id.}}$ at \P 28.)
- 24. Mr. Willard entered into an interim "Operation and Management Agreement" with BHI effective May 1, 2013, under which BHI agreed to continue active operations of the Virginia Property. (Id. at ¶ 29.)
- 25. This Operation and Management Agreement did not excuse BHI's rent obligations, but provided incentive for BHI to reduce its liability for damages to Mr. Willard and Overland while they attempted to locate a replacement tenant. ($\underline{\text{Id.}}$ at \P 31.)
- 26. Unfortunately, in late May 2013, Mr. Willard discovered that the Virginia Property was not fully operational and was actually in total disarray. (<u>Id.</u> at ¶ 32.)
- 27. On June 1, 2013, BHI vacated the Virginia Property having paid no rent whatsoever since its sudden breach of the Virginia Lease on March 1, 2013. (Id. at ¶ 35.)

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On June 14, 2013, Mr. Willard received a Notice of Intent to Foreclose from the

2	Loan Servicing Agent. (<u>Id.</u> at ¶ 36.)
3	29. Following the breach, despite Mr. Willard's diligent efforts, he was unable to find
4	a replacement tenant to lease the Virginia Property. (<u>Id.</u> at ¶ 37.)
5	30. On February 14, 2014, Overland and Mr. Willard agreed to enter into an
6	agreement with Longley Partners, LLC ("Longley") for Longley to purchase the Virginia
7	Property via short sale. (<u>Id.</u> at ¶ 39.)
8	31. Due to the Defendants' breach, Mr. Willard and the Willard Plaintiffs lost their
9	investment, their stream of rental income of approximately \$140,000.00 a month, and the
10	Virginia Property. (<u>Id.</u> at ¶ 40.)
11	B. Mr. Willard's History with Prior Counsel
12	32. When Defendant Berry-Hinckley Industries violated the Virginia Lease, Mr.
13	Willard faced losing his substantial income and retirement. (<u>Id.</u> at ¶¶ 40, 45.)
14	33. Mr. Willard is a senior citizen and was very much dependent on the income
15	derived from the Virginia Property. (<u>Id.</u> at ¶¶ 41-47, 94.)
16	34. Mr. Willard's income not only provided for him, but also for his ex-wife and his
17	blind father, who was 92 years old at the time of the breach and was in an assisted living facility.
18	(<u>Id.</u> at ¶ 42.)
19	35. Presently, Mr. Willard has only a social security income of \$1,630.00 per month.
20	(<u>Id.</u> at ¶ 47.)
21	36. To try to avoid financial ruin, Mr. Willard pursued a lawsuit against BHI and its
22	guarantor, Jerry Herbst. (<u>Id.</u> at ¶ 48.)
23	37. Mr. Willard was living in the San Francisco Bay Area and originally retained an
24	attorney there named Steven Goldblatt. (<u>Id.</u> at ¶ 49.)
25	38. Mr. Goldblatt filed the case in California, which Mr. Willard later learned was not
26	appropriate. Mr. Goldblatt then had to withdraw because of a serious car accident. (<u>Id.</u> at ¶ 50.)
27	39. Mr. Willard was thus forced to find another attorney to take his case and file it in
28	the correct jurisdiction.

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6	Mr. Willard ha	d every reason to believe that Mr. Moquin was qualified and would take this case
7	very seriously.	$(\underline{\text{Id.}} \text{ at } \P 54.)$
8	43.	Because of Mr. Willard's lack of income, Mr. Moquin agreed to take the case on a
9	contingency fe	e. (<u>Id.</u> at ¶ 55.)
10	44.	At the onset, Mr. Moquin was busy cleaning up and assimilating the original
11	lawsuit that th	e previous attorney had incorrectly filed in California, filing this current case in
12	Reno, and subs	sequently amending the complaint in this case. ($\underline{\text{Id.}}$ at \P 56.)
13	45.	Throughout 2015 and 2016, Mr. Willard believed Mr. Moquin was quite busy
14	dealing with d	iscovery demands, interrogatories, vetting, research, and culminating in a hearing
15	regarding defe	endants' partial motion for summary judgment on certain matters of the lawsuit.
16	(<u>Id.</u> at ¶ 58.)	
17	46.	After some time, Mr. Willard realized that Mr. Moquin was having financial
18	difficulties. He	owever, Mr. Moquin continued moving forward with this case, until some point in
19	mid-to-late 201	17. (<u>Id.</u> at ¶ 63.)
20	47.	As it turned out, Mr. Moquin was dealing with more than just financial problems.
21	48.	Mr. Willard discovered that as much as Mr. Moquin wanted to respond to
22	deadlines in a t	timely fashion, he was dealing with mental health issues and "demons" beyond his
23	control. (Id. at	±¶ 66.)
24	49.	Mr. Willard also discovered that Mr. Moquin was struggling with a constant
25	marital conflic	t that greatly interfered with his work. ($\underline{\text{Id.}}$ at \P 67.)
26	50.	In addition, Mr. Moquin was suffering from bipolar disorder. (Id. at $\P\P$ 70-76;
27	see also Ex. 8 a	at 5.)
28	51.	Mr. Moquin's disorder is both severe and debilitating. (Ex. 1 at ¶ 73.)
on, son reet,		WILLARD PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF PAGE 6

The Willard Plaintiffs were directed to another California attorney, Brian Moquin.

At the time that Mr. Willard retained him, Mr. Moquin seemed to be financially

Upon reviewing Mr. Moquin's professional status and speaking to other people,

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stable. (Id. at \P 53.)

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(Id. at \P 52.)

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1	52. Symptoms of Mr. Moquin's disorder manifest as apathy, an inability to
2	concentrate, difficulty making decisions, an inability to accomplish tasks, missed work, lack of
3	energy, and depressed mood. (<u>Id.</u> at ¶¶ 74-76; <u>see also</u> Ex. 5.)
4	53. Mr. Willard only now realizes that while Mr. Moquin was assuring him that he
5	was working on the case, he was missing deadlines and failing to properly pursue the case. (Id.
6	at ¶¶ 76-80.)
7	54. Before the case was dismissed, local counsel David O'Mara had raised concerns
8	about Mr. Moquin's responsiveness, but after having his total income dissipated after the
9	Defendants' breach, and having only a social security income to rely on, Mr. Willard's felt that
10	his only option was to rely on Mr. Moquin. (<u>Id.</u> at ¶ 81.)
11	55. In addition, Mr. Moquin repeatedly assured Mr. Willard that he would prevail and
12	that the case was proceeding fine. ($\underline{\text{Id.}}$ at \P 82.)
13	56. For his part, Mr. Willard made ongoing efforts on an almost daily basis to push
14	the case forward, provide Mr. Moquin with what he needed, and to pursue the case against the
15	Defendants for breach of the Virginia Lease and the personal guarantee. $(\underline{\text{Id.}} \text{ at } \P 83.)^1$
16	57. Based on his communications with Mr. Moquin, Mr. Willard felt assured that the
17	counterclaims brought by the Defendants were without merit and misleading. (<u>Id.</u> at ¶ 84.)
18	58. Those counterclaims included misrepresentations about the original California
19	case, supposedly being unaware of his damages, and incorrectly claiming Mr. Willard had
20	terminated the operation lease. (<u>Id.</u> at ¶ 85.)
21	59. Mr. Willard was devastated to realize that Mr. Moquin had not been able to file
22	timely oppositions and had failed to comply with various discovery rules. (<u>Id.</u> at ¶ 86.)
23	60. Mr. Willard can now see some of the apparent symptoms manifested in his
24	communications with Mr. Moquin, where Mr. Moquin would continually provide anticipated
25	completion dates of various documents, but then change those anticipated dates, and incidences
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28	¹ If it would assist the Court, the Willard Plaintiffs are willing to provide text messages with Mr. Moquin for the Court's in camera review. These messages corroborate his failures and the Plaintiffs' efforts to pursue the case.

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where Mr. Moquin would alternate between cycles of optimism (mania) and then going days when he would not respond at all (depression). (Id. at \P 88.)

- 61. Mr. Moquin's court records reveal disastrous personal problems that clearly affected his ability to practice and also corroborate that his failures in this case were not isolated.
- 62. In her Request for Domestic Violence Restraining Order, which is signed under penalty of perjury, Mr. Moquin's wife, Natasha Moquin, confirms that Mr. Moquin "was recently diagnosed with Bipolar disorder, has been paranoid and violent," and that she is concerned about triggering a psychotic reaction. (Ex. 8 at 5.)
- 63. Natasha Moquin also confirms that the worst abuse she suffered from Mr. Moquin was around September 2016 – showing that his personal problems have been in the background of all of the critical events in this case. (Ex. 8 at 10.)
- 64. Natasha Moquin further reveals that for years she has been concerned that Mr. Moquin was failing to meet filing responsibilities in his cases. (Ex. 8 at 11.)
- 65. Prior to filing for divorce, Natasha Moquin had already received an Emergency Protective Order against Mr. Moquin. (Ex. 8 at 5; see also Ex. 6.)
- 66. Mr. Moquin was even arrested pursuant to that Emergency Protective Order on January 23, 2018. (Ex. 7.)
- 67. Having now received Mr. Moquin's diagnosis and learning more about his extensive personal problems, Mr. Willard can finally see how the turmoil in Mr. Moquin's life affected the Willard Plaintiffs' case. (Id. at ¶ 87.)
- 68. At age 76, Mr. Willard's only chance of living his remaining years above the poverty level is to recover damages for the Defendants' breach of the Virginia Lease and personal guarantee. (Id. at $\P\P$ 94-99.)

III. **LEGAL STANDARD**

Rule 60(b) provides in relevant part that "upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect" The Rule further states that a Rule 60(b) "motion shall be made within a reasonable time, and for reasons

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(1), (2), and (3) not more than 6 months after the proceeding was taken or the date that written notice of entry of the judgment or order was served."

"The salutary purpose of Rule 60(b) is to redress any injustices that may have resulted because of excusable neglect." Nev. Indus. Dev. v. Benedetti, 103 Nev. 360, 364, 741 P.2d 802, 805 (1987). "Rule 60 should be liberally construed to effectuate that purpose." Id.

This Court has wide discretion in determining what constitutes excusable neglect. Cicerchia v. Cicerchia, 77 Nev. 158, 161-62, 360 P.2d 839, 841 (1961). In Yochum v. Davis, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982), the Nevada Supreme Court set forth several factors for a trial court to consider in determining whether relief should be granted based upon excusable neglect, including: (1) whether the party seeking relief promptly moved for relief, (2) the absence of an intent to delay proceedings; (3) a lack of knowledge of the procedural requirements, and (4) good faith. Id. Notably, "[a] lack of procedural knowledge on the part of the moving party is not always necessary to show excusable neglect under NRCP 60(b)(1)." Stoecklein v. Johnson <u>Elec.</u>, 109 Nev. 268, 273, 849 P.2d 305, 308 (1993). The Nevada Supreme Court has stated that "[e]ach case depends upon its own facts," and a lack of procedural knowledge is just one persuasive factor." Id. However, Rule 60(b) is guided by "the state's sound basic policy of resolving cases on their merits whenever possible." Stoecklein, 109 Nev. at 274, 849 P.2d at 309.

The Court will also consider whether the Plaintiffs can establish a meritorious claim or defense. This burden, however, is minimal. See id. (the mere filing of a good faith answer established a meritorious defense). The purpose of this requirement is simply to ensure that setting aside a judgment would not be pointless. Century 21 Real Estate LLC v. Kenneth M. <u>Yanni, Inc.</u>, No. 07-6078 (JAG), 2009 U.S. Dist. LEXIS 26990, at *6 (D.N.J. Mar. 31, 2009) ("there would be no point in setting aside the default judgment" if the defendant could not demonstrate the possibility of his success on the merits.")

IV. **LEGAL ARGUMENT**

A. Plaintiffs' Motion Will Redress Injustice

Unequivocally, Mr. Moquin's mental health problems and inactions in this case caused the Defendants inconvenience, annoyance, and delay. The simple and escapable truth, however,

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is that the harm Mr. Moquin caused to Mr. Willard and Overland is disproportionately larger than the harm he caused the Defendants.

At its core, this is a simple case about a breach of a lease with a personal guarantee. The Defendants cannot credibly deny the breach, or that the accelerated rent owed to Mr. Willard and Overland under the Virginia Lease exceeds approximately \$15,000,000.00. The Defendants also cannot deny that as a practical matter, their breach of the Virginia Lease financially devastated the Willard Plaintiffs and caused them to lose the Virginia Property (even if Mr. Willard's damages are limited by law such that he cannot recover "short-sale" or other damages that naturally flow from the breach). If the Willard Plaintiffs' case is not reinstated, the Defendants will almost fully escape the consequences of their strategic breach. More importantly, Mr. Willard will face a continuation of his financial ruin – and at age 76, will effectively be deprived of any hope at a comfortable future.

Conversely, Mr. Herbst, who personally guaranteed the lease and represented a net worth in excess of \$200,000,000, will face no such tribulation. In light of Rule 60(b)'s liberally interpreted and salutary purpose of redressing injustice, this Court should grant Mr. Willard relief from its orders entered due to Mr. Moquin's failures and allow this case to proceed to trial. See Nev. Indus. Dev. 103 Nev. at 364, 741 P.2d at 805.

B. The Plaintiff Can Establish Excusable Neglect

Mr. Moquin's Psychological Disorder Constitutes Excusable Neglect

Under Nevada law, where an attorney's mental illness causes procedural harm to his or her client, NRCP 60(b)(1) justifies granting relief to the client. See Passarelli v. J. Mar Dev., 102 Nev. 283, 720 P.2d 1221 (1986). Other courts are in accord. See United States v. Cirami, 563 F.2d 26, 34 (2d Cir. 1977) (where a psychological disorder led a party's attorney to neglect almost completely his clients' business while at the same time assuring them that he was attending to it, Rule 60(b) relief is appropriate); Boehner v. Heise, 2009 U.S. Dist. LEXIS 41471, at *9 (S.D.N.Y. May 14, 2009) (counsel's psychological disorder justified relief under Rule 60(b)); Cobos v. Adelphi Univ., 179 F.R.D. 381, 388 (E.D.N.Y. 1998) (where an attorney's

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mishandling of a movant's case stems from the attorney's mental illness, extraordinary circumstances may justify relief).

Clearly, as the Statement of Facts and the attached exhibits demonstrate, Mr. Moquin was suffering from a psychological disorder that caused him to constructively abandon the case. Accordingly, the Court should find excusable neglect and grant the Willard Plaintiffs' relief from the Court's orders disposing of their claims.

ii. The Excusable Neglect Factors

Relief from Rule 60(b)(1) is also appropriate because Mr. Willard can satisfy the Yochum factors. These include: (1) whether the party seeking relief promptly moved for relief under NRCP 60(b), (2) the absence of an intent to delay proceedings; (3) a lack of knowledge of the procedural requirements, and (4) good faith.

Upon discovering that Mr. Moquin failed to do what he promised, Mr. Willard located replacement counsel, who has filed this Motion well within the six (6) months required under Rule 60(b). Thus, the Willard Plaintiffs have promptly moved for relief.

In addition, Mr. Moquin's mental illness demonstrates that the Willard Plaintiffs have at all times acted in good faith and without the intent to delay the proceedings. The Plaintiffs are, in fact, the victims of Mr. Moquin's assurances.

Finally, Mr. Willard relied upon Mr. Moquin's promises that he was meeting the Court's procedural requirements. Thus, the Willard Plaintiffs were unaware of any procedural rules that were not being satisfied.

In addition to the Yochum factors, Mr. Willard must be able to establish a meritorious claim. As was noted above, the burden for this showing is minimal. Mr. Willard hereby incorporates his analysis from the Motion for Summary Judgment of Plaintiffs Larry J. Willard and Overland Development Corporation. (Ex. 9 at 14:1-15-19:13.) As that motion and the Court's pleadings, papers, and files all demonstrate, the Willard Plaintiffs have legitimate claims against these Defendants that far surpass the mere "possibility of success" that they need to demonstrate at this stage.

C. Case-Terminating Sanctions in this Case Are Not Appropriate in Light of the Mental Health Issues of Plaintiffs' Prior Counsel

On March 6, 2018, this Court entered its Sanctions Order. The Sanctions Order dismissed Plaintiffs' claims with prejudice, and was therefore a case-terminating sanction. "Because dismissal with prejudice is the most severe sanction that a court may apply . . . its use must be tempered by a *careful* exercise of judicial discretion." Hunter v. Gang, 123 Nev ____, ____, 377 P.3d 448, 455-456 (Nev. Ct. App. 2016) (internal citations omitted) (emphasis in original). Further, a heightened standard of review applies to case-terminating sanctions. Young v. Johnny Ribeiro Bldg., 106 Nev. 88, 92-93, 787 P.2d 777 (1990).

Plaintiff understands that the Court entered a case-terminating sanction because of Mr. Moquin's repeated failure to comply with discovery rules and this Court's orders. Mr. Moquin's failure to respond deprived the Plaintiffs of any opportunity to explain their position. Moreover, neither the parties nor the Court knew that these failures were caused by Mr. Moquin's psychological condition. When these facts are applied to the sanctions analysis required under Young, it becomes clear that relief from the Sanctions Order is appropriate.

In <u>Young</u>, the Nevada Supreme Court explained the factors the court should consider when considering dismissal with prejudice as follows:

The factors a court may properly consider include, but are not limited to, the degree of willfulness of the offending party, the extent to which the non-offending party would be prejudiced by a lesser sanction, the severity of the sanction of dismissal relative to the severity of the discovery abuse, whether any evidence has been irreparably lost, the feasibility and fairness of alternative, less severe sanctions, such as an order deeming facts relating to improperly withheld or destroyed evidence to be admitted by the offending party, the policy favoring adjudication on the merits, whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney, and the need to deter both the parties and future litigants from similar abuses.

Young, 106 Nev. at 92-93, 787 P.2d at 780.

i. Mr. Moquin's Inability to Comply with the Discovery Rules and this Court's Orders Was Not Willful

"Sanctions may only be imposed where there has been willful noncompliance with a court order" <u>GNLV Corp. v. Serv. Control Corp.</u>, 111 Nev. 866, 869, 900 P.2d 323 (1995).

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The Defendants assumed the Plaintiffs were engaged in willful misconduct, and even argued that Plaintiffs engaged in a bad faith attempt to sabotage them. (See Motion for Sanctions at 26:13-16 ("Plaintiffs' bad faith motives in waiting to ambush Defendants with these damages also are plainly evidenced by their eleventh-hour Motions requesting brand-new, different, relief "); 20:11-12 ("Plaintiffs' newly-requested relief and conduct throughout this case is patently improper, in bad faith, and deliberate "); 22:5-9 ("[t]he inexorable conclusion from this conduct is Plaintiffs strategically violated the law and willfully ignored this Court's orders to unfairly ambush the Defendants and deprive them of their inability to defend this case." (emphasis supplied).)

As the Court can see, these allegations are 100% untrue. Mr. Willard did not engage in any willful misconduct. Instead, Plaintiffs' failures are the result of Mr. Moquin's mental illness. Any other conclusion is belied by the factual evidence submitted in support of this Motion, and by plain reason. Notably, it strains credulity to conclude, in light of what happened in this case, that Mr. Moquin was acting to strategically ambush the Defendants when he could not even oppose motions or timely file a request for submission of his own motions.

Because there were no willful violations or non-compliance with orders or rules in this case, the Court should grant Mr. Willard and Overland relief under Rule 60(b).

ii. Defendants' Prejudice is Real, But More Limited Than the Defendants Contend

Plaintiff does not dispute that Mr. Moquin's failures have caused delay and some prejudice. However, delay alone is not generally considered substantial prejudice. Lemoge v. United States, 587 F.3d 1188, 1196 (9th Cir. 2009) ("[p]rejudice requires greater harm than simply that relief would delay resolution of the case."). Further, while the Defendants contend that the parties have not made any progress with discovery or moved closer to trial readiness, this is not completely accurate. The Defendants have already prevailed on one motion for partial summary judgment, and, more importantly, have acknowledged that they have been able to prepare defenses to Plaintiffs' accelerated-rent damages, which exceed \$15,000,000.00. (Compare Motion for Sanctions at 19:8-10 with 17:1-5.) Thus, if the Court grants this motion, trial can be scheduled for the not-to-distant future.

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Indeed, the crux of the Defendants' prejudice relates to Mr. Moquin's claim for "diminution in value" damages and reliance upon a non-disclosed expert. To the extent that the Court finds that complete relief due to Mr. Moquin's mental illness is not appropriate, any remaining sanction should focus on the "diminution of value" claim. See, e.g., Young, 106 Nev. at 92, 787 P.2d at 779-80 ("fundamental notions of due process require that the discovery sanctions for discovery abuses be just and that the sanctions relate to the claims which were at issue in the discovery order which is violated.").

iii. Dismissal is Too Severe of a Sanction

Dismissal of Plaintiff's case with prejudice is too severe of a sanction. As the Statement of Facts demonstrates, the Defendants' deliberate breach of the Virginia Lease financially destroyed Mr. Willard. This case unfortunately presents the only chance he has at age 76 to recover any financial compensation and live out his remaining years with some financial stability. If the Defendants face no responsibility for their breach, and are absolved from liability under the personal guarantee, they will ultimately receive a windfall in excess of \$15,000,000.00. Conversely, Mr. Willard – through no fault of his own – will be left in financial ruin.

The Defendants' Motion for Sanctions argued that dismissal with prejudice was not too severe of a sanction because of the willfulness of the violations and the need to deter future recalcitrant conduct. (Motion for Sanctions at 30:6-19.) Yet, as was noted above, Plaintiffs' failures were not willful. Indeed, under Nevada law, they constituted excusable neglect. Thus, the dismissal sanction is clearly too severe.

Finally, there is no question that sanctions serve no deterrent purpose when the cause of a litigant's failures was the mental illness of his attorney.²

iv. Nevada's Policy of Adjudicating Cases on the Merits, and Whether the Sanctions Unfairly Operate to Penalize Mr. Willard for Mr. Moquin's Conduct

The Nevada Supreme Court has repeatedly declared Nevada's policy that cases be adjudicated on the merits. Because of the clear excusable neglect, and the Defendants'

² For this reason, the Defendants' argument that dismissal with prejudice is necessary to deter similar abusive conduct does not apply. (See Motion for Sanctions at 31:11-28.)

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acknowledgment of being prepared to assert defenses to Plaintiff's rent-based damages, this Court should follow Nevada's policy and allow this case to proceed to trial.

If the Court does not provide relief, the Willard Plaintiffs will undoubtedly be unfairly penalized by Mr. Moquin's conduct. Mr. Moquin repeatedly assured Mr. Willard that the case was proceeding fine. It was only in late 2017 that it became clear to Mr. Willard that something was terribly wrong and that Mr. Moquin was suffering from mental illness. Critically, Nevada Supreme Court precedent makes clear that it would be improper to impute Mr. Moquin's conduct to the Willard Plaintiffs because of Mr. Moquin's mental illness. Passarelli, 102 Nev. at 286, 720 P.2d at 1224 (noting that it would be unfair to impute the attorney's conduct to the client and deprive the client of a "full trial on the merits.").

V. CONCLUSION

The non-willful failure of an innocent party to comply with procedural rules and orders, when caused by the serious mental health disorder of his attorney, constitutes excusable neglect. Further, under no circumstances should such excusable neglect justify a windfall to a party that deliberately breached a lease and refused to honor a personal guarantee.

Mr. Willard and Overland were financially devastated as a result of the Defendants' breaches. They deserve their day in court and should not be deprived of that opportunity solely because their former attorney suffers from severe mental illness. Therefore, the Court should grant this motion, set aside the orders it entered due to Mr. Moquin's failure to respond, and allow this case to proceed to a trial on the merits.

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 18th day of April, 2018.

ROBERTSON, JOHNSON, MILLER & WILLIAMSON

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By: /s/Richard D. Williamson
Richard D. Williamson, Esq.
Jonathan J. Tew, Esq.
Attorneys for the Willard Plaintiffs

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

1 **CERTIFICATE OF SERVICE** 2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of Robertson, Johnson, 3 Miller & Williamson, 50 West Liberty Street, Suite 600, Reno, Nevada 89501, over the age of 18, and not a party within this action. I further certify that on the 18th day of April, 2018, I 4 5 electronically filed the foregoing WILLARD PLAINTIFFS' RULE 60(b) MOTION FOR **RELIEF** with the Clerk of the Court by using the ECF system which served the following 6 parties electronically: 7 John P. Desmond, Esq. 8 Brian R. Irvine, Esq. 9 Anjali D. Webster, Esq. Dickinson Wright 10 100 West Liberty Street, Suite 940 Reno, NV 89501 11 Attorneys for Defendants/Counterclaimants 12 /s/ Kimberlee Hill 13 An Employee of Robertson, Johnson, Miller & Williamson 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

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Index of Exhibits

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3	1	Declaration of Larry J. Willard	9
4	2	Lease Agreement dated 11/18/05	35
5	3	Letter dated 4/12/13 from Gerald M. Gordon to Steven Goldblatt	2
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7	5	13 Symptoms of Bipolar Disorder	2
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EXHIBIT "1" Transaction # 6636476: yviloria

EXHIBIT "1"

EXHIBIT "1"

1	CODE: 1520									
$_{2}$	Richard D. Williamson, Esq., SBN 9932 Jonathan Joel Tew, Esq., SBN 11874									
3	ROBERTSON, JOHNSON, MILLER & WILLIAM 50 West Liberty Street, Suite 600	SON								
	Reno, Nevada 89501									
4	Telephone: (775) 329-5600 Facsimile: (775) 348-8300									
5	Attorneys for Plaintiffs Larry J. Willard, individually and as Trustee of the Larry									
6	James Willard Trust Fund, and Overland Development Corporation									
7	Development Corporation									
8	IN THE SECOND JUDICIAL DISTRICT CO	OURT OF THE STATE OF NEVADA								
9	IN AND FOR THE COUNTY OF WASHOE									
10	LARRY J. WILLARD, individually and as									
11	Trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT	Case No. CV14-01712								
12	CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A.	Dept. No. 6								
13	WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley	r								
	Intervivos Revocable Trust 2000,									
14	Plaintiffs,									
15	VS.									
16	BERRY-HINCKLEY INDUSTRIES, a Nevada									
17	corporation; and JERRY HERBST, an individual									
18										
19	Defendants.									
20	BERRY-HINCKLEY INDUSTRIES a Nevada									
21	corporation; and JERRY HERBST, an individual,									
22	Counterclaimants,									
23	VS.									
24	LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund;									
25	OVERLAND DEVELOPMENT CORPORATION, a California corporation,									
26	Counterdefendants.									
27										
28	DECLARATION OF LAI	RRY J. WILLARD								

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I, Larry J. Willard, hereby declare and state as follows:

- 1. I am the President, Chief Executive Officer, and sole Director of Overland Development Corporation, a California corporation ("Overland").
 - 2. I am also the trustee of the Larry James Willard Trust Fund.
- 3. On November 18, 2005, I entered into a Purchase and Sale Agreement with P.A. Morabito and Co. Limited to purchase a commercial property located at 7695 and 7699 South Virginia Avenue, Reno, Nevada (the "Virginia Property") for a total purchase price of \$17,750,000.00.
- 4. I paid a total of \$4,668,738.49 in earnest money for the Virginia Property, and borrowed \$13,250,000.00 from South Valley National Bank ("South Valley") to pay the balance of the purchase price.
 - 5. I assigned the Purchase and Sale Agreement to Overland and my trust.
- 6. 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 (20) years at a base annual rental rate of \$1,464,375.00 with the annual rent increasing by two percent per year compounded annually.
- 7. On December 2, 2005, Berry-Hinkley Industries ("BHI"), Overland, and my trust signed a lease agreement (the "Virginia Lease") to accomplish this lease-back, which was made effective as of November 18, 2005.
 - 8. A true and correct copy of the Virginia Lease is attached as Exhibit 2.
- 9. On February 21, 2006, we entered into a Lease Subordination, Non-Disturbance and Attornment Agreement (the "Subordination Agreement"), which informed BHI that we were purchasing the Virginia Property with financing from South Valley.
- 10. In the Subordination Agreement, BHI: (1) expressly agreed not to terminate the Virginia Lease without obtaining the consent of South Valley; and (2) acknowledged that South Valley would not make the loan without the Subordination Agreement being in place.
- 11. BHI and its owners also knew that breaching the Virginia Lease would have devastating consequences on Overland, my trust, and me.

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12.	On	March	16,	2006,	we	refinanced	the	South	Valley	loan	with	Telesis
Community C	Credit	Union ("Tele	esis") fo	or a t	otal loan am	ount	of \$13,	312,500.	.00.		

- 13. Under this loan, we were required to pay \$87,077.52 per month to Telesis's loan servicing agent, Business Partners, LLC.
- 14. On February 17, 2007, BHI sent an offer letter to me and other landlords indicating that Jerry Herbst ("Mr. Herbst") intended to acquire BHI's convenience store assets, which included the Virginia Property.
- 15. As part of the offer, Mr. Herbst offered to personally guarantee BHI's payments and performance under the Virginia Lease.
- 16. As a material inducement for this offer, Mr. Herbst representated that his net worth exceed \$200,000,000.
- 17. In reliance upon Mr. Herbst's and BHI's representations and Mr. Herbst's personal guarantee, I accepted Herbst's offer.
 - 18. BHI stayed current on its rent until 2013.
- 19. On March 1, 2013, without any notice, violated the Virginia Lease by not sending the monthly rent payment.
- 20. On March 10, 2013, BHI's finance department informed me that it would no longer pay any rent.
- 21. On April 12, 2013, BHI and Herbst's lawyers sent a letter indicating that BHI did not intend to cure the breach of the Virginia Lease and instead planned to vacate the Virginia Property on April 30, 2013.
 - 22. A true and correct copy of that letter is attached as Exhibit 3.
 - 23. Under the Virginia Lease, upon BHI's breach, the rent due rent was accelerated.
 - 24. The amount owed now exceeds \$15,000,000.
 - 25. Mr. Herbst fully guaranteed the Virginia Lease, so he is also liable for that sum.
- 26. Unfortunately, we could not wait for BHI and Mr. Herbst to honor their contracts as their breach placed us under tremendous financial stress.

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- 27. Under our loan for the Virginia Property, Overland, my trust, and I had an obligation to pay \$87,077.52 per month and we relied on the monthly rent of approximately \$140,000 from BHI and Mr. Herbst to pay the loan.
- 28. Therefore, I coordinated with BHI and Mr. Herbst to remain on the Virginia Property until we could find a replacement tenant.
- 29. To do this, we entered into an interim "Operation and Management Agreement" effective May 1, 2013, under which BHI promised to continue active operations of the Virginia Property.
- 30. A true and correct copy of the Operation and Management Agreement is attached as Exhibit 4.
- 31. This agreement did not excuse BHI's rent obligations, but provided an incentive for BHI to reduce its liability for damages to us while they looked for a replacement tenant.
- 32. Unfortunately, in late May 2013, I discovered that the Virginia Property was not fully operational.
- 33. BHI had removed signs and boarded entry doors to the convenience store; it had broken down equipment in the car wash; there were torn awnings; and there was insufficient inventory in oil and lube shop. The Defendants had left the Virginia Property in disarray.
- 34. When I reviewed property in late May it appeared to me that the Virginia Property may have been only partially operational for weeks.
- 35. On June 1, 2013, BHI vacated the Virginia Property having paid no rent whatsoever since its sudden breach of the Virginia Lease on March 1, 2013.
- 36. On or about June 14, 2013, I received a Notice of Intent to Foreclose from the lender's loan servicing agent, Business Partners, LLC.
- 37. Following the breach, despite our diligent efforts, Overland, my trust, and I were unable to find a replacement tenant to lease the property.
 - 38. By February 2014, we had no way to keep the property.
- 39. On February 14, 2014, we agreed to enter into an agreement to sell the Virginia Property to Longley Partners, LLC through a short sale.

1	40.	Due to the Defendants' breach, Overland, my trust, and I lost our investment, our
2	substantial mo	onthly rental income of approximately \$140,000, and the Virginia Property.
3	41.	I was already a senior citizen at the time of the Defendants' breach.
4	42.	That income also provided for my ex-wife and my blind father, who was 92 years
5	old at the time	of the breach and was in an assisted living facility.
6	43.	The Defendants also put Edward Wooley in a bad situation.
7	44.	I understand that he also had agreements that Mr. Herbst and BHI breached.
8	45.	After BHI violated our respective leases, Edward Wooley and I both faced losing
9	our substantia	l income and retirement. We were forced to contemplate insolvency and financial
10	ruin.	
11	46.	This was devastating to me in that I had invested approximately \$5,000,000 in the
12	Virginia Prope	erty, and depended on that property for my monthly income.
13	47.	Presently, I have only a social security income of \$1,630.00 per month.
14	48.	Therefore, in an effort to avoid financial ruin, Ed Wooley and I joined in pursuing
15	a lawsuit agair	nst BHI and Mr. Herbst.
16	49.	Mr. Wooley and I were living in the San Francisco Bay Area and originally
17	retained an att	orney there named Steven Goldblatt.
18	50.	Mr. Goldblatt filed the case in California, which we later learned was not
19	appropriate. N	Mr. Goldblatt then had to withdraw because of a serious car accident.
20	51.	Therefore, Mr. Wooley and I were forced to find another attorney to take our case
21	and file it in th	ne correct jurisdiction.
22	52.	We were directed to another California attorney, Brian Moquin.
23	53.	At the time that we retained Mr. Moquin, he seemed to be a stable, accomplished
24	lawyer.	
25	54.	Upon reviewing Mr. Moquin's professional status and speaking to other people,
26	we had every	reason to believe that Mr. Moquin was qualified and would take this case very
27	seriously.	
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- 55. Because of my lack of income, Mr. Moquin agreed to take the case on a contingency fee.
- 56. At the onset Mr. Moquin was busy cleaning up and assimilating the original lawsuit that the previous attorney had incorrectly filed in California, filing this current case in Reno, and subsequently amending the complaint in this case.
- 57. Mr. Moquin always assured me that this case was a fairly simple one that not only had a very good lease in place but also a guarantee from a person with very substantial wealth.
- 58. Throughout 2015 and 2016, I believed Mr. Moquin was quite busy dealing with discovery demands, interrogatories, vetting, research, and culminating in a hearing regarding defendants' partial motion for summary judgment on certain matters of the lawsuit.
- 59. Periodically I did get concerned with the slow pace of the litigation and the lack of a resolution, but Mr. Moquin always had an explanation or "legal reasons" for any issues and delays. He also frequently explained that the defendants' attorneys were the cause of the delay.
 - 60. Until recently, I had no option but to rely on Mr. Moquin.
- 61. When the defendants abandoned their lease, I was financially devastated and had no resources to pay for a lawyer.
 - 62. Initially, I could only hire a lawyer on a contingency fee basis.
- 63. After some time, it became apparent to me that Mr. Moquin was having some financial difficulties. However, he continued moving forward with this case and I did not know how badly his personal life was affecting his work.
- 64. Mr. Moquin continued to assure me that he would be able to secure a large judgment or settlement. Therefore, expecting a favorable result, I borrowed money from friends and family and also secured loans from friends and family for Mr. Moquin's personal expenses.
 - 65. As it turned out, Mr. Moquin was dealing with more than just financial problems.
- 66. I am now convinced that as much as Mr. Moquin wanted to respond timely and appropriately, he was dealing with issues and "demons" beyond his control.
- 67. I have learned that Mr. Moquin was apparently struggling with a constant marital conflict that greatly interfered with his work.

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- 68. This culminated in Mr. Moquin suffering what I can only describe as a total mental breakdown.
- 69. After Mr. Moquin suffered this mental breakdown, I recommended that he visit Dr. Douglas Mar, who is well-respected psychiatrist in Campbell, California.
- 70. Mr. Moquin later explained to me that Dr. Mar had diagnosed him with bipolar disorder and that he needed money to pay Dr. Mar for treatment.
- 71. After obtaining a loan from a friend, I arranged to pay Dr. Mar for his services, but I do not know if Mr. Moquin has continued with any course of treatment.
- 72. Mr. Moquin would often claim to stay up late working on our case through the night. I assumed that he was just a very hard worker and that our case was in good hands. I did not realize that his behavior may have been a symptom of mental illness.
 - 73. I believe that Mr. Moquin's disorder is severe and debilitating.
- 74. I am informed and believe that symptoms of Mr. Moquin's disorder can manifest as having apathy about some things, experiencing difficulty concentrating and making decisions, struggling with deciding what to do next, and suffering from a depressed mood.
- 75. An article discussing some of the symptoms that bipolar disorder can present is attached as Exhibit 5.
- 76. I now see that Mr. Moquin was suffering from many of these symptoms throughout his work on my case.
 - 77. There have also been periods when Mr. Moquin was unavailable.
- 78. I have learned that Mr. Moquin has been going through a bitter divorce with his wife and that at one point he was even arrested in conjunction with those proceedings.
- 79. True and correct copies of some of the documents involved in that domestic dispute are attached as Exhibits 6, 7, and 8.
- 80. Only now do I realize that while Mr. Moquin was assuring me that he was working on this case, he was missing deadlines and failing to properly pursue the case. At the time that they were occurring, I did not realize the extent of these circumstances, and they were completely out of our control.

DECLARATION OF LARRY J. WILLARD

PAGE 7

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	81.	Before	the case was dism	nissed, l	ocal atto	rney	David	d O'Mara	a had raised	conce	erns
about	Mr.	Moquin's	responsiveness.	After	having	my	total	income	dissipated	after	the
Defen	dants	' breach, ar	nd having only a s	ocial se	curity in	come	e to re	ly on, I fe	elt I only ha	d this	one
option	of co	ontinuing to	rely on Mr. Moq	uin.							

- 82. In addition, Mr. Moquin repeatedly assured me that we would prevail and that the case was proceeding fine.
- 83. For my part, I was making ongoing efforts on an almost daily basis to push the case forward, provide Mr. Moquin with what he needed, and to pursue our case against the Defendants for breach of lease agreements that were backed up with a personal guarantee.
- 84. Based on my communications with Mr. Moquin, I felt assured that the counterclaims brought by the Defendants were without merit and, I believe, misleading.
- 85. Those counterclaims included misrepresentations about the original California case, supposedly being unaware of our damages, and incorrectly claiming I had terminated the operation lease, which is not true.
- 86. It was devastating and agonizing to realize that Mr. Moquin had not been able to respond with opposition that would have clearly refuted the Defendants' unmerited claims.
- 87. Having now received Mr. Moquin's diagnosis and learning more about his personal problems, I can now see how Moquin's issues affected our case.
- 88. I can now see some of the apparent symptoms manifested in our communications with Mr. Moquin, including continually giving us anticipated dates by which he would finish projects and later having to change them, and alternating between cycles of irrepressible optimism and ideas (mania) and then going days when he would not respond at all (depression).
- 89. If the court would like to review the text messages that I exchanged with Brian, I am happy to provide those.
- 90. Although I am sympathetic for Mr. Moquin's personal struggles, I believe it is unfair that my case should be dismissed because of his mental collapse and family strife.
- 91. I am an innocent victim and believe that I deserve an opportunity to prove my case against the defendants.

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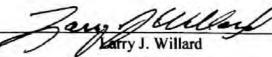
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- 92. It is unfair for me and my family to not only go through but now possibly be put in a position where I lose everything I worked for over the last fifty years.
- 93. I worked all of my life to finally be able to retire and enjoy the remaining few years I have.
 - 94. In a few months I will turn 76 years old.
- 95. It has been over five years since the defendants breached their agreements with me and I have only my social security benefits to survive.
- 96. I had invested approximately \$5,000,000 in the property that is the subject of this case, which supposedly had a strong lease and an "iron glad" guarantee behind it.
- 97. The gentleman that put up the guarantee, Jerry Herbst, had assured us that he had a net worth of over \$200,000,000 and was able to back up his guarantee.
- 98. To have to go through all the stress that has been involved in trying to recover and now being potentially stripped to poverty level because of what I now see is excusable neglect by an attorney suffering from mental illness is not only wrong but unjust.
 - I mainly wanted to recover from my losses and move on with my life.
- 100. I was 71 years old at the time of the breach and will not recapture these last 5 years but hopefully and God-willing will enjoy the remaining ones.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Dated this 8 day of April, 2018.



A.App.3703
FILED
Electronically
CV14-01712
2018-04-18 02:59:37 PM
Jacqueline Bryant
Clerk of the Court

EXHIBIT "2", Transaction # 6636476: yviloria

EXHIBIT "2"

EXHIBIT "2"

LEASE AGREEMENT

THIS LEASE AGREEMENT (this "Lease") is made as of November 18, 2005 by and between OVERLAND DEVEOPMENT CORPORATION INC. dba LJW ENTERPIRSES INC. and LARRY J. WILLARD, TRUSTEE OF THE LARRY JAMES WILLARD TRUST ("Lessor"), whose address is 133 Glenridge Avenue, Los Gatos, CA 95030, and BERRY-HINCKLEY INDUSTRIES, a Nevada corporation ("Lessee"), whose address is 425 Maestro Drive, Reno, NV 89511

In consideration of the mutual covenants and agreements herein contained, Lessor and Lessee hereby covenant and agree as follows:

Certain Defined Terms. Capitalized terms not defined herein shall have the meanings set forth in Exhibit A hereto.

Lease of Property; Use; Possession. In consideration of the Rentals and other Monetary Obligations to be paid by Lessee and of the other terms, covenants and conditions on Lessee's part to be kept and performed, Lessor hereby leases to Lessee, and Lessee hereby takes and leases, the Property (as such term is defined in Exhibit A attached hereto and which Property is located at the address set forth in Exhibit B attached hereto and situated on the real property legally described in Exhibit B attached hereto), subject to the Permitted Encumbrances, all Legal Requirements (including any existing violation thereof), and the condition of the Property as of the Effective Date; provided, however, that the recital of the Permitted Encumbrances herein shall not be construed as a revival of any Permitted Encumbrance which may have expired or been terminated. During the Lease Term, the Property shall be used solely for the operation of a Permitted Facility, and related purposes such as ingress, egress and parking.

To the maximum extent permitted by law, Lessee waives the implied warranty of suitability of the Property and Lessee acknowledges that it has accepted the Property "as is," in its current condition, with no representations, warranties or covenants, express or implied, on the part of the Lessor with respect to condition of the same or the suitability of the Property for Lessee's intended use.

Lease Term; Extension. The initial term of this Lease ("Initial Term") shall commence February 24, 2006 ("Effective Date") and shall expire at midnight on August 23, 2023 ("Expiration Date"), unless terminated sooner as provided in this Lease and as may be extended as provided herein. The time period during which this Lease shall actually be in effect, including any Extension Term, is referred to herein as the "Lease Term." Lessee shall have the right and option (each, an "Extension Option") to extend the Initial Term for four (4) additional successive periods of five (5) years each (each, an "Extension Term"), pursuant to the terms and conditions of this Lease then in effect. Lessee may only exercise the Extension Options by giving written notice thereof to Lessor of its election to do so first, no later than two hundred forty (240) days prior to the Expiration Date and two hundred forty (240) days prior to the immediately preceding Extension Term, as the case may be. If written notice of the exercise of any Extension Option is not received by Lessor by the applicable dates described above, then this

Sample Lease 1/4/2006 000160/09959 GBDOCS 469445v2 Lease shall terminate on the last day of the Initial Term or, if applicable, the last day of the Extension Term then in effect.

4. Rental and Other Monetary Obligations.

- A. Base Monthly Rental. During the Initial Term, on or before the first day of each calendar month, Lessee shall pay in advance the Base Monthly Rental; provided, however, if the Effective Date is a date other than the first day of the month, Lessee shall pay to Lessor (or any other party designated by Lessor) on the Effective Date the Base Monthly Rental prorated by multiplying the Base Monthly Rental by a fraction, the numerator of which is the number of days remaining in the month (including the Effective Date) for which Rental is being paid, and the denominator of which is the total number of days in such month. During the Extension Terms, if any, Lessee shall pay the Rental (including the Base Monthly Rental) in the manner set forth in this Section 4. Unless otherwise specifically stated to the contrary herein, Lessee shall perform all its obligations under this Lease at its sole cost and expense and shall pay all Rental and any other Monetary Obligation due hereunder when due and payable, without notice or demand.
- B. Adjustments. On the first Adjustment Date and on each Adjustment Date thereafter, the Base Annual Rental shall increase by an amount equal to the Rent Adjustment. The "Rent Adjustment" shall be an amount equal to two percent (2%) of the Base Annual Rental in effect immediately prior to the applicable Adjustment Date. The Adjustment Date shall be on the annual anniversary of the Effective Date.
- C. Additional Rental. Lessee shall pay and discharge, as additional rental ("Additional Rental"), all sums of money required to be paid by Lessee under this Lease which are not specifically referred to as Base Annual Rental or Base Monthly Rental. Lessee shall pay and discharge any Additional Rental when the same shall become due, provided that amounts which are billed to Lessor or any third party, but not to Lessee, shall be paid within five (5) days after Lessor's demand for payment thereof or, if later, when the same are due. In no event shall Lessee be required to pay to Lessor any item of Additional Rental that Lessee is obligated to pay and has paid to any third party pursuant to any provision of this Lease.
- D. Payment of Rental and Other Monetary Obligations. All Rental and other Monetary Obligations which Lessee is required to pay hereunder shall be the unconditional obligation of Lessee and shall be payable in full when due without any setoff, abatement, deferment, deduction or counterclaim whatsoever, except as set forth herein. All payments of Base Monthly Rental and any other Monetary Obligations payable to Lessor shall be remitted to Lessor at Lessor's address set forth in the first paragraph of this Lease or such other address as Lessor may designate pursuant to Section 24 hereof.
- E. Late Payment Charge. Lessee acknowledges that late payment by Lessee to Lessor of Rental will cause Lessor to incur costs not contemplated by this Lease, the exact amount of such costs being extremely difficult and impracticable to fix in advance.

Sample Lease 1/4/2006 Such costs include, without limitation, processing and accounting charges, and late charges that may be imposed on Lessor by the terms of any encumbrance and note secured by any encumbrance covering the Property. Therefore, if any payment which is required to be made by Lessee to Lessor pursuant to the terms of this Lease is made more than ten (10) days after the due date thereof, then Lessee shall pay to Lessor, as a late payment charge, five percent (5%) of the amount of the delinquent payment. Additionally, if any payment which is required to be made by Lessee pursuant to the terms of this Lease is made more than ten (10) days after the due date thereof, such payment shall bear interest at the Default Rate until received by Lessor. The late payment charge and default interest shall be paid to Lessor at the time of payment of the delinquent amount. The late payment charge and the default interest charge shall compensate Lessor for the expenses incurred by Lessor in financing, collecting and processing the late payment. The parties agree that the late charge and the default interest charge represent a fair and reasonable estimate of the costs that Lessor will incur by reason of late payment by Lessee.

5. Gaming. Lessor hereby conditionally assigns to Lessee all leases, written or oral, and all agreements for use or occupancy of the Property together with any and all extensions and renewals thereof and any and all further leases, subleases, lettings or agreements (including subleases thereof and tenancies following attornment) upon or covering the use or occupancy of the Property all of which leases, agreements, subleases and tenancies are herein sometimes collectively referred to as the "Assigned Leases"; (ii) the immediate and continuing right to collect and receive all of the rents, income, receipts, revenues, issues and profits now due or which may become due or which may now or hereafter become due from or out of the Assigned Leases or any part thereof, including, but not limited to, security deposits, minimum rents, additional rents, parking rents, deficiency rents and liquidated damages following default, any premium payable by any tenant upon the exercise of a cancellation privilege contained in its Lease; all proceeds payable under any policy of insurance covering loss of rents resulting from untenantability caused by destruction or damage to the Property; any and all rights and claims of any kind which Lessor has or hereafter may have against the tenants under the Assigned Leases and any subtenants and other occupants of the Property; any award granted Lessor after the date hereof in any court proceeding involving any tenant in any bankruptcy, insolvency or reorganization proceedings in any state or federal court and any and all payments made by any tenant in lieu of rent (any and all such moneys, rights and claims identified in this paragraph are herein sometimes referred to as the "Rents" and sometimes as the "Rent"); and (iii) all of the rights, powers and privileges of Lessor (A) to accept prepayment of more than one (1) monthly installment of the Rent thereunder, and (B) except with respect to the Assigned Lease, (I) to cancel, terminate or accept the surrender of any Assigned Lease, and (II) to amend, modify or abridge any of the terms, covenants or conditions of any Assigned Lease. The assignment contained in this Section 5 and Lessee's interest in the Assigned Leases shall become void and of no further force or effect upon the expiration or early termination of this Lease and upon such event, Lessor shall be the sole party with any interest as a landlord or lessor in the Assigned Leases. Furthermore, Lessee shall have no right to collect any amounts under the Assigned Leases upon the occurrence and continuance of an Event of Default and all such amounts shall be paid to Lessor during any such period.

Sample Lease 1/4/2006

- 6. Nevada Gaming Control Board. Lessor will follow all laws of the State of Nevada and cooperate with WGI in making application to the Nevada Gaming Control Board as may be required.
- 7. Rentals To Be Net to Lessor. The Base Annual Rental payable hereunder shall be net to Lessor, so that this Lease shall yield to Lessor the Rentals specified during the Lease Term, and all Costs and obligations of every kind and nature whatsoever relating to the Property shall be performed and paid by Lessee, including but not limited to all impositions, operating charges, maintenance charges, construction costs and any other charges, costs and expenses now existing or that arise or may be contemplated under the Permitted Encumbrances or otherwise, all maintenance and repair expenses, all utility expenses, all Taxes, all premiums for insurance required to be maintained by Lessee pursuant to the terms hereof and all other expenses, charges, assessments and costs associated with the Property or otherwise provided to be paid by Lessee pursuant to the terms of this Lease. All such charges, costs and expenses shall constitute Additional Rental and upon the failure of Lessee to pay any of such costs, charges or expenses, Lessor shall have the same rights and remedies as otherwise provided in this Lease for the failure of Lessee to pay Base Annual Rental. It is the intention of the parties except as expressly provided herein that this Lease shall not be terminable for any reason by Lessee, and that Lessee shall in no event be entitled to any abatement of, or reduction in, Rental payable under this Lease, except as otherwise expressly provided herein. Any present or future law to the contrary shall not alter this agreement of the parties.
- 8. Taxes and Assessments. Lessee shall pay, prior to the earlier of delinquency or the accrual of interest on the unpaid balance, one hundred percent (100%) of the following (collectively, "Taxes"): all taxes and assessments of every type or nature assessed against or imposed upon the Property or Lessee during the Lease Term, including without limitation, all ad valorem taxes, assessments and special assessments upon the Property or any part thereof and upon any personal property, trade fixtures and improvements located on the Property, whether belonging to Lessor or Lessee, or any tax or charge levied in lieu of such taxes and assessments; all taxes, charges, license fees and or similar fees imposed by reason of the use of the Property by Lessee; and all excise, transaction, privilege, license, sales, use and other taxes upon the Rental or other Monetary Obligations hereunder, the leasehold estate of either party or the activities of either party pursuant to this Lease, and all interest, surcharges or service or other fees payable in connection with the foregoing.

Within thirty (30) days after each tax and assessment payment is required by this Section to be paid and upon request of Lessor, Lessee shall, upon prior written request of Lessor, provide Lessor with evidence reasonably satisfactory to Lessor that such payment was made in a timely fashion. Lessee may, at its own expense, contest or cause to be contested by appropriate legal proceedings conducted in good faith and with due diligence, any above-described item or lien with respect thereto, including, without limitation, the amount or validity or application, in whole or in part, of any such item, provided that (A) neither the Property nor any interest therein would be in any danger of being sold, forfeited or lost by reason of such proceedings, (B) no monetary Event of Default has occurred, (C) Lessee shall promptly provide Lessor with copies of all notices received or delivered by Lessee and filings made by Lessee in connection with such proceeding, and (D) Lessee shall indemnify and hold Lessor harmless against any loss, Costs or damages arising from or related to such contest.

Sample Lease 1/4/2006 If Lessee shall fail to pay any Taxes when due and before any delinquency, penalty or interest is imposed on such Taxes, Lessor shall have the right to pay the same after notice to Lessee, in which case Lessee shall repay in full such amount to Lessor with Lessee's next Base Monthly Rental installment together with interest at the Default Rate.

- 9. Utilities. Lessee shall contract, in its own name, for and pay when due (and hold Lessor free and harmless from) all charges for the connection and use of water, gas, electricity, telephone, garbage collection, sewer use and other utility services supplied to the Property during the Lease Term. All utility charges, assessments and fees for the last year of the Lease shall be prorated as of the termination date of this Lease. No full or partial utility deprivation including, but not limited to, blackout, brownout, or rationing, nor any loss of or damage to improvements related to disruption or failure of any utility service shall give rise to any abatement of Rentals nor give rise to any right of Lessee to offset Rentals or to terminate the Lease, unless caused by the gross negligence or willful misconduct of Lessor or its agents, employees or contractors (but not of any other tenants or occupants of the Property). Lessor shall reasonably cooperate with Lessee, but without out-of-pocket expense to Lessor, in Lessee's efforts to restore utility service to the Property; provided, however, that if the utility service was disrupted due to Lessor's gross negligence or willful misconduct, then the cost of such restoration shall be borne by Lessor.
- 10. Insurance. Throughout the Lease Term, Lessee shall maintain, at its sole expense, the following types and amounts of insurance:
 - Insurance against loss or damage to the Property and all buildings and improvements thereon under an "all risk" insurance policy, which shall include coverage against all risks of direct physical loss, including loss by fire, lightning, and other risks normally included in the standard ISO special form (which shall include coverage for all risks commonly insured for properties similar to the Property in the Reno, Nevada area, including insurance coverage for damage caused by earthquake, flood, tornado, windstorm and other disasters for which insurance is customarily maintained for similar commercial properties). Such insurance shall be in amounts sufficient to prevent Lessor from becoming a co-insurer under the applicable policies, and in any event, after application of deductible, in amounts not less than 100% of the full insurable replacement cost. Such insurance shall contain an agreed valuation provision in lieu of any coinsurance clause, an increased cost of construction endorsement, debris removal coverage and a waiver of subrogation endorsement in favor of Lessor. While any portion of the improvements on the Property is being rebuilt on the Land, Lessee shall provide such property insurance in builder's risk completed value form, including coverage available on the so-called "all-risk" non-reporting form of policy in an amount equal to 100% of the full insurable replacement value of the improvements on the Property or such portion as is being rebuilt. The insurance policy shall insure Lessee as loss payee. No parties other than Lessor's Lender and Lessee may be named as insureds or loss payees on such property insurance policy.
 - B. Commercial general liability insurance, including products and completed operation liability, covering Lessor and Lessee against bodily injury liability, property damage liability and personal and advertising injury, liquor liability coverage (to the extent liquor is sold or manufactured at the Property), garage liability coverage including

Sample Lease 1/4/2006 without limitation any liability arising out of the ownership, maintenance, repair, condition or operation of the Property or adjoining ways, streets, parking lots or sidewalks. Such insurance policy or policies shall contain a broad form contractual liability endorsement under which the insurer agrees to insure Lessee's obligations under Section 15 hereof to the extent insurable, and a "severability of interest" clause or endorsement which precludes the insurer from denying the claim of Lessee, Lessor or Lessor's Lender because of the negligence or other acts of the other, shall be in amounts of not less than \$2,000,000 per occurrence for bodily injury and property damage, and \$2,000,000 general aggregate per location, or such higher limits as Lessor may reasonably require from time to time or as may be required by the Permitted Encumbrances, and shall be of form and substance satisfactory to Lessor.

- C. Workers' compensation insurance in the statutorily mandated limits covering all persons employed by Lessee on the Property or any persons employed by Lessee in connection with any work done on or about any Property for which claims for death or bodily injury could be asserted against Lessor, Lessee or the Property, together with Employers Liability Insurance with limits of not less than \$100,000 per accident or disease and \$500,000 aggregate by disease.
- D. Rental value insurance, equal to 100% of the Base Annual Rental (as may adjusted hereunder) for a period of not less than twelve (12) months; which insurance shall be carved out of Lessee's business interruption coverage for a separate rental value insurance payable to Lessor, or if rental value insurance is included in Lessee's business interruption coverage, the insurer shall provide priority payment to any Rental obligations, and such obligations shall be paid directly to Lessor. Such insurance is to follow form of the real property "all risk" coverage and is not to contain a co-insurance clause.
- E. Comprehensive Boiler & Machinery Insurance against loss or damage from explosion of any steam or pressure boilers or similar apparatus, if any, located in or about the Property in an amount not less than the actual replacement cost of the Property. Such insurance should be in an amount of the lesser of 25% of the 100% replacement cost or \$5,000,000.00.

All insurance policies shall:

(i) Provide (1) for a waiver of subrogation by the insurer as to claims against Lessor, Lessor's Lenders and their employees, officers and agents, (2) that the insurer shall not deny a claim and that such insurance cannot be unreasonably cancelled, invalidated or suspended on account of the conduct of Lessee, its officers, directors, employees or agents, or anyone acting for Lessee or any sublessee or other occupant of the Property, and (3) that any losses otherwise payable thereunder shall be payable notwithstanding any act or omission of Lessor, Lessor's Lenders or Lessee which might, absent such provision, result in a forfeiture of all or a part of such insurance payment;

- (ii) Be primary and provide that any "other insurance" clause in the insurance policy shall exclude any policies of insurance maintained by Lessor and the insurance policy shall not be brought into contribution with insurance maintained by Lessor;
 - (iii) intentionally omitted

- (iv) Contain a standard non-contributory mortgagee clause or endorsement in favor of any Lessor's Lender designated by Lessor;
- (v) Provide that the policy of insurance shall not be terminated, cancelled or amended without at least thirty (30) days' prior written notice to Lessor and to any Lessor's Lender covered by any standard mortgagee clause or endorsement;
- (vi) Provide that the insurer shall not have the option to restore the Property if Lessor elects to terminate this Lease in accordance with the terms hereof;
- (vii) Be in amounts sufficient at all times to satisfy any coinsurance requirements thereof;
- (viii) Except for workers' compensation insurance referred to in <u>Section 10.C</u> above, name Lessor and any Lessor Affiliate requested by Lessor, as an "additional insured" (and, with respect to any Lessor's Lender designated by Lessor, as an "additional insured mortgagee") with respect to general liability insurance, and as a "named insured" with respect to real property and "loss payee" with respect to all real property and rent value insurance, as appropriate and as their interests may appear;
- (ix) Be evidenced by delivery to Lessor and any Lessor's Lender designated by Lessor of an Acord Form 28 for property coverage (or any other form requested by Lessor) and an Acord Form 25 for liability, workers' compensation and umbrella coverage (or any other form requested by Lessor); provided that in the event that either such form is no longer available, such evidence of insurance shall be in a form reasonably satisfactory to Lessor and any lender designated by Lessor; such certificates of insurance shall be delivered to Lessor prior to the Effective Date; and
- (x) Be issued by insurance companies licensed to do business in the states where the Property is located and which are rated A:VIII or better by Best's Insurance Guide or are otherwise approved by Lessor.

It is expressly understood and agreed that (I) if any insurance required hereunder, or any part thereof, shall expire, be withdrawn, become void by breach of any condition thereof by Lessee, or become void or in jeopardy by reason of the failure or impairment of the capital of any insurer, Lessee shall immediately obtain new or additional insurance reasonably satisfactory

to Lessor and any lender designated by Lessor; (II) the foregoing minimum limits of insurance coverage shall not limit the liability of Lessee for its acts or omissions as provided in this Lease; and (III) Lessee shall procure policies for all insurance for periods of not less than one year and shall provide to Lessor and any servicer or lender of Lessor certificates of insurance or, upon Lessor's request, duplicate originals of insurance policies evidencing that insurance satisfying the requirements of this Lease is in effect at all times.

Lessee shall pay as they become due all premiums for the insurance required by this Section 10. In the event that Lessee fails to comply with any of the foregoing requirements of this Section 10 within ten (10) days of the giving of written notice by Lessor to Lessee, Lessor shall be entitled to procure such insurance. Any sums expended by Lessor in procuring such insurance shall be Additional Rental and shall be repaid by Lessee, together with interest thereon at the Default Rate, from the time of payment by Lessor until fully paid by Lessee immediately upon written demand therefor by Lessor.

Anything in this <u>Section 10</u> to the contrary notwithstanding, any insurance which Lessee is required to obtain pursuant to this <u>Section 10</u> may be carried under a "blanket" policy or policies covering other properties or liabilities of Lessee provided that such "blanket" policy or policies that otherwise comply with the provisions of this <u>Section 10</u> and specify the location of the Property.

- 11. Intentionally Omitted
- 12. Compliance With Laws, Restrictions, Covenants, Encumbrances and Agreements. It is expressly understood and agreed that the obligations of Lessee under this Section shall survive the expiration or earlier termination of this Lease for any reason.
 - A. Legal and Gaming Law Compliance. Lessee's use and occupation of the Property, the use and occupation of the Property by any other person (including but not limited to any subtenants and WGI) and the condition of the Property, shall, at Lessee's sole cost and expense, comply with all Legal Requirements (including without limitation the Americans with Disabilities Act and all Legal Requirements related to gaming operations and the sales of tobacco and liquor on the Property). Lessee shall promptly file, or cause to be filed, and provide to Lessor any notices, reports or other filings that Lessee or any other Person is required to file or provide to any Governmental Authorities regarding the business operations conducted on or from the Property, including but not limited to those described in Subsection D(iii) hereof and those required by Governmental Authorities with respect to gaming operations and the sales of tobacco and liquor on the Property, including any filings required to be made in connection with the change of ownership or control of Lessee and, within fifteen (15) days of Lessee's receipt of written notice from Lessor of any planned or actual change in the ownership or control of Lessor or any planned or actual change in the ownership of the Property.
 - B. Acts Resulting in Increased Insurance Rates. Lessee will use its commercially reasonable efforts to prevent any act or condition to exist on or about the Property which will materially increase any insurance rate thereon, except when such acts are required in the normal course of its business and Lessee shall pay for such increase.

Sample Lease 1/4/2006 Lessee shall comply with all orders and directives of any insurance companies issuing liability, fire, or extended coverage insurance pursuant to <u>Section 10</u> hereof, and Lessee shall not do, bring, or keep anything in or about the Property that will cause a cancellation of any insurance covering the Property.

C. Prevention of Nuisance. Lessee shall not commit nor cause or permit to be committed any public or private nuisance on the Property.

D. Environmental.

- (i) Covenants. All uses and operations on or of the Property, including the use and operation of UST's on the Property, whether by Lessee or any other Person, shall be in compliance with all Environmental Laws and permits issued pursuant thereto. Lessee shall keep the Property or cause the Property to be kept free and clear of all Environmental Liens, whether due to any act or omission of Lessee or any other Person. Lessee hereby represents and warrants that Lessee shall not install and shall not permit any person to install any asbestos containing materials ("ACM") or materials or equipment containing polychlorinated biphenyl ("PCBs") in the Property, and to the extent any ACM, PCBs or other Hazardous Materials are on or in the Property, the same shall be maintained, stored and used in accordance with all Legal Requirements.
- Notification Requirements. Lessee shall immediately notify Lessor (ii) in writing upon Lessee obtaining actual knowledge of (1) any Releases or Threatened Releases in, on, under or from the Property other than in Permitted Amounts, or migrating towards any of the Property; (2) any non-compliance with any Environmental Laws related in any way to any of the Property; (3) any actual or potential Environmental Lien; (4) any required or proposed Remediation of environmental conditions relating to any of the Property required by applicable Governmental Authorities; and (5) any written or oral notice or other communication which Lessee becomes aware from any source whatsoever (including but not limited to a Governmental Authority) relating in any way to Hazardous Materials, Regulated Substances or USTs, or Remediation thereof at or on the Property, other than in Permitted Amounts, possible liability of any Person relating to the Property pursuant to any Environmental Law, other environmental conditions in connection with the Property, or any actual or potential administrative or judicial proceedings in connection with anything referred to in this Subsection D.
- (iii) Reports and Investigations. Lessee shall promptly supply Lessor with copies of all reports of any testing of the Property conducted by or at the request of Lessor or any Governmental Authorities and all submissions by Lessee to any Governmental Authority concerning environmental matters, the USTs, or Hazardous Materials. Lessee shall furnish to Lessor certificates of enrollment issued by the State of Nevada, Division of Environmental Projection, for each UST at the Property no later than October 30 of each year, and gasoline storage tank permits issued by the Department of Air Quality Management of the County

in which the Property is located with respect to each UST on the Property no later than May 5 of each year, and such other certificates or permits as may be issued or required by any other Governmental Authority; all of the foregoing shall evidence continuing compliance of each UST on the Property with all applicable Legal Requirements. Additionally, upon Lessor's reasonable request in the event that Lessor reasonably suspects that Contamination (as hereafter defined) may have occurred or be occurring at the Property, Lessee agrees to perform, at Lessee's sole expense, an environmental assessment of the Property, including soil borings, to confirm whether such Contamination is occurring. Additionally, at least ninety (90) days prior to the expiration of the Lease Term, Lessee agrees to perform an environmental assessment of the Property in order to define the nature and extent of Contamination, if any.

Indemnification. Lessee shall indemnify, defend, protect and hold each of the Indemnified Parties free and harmless from and against any and all Losses, arising from or caused in whole or in part, directly or indirectly, by any of the following, unless arising from or caused by the gross negligence or willful misconduct of the Indemnified Party requesting indemnification: (a) the use, storage, transportation, disposal, release, discharge or generation of Hazardous Materials to, in, on, under or about the Property (whether occurring before or after the date hereof) (any of the foregoing in violation of Legal Requirements is "Contamination"), including diminution in value of the Property; and (b) the cost of any required or necessary repair, remediation, cleanup or detoxification and the preparation of any closure or other required plans or reports, whether such action is required or necessary prior to or following transfer of title to the Property (such acts are sometimes referred to herein as "Corrective Action"), and (c) Lessee's failure to comply with any Legal Requirements. Lessee's obligations to perform Correction Action shall include, without limitation, and whether foreseeable or unforeseeable, all cost of any investigation (including consultants and attorneys fees and testing) required or necessary repair, remediation, restoration clean up, detoxification or decontamination of the Property and the preparation and implementation of any closure, remedial action or other required plans in connection therewith, and shall survive the expiration or earlier termination of the Term of this Lease. This agreement to indemnify, defend, protect and hold harmless each of the Indemnified Parties shall be in addition to any other obligations or liabilities Lessee may have to Lessor or the Indemnified Parties, if any, at common law under all statutes and ordinances or otherwise and survive the termination of the Lease.

In the event that Lessee is required to perform Corrective Action to address any Contamination, Lessee shall perform such activities in a diligent manner. In the event that Lessee has not completed its Corrective Action (if necessary), as required herein, by the expiration of the Lease Term, Lessor shall grant Lessee, and its consultants, contractors and agents a revocable license, at no cost to Lessee except as set forth in the succeeding sentence, to enter upon the Property from and after the date of expiration of the Lease Term to conduct Corrective Action and to place and remove all necessary equipment and

Sample Lease 1/4/2006 improvements on the Property sufficient to satisfy the requirements of all Governmental Authorities regarding the Contamination. If such post-expiration Corrective Action will unreasonably interfere with a reasonably foreseeable intended commercial use of the Property (i.e., if Lessor cannot reasonably lease the Property for reasonable commercial uses at reasonable market rents), the Lease Term shall be extended until sixty (60) days after the Corrective Action has been performed such that post-expiration Corrective Action by Lessee no longer unreasonably interferes with a reasonably foreseeable commercial use of the Property, and Lessee agrees to keep Lessor apprised of the anticipated completion date of the Corrective Action.

E. Intentionally Omitted.

- F. Dealer Requirements. In addition to the requirements set forth in this Lease, Lessee, in its use, occupancy and maintenance of the Property shall comply with all requirements of its Dealer Agreements with Dealer. Lessee hereby consents to Lessor providing information it obtains to Dealer and to Lessor obtaining from Dealer information which Dealer receives relating to Lessee's operation of its business on the Property.
- G. WGI Agreements. Lessee represents that the WGI Agreement is in full force and effect, and that the WGI Agreement permits WGI to operate gaming machines on the Property. Lessee shall abide by all the terms and conditions of the WGI Agreement, and Lessee represents and warrants that WGI has approved this Lease, if WGI has such approval rights under the WGI Agreement.
- H. Winner's Corner. Lessee shall at all times operate the gas station and convenience store on the Property under the trade name "Winner's Corner" and/or under a major oil brand (such as Chevron, BP, Amoco, Shell, Sun Oil, or the such).
- 13. Maintenance; Repairs and Reconstruction. Lessee shall, at its sole cost and expense, be responsible for keeping all of the buildings, structures, improvements and signs erected on the Property in good and substantial order, condition, and repair, including but not limited to replacement, maintenance and repair of all structural or load-bearing elements, roofs, walls, foundations, gutters and downspouts, heating, ventilating and air conditioning systems, any building security and monitoring system, windows, walls, doors, electrical and other utility systems and equipment, mechanical equipment, plumbing and all other components of the buildings, mowing of lawns and care, weeding and replacement of plantings; replacing, resurfacing and striping of walkways, driveways and parking areas, and adjacent public sidewalks; removal of snow and ice from the Property and adjacent public sidewalks, removal of trash, maintenance of utility lines and exterior lighting and signage on Property, and any maintenance, repairs or replacements (or fees or reserves therefor) as may be required by any Permitted Encumbrances. All such replacements, maintenance and repair shall keep the Property in good repair and in a clean, safe, and sanitary condition and in compliance with all Legal Requirements and insurance regulations. Lessee must make all repairs, corrections, replacements, improvements or alterations necessitated by age, Lessee's use, or natural elements

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or as required pursuant to Governmental Authorities or Legal Requirements. Lessee expressly waives the benefit of any statute now or hereinafter in effect which would otherwise afford Lessee the right to make repairs, corrections, improvements or alterations at Lessor's expense or to terminate this Lease because of Lessor's failure to keep the Property in good order, condition or repair, or which would otherwise require Lessor to make repairs, corrections, improvements, replacements or alterations. If the buildings or any improvements on the Property violate any Permitted Encumbrances or Legal Requirements, then Lessee shall, upon the written demand of a Governmental Authority or the written demand of a party to or beneficiary of any Permitted Encumbrance, repair, restore, relocate and/or rebuild the same in accordance with Legal Requirements (including any special or conditional use permits or other variances granted specifically for the Property) and the Permitted Encumbrances.

Lessee shall, at its sole cost and expense, be responsible to repair or reconstruct damage or destruction to any buildings, structures or improvements erected on the Property from acts of God or any other catastrophes or causes. Any such repairs or reconstruction shall restore the buildings and all improvements on the Property to substantially the same condition immediately prior to such damages or destruction and this Lease shall remain in full force and effect, provided, however, that Lessee shall have the right to replace the improvements with different structures so long as (a) the value of the Property with such different structures is no less than the value of the Property immediately prior to the date of casualty and the different square footage of the new buildings is no less than the buildings existing as of the date hereof, and (b) the new structure can be built and occupied in compliance with Legal Requirements (including any special or conditional use permits or other variances granted specifically for the Property) and the Permitted Encumbrances. Such repair, restoration, relocation and rebuilding (all of which are herein called a "repair") shall be commenced within a reasonable time however no more than thirty (30) days after the later of (i) the date that such damage or destruction occurred, (ii) the date that all permits and other approvals necessary to authorize such rebuilding have been issued following reasonable pursuit of the same by Lessee, and (iii) the date that any insurance proceeds payable to Lessor or its lender in conjunction with such damage or destruction, if any, have been made available to Lessee as set forth herein; thereafter, the repair shall be diligently pursued to completion. Lessee shall give Lessor at least fifteen (15) days written notice prior to commencing the repair to permit the Lessor to post appropriate notices of non-responsibility, and all such repair work shall be subject to the provisions of <u>Section 14</u> hereof related to alterations, improvements and additions to the Property.

The proceeds of any insurance maintained under Section 10 hereof shall be made available to Lessee for payment of costs and expense of repair.

Waste; Alterations and Improvements; Trade Fixtures and Equipment. Lessee shall not commit actual or constructive waste upon the Property. During the Lease Term, Lessee may construct any additions or improvements to the Property and make such structural or non-structural alterations to the Property as are reasonably necessary or desirable for Lessee's use of the Property for a Permitted Facility. All improvements, alterations, or additions shall be constructed by Lessee at Lessee's sole cost and expense. Prior to the commencement of construction of any additions, improvements, or alterations to the Property, Lessee shall give Lessor at least fifteen (15) days written notice to allow Lessor to post appropriate notices of nonresponsibility. Notwithstanding anything herein to the contrary, without Lessor's prior written Sample Lease

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consent, Lessee shall not make any alterations that will decrease the value or function of the improvements located on the Property.

Lessee's right to make any alterations, improvements and additions shall be deemed conditioned upon Lessee acquiring a permit to do so from appropriate Governmental Authorities, the furnishing of a copy thereof to Lessor prior to the commencement of the work and the compliance by Lessee of all conditions of said permit in a prompt and expeditious manner. All alterations, improvements or other construction by Lessee shall be in compliance with all Legal Requirements, and all alterations and improvements shall be done and performed in good and workmanlike manner, using new and first quality materials. All costs of any such improvements shall be paid by Lessee.

Upon completion of any such work, Lessee shall submit to Lessor as-built plans of any structural, mechanical or interior utility improvements and alterations made, a sworn construction statement, lien waivers from all persons or entities providing materials, services or equipment for the work completed and, if available, an endorsement to Lessor's policy of title insurance or other evidence from a title company confirming the absence of any liens or other matters of record related to the work performed.

Unless expressly released by Lessor in writing, all improvements or alterations shall be and remain, at the time of expiration or other termination of this Lease, the property of Lessor without payment or offset unless such improvements are not attached to the Property. Notwithstanding anything herein to the contrary, all plumbing, electrical, HVAC equipment, doors, ceiling and floor tiles, and wall coverings shall become the property of Lessor and remain in place on the Property upon expiration or other termination of this Lease.

During the Lease Term, Lessee shall have the right to locate in the Property such personal property, furniture, trade fixtures, and equipment (hereafter referred to as "Fixtures and Equipment") as shall be considered by Lessee to be appropriate or necessary to Lessee's use and occupancy of the Property.

All Fixtures and Equipment shall be provided by Lessee at Lessee's own cost and expense. During the term of this Lease, Lessee may remove any Fixtures and Equipment installed by Lessee, and any and all such Fixtures and Equipment shall remain the sole property of Lessee. Lessee shall perform (and pay all costs associated with) any and all restoration necessitated by the removal of Lessee's Fixtures and Equipment, including but not limited to damage resulting from removal of any of Lessee's signs in or about the Property.

Lessee shall keep the Property free and clear of all mechanic's, materialmen or similar liens, including, but not limited to, those resulting from the construction of alterations, improvements, additions, trade fixtures, and equipment performed by or for Lessee.

Lessee shall have the right to contest the correctness or validity of any such lien if,
Lessee first procures and records a lien release bond issued by a corporation authorized to issue surety bonds in the state in which the Property are located in an amount required by Legal
Requirements to remove such lien. The bond or its equivalent shall meet all applicable requirements of the state in which the Property are located. In the event that any lien does so

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attach, and is not released within thirty (30) days after written notice to Lessee thereof, Lessor, in its sole discretion, may pay and discharge the same and relieve the Property therefrom, and Lessee agrees to repay and reimburse Lessor as Additional Rental upon demand for the amount so paid by Lessor. On final determination of the lien or claim of lien Lessee will immediately pay any judgment rendered, and all costs and charges, and shall cause the lien to be released or satisfied. In addition, Lessor may require Lessee to pay Lessor's reasonable attorneys' fees and costs in participating in such action if Lessor shall decide it is in its best interest to do so.

- 15. Indemnification. Lessee agrees to use and occupy the Property at its own risk and hereby releases Lessor and Lessor's agents and employees from all claims for any damage or injury to the full extent permitted by law. Lessee agrees that Lessor shall not be responsible or liable to Lessee or Lessee's employees, agents, customers or invitees for bodily injury, personal injury or property damage occasioned by the acts or omissions of any other lessee or such lessee's employees, agents, contractors, customers or invitees. In addition to other specific indemnification provisions set forth in this Lease, Lessee shall indemnify, protect, defend and hold harmless each of the Indemnified Parties from and against any and all Losses caused by, incurred or resulting from Lessee's use and occupancy of the Property, whether relating to its original design or construction, latent defects, alteration, maintenance, use by Lessee or any Person thereon, with supervision or otherwise, or from any breach of, default under, or failure to perform, any term or provision of this Lease by Lessee, its officers, employees, agents or other Persons. It is expressly understood and agreed that Lessee's obligations under this Section shall survive the expiration or earlier termination of this Lease for any reason.
- Obligations herein provided and shall keep and perform all of the terms, covenants and conditions on its part herein contained, Lessee shall have, subject and subordinate to Lessor's rights herein, the right to the peaceful and quiet occupancy of the Property, subject to the Permitted Encumbrances, Laws and the WGI Agreement and any use or occupancy agreements, leases or licenses now affecting the Property or hereinafter made by Lessee.
- 17. Inspection; Right of Entry. Lessor and its authorized representatives shall have the right, at all reasonable times and upon giving reasonable prior notice (except in the event of an emergency, in which case no prior notice shall be required), to enter the Property or any part thereof and to inspect the same; to serve, post, or keep posted any notices required or allowed under the provisions of this Lease or by law; to show the Property to prospective brokers, agents, buyers, or persons interested in an exchange, at any time; and to show the Property to prospective tenants within two hundred forty (240) days prior to the expiration of this Lease or any time during the option period and to place upon the Property any "to let" or "for lease" signs at any time within two hundred forty (240) days prior to the expiration of this Lease. Lessee hereby waives any claim for damages for any injury or inconvenience to or interference with Lessee's business, any loss of occupancy or quiet enjoyment of the Property and any other loss occasioned by such entry, but, subject to Section 37, excluding damages arising as a result of the negligence or intentional misconduct of Lessor.

18. Condemnation and Casualty.

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- A. Damage or Destruction to the Property; No Abatement of Rent. If the Property is damaged or destroyed as a result of fire or other casualty Lessee shall promptly restore the Property pursuant to the terms of Section 13 hereof. Notwithstanding the partial or total destruction of the Property and any part thereof, and notwithstanding whether the casualty is insured or not, there shall be no abatement of Rentals or of any other obligation of Lessee hereunder including, without limitation, payment of operating expenses, insurance premiums and Taxes, by reason of such damage or destruction unless the Lease is terminated by virtue of another provision of this Lease.
- B. Option to Terminate. If the Property is damaged or destroyed during the last one (1) year of the Lease Term to the extent that the Property is untenable, Lessee may terminate this Lease as of the date of such damage or destruction by giving written notice to Lessor of such election within thirty (30) days following the date of such fire or other casualty, in which case, all insurance proceeds related to the Property (other than attributable to Lessee's Fixtures and Equipment) will be paid over to Lessor, or if required by Lessor's Lender, to such lender.
- C. Termination Upon Taking. If as a consequence of a Taking, (i) any part of the convenience store building on the Property; or (ii) twenty-five percent (25 %) or more of the parking area at the Property shall be taken and Lessee determines in its reasonable discretion that such Taking will have a material adverse impact on the ability of Lessee to conduct its normal business operations from the Property, then, within thirty (30) days after the date on which Lessee receives written notice of such Taking, Lessee may terminate this Lease by written notice to Lessor which termination shall be effective as of the date the condemning authority takes actual possession of the portion of the Property that is subject to the Taking. If Lessee terminates this Lease, Lessor shall promptly refund to Lessee all unearned Annual Base Rental and other amounts paid in advance by Lessee.
- D. Obligation to Restore. If a Taking does not result in a termination of this Lease pursuant to <u>Subsection C</u> hereof, Lessee shall restore the Property to a condition similar in physical appearance to that which existed immediately prior to the Taking to the extent possible such that Lessee can conduct its normal business operations, Lessee shall commence such restoration within ninety (90) days after the occurrence of the taking and shall complete such restoration within six (6) months after the occurrence of the taking.
- E. Condemnation Award. Any condemnation award payable during the term of this Lease shall belong to and be paid to Lessor, including but not limited to awards payable with respect to damage to either the fee or leasehold estates, except that Lessee shall receive from the award the following:
 - i. If Lessee exercises its rights to terminate this Lease, the portion of the award, if any, attributable to Lessee's Equipment or Fixtures that are taken in the Taking and the unamortized cost of any leasehold improvements made to the Property by Lessee after the date hereof that are taken in the Taking.

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- ii. The portion of the award, if any, attributable to severance damages for the repair or restoration of the Property (herein called "repair"), but only if Lessee does not exercise Lessee's right to terminate the Lease and further provided, that such damages shall be deposited and disbursed in accordance with the provisions hereof related to the handling of insurance proceeds that are applied to a repair of the Property and Lessee shall promptly commence and diligently complete the repair so that upon completion the Property will have a character and commercial value as nearly as possible equal to the value of the Property immediately prior to the taking, and further provided that, in the event such damages are insufficient to cover the cost of repair, then any amounts required over the amount thereof that are required to complete said repair shall be promptly deposited with the disbursing entity by Lessee in advance of commencing the repair.
- iii. Additionally, if this Lease is terminated as a result of any such taking, Lessee shall be permitted to recover its relocation expenses and the going concern value of Lessee's business from the condemning authority (but not from Lessor or the portion of the award otherwise payable to Lessor) as provided by law.
- 19. Intentionally Deleted.
- 20. Default, Conditional Limitations, Remedies and Measure of Damages.
- A. Event of Default. Each of the following shall be an event of default by Lessee under this Lease (each, an "Event of Default"):
 - (i) If any Rental or other Monetary Obligation due under this Lease is not paid within five (5) Business Days of notice it is past due, provided, however, that if within the first twelve (12) months of the Lease Term, Lessor has given two (2) such notices to Lessee, then a default shall be deemed to have occurred when such failure has continued for three (3) business days after the same is due, without notice thereof by Lessor to Lessee; and further, provided, however, that after the first twelve (12) months of the Lease Term, if Lessor has given such notice to Lessee within the preceding twelve (12) months, then a default shall be deemed to have occurred when such failure has continued for three (3) Business Days after the same is due, without notice thereof by Lessor to Lessee;
 - (ii) if there is an Insolvency Event;
 - (iii) if Lessee fails to observe or perform any of the other covenants, conditions or obligations of Lessee in this Lease; provided, however, if any such failure does not involve the payment of any Monetary Obligation, does not place any rights or property of Lessor in immediate jeopardy, as determined by Lessor in its reasonable discretion, then such failure shall not constitute an Event of Default hereunder, unless otherwise expressly provided herein, unless and until Lessor shall have given Lessee notice thereof and a period of thirty (30) days shall

have elapsed, during which period Lessee may correct or cure such failure, upon failure of which an Event of Default shall be deemed to have occurred hereunder without further notice or demand of any kind being required. If such failure cannot reasonably be cured within such thirty (30) day period, as determined by Lessor in its reasonable discretion, and Lessee is diligently pursuing a cure of such failure, then Lessee shall have a reasonable period to cure such failure beyond such thirty (30) day period. If Lessee shall fail to correct or cure such failure within such period and said period is not extended by the parties, an Event of Default shall be deemed to have occurred hereunder without further notice or demand of any kind being required;

- (iv) if Lessee shall be liquidated or dissolved or shall begin proceedings towards its liquidation or dissolution; or
- B. Remedies. Upon the occurrence of an Event of Default, with or without notice or demand, except as otherwise expressly provided herein or such other notice as may be required by statute and cannot be waived by Lessee, Lessor shall be entitled to exercise, at its option, concurrently, successively, or in any combination, all remedies available at law or in equity, including without limitation, any one or more of the following:
 - To terminate this Lease, whereupon Lessee's right to possession of the Property shall cease and this Lease, except as to Lessee's liability, shall be terminated. Upon such termination, Lessor shall be entitled to recover liquidated damages equal to the total of (i) the cost of recovering possession of the Property; (ii) the unpaid Rental earned at the time of termination, plus interest at the Default Rate thereon; (iii) late charges and interest at the Default Rate on the unpaid Rental; (iv) the present value of the balance of the Base Annual Rental for the remainder of the Lease Term using a discount rate of four percent (4%), less the present value of the reasonable rental value of the Property for the balance of the Term remaining after a one-year period following repossession using a discount rate of four percent (4%); (v) costs of operating the Property until relet and the reasonable costs of performing any obligations of Lessee under this Lease to be performed upon termination or expiration of this Lease (including but not limited to the Lessee's obligations under Sections 12.D and 27 hereof); and (vi) any other sum of money and damages reasonably necessary to compensate Lessor for the detriment caused by Lessee's default.
 - (ii) To the extent not prohibited by applicable law, to reenter and take possession of the Property (or any part thereof) without being deemed guilty in any manner of trespass or becoming liable for any loss or damage resulting therefrom, without resort to legal or judicial process, procedure or action. No notice from Lessor hereunder or under a forcible entry and detainer statute or similar law shall constitute an election by Lessor to terminate this Lease unless such notice specifically so states. If Lessee shall, after default, voluntarily give up possession of the Property to Lessor, deliver to Lessor or its agents the keys to the Property, or both, such actions shall be deemed to be in compliance with Lessor's

rights and the acceptance thereof by Lessor or its agents shall not be deemed to constitute a termination of the Lease. Lessor reserves the right following any reentry and/or reletting to exercise its right to terminate this Lease by giving Lessee written notice thereof, in which event this Lease will terminate, and Lessor may recover liquidated damages as set forth in <u>Subsection (i)</u> above.

- (iii) To bring an action against Lessee for any damages sustained by Lessor or any equitable relief available to Lessor.
- (iv) To relet the Property or any part thereof for such term or terms (including a term which extends beyond the original Lease Term), at such rentals and upon such other terms as Lessor, in its sole discretion, may determine, with all proceeds received from such reletting being applied to the Rental and other Monetary Obligations due from Lessee in such order as Lessor may, in it sole discretion, determine, which other Monetary Obligations include, without limitation, all commercially reasonable repossession costs, brokerage commissions, attorneys' fees and expenses and repair costs. Lessor reserves the right following any reentry and/or reletting to exercise its right to terminate this Lease by giving Lessee written notice thereof, in which event this Lease will terminate as specified in said notice.
- (v) To recover from Lessee all Costs paid or incurred by Lessor as a result of such breach, regardless of whether or not legal proceedings are actually commenced.
- (vi) To immediately or at any time thereafter, and with or without notice, at Lessor's sole option but without any obligation to do so, correct such breach or default and charge Lessee all Costs incurred by Lessor therein. Any sum or sums so paid by Lessor, together with interest at the Default Rate, shall be deemed to be Additional Rental hereunder and shall be immediately due from Lessee to Lessor. Any such acts by Lessor in correcting Lessee's breaches or defaults hereunder shall not be deemed to cure said breaches or defaults or constitute any waiver of Lessor's right to exercise any or all remedies set forth herein.
- (vii) To immediately or at any time thereafter, and with or without notice, except as required herein, set off any money of Lessee held by Lessor under this Lease.
- (viii) To seek any equitable relief available to Lessor, including, without limitation, the right of specific performance.

All powers and remedies given by this Section to Lessor, subject to applicable Law, shall be cumulative and not exclusive of one another or of any other right or remedy or of any other powers and remedies available to Lessor under this Lease, by judicial proceedings or otherwise, to enforce the performance or observance of the covenants and agreements of Lessee contained in this Lease, and no delay or omission of Lessor to

exercise any right or power accruing upon the occurrence of any Event of Default shall impair any other or subsequent Event of Default or impair any rights or remedies consequent thereto. Every power and remedy given by this Section or by Law to Lessor may be exercised from time to time, and as often as may be deemed expedient, by Lessor, subject at all times to Lessor's right in its sole judgment to discontinue any work commenced by Lessor or change any course of action undertaken by Lessor.

C. Default by Lessor. Lessor shall be in default under this Lease if Lessor fails or refuses to perform any obligation of Lessor under the terms of this Lease, and if the failure to perform the obligation is not cured within thirty (30) days after notice of the default has been given by Lessee to Lessor. If the default cannot reasonably be cured within thirty (30) days, then Lessor shall not be in default if Lessor commences to cure the default within the thirty (30) day period and diligently and in good faith continues to cure the default thereafter.

Lessee, at any time after expiration of the cure period provided above and a subsequent written notice to Lessor, may cure the default at Lessor's cost. If Lessee at any time, as a result of Lessor's default, pays any sum or performs any act that requires the payment of any sum, the sum paid by Lessee shall be due immediately from Lessor to Lessee at the time the sum is paid, and if paid at a later date shall bear interest at the rate of twelve percent (12%) per annum from the date the sum is paid by Lessee until the date Lessee is reimbursed by Lessor. Any amounts due from Lessor to Lessee pursuant to this Section 15 may be deducted or offset against Lessee's Base Monthly Rental.

21. Mortgage, Subordination and Attornment. Lessor's interest in this Lease and/or the Property shall not be subordinate to any liens or encumbrances placed upon the Property by or resulting from any act of Lessee, and nothing herein contained shall be construed to require such subordination by Lessor. Notwithstanding the terms of or the parties to the WGI Agreement and any other agreements pursuant to which Persons other than Lessee have the right to occupy any portion of the Property, such agreements shall, as between Lessor and Lessee, be treated as an instrument subordinate to Lessor's interest in the Property and this Lease. Lessee shall keep the Property free from any liens for work performed, materials furnished or obligations incurred by Lessee. NOTICE IS HEREBY GIVEN THAT LESSEE IS NOT AUTHORIZED TO PLACE OR ALLOW TO BE PLACED ANY LIEN, MORTGAGE, DEED OF TRUST, SECURITY INTEREST OR ENCUMBRANCE OF ANY KIND UPON ALL OR ANY PART OF THE PROPERTY OR LESSEE'S LEASEHOLD INTEREST THEREIN, AND ANY SUCH PURPORTED TRANSACTION SHALL BE VOID.

This Lease at all times shall automatically be subordinate to the lien of any and all Deeds of Trust now or hereafter placed upon the Property by Lessor, provided, that the holder of such interest shall not disturb Lessee's use and enjoyment of Lessee's rights under this Lease so long as Lessee is not in default hereunder. Lessee covenants and agrees to execute and deliver, upon demand, such further instruments which are acceptable to Lessee, subordinating this Lease to the lien of any or all such Deeds of Trust as shall be desired by Lessor, or any present or proposed Deeds of Trust; provided, that the terms and provisions of any such instrument are commercially reasonable. The Lessee acknowledges that the terms and provisions of the Instrument attached hereto as Exhibit C are commercially reasonable.

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If any Lessor's Lender, mortgagee, receiver or other secured party elects to have this Lease and the interest of Lessee hereunder be superior to any such Deed of Trust and evidences such election by notice given to Lessee, then this Lease and the interest of Lessee hereunder shall be deemed superior to any such Deed of Trust, whether this Lease was executed before or after such Deed of Trust and in that event such mortgagee, receiver or other secured party shall have the same rights with respect to this Lease as if it had been executed and delivered prior to the execution and delivery of such Deed of Trust and had been assigned to such mortgagee, receiver or other secured party.

In the event any purchaser or assignee of any mortgagee or deed of trust holder at a foreclosure sale acquires title to the Property, or in the event that any mortgagee or any assignee otherwise succeeds to the rights of Lessor as Lessor under this Lease, Lessee shall attorn to mortgagee or deed of trust holder or such purchaser or assignee, as the case may be (a "Successor Lessor"), and recognize the Successor Lessor as lessor under this Lease, and, if the Successor Lessor in its sole discretion elects to recognize Lessee's tenancy under this Lease, this Lease shall continue in full force and effect as a direct lease between the Successor Lessor and Lessee, provided that the Successor Lessor shall only be liable for any obligations of Lessor under this Lease which accrue after the date that such Successor Lessor acquires title. The foregoing provision shall be self-operative and effective without the execution of any further instruments.

Lessee shall give written notice to any Lessor's Lender of whom Lessee is notified of in writing of any breach or default by Lessor of any of its obligations under this Lease and give such lender or mortgagee the same rights to which Lessor might be entitled to cure such default before Lessee may exercise any remedy with respect thereto. Upon request by Lessor, Lessee shall authorize Lessor to release to Lessee's financial statements delivered to Lessor pursuant to this Lease to such Lessor's Lender.

22. Estoppel Certificate and Other Documents. At any time, and from time to time, each party shall, promptly and in no event later than ten (10) days after a request from the other execute, acknowledge and deliver to the requesting party, as the case may be, a certificate in the form supplied by the requesting party, certifying: (A) that this Lease is in full force and effect and has not been modified (or if modified, setting forth all modifications), or, if this Lease is not in full force and effect, the certificate shall so specify the reasons therefor; (B) the commencement and expiration dates of the Lease Term; (C) the date to which the Rentals have been paid under this Lease and the amount thereof then payable; (D) whether there are then any existing defaults by Lessee or Lessor in the performance of its obligations under this Lease, and, if there are any such defaults, specifying the nature and extent thereof; (E) that no notice has been received by the certifying party of any default under this Lease which has not been cured, except as to defaults specified in the certificate; (F) the capacity of the person executing such certificate, and that such person is duly authorized to execute the same on behalf of Lessee; and; (G) and any other information reasonably requested by the requesting party.

Lessor and Lessee further agree to reasonably negotiate execute all reasonable documents, including without limitation, estoppel certificates, non-disturbance certificates and other documents requested by WGI, any Lessor's Lender or any lender of Lessee in connection

Sample Lease 1/4/2006 with a loan to be obtained by Lessor or Lessee, or in connection with a sale, assignment, sublease or other disposition of the Lessor's interest under this Lease.

23. Assignment/Subletting. Lessee's interest in this Lease shall not, voluntarily, involuntarily, or by operation of law, be assigned to any third person or entity without the prior written consent of Lessor which will not be unreasonably withhold conditioned or delayed.

In the event of an assignment of Lessee's interest under this Lease to a third person or entity which has been approved by the Lessor, the original Lessee shall be relieved from any and all further obligations under the terms of this Lease upon delivery to Lessor of an originally executed assumption of all of Lessee's obligations under this Lease by the assignee, and upon cure of all then existing defaults of Lessee under the terms of this Lease.

Other than for the WGI Agreement and any Replacement WGI Agreement, and any other agreements pursuant to which experienced and reputable operators are permitted to occupy discreet portions of the convenience store building located on the site for uses that are complementary to or extensions of Lessee's gas station and convenience store operations (e.g., quick-service restaurants, deli and sandwich shops, coffee shops, juice shops, postal contract units and/or UPS/Federal Express services) when such uses are not in violation of Legal Requirements or the Permitted Encumbrances(such other agreements are referred to herein as "Permitted Subleases"), Lessee may not sublease all or any part of the Property without the prior written consent of the Lessor, which shall not be unreasonably withheld, conditioned or delayed. In no event will any Permitted Subleases, or any other subleases that Lessor consents to relieve Lessee of any liability hereunder during the period of any such subletting. Additionally, Lessee shall give Lessor at least thirty (30) days advance notice of any proposed Permitted Sublease, which notice shall be accompanied by a copy of the form of the Permitted Sublease.

Each Permitted Sublease, and any other sublease that Lessor may consent to pursuant to the foregoing paragraph shall provide that (i) the term thereof will not exceed the Initial Term hereof and any extensions of the Initial Term that are permitted hereunder; (ii) the sublease and subtenant shall be subject to and bound by all the terms and conditions of this Lease (except that the Lessee shall continue to pay all Rental and Monetary Obligations hereunder and Lessee shall collect any rents owed by the subtenant pursuant to the sublease); (iii) the sublease shall state that, at Lessor's election, the subtenant will attorn to Lessor and recognize Lessor as Lessee's successor under the sublease for the balance of the sublease term if this Lease is surrendered by Lessee or terminated by reason of Lessee's default.

24. Notices. All notices, demands, designations, certificates, requests, offers, consents, approvals, appointments and other instruments given pursuant to this Lease (collectively called "Notices") shall be in writing and given by any one of the following: (A) hand delivery, (B) express overnight delivery service, (C) certified or registered mail, return receipt requested or (D) facsimile, provided that a copy of such facsimile is also sent via certified or registered mail, return receipt requested, or by overnight delivery service, within one Business Day of the transmission of such facsimile, and shall be deemed to have been delivered upon (i) receipt, if hand delivered, (ii) the next Business Day, if delivered by a reputable express overnight delivery service, (iii) the third Business Day following the day of deposit of such notice with the United States Postal Service, if sent by certified or registered mail, return receipt

Sample Lease 1/4/2006 requested, or (iv) transmission, if delivered by facsimile pursuant to the requirements of <u>Section 24.D</u> above. Notices shall be provided to the parties and addresses (or electronic mail addresses) specified below:

If to Lessee:

Berry-Hinckley Industries Attn: Paul A. Morabito 425 Maestro Drive Reno, NV 89511

Telephone: (775) 689-1222 Facsimile: (775) 689-1232

With a copy to:

Hodgson Russ LLP

Attn: Sujata Yalamanchili One M&T Plaza, Suite 2000

Buffalo, NY 14023

Telephone: (716) 848-1657 Facsimile: (716) 849-0349

If to Lessor:

Overland Development Corporation Inc.

Attn: Larry Willard 133 Glenridge Avenue Los Gatos, CA 95030

With a copy to

Sam Chuck, Esq.

Rossi, Hamerslough, Reischl & Chuck

1960 The Alameda, Suite 200

San Jose, CA 95126

Telephone: (408) 261-4252 Facsimile: (408) 261-4292

or to such other address or such other person as either party may from time to time hereafter specify to the other party in a notice delivered in the manner provided above.

25. Holdover. If Lessee remains in possession of the Property after the expiration of the term hereof, Lessee, at Lessor's option and within Lessor's sole discretion, may be deemed a Lessee on a month-to-month basis and shall continue to pay Rentals and other Monetary Obligations in the amounts herein provided, except that the Base Monthly Rental shall be automatically increased to one hundred fifty percent (150%) of the last Base Monthly Rental payable under this Lease.

26. Intentionally Omitted.

27. Surrender. At the expiration of the Lease Term, Lessee may remove from the Property all of Lessee's Fixtures and Equipment. Lessee shall repair any damage caused by such removal and shall leave the Property broom clean and in good and working condition and repair inside and out, and comply with all of the requirements of Section 12.D hereof. Lessor may, in

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its sole discretion, elect to retain or dispose of in any manner any Fixtures or Equipment, personal property and vehicles to which Lessee is entitled but which Lessee does not remove from the Property pursuant to this Section within ten (10) days after notice, provided, however, that upon demand, Lessee shall reimburse Lessor for all costs incurred by Lessor in removing any Fixtures and Equipment and any all personal property, vehicles and inventory, Hazardous Materials, USTs and related equipment, located in or about the Property that are left therein by Lessee or in restoring the Property to the condition required by this Lease.

- 28. Financial Statements; Compliance Certificate. Once per calendar year, and within 120 days after the end of Lessee's fiscal year, Lessee shall furnish to Lessor audited financial statements of Lessee for the immediately preceding fiscal year. Lessor shall maintain such statements in confidence but may disclose any financial statements furnished by Lessee to Lessor's lawyers, any prospective purchaser of the Property who has entered into a signed purchase agreement with Lessor, prospective and existing lenders of Lessor, and to Lessor's consultants and accountants; Lessor shall advise such permitted recipients that the financial statements furnished to them are to be held in confidence. In no event shall Lessor knowingly disclose Lessee's financial statements to competitors of Lessee.
- 29. Force Majeure. Any prevention, delay or stoppage due to strikes, lockouts, acts of God, enemy or hostile governmental action, civil commotion, fire or other casualty beyond the control of the party obligated to perform (each, a "Force Majeure Event") shall excuse the performance by such party for a period equal to any such prevention, delay or stoppage, expressly excluding, however, the obligations imposed upon Lessee with respect to Rental and other Monetary Obligations to be paid hereunder.
- 30. No Merger. There shall be no merger of this Lease nor of the leasehold estate created by this Lease with the fee estate in or ownership of the Property by reason of the fact that the same person, corporation, firm or other entity may acquire or hold or own, directly or indirectly, (A) this Lease or the leasehold estate created by this Lease or any interest in this Lease or in such leasehold estate, and (B) the fee estate or ownership of the Property or any interest in such fee estate or ownership. No such merger shall occur unless and until all persons, corporations, firms and other entities having any interest in (i) this Lease or the leasehold estate created by this Lease, and (ii) the fee estate in or ownership of the Property or any part thereof sought to be merged shall join in a written instrument effecting such merger and shall duly record the same.
- 31. Characterization. Lessor and Lessee acknowledge and warrant to each other that each has been represented by independent counsel and has executed this Lease after being fully advised by said counsel as to its effect and significance. This Lease shall be interpreted and construed in a fair and impartial manner without regard to such factors as the party which prepared the instrument, the relative bargaining powers of the parties or the domicile of any party. Whenever in this Lease any words of obligation or duty are used, such words or expressions shall have the same force and effect as though made in the form of a covenant.
- 32. Easements. During the Lease Term, Lessor shall not have the right to grant easements on, over, under and above the Property without the prior consent of Lessee, which consent will not be unreasonably withheld, conditioned or delayed.

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- 33. Bankruptcy. Intentionally Omitted.
- 34. Attorneys' Fees. In the event of any judicial or other adversarial proceeding concerning this Lease, to the extent permitted by Law, Lessor the prevailing party shall be entitled to recover all of its reasonable attorneys' fees and other Costs in addition to any other relief to which it may be entitled. In addition, the prevailing party shall, upon demand, be entitled to all attorneys' fees and all other Costs incurred in the preparation and service of any notice or demand hereunder, whether or not a legal action is subsequently commenced.
- 35. Memorandum of Lease. Concurrently with the execution of this Lease, Lessor and Lessee are executing Lessor's standard form memorandum of lease in recordable form, indicating the names and addresses of Lessor and Lessee, a description of the Property, the Lease Term, but omitting Rentals and such other terms of this Lease as Lessor may not desire to disclose to the public. Further, upon Lessor's request, Lessee agrees to execute and acknowledge a termination of lease and/or quit claim deed in recordable form to be held by Lessor until the expiration or sooner termination of the Lease Term.
- 36. No Broker. Lessor and Lessee represent and warrant to each other that they have had no conversation or negotiations with any broker concerning the leasing of the Property. Each of Lessor and Lessee agrees to protect, indemnify, save and keep harmless the other, against and from all liabilities, claims, losses, Costs, damages and expenses, including attorneys' fees, arising out of, resulting from or in connection with their breach of the foregoing warranty and representation.
- 37. Waiver of Jury Trial and Punitive, Consequential, Special and Indirect Damages. Lessor and Lessee hereby knowingly, voluntarily and intentionally waive the right either may have to a trial by jury with respect to any and all issues presented in any action, proceeding, claim or counterclaim brought by either of the parties hereto against the other or its successors with respect to any matter arising out of or in connection with this Lease, the relationship of Lessor and Lessee, Lessee's use or occupancy of the Property, and/or any claim for injury or damage, or any emergency or statutory remedy. This waiver by the parties hereto of any right either may have to a trial by jury has been negotiated and is an essential aspect of their bargain. Furthermore, Lessee hereby knowingly, voluntarily and intentionally waives the right it may have to seek punitive, consequential, special and indirect damages from Lessor, Lessor's Lenders, and any of the Affiliates, officers, directors, members, managers or employees of Lessor, Lessor's Lenders, or any of their successors with respect to any and all issues presented in any action, proceeding, claim or counterclaim brought with respect to any matter arising out of or in connection with this Lease or any document contemplated herein or related hereto. The waiver by Lessee of any right it may have to seek punitive, consequential, special and indirect damages has been negotiated by the parties hereto and is an essential aspect of their bargain.

38. Miscellaneous.

A. Time Is of the Essence. Time is of the essence with respect to each and every provision of this Lease.

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- B. Waiver and Amendment. No provision of this Lease shall be deemed waived or amended except by a written instrument unambiguously setting forth the matter waived or amended and signed by the party against which enforcement of such waiver or amendment is sought. Waiver of any matter shall not be deemed a waiver of the same or any other matter on any future occasion. No acceptance by Lessor of an amount less than the Rental and other Monetary Obligations stipulated to be due under this Lease shall be deemed to be other than a payment on account of the earliest such Rental or other Monetary Obligations then due or in arrears nor shall any endorsement or statement on any check or letter accompanying any such payment be deemed a waiver of Lessor's right to collect any unpaid amounts or an accord and satisfaction.
- C. Successors Bound. Except as otherwise specifically provided herein, the terms, covenants and conditions contained in this Lease shall bind and inure to the benefit of the respective heirs, successors, executors, administrators and assigns of each of the parties hereto.
- D. Captions. Captions are used throughout this Lease for convenience of reference only and shall not be considered in any manner in the construction or interpretation hereof.
- E. Severability. The provisions of this Lease shall be deemed severable. If any part of this Lease shall be held unenforceable by any court of competent jurisdiction, the remainder shall remain in full force and effect, and such unenforceable provision shall be reformed by such court so as to give maximum legal effect to the intention of the parties as expressed therein.
- F. Other Documents. Each of the parties agrees to sign such other and further documents as may be necessary or appropriate to carry out the intentions expressed in this Lease; provided such documents are reasonably acceptable to each parties' counsel.
- G. Entire Agreement. This Lease and any other instruments or agreements referred to herein, constitute the entire agreement between the parties with respect to the subject matter hereof, and there are no other representations, warranties or agreements except as herein provided.
- H. Forum Selection; Jurisdiction; Venue; Choice of Law. For purposes of any action or proceeding arising out of this Lease, the parties hereto expressly submit to the jurisdiction of all federal and state courts located in the State of Nevada. Lessee consents that it may be served with any process or paper by registered mail or by personal service within or without the State of Nevada in accordance with applicable law. Furthermore, Lessee waives and agrees not to assert in any such action, suit or proceeding that it is not personally subject to the jurisdiction of such courts, that the action, suit or proceeding is brought in an inconvenient forum or that venue of the action, suit or proceeding is improper. Nothing contained in this Section shall limit or restrict the right of Lessor to commence any proceeding in the federal or state courts located in

the state where each Property is located to the extent Lessor deems such proceeding necessary or advisable to exercise remedies available under this Lease.

- I. Counterparts. This Lease may be executed in one or more counterparts, each of which shall be deemed an original.
- J. Prohibited Persons and Transactions. Lessee and Lessor (each a "Representing Party") represents to its current knowledge to the other that the Representing Party is not a person or entity, nor owns property or interests in property, which is blocked pursuant to Executive Order 13224 signed on September 24, 2001 and entitled "Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit or Support Terrorism" or under any rules and regulations related thereto.
- 39. Intentionally Omitted.
- 40. Amendments to Accommodate Sale to Tenants In Common. At the request of Lessor, Lessee shall execute any amendments to this Lease that Lessor deems reasonably necessary to accommodate Lessor's sale of the Property to tenants in common (and subsequent management of the Property by such tenants in common or a manager appointed by them), provided that such amendments do not materially and negatively impact Lessee's obligations hereunder.

[Remainder of page intentionally left blank; signatures follow]

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Notary Public

My Commission Expires: 10-15-67

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STATE OF CALIFORNIA COUNTY OF Santa Clara

) S.S.

On December 2, 2005

before me,

Ilna I. Seda

a Notary Public in and for said County and State, personally appeared

Larry J. Willard

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(les) and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s), acted, executed the instrument.

WITNESS my hand, and official seal.

Signature 🕪

J. Rudy

TINA T. SEDA Commission # 1441079 Natary Public - Calilotnia Santa Clara County My Comm. Expires Oct 15, 2007

(This area for official notorial seal)

Jan 3 Zuu

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LESSEE:

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation

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Paul Morabito, its Chief Executive Officer

Tax Identification No. 88-0125101

STATE OF NEVADA)

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COUNTY OF WASHOD)

The foregoing instrument was acknowledged before me on 1/4/06 by Paul Morabito, as Chief Executive Officer of BERRY-HINCKLEY INDUSTRIES, a Nevada corporation, on behalf of the corporation.

Notary Public

My Commission Expires: 2/14/07

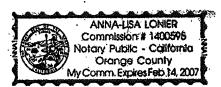


EXHIBIT A

DEFINED TERMS

The following terms shall have the following meanings for all purposes of this Lease:

"Additional Rental" has the meaning set forth in Section 4.C.

"Adjustment Date" means _____, and every anniversary thereafter during the Initial Term, and any Extension Term.

"Affiliate" means any Person which directly or indirectly controls, is under common control with or is controlled by any other Person. For purposes of this definition, "controls", "under common control with", and "controlled by" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting securities or otherwise.

"Base Annual Rental" means \$1,464,375.00.

"Base Monthly Rental" means an amount equal to 1/12 of the applicable Base Annual Rental.

"Business Day" means Monday through Friday, except those days on which the United States Postal Service does not deliver regular first-class mail.

"Casualty" means any loss of or damage to any property included within or related to any Property or arising from an adjoining property caused by fire, flood or other casualty.

"Condemnation" means a Taking and/or a Requisition.

"Costs" means all reasonable costs and expenses incurred by a Person, including without limitation, reasonable attorneys' fees and expenses, court costs, expert witness fees, costs of tests and analyses, repair and maintenance, travel and accommodation expenses, deposition and trial transcripts, copies and other similar costs and fees, brokerage fees, escrow fees, title insurance and other insurance premiums, appraisal fees, stamp taxes, recording fees and transfer taxes or fees, as the circumstances require.

"Dealer" means any Person that supplies gasoline and/or diesel fuel to Lessee at the Property for sale to third parties, or its successor or assigns.

"Dealer Agreement" means a written agreement or other document granting Lessee the right to operate a gas station operation under the flag, brand or trade name of a Dealer.

"Default Rate" means 18% per annum or the highest rate permitted by law, whichever is less.

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"Deed of Trust" means any and all deeds of trust, mortgages or other liens to secure debts or other security instruments here and after placed by Lessor on the Property or any part thereof (except the Lessee's personal property or trade fixtures), and to any and all renewals, modifications, consolidations, replacements, extensions or substitutions of any such instruments.

"Effective Date" has the meaning set forth in Section 3 of this Lease.

"Environmental Laws" means federal, state and local laws, ordinances, common law requirements and regulations and standards, rules, policies and other governmental requirements, administrative rulings and court judgments and decrees having the effect of law in effect now or in the future and including all amendments, that relate to Hazardous Materials, Regulated Substances, USTs, and/or the protection of human health or the environment, or relating to liability for or Costs of Remediation or prevention of Releases, and apply to Lessee and/or the Property.

"Environmental Liens" means liens that may be imposed pursuant to Environmental Laws, including but not limited to Nevada Revised Statutes Chapters 459 and 618.

"Event of Default" has the meaning set forth in Section 20.A.

"Expiration Date" has the meaning set forth in Section 3.

"Extension Option" has the meaning set forth in Section 3.

"Extension Term" has the meaning set forth in Section 3.

"Force Majeure Event" has the meaning set forth in Section 29.

"Governmental Authority" means any governmental authority, agency, department, commission, bureau, board, instrumentality, court or quasi-governmental authority of the United States, any state or any political subdivision thereof (including but not limited to the Nevada Department of Environmental Protection, the Nevada Gaming Control Board and the Nevada Gaming Commission) with authority to adopt, modify, amend, interpret, give effect to or enforce any federal, state and local laws, statutes, ordinances, rules or regulations, including common law, or to issue court orders.

"Hazardous Materials" includes: (a) oil, petroleum products, flammable substances, explosives, radioactive materials, hazardous wastes or substances, toxic wastes or substances or any other materials, contaminants or pollutants which pose a hazard to the Property or to Persons on or about the Property, cause the Property to be in violation of any local, state or federal law or regulation, (including without limitation, any Environmental Law), or are defined as or included in the definition of "hazardous substances", "hazardous wastes", "hazardous materials", "toxic substances", "contaminants", "pollutants", or words of similar import under any applicable local, state or federal law or under the regulations adopted, orders issued, or publications promulgated pursuant thereto, including, but not limited to: (i) the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. §9601, et seq.; (ii) the Hazardous Materials Transportation Act, as amended, 49 U.S.C. §1801, et seq.; (iii) the Resource Conservation and Recovery Act, as amended, 42 U.S.C. §6901, et seq.; and Sample Lease 1/4/2006

(iv) regulations adopted and publications promulgated pursuant to the aforesaid laws; (b) asbestos in any form which is or could become friable, urea formaldehyde foam insulation, transformers or other equipment which contain dielectric fluid containing levels of polychlorinated biphenyls in excess of fifty (50) parts per million; (c) underground storage tanks; and (d) any other Regulated Substances, chemical, material or substance, exposure to which is prohibited, limited or regulated by any governmental authority or which may or could pose a hazard to the health and safety of the occupants of the Property or the owners and/or occupants of any adjoining property.

"Indemnified Parties" means Lessor, any Lessor's Lenders and their members, managers, officers, directors, shareholders, partners, employees, agents, servants, representatives, contractors, subcontractors, affiliates, subsidiaries, participants, successors and assigns, including, but not limited to, any successors by merger, consolidation or acquisition of all or a substantial portion of the assets and business of Lessor or any Lessor's Lenders, as applicable.

"Initial Term" has the meaning set forth in Section 3.

"Insolvency Event" means (a) Lessee's (i) failure to generally pay its debts as such debts become due; (ii) admitting in writing its inability to pay its debts generally; or (iii) making a general assignment for the benefit of creditors; (b) any proceeding being instituted by or against Lessee (i) seeking to adjudicate it a bankrupt or insolvent; (ii) seeking liquidation, winding up, reorganization, arrangement, adjustment, protection, relief, or composition of it or its debts under any law relating to bankruptcy, insolvency, or reorganization or relief of debtors; or (iii) seeking the entry of an order for relief or the appointment of a receiver, trustee, or other similar official for it or for any substantial part of its property, and in the case of any such proceeding instituted against Lessee, either such proceeding shall remain undismissed for a period of one hundred twenty (120) days or any of the actions sought in such proceeding shall occur; or (c) Lessee taking any corporate action to authorize any of the actions set forth above in this definition.

"Law(s)" means any constitution, statute, rule of law, code, ordinance, order, judgment, decree, injunction, rule, regulation, policy, requirement or administrative or judicial determination, even if unforeseen or extraordinary, of every duly constituted Governmental Authority, court or agency, now or hereafter enacted or in effect.

"Lease Term" shall have the meaning described in Section 3.

"Legal Requirements" means the requirements of all present and future Laws (including without limitation, Environmental Laws and Laws relating to accessibility to, usability by, and discrimination against, disabled individuals), all judicial and administrative interpretations thereof, including any judicial order, consent, decree or judgment, and all covenants, restrictions and conditions now or hereafter of record which may be applicable to Lessee or to the Property, or to the use, manner of use, occupancy, possession, operation, maintenance, alteration, repair or restoration of to the Property, even if compliance therewith necessitates structural changes or improvements or results in interference with the use or enjoyment of the Property.

"Lessor's Lender" means any lender of Lessor that has a lien on the Property, including any lenders named in any Deed of Trust.

Sample Lease 1/4/2006

"Losses" means any and all claims, suits, liabilities (including, without limitation, strict liabilities), actions, proceedings, obligations, debts, damages, losses, Costs, diminutions in value, fines, penalties, interest, charges, fees, judgments, awards, amounts paid in settlement and damages of whatever kind or nature, inclusive of bodily injury and property damage to third parties (including, without limitation, attorneys' fees and other Costs of defense).

"Monetary Obligations" means all Rental and all other sums payable or reimbursable by Lessee under this Lease to Lessor, to any third party on behalf of Lessor, or to any Indemnified Party.

"Notices" has the meaning set forth in Section 24.

"Permitted Amounts" shall mean, with respect to any given level of Hazardous Materials or Regulated Substances, that level or quantity of Hazardous Materials or Regulated Substances in any form or combination of forms which does not constitute a violation of any Environmental Laws and is customarily employed in, or associated with, similar businesses located in the states where the Property is located.

"Permitted Encumbrances" shall mean those covenants, restrictions, reservations, liens, conditions, encroachments, easements, survey exceptions, parties in possession and other matters of title that affect the Property as of the date of Lessor's acquisition thereof and those items which hereafter affect title as permitted under this Lease, including but not limited to those identified in the owner's policy of title insurance issued to Lessor by First American Title Insurance Company or an agent thereof in conjunction with Lessor's acquisition of the Property.

"Permitted Facility" means a gas station with convenience store (and restaurant and postal unit operations within a convenience store), and uses incidental or related thereto including but not limited to a car wash, quick lube/oil change facility, the operation of gaming devices within the convenience store and offices for Lessee's operations, together with uses that are complementary to or extensions of Lessee's gas station and convenience store operations (e.g., quick-service restaurants, deli and sandwich shops, coffee shops, juice shops, postal contract units and/or UPS/Federal Express services) when such uses are not in violation of Legal Requirements or the Permitted Encumbrances.

"Permitted Sublease" has the meaning set forth in Section 23.

"Person" means any individual, partnership, corporation, limited liability company, trust, unincorporated organization, Governmental Authority or any other form of entity.

"Property" means, that parcel or parcels of real estate located at the address set forth in Exhibit B and legally described on Exhibit B attached hereto (which parcels may be fee estates or easement estates), together with all rights, privileges, and appurtenances associated therewith, all buildings, fixtures and other improvements now or hereafter located on such parcels of real estate (whether or not affixed to such real estate).

Sample Lease 1/4/2006

"Regulated Substances" means "petroleum" and "petroleum-based substances" or any similar terms described or defined in any of the Environmental Laws and any applicable federal, state, county or local laws applicable to or regulating USTs.

"Release" means any presence, release, deposit, discharge, emission, leaking, spilling, seeping, migrating, injecting, pumping, pouring, emptying, escaping, dumping, disposing or other movement of Hazardous Materials, Regulated Substances or USTs.

"Remediation" means any response, remedial, removal, or corrective action, any activity to cleanup, detoxify, decontaminate, contain or otherwise remediate any Hazardous Materials, Regulated Substances or USTs, any actions to prevent, cure or mitigate any Release, any action to comply with any Environmental Laws or with any permits issued pursuant thereto, any inspection, investigation, study, monitoring, assessment, audit, sampling and testing, laboratory or other analysis, or any evaluation relating to any Hazardous Materials, Regulated Substances or USTs.

"Rental" means, collectively, the Base Annual Rental and the Additional Rental.

"Rent Adjustment" has the meaning set forth in Section 4.B.

"Successor Lessor" has the meaning set forth in Section 21.

"Taking" means (a) any taking or damaging of all or a portion of the Property (i) in or by condemnation or other eminent domain proceedings pursuant to any Law, general or special, or (ii) by reason of any agreement with any condemnor in settlement of or under threat of any such condemnation or other eminent domain proceeding, or (iii) by any other means, or (b) any de facto condemnation that constitutes a compensable taking under applicable law. The Taking shall be considered to have taken place as of the later of the date actual physical possession is taken by the condemnor, or the date on which the right to compensation and damages accrues under the law applicable to the Property.

"Threatened Release" means a substantial likelihood of a Release which requires action to prevent or mitigate damage to the soil, surface waters, groundwaters, land, stream sediments, surface or subsurface strata, ambient air or any other environmental medium comprising or surrounding any Property which may result from such Release.

"USTs" means any one or combination of tanks and associated product piping systems used in connection with storage, dispensing and general use of Regulated Substances.

"WGI" means Winner's Gaming, Inc.

"WGI Agreement" means any and all agreements of Lessee with WGI pursuant to which WGI currently operates gaming machines or devices and related equipment (or the technological evolution thereof) on the Property and any Substitute WGI Agreement (as defined in <u>Section 12.F</u>).

Sample Lease 1/4/2006

EXHIBIT B

ADDRESS AND LEGAL DESCRIPTION OF PROPERTY

PROPERTY ADDRESS: 7695 - 7699 S. Virginia Street, Reno, Nevada (APN 043-011-48)

PROPERTY LEGAL DESCRIPTION:

Parcel I

The land referred to herein is situated in the City of Reno, County of Washoe, State of Nevada, located within a portion of the South Half (S 1/2) of the Northwest Quarter (NW 1/4) of Section 6, Township 19 North, Range 20 East, M.D.M., and being more particularly described as follows:

Commencing at the Southwest corner as Parcel "C", a found nail and tag on a fence post, as shown on Parcel Map No. 218, File No. 388954, on file in the County Recorders Office, Washoe County, Nevada; thence North 00°16'56" East, a distance of 579.25 feet to the Northerly side of Longley Lane, Thence along said Northerly side South 69°21'09" West, a distance of 21.41 feet to the true point of beginning.

Thence along the said Northerly line of Longley Lane South 69°21'09" West, a distance of 301.22 feet to the Easterly line of U.S. 395; thence along said Easterly line North 21°04'38" West, a distance of 653.04 feet; thence leaving said Easterly line North 14°55'49" East, a distance of 126.66 feet, thence North 89°52'07" East, a distance of 458.81 feet; thence North 19°19'30" West, a distance of 0.78 feet; thence North 84°51'10" East, a distance of 213.17 feet to the Westerly line of South Virginia Street; thence along said Westerly line South 20°39'19" East, a distance of 257.92 feet; thence leaving said westerly line of South Virginia North 89°40'18" West, a distance of 275.76 feet; thence South 00°16'56" West, a distance of 406.67 feet to the true point of beginning.

Parcel II

A non-exclusive easement for ingress, egress and access by and for vehicular pedestrian traffic and vehicle parking as set forth in that certain mutual parking and access agreement recorded April 12, 1995 in Book 4282, Page 40 as Instrument No. 1885230 of Official Records, Washoe County Recorder's Office, Washoe County, Nevada.

Note: The above metes and bounds legal description appeared previously in that certain document recorded August 27, 1996, in Book 4656, Page 716, as Instrument No. 2024695.

Sample Lease 1/4/2006 B-1

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Clerk of the Court

EXHIBIT '3', Transaction # 6636476: yviloria

EXHIBIT "3"

EXHIBIT "3"



April 12, 2013

VIA EMAIL & REGULAR MAIL:

Email: <u>l.steven.goldblatt@gmail.com</u>

The Goldblatt Law Firm Attn: L. Steven Goldblatt, Esq. 22 Martin Street Gilroy, California 95037

Re: Berry-Hinkley Industries Inc. ("BHI") Lease Agreement (the "Lease") with regard

to 7695 S. Virginia St., Reno, Nevada (the "Leased Premises")

Dear Mr. Goldblatt:

By letter dated March 18, 2013, this office notified your client, Overland Development Corporation Inc., that it had been retained by BHI and Mr. Jerry Herbst with regard to certain outstanding obligations due regarding the Leased Premises. In part, we stated that BHI determined it is simply not in the position to continue to operate the business located on the Leased Premises and maintain the Lease. The losses it is experiencing can no longer be sustained. As such, BHI intended to cease to operate the Leased Premises and offered to assist in a coordinated turnover of the Leased Premises to either your client or its designated party, affording your client the opportunity to maintain operations and preserve value. We proposed that all negotiations in this regard must be concluded by April 1, 2013. By virtue of various delays, and to provide your client more time to consider the alternatives, BHI determined not to enforce this deadline.

While we have exchanged communications with regard to the Lease and the Leased Premises, we have not received any communication with regard to such a turnover. We also understand that Jackson Oil Co. has or will be contacting you with regard to leasing the Leased Premises.

In the absence of any agreement or a demand by you to vacate the Leased Premises, BHI will be vacating the Leased Premises on April 30, 2013. Again, BHI is prepared to coordinate with you, your client or its designee a turnover of the Leased Premises on or before April 30,

Gordon Silver

Attorneys and Counselors at Law

April 12, 2013 Page 2

2013. Please contact Chris Kemper at 702-798-6400 immediately, but no later than April 20, to coordinate a transition plan.

Very truly yours,

GORDON SILVER

GERALD M. GORDON, ESQ.

MMW/crs

cc: Jerry Herbst (via email)

Chris Kemper (via email)

Mark M. Weisenmiller, Esq. (via email)

Marc Berger (via email)

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EXHIBIT "4", Transaction # 6636476: yviloria

EXHIBIT "4"

EXHIBIT "4"

OPERATION AND MANAGEMENT AGREEMENT

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

RECITALS

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

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

TERM/TERMINATION.

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

GENERAL SCOPE OF SERVICES.

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

RELATIONSHIP OF PARTIES.

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

4. COMPENSATION TO OPERATOR.

In consideration of Operator performing the Services and the other mutual covenants set forth herein, Owner shall pay to Operator the sum of Ten Thousand and No/100ths Dollars (\$10,000:00) per month (the "Fee"), and Owner then shall be entitled to all Net Profits (below defined) generated at the Location during each month of the term of this Agreement. The Fee and Net Profits payment shall be payable as set forth below.

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

5. RENT.

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

6. OPERATOR'S EMPLOYEES.

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

INSURANCE.

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

8. DEFAULT -- REMEDIES.

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

INDEMNIFICATION.

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

10. CONFLICTING PROVISIONS.

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

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

"OPERATOR"

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation

Name: Chris Kemper

Title: V.F. of Hann.

"OWNER"

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

CAUTOWN corporation

By: Colland

Name: CARRY COMMENT

Title: / Force C

Trustee, THE WILLARD FAMILY TRUST

DATED NOVEMBER 14, 1987

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Clerk of the Court

EXHIBIT "5" Transaction # 6636476: yviloria

EXHIBIT "5"

EXHIBIT "5"



13 Symptoms of Bipolar Disorder: Are You Bipolar?

By: Angela Ayles on Thursday, April 18th, 2013

Bipolar disorder is a mood disorder that affects millions of people from all walks of life. According to medical professionals, people who suffer from this condition experience episodes of mania, which are typically followed by episodes of depression and vice versa.

The most common symptom associated with bipolar disorder is mood swings. Individuals who are bipolar will experience heightened euphoria and happiness, followed by drastic depression and guilt. While mood swings are the most common symptom, they are not the only symptom. There are several other hallmarks of this condition and many of them contradict each other. Essentially, there are two types of symptoms: manic symptoms and depressive symptoms. Each set of symptoms produce very different types of behavior and are often experienced back to back in a short period of time.

Below you will find a list of bipolar symptoms from various medical sources as well as the type (manic or depressive, or both) associated with each:



1. Mood Swings

Type: Manic and Depressive

Mood swings are the most common symptom of bipolar disorder and are a combination of the manic and depressive symptoms. A mood swing is characterized by high levels of positivity followed by high levels of negativity and depression or vice versa. Manic periods can last anywhere from a few days to a few months, as can their depressive counterparts.

It is very important to note that many people with bipolar disorder also experience a buffer phase known as "hypomania." These are like mild manic episodes which do not significantly interfere with the patient's everyday responsibilities and behavior. In fact they may function better than normal. It is also common for people to experience mood instabilities in the days leading up to the full onset of a manic or depressive episode.



2. Euphoria

Type: Manic

A manic episode will present symptoms of euphoria in patients. Sufferers experience a heightened level of happiness and a sense of accomplishment. They often engage in goal-oriented projects and activities, and feel "unstoppable" in the pursuit of these goals, even though they are often easily distracted from them.

Some patients describe the euphoria of bipolar disorder as a kind of "high." They may feel very outgoing and unnaturally happy regardless of whether or not the social situation they are in warrants it. Conversely, the euphoria can suddenly give way to extreme irritability.



3. Rapid Speech

Type: Manic

A good indication that someone is experiencing a manic episode is rapid speech. Patients will suddenly begin speaking extremely quickly for long periods of time, but they are rarely able to follow a train of thought through to its logical conclusion. Instead, they tend to jump from one subject to another in rapid-fire mode, displaying thought patterns that make little sense to others around them.

The rapid speech symptoms are part and parcel of a general burst of energy which patients experience during a manic episode. Other characteristics include a sudden increase in pursuing goal-oriented activities and a feeling of being "unstoppable." Restlessness and an overestimation of one's own abilities are also hallmarks of the energy burst symptom.



4. Increased

Type: Manic

Racing thoughts are a common manic bipolar symptom. Individuals will often have a difficult time focusing on one thing and will tend to over-analyze their thoughts. Thoughts and speech jump seemingly at random from one unrelated topic to another, which increases the patient's distractibility. Such symptoms significantly hold back the patient's pursuit of goal-oriented objectives.

During milder manic episodes known as "hypomania," patients are largely able to curtail the chaotic consequences of their racing thoughts. While patients may enjoy clarity of mind and high periods of productivity during the hypomania phase, these positive effects suddenly vanish when the patient descends into full-on mania.



Irritation

Type: Manic and Depressive

Irritation and agitation are common in both manic and depressive episodes. Sufferers are easily irritated by situations they normally wouldn't be agitated with. Mood instabilities are typically present during both manic and depressive episodes; patients may quickly switch from one extreme to the other before returning to their euphoric or despondent baseline.

Treatment for bipolar disorder often focuses on stabilizing mood, thus preventing both sudden and longer-phase shifts between happiness and sadness. The severity of mood swings are often used by clinicians to determine how well a given patient is (or is not) responding to treatment.



6. Increased Physical Activity

Type: Manic

When a person is experiencing a manic episode they will often have extremely high levels of energy. To help relieve the energy, sufferers often turn to physical activity. If someone suddenly feels the need to exercise excessively to exert energy, it may be an indication of an underlying problem if it continues in a cyclical pattern and is interrupted by long periods of lethargy.

Another way in which this symptom manifests is through compulsive sexual behavior. During a manic episode, a patient may suddenly engage in risky or excessive sex with little to no regard for possible consequences. This can lead to a whole host of other issues, including STIs and unwanted pregnancies.

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7. Careless Use of Drugs/Alcohol

Type: Manic

Sometimes, people suffering from bipolar disorder will turn to drugs and alcohol. Careless use of these substances may be a warning sign of deeper issues. Worse, illicit drugs and excessive alcohol consumption have both been shown to further destabilize mood, which just makes the condition's symptoms all that much worse.

Drugs and alcohol are also known to increase the anxiety that can accompany the hypomanic "bridge phase." It's little wonder that most successful treatment programs stress to patients that they must limit or eliminate alcohol consumption and avoid street drugs altogether.



8. Decreased Need for Sleep

Type: Manic

As previously noted, manic episodes often involve large bursts of energy and euphoria. These symptoms can make it incredibly difficult to sleep. An individual experiencing this symptom may require less sleep, but won't necessarily feel tired or exhausted. Thus, this symptom is often mischaracterized as insomnia.

A person suffering from insomnia experiences persistent difficulty falling asleep or staying asleep. This isn't quite what happens during a manic episode. Patients typically just don't feel tired to the same degree they normally would, and as such, they choose to stay up and use outlets to expend their energy rather than try to sleep.



9. Missed Work

Type: Manic and Depressive

A common symptom of bipolar disorder is the inability to maintain a schedule. For this reason, many bipolar sufferers will often miss work (or school or other commitments).

In fact, one of the key diagnostic criteria for the disorder is that the patient's symptoms are severe enough to interfere with his or her ability to function in day-to-day life.

During a manic period, a person may miss work because they are too busy pursuing other activities they deem to be more important, or because they cannot focus on the task at hand. During a depressive episode, the patient may simply be too lethargic to get out of bed or fail to see the point in continuing to work.



10. Fatigue

Type: Depressive

Contrary to manic symptoms, individuals suffering from a depressive episode will often experience extreme tiredness and fatigue. Wanting to go to bed, staying in bed late, and an overall lack of motivation throughout the day are all signs of bipolar disorder. These symptoms are one of the clearest examples of the day-to-night dichotomy between mania and depression.

In addition to physical fatigue, patients often feel mentally "bogged down" during a depressive episode, despite the fact that they are getting ample sleep. Mental sluggishness replaces energetic goal-oriented euphoria, and patients suddenly lack the drive or desire to do the things that interest them.



11. Chronic Pain with No Known Cause

Type: Depressive

Individuals experiencing other symptoms on the list, along with chronic pain with no known cause, may be suffering from bipolar disorder. This pain can present itself throughout many parts of the body including, but not limited to, severe headaches. Muscle aches and generalized, nonspecific body aches can also occur.

In some cases, the pain has a known cause, but is amplified and intensified. For example, a person with a mildly bruised knee may complain of unbearable throbbing pain that exceeds what would normally be expected from such an injury. Curiously, it seems that antidepressants offer the most effective relief from this type of pain.



12. Sadness/Hopelessness

Type: Depressive

One of the most telltale symptoms of a depressive episode associated with bipolar disorder is an overwhelming feeling of sadness and hopelessness. Individuals can fall into a state of depression and may have noticeably different symptoms than those related to a manic episode (where individuals experience a heightened sense of happiness and euphoria). They suddenly become sluggish and don't see a point in pursuing goals.

Another common symptom is a near-total loss of interest in activities the patient once enjoyed, including sexual activity. This is often in stark contrast to what happens during a manic episode, when patients tirelessly pursue their interests and may engage in compulsive, excessive sexual acts.



13. Suicidal Thoughts

Type: Depressive

As noted in slide 12, individuals with bipolar disorder will often feel sad and depressed. In extreme cases, they may develop suicidal thoughts and act in a suicidal manner. This can be extremely dangerous, since bipolar disorder also commonly includes compulsiveness. A person feeling despondent to the point of suicide may suddenly attempt to take his or her own life.

If these symptoms present themselves, seek medical or professional attention immediately. Patients suffering from suicidal ideations or suicidal behavior need prompt and aggressive interventions to defuse the risk of tragic consequences.

A.App.3750 FILED Electronically CV14-01712 2018-04-18 02:59:37 PM Jacqueline Bryant Clerk of the Court

EXHIBIT "6636476: yviloria

EXHIBIT "6"

EXHIBIT "6"

EPO-001

ONE copy to court, DNE copy to restrained person, ONE copy to protected person, ONE copy to issuing agency

LAW ENFORCEMENTACA PONSIGNS 1

EMERGENCY PROTECTIVE ORDER (See reverse for important notices.)

PROTECTED PERSONS (insert names of all persons protected by this Order):	
NATASILA V MCGUIN, KIT IN THIN	
2. RESTRAINED PERSON (name): BRIAN PHILD MIGHTN	
Sex: M F Ht.: 62 Wt.: 186 Hair color: 112 Eye color: 112 Race: 10 Age: 10 Date of birth: 1/1/5-6	7
3. TO THE RESTRAINED PERSON:	
 a. YOU MUST NOT harass, attack, strike, threaten, assault (sexually or otherwise), hit, follow, stalk, molest, destroy any personal property of, disturb the peace of, keep under surveillance, or block the movements of each person named in it b. YOU MUST NOT contact, either directly or indirectly, by any means, including but not limited to by telephone, mail, e-mother electronic means, any person named in item 1. 	em 1. ail or
c. YOU MUST stay away at least: 300 yards from each person named in item 1,	
stay away at least: yards from move out immediately from	
(address): 3287 RUFFINO CANE SANTSE CA 95148	
 d. YOU MUST NOT own, possess, purchase, receive, or attempt to purchase or receive any firearm or ammunition. If you have any firearms, you must turn them in to a law enforcement agency or sell them to, or store them with, a licensed gun dealer. e. YOU MUST NOT take any action, directly or through others, to obtain the addresses or locations of any person named in its given temporary care and control of the following minor children of the parties (names and ages): 	
	7
5. THIS ORDER WILL EXPIRE AT THE CLOSE OF THE COURT BUSINESS DAY ON: 30, 2018	
6. TO THE PROTECTED PERSON: If you need protection for a longer period of time, you must request restraining orders from the court in the county where you live: INSERT DATE OF FIFTH COURT DAY OR SEVENTH CALENDAR DAY, WHICHEVER IS EARLIER; DO NOT COUNT DAY THE ORDER IS GRANTED.	
(Name and address of court): Surchiolic Coult Tustice Court, 201 No. 15, SANTECAS	115
If you go to court to request restraining orders, take your copy of this form with you. If a juvenile petition is pending, file in that co	ourt.
 Reasonable grounds for the issuance of this Order exist, and an emergency protective order is necessary to prevent the occurre or recurrence of domestic violence, child abuse, child abduction, elder or dependent adult abuse, or stalking. Individual officers (name): 	ence
8. Judicial officer (name): AALON VENSKY granted this Order on (date): 15/3-2018 at (time): 1803	1"
* APPLICATION	
9 The events that caused the protected person to fear immediate and present danger of domestic violence, child abuse, child abduction, elder or dependent adult abuse (except solely financial abuse), or stalking are (give facts and dates, specify weapon.	s):
PUT TOTAL MENCY TRUMENTED TODAY THE BY ENGLISH WE WAY THE WHEN ?	AZ W
THERE IT WALK MANAY FILOW THE GA THE NIGHT PHINED TO WHING TO KENE ASISTS. WHILE	_
SUMD THE BY HAVE THERETHED TO KIND HEL END THE PASTE	
10. Firearms were: observed reported searched for seized	
71. The person to be protected lives with the person to be restrained and requests an order that the restrained person move our immediately from the address in item 3c.	
12. The person to be protected has minor children in common with the person to be restrained, and a temporary custody order requested because of the facts alleged in item 9. A custody order does does not exist.	is
By: Au fish	
(PRINT NAME OF LAW ENFORCEMENT OFFICER) (SIGNATURE OF LAW ENFORCEMENT OFFICER)	
Agency: Telephone No.: (4/6)277- 4/6-3/ Badge No.: 27	
13. Person served (name):	-
14. I personally delivered copies of this Order to the person served as follows: Date:	
15. At the time of service, I was at least 18 years of age and not a party to this cause.	ficer.
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Date:	
(TYPE OR PRINT NAME OF SERVER) Page	of 2

EMERGENCY PROTECTIVE ORDER WARNINGS AND INFORMATION

TO THE RESTRAINED PERSON: VIOLATION OF THIS ORDER IS A MISDEMEANOR PUNISHABLE BY A \$1,000 FINE. ONE YEAR IN JAIL, OR BOTH, OR IT MAY BE PUNISHABLE AS A FELONY. THIS PROTECTIVE ORDER SHALL BE ENFORCED BY ALL LAW ENFORCEMENT OFFICERS IN THE STATE OF CALIFORNIA WHO ARE AWARE OF OR SHOWN A COPY OF THE ORDER. THE TERMS AND CONDITIONS OF THIS ORDER REMAIN ENFORCEABLE REGARDLESS OF THE ACTS OF THE PARTIES; IT MAY BE CHANGED ONLY BY ORDER OF THE COURT (PENAL CODE SECTION 13710(b)).

YOU ARE PROHIBITED FROM OWNING, POSSESSING, PURCHASING, RECEIVING, OR ATTEMPTING TO PURCHASE OR RECEIVE A FIREARM OR AMMUNITION. (PENAL CODE SECTIONS 29825(a), 30305(a).) A VIOLATION IS SUBJECT TO A \$1,000 FINE AND IMPRISONMENT OR BOTH. WITHIN 24 HOURS OF RECEIPT OF THIS ORDER, YOU MUST TURN IN YOUR FIREARMS TO A LAW ENFORCEMENT AGENCY, SELL THEM TO A LICENSED FIREARMS DEALER, OR STORE THEM WITH A LICENSED FIREARMS DEALER UNTIL THE EXPIRATION OF THIS ORDER. (PENAL CODE SECTION 29830.) PROOF OF SURRENDER, SALE, OR STORAGE MUST BE FILED WITH THE COURT WITHIN 48 HOURS OF RECEIPT OF THIS ORDER.

To the restrained person: This order will last until the date and time in Item 5 on the reverse. The protected person may, however, obtain a more permanent restraining order from the court. You may seek the advice of an attorney on any matter connected with this order. The attorney should be consulted promptly so that the attorney may assist you in responding to the order.

A la persona bajo restricción judicial: Esta orden durarà hasta la fecha y hora indicada en el punto 5 al dorso. La persona protegida puede, sin embargo, obtener una orden de entredicho (restricción judicial) más permanente de la corte. Usted puede consultar a un abogado en conexión con cualquier asunto relacionado con esta orden. Debe consultar al abogado inmediatamente para que él o ella le pueda ayudar a responder a la orden.

| A R 24 24 365 1230 Hot

To the protected person: This order will last only until the date and time noted in item 5 on the reverse. If you wish to seek continuing protection, you will have to apply for an order from the court at the address in item 6. You may apply for a protective order free of charge. In the case of an endangered child, you may also apply for a more permanent order at the address in item 6, or if there is a juvenile dependency action pending, you may apply for a more permanent order under section 213.5 of the Welfare and Institutions Code. In the case of a child being abducted, you may apply for a Child Custody and Visitation Order from the court. You may seek the advice of an attorney on any matter connected with your application for any future court orders. The attorney should be consulted promptly so that the attorney may assist you in making your application. You do not have to have an attorney to get the protective order.

A la persona protegida: Esta orden durará sólo hasta la fecha y hora indicada en el punto 5 al dorso. Si usted desea que la protección continúe, tendrá que solicitar una orden de la corte en la dirección indicada en el punto 6. La solicitud de la orden de protección es gratis. En el caso de que un niño o una niña se encuentre en peligro, puede solicitar una orden más permanente en la dirección indicada en el punto 6, o si hay una acción legal pendiente de tutela juvenil, puede solicitar una orden más permanente conforme a la sección 213.5 del código titulado en inglés Welfare and Institutions Code. En el caso del secuestro de un niño o una niña, usted puede solicitar de la corte una orden para la guarda del niño o de la niña (Child Custody and Visitation Order). Puede consultar a un abogado en conexión con cualquier asunto relacionado con las solicitudes de órdenes de la corte que usted presente en el futuro. Debe consultar un abogado inmediatamente para que él o ella le pueda ayudar a presentar su solicitud. Para obtener la orden de protección no es necesario que un abogado le represente.

To law enforcement: The emergency protective order shall be served upon the restrained party by the officer, if the restrained party can reasonably be located, and a copy shall be given to the protected party. A copy shall be filed with the court as soon as practicable after issuance. Also, the officer shall have the order entered into the computer database system for protective and restraining orders maintained by the Department of Justice. The availability of an emergency protective order shall not be affected by the fact that the endangered person has vacated the household to avoid abuse. A law enforcement officer shall use every reasonable means to enforce an emergency protective order. A law enforcement officer who acts in good faith to enforce an emergency protective order shall not be held civilly or criminally liable.

If a child is in danger of being abducted: This order will last only until the date and time noted in item 5 on the reverse. You may apply for a child custody order from the court.

En el caso de peligro de secuestro de un niño o de una niña: Esta orden será válida sólo hasta la hora y fecha indicada en el punto 5 al dorso. Usted puede solicitar de la corte una orden para la guarda del niño o de la niña (Child Cusiody and Visitation Order).

This emergency protective order is effective when made. This order shall expire on the date and time specified in item 5 on the reverse. The provisions of this emergency protective order take precedence in enforcement over provisions of other existing protective orders between the same protected and restrained persons to the extent the provisions of this order are more restrictive. In other words, the provisions in this emergency protective order take precedence over the provisions in any other protective order, including a criminal protective order, if (1) the person to be protected is already protected by the other protective order, (2) the person to be restrained is subject to that other order, and (3) the provisions in this emergency order are more restrictive than the provisions in that other order. The provisions in another existing protective order remain in effect and take precedence if they are more restrictive than the provisions in this emergency protective order.

EPO-001 [Rev. January 1, 2014]

A.App.3753
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CV14-01712
2018-04-18 02:59:37 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6636476 : yviloria

EXHIBIT "7"

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2018-04-18 02:59:37 PM
Jacqueline Bryant
Clerk of the Court

EXHIBIT '89, Transaction # 6636476: yviloria

EXHIBIT "8"

EXHIBIT "8"

Request for Domestic

Clark stamps date here when form is illed. DV-100 Violence Restraining Order 2018 JAN 31 You must also complete form CLETS-001, Confidential CLETS Information, and give it to the clerk when you file this Request. Name of Person Asking for Protection: Natasha Vladimirovna Moquin Your lawyer in this case (if you have one): Name: Self-Represented State Bar No.: Firm Name: Self-Represented Address (If you have a lawyer for this case, give your lawyer's Fill in court name and street address: information. If you do not have a lawyer and want to keep your home Superior Court of California, County of address private, give a different mailing address instead. You do not have Santa Clara to give your telephone, fax, or e-mail.): Street 201 N. First St., San Jose, CA 95113 Address: 3287 Mail: 191 N. First St., San Jose, CA 95113 City: Som Tase State: CA Family Justice Center Telephone: 408.628.7596 E-Mail Address: notos hamopuin @ gmail. com Court fills in case number when form is ifed. Name of Person You Want Protection From: Case Number: Brian Philip Moouin Description of person you want protection from: Height: 6'2 Weight: 190 Sex: M M .F Hair Color: brown Eye Color: brown Race: White Date of Birth: Address (if known): un be nown City: SAM Tose Zip: Un henow State: 3) Do you want an order to protect family or household members? X Yes No If yes, list them: Lives with you? Relationship to you Full name child X Yes No X Yes No ☐ Yes ☐ No. Check here if you need more space. Attach a sheet of paper and write "DV-100, Protected People" for a title. What is your relationship to the person in (2) ? (Check all that apply): a. We are now married or registered domestic partners. If you do not have one of these relationships, We used to be married or registered domestic partners. the court may not be able to consider your c. \(\subseteq \text{We live together.} \) request. Read form DV-500-INFO for help. d We used to live together. e. We are related by blood, marriage, or adoption (specify relationship): f. \(\sum \) We are dating or used to date, or we are or used to be engaged to be married. g. X We are the parents together of a child or children under 18: Date of Birth: 9/4/2002 Child's Name: Tyler Sthonso Moowin Kai Str Your Monuin Date of Birth: 9/28/2013 Child's Name: Date of Birth: Child's Name: Check here if you need more space. Attach a sheet of paper and write "DV-100, Additional Children" for a h. We have signed a Voluntary Declaration of Paternity for our child or children. (Attach a copy if you have one). This is not a Court Order. Judick! Council of California, www.couns.co.gov Request for Domestic Violence Restraining Order

Revised July 1, 2016, Mandatory Form Family Code, 9 6200 ot seq

(Domestic Violence Prevention)

ROHC!

DV-100, Page 1 of 6

				18F	000349
5)	a,	ther Restraining Orders and Con Are there any restraining/protective ord (emergency protective orders, criminal, No Yes (date of order): 1/13). Have you or any other person named in No Yes If yes, check each kin	ers currently in place OR that in juvenile, family)? 2018 and (expiration date): // 3 been involved in another and of case and indicate where a	130 2018 (Atto court case with t	ach a capy if you have one) he person in ②? vas filed:
		Kind of Case Divorce, Nullity, Legal Separation Civil Harassment Domestic Violence Criminal Juvenile, Dependency, Guardianship	County or Tribe Where Filed	1 Year Filed	Case Number (if known)
Chi	ecl	☐ Child Support ☐ Parentage, Paternity ☐ Other (specify): ☐ Check here if you need more space. title. K the orders you want. ☑	Attach a sheet of paper and w	rite "DV-100, O	ther Court Cases" for a
6	X Ia a	Personal Conduct Orders sk the court to order the person in ② not Marass, attack, strike, threaten, assau property, disturb the peace, keep unotherwise), or block movements Contact, either directly or indirectly, or other electronic means	ult (sexually or otherwise), hit, der surveillance, impersonate (follow, stalk, m on the Internet,	iolest, destroy personal electronically or
		The person in (2) will be ordered not to person unless the court finds good cause	take any action to get the addi e not to make the order.	resses or locatio	ons of any protected
7		Stay-Away Order			
	a.	My home My job or workplace) to stay at least <u>300</u> yards My school Each person listed in ③ The child(ren)'s school or child Other <i>(specify):</i>		heck all that apply):
	b.	If the person listed in (2) is ordered to s get to his or her home, school, job, work	tay away from all the places lis		he or she still be able to (If no, explain):
8)	×	Move-Out Order (If the person in ② lives with you and	you want that person to stay a	way from your	home, you must ask for

I ask the court to order the person in (2) to move out from and not return to (address): 3287 Ruffino La. San Jose, CA 45148

I have the right to live at the above address because (explain):

This is not a Court Order.

Revised July 1, 2018

this move-out order.)

Request for Domestic Violence Restraining Order (Domestic Violence Prevention) DV-100, Page 2 of 5

Case Number L 00036

If the judge approves the order, the person in (2) will be ordered not to own, possess, purchase, or receive a freezon or amountation. The person will be ordered to sell to, or store with, a licensed gun dealer, or turn in to lan engineerem, any guns or firezons that he or she owns or possesses. I			
Lask for the right to record communications made to me by the person in ② that violate the judge's orders. Care of Animals Lask for the sole possession, care, and control of the animals listed below. I ask the court to order the person in ② to stay at least yards away from and not take, sell, transfer, encumber, conceal, molest, attack, strike, threaten, harm, or otherwise dispose of the following animals: Lask for the animals to be with me because:	9	I believe the person in (2) owns or possesses guns, firearms If the judge approves the order, the person in (2) will be or firearm or annunition. The person will be ordered to sell to enforcement, any guns or firearms that he or she owns or po	dered not to own, possess, purchase, or receive a o, or store with, a licensed gun dealer, or turn in to law
11 □ Care of Animals Lask for the sole possession, care, and control of the animals listed below. Lask the court to order the person in (2) to stay at least yards away from and not take, sell, transfer, encumber, conceal, molest, attack, strike, threaten, harm, or otherwise dispose of the following animals: Lask for the animals to be with me because: 12 ○ Child Custody and Visitation a. ☑ I do not have a child custody or visitation order and I want one. b. ☐ Thave a child custody or visitation order and I want it changed. 11 I you ask for orders, you must fill out and attach form DV-105. Request for Child Custody and Visitation Orders. 13 ○ Child Support Check all that apply). a. ☑ I do not have a child support order and I want to be legal parents of the children (use form DV-180. Agreement and Judgment of Parentage). 3 ○ Child Support (Check all that apply). a. ☑ I do not have a child support order and I want it changed. b. ☐ Thave a child support order and I want it changed. c. ☐ I now receive or have applied for TANF, Welfare, CalWORKS, or Medi-Cally you usk for child support orders, you must fill out and attach form FL-150. Income and Expense Declaration or form FL-155, Financial Statement (Simplified). 14 ○ Property Control Lask the court to give only me temporary use, possession, and control of the property listed here: 15 ○ Debt Payment Lask the court to order the person in ② to make these payments while the order is in effect: 16 ○ Chack here if you need more space, Attach a sheet of paper and write "DY-100, Dabt Payment" for a title Pay to: 17 ○ Spours After ○ For Expreedits Amounts S 55 Pa Car Doue date: 18 ○ Debt Payment Lask the court to order the person in ② to make these payments while the order is in effect: 18 ○ Debt Payment Lask the court of order the person in ② to make these payments while the order is in effect: 19 ○ Debt Payment Lask the court of order the person in ② to make these payments while the order is in effect: 10 ○ Debt Payment 11 □ May Taylor Bayes Afte	10)		by the person in (2) that violate the judge's orders.
(2) to stay at least yards away from and not take, sell, transfer, encumber, conceal, molest, attack, strike, threaten, harm, or otherwise dispose of the following animals: Task for the animals to be with me because: Task for the animals to be with me because: Task for the animals to be with me because: Task for the animals to be with me because: Task for the animals to be with me because:	(11)		
12		(2) to stay at least yards away from and not to	ake, sell, transfer, encumber, conceal, molest, attack,
a.		I ask for the animals to be with me because:	
a.	(13)	M Child Custody and Visitation	
b.	(19)		I want one,
 If you ask for orders, you must fill out and attach form DV-105, Request for Child Custody and Visitation Orders. You and the other parent may tell the court that you want to be legal parents of the children (use form DV-180. Agreement and Judgment of Parentage). (3) Agreement and Judgment of Parentage). (4) Agreement and Judgment of Parentage). (5) I have a child support order and I want it changed. (6) I have a child support order and I want it changed. (7) I now receive or have applied for TANF, Welfare, CalWORKS, or Medi-Cal. If you ask for child support orders, you must fill out and attach form FL-150. Income and Expense Declaration or form FL-155. Financial Statement (Simplified). (4) Property Control Lask the court to give only me temporary use, possession, and control of the property listed here: Parsche. Cayenne Hybrid 15 Debt Payment Lask the court to order the person in ② to make these payments while the order is in effect: Check here if you need more space. Attach a sheet of paper and write "DV-100, Debt Payment" for a title Pay to: Check here if you need more space. Attach a sheet of paper and write "DV-100, Debt Payment" for a title Pay to: Check here if you need more space. Attach a sheet of paper and write "DV-100, Debt Payment" for a title Pay to: Check here if you need more space. Attach a sheet of paper and write "DV-100, Debt Payment" for a title Pay to: Check here if you need more space. Attach a sheet of paper and write "DV-100, Debt Payment" for a title Pay to: Check here if you need more space. Attach a sheet of paper and write "DV-100, Debt Payment" for a title Pay to: Check here if you need more spaces. Attach a sheet of paper and write "DV-100, Debt Payment" for a title Pay to: Check here if you need more spaces. Attach a sheet of paper and write "DV-100, Debt Payment" for a title Pay to: Check here if you need more spaces. Attach a sheet of paper and write "DV-100, Debt Payment" for a title pay to: Check here if you		그 얼마나 아무슨 사이는 아이들이 아니라 아이를 받아 아니라이다. 나는 아이들이 아이들이 나를 하는데 아니다.	
Agreement and Judgment of Parentage). Child Support (Check all that apply): A			
a. I do not have a child support order and I want one. b. I have a child support order and I want it changed. c. I now receive or have applied for TANF, Welfare, CalWORKS, or Medi-Cal. If you ask for child support orders, you must fill out and attach form FL-150. Income and Expense Declaration or form FL-155, Financial Statement (Simplified). 14 Property Control 1 ask the court to give only me temporary use, possession, and control of the property listed here: Possche Cayenne Hybrid 1 ask the court to order the person in (2) to make these payments while the order is in effect: Check here if you need more space, Attach a sheet of paper and write "DV-100, Debt Payment" for a title Pay to: Chase Acto For cor regiments Amount: \$ 5540.20 Due date: 1/3/2018 16 Property Restraint I am married to or have a registered domestic partnership with the person in (2). I ask the judge to order that the person in (2) not borrow against, sell, hide, or get rid of or destroy any possessions or property, excep in the usual course of business or for necessities of life. I also ask the judge to order the person in (2) to notify me of any new or big expenses and to explain them to the court. 17 Spousal Support I am married to or nave a registered domestic partnership with the person in (2) and no spousal support order exists. I ask the court to order the person in (2) to pay spousal support. (You must complete, file, and serve for FL-150. Income and Expense Declaration, before your hearing). This is not a Court Order.		You and the other parent may tell the court that you want to	
a	(13)	☐ Child Support (Check all that apply):	
 c. ☐ I now receive or have applied for TANF, Welfare, CalWORKS, or Medi-Cal. If you ask for child support orders, you must fill out and attach form FL-150. Income and Expense Declaration or form FL-155. Financial Statement (Simplified). 14 Property Control I ask the court to give only me temporary use, possession, and control of the property listed here:		a. X I do not have a child support order and I want one.	
If you ask for child support orders, you must fill out and attach form FL-150. Income and Expense Declaration or form FL-155, Financial Statement (Simplified). 1 Set the court to give only me temporary use, possession, and control of the property listed here: Porsche Cayenne Hybrid		 Ы I have a child support order and I want it changed. 	
14 Property Control 1 ask the court to give only me temporary use, possession, and control of the property listed here: Porsche Cayenne Hyer id 15 Debt Payment 1 ask the court to order the person in (2) to make these payments while the order is in effect: Note there if you need more space. Attach a sheet of paper and write "DV-100, Debt Payment" for a title Pay to: Chase Auto For: Der Nogments Amount: \$ 5540.20 Due date: 1/3/30/8 16 Property Restraint 1 am married to or have a registered domestic partnership with the person in (2). I ask the judge to order that the person in (2) not borrow against, sell, hide, or get rid of or destroy any possessions or property, excep in the usual course of business or for necessities of life. I also ask the judge to order the person in (2) to notify me of any new or big expenses and to explain them to the court. 17 Spousal Support 1 am married to or have a registered domestic partnership with the person in (2) and no spousal support order exists. I ask the court to order the person in (2) to pay spousal support. (You must complete, file, and serve for FL-150, Income and Expense Declaration, before your hearing). This is not a Court Order.			
I ask the court to give only me temporary use, possession, and control of the property listed here: Porsche Cayenne Hybrid Debt Payment I ask the court to order the person in ② to make these payments while the order is in effect: Check here if you need more space. Attach a sheet of paper and write "DV-100, Debt Payment" for a title Pay to: Chase. Auto For. Our payments Amount: \$ 5,540,20 Due date: 1/3/2018 Property Restraint I am married to or have a registered domestic partnership with the person in ②. I ask the judge to order that the person in ② not borrow against, sell, hide, or get rid of or destroy any possessions or property, excep in the usual course of business or for necessities of life. I also ask the judge to order the person in ② to notify me of any new or big expenses and to explain them to the court. Spousal Support I am married to or have a registered domestic partnership with the person in ② and no spousal support order exists. I ask the court to order the person in ② to pay spousal support. (You must complete, file, and serve for FL-150, Income and Expense Declaration, before your hearing). This is not a Court Order.			ach form FL-150 Income and Expense Declaration or
Debt Payment Lask the court to order the person in (2) to make these payments while the order is in effect: Lask the court to order the person in (2) to make these payments while the order is in effect: Check here if you need more space. Attach a sheet of paper and write "DV-100, Debt Payment" for a title Pay to: Chase. Acto For: Cor Regiments Amount: \$5640.20 Due date: 1/3/30/8	(14)	☑ Property Control	
1 ask the court to order the person in ② to make these payments while the order is in effect: Check here if you need more space, Attach a sheet of paper and write "DV-100, Debt Payment" for a title Pay to: Chase Auto For: Our payments Amount: \$554020 Due date: 1/3/2018			n, and control of the property listed here:
1 ask the court to order the person in ② to make these payments while the order is in effect: Check here if you need more space, Attach a sheet of paper and write "DV-100, Debt Payment" for a title Pay to: Chase Auto For: Our payments Amount: \$554020 Due date: 1/3/2018	(15)	□ Debt Payment □	
I am married to or have a registered domestic partnership with the person in ②. I ask the judge to order that the person in ② not borrow against, sell, hide, or get rid of or destroy any possessions or property, excep in the usual course of business or for necessities of life. I also ask the judge to order the person in ② to notify one of any new or big expenses and to explain them to the court. Spousal Support I am married to or have a registered domestic partnership with the person in ② and no spousal support order exists. I ask the court to order the person in ② to pay spousal support. (You must complete, file, and serve for FL-150. Income and Expense Declaration, before your hearing). This is not a Court Order.	0	1 ask the court to order the person in (2) to make these p	f paper and write "DV-100, Debt Payment" for a title.
I am married to or have a registered domestic partnership with the person in (2). I ask the judge to order that the person in (2) not borrow against, sell, hide, or get rid of or destroy any possessions or property, except in the usual course of business or for necessities of life. I also ask the judge to order the person in (2) to notify one of any new or big expenses and to explain them to the court. Spousal Support I am married to or have a registered domestic partnership with the person in (2) and no spousal support order exists. I ask the court to order the person in (2) to pay spousal support. (You must complete, file, and serve for FL-150. Income and Expense Declaration, before your hearing). This is not a Court Order.	(16)	M Property Restraint	
I am married to or have a registered domestic partnership with the person in ② and no spousal support order exists. I ask the court to order the person in ② to pay spousal support. (You must complete, file, and serve for FL-150. Income and Expense Declaration, before your hearing). This is not a Court Order.	0	I am married to or have a registered domestic partner that the person in (2) not borrow against, sell, hide, or go in the usual course of business or for necessities of life.	et rid of or destroy any possessions or property, except I also ask the judge to order the person in ② to notify
	17)	☑ Spousal Support I am married to or have a registered domestic partnershir exists. I ask the court to order the person in ② to pay spouse. Income and Expense Declaration, before your I.	p with the person in ② and no spousal support order tousal support. (You must complete, file, and serve form tearing).
Product live 2016 Description Democtic Violence Restraining Urger DV-100, Fage 31			

F84-000369

18)	ĵχ	Rights to Mobile Device and Wireless Phone Account
9	2	Property control of mobile device and wireless phone account
	-	Task the court to give only me temporary use, possession, and control of the following mobile devices: Apple Plane 6s gold Inple Phone 6s silver and the wireless phone account for the
		following wireless phone numbers because the account currently belongs to the person in (2):
		(including area code): 408.628.7596 My number Injumber of child in my care
		(including area code): 408.614.5350 my number number of child in my care
		(including area code):
		Check here if you need more space. Attach a sheet of paper and write "DV-100, Rights to Mobile Device and Wireless Phone Account" for a title.
	b.	☐ Debt Payment
		I ask the court to order the person in (2) to make the payments for the wireless phone accounts listed in 18a
		because:
		Name of the wireless service provider is: Amount: \$ Due Date:
		If you are requesting this order, you must complete, file, and serve form F1-150. Income and Expense
		Declaration, before your hearing.
	c.	▼ Transfer of Wireless Phone Account
	Ĥ	I ask the court to order the wireless service provider to transfer the billing responsibility and rights to the wireless phone numbers listed in 18a to me because the account currently belongs to the person in (2).
		If the judge makes this order, you will be financially responsible for these accounts, including monthly service
		fees and costs of any mobile devices connected to these phone numbers. You may be responsible for other fees.
		You must contact the wireless service provider to find out what fees you will be responsible for and whether you
		are eligible for an account.
65	П	Insurance
19)	_	I ask the court to order the person in (2) NOT to eash, borrow against, cancel, transfer, dispose of, or change the
		beneficiaries of any insurance or coverage held for the benefit of me or the person in 2), or our child(ren), for
		whom support may be ordered, or both.
66	Ø	Lawyer's Fees and Costs
20)	Z	I ask that the person in (2) pay some or all of my lawyer's fees and costs.
		You must complete, file, and serve form FL-150, Income and Expense Declaration, before your hearing.
~	157	
21)	M	Payments for Costs and Services
_		I ask the court to order the person in ② to pay the following:
		You can ask for lost earnings or your costs for services caused directly by the person in (2) (damaged property,
		medical care, counseling, temporary housing, etc.). You must bring proof of these expenses to your hearing.
		Pay to: Dil Eag Singh For: January 18 zent Amount: \$ 5,495.00
		Pay to: For: Amount: S
22	X	
22)	2	I ask the court to order the person listed in (2) to go to a 52-week batterer intervention program and show proof
		of completion to the court.
0		Other Orders
23)	1	What other orders are you asking for?
		What biller orders are you asking to:
		☐ Check here if you need more space. Attach a sheet of paper and write "DV-100, Other Orders" for a title.
		This is not a Court Order.
Revised	Lady 1	Request for Domestic Violence Restraining Order DV-100, Page 4 of

24)	Time for Service (Notice) The papers must be personally served on the person in (2) at least five days before the hearing, unless the court orders a shorter time for service. If you want there to be fewer than five days between service and the hearing, explain why below. For help, read form DV-200-INFO, "What Is Proof of Personal Service"? The person in (2) was reantly diagnosed with Bipolar disorder, has been parapoid and violent. I don't want to trigger psycotic reaction.
25)	No Fee to Serve (Notify) Restrained Person If you want the sheriff or marshal to serve (notify) the restrained person about the orders for free, ask the court clerk what you need to do.
26)	Court Hearing The court will schedule a hearing on your request. If the judge does not make the orders effective right away ("temporary restraining orders"), the judge may still make the orders after the hearing. If the judge does not make the orders effective right away, you can ask the court to cancel the hearing. Read form DV-112, Waiver of Hearing on Denied Request for Temporary Restraining Order, for more information.
(27)	Describe Abuse Describe how the person in ② abused you. Abuse means to intentionally or recklessly cause or attempt to cause bodily injury to you; or to place you or another person in reasonable fear of imminent serious bodily injury; or to harass, attack, strike, threaten, assault (sexually or otherwise), hit, follow, stalk, molest, keep you under surveillance, impersonate (on the Internet, electronically or otherwise), batter, telephone, or contact you; or to disturb your peace; or to destroy your personal property. (For a complete definition, see Fam. Code, §§ 6203, 6320.) a. Date of most recent abuse: See attachment "DV-100, Recent Abuse 1. Who was there? See attachment "DV-100, Recent Abuse 2. Describe how the person in ② abused you or your child(ren):
	See attachment "DV-100, Recent Abuse
	 Check here if you need more space. Attach a sheet of paper and write "DV-100, Recent Abuse" for a title. Did the person in ② use or threaten to use a gun or any other weapon?
	4. Describe any injuries: 200 marks on my wrists
	5. Did the police come? ☐ No ☒ Yes If yes, did they give you or the person in② an Emergency Protective Order? ☒ Yes ☐ No ☐ I don't know Attach a copy if you have one. The order protects ☒ you or ☐ the person in ②

Request for Domestic Violence Restraining Order (Domestic Violence Prevention)

Revised July 1, 2016

DV-100, Page 5 of 6

19 LO0034

27)		ibe Abuse (contin								
			you (or your child(ren)							
			tachment "DV-100, F e attachment "DV-10							
			rson in ② abused you or							
			See attachr	nent "DV-100,						
				nt Abuse						
		Check here if you title.	u need more space. Attac	h a sheet of paper and write	e "DV-100, Recent Abuse" for a					
	3	Did the person in 2	use or threaten to use a g	gun or any other weapon? [No [] Yes (If yes, describe):					
	4	Describe any injurie	s: bruises and	cuts on my boa	ly and on my foce.					
	5	5. Did the police come	? WINo □ Yes							
	If yes, did they give you or the person in (2) an Emergency Protective Order?									
	Yes At No I I don't know Attach a copy if you have one.									
			you or the per		and the control of th					
		or describe any prev	ibused you other times, ci vious abuse on an attache nent "DV-100, Recen	d sheet of paper and write '	<u>DV-101</u> , Description of Abuse 'DV-100, Previous Abuse' for a					
28)	Other	Persons to Be Pro	The second secon	. , , , , , , , , , , , , , , , , , , ,						
	The per	sons listed in item (3)	need an order for protect	ion because (describe): Th	e person in 2 would					
	Tuga le			2 Tyler Moquin (15						
	Stupi	111			out of my office					
	Kai	lly when Tuler Moovin (4'vo).	is asking for the person in Q	help with his hom						
	is f	acking cult"	or " your mem co	an go fuck herself						
	NEVE	ER spend ANY	time with the k	ids take them place	s or pay basic attention to their					
29)	The pe	usen'in Q would a r of pages attached to d	egultifly fail to p	rovid basic hesess.	ities for kids, like food and housing.					
decl	are unde	er penalty of perjury un	der the laws of the State	of California that the inform	nation above is true and correct.					
Date:	1/29	9/2018		in						
No	toch	Vladimirovna	Moonin	Notash	a Mogran					
Туре	or print	your name	V	Sign your name	V V					
Date:										
		esented		Self-Represente	d					
Lawy	er's nan	ne, if you have one		Lawyer's signature						
			This is not a	Court Order.						
M 2 day	Indian poem			The state of the s	DV-100, Page 6 of 6					

EPO-001

ONE popy to court, ONE copy to restrained parson, ONE copy to excitated serson, ONE copy to issuing agency

LAW ENFORCE	CEMENTICASE NUMBER.	
130 2	12 11 11 11 11 11 11 11 11 11 11 11 11 1	1
1775	JAMEN SI	7

EMERGENCY PROTECTIVE ORDER (See reverse for important notices.)

	BRATPAYER SPRANE (************************************
4	PROTECTED PERSONS linsert names of all persons protected by this Order).
7	DESTRUMENT DEPENDANCE OF THE STATE OF THE ST
2.	RESTRAINED PERSON (name): A VIII A CONTROL OF A CONTROL O
39)	
5.	TO THE RESTRAINED PERSON:
	e. YOU MUST NOT harass, attack, strike, threaten, assault (sexually or otherwise), hit, follow, stalk, molest, destroy any personal property of, disturb the peace of, keep under surveillance, or block the movements of each person named in item 1. YOU MUST NOT comact, either directly or indirectly, by any means, including but not limited to by telephone, mail, e-mail or other electronic means, any person named in item 1.
	c. To You Must stay away at least 3 yards from each person named in item 1
	stay away at least: 1/1 yards from move out immediately from / leadcess): 1/15/7 Report Town (Section 1)
4.	d. YOU MUST NOT own, possess, purchase, receive, or attempt to purchase or receive any firearm or ammunition. If you have any firearms, you must turn them in to a law enforcement agency or sell them to, or store them with, a licensed gun dealer. e. YOU MUST NOT take any action, directly or through others, to obtain the addresses or locations of any person named in item 1. (Name):
5	THIS ORDER WILL EXPIRE AT THE CLOSE OF THE COURT BUSINESS DAY ON: 1.840 - 320
6	TO THE PROTECTED PERSON: If you need protection for a longer period of time, INSERT DATE OF SINTH COURT DAY OR SEVENTING
٥,	you must request restraining orders from the court in the county where you live: CALENDAR DAY, WHICHCLER IS EARLIER, DONOR GOUNT DAY, THE CHICAGO THE
	(Name and address of count) Supplied to the Country of the Country
	If you go to court to request restraining orders, take your copy of this form with you. If a juvenile petition is pending, file in that court
7. 9.	Heasonable grounds for the issuance of this Order exist, and an emergency protective order is necessary to prevent the occurrence or recurrence of domestic violence, child abuse child abduction, elder or dependent adult abuse, or stalking. Judicial officer (name): 18 N PE 18 11 granted this Order on (date): 18 20 30 at (time): 18 20 30
	APPLICATION
i,	The events that caused the protected person to fear immediate and present danger of domestic violence, child abuse, child abuse (except sciely linancial abuse), or stalking are (give tacis and dates; specify weapons). The content of the protected person to fear immediate and present danger of domestic violence, child abuse, child abuse, child abuse (except sciely linancial abuse), or stalking are (give tacis and dates; specify weapons).
10.	☐ Firearms there ☐ observed ☐ reported ☐ searched for ☐ seized
11	immediately from the address in item 3c. The person to be protected has minor children in common with the person to be restrained, and a temporary custody order is
	requested because of the facts alleged in item 9. A custody order does does not _exist.
By	
	(SIGNATURE OF LAW ENFORCEMENT OFFICER) (SIGNATURE OF LAW ENFORCEMENT OFFICER)
Àg	ency: 57 CD Telephone No. (# 5) (77 463) Badge No. (777)
Ξ	PROOF OF SERVICE
13	Person served (name):
14	Address: Address: Date: Time: Tim
15	At the time of service, I was at least 18 years of age and not a party to this cause. — I am a California law enforcement officer. My name, address, and telephone number are (this dues not have to be server's name telephone number or address):
	eciate under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_	(TYPE OR PRINT NAME OF SHADER) (SIGNATURE OF SERVER) Buge 1a) 2

~18FL000369

DV-100, Debt Payment

Pay to: Comcost For: Internet Amount: \$294.65 Due date: 1/2/18

Pay to: City of San Jose For: Water Amount: \$585.80 Due date: 1/2/18

Pay to: PG&& For: Electricity Amount: \$1,400.00 Due date: 2/7/18

CASE N	AME: Mog	Win and	Last Name	CASE	#18F	100	036
Children	:						
p) Write	about the pa	arenting (vi	sitation) schedu	le you have	with the o	ther pare	nt now
			of you have the				
	chedule?						
We liv	e together	now and do	not have a visi	tation sche	dule OR		
			dy and isn't seei			OR	
		describe):_			(,		
	, , , ,						
		ain why yo	ou need the cour	t to order th	ne schedule	e you fille	d out or
If "YES",	olease expl			t to order th	ne schedule	e you fille	d out or
If "YES",	olease expl			t to order th	ne schedule	e you fille	d out or
If "YES",	olease expl			t to order th	ne schedule	e you fille	d out or
If "YES",	olease expl			t to order th	ne schedule	e you fille	d out or
If "YES",	olease expl			t to order th	ne schedule	e you fille	d out or
If "YES",	olease expl			t to order th	ne schedule	e you fille	d out or
If "YES",	olease expl			t to order th	ne schedule	e you fille	d out or
If "YES",	olease expl			t to order th	ne schedule	e you fille	d out or
If "YES",	olease expl			t to order th	ne schedule	e you fille	d out or
If "YES",	olease expl			t to order th	ne schedule	e you fille	d out or

CASE #: 18FL000369 CASE NAME: Moreun and Moreun n) Describe the worst abuse and when it happened: J 2 ☐ The most recent abuse is the worst abuse OR 3 ☑ The worst abuse was papproximate date) around September 16 and the person I 4 want a restraining order against (describe what they pid to you): 5 6 laundry. Brion Moowin 7 to lay down carefully 8 Laccidentally moved his flanket 9 kickina 10 and 11 12 13 Describe any other previous (past) violence or threats of violence that you haven't 14 already written about here (include dates or about when it happened): years ago Brian Moorin and I got into an argument. 15 16 was going to kall me, reen 17 as hard as he could) kicked me in my lower tock 18 19 thinking he might have 20 21 22 to tail take 23 also sometimes restrict Would 24 and take my car keys refused to have sex with DV-100, Item 26 - ABUSE Page

Case name: Moquin and Moquin 18FL000369

Financial obuse: I was never allowed to have o job because Brian Moquin did not want me to "be moking money to someone else", he convinced me that I needed to stay home and help him with his fusinesses when he storted his Law Practice in 2010 excited that we were finally going to do something together, I would be helping him with the financial part of it and filling, bringing my expertise and will be part of the fusiness, which is what he told me. It little bit into it I started asking about it because it looked like he was forgoing billing responcibilities. He told me that he did not want me feing involved. There were several clients whom he had never billed for a total of around \$600kto \$800k, all while continuously ignoring and for a busing me and the kids and telling me to "stay out of his way" because he wis "working for us" Eventually, I stopped asking about it, Because every time I would be would tell me that I am "a greedy cent" or "poor loly, why don't you go Pock to Russia and have nothing like you did before you met me", which actually wasn't the case.

Case name: Mogain and Mogain 18FL000369

He would get very expensive equipment, countless computers, luxury cors without ever consulting with me or even mentioning any-thing. All on credit. Eventually he started forrowing money. I was against it, but he would always abuse me so that I stop trying to say anything. Finally he couldn't get ony more chedit. He asked if I had any credit lines. I send I had two, but I wasn't comfortable giving it to him, Since that debt was going to be on me and would affect my credit score. He, once again, abused me foth vertally and physically until I gave up and gave it all to him by taking out cash odvances.

He put us into around \$500,000 in debt. All credit cards are shut down, both credit scores destroyed from over 800 points each and when he was taken to jail there were no money for even groceries. He did not pay January 18 rent; electricity, water and internet bills are two month overdue and schedulled to be shud down in the beginning of February 18. Car payments are 4 months behind and my our is out for reposession.

Case name: Moquin and Moquin

18FL000369

He started calling the house as soon as he got out of jail, which was a violation of the protective order. He told my son that he was going to see me for anything he can make up to make my life a living hell. Through a friend that is currently staying in the house with us he said that he was going to help land lord to help evict his own children. He also said that he can't get a job now because he has pending criminal charge against him , which by his words was going to affect his lackground check. Its far as I know it is not the case, but I think he is trying to pressure me to drop charges.

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Transaction # 6353981 : csulezic 1 \$2160 THE O'MARA LAW FIRM, P.C. 2 DAVID C. O'MARA, ESQ. NEVADA BAR NO. 8599 3 311 East Liberty Street Reno, Nevada 89501 4 Telephone: 775/323-1321 Fax: 775/323-4082 5 LAW OFFICES OF BRIAN P. MOQUIN 6 BRIAN P. MOOUIN, ESO. 7 Admitted Pro Hac Vice CALIFORNIA BAR NO. 247583 8 3287 Ruffino Lane San Jose, CA 95148 Telephone: 408.300.0022 Fax: 408.843.1678 10 bmoquin@lawprism.com 11 Attornevs for Plaintiffs 12 LARRY J. WILLARD, OVERLAND DEVELOPMENT CORPORATION, 13 EDWARD C. WOOLEY, and JUDITH A. WOOLEY 14 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA 15 IN AND FOR THE COUNTY OF WASHOE 16 Case No. CV14-01712 LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; 17 OVERLAND DEVELOPMENT Dept. 6 CORPORATION, a California corporation; 18 EDWARD C. WOOLEY AND JUDITH A. MOTION FOR SUMMARY JUDGMENT 19 WOOLEY, individually and as trustees of the OF PLAINTIFFS LARRY J. WILLARD Edward C. Wooley and Judith A. Wooley AND OVERLAND DEVELOPMENT 20 Intervivos Revocable Trust 2000, **CORPORATION** 21 Plaintiffs, 22 V. 23 BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; JERRY HERBST, an 24 individual; and JH, INC., a Nevada corporation, 25 26 Defendants. 27 AND RELATED COUNTERCLAIM 28

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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

(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.]

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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.]

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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

these fines, and consequently they remain outstanding. [Decl. Willard at ¶ 67; Ex. 35.]

III.

ARGUMENT

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A. LEGAL STANDARD

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1. **Summary Judgment.**

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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

(2008) (quoting Cuzze v. Univ. & Cmty. Coll. Sys. of Nev., 123 Nev. 598, 72 P.3d 131 (2007)).

2. <u>Interpretation of contract terms.</u>

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. <u>Interpretation of express indemnity provisions.</u>

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. <u>Terms of the Operation and Management Agreement.</u>

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.]

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.]

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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. <u>BHI failed to maintain and repair the Virginia Property.</u>

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. <u>BHI removed all signage from the Virginia Property.</u>

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. <u>BHI tendered a provably false accounting of Net Profits.</u>

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.

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 2 guarantees the timely payment and performance of each of BHI's obligations arising out of and 3 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 4 enforceability of such obligations." [Ex. 7.1 at ¶ 1.] The Personal Guaranty further provides that 5 Defendant "agrees that if and to the extent that BHI either (a) fails to satisfy any of the 6 7 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 8 the full extent of any unsatisfied Guaranteed Obligations." [Id.] The Personal Guaranty further 9 10 provides that, "This agreement is an unconditional, absolute, present and continuing guaranty of payment and performance . . . " [*Id*.] 11 Furthermore, the Personal Guaranty provides: 12 13 [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 14 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 15 with or into, any other entity; [* * *]. The Guarantor hereby waives any defense 16 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 17 whatsoever that would exonerate, or constitute or give rise to a defense to, the obligation of a surety or guarantor. 18 [Ex. 7.1–7.2 at ¶ 2.] The Operation and Management Agreement did not alter the Personal 19 Guaranty. [Decl. Willard at ¶ 21; Ex. 13.] The Amended Lease also had no effect on the 20 Personal Guaranty. [Decl. Willard at ¶ 11; Ex. 6.] 21 It is undisputed that Herbst was notified of BHI's breach of the Virginia Lease but failed 22 to meet his obligations under the Personal Guaranty. [Decl. Willard at ¶¶ 16–20; Exs. 10–12.] 23 Consequently, it is beyond dispute that Herbst breached the Personal Guaranty and is 24 25 absolutely liable to the Virginia Plaintiffs for damages. /// 26 /// 27

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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. **Breach-induced expenses.**

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, moving 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 $\P\P$ 68, 69; Decl. Moquin at $\P\P$ 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

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 II")*, 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

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. Summary of damages.

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 1 2 at ¶ 13; Ex. 36.6 at Table VIII.] 3 IV. 4 **CONCLUSION** Based on the foregoing, the Willard Plaintiffs respectfully request that the Court grant 5 summary judgment in their favor on all Counts of Defendants' Counterclaim. The Willard 6 Plaintiffs further request that the Court grant summary judgment with respect to the issue of 7 liability of defendant Berry-Hinckley Industries for breach of the Virginia Lease and with 8 respect to the issue of liability of defendant Jerry Herbst for breach of the Personal Guaranty and 9 10 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. 11 Respectfully submitted, 12 13 LAW OFFICES OF BRIAN P. MOQUIN 14 DATED: October 17, 2017 15 BRIAN P. MOQUIN 16 Attorneys for Plaintiffs 17 LARRY J. WILLARD and OVERLAND DEVELOPMENT CORPORATION 18 19 20 21 22 23 24 25 26 27 28 - 21 -

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AFFIRMATION

(Pursuant to NRS 239B.030)

The undersigned does hereby affirm that the preceding document filed in the abovereferenced 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

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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.

8 DATED: October 18, 2017

BRIAN P. MOQUIN

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