IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; and OVERLAND DEVELOPMENT CORPORATION, a California corporation, Appellants, vs. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual, Respondents.	**SUPREME COURT NO. 77780** District Court Case No. CV14-01712 **RESPONDENTS' ANSWERING BRIEF**

APPEAL

From the Second Judicial District Court, Washoe County
The Honorable Lynne K. Simons, Department VI, District Judge
District Court Case No. CV17-01712

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RESPONDENTS'
ANSWERING BRIEF

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DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation ("BHI") is 100% owned by JH, Inc., a Nevada corporation. BHI and JERRY HERBST,[1] an individual, (collectively referred to herein as "Defendants") are represented by Dickinson Wright, PLLC. The law firm of Dickinson Wright, PLLC, represented BHI and Jerry Herbst below.

DATED this 9th day of October, 2019.

DICKINSON WRIGHT, PLLC

/s/ Brian R. Irvine
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[1]Mr. Herbst passed away on November 27, 2018. 1 Respondents' Appendix ("RA") 94-96.

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INTRODUCTION

This is an appeal from an NRCP 60(b) order in a case in which Willard,[2] the plaintiff below, sought millions of dollars against Defendants and then completely failed to comply with even the most basic discovery obligations, instead holding Defendants captive for **years** without letting them reach the merits of the case to prepare their defenses, forcing three continuances of the trial date and violating numerous court orders along the way. Indeed, Willard never even provided an NRCP 16.1 damages calculation.

Defendants repeatedly demanded that Willard comply with his discovery obligations, and the Court ordered Willard to correct his numerous and continued discovery infractions. Willard was abundantly aware of his failures; indeed, he personally attended the hearing where his NRCP 16.1 deficiencies were addressed and ordered to be rectified. Yet, Willard blatantly and continuously ignored his obligations. Nor was he abandoned—his **two** attorneys filed multiple documents throughout the case, and attended every hearing. Rather, Willard and his counsel inexcusably disregarded the District Court's orders and the NRCP, all to the prejudice of Defendants.

[2]"Willard" refers to Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund, and Overland Development Corporation.

Then, "[a]fter three years of obstinate refusal to provide Defendants with an NRCP 16.1 damages calculation and after nearly one year of refusing to comply with the requirements to properly disclose an expert, [Willard] filed motions for summary judgment in which he requested brand-new, never-disclosed types, categories, and amounts of damages with only four weeks remaining in discovery." 16 AA 3620.[3] Indeed, Willard, who personally averred that he "collaborated" with his attorney in preparing his damages, 7 AA 1574-76, sought more than triple (nearly $40 million more) in damages than he had identified in his complaint. The District Court found that this was in "bad faith," an effort to "ambush Defendants," and was a "strategic decision" to prejudice Defendants. 16 AA 3630.

In light of the foregoing, Defendants filed several sanctions motions, seeking, *inter alia*, dismissal. The District Court admonished Willard's counsel that it was "very seriously considering granting all of it," *id*. 3624, but Willard never responded to Defendants' sanctions motions. Based on Willard's egregious failures throughout the case, the District Court dismissed the case in a detailed, 34-page Sanctions Order.

Willard did not appeal the Sanctions Order. Instead, he filed a motion seeking relief under NRCP 60(b)(1). Therein, he claimed that he was entitled to relief because (1) one of his attorneys allegedly suffered from bipolar disorder and

[3]Page 3620 in Volume 16 of Appellants' Appendix ("AA").

allegedly had a "mental breakdown" after Defendants filed their sanctions motions, and (2) the Sanctions Order allegedly failed to consider all of the dismissal factors. However, Willard failed to support his Motion with any admissible evidence, and regardless, his Motion was meritless. The District Court denied it, and this appeal followed.

On appeal, Willard improperly attempts to focus only on his failure to oppose Defendants' sanctions motions. However, Willard ignores the critical fact that **throughout the entire case**, he repeatedly disregarded the District Court's orders and his obligations under Nevada law. Indeed, Defendants obviously filed their sanctions motions, and the District Court was "very seriously considering granting all of it," **before** Willard failed to oppose the sanctions motions. The District Court also expressly found that dismissal was warranted separate from Willard's failure to oppose those motions.

Further, many of Willard's arguments may not even properly be considered in this appeal. While Willard originally attempted to appeal the Sanctions Order and the 60(b) Order, this Court issued an order to show cause as to why the appeal of the Sanctions Order should not be dismissed as untimely, and Willard dismissed his appeal of the Sanctions Order in response. (August 23, 2019, Order, on file herein); Opening Brief ("AOB") 4. Yet Willard is still improperly attempting to argue the propriety of the Sanctions Order, arguing that the District Court allegedly failed to

consider every dismissal factor therein. These arguments are irrelevant to NRCP 60(b)(1) and therefore should be summarily rejected.

Finally, Willard failed to support his NRCP 60(b) Motion with any admissible evidence; ignored the fact that he had two attorneys throughout the case, yet only claimed excusable neglect as to one; and made meritless abandonment arguments which run afoul of general agency principles and his conduct throughout the case. Each of these grounds independently warrants affirmance. Thus, the District Court should be affirmed.

RESPONSE TO ROUTING STATEMENT

The Court of Appeals presumptively decides appeals from post-judgment orders. NRAP 17(b)(7). Further, Defendants disagree with Willard's argument that the case presents issues of statewide public importance—rather, it is a simple case in which the District Court correctly denied Willard's NRCP 60(b) Motion based upon settled law, in large part due to the exclusion of most of Willard's evidence offered in support of that Motion. However, Defendants have no objection to either Court deciding this appeal.

STATEMENT OF THE ISSUES

Whether the District Court acted within its discretion in denying Willard's NRCP 60(b) Motion, where Willard presented no admissible evidence in support of

the Motion, and the Motion did not establish any factual or legal grounds to set aside the order from which Willard sought relief.

STATEMENT OF FACTS

1. Willard's sanctionable conduct throughout the case led to dismissal.

In August 2014, Plaintiffs Willard and Wooley[4] filing a joint complaint against Defendants. 16 AA 3609. Willard had two attorneys throughout the case: Brian Moquin, a California attorney admitted *pro hac vice*, and David O'Mara, a Reno attorney. *Id*. 3608. Willard sought substantial damages, *id*. 3609, including more than $7 million that was subsequently withdrawn and/or dismissed by the District Court on Defendants' Motion for Partial Summary Judgment on the basis that Willard never incurred the damages and they were unforeseeable as a matter of law. 7 AA 1501-1513.

Throughout the case, Willard committed multiple infractions, culminating in the District Court dismissing Willard's case with prejudice. 16 AA 3608-39. Specifically:

- Willard never provided NRCP 16.1(a)(1)(C) damages calculations. Defendants demanded compliance through numerous communications and discovery requests, but to no avail. *Id*. In January 2017, at a hearing personally

[4]Wooley is not a party to this appeal.

attended by Willard, Willard's counsel admitted this deficiency, and the Court ordered that Willard provide compliant damages calculations. *Id*. 3615-16. However, Willard "blatantly disregarded" this order. *Id*. 3629. The District Court found this was willful. *Id*. 3629-30.

- Willard provided a patently inadequate expert disclosure of Daniel Gluhaich, containing only topics of possible testimony, but no actual opinions or bases for those opinions as required by the rules, and admitted that it was inadequate. *Id*. 3612-13, 3617-18. The Court ordered Willard to provide a compliant disclosure of Gluhaich's opinions. *Id*. 3619. Yet, Willard never did so. *Id*. 3629. The District Court found that this was also willful. *Id*. 3630.

- The District Court found that Willard "completely ignored multiple Orders from this Court, deadlines imposed by this Court, and [his] obligations pursuant to the Nevada Rules of Civil Procedure." *Id*. 3637.

- Because of Willard's numerous and ongoing infractions, Defendants were forced to extend discovery and delay trial multiple times to give Willard additional time to comply with basic discovery obligations. *Id*. 3611-12, 3616-20, 3635.

- Then, "[a]fter three years of obstinate refusal to provide Defendants with an NRCP 16.1 damages calculation or to supplement any damages calculations, and after nearly one year of refusing to comply with the requirements to properly disclose an expert, Plaintiffs filed motions for summary judgment in which they requested

brand-new, never-disclosed types, categories, and amounts of damages with only four weeks remaining in discovery." *Id*. 3620. Willard's Motion, which sought triple the amount of damages alleged in the Complaint (nearly $40 million more), relied upon expert opinions that Willard had never disclosed,[5] and also upon documents Willard had never disclosed, despite those documents being in his possession throughout the case. *Id*. 3621, 3630-31. The Court found that this was "willful," in "bad faith," an "ambush," and a "strategic decision." *Id*.

- Because of this conduct, Defendants filed a motion seeking sanctions, including dismissal, and a motion to strike Gluhaich's opinions. Willard never opposed these motions, despite multiple extensions from Defendants and the Court. *Id*. 3624. While this was one basis for dismissal, the Court found that "separate from this consideration, good cause exists to dismiss this case." *Id*. 3628. Further, Willard admits that "[b]efore the case was dismissed,….O'Mara had raised concerns about Mr. Moquin's unresponsiveness," but that Willard knowingly elected to keep Moquin as his counsel, and did nothing to stop the Court form dismissing his claims. *See, e.g.*, 16 AA 3701; 17 AA 3964-65.

[5]"Unlike the damages sought in the Complaint," Willard's newly-requested damages "would necessarily require Willard to provide expert opinion." 16 AA 3621.

The District Court dismissed the case with prejudice, considering the pertinent dismissal factors in a detailed, 34-page Order (the "Sanctions Order"). 16 AA 3608-39.

2. <u>The District Court denied Willard's NRCP 60(b) Motion</u>.

In April 2018, Willard filed a Motion to Set Aside the Sanctions Order and the Motion to Strike pursuant to NRCP 60(b)(1) (the "60(b) Motion") through new counsel. 16 AA 3675. Willard's claimed basis for relief was that Moquin "failed to properly prosecute this case due to a serious mental illness and a personal life that was apparently in shambles." *Id*. 3676. Willard also argued that the Sanctions Order was insufficient under *Young v. Johnny Ribeiro*, 106 Nev. 88, 787 P.2d 777 (1990), because the Court allegedly did not consider whether sanctions unfairly operated to penalize Willard. 18 AA 4068.

However, the District Court found that Willard failed to support the Motion with any competent or admissible evidence. 18 AA 4072-81. Willard also failed to meet his burden under NRCP 60(b) because he did not demonstrate any excusable neglect, abandonment, or lack of knowledge. *Id*. 4081-88. Additionally, even if Willard had sufficiently shown that Moquin's actions warranted a finding of excusable neglect, Willard made no argument as to O'Mara's neglect. *Id*. 4088-89. Finally, the District Court reiterated that the Sanctions Order sufficiently addressed the *Young* factors. *Id*. 4090.

Accordingly, the District Court denied Willard's NRCP 60(b) Motion. *Id.* 4091. This appeal ensued.

SUMMARY OF ARGUMENT

Despite Willard's desperate attempts to create as many purported appellate issues as possible, this is a simple appeal. The sole issue is whether the District Court acted within its discretion in denying Willard's 60(b) Motion.

The District Court correctly decided the 60(b) Motion. In fact, there are multiple, independent bases requiring affirmance of the District Court: first, Willard failed to support the 60(b) Motion with any admissible evidence, which alone necessitates affirmance. Further, even if Willard had met his threshold evidentiary burden, he failed to: (1) account for the fact that he had two attorneys throughout the entire case, and only claimed excusable neglect as to one attorney; (2) establish abandonment by his counsel, as the District Court found; and (3) establish that the Sanctions Order was insufficient (and indeed, Willard should not even be permitted to make such arguments when he voluntarily dismissed his untimely appeal of the Sanctions Order). Each of these failures, alone, warrants affirmance. In sum, Willard simply cannot credibly argue that the District Court abused its discretion in denying Willard's 60(b) Motion, and Defendants respectfully request that the District Court be affirmed.

ARGUMENT

2. Willard misstates the standard of review.

Willard argues that "a heightened standard of review applies" when the sanction imposed is dismissal with prejudice. AOB 27. However, Willard is not appealing from the Sanctions Order, AOB 4; thus, this heightened standard is inapplicable. Rather, Willard is appealing only from the 60(b) Order, and this Court reviews the District Court's determination that Willard did not establish excusable neglect entitling him to NRCP 60(b) relief under an abuse of discretion standard. *See Rodriguez v. Fiesta Palms, LLC*, 134 Nev. ___, 428 P.3d 255, 257 (2018) ("The district court has wide discretion in deciding whether to grant or deny a motion to set aside a judgment under NRCP 60(b). Its determination will not be disturbed on appeal absent an abuse of discretion."); *Britz v. Consol. Casinos Corp.*, 87 Nev. 441, 445–46, 488 P.2d 911, 915 (1971) ("A court has wide discretion in determining what neglect is excusable and what is inexcusable."). The District Court's evidentiary determinations are also reviewed for abuse of discretion, and this Court will not interfere absent a showing of "palpable abuse." *Frei ex rel. Litem v. Goodsell*, 129 Nev. 403, 408, 305 P.3d 70, 73 (2013).

3. The District Court correctly denied Willard's 60(b) Motion.

The District Court correctly decided Willard's 60(b) Motion for multiple, independent reasons, each of which will be addressed in turn.

a. **The District Court correctly found that the 60(b) Motion was not supported by admissible evidence.**

In Nevada, a movant bears the burden to establish NRCP 60(b) relief by a preponderance of the evidence. *See Britz*, 87 Nev. at 446, 488 P.2d at 915. Further, while a "district court has wide discretion in deciding whether to grant or deny a motion to set aside a judgment under NRCP 60(b),…this discretion is a legal discretion and **cannot be sustained where there is no competent evidence to justify the court's action**." *Stoecklein v. Johnson Elec., Inc.*, 109 Nev. 268, 271, 849 P.2d 305, 307 (1993) (emphasis added); *Otak Nev., LLC v. Eighth Judicial Dist. Court*, 129 Nev. 799, 805, 312 P.3d 491, 496 (2013) (court abuses its discretion when its decision is not supported by substantial evidence).

Here, Willard sought relief under the excusable neglect standard in NRCP 60(b)(1) based upon a single, unsubstantiated allegation: that Moquin had mental health issues, specifically bipolar disorder.[6] *See, e.g.*, 16 AA 3686, 3685, 3676, 3688;

[6]Willard sets forth "background facts" regarding the purported merits of his Complaint, citing his own declaration as support. AOB 7-11. However, these are irrelevant to the sole germane issue: whether NRCP 60(b) grounds existed to set aside the Sanctions Order. The District Court found that Willard's discussion of these facts was "not relevant to the Court's determination of the Rule 60(b) Motion and [were] not considered" by the Court. 18 AA 4069 n.5. Even Willard recognizes that "[t]o receive Rule 60(b) relief, the moving party is no longer required to demonstrate a meritorious claim or defense." AOB 7 n.2. Thus, these self-serving "facts" can be summarily disregarded.

18 AA 4072; AOB 44 ("Moquin was suffering from a psychological disorder that caused him to abandon his clients. Accordingly, the district court should have found excusable neglect.").

However, as the District Court found, there is simply no question that Willard failed to support his 60(b) Motion with any competent evidence. 18 AA 4072-81. Thus, the District Court properly denied the 60(b) Motion, and was in fact required to do so.[7] *Stoecklein*, 109 Nev. at 271, 849 P.2d at 307.

Willard's arguments on appeal do not change this result. As discussed, a district court enjoys wide deference on evidentiary rulings. This Court reviews a decision to exclude evidence for abuse of discretion, and will not interfere "absent a showing of palpable abuse." *Frei*, 129 Nev. at 408, 305 P.3d at 73; *Hall v. SSF, Inc.*, 112 Nev. 1384, 1392–93, 930 P.2d 94, 99 (1996) ("The decision to admit or exclude testimony rests within the sound discretion of the trial court and will not be disturbed unless it is manifestly wrong.")

[7]Accordingly, Willard's argument that the District Court erred in purportedly failing to consider the *Yochum v. Davis*, 653 P.2d 1215 (1982), factors is misplaced, as Willard could not even satisfy his threshold evidentiary burden. AOB 52-53; *see also, e.g.*, 16 AA 3686 (arguing that "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."). Further, the District Court did consider factors such as Willard's awareness of key procedural rules and deadlines, and his lack of diligence in promptly informing the Court of any issues. 18 AA 4085-88, 4064.

Because Willard did not support his sole basis for relief with any admissible evidence, the 60(b) Order should be affirmed. *See generally Agnello v. Walker*, 306 S.W.3d 666, 675 (Mo. App. 2010) (hearsay testimony or documentation cannot serve as the evidence necessary to meet movant's burden of persuasion to set aside judgment under Rule 60); *New Image Industries v. Rice*, 603 So.2d 895, 897 (Ala. 1992) (affirming trial court's refusal to grant Rule 60 relief where only evidence of excusable neglect was an affidavit containing inadmissible hearsay and speculation). Willard's challenges to the District Court's evidentiary determinations, each of which will be addressed in turn, are unavailing.

i. **The District Court properly excluded Dr. Mar's purported diagnosis.**

First, Willard challenges the District Court's exclusion of "Moquin's statement to Willard that Dr. Mar diagnosed Moquin with bipolar disorder," AOB 40, specifically, the following paragraph from Willard's declaration in support of his 60(b) Motion: "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." 16 AA 3700.

The District Court found that this statement was "inadmissible hearsay with no exception under NRS 51.105(1) because Mr. Willard's declaration does not constitute Mr. Moquin's declaration of 'then existing state of mind….'" 18 AA

4075. Rather, "Dr. Mar purportedly diagnosed Mr. Moquin; Mr. Moquin told Mr. Willard of Dr. Mar's purported diagnosis; and Mr. Willard makes the statement of Mr. Moquin's diagnosis."[8] *Id*. The Court also found that the statements "were not spontaneous and instead were a basis for Mr. Moquin to request monetary assistance," and were "not admissible as contemporaneous statements Mr. Moquin made about his own present physical symptoms or feelings." *Id*. 4075-76.

Willard erroneously attempts to equate these statements, which are, at most, Willard recounting Moquin's narrative recounting an alleged prior conversation with his doctor, with a "spontaneous statement about [Moquin's] present condition at the very time he made the statement to Willard." AOB 40. This attempt is wholly unavailing.

First, Nevada law categorically prohibits the use of this testimony for Willard's intended purpose. NRS 51.105. Even taking Willard's declaration at face value, Willard claims that "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." 16 AA 3700 (emphases added). That cannot be used to establish that Moquin had bipolar disorder, or even that Dr. Mar had diagnosed him with bipolar disorder, because "[a] statement of memory or belief **to prove the fact remembered**

[8]This is the "hearsay within hearsay" about which Willard purports to be confused. AOB 41 n.6.

or believed is inadmissible under the hearsay rule unless it relates to the execution, revocation, identification or terms of declarant's will." NRS 51.105(2) (emphasis added); *see also Marshall v. Commonwealth Aquarium*, 611 F.2d 1, 4–5 (1st Cir. 1979).

Moreover, this was clearly not "a spontaneous statement about his present condition at the very time he made the statement to Willard," or "evidence of Moquin's state of mind at the time of the conversation," or an "admi[ssion] that he was bipolar," as Willard argues on appeal. AOB 40. This much is evident from Willard's own declaration, which simply claims that Moquin "later" explained that "Dr. Mar had diagnosed him with bipolar disorder." As the District Court found, this was not a contemporaneous statement that Moquin made about his own present physical symptoms or feelings. 18 AA 4076. Instead, Moquin's statement was a statement of memory and a mere narrative of his alleged prior conversation with Dr. Mar. A narrative of a former conversation is not a contemporaneous statement of present physical symptoms or feelings. As one court explained in an analogous context:

> Mr. Henry's statement to Ms. Merrick explaining that he informed Dr. Smoot that he was having bad gas pains and that Dr. Smoot suggested walking and/or an enema to relieve the pressure is not admissible as [a state-of-mind] exception to the hearsay rule…Mr. Henry's statement to Ms. Merrick was a statement of Mr. Henry's perception of his conversation with Dr. Smoot (the event or incident), and the statement was not a statement of Mr. Henry's then existing state of mind. The

> Decedent's statement did not assert a state of his mind while making the statement to Ms. Merrick (for example, "I am in pain"). The statement merely explained a past incident where Mr. Henry allegedly spoke to Dr. Smoot. Mr. Henry's statement may tend to show the reasons why he did certain things (i.e. receive an enema or walk around), but the statement cannot be characterized as an assertion of Mr. Henry's state of mind.

Henry v. Nanticoke Surgical Assocs., P.A., 931 A.2d 460, 464 (Del. Super. Ct. 2007). Similarly, here, Willard does not allege that Moquin made a contemporaneous statement of his state of mind (for example, "I am in pain"). The statement merely explained a past incident where Dr. Mar allegedly made a statement to Moquin, which is not admissible under the state-of-mind exception. *See, e.g.*, *State v. Bell*, 950 S.W.2d 482, 484 (Mo. 1997) (victim's hearsay testimony concerning past abuse "was not a declaration of her state of mind[, but instead] was pure narration of past acts by another."). Instead, the statement at issue is nothing more than classic, inadmissible hearsay.

Indeed, if anything, Willard is trying to admit **Dr. Mar's** purported statement (the alleged diagnosis) under the state-of-mind exception. But, as Dr. Mar is not the declarant of the statement Willard sought to admit, this exception does not apply, as Dr. Mar's state of mind is irrelevant. *See, e.g.*, *Serrano v. Rotman*, 943 N.E.2d 1179, 1192 (Ill. Ct. App. 2011) ("The state of mind exception applies only to the state of mind of the declarant and not the state of mind of someone other than the declarant.").

Finally, Willard's spontaneity argument can be disregarded. Willard argues that "[s]pontaneity is not an absolute requirement to admissibility under the state of mind exception, but is a factor to assess in weighing admissibility."[9] AOB 40. This runs afoul of NRS 51.105, which applies to a statement of the declarant's "then existing state of mind…." *See* 2 McCormick On Evid. § 273 (7th ed.) (stating that "not only does the [analogous federal] rule mandate that the statement must be spontaneous by its requirement that the statement describe a 'then existing' physical condition, but the Advisory Committee Note indicates that the rule is a specialized application of the broader rule recognizing a hearsay exception for statements describing a present sense impression, the cornerstone of which is spontaneity. If circumstances demonstrate a lack of spontaneity, exclusion should follow."). Regardless, Willard did not allege that Moquin made statements about his then-existing feelings or symptoms. Thus, the proffered testimony simply does not come within the state-of-mind exception.

[9]Willard cites *Alarm Fin Enterprises, LP v. Alarm Prot. Tech, LLC,* 743 F. App'x 786, 788 (9th Cir. 2018) to claim spontaneity is not an absolute requirement. However, at best, that case only demonstrates that the Ninth Circuit has stated that "[e]vidence that the statement was not contemporaneous weighs against admission," which would not compel, or even justify, a different conclusion here. *Id*.

In sum, there is no question that the District Court did not commit "palpable abuse" in excluding this testimony.[10]

ii. **The District Court properly excluded Willard's lay witness testimony regarding Moquin's alleged mental condition.**

Next, Willard challenges the District Court's determination that Willard was not qualified to opine on Moquin's mental condition, mental disorder, or symptoms of any disorder or condition that manifested. AOB 42; 18 AA 4076-78. Willard's argument lacks merit.

Specifically, Willard cites but one case—*Carter v. US*, 252 F.2d 608, 618 (D.C. Cir. 1957)—for the proposition that "lay witness testimony is actually very admissible, and indeed helpful, when it concerns mental illness."[11] AOB 42.

[10]Willard's gratuitous assertions that this was "a statement against Moquin's interest as it could have subjected him to possible civil liability or bar discipline," or that "the special circumstances under which this statement was made offer assurances of accuracy" can be summarily disregarded. AOB 40-41. Willard did not make this argument in his 60(b) briefing, and therefore waived it. 16 AA 3675-92; 19 AA 4332-52. Regardless, it is offensive to claim, without **any** support, that having bipolar disorder subjects one to civil liability or discipline. Further, there were no inherent assurances of accuracy—to the contrary, Willard's statements constituted hearsay within hearsay to establish purported facts in a way that is expressly prohibited by NRS 51.105(2). 18 AA 4075-76.

[11]Willard also argues that his psychology degree earned in 1965 "provides even more value." AOB 42. However, Willard is a retired developer, and there is no indication that he contains the expertise necessary to opine on Moquin's alleged mental condition or symptoms that manifested therefrom. Willard also does not appear to challenge the District Court's exclusion of his proffered internet article listing alleged symptoms. 18 AA 4075; AOB 41-42.

However, *Carter* merely contained a generalized discussion of lay witness testimony in a criminal case. A much more recent case from the same circuit is more specific and instructive, and held that a district court did not err by excluding evidence of bipolar disorder from a lay witness:

> Lane next argues that the district court erred in excluding her testimony that Briscoe suffered from ADHD and bipolar disorder. While this testimony would have been of questionable relevance at best, the trial court clearly did not err in excluding Lane's testimony on Briscoe's medical condition. A trial court does not err by excluding evidence of a medical condition from a lay witness. A lay witness may not testify based on scientific or other specialized knowledge….We do not disturb the ruling of a district court where…an independent basis for that ruling is uncontested….Even if the evidence would have been probative, Lane cannot credibly contend that she was qualified to testify about a medical diagnosis. The district court did not abuse its discretion in excluding Lane's testimony on Briscoe's medical condition.

Lane v. D.C., 887 F.3d 480, 485–86 (D.C. Cir. 2018) (citations omitted).

And, as the District Court found, other courts are in accord. 18 AA 4078 (quoting *In re Petition for Involuntary Commitment of Joseph R. Barbour*, 733 A.2d 1286 (Pa. 1999) ("Lay witness and non-expert could not provide expert testimony regarding involuntary committee's medical diagnosis, specifically the existence of mood disorder known as bipolar disorder.")), 4076-77 (quoting *White v. Corn*, 616 S.E.2d 49, 54 (Va. App. 2005) ("While lay witnesses may testify to the attitude and demeanor of the defendant, lay witnesses cannot express an opinion as to the existence of a particular mental disease or condition.")); *In re FM Forrest*, 587 BR 891, 922, 925 (Bankr S.D. Tex. 2018) (in context of an NRCP 60(b)(6) argument,

attorney was "not competent as a matter of law to give opinion testimony that she was mentally incapacitated"; such testimony needed to come from a medical doctor).

Thus, the District Court clearly did not commit "palpable abuse" in excluding Willard's testimony declaring that Moquin had a complete "mental breakdown," attempting to describe (with assistance from an unauthenticated internet article) how Moquin's symptoms of his alleged bipolar disorder might manifest, or speculating how those symptoms may have affected Moquin's work. 18 AA 4076-78; 16 AA 3700.

iii. **The District Court correctly excluded exhibits 6-8 to the 60(b) Motion.**

Next, Willard challenges the District Court's decision to exclude exhibits 6-8 to Willard's 60(b) Motion, which purport to detail Moquin's alleged domestic abuse of his family, and also contain statements about Moquin's alleged bipolar condition. AOB 42-44. Willard's arguments lack merit.

First, as the District Court found, Willard could not authenticate the exhibits or identify them pursuant to NRS 52.015(1) or NRS 52.025 because he is not the author of those documents and has no personal knowledge of their authenticity. 18 AA 4079. Further, as the District Court found, the exhibits do not satisfy the requirements for presumed authenticity under NRS 52.125 because they are not certified copies of public records. *Id*. On appeal, Willard provides no basis to challenge these findings other than simply declaring that the exhibits are authentic

based on Willard's declaration, the documents' appearance, and their surrounding characteristics, and cursorily citing the statutes upon which the District Court relied.[12] AOB 42. Thus, Willard's argument unequivocally does not establish that the District Court committed "palpable abuse" in excluding this evidence. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

Moreover, Willard offers no support for his argument that the District Court should have taken judicial notice of the exhibits other than to say it was an "unfair double standard" to take judicial notice of Moquin's bar status but not Exhibits 6-8. AOB 43. Again, this cursory argument is wholly insufficient, particularly where, as the District Court noted, "no party requested this Court to take judicial notice of the California court records…."[13] 18 AA 4079; *cf. Madeja v. Olympic Packers, LLC.*, 310 F.3d 628, 639 (9th Cir. 2002) ("Given that the documents submitted by

[12]Willard also argues that "if Defendants truly doubted the documents' authenticity, then the Defendants should have provided some rebuttal 'evidence or other showing sufficient to support a contrary finding' in their opposition." AOB 42-43 (quoting NRS 52.015(3)). However, Defendants raised Willard's lack of personal knowledge and the lack of certification. 17 AA 3809. There was simply no reason for Defendants to provide evidence rebutting the inadmissible evidence offered by Willard, especially where Willard bore the burden of proving excusable neglect with competent evidence.

[13]Thus, Willard waived this argument. 16 AA 3675-92; 19 AA 4332-52.

Appellants for judicial notice were in fact not authenticated, the district court did not abuse its discretion in refusing to take judicial notice of IMAR's bankruptcy proceedings.").

Finally, the Court found that even if the exhibits could be authenticated, the statements therein regarding Moquin's alleged disorder were inadmissible lay opinion and would still be inadmissible hearsay, as they were apparently authored by Moquin's wife, and Willard was offering them to prove that Moquin suffers from bipolar disorder and his life was in "shambles." 18 AA 4079.

Willard claims that "Exhibits 6 and 7 were not offered for the truth of the facts stated in them but rather as examples of the personal turmoil that Moquin was facing," and that Exhibit 8 should have been used as an example that "there was turmoil in Moquin's home life." AOB 43-44. This argument makes little sense, because if the subject exhibits were not offered for the truth of the facts stated in them, then the exhibits would have no relevance. Willard's argument is also disingenuous, as Willard clearly attempts to utilize those exhibits for their contents, arguing that Moquin's wife "confirms that Mr. Moquin 'was recently diagnosed with Bipolar disorder, has been paranoid and violent,' and that Mrs. Moquin is concerned about triggering a psychotic reaction," and that Moquin's wife "further reveals that for years she has been concerned that Moquin was failing to meet filing responsibilities in this case." 16 AA 3683; AOB 15. Willard has provided no non-

hearsay purpose for admitting these exhibits. And regardless, because the contents of those exhibits are inadmissible, the exhibits do not establish that Moquin had bipolar disorder, or anything else establishing excusable neglect. *Cf. id*. (claiming that Moquin's "personal problems have been in the background of all of the critical events in this case" based upon Ms. Moquin's "confirm[ation] that the worst abuse she suffered from Moquin was around September 2016").

Accordingly, Willard cannot demonstrate that the District Court committed palpable abuse in excluding Exhibits 6-8 to the 60(b) Motion.

iv. **The District Court correctly excluded the exhibits to the 60(b) Reply.**

Next, Willard argues that the District Court abused its discretion in concluding that Exhibits 5-10 to the 60(b) Reply were not relevant because they detailed alleged events that occurred after the District Court entered its initial Sanctions Order. AOB 44-45. According to Willard, "[t]he events that took place from January 2018 afterwards support the Plaintiffs' position that Moquin abandoned them and that he was suffering from mental illness," and the "documents are indisputably relevant to the issue of abandonment and excusable neglect." *Id*.

Willard is simply incorrect. Exhibits 5-10 "contain only communications and descriptions of events that occurred after" the January Sanctions Orders. 18 AA 4080. The District Court concluded that "[l]ogically, relevant events asserted to support Plaintiffs' argument of excusable neglect must have necessarily occurred

prior to the entry of the orders Plaintiffs seek to set aside." *Id*. Case law is in accord. *See Gersing v. Real Vision, Inc.*, 817 S.E.2d 500 (N.C. Ct. App. 2018) ("Excusable neglect is something which must have occurred at or before entry of the judgment, and which caused it to be entered. Therefore, excusable neglect on the part of the attorney occurs only when the attorney's actions were the cause of the entry of judgment."); *Henry v. Goins*, 104 S.W.3d 475, 480 (Tenn. 2003) ("As relief under Rule 60.02 is available **from** a final judgment…, generally speaking, the grounds for relief asserted under Rule 60.02(1) must have occurred at or before the entry of the final judgment and must have resulted in the judgment's entry…."). Thus, these exhibits were irrelevant, and the District Court correctly excluded them.

v. **There is no basis for this Court to take judicial notice of Moquin's disciplinary action.**

Finally, Willard requests that this Court take judicial notice of this Court's Docket No. 78946. AOB 23-26. According to Willard, that docket contains Moquin's conditional guilty plea in his attorney discipline proceedings, wherein he purportedly pled guilty to a number of RPC violations. *Id*. at 24-25. Willard further claims that the guilty plea "also shows that Moquin stated that he had been diagnosed with bipolar disorder, and he had been arrested in California on charges of domestic violence." *Id*.

This Court should decline Willard's request because that Docket could not have been considered as part of Willard's underlying 60(b) Motion. Pursuant to NRCP 60(c)(1), a party moving for NRCP 60(b)(1) relief,[14] as Willard did here, must move "no more than 6 months after the date of the proceeding or the date of service of written notice of entry of the judgment or order, whichever date is later," and even that represents "the extreme limit of reasonableness." *Rodriguez*, 428 P.3d at 257. Further, "[t]he time for filing the motion cannot be extended under Rule 6(b)." NRCP 60(c). Indeed, certain courts interpreting FRCP 60(c)[15] have stated the time limit is jurisdictional. *See Censke v. United States*, 314 F.R.D. 609, 611 (N.D. Ill. 2016); *Arrieta v. Battaglia*, 461 F.3d 861, 864 (7th Cir. 2006).

Here, the guilty plea upon which Willard seeks to rely was not entered until April 16, 2019, more than one year after the District Court entered its January 4, 2018, Sanctions Orders and March 6, 2018, Sanctions Order from which Willard sought NRCP 60(b)(1) relief. AOB 25. Accordingly, that guilty plea could not have been considered by the District Court and may not be considered by this Court. Certainly, Willard could not have used it as a basis to bring an NRCP 60(b)(1), (2),

[14]To the extent this is claimed to be "newly-discovered evidence," it is still subject to the NRCP 60(c) 6-month time limit.

[15]FRCP 60(c) is actually more lenient, as it permits up to one year to file and does not contain the 6(b) limitation.

or (3) Motion, nor could the District Court consider it in the event of a remand. NRCP 60(c).

Thus, Willard's request that "this court should take judicial notice of the contents of docket No. 78946" should be denied, both for its untimeliness and pursuant to general rules of judicial notice. AOB 26; *see also Mack v. Estate of Mack*, 125 Nev. 80, 206 P.3d 98 (2009) (noting that "[a]s a general rule, we will not take judicial notice of records in another and different case, even though the cases are connected," and making an exception on the facts presented in that case); *In re W. States Wholesale Nat. Gas Antitrust Litig*., 633 F. Supp. 2d 1151, 1168–69 (D. Nev. 2007) (noting that "when a court takes judicial notice of a matter of public record, such as another court's opinion, it may not do so for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity."); *cf. generally Carson Ready Mix, Inc. v. First Nat. Bank of Nevada*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981).

And regardless, even if this Court takes judicial notice, the proceedings in Docket No. 78946 do not help Willard. Indeed, in testifying, Moquin appears to suggest that his bipolar diagnosis was contrived to best situate Willard to seek NRCP 60(b) relief:

> I told Mr. Willard that I had found case law that indicated that it was possible to get something set aside. This was in December or early January. Well, December 2017, early January 2018, before I was kicked

> out of my house, I found case law in Nevada that indicated that if there were severe problems, either mental problems or problems on the home front in terms of interference with the law practice, that that may constitute grounds for setting aside a dismissal.
>
> Mr. Willard had been married to a woman who had bipolar disorder, and he recommended that I just go and talk to the psychiatrist. I did that. And it turns out that this psychiatrist was a cottage industry diagnosing people with bipolar disorder, and he diagnosed me as being bipolar, saying that just because I had never experienced profound depression doesn't mean, given my childhood, that it wasn't imminent.

Docket No. 78946 Record on Appeal ("Moquin ROA") Vol. 1, pg. 103. Moquin also testified that he "spent hundreds of hours" responding to Defendants' discovery requests, and defended much of his conduct throughout the litigation. *Id*. 96-98. He testified that "I kept Mr. Willard informed," and that "I've stipulated to statements that I have failed to keep him adequately informed. But to a certain extent, given the way things went out, that I'm willing to do. However, that is not the case during the pendency of my representation of Mr. Willard." *Id*. 99-100. He also testified to attempting to help Willard in 2018. *Id*. 104-106.

In sum, the District Court correctly found that Willard wholly failed to support his 60(b) Motion with admissible evidence which would satisfy his burden to prove entitlement to NRCP 60(b) relief. Willard's appellate challenges to the District Court's findings fall far short of demonstrating palpable abuse.[16] In fact, not only

[16]In his brief, Willard copies three pages of his declaration, arguing that "Willard's declarations alone, which are based on his personal knowledge and his own experiences with Moquin, substantiate the Plaintiffs' inadvertence, surprise,

does Willard wholly fail to establish the existence of bipolar order with any admissible evidence, he also **completely** fails to demonstrate that Moquin's alleged bipolar disorder was the actual cause of any of the conduct of which he complains. *Cf. Forrest*, 587 B.R. at 925 (under Rule 60(b)(6), "if a movant wants to establish that he is entitled to relief due to his attorney's mental illness, then he must introduce evidence from a medical doctor that such illness existed, when it existed, and that it in fact impaired the attorney's ability to represent the movant."). Thus, the District Court should be affirmed.

b. **Even if the excluded evidence was considered, the District Court still correctly denied Willard's Motion.**

Even considering Willard's inadmissible evidence, the District Court properly denied Willard's 60(b) Motion for multiple, independent reasons.

i. **Willard virtually ignores O'Mara's critical role in the analysis.**

First, tellingly absent from Willard's brief is any meaningful discussion of the fact that Willard had **two** lawyers throughout the entire case. Because Willard also

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and excusable neglect." AOB 46-49. However, the District Court expressly found that Willard's observations were not based on his own perceptions or observations, that Willard lacked personal knowledge to testify to the assertions regarding Moquin's mental disorder or private personal life, and that his statements were speculative, citing numerous examples of Willard's declaration in support. 18 AA 4074-75. Further, the declaration is replete with statements that the District Court found were independently inadmissible as discussed herein.

had O'Mara as counsel, Willard's arguments regarding Moquin, even if somehow sufficient, do not entitle Willard to NRCP 60(b) relief.

Indeed, even where one attorney's incapacitation may provide a basis for finding excusable neglect, a plaintiff is not entitled to post-judgment relief where the plaintiff also had another capable attorney. In *Walls v. Brewster*, the district court dismissed a plaintiff's case. 112 Nev. 175, 912 P.2d 261 (1996). The plaintiff subsequently moved to vacate or amend the order, claiming that the plaintiff's failures were the result of excusable neglect; namely, the illness of plaintiff's attorney. *Id*. at 177-78, 912 P.3d at 262. The district court denied the motion, stating that while the illness of one of the plaintiff's attorneys may have constituted excusable neglect, the plaintiff had two attorneys, and there was no valid claim of excusable neglect as to the second attorney, who was not ill and could have rectified the plaintiff's failures. *Id*. This Court affirmed, echoing the district court's reasoning. *Id*. at 179, 912 P.2d at 263.

Applying *Walls* here, even if Willard somehow demonstrated excusable neglect by Moquin, this does not in any way excuse O'Mara's failures. Thus, Willard's entire basis for NRCP 60(b) relief is patently insufficient because it fails to recognize that Willard had another attorney, O'Mara, for whom Willard offers no claim of excusable neglect.

The fact that O'Mara was purportedly local counsel makes no difference. Nevada law clearly defines the responsibilities of local counsel, and requires that local counsel take active responsibility to represent the client and manage the case in accordance with applicable rules:

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

SCR 42(14). The District Court found "O'Mara's representation, even if contractually limited, was governed by this rule." 18 AA 4088. Indeed, O'Mara expressly "consent[ed] as Nevada Counsel of Record to the designation of Petitioner to associate in this cause pursuant to SCR 42" as part of his Motion to Associate Counsel. 1 AA 213; 18 AA 4089.

Thus, O'Mara was "responsible for" and required to "actively participate in" the representation of Willard, SCR 42(14)(a), O'Mara was responsible to the court for the administration this action, *id*. at 14(c), (1)(a)(1), and it was O'Mara's responsibility "to ensure that the proceeding is tried and managed in accordance with

all applicable Nevada procedural and ethical rules." *Id*. at 14(c); *see also* WDCR 23(1) ("Counsel who has appeared for any party shall represent that party in the case and shall be recognized by the court and by all parties as having control of the client's case, until counsel withdraws, another attorney is substituted, or until counsel is discharged by the client in writing, filed with the filing office, in accordance with SCR 46 and this rule.").

"The purpose of [such] rule[s] is self-evident, namely to allow out-of-state counsel to appear only with the support and supervision of a local attorney." *Duke Univ. v. Universal Prod. Inc.*, 2014 WL 3670019, at *2 (M.D.N.C. July 24, 2014). "In that regard, the requirement to associate local counsel serves a useful function. Local counsel can be assumed to be familiar with local procedures and practices and make that knowledge and expertise available to out of district counsel, thus promoting efficiency and lowering costs." *Id*. Courts have interpreted similar rules as "impos[ing] a significant, ongoing responsibility on [so-called] local counsel [that] should not be taken lightly." *Id*.

Thus, even if Willard's deficient theories about Moquin had any evidentiary support, Willard offers no explanation as to why O'Mara did not fulfill his clearly-delineated duties. Willard's argument ignores, and runs afoul of, the plain language of SCR 42.

Further, O'Mara had far more than a perfunctory role in the case. From the outset, O'Mara signed the Verified Complaint, claiming "[u]nder penalty of perjury" that "he is the attorney for [Willard] in the foregoing Complaint and knows the contents thereof, that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and that as to such matters he believes them to be true." 1 AA 18. He also signed Willard's answer to Defendants' counterclaim. 2 AA 306. And as the Court found, "O'Mara attended every hearing and court conference in this case," 18 AA 4089, including the hearing at which Moquin admitted that Willard had not provided compliant NRCP 16.1 damages disclosures. 19 AA 4237. Importantly, "O'Mara was the sole signatory on [the] deficient initial disclosures,…the uncured deficiencies of which were a basis for the sanction of dismissal." 18 AA 4089; 13 AA 3060-66. In other words, **O'Mara's** conduct of propounding deficient disclosures that were never rectified was actually a critical basis for dismissal. *See, e.g.*, 16 AA 3624-37. Further, O'Mara was copied on every communication in which Defendants informed Willard's counsel of their continued lack of compliance. *See, e.g.*, 13 AA 3078-82, 3084-85; 14 AA 3112-13, 3121-23 (copying O'Mara), 3210-11, 3213-15, 3302-07, 3321, 3324, 3345, 3347-49, 3355-58, 3448, 3455-58 (same).

When the time came for Willard to seek additional time to oppose Defendants' motions, O'Mara's active role continued—O'Mara signed and brought

a Motion before the District Court seeking a time extension and representing that "Counsel has been diligently working for weeks to respond to Defendant's serial motions, which include seeking dismissal of Plaintiffs' case. With the full intention of submitting said responses, Counsel for Plaintiffs encountered unforeseen computer issues…. Counsel for Plaintiffs is confident that with a one-day extension they will be able to recreate and submit the oppositions to Defendants' three motions." 15 AA 3568-71; 18 AA 4089. O'Mara also appeared—and participated in—the hearing regarding Willard's allegedly forthcoming oppositions to Defendants' Sanctions Motions. *See, e.g.*, 19 AA 4306-08. Accordingly, as the District Court concluded, "O'Mara's involvement precludes a conclusion of excusable neglect here." 18 AA 4089.

Willard's scant arguments regarding O'Mara simply cannot overcome the District Court's findings. Willard claims that "the record reflects that [O'Mara] was led to believe that Moquin would respond to the Defendants' motions and was effectively unaware that Moquin had abandoned the case," and that O'Mara "justifiably relied on [Moquin's] promise" that "all three oppositions would be filed today."[17] AOB 50, 53-54 (quoting 17 AA 3964).

[17]Even disregarding the hearsay issue, this "promise" was allegedly made on December 11, 2017, one day **prior** to the hearing, attended by O'Mara, discussing Willard's failure to file. *Id*. Thus, Willard cannot credibly contend that O'Mara relied upon this alleged promise.

This argument is meritless. First, it is untenable to argue that O'Mara was "effectively unaware" that Moquin failed to file any oppositions—as a counsel of record for Willard, O'Mara received electronic notification of every single filing in the case. Defendants filed Notices of Non-Opposition for each of their motions less than two hours after Willard failed to oppose them; thus, O'Mara knew of this failure the day it occurred. 1 Respondents' Appendix ("RA") 82-93. In fact, Willard admitted in his moving papers that O'Mara knew about Moquin's alleged unresponsiveness before the oppositions were even due. *See, e.g.*, 16 AA 3701 (Willard claiming that "[b]efore the case was dismissed, local attorney David O'Mara had raised concerns about Mr. Moquin's responsiveness. After having my total income dissipated after the Defendants' breach, and having only a social security income to rely on, I felt I only had this one option of continuing to rely on Mr. Moquin."); 17 AA 3964-65. Yet, O'Mara filed nothing with the District Court until March of 2018 (three months later), seeking to withdraw as counsel. 16 AA 3654; 18 AA 4085 ("Despite knowing no oppositions had been filed, neither Mr. Willard (through Mr. O'Mara), Mr. Moquin, nor Mr. O'Mara contacted Defendants' counsel or this Court to address the status of this case.").

Further, Willard's failure to oppose Defendants' Motions was **only one** of several independent reasons the District Court dismissed the case. *See, e.g.*, 16 AA 3628 ("[S]eparate from [the failure to oppose Defendants' Sanctions Motion], good

cause exists to dismiss this case."), 3629-38 (detailing Willard's noncompliance with the Nevada Rules of Civil Procedure and the District Court's Orders as bases to dismiss), 3629 (referencing the fact that the District Court was "seriously considering" dismissal before Willard's Oppositions were even due). Thus, even if O'Mara was somehow "unaware" that Moquin had purportedly "abandoned the case" in December of 2017, this does not excuse O'Mara's undisputed knowledge of—and contributions to—the misconduct throughout the case which led to dismissal.

O'Mara's involvement in and knowledge of these procedural deficiencies below were a critical basis for dismissal. O'Mara also plainly knew of Moquin's failure to file oppositions to Defendants' Sanctions Motion. *Supra*. Thus, Willard's reliance upon *Scott v. Dalkon Shield Claimants' Tr.*, 1994 WL 321212 (E.D. La. June 23, 1994) and *Maples v. Thomas*, 565 U.S. 266 (2012) is misplaced, as those cases are factually distinguishable.[18]

[18]In *Scott*, the Court sanctioned an attorney under 28 U.S.C. 1927 where that attorney (who had never "formally enrolled" to practice in the case as unlicensed attorney in Louisiana) had led his co-counsel and the plaintiff to believe that he would be responsible for representing plaintiff as lead counsel at a deposition and for procuring expert witnesses, but then abandoned plaintiff three months before trial right before the expert disclosure deadline. *Scott,* 1994 WL 321212 *1. The Court had previously granted plaintiff's motion to continue trial and the expert disclosure deadline based upon the attorney's abandonment. *Id*. *Scott* is distinguishable not only because it is not a Rule 60(b) case, but also because the plaintiff in that case,

Willard's reliance *Coburn Optical Indus., Inc. v. Cilco, Inc.*, 610 F.Supp. 656, 660 (M.N.D.C. 1985) for the proposition "that local counsel must be able to rely to some extent on the representations of reputable out of state attorneys, especially when local counsel has no independent knowledge concerning the representations" is also misplaced. AOB 51. In that case, the court also found "that local counsel must share the liability for attorney's fees and costs imposed on defendant and its lead

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through counsel of record in Louisiana, moved to extend the deadlines upon learning of the abandonment, which Willard failed to do here.

In *Maples*, the United States Supreme Court granted habeas corpus relief following affirmance of petitioner's conviction and death sentence where his attorneys switched law firms and left Alabama without informing their client or seeking leave to withdraw, and failed to meet the deadline to file a notice of appeal from the Alabama trial court's denial of petitioner's motion for postconviction relief under Alabama Rule 32. *Maples*, 132 S.Ct. at 913-14. The Court held that the attorneys' conduct (and the fact that his local counsel made clear "that he would undertake no substantive involvement in the case" (*id*.)) left petitioner "without any functioning attorney of record" which constituted cause to excuse petitioner's procedural default. *Id*. at 915-16. *Maples i*s readily distinguishable from this case, where Willard indisputably had a functioning attorney (O'Mara) who did far more in this case than simply prepare *pro hac vice* applications. Moreover, this Court has already held that for the holding in *Maples* to allow relief based upon attorney misconduct, the attorney must "actually abandon[] the client without notice, thus severing the principal-agent relationship." *Huckabay Props. v. NC Auto Parts*, 130 Nev. 196. 204 n. 4, 322 P.3d 429, 434 n. 4 (2014). Here, the *Maples* exception does not allow relief for Willard, who had O'Mara as his attorney throughout the case and had notice of Moquin's alleged abandonment prior to the entry of the Sanctions Order but chose to keep him as his attorney for financial reasons. 16 AA 3701; 17 AA 3964-65. Instead, Willard is subject to the general rule in Nevada of "holding a litigant responsible for its attorney's procedural errors." *Huckaby*, 130 Nev. at 204 n. 4, 322 P.3d at 434 n.4.

counsel arising from the filing of defendant's motion to dismiss," where local counsel signed the Defendants' sanctionable motion. *Coburn*, 610 F.Supp. at 660. In assessing the extent of liability, it explained that Rule 11 requires "that the lawyer who elects to sign a paper take responsibility for it, even if that responsibility is shared," and that "[t]he Court expects local counsel who appear with attorneys not locally admitted to ensure that Local Rules and the Federal Rules of Civil Procedure are followed even when the pleadings or motion is not prepared by them." *Id*. Here, the underlying case never even reached the merits because Willard and his attorneys ignored the NRCP and the Court's orders regarding the same. If O'Mara's involvement is to be disregarded in a case which was dismissed for repeated lack of compliance with **Nevada** procedure, that would render meaningless SCR 42 and the entire rationale for requiring local counsel.

Accordingly, as Willard makes no claim that O'Mara acted with excusable neglect, his 60(b) Motion failed as a matter of law, even if he had established excusable neglect with respect to Moquin. *See Walls*, 112 Nev. 175, 912 P.2d 261.

ii. **The District Court correctly determined that Willard was not abandoned by his two attorneys.**

Next, as an independent basis to affirm, the District Court acted well within its discretion in declining to find abandonment. Willard argues that "where an attorney's mental illness causes procedural harm to his or her client, NRCP 60(b)(1) justifies granting relief to the client," and that because "Moquin was suffering a

psychological disorder that caused him to abandon the case,…the court should find excusable neglect." AOB 34. This lacks merit.

First, even taking Willard's arguments as true, Willard has not established abandonment as a basis for NRCP 60(b) relief. [19] This is because Willard does not claim that Moquin abandoned him until, at the earliest, December of 2017. *See, e.g.*, AOB 35-36 (arguing that Moquin abandoned Willard by failing to oppose Defendants' Sanctions Motions and failing to help Willard set aside the Sanctions Order), 38 (arguing that "simply because Moquin attended depositions, filed motions years before December 2017, and managed to file motions for summary judgment in October 2017, is not relevant to what happened from December 2017 afterward.");

[19]The cases Willard cites for this proposition are readily distinguishable because they include competent evidence supporting a mental illness finding—sworn statements from the attorney describing his own mental illness, and in most, testimony from the attorneys' physician. *See United States v. Cirami*, 563 F.2d 26, 31 (2d Cir. 1977) (attorney's affidavit and a letter from his psychologist indicated he was suffering from a mental disorder and was being treated); *Boehner v. Heise*, 2009 WL 1360975 at *3 (S.D.N.Y. May 14, 2009) (attorney's declaration and psychologist's written evaluation indicated attorney's psychological condition caused him to stop practicing law); *Cobos v. Adelphi University*, 179 F.R.D. 381, 388 (E.D.N.Y 1998) ("[i]n support of the clients' motion to vacate, both the attorney and her psychiatrist submitted affidavits detailing the severity of the attorney's illness"); *Passarelli v. J-Mar Devlopment, Inc.*, 102 Nev. 283, 285 (1986) (record showed that attorney was suffering from substance abuse problems that caused him to close his practice and seek medical treatment); *cf. Forrest*, 587 B.R. at 924 ("[I]n *Cirami*, unlike the suit at bar, the party seeking relief did in fact introduce evidence from a medical doctor to help prove that the very high threshold of 'truly extraordinary circumstances' required by Rule 60(b)(6) were present.").

19 AA 4335 (Willard's counsel stating that "I think [Moquin's] track record up until late 2017 was that he did do his job, then something terrible did happen"). Willard even argues that "the most glaring evidence of Moquin's abandonment" was "his repeated refusal to cooperate with Plaintiffs in their attempts to reinstate the case." AOB 39, 45.

However, Moquin's alleged actions in December of 2017 were not the cause of the dismissal. Obviously, Defendants' Sanctions Motions were not based upon Willard's failure to oppose those Motions. Further, even at the December 2017 hearing, the District Court informed counsel that "you need to know going into these oppositions, that I'm **very seriously considering granting all of it**…I haven't decided it, but I need to see **compelling** reason not to grant it." 18 AA 4067 (emphases added), 4086. And importantly, the Sanctions Order held that "**separate from** [the failure to respond to Defendants' Sanctions Motion], good cause exists to dismiss this case. 16 AA 3628 (emphasis added). The District Court then discussed how Willard's sanctionable conduct **throughout this case** warranted dismissal, including: (1) Willard's failure to provide damages disclosure (which the District Court held was "so central to this litigation, and to Defendants' rights and ability to defend this case, that dismissal of the entire case [was] necessary"); (2) Willard's failure to ever properly disclose the opinions of Gluhaich, notwithstanding that he untimely sought new damages that would necessarily require expert opinion and

improperly attempted to rely on Gluhaich for the same; (3) Willard's "complete disregard for this Court's Orders, deadlines imposed by this Court, and the judicial process in general"; and (4) Willard's willful noncompliance throughout the case, including waiting until the eleventh hour to "ambush" Defendants by completely changing his relief sought and providing key documents that were in his possession throughout the case. 16 AA 3629-33, 3637.

Thus, while the failure to oppose the Sanctions Motions certainly did not help Willard's cause, it is abundantly clear from the record, and the District Court's express findings on the matter, that dismissal was warranted separate from the failure to oppose the Sanctions Motions. *Id*. 3628. As the District Court reiterated in its 60(b) Order, "Plaintiffs' multiple instances of non-compliance, including the Plaintiffs' failure to provide a compliant damages disclosure in this action, is reflected in the court file for this proceeding, occurring well before Mr. Moquin's purported breakdown in December, 2017 or January, 2018 asserted as preventing him from opposing the motions." 18 AA 4085-86.

Further, Moquin's alleged actions which occurred **after** the Sanctions Order could not possibly have been the cause of the Sanctions Order. *See, e.g.*, 18 AA 4080 ("Logically, relevant events asserted to support Plaintiffs' argument of excusable neglect must have necessarily occurred prior to the entry of the orders Plaintiffs seek to set aside.").

Thus, common sense dictates that Moquin's alleged conduct from December of 2017 to May of 2018, which did not cause the District Court to dismiss the case, and which largely occurred after the entry of the Sanctions Order, does not establish excusable neglect. As discussed *supra*, "[e]xcusable neglect is something which must have occurred at or before entry of the judgment, and which caused it to be entered." *Gersing*, 817 S.E.2d 500.

Second, the record amply demonstrates that Willard was not abandoned. Specifically, as the District Court found, "Moquin did not abandon Plaintiffs. He appeared at status hearings, participated in depositions, filed motions and other papers, including a lengthy opposition to Defendants' motion for partial summary judgment. Mr. Moquin participated in oral arguments and filed two summary judgment motions with substantial supporting exhibits and detailed declarations." 18 AA 4086. Indeed, Moquin answered Defendants' counterclaim and asserted 20 affirmative defenses, 2 AA 299-307; defended Willard's deposition, 3 AA 500-01; opposed Defendants' Motion for Partial Summary Judgment with a 22-page opposition accompanied by three affidavits and 51 exhibits, 4 AA 795-6 AA 1366; filed a lengthy objection to Defendants' proposed order on their Motion for Partial Summary Judgment, 7 AA 1431-49, and filed two Motions for Summary Judgment in October 2017 which purportedly "contained a detailed description of the damages Plaintiffs were seeking," AOB 16, and were each accompanied by three detailed

affidavits and collectively more than 70 exhibits. 7 AA 1548-10 AA 2283; 1 RA 32-81. Further, if O'Mara's signed representations to the District Court are to be believed, "[c]ounsel [was] diligently working for weeks to respond to Defendants' serial motions, which include seeking dismissal with prejudice of Plaintiffs' case." 15 AA 3568-71. Moquin also participated in every hearing prior to Willard obtaining new counsel. 18 AA 4218; 19 AA 4237, 4306. Thus, Willard was not abandoned. Instead, as the District Court found, "Plaintiffs' attorneys did not completely abandon the case. Rather, the Nevada Rules of Civil Procedure, this Court's express orders, and Defendants' requests for damages computations and expert disclosures were ignored." 18 AA 4084; *cf. Huckabay*, 130 Nev. at 204 n.4, 322 P.3d at 434 n.4 (declining to find abandonment in an appeal where the attorney ignored court rules and orders).

Moreover, as discussed *supra*, Willard *per se* could not be abandoned because he had two separate attorneys throughout the case. O'Mara was still counsel of record, and could have at least informed the Court of Moquin's alleged non-responsiveness and requested relief prior to dismissal.

Thus, rather than demonstrating abandonment, the record unequivocally demonstrates that Willard and his two separate attorneys simply chose to continually and repeatedly ignore the NRCP, the District Court's Orders, and Defendants' repeated requests, only to ambush Defendants with their summary judgment motions

containing new and undisclosed alleged damages, expert opinions, and critical documents at the virtual close of discovery, as detailed in the Sanctions Order. 16 AA 3607-40.

Third, Nevada agency principles preclude an abandonment finding. "[C]lients must be held accountable for the acts and omissions of their attorneys," because the client "voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts of omissions of this freely selected agent." *Huckabay,* 130 Nev. at 204, 322 P.3d at 433 (quotations omitted); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34 (1962).

In *Huckabay*, this Court dismissed an appeal where appellants' lead counsel (appellant had two attorneys) failed to timely file an opening brief following multiple extensions. 130 Nev. at 198, 322 P.3d at 430. This Court held, among other things, that "[a]ppellants' dissatisfaction with their attorney's performance…does not entitle them to the reinstatement of their appeals, and their argument to the contrary is not consistent with general agency principles, under which a civil litigant is bound by the acts or omissions of its voluntarily chosen attorney." *Id*. at 198, 204-205, 322 P.3d at 430, 434-35.

On appeal, Willard argues that this case falls within a possible exception of "exceptional circumstances" to the general agency rule, where "the lawyer's addictive disorder and abandonment of his legal practice" may justify relief for the

victimized client. *Id*. at 204 n.4, 322 P.3d at 434 n.4 (citing *Passarelli*, 102 Nev. at 286). Specifically, he argues that "Moquin *unequivocally* abandoned the Plaintiffs," as he "could not function and oppose dispositive motions," "was often unresponsive to his clients," and he "refused to help Willard or new counsel" with the 60(b) Motion from January-May 2018. AOB 35-37. However, the facts of *Pasarelli* are readily distinguished and do not support Willard's argument. First, the *Passarelli* Court was presented with **evidence in the record** that the attorney suffered from substance abuse that led to him not coming to the office, missing most appointments and becoming unable to function. 102 Nev. at 285. Second, the attorney in *Passarelli* voluntarily closed his law practice. *Id*. Third, he was transferred to disability inactive status by the Nevada Bar. *Id*. Fourth, the client in *Pasarelli* had no idea trial had even been set, whereas Willard clearly knew that there were deadlines set for him to oppose the Sanctions Motion. *See, e.g.*, 17 AA 3959-65. Finally, and perhaps most importantly, the client in *Passarelli* had only one attorney. *Id*. As discussed *ad nauseam*, none of these facts are present here. Rather, the analysis in *Huckabay* compels the conclusion that the District Court correctly denied the 60(b) Motion. *See also Cicerchia v. Cicerchia*, 77 Nev. 158 (noting authority that a party cannot be relieve from a judgment taken against him in consequences of the neglect, carelessness, forgetfulness, or inattention of his attorney).

Finally, Willard's own knowledge and involvement precludes an abandonment finding. Willard claims that he knew that Moquin was having financial difficulties, and that he borrowed money to fund Moquin's personal expenses. 16 AA 3699 ¶¶63-65. Willard also claims that he became aware at some point that Moquin had suffered a mental breakdown, that he recommended a psychiatrist to Moquin and that he again borrowed money to pay for Moquin's treatment. *Id*. at 3700 ¶¶68-71. Therefore, it is abundantly clear that Willard was fully aware of Moquin's alleged problems, yet continued to allow Moquin to represent him. This is another significant difference between this case and the cases upon which Willard relies, AOB 34, where the parties were unaware of the attorneys' problems. *See Passarelli*, 102 Nev. at 286 ("Passarelli was effectually and **unknowingly** deprived of legal representation") (emphasis added); *Cirami*, 563 F.2d at 29-31 (client discovered that attorney had a mental disorder that prevented him from opposing summary judgment more than two years later); *Boehner*, 2009 WL 1360975 *2 (client did not learn that case had been dismissed or learn of attorney's mental condition until several months after dismissal).

In addition, Willard claims that he was informed by O'Mara prior to the dismissal of his claims that Moquin was not responsive, but decided to do nothing about it due to financial reasons. 16 AA 3701 ¶81. Willard's inaction, when armed with this knowledge, is inexcusable, as Willard had a duty to exercise diligence to

ascertain the status of his case. Indeed, even "where an attorney's mishandling of a movant's case stems from the attorney's mental illness," which might justify relief under Rule 60(b), "client diligence must still be shown." *Cobos*, 179 F.R.D. at 388; *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350, 357 (5th Cir. 1993) ("A party has a duty of diligence to inquire about the status of a case...."); *Pryor v. U.S. Postal Service*, 769 F.2d 281, 287 (5th Cir. 1985) (same). Thus, as the District Court found, Willard "chose to retain Mr. Moquin and did not terminate his representation, even after becoming aware that he did not file a timely response to the Motion for Sanctions. Plaintiffs cannot now avoid the consequences of the acts or omissions of their freely selected agent."[20] 18 AA 4085.

Thus, the District Court did not abuse its discretion in declining to find abandonment or excusable neglect, and should be affirmed.

iii. **The District Court properly declined to set aside the judgment based on the *Young* factors.**

Finally, the District Court did not abuse its discretion in declining to set aside the Sanctions Order based on the *Young* factors. On appeal, Willard argues that

[20]Willard also claims that the District Court made an "inaccurate finding that Plaintiffs knew of Moquin's psychiatric problems before the…January 4, 2018….Sanctions Order." AOB 39. However, Willard argued in his 60(b) Motion that "[i]t 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**." 16 AA 3690 (emphases added).

"Plaintiffs were entitled to Rule 60(b) relief because the District Court erred in choosing to impose case-terminating sanctions rather than awarding a lesser sanction more proportional to any harm caused to the Defendants" and because the District Court allegedly failed to consider any penalty to Willard in its Sanctions Order. AOB 27-34. Willard's arguments lack merit.

1. Willard's arguments about the propriety of the Sanctions Order not properly part of this appeal.

First, Willard's arguments concerning the alleged propriety of the Sanctions Order could have only been raised on a direct appeal from the Judgment, not in the 60(b) Motion or this appeal from the 60(b) Order. For example, Willard argues that Defendants' prejudice did not justify the sanction imposed in the Sanctions Order, or that the District Court failed to analyze all dismissal factors in its Sanctions Order. AOB 26, 30, 33, 2, 5 (Issues 1 and 2). However, Willard, who voluntarily dismissed his appeal from the Sanctions Order in response to this Court's Order to Show Cause, (August 23, 2019, Order, on file herein), cannot now argue the propriety of the Sanctions Order as part of this 60(b) appeal. That Willard improperly raised these arguments in his 60(b) briefing is irrelevant and does not allow him to appeal those issues here. And, Willard's inclusion of such arguments in his brief is both disingenuous and improper given his dismissal of his appeal taken from the Judgment.

Indeed, multiple courts have held that 60(b) Motions are not proper substitutes for that which should have been raised in a direct appeal from the underlying judgment or order and may not be used to circumvent the timeline for filing an appeal. *See generally, e.g.*, *Mathews v. Carreira*, 770 N.E.2d 560 (Ma. App. 2002) ("Rule 60(b) cannot be used as a substitute for the regular appeal procedure."); *Carrabine v. Brown*, 1993 WL 318809 (Ohio Ct. App. 1993) (A motion for relief from judgment under Civ.R. 60(B)(1) cannot be predicated upon the argument that the trial court made a mistake in rendering its decision); *Morgan v. Estate of Morgan*, 688 So. 2d 862, 864 (Ala. Civ. App. 1997).

This is also not a case where, as with a default judgment, Willard was unaware of the judgment within the time to appeal. To the contrary, on March 9, 2018, after Willard's claims had been dismissed, Defendants requested that the District Court enter judgment upon the dismissal of Defendants' counterclaims so that all claims of all parties would be dismissed. 16 AA 3646. Willard opposed this request, arguing that the District Court should stay entry of a judgment until after consideration of Willard's 60(b) Motion. *Id*. at 3661, 3663 (advocating for "one, consolidated appeal"). Willard strategically chose not to appeal the Sanctions Order, and subsequently voluntarily dismissed his appeal therefrom. Willard cannot now use his NRCP 60(b) appeal as a vehicle to challenge the Sanctions Order. Thus, any

arguments that are improper attempts to seek appellate review of the Sanctions Order, as opposed to the 60(b) Order, must be disregarded.

2. <u>There was no undue penalty to Willard</u>.

Even assuming *arguendo* that Willard's arguments are properly on appeal, they lack merit. Willard argues that "the District Court erred by not considering whether the sanctions unfairly operated to penalize the Plaintiffs for the misconduct of their attorney." AOB 33.

However, this is wholly unavailing. First, As the District Court recognized in the Sanctions Order and the 60(b) Order, consideration of the *Young* factors is discretionary. 16 AA 3628; 18 AA 4090. Indeed, *Young* identifies "[t]he factors a court **may** properly consider…." 106 Nev. at 93, 787 P.2d at 780. Thus, the District Court was not required to consider every *Young* factor. This Court has affirmed this notion, explaining that "this court does not require district courts to consider every *Young* factor, so long as the district court's analysis is thoughtfully performed." *N. Am. Properties v. McCarran Int'l Airport*, No. 61997, 2016 WL 699864, at *5 (Nev. Feb. 19, 2016) (unpublished).

Second, even if the District Court was required to consider all of the *Young* factors, it unequivocally did so. In the Sanctions Order, the District Court quoted *Huckabay* and *Link* in noting that "a party cannot seek to avoid a dismissal based on arguments that his or her attorney's acts or omissions led to the dismissal." 16 AA

3635-36. The Court also attributed sanctionable conduct to Willard personally. For example, a critical basis for dismissal was Willard's failure to ever provide a NRCP 16.1 damages disclosure, and failure to comply with the District Court's order that Willard do so. *Id*. at 3629-30. As the District Court noted, Willard was personally present at the hearing where Defendants' counsel informed the District Court that Willard had never provided an NRCP 16.1 damages disclosure, Moquin admitted the same, and the District Court directed, in open court, that Plaintiffs must serve, within 15 days of the entry of the District Court's order, an updated NRCP 16.1 damages disclosure. *Id*. at 3615-16. Thus, Willard was clearly aware of the NRCP 16.1 failures and the order to fix them.

The District Court also held that "it is clear that Plaintiffs' failure to disclose the appraisals upon which many of their calculations [in their Motions for Summary Judgment] were based was also willful." 16 AA 3631. The District Court elaborated that many of Willard's damages calculations in his Motion were based upon appraisals commissioned in 2008 and 2014, as acknowledged by Willard, but that "these appraisals were never disclosed to Defendants at any time before [Willard's] motion," despite the fact that "Defendants requested Willard to 'produce any and all appraisals for the Property from January 1, 2012, through present,'…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." *Id*. 3632.

Further, common sense dictates that Willard, who authored a 15-page affidavit in support of his October 2017 Motion for Summary Judgment and averred that he "collaborated" with Moquin on his attached damages summary, was aware that the damages he sought in that Motion were significantly different than those ostensibly sought in his Complaint, or in his Interrogatory Responses which he personally verified.[21] 3 AA 608; 7 AA 1574-76; 16 AA 3621 (finding that "Willard sought more than triple the amount of damages (nearly $40 million more) than he sought in the complaint and ostensibly throughout this case," and detailing the many new and different bases for damages). The District Court recognized that this eleventh-hour significant change in damages was patently unfair to Defendants, *id*.

[21]Willard downplays his Motion for Summary Judgment and the damages sought therein. However, Willard's claims are replete with blatant inaccuracies. For example, Willard claims that under the lease, "the rent was accelerated upon BHI's breach," citing only his declaration in support. AOB 10. However, the lease contained a liquidated damages provision, not an accelerated rent provision—which, as the District Court found, is very different. 1 AA 38; 16 AA 3621. Willard also claims that his Motion sought "previously-disclosed rent damages," AOB 17, and that his "basic, breach of lease damages…were calculated and disclosed in the original Verified Complaint and again in the Verified First Amended Complaint." *Id*. 2. However, as the District Court found, Willard sought multiple brand new and different categories of relief, totaling nearly $40 million more than his original damages sought. 16 AA 3621. In fact, Willard's Complaint originally also sought millions in damages which Willard never even incurred or were unforeseeable as a matter of law. 7 AA 1501-1513.

at 3623, and demonstrated "bad faith motives in waiting to ambush Defendants," which was "strategic." *Id*. 3630. Accordingly, the Sanctions Order amply considered this factor.

Lest any doubt remained, the District Court also explicitly addressed the concept of an undue penalty to Willard in its 60(b) Order. It held that "[w]hile each suggested factor discussion in the Sanctions Order was not labeled by factor, the Court addressed the factors it deemed appropriate…. In light of the circumstances in this case, the dismissal of Plaintiff's claims did not unfairly penalize Plaintiffs based on the factors analyzed in the Sanctions Order." 18 AA 4090. It also explained that Willard knew of Moquin's alleged inaction, and that Willard "knew of the actions that supported the Sanctions Order." *Id*. 4087. Thus, the District Court did not abuse its discretion in declining to set aside the Sanctions Order on this basis. *See also supra* (client is bound by the acts or omissions of its voluntarily-chosen attorney).

3. <u>The sanction was proportionate to the offense</u>.

Willard also argues that the sanction was disproportionate to the offense, addressing the *Young* factors in turn. AOB 27-33. Assuming these arguments are properly on appeal, they are unavailing, as Willard's offenses were egregious and continuous. The District Court did not abuse its discretion in declining to set aside the Sanctions Order under NRCP 60(b).

a. <u>The noncompliance was willful</u>.

First, Willard argues that "Defendants…argued that Plaintiffs engaged in a bad faith attempt to sabotage them," but that "Plaintiffs did not engage in *any* willful misconduct. Instead, Plaintiffs' failures are solely the result of Moquin's mental illness and other serious personal problems." AOB 29. Willard also claims that "[t]here was no evidence to establish that Moquin or the Plaintiffs acted willfully or strategically." *Id*. Willard's argument lacks merit and is belied by the record.

Initially, despite Willard claiming that "Defendants" assumed misconduct and sabotage, it was the **District Court** that expressly found that Willard engaged in willful misconduct, exhibited "bad faith motives," and strategically ambushed Defendants. 16 AA 3630. Further, even disregarding that Willard provided no admissible evidence of mental illness, Willard's claim that "Plaintiffs' failures are solely the result of Moquin's mental illness and other serious personal problems" is belied by the record. AOB 29. As discussed in detail *supra*, the District Court highlighted multiple acts that supported its finding of willfulness, including conduct attributable to Willard or conduct of which Willard was indisputably aware. 16 AA 3629-33. These willful failures, including Willard's failure to ensure compliance with a Court order that he personally heard, or to provide critical documents until the virtual close of discovery, cannot possibly be excused by Moquin's alleged mental state. Further, as discussed *supra*, the willful violations that formed the basis

for the Sanctions Order primarily occurred well before Moquin's alleged "mental breakdown," and therefore could not be excused by it. Thus, the District Court did not abuse its discretion in declining to set aside the Sanctions Order on this claimed basis.

b. Defendants suffered substantial prejudice.

Next, Willard argues that "Defendants' prejudice, if any, was much more limited than the Defendants contended." AOB 30. According to Willard, there was only "some delay and minor prejudice," and Defendants could have prepared defenses to Plaintiffs' damages. *Id*.

Willard's argument, which cannot possibly be affected by Willard's claimed NRCP 60(b)(1) grounds, is improperly part of this appeal. Regardless, as the District Court found, "Plaintiffs' repeated and willful delay in providing information to Defendants has necessarily prejudiced Defendants," and further, Plaintiffs' last-minute drastic changes "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." 16 AA 3634. Indeed, "prejudice from unreasonable delay is presumed" and failure to comply with court orders

mandating discovery is sufficient prejudice. *In re Phenylpropanolamine (PPA) Products*, 460 F.3d 1217, 1236 (9th Cir. 2006).

The prejudice finding "deserves substantial deference because the district court judge is in the best position to assess prejudice." *Id*. at 1228. Thus, to the extent this Court even considers this improperly-raised argument, Willard has not demonstrated that the District Court abused its discretion in declining to set aside the Sanctions Order on this basis (or even that the District Court abused its discretion in finding prejudice in the first instance).

In fact, Defendants would now be even more prejudiced than when the District Court issued its Sanctions Order. Specifically, the sole individual defendant, Jerry Herbst, passed away on November 27, 2018. 1 RA 94-96. Herbst was also the President and owner of BHI, the only other Defendant. Obviously, Herbst is central to Willard's case; among other things, Willard asserted a breach of guaranty claim against Herbst personally. 2 AA 236. Herbst (along with BHI) also asserted a counterclaim against Willard. *Id*. 268. Yet, Defendants will never have the benefit of Herbst's testimony. This is because even though Willard initiated this lawsuit against Defendants in April 2013 (in the wrong jurisdiction, California), and initiated the underlying action against Defendants in August 2014, and therefore had **multiple years** to depose Herbst or propound written discovery requests upon him before his passing, Willard never even attempted to do so. 16 AA 3607-40. The fact that

Willard "languidly [held] Defendants in litigation while simultaneously failing to meet [his obligations] under the NRCP to provide threshold information necessary to defend this case and to comply with the other obligations imposed by the NRCP" now prejudices Defendants significantly more than even when the District Court found prejudice in its Sanctions Order. *Id*. 3634.

c. The remaining *Young* factors do not entitle Willard to relief.

Willard also argues that dismissal was too severe of a sanction, and that the District Court "should have followed Nevada's policy and allowed the case to proceed to trial." AOB 31-32.

The attempts to challenge the Sanctions Order are not properly part of this appeal. *See, e.g.*, AOB 31 (arguing the purported financial effect of the alleged breach on Willard, [22] which has no relation to NRCP 60(b)), 32 (arguing that the court should have "allowed the case to proceed to trial" in part because of "Defendants' acknowledgement of being prepared to assert defenses to Plaintiff's rent-based damages").

[22]Willard's brief is replete with attempts to invoke sympathy. *See, e.g.*, AOB 1, 12. The District Court "disregard[ed] the paragraphs included in the Willard Declaration…that can be construed to be stated [to] appeal to the Court's sympathy." 18 AA 4070 n.6. As they are irrelevant to whether the 60(b) Motion was correctly decided, Defendants submit that this Court need not consider these attempts either.

And regardless, the arguments lack merit. The District Court considered these factors in detail. With respect to the severity of the sanction, it held that "dismissal is not too severe for Plaintiffs' repeated and willful noncompliance with Court orders and with Nevada law," and also discussed prior sanctions which had no effect. 16 AA 3634-35. These violations occurred before Moquin's alleged "mental breakdown," and regardless, "a party cannot seek to avoid a dismissal based on arguments that his or her attorneys' acts or omissions led to the dismissal." *Huckabay*, 130 Nev. at 205, 311 P.3d at 434.

With respect to the policy favoring consideration on the merits, the District Court expressly found that "[a]lthough 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," providing detailed examples. 16 AA 3636. Indeed, this policy "is not boundless and must be weighed against other policy considerations…." *Huckabay*, 130 Nev. at 203, 322 P.3d at 433. Willard's own actions, which spanned nearly five years from the initial filing in California to dismissal, prevented this case from being heard on the merits; thus, the District Court did not abuse its discretion. *See Rodriguez*, 428 P.2d at 256 (a district court has "broad discretion" to balance the importance of deciding cases on the merits and the need to swiftly administer justice); *PPA*, 460 F.3d at 1228 ("this factor lends little support to a party whose responsibility it is to move a case

toward disposition on the merits but whose conduct impedes progress in that direction.").

Thus, Willard has not established any entitlement to relief on this claimed basis.

CONCLUSION

Based on the foregoing, Defendants respectfully request that this Court affirm the District Court.

Respectfully submitted this 9th day of October, 2019.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Answering Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[x] This Answering Brief has been prepared in a proportionally spaced typeface using Microsoft Word version 14.0.6129.5000 (2010) in 14 point Times New Roman font;

2. I further certify that this Answering Brief complies with the page – or type – volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7), it is:

[x] Proportionately spaced, has a typeface of 14 points or more and contains 13,988 words.

3. Finally, I hereby certify that I have read this Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the

requirements of the Nevada Rules of Appellate Procedure.

DATED this 9th day of October, 2019.

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CERTIFICATE OF SERVICE

I certify that I am an employee of DICKINSON WRIGHT, PLLC, and that on this date, pursuant to NRAP 25(d), I am serving the attached **RESPONDENTS' ANSWERING BRIEF** on the party(s) set forth below by:

☒ By electronic service by filing the foregoing with the Clerk of Court using the ECF Electronic Filing System, which will electronically mail the filing to the following individuals.

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