

IN THE SUPREME COURT OF THE STATE OF NEVADA

<p>LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; and OVERLAND DEVELOPMENT CORPORATION, a California corporation,</p> <p>Appellants,</p> <p>vs.</p> <p>BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual,</p> <p>Respondents.</p>	<p>SUPREME COURT NO. 77780</p> <p>Electronically Filed Oct 09 2019 02:47 p.m. Elizabeth A. Brown Clerk of Supreme Court</p> <p>District Court Case No. CV14-01712</p> <p>RESPONDENTS' ANSWERING BRIEF</p>
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APPENDIX TO RESPONDENTS' ANSWERING BRIEF

VOLUME 1

RA001-RA096

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

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

CASE NO. CV14-01712
DEPT. 6

Plaintiff,
vs.

**DEFENDANTS' MOTION TO COMPEL
DISCOVERY RESPONSES**

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

Defendants.

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

Counterclaimants,
vs

LARRY J. WILLARD, individually and as

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

4
5 Counter-defendants.
6
7 _____/

8 Defendants Berry-Hinckley Industries (“BHI”) and Jerry Herbst (collectively,
9 “Defendants”), by and through their attorneys of record, Dickinson Wright PLLC, hereby file
10 this Motion to Compel, seeking to compel Plaintiffs Larry J. Willard, individually and as trustee
11 of the Larry James Willard Trust Fund; Overland Development Corporation; and Edward C.
12 Wooley and Judith A. Wooley, individually and as trustees of the Edward C. Wooley and Judith
13 A. Wooley Intervivos Revocable Trust 2000 (collectively, “Plaintiffs”) to respond to
14 Defendants’ discovery requests, and to award Defendants their fees and costs associated with this
15 Motion. This Motion is based upon NRCP 37, the following Points and Authorities, the
16 Declaration of Brian Irvine, attached hereto as **Exhibit 1**, the exhibits attached hereto, and all
17 pleadings and papers on file herein.

18 **MEMORANDUM OF POINTS AND AUTHORITIES**

19 **FACTS AND PROCEDURAL HISTORY**

20 This action was initiated on August 8, 2014, at which time Plaintiffs filed a complaint
21 against Defendants, claiming breach of certain lease and guaranty agreements. (Complaint, on
22 file herein; *see also* First Amended Complaint, on file herein.) This action is presently in the
23 discovery phase, with the initial expert disclosure deadline set for September 11, 2015, and
24 discovery set to close on November 12, 2015. (Joint Case Conference Report, on file herein.)

25 Pertinent to this Motion, on April 22, 2015, Defendants served the Plaintiffs with the
26 following discovery requests: (1) Requests for Production of Documents to Willard,¹ attached
27
28

¹As it is used herein, the term “Willard” refers to Larry J. Willard, individually and as
trustee of the Larry James Willard Trust Fund, collectively with Overland Development
Corporation.

1 hereto as **Exhibit 2**; (2) Requests for Production of Documents to Wooley,² attached hereto as
2 **Exhibit 3**; (3) Interrogatories to Willard, attached hereto as **Exhibit 4**; and (4) Interrogatories to
3 Wooley, attached hereto as **Exhibit 5**.

4 Plaintiffs' responses to Defendants' discovery requests were due on May 26, 2015. *See*
5 NRCP 33(b)(3) (providing, in pertinent part, that "[t]he party upon whom the interrogatories
6 have been served shall serve a copy of the answers, and objections if any, within 30 days after
7 service of the interrogatories."); *see also* NRCP 34(b)(2)(A) (providing, in pertinent part, that
8 "[t]he party to whom the request is directed must respond in writing within 30 days after being
9 served.").

10 Plaintiffs failed to provide Defendants with their responses on May 26, 2015. (Decl. of B.
11 Irvine ¶ 4, **Exhibit 1**.) Rather, on the day Plaintiffs' discovery responses were due, counsel for
12 Plaintiffs requested a one-week extension for Plaintiffs' discovery responses. *Id.* Defendants'
13 counsel agreed to the extension; thus, Plaintiffs' discovery responses were due by June 2, 2015.
14 *Id.* ¶ 5.

15 On June 2, 2015, Plaintiffs again failed to provide Defendants with Plaintiffs' discovery
16 responses. *Id.* ¶ 8. On June 12, 2015, Plaintiffs' counsel informed Defendants' counsel (without
17 requesting another extension) that Plaintiffs would likely provide their discovery responses by
18 June 15 or 16, but no later than June 19. *Id.* ¶ 6. On June 15, 2015, Defendants' counsel wrote
19 Plaintiffs' counsel, reminding Plaintiffs' counsel that Plaintiffs' discovery responses were late.
20 (June 15, 2015, Letter, **Exhibit 6**.) Defendants' counsel also informed Plaintiffs' counsel that
21 failure to provide discovery responses by June 19, 2015, would result in Defendants filing a
22 motion to compel. *Id.*

23 Plaintiffs still failed to provide discovery responses or otherwise respond to Defendants'
24 letter by June 19, 2015. (Decl. of B. Irvine ¶ 8, **Exhibit 1**.) Indeed, the only communication from
25 Plaintiffs' counsel has been yet another request for additional time on June 23, 2015 (and even

26 ²As it is used herein, the term "Wooley" refers to Edward C. Wooley and Judith A.
27 Wooley, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos
28 Revocable Trust 2000.

1 this was only in response to Defendants informing Plaintiffs' counsel that Defendants planned to
2 file this Motion). (June 23, 2015, Email Exchange, **Exhibit 7**.) Plaintiffs' discovery responses
3 are now 21 days past due. *Id.* ¶ 10.

4 **DISCUSSION**

5 Based on Plaintiffs' continued and repeated unresponsiveness, Defendants respectfully
6 request that this Court compel Plaintiffs to respond to Defendants' discovery requests. NRC
7 37(a)(2)(B) provides, in pertinent part, as follows:

8 [If] a party fails to answer an interrogatory submitted under Rule
9 33, or if a party, in response to a request for inspection submitted
10 under Rule 34, fails to respond that inspection will be permitted as
11 requested or fails to permit inspection as requested, the discovering
12 party may move for an order compelling an answer, or a
13 designation, or an order compelling inspection in accordance with
14 the request. The motion must include a certification that the
15 movant has in good faith conferred or attempted to confer with the
16 person or party failing to make the discovery in an effort to secure
17 the information or material without court action.

18 NRC 37(a)(2)(B).

19 In this case, it is undisputed that Plaintiffs have failed to respond to Defendants'
20 interrogatories or requests for production of documents. Further, Defendants have in good faith
21 attempted to confer with Plaintiffs on this matter, first agreeing to a one-week extension and
22 subsequently asking Plaintiffs to provide discovery responses. (Declaration of B. Irvine ¶¶ 4-7,
23 **Exhibit 1**; June 15, 2015, Letter, **Exhibit 6**.) Plaintiffs failed to timely respond in any manner to
24 Defendants' June 15, 2015, letter. (Decl. of B. Irvine ¶ 8, **Exhibit 1**.) And, even upon being
25 informed that Defendants planned to file the present Motion, Plaintiffs still did not provide
26 discovery responses, instead seeking more time. (June 23, 2015, Email Exchange, **Exhibit 7**.)
27 Accordingly, Defendants respectfully submit that the NRC 37(a)(2)(B) criteria has been
28 satisfied, necessitating an order compelling Plaintiffs to respond to Defendants' discovery
requests.

1 Defendants also request that this Court award Defendants the fees and costs associated
2 with the filing of this Motion. Pursuant to NRCP 37(a)(4)(A):

3 If the motion is granted or if the disclosure or requested discovery
4 is provided after the motion was filed, the court shall, after
5 affording an opportunity to be heard, require the party or deponent
6 whose conduct necessitated the motion or the party or attorney
7 advising such conduct or both of them to pay to the moving party
8 the reasonable expenses incurred in making the motion, including
9 attorney's fees, unless the court finds that the motion was filed
10 without the movant's first making a good faith effort to obtain the
11 disclosure or discovery without court action, or that the opposing
12 party's nondisclosure, response or objection was substantially
13 justified, or that other circumstances make an award of expenses
14 unjust.

11 Plaintiffs' unjustifiable and continual failure to provide Defendants with responses to
12 Defendants' discovery requests has left Defendants with no choice but to file the present Motion.
13 Indeed, Plaintiffs' failure to respond to Defendants' discovery requests is severely hampering
14 Defendants' ability to defend this case. Many of Defendants' discovery requests seek
15 information that would be primarily within Plaintiffs' knowledge, such as measures taken by
16 Plaintiffs to re-let or sell the properties at issue in this case. (*See* Defendants' discovery requests,
17 attached hereto as **Exhibits 2-5**.) Defendants also need to conduct significant written and
18 deposition discovery well in advance of the initial expert disclosure deadline, September 11,
19 2015, so that any expert could utilize such discovery in offering opinions related to this action.
20 This discovery may include third-party subpoenas, but obtaining documents and information
21 from Plaintiffs is the required first step, and Defendants cannot afford to wait indefinitely for
22 Plaintiffs to respond. Thus, Defendants have no choice but to file the present Motion, and
23 Defendants respectfully request that this Court award Defendants the fees and costs associated
24 with the filing of this Motion.

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AFFIRMATION
Pursuant to NRS 239B.030

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

DATED this 23rd day of June, 2015.

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19 | *Attorneys for Defendants Berry-Hinckley*
Industries and Jerry Herbst

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 Federal Express (or other overnight delivery)

EM/ECF Electronic Notification

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EXHIBIT LIST

Exhibit	Description	Pages³
1	Declaration of Brian R. Irvine	3
2	Requests for Production of Documents to Willard	7
3	Requests for Production of Documents to Wooley	7
4	Interrogatories to Willard	9
5	Interrogatories to Wooley	9
6	June 15, 2015, Letter	1
7	June 23, 2015, Email Exchange	2

³ Exhibit Page counts are exclusive of exhibit slip sheets.

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10 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
11 **IN AND FOR THE COUNTY OF WASHOE**
12

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

CASE NO. CV14-01712
DEPT. 6

17
18 Plaintiff,
19 vs.

**ORDER GRANTING DEFENDANTS'
MOTION TO COMPEL DISCOVERY
RESPONSES**

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

21 Defendants.
22 _____/

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

25 Counterclaimants,
26 vs

27 LARRY J. WILLARD, individually and as
trustee of the Larry James Willard Trust Fund;
28

1 OVERLAND DEVELOPMENT
2 CORPORATION, a California corporation;

3
4 Counter-defendants.
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6 The Court, having reviewed Defendants' Motion to Compel Discovery Responses filed
7 on June 23, 2015, and good cause appearing,

8 IT IS HEREBY ORDERED:

9 Plaintiffs shall have to and including Wednesday, July 8, 2015, by 5:00 p.m., to serve
10 Discovery Responses to Defendants' Discovery Requests, attached as Exhibits 2 through 5 to
11 Defendants' Motion to Compel Discovery Responses. Plaintiffs shall pay Defendants'
12 reasonable expenses incurred in making the motion, including attorney's fees. *See* NRCP
13 37(a)(4)(A).

14 DATED this 15th day of July, 2015.

15
16 
17 DISTRICT COURT JUDGE

18 *Respectfully submitted by:*

19 DICKINSON WRIGHT, PLLC

20 /s/ Brian R. Irvine

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22 Nevada Bar No. 5618

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Jerry Herbst*

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

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

CASE NO. CV14-01712
DEPT. 6

Plaintiff,
vs.

**DEFENDANTS' SECOND MOTION TO
COMPEL DISCOVERY RESPONSES**

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

Defendants.

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

Counterclaimants,
vs

LARRY J. WILLARD, individually and as

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

3
4 Counter-defendants.
5

6 Defendants Berry-Hinckley Industries ("BHI"), Jerry Herbst, and JH, Inc., (collectively,
7 "Defendants"), by and through their attorneys of record, Dickinson Wright, PLLC, hereby
8 respectfully submit their Second Motion to Compel Discovery Responses. Defendants seek to
9 compel Plaintiffs Larry J. Willard, individually and as trustee of the Larry James Willard Trust
10 Fund; Overland Development Corporation; and Edward C. Wooley and Judith A. Wooley,
11 individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos
12 Revocable Trust 2000 (collectively, "Plaintiffs") to fully respond to Defendants' discovery
13 requests, and to award Defendants their fees and costs associated with this Motion. This Motion
14 is based upon NRCP 37, the following Points and Authorities, the Declaration of Brian Irvine,
15 attached hereto as **Exhibit 1**, the exhibits attached hereto, and all pleadings and papers on file
16 herein.

17 **MEMORANDUM OF POINTS AND AUTHORITIES**

18 **FACTS AND PROCEDURAL HISTORY**

19 Defendants truly regret being forced to file yet another discovery motion with this Court,
20 but they have no choice but to seek relief due to Plaintiffs' continued unwillingness or inability
21 to meet discovery deadlines and provide Defendants with critical information that will permit
22 Defendants to prepare for depositions and generally defend themselves in this action.

23 This action was initiated on August 8, 2014, at which time Plaintiffs filed a complaint
24 against Defendants, claiming breach of certain lease and guaranty agreements. (Complaint, on
25 file herein; *see also* First Amended Complaint, on file herein.) This action is presently in the
26 discovery phase, with the initial expert disclosure deadline set for September 11, 2015, and
27 discovery set to close on November 12, 2015. (Joint Case Conference Report, on file herein.)

1 Pertinent to this Motion, on April 22, 2015, Defendants sent Plaintiffs the following
2 discovery requests: (1) First Set of Requests for Production of Documents to Willard, attached
3 hereto as **Exhibit 2**;¹ (2) First Set of Requests for Production of Documents to Wooley, attached
4 hereto as **Exhibit 3**; (3) First Set of Interrogatories to Willard, attached hereto as **Exhibit 4**; and
5 (4) First Set of Interrogatories to Wooley, attached hereto as **Exhibit 5**.

6 As this Court is aware, Plaintiffs' responses to Defendants' discovery requests were
7 initially due on May 26, 2015. Numerous delays in Plaintiffs' responses to these discovery
8 requests forced Defendants to file a Motion to Compel Discovery Responses and a Motion for an
9 Order Shortening Time on June 23, 2015. (Motion to Compel, on file herein; Motion for an
10 Order Shortening Time, on file herein.) Plaintiffs did not oppose the Motion to Compel by the
11 deadline imposed by this Court in its order shortening time. (See Notice of Non-opposition, on
12 file herein; Order Shortening Time, on file herein.)

13 On July 1, 2015, this Court granted Defendants' Motion to Compel Discovery Responses,
14 and ordered Plaintiffs to serve the discovery responses to Defendants' discovery requests on or
15 before July 8, 2015, at 5:00 p.m. (Order Granting Defendants' Motion to Compel, on file herein.)
16 This Court also awarded Defendants' reasonable expenses incurred in making the motion,
17 including Defendants attorney's fees. *Id.*

18 Plaintiffs' counsel contacted Defendants' counsel on July 8, 2015, the deadline imposed
19 by the Court, and negotiated an extension until midnight. (See July 9, 2015, email, **Exhibit 6**.)
20 However, Plaintiffs did not proffer their responses that evening. (Decl. of B. Irvine ¶ 16, **Exhibit**
21 **1**.) Outside of the timeframe mandated in the Order Granting Defendants' Motion to Compel and
22 that negotiated by the parties, Plaintiffs' finally proffered their responses to Defendants' written
23 discovery on July 9th and 10th, 2015—75 days after the April 22, 2015, date of service. *Id.* ¶¶
24 17-18.

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27 ¹As it is used herein, the term "Willard" refers to Larry J. Willard, individually and as
28 trustee of the Larry James Willard Trust Fund, collectively with Overland Development
Corporation.

1 While Plaintiffs had at least 75 days to compile their responses, the responses were
2 unfortunately still deficient in several areas. *Id.* ¶ 18. Accordingly, Defendants sent Plaintiffs a
3 detailed letter on July 15, 2015, informing them of the nature of the deficiencies. (July 15, 2015,
4 Letter, **Exhibit 11**.)

5 As to the Larry Willard Responses, Defendants identified multiple deficiencies. *Id.*
6 Interrogatories Nos. 1-5 and Requests for Production Nos. 1-5 and 13-16, require (1) clarification
7 as to whether the Willard Plaintiffs contracted with any real estate professional for the Willard
8 property other than Daniel Gluhaich; (2) supplementation of the responses with missing
9 attachments to emails; and (3) supplementation of the responses with documents detailing efforts
10 to sell or relet the property, such as signage, advertisements, websites, listings, flyers,
11 newspapers, periodicals, offers, contracts, etc. (*Id.*; Willard's Responses to Defendants First Set
12 of Interrogatories, **Exhibit 7**; Willard's Responses to Defendants' First Set of Requests for
13 Production of Documents, **Exhibit 8**)

14 Interrogatory No. 7 and Requests for Production Nos. 7 and 23 require supplementation
15 of the responses with (1) the spreadsheets used to calculate the Base Monthly Rental
16 computation and a "NPV" computation; (2) the documents evidencing and supporting the
17 calculations made by Mr. Willard's accountant, Mitra Ehsanipour; (3) the Seller's Final Closing
18 Statement; and (4) copies of the invoices from Nevada Energy, Mr. Willard's bankruptcy
19 attorney and accountant, and Mr. Goldblatt. *Id.*

20 Interrogatory No. 9 and Request for Production No. 9 require supplementation with
21 documents reflecting the negotiations with the mortgage holder that resulted in the short sale. *Id.*

22 Requests for Production Nos. 13-14 appear to be missing correspondence between Mr.
23 Willard and Mr. Gluhaich. *Id.*

24 Request for Production No. 15 seems to be lacking correspondence between Mr. Willard
25 and/or Mr. Gluhaich and representatives from Longley Partners, LLC. *Id.*

26 And, finally, as to Requests for Production Nos. 17-21, it seems likely that additional
27 documents may exist that were not been produced. *Id.*

1 Defendants also identified deficiencies with the Wooley Plaintiffs' Responses. *Id.* The
2 responses to Interrogatory No. 7 and Request for Production No. 7, need to be supplemented
3 with (1) the spreadsheets used to calculate the Base Monthly Rental computation and a "NPV"
4 computation; (2) the actual invoices paid by the Wooley Plaintiffs for property taxes; (3) the full
5 explanation of their calculation of the damages alleged in Paragraph 39 (related to the lease by
6 and between BHI and B&J Pizza, Inc.); (4) all documents evidencing and/or supporting the
7 revised computations by Josey Schenkoske; and (5) copies of the invoices from Mr. Goldblatt.
8 (*Id.*; Wooley's Responses to Defendants' First Set of Interrogatories, **Exhibit 9**; Wooley's
9 Responses to Defendants' First Set of Requests for Production of Documents, **Exhibit 10**.)

10 As to Requests for Production Nos. 11, 12, and 13, the responses seem to be missing (1)
11 the contract whereby Mr. Gluhaich agreed to serve as the real estate broker for the property and
12 (2) additional correspondence between the Wooley Plaintiffs and Mr. Gluhaich. *Id.*

13 The responses to Requests for Production Nos. 14 and 16-19 also seem to be lacking
14 responsive documents. *Id.*

15 Upon receipt of the July 15, 2015, letter detailing these multiple deficiencies, Plaintiffs'
16 indicated that they would provide supplemental responses by Tuesday, July 21, 2015, at the
17 latest. (July 16, 2015, email, **Exhibit 12**.) Subsequently, on July 20, 2015, Plaintiffs' counsel
18 provided assurances that Plaintiffs were searching for additional documents for supplementation
19 of the responses and that the supplement would be provided on July 20, 2015. (July 20, 2015,
20 email, **Exhibit 13**).

21 Defendants' counsel again spoke with Plaintiffs' counsel on July 29, 2015 about the
22 supplemental responses, and Plaintiffs' counsel promised to send out responses by midnight that
23 same day. (July 29, 2015 letter, **Exhibit 14**; July 29, 2015 email, **Exhibit 15**). However, no
24 responses were received on July 29, 2015. Plaintiffs' counsel wrote again on July 31, 2015, and
25 said that he was "turning his attention" to the supplements. (July 31, 2015 email, **Exhibit 16**).
26 But, by August 4, 2015, nothing had been received, so Defendants sent another email warning
27 Plaintiffs of their intention to file this motion by August 5, 2015. (August 4, 2015 and August 6,

1 2015 email exchange, **Exhibit 17**). Counsel for Plaintiffs wrote back on August 6, 2015 and
2 again promised that the supplement would be provided by that afternoon. *Id.* However, as of the
3 date of this filing, no such supplemental responses have been proffered. (Decl. of B. Irvine ¶ 25,
4 **Exhibit 1.**)

5 Defendants need to receive full and complete responses to their written discovery
6 requests in the immediate future or they will be unable to adequately prepare for the depositions
7 of Messrs. Willard, Wooley, and Gluhaich, all of which are scheduled in late August. This will
8 also cause significant problems for Defendants in their efforts to provide potential experts with
9 critical facts that can be used to support the opinions contained in their expert reports, which
10 must be disclosed by mid-September.

11 **DISCUSSION**

12 Based on Plaintiffs' continued and repeated unresponsiveness, Defendants respectfully
13 request that this Court compel Plaintiffs to fully respond to Defendants' discovery requests.
14 NRCP 37(a)(2)(B) provides, in pertinent part, as follows:

15
16 [If] a party fails to answer an interrogatory submitted under Rule
17 33, or if a party, in response to a request for inspection submitted
18 under Rule 34, fails to respond that inspection will be permitted as
19 requested or fails to permit inspection as requested, the discovering
20 party may move for an order compelling an answer, or a
21 designation, or an order compelling inspection in accordance with
the request. The motion must include a certification that the
movant has in good faith conferred or attempted to confer with the
person or party failing to make the discovery in an effort to secure
the information or material without court action.

22 NRCP 37(a)(2)(B).

23 In this case, Plaintiffs have failed to fully respond to Defendants' interrogatories or
24 requests for production of documents. Further, Defendants have in good faith attempted to confer
25 with Plaintiffs on this matter. The timeline of these discovery requests is illustrative of
26 Defendants repeated attempts to obtain the necessary information and Plaintiffs' pattern of
27 dilatory noncompliance:

- 1 • Plaintiffs failed to provide Defendants with their responses to Plaintiffs' discovery
2 requests on their due date, May 26, 2015. (Decl. of B. Irvine ¶ 4, **Exhibit 1**.)
- 3 • Rather, that day, counsel for Plaintiffs requested a one-week extension, which
4 Defendants' counsel granted, but which Plaintiffs failed to comply with. *Id.* ¶ 5, 8.
- 5 • Then, on June 12, 2015, Plaintiffs' counsel informed Defendants' counsel (without
6 requesting another extension) that Plaintiffs would likely provide their discovery
7 responses by June 15 or 16, but no later than June 19. *Id.* ¶ 6.
- 8 • On June 15, 2015, Defendants' counsel wrote Plaintiffs' counsel, reminding Plaintiffs'
9 counsel that Plaintiffs' discovery responses were late and warning that failure to provide
10 discovery responses by June 19, 2015, would result in Defendants filing a motion to
11 compel. *Id.* ¶¶ 7-8.
- 12 • Plaintiffs still failed to provide discovery responses by June 19, 2015. *Id.* ¶ 9.
- 13 • Instead, on June 23, 2015, Plaintiffs' counsel requested more additional time (in response
14 to an email from Defendants). *Id.* ¶ 10.
- 15 • These delays led Defendants to file a Motion to Compel Discovery Responses and a
16 Motion for an Order Shortening Time on June 23, 2015. (Motion to Compel, on file
17 herein; Motion for an Order Shortening Time, on file herein.)
- 18 • On July 1, 2015, this Court granted Defendants' Motion to Compel Discovery Responses,
19 and ordered Plaintiffs to serve the discovery responses to Defendants' discovery requests
20 on or before July 8, 2015, at 5:00 p.m. (Order granting Defendants' Motion to Compel,
21 on file herein.)
- 22 • Plaintiffs then contacted Defendants on the due date, July 8, 2015, and negotiated an
23 extension until midnight. (*See* July 9, 2015, email, **Exhibit 6**.)
- 24 • However, Plaintiffs did not proffer their responses that evening.
- 25 • It was not until 75 days after the April 22, 2015, date of service that Plaintiffs' finally
26 proffered (some of) their responses to Defendants' written discovery on July 9th and
27 10th, 2015.

- 1 • However, as explained, these responses were deficient.
- 2 • Defendants sent Plaintiffs a detailed letter on July 15, 2015, informing them of the nature
- 3 of the deficiencies. (July 15, 2015, letter, **Exhibit 11**.)
- 4 • In response, Plaintiffs' indicated that they would provide supplemental responses by
- 5 Tuesday, July 21, 2015, at the latest. (July 16, 2015, email, **Exhibit 12**.)
- 6 • Plaintiffs' counsel provided further assurances on July 20, 2015, that additional
- 7 documents would be provided by July 21, 2015. (July 20, 2015, email, **Exhibit 13**.)
- 8 • Plaintiffs' counsel again promised on July 29, 2015 to send out supplemental responses
- 9 by midnight that same day. (July 29, 2015 letter, **Exhibit 14**; July 29, 2015 email,
- 10 **Exhibit 15**). However, no responses were received on July 29, 2015.
- 11 • Plaintiffs' counsel wrote again on July 31, 2015, and said that he was "turning his
- 12 attention" to the supplements. (July 31, 2015 email, **Exhibit 16**).
- 13 • Plaintiffs again promised on August 6, 2015 that the supplement would be provided by
- 14 that afternoon. (**Exhibit 17**).

15 Accordingly, Defendants respectfully submit that the NRCP 37(a)(2)(B) criteria has been
16 satisfied, necessitating an order compelling Plaintiffs to respond fully to Defendants' discovery
17 requests and to address the concerns in Defendants' July 15, 2015, Letter by supplementing their
18 discovery responses.

19 Defendants also request that this Court award Defendants the fees and costs associated
20 with the filing of this Motion. Pursuant to NRCP 37(a)(4)(A):

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

1 justified, or that other circumstances make an award of expenses
2 unjust.

3 Plaintiffs' unjustifiable and continual failure to provide Defendants with full and
4 complete responses to Defendants' discovery requests has left Defendants with no choice but to
5 file the present Motion. Indeed, Plaintiffs' dilatory noncompliance with Defendants' discovery
6 requests is severely hampering Defendants' ability to defend this case. Many of Defendants'
7 discovery requests seek information that would be primarily within Plaintiffs' knowledge, such
8 as measures taken by Plaintiffs to re-let or sell the properties at issue in this case.

9 Defendants also need to conduct significant written and deposition discovery well in
10 advance of the initial expert disclosure deadline on September 11, 2015, so that any expert could
11 utilize such discovery in offering opinions related to this action. This discovery includes third-
12 party subpoenas (and depositions) including that of Daniel Gluhaich, but obtaining complete
13 documents and information from Plaintiffs is the required first step, and Defendants cannot
14 afford to wait indefinitely for Plaintiffs to fully respond.

15 Moreover, the depositions of Messrs. Willard, Wooley, and Gluhaich are quickly
16 approaching at the end of August, and the disclosures are necessary to prepare for these
17 depositions. Defendants have scheduled a deposition of Mr. Wooley to occur on August 20,
18 2015, the deposition of Mr. Willard for August 21, 2015 and the deposition of Mr. Gluhaich for
19 August 25, 2015 in San Jose, and need adequate time to review their subpoena responses and
20 incorporate those documents into counsel's preparation prior to his deposition. Thus, Defendants
21 have no choice but to file the present Motion, and Defendants respectfully request that this Court
22 award Defendants the fees and costs associated with the filing of this Motion.

23 CONCLUSION

24 Based on the foregoing, Defendants respectfully request that this Court compel Plaintiffs
25 to fully respond to Defendants' discovery requests and to address the concerns in Defendants'
26 July 15, 2015, Letter by supplementing their discovery responses, and that this Court award
27 Defendants the fees and costs associated with bringing this Motion.

28 ///

AFFIRMATION
Pursuant to NRS 239B.030

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

DATED this 7th day of August, 2015.

DICKINSON WRIGHT



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

CERTIFICATE OF SERVICE

I certify that I am an employee of DICKINSON WRIGHT, and that on this date, pursuant to NRCP 5(b); I am serving a true and correct copy of the attached **DEFENDANTS' SECOND MOTION TO COMPEL DISCOVERY RESPONSES** on the parties as set forth below:

- ☒ Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, Reno, Nevada, postage prepaid, following ordinary business practices
- ☐ Certified Mail, Return Receipt Requested
- ☐ Via Facsimile (Fax)
- ☒ Via E-Mail
- ☐ Placing an original or true copy thereof in a sealed envelope and causing the same to be personally Hand Delivered
- ☐ Federal Express (or other overnight delivery)
- ☐ EM/ECF Electronic Notification

Addressed as follows:

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David C. O'Mara
THE O'MARA LAW FIRM
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Reno, Nevada 89501

DATED this 7th day of August, 2015


An employee of DICKINSON WRIGHT

Exhibit	Description	Pages ²
1	Declaration of Brian R. Irvine	5
2	First Set of Requests for Production of Documents to Willard	7
3	First Set of Requests for Production of Documents to Wooley	7
4	First Set of Interrogatories to Willard	9
5	First Set of Interrogatories to Wooley	9
6	July 9, 2015, email	1
7	Willard's Responses to Defendants' First Set of Interrogatories	11
8	Willard's Responses to Defendants' First Set of Requests for Production of Documents	9
9	Wooley's Responses to Defendants' First Set of Interrogatories	9
10	Wooley's Responses to Defendants' First Set of Requests for Production of Documents	9
11	July 15, 2015, Letter	4
12	July 16, 2015, email	2
13	July 20, 2015, email	1
14	July 29, 2015 letter	2
15	July 29, 2015 email	2
16	July 31, 2015 email	1
17	August 4, 2015 and August 6, 2015 email exchange	2

² Exhibit Page counts are exclusive of exhibit slip sheets.

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

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

CASE NO. CV14-01712
DEPT. 6

Plaintiff,
vs.

MS
**[PROPOSED] ORDER GRANTING
DEFENDANTS' SECOND MOTION TO
COMPEL DISCOVERY RESPONSES**

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

Defendants.

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

Counterclaimants,
vs

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

Counter-defendants.

The Court, having reviewed Defendants' Second Motion to Compel Discovery Responses for Defendants' Second Set of Requests for Written Discovery filed on August 13, 2015, and good cause appearing,

IT IS HEREBY ORDERED:


Plaintiffs shall have to and including ~~Tuesday~~ ^{Wednesday, 19th} August 18, 2015, by 12:00 p.m., produce supplemental responses to Defendant's First set of written discovery.

DATED this 17th day August, 2015.


DISTRICT COURT JUDGE

Respectfully Submitted by:

DICKINSON WRIGHT



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18 *Jerry Herbst*

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

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

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

CASE NO. CV14-01712

DEPT. 6

STIPULATION AND [PROPOSED]
ORDER TO CONTINUE TRIAL

Plaintiff,

vs.

(SECOND REQUEST)

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

Defendants.

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

Counterclaimants,

vs

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

6
7 Counter-defendants.
8
9

10
11 Plaintiffs Edward C. Wooley and Judith A. Wooley, individually and as trustees of the
12 Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, Plaintiffs/ Counter-
13 defendants Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund, and
14 Overland Development Corporation (collectively, "Plaintiffs"); and Defendants/ Counterclaimants
15 Berry-Hinckley Industries and Jerry Herbst (collectively, "Defendants," and together with Plaintiffs,
16 "the Parties"), by and through their respective attorneys of record, hereby stipulate and agree that
17 good cause exists for this Court to enter an order to vacate the trial date scheduled to begin on
18 August 29, 2016 based on the following:

19 1. The Parties need to conduct significant additional discovery, including discovery
20 relating to expert disclosures.

21 2. Specifically, Plaintiffs still need to provide Defendants with (1) Plaintiffs' tax returns
22 that have not yet been provided; (2) any new information relating to the current re-let status of the
23 property located in Carson City, Nevada, owned by the Wooley Plaintiffs; (3) new information
24 relating to the Wooley Plaintiffs' efforts to refinance the Wooley Plaintiffs' loan on the property
25 located in Carson City, Nevada; (4) information relating to Plaintiffs' tax calculations performed by
26 Plaintiffs' accountants and referenced as part of Plaintiffs' responses to Defendants' interrogatories;
27 (5) Plaintiffs' NRCP 16.1 damages calculations; and (6) any other supplemental information
28 requested by Defendants.

3. Accordingly, the Parties stipulate to a short continuance of the trial date, up to and
including 180 days beyond the presently scheduled date of August 29, 2016.

4. The Parties agree to appear and reschedule the trial within five (5) days of the date of
this Court's Order approving the Parties' stipulation.

1 The parties further stipulate and agree that should this Court enter an order continuing the
2 trial, the following deadlines in the March 14, 2016, Stipulation and Order on file herein shall be
3 amended as follows:

4 1. The discovery deadline shall be extended until sixty (60) days before the first day of
5 the rescheduled trial; provided, however, that if the 60th day before trial falls on a weekend or
6 holiday, the deadline shall be the following judicial day.

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

11 3. The deadline to serve expert disclosures shall be extended until ninety (90) days
12 before the close of discovery; provided, however, that if the 90th day before the close of discovery
13 falls on a weekend or holiday, the deadline shall be the following judicial day.

14 4. The deadline to serve rebuttal expert disclosures shall be extended until thirty (30)
15 days after the deadline to file initial expert disclosures; provided, however, that if the 30th day after
16 initial expert disclosures falls on a weekend or holiday, the deadline shall be the following judicial
17 day.

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

3 **AFFIRMATION**
4 **Pursuant to NRS 239B.030**


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


7 Dated this 26th day of April, 2016.

Dated this 26th day of April, 2016.

8 Attorneys for Plaintiffs

Attorneys for Defendants

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ORDER

This Court, having reviewed the Stipulation to Continue Trial submitted by the parties, and good cause appearing,

IT IS HEREBY ORDERED that good cause exists to vacate the trial date in the above-referenced matter.

IT IS FURTHER ORDERED that the parties shall reset the trial within five (5) days of this Order, unless this Court waives this requirement.

IT IS FURTHER ORDERED that the discovery deadline shall be extended until 60 days before the first day of the rescheduled trial; provided, however, that if the 60th day before trial falls on a weekend or holiday, the deadline shall be the following judicial day.

IT IS FURTHER ORDERED that the deadline to serve, file, and submit for decision any dispositive motions shall be extended until 30 days before the first day of the rescheduled trial; provided, however, that if the 30th day before trial falls on a weekend or holiday, the deadline shall be the following judicial day.

IT IS FURTHER ORDERED that the deadline to serve expert disclosures shall be extended until ninety (90) days before the close of discovery; provided, however, that if the 90th day before the close of discovery falls on a weekend or holiday, the deadline shall be the following judicial day.

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1 IT IS FURTHER ORDERED that the deadline to serve rebuttal expert disclosures shall be
2 extended until 30 days after the deadline to file initial expert disclosures; provided, however, that if
3 the 30th day after initial expert disclosures falls on a weekend or holiday, the deadline shall be the
4 following judicial day.

5 *No further continuances will be*
6 *granted. JB*

7
8 IT IS SO ORDERED.

9 DATED this 14 day of May, 2016.

10 
11 DISTRICT COURT JUDGE

12 Respectfully submitted by:

13 DICKINSON WRIGHT, PLLC

14 

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CERTIFICATE OF SERVICE

I certify that I am an employee of DICKINSON WRIGHT, PLLC, and that on this date, pursuant to NRCP 5(b), I am serving the attached **STIPULATION AND ORDER TO CONTINUE TRIAL (SECOND REQUEST)** on the party(s) set forth below by:

- ☒ Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, Reno, Nevada, postage prepaid, following ordinary business practices.
- ☐ By electronic service by filing the foregoing with the Clerk of Court using the E Flex system, which will electronically mail the filing to the following individuals.
- ☐ Certified Mail
- ☐ (BY PERSONAL DELIVERY) by causing a true copy thereof to be hand delivered this date to the addressee(s) set forth below.
- ☐ (BY FACSIMILE) on the parties in said action by causing a true copy thereof to be telecopied to the number indicated after the addressees) noted below. addressed as follows:
- ☒ By email to the email addresses below.
- ☐ Federal Express (or other overnight delivery)

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DATED this 26th day of April, 2016.


An Employee of DICKINSON WRIGHT, PLLC

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

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

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

Plaintiffs,

v.

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

Defendants.

Case No. CV14-01712

Dept. 6

**MOTION FOR SUMMARY JUDGMENT
OF PLAINTIFFS EDWARD C. WOOLEY
AND JUDITH A. WOOLEY**

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5	<i>Nev. Contract Servs., Inc. v. Squirrel Companies, Inc.</i> ,	
6	119 Nev. 157, 68 P.3d 896 (2003)	7
7	<i>Owens-Corning Fiberglass Corp. v. Texas Comm. Bank Nat'l Ass'n</i> ,	
	104 Nev. 556, 763 P.2d 335 (1988)	8
8	<i>Pegasus v. Reno Newspapers, Inc.</i> ,	
9	118 Nev. 706, 57 P.3d 82 (2002)	5
10	<i>Reno Club, Inc. v. Young Investment Co.</i> ,	
11	64 Nev. 312, 182 P.2d 1011 (1947)	6
12	<i>Torrealba v. Kesmetis</i> ,	
	124 Nev. 95, 178 P.3d 716 (2008)	6
13	<i>Valley Bank v. Marble</i> ,	
14	105 Nev. 366, 775 P.2d 1278 (1989)	5
15	<i>Washington Trust Bank v. Circle K Corp.</i> ,	
	15 Wash.App. 89, 546 P.2d 1249 (1976)	12
16	<i>Wood v. Safeway</i> ,	
17	121 Nev. 724, 121 P.3d 1026 (2005)	5, 6
18		
19	<u>NEVADA RULES OF CIVIL PROCEDURE</u>	
20	Nev. R. Civ. P. 56 (West 2015)	1, 6
21		
22	<u>FEDERAL STATUTES</u>	
23	26 U.S.C. § 1031 (West 2016)	1
24		
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26		
27		
28		

1 **I.**

2 **INTRODUCTION**

3 Plaintiffs EDWARD C. WOOLEY (“Wooley”) and JUDITH A. WOOLEY (collectively,
4 “the Wooley Plaintiffs”) move for summary judgment on Counts 3 and 4 of the First Amended
5 Complaint filed on January 21, 2015, which seek, respectively, to recover damages incurred as a
6 result of the breach of a long-term corporate lease agreement by defendant BERRY-HINCKLEY
7 INDUSTRIES (“BHI”) and as a result of the subsequent breach of the personal guaranty of
8 BHI’s payment and performance under the lease agreement by defendant Jerry Herbst (“Herbst”)
9 (BHI and Herbst collectively referred to herein as “Defendants”).

10 Summary judgment is proper since the plain terms of the underlying documents impose
11 unequivocal payment obligations on Defendants and Defendants without question are in default
12 of these obligations. Accordingly, the Wooley Plaintiffs request that the Court enter summary
13 judgment in their favor and against Defendants, jointly and severally, for the amount of actual
14 damages immediately due and owing to the Wooley Plaintiffs.

15 This motion is made pursuant to NRCP 56, the attached memorandum of points and
16 authorities and exhibits thereto, the affidavit of Edward C. Wooley, the affidavit of Daniel
17 Gluhaich, the affidavit of Brian P. Moquin, all pleadings and papers in the record, and upon such
18 further evidence and argument that may be presented in reply and at the hearing on the motion.

19 **II.**

20 **UNDISPUTED MATERIAL FACTS**

21 On July 1, 2005, as part of a property exchange pursuant to 26 U.S.C. § 1031 (a “1031
22 Exchange”), the Wooley Plaintiffs entered into a Purchase and Sale Agreement to purchase a
23 commercial property located at 1820 East U.S. Highway 50, Carson City, Nevada (the
24 “Highway 50 Property”). [Decl. Edward C. Wooley at ¶ 3; Ex. 1.] The Purchase and Sale
25 Agreement contained a lease-back provision under which the seller would lease back the
26 Highway 50 Property for a period of twenty years (the “Lease Term” at a base annual rental rate
27 of \$272,000.00 with the annual rental rate increasing by two percent per year. [Decl. Wooley at
28 ¶ 4; Ex. 1.1 at ¶ D.]

1 On December 2, 2005, BHI and the Wooley Plaintiffs executed a Lease Agreement (the
2 “Highway 50 Lease”) on the Highway 50 Property containing the lease terms from the Purchase
3 and Sale Agreement. [Decl. Wooley at ¶ 5; Ex. 2.]

4 As part of the Wooley Plaintiff’s efforts to refinance the mortgage on the Highway 50
5 Property, in August 2006 they commissioned an appraisal of the highway 50 Property from
6 Birch|REA Partners, Inc. (the “2006 Appraisal”). The appraisal was issued on December 8,
7 2006 and concluded that the fair market value of the Highway 50 Property as leased was
8 \$3,430,000.00. [Decl. Wooley at ¶ 6; Ex. 3.]

9 On February 17, 2007, counsel for Herbst sent an offer letter to the Wooley Plaintiffs and
10 other landlords indicating that Herbst intended to acquire BHI’s convenience store assets, which
11 included the lease of the Highway 50 Property. [Decl. Wooley at ¶ 7; Ex. 4.] In the offer letter,
12 Herbst offered to personally guarantee BHI’s payments and performance under the Highway 50
13 Lease in return for amending certain terms in the Highway 50 Lease. [Decl. Wooley at ¶ 8; Ex.
14 4.1–4.3.]

15 On or about March 9, 2007, the Wooley Plaintiffs executed and sent to counsel for
16 defendant Jerry Herbst a Landlord’s Estoppel Certificate, which stated that the Lease on the
17 Highway 50 Property commenced in November 2005 and would expire in November 2025.
18 [Decl. Wooley at ¶ 9; Ex. 5.]

19 In consideration for Herbst providing a personal guaranty of the Highway 50 Lease, on
20 March 12, 2007, the Wooley Plaintiffs executed an Amendment to the Highway 50 Lease, which
21 modified certain provisions of the original Highway 50 Lease but did not change the Lease Term
22 nor did it substantively modify the remedies available in the event of a breach. [Decl. Wooley at
23 ¶ 10; Ex. 6.]

24 Also on March 12, 2007, Herbst executed a Guaranty Agreement (the “Herbst
25 Guaranty”) ensuring BHI’s payment and performance under the Highway 50 Lease. [Decl.
26 Wooley at ¶ 11; Ex. 7.]

27 On April 20, 2007, the Wooley Plaintiffs signed a Memorandum of Lease confirming
28 that the lease term on the Highway 50 Property commenced on December 1, 2005 and continued

1 until November 30, 2025. This Memorandum of Lease was also signed by the corporate
2 secretary of BHI and was duly notarized. [Decl. Wooley at ¶ 12; Ex. 8.]

3 On June 29, 2011, BHI and the Wooley Plaintiffs executed a Second Amendment to the
4 Highway 50 Lease, which freed up moneys held in escrow for BHI to build out the property and
5 which changed the Base Monthly Rent from \$25,000.00 per month to \$20,025.82 per month.
6 This Second Amendment did not modify the terms of the Herbst Guaranty, nor did it
7 substantively modify the Lease Term or the remedies available in the event of a breach.
8 However, Section 4 changed to May the month in which the Base Monthly Rent would increase
9 by 2% per annum as provided for by Section 4(B) of the Highway 50 Lease. [Decl. Wooley at ¶
10 13; Ex. 9.]

11 On March 1, 2013, BHI failed to tender rent payments under the Highway 50 Lease. As
12 a result, the Wooley Plaintiffs engaged an attorney to contact BHI and Herbst to demand
13 payment. [Decl. Wooley at ¶ 14.]

14 On March 18, 2013, counsel for Defendants sent a letter to the Wooley Plaintiffs'
15 attorney confirming that BHI and Herbst had in fact breached the Highway 50 Lease and the
16 Herbst Guaranty, respectively, and had no intention of curing their breaches. [Decl. Wooley at ¶
17 15; Ex. 10.]

18 On June 3, 2013, counsel for Defendants sent a letter to the Wooley Plaintiffs' attorney
19 informing them for the first time that BHI had subleased 33.7% of the Highway 50 Property to
20 B&J Pizza, Inc. d/b/a Little Caesar's Pizza ("B&J Pizza") at a rental rate of \$2,485.80 per
21 month. Shortly thereafter, B&J Pizza paid the Wooley Plaintiffs rent and late fees for the
22 months of March, April, and May 2013. [Decl. Wooley at ¶ 16; Ex. 11.]

23 Because BHI failed to pay the property taxes due on the Highway 50 Property, in direct
24 violation of Section 8 of the Highway 50 Lease, on July 15, 2013 the Wooley Plaintiffs paid
25 \$1,051.01 to the City of Carson City, Nevada Assessor's Office. [Decl. Wooley at ¶ 17; Ex. 12.]

26 Because BHI allowed insurance on the Highway 50 Property to lapse, in direct violation
27 of Section 10 of the Highway 50 Lease, on June 28, 2013 the Wooley Plaintiffs obtained
28 replacement insurance on the Highway 50 Property. On July 19, 2013, the Wooley Plaintiffs

1 paid the initial premium payment of \$735.00. [Decl. Wooley at ¶ 18; Ex. 13.]

2 On July 17, 2013, the Wooley Plaintiffs engaged Coldwell Banker Commercial (the
3 “property manager”) to serve as the property manager for the Highway 50 Property. They
4 subsequently renewed this engagement several times and the engagement is currently active.
5 Throughout the engagement, in addition to reimbursing payments made by the property manager
6 for property taxes, insurance, maintenance, and repairs on the Highway 50 Property, the Wooley
7 Plaintiffs have paid the property manager \$500.00 per month each and every month for their
8 property management services. [Decl. Wooley at ¶ 19; Ex. 14.]

9 The Wooley Plaintiffs incurred expenses totaling \$12,822.53 in operating expenses,
10 maintenance costs, property taxes, and property insurance from July 17, 2013 through December
11 31, 2013. These expenses were advanced by the property manager and then reimbursed by the
12 Wooley Plaintiffs. [Decl. Wooley at ¶ 20; Ex. 15.]

13 The Wooley Plaintiffs incurred expenses totaling \$9,824.63 in operating expenses,
14 maintenance costs, property taxes, and property insurance from January 1, 2014 through
15 December 31, 2014, after crediting the Common Area Maintenance (“CAM”) fees that were
16 paid by B&J Pizza. These expenses were advanced by the property manager and then
17 reimbursed by the Wooley Plaintiffs. [Decl. Wooley at ¶ 21; Ex. 16.]

18 In late Spring 2015, being confronted with the threat of foreclosure due to the fact that
19 they could not afford to pay the mortgage on the Highway 50 Property as a result of BHI’s
20 breach and the resulting lack of income, the Wooley Plaintiffs began efforts to refinance the
21 mortgage we held on the Highway 50 Property. As part of their application to refinance the
22 mortgage with Meadows Bank, on June 9, 2015, they paid \$3,000.00 for an appraisal of the
23 Highway 50 Property. The appraisal was conducted by Evaluations Services of Reno, Nevada
24 and was issued on June 19, 2015 (the “2015 Appraisal”). The 2015 Appraisal concluded that the
25 “as is” value of the Highway 50 Property following the breach was \$765,000.00. [Decl. Wooley
26 at ¶ 22; Ex. 17.]

27 The Wooley Plaintiffs incurred expenses totaling \$12,165.99 in operating expenses,
28 maintenance costs, property taxes, and property insurance from January 1, 2015 through

1 December 31, 2015, after crediting the CAM fees that were paid by B&J Pizza. These expenses
2 were advanced by the property manager and then reimbursed by the Wooley Plaintiffs. [Decl.
3 Wooley at ¶ 23; Ex. 19.]

4 The Wooley Plaintiffs incurred expenses totaling \$11,098.66 in operating expenses,
5 maintenance costs, property taxes, and property insurance from January 1, 2016 through
6 December 31, 2016, after crediting the CAM fees that were paid by B&J Pizza. These expenses
7 were advanced by the property manager and then reimbursed by the Wooley Plaintiffs. [Decl.
8 Wooley at ¶ 24; Ex. 20.]

9 The Wooley Plaintiffs incurred expenses totaling \$8,065.17 in operating expenses,
10 maintenance costs, property taxes, and property insurance from January 1, 2017 through August
11 31, 2017, after crediting the CAM fees that were paid by B&J Pizza. These expenses were
12 advanced by the property manager and then reimbursed by the Wooley Plaintiffs. [Decl. Wooley
13 at ¶ 25; Ex. 21.]

14 **III.**
15 **ARGUMENT**

16 **A. LEGAL STANDARD**

17 **1. Summary Judgment.**

18 Summary judgment is appropriate when the pleadings, depositions, answers to
19 interrogatories, admissions, and affidavits, if any, that are properly before the Court demonstrate
20 that no genuine issues of material fact exist, and the moving party is entitled to judgment as a
21 matter of law. *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 713, 57 P.3d 82, 87 (2002).
22 Substantive law controls whether factual disputes are material and will preclude summary
23 judgment; other factual disputes are irrelevant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
24 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine issue of material fact is one where the
25 evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Valley*
26 *Bank v. Marble*, 105 Nev. 366, 367, 775 P.2d 1278, 1282 (1989).

27 The Nevada Supreme Court has held that the non-moving party may not defeat a motion
28 for summary judgment by relying “on gossamer threads of whimsy, speculation and conjecture.”

1 *Wood v. Safeway*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005). When a motion for summary
2 judgment is made and supported as required by NRCP 56, the non-moving party must not rest
3 upon general allegations and conclusions, but must by affidavit or otherwise set forth specific
4 facts demonstrating the existence of a genuine factual issue. *Id.*

5 The pleadings and proof offered in a motion for summary judgment are construed in the
6 light most favorable to the non-moving party. *Hoopes v. Hammargren*, 102 Nev. 425, 429, 725
7 P.2d 238, 241 (1986). However, the non-moving party still “bears the burden to ‘do more than
8 simply show that there is some metaphysical doubt’ as to the operative facts in order to avoid
9 summary judgment being entered.” *Wood, supra*, 121 Nev. at 732, 121 P.3d at 1031. “To
10 successfully defend against a summary judgment motion, ‘the nonmoving party must transcend
11 the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a
12 genuine issue of material fact.’” *Torrealba v. Kesmetis*, 124 Nev. 95, 100, 178 P.3d 716, 720
13 (2008) (quoting *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 72 P.3d 131 (2007)).

14 **2. Interpretation of contract terms.**

15 Under Nevada law, there is no right to interpret an agreement as meaning something
16 different from what the parties intended as expressed by the language they saw fit to employ.
17 *Reno Club, Inc. v. Young Investment Co.*, 64 Nev. 312, 324, 182 P.2d 1011, 1017 (1947). When
18 the contract at issue is clear on its face, the Court must enforce the contract as it is written.
19 *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 776, 121 P.3d 599, 603 (2005). “The
20 court has no authority to alter the terms of an unambiguous contract.” *Id.*; see also *Kaldi v.*
21 *Farmers Ins. Exch.*, 117 Nev. 273, 281, 21 P.3d 16, 21 (2001) (stating that courts are not free to
22 modify or vary the terms of an unambiguous contract). Where a contract is unambiguous, parole
23 evidence may not be introduced to interpret the agreement of the parties. See *Margrave v.*
24 *Dermody Props.*, 110 Nev. 824, 829, 878 P.2d 291, 294 (1994), citing *Farmers Ins. Exch. v.*
25 *Young*, 108 Nev. 328, 333 n.3, 832 P.2d 376 (1992); *Canfield v. Gill*, 101 Nev. 170, 171 n.1, 693
26 P.2d 1259 (1985).

27 **3. Interpretation of express indemnity provisions.**

28 An indemnity provision must be interpreted by the Court as a matter of law so long as

1 extrinsic evidence is not required to interpret the indemnity language. *Continental-Heller Corp.*
2 *v. Amtech Mechanical Services, Inc.*, 53 Cal.App.4th 500, 504, 61 Cal.Rptr.2d 668, 670 (1997).
3 Contractual, or express, indemnity arises when two parties agree, pursuant to a contractual
4 provision, that one party will reimburse the second party for liability from the first party's
5 actions. *See George L. Brown Ins. Agency, Inc. v. Star Ins. Co.* (“*George L. Brown*”), 126 Nev.
6 316, 237 P.3d 92, 96 (2010); *Continental Casualty Co. v. Farnow*, 79 Nev. 428, 386 P.2d 90
7 (1963).

8 Where the parties have expressly contracted with respect to the duty to indemnify, the
9 extent of that duty must be determined from the contract. *See George L. Brown, supra*, 126 Nev.
10 at 316. Thus, the contract should be read as a whole and given a construction that will
11 accomplish the object of providing indemnity for the losses covered by the contract. *American*
12 *Excess Inc. Co. v. MGM Grand Hotels, Inc.*, 102 Nev. 601, 604, 729 P.2d 1352 (1986); *National*
13 *Union Fire Ins. v. Reno's Exec. Air*, 100 Nev. 360, 682 P.2d 1380 (1984).

14 **B. BHI BREACHED THE HIGHWAY 50 LEASE**

15 To prevail on a breach of contract claim, a plaintiff must establish that (A) a valid
16 contract existed between plaintiff and defendant, (B) the plaintiff performed or was excused
17 from performance, (C) the defendant breached, and (D) plaintiff sustained damages as a result of
18 the breach. *Nev. Contract Servs., Inc. v. Squirrel Companies, Inc.*, 119 Nev. 157, 161, 68 P.3d
19 896, 899 (2003); *see also Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000) (“[a]
20 breach of contract may be said to be a material failure of performance of a duty arising under or
21 imposed by agreement”).

22 Here, in pertinent part, Section 4(D) of the Highway 50 Lease states:

23 All Rental and other Monetary Obligations which Lessee is required to pay
24 hereunder shall be the unconditional obligation of Lessee and shall be payable in
25 full when due without any setoff, abatement, deferment, deduction or
counterclaim whatsoever, except as set forth herein.

26 [Ex. 2.2 at § 4(D).]

27 Furthermore, in pertinent part, Section 7 of the Highway 50 Lease states:

28 ///

1 It is the intention of the parties except as expressly provided herein that this Lease
2 shall not be terminable for any reason by Lessee, and that Lessee shall in no event
3 be entitled to any abatement of, or reduction in, Rental payable under this Lease,
4 except as otherwise expressly provided herein. Any present or future law to the
contrary shall not alter this agreement of the parties.

5 [Ex. 2.4 at § 7.] It is undisputed that BHI was obligated under the Highway 50 Lease to make
6 monthly payments to the Wooley Plaintiffs but failed to do so beginning on March 1, 2013 and
7 continuing to the present date. [Decl. Wooley at ¶¶ 14, 15; Ex. 10.] It is further undisputed that
8 despite Plaintiffs' demands, BHI made no further payments as required under the Highway 50
9 Lease.

10 Consequently, it is undisputed that BHI breached the Highway 50 Lease.

11 **C. HERBST BREACHED THE PERSONAL GUARANTY**

12 Under Nevada law, an "unconditional" guaranty is enforceable by its terms. *See Daly v.*
13 *Del E. Webb Corp.*, 96 Nev. 359, 361, 609 P.2d 319, 320 (1980); *Owens-Corning Fiberglass*
14 *Corp. v. Texas Comm. Bank Nat'l Ass'n*, 104 Nev. 556, 558-59, 763 P.2d 335, 336 (1988).
15 Specifically, an "absolute guaranty is one which is conditioned solely upon the event of default
16 by the principal obligor of fulfillment of the duty the performance of which is guaranteed." *Id.*

17 Under the Personal Guaranty, Herbst "unconditionally, absolutely and irrevocably
18 guarantees the timely payment and performance of each of BHI's obligations arising out of and
19 under the Lease. . . . The Guarantor's guaranty made hereby is a guaranty of timely payment
20 and performance of the Guaranteed Obligations and note merely of collectability or
21 enforceability of such obligations." [Ex. 7.1 at ¶ 1.] The Personal Guaranty further provides that
22 Defendant "agrees that if and to the extent that BHI either (a) fails to satisfy any of the
23 Guaranteed Obligations and fails to remedy such failure within thirty (30) days after receiving
24 written notice from the Lessor of such failure, . . . the Guarantor will be directly responsible for
25 the full extent of any unsatisfied Guaranteed Obligations." *[Id.]* The Personal Guaranty further
26 provides that, "This agreement is an unconditional, absolute, present and continuing guaranty of
27 payment and performance . . ." *[Id.]*

28 ///

1 Furthermore, the Personal Guaranty provides:

2 [T]he obligations of the Guarantor hereunder shall not be impaired, affected or
3 released by, any of the following: (i) any modification, supplement, extension or
4 amendment of any of the Guaranteed Obligations or the Lease; [* * *] (vi) any
5 transfer of the assets of Lessor to, or any consolidation or merger of the Lessor
6 with or into, any other entity; [* * *]. The Guarantor hereby waives any defense
7 to its obligations hereunder that might arise as a result of any of the foregoing,
and hereby waives the effect of any fact, circumstance or event of any nature
whatsoever that would exonerate, or constitute or give rise to a defense to, the
obligation of a surety or guarantor.

8 [Ex. 7.1–7.2 at ¶ 2.] The Second Amended Leases had no effect on the Personal Guaranty.

9 [Decl. Wooley at ¶ 13; Ex. 9.]

10 It is undisputed that Herbst was notified of BHI’s breach of the Highway 50 Lease but
11 failed to meet his obligations under the Personal Guaranty. [Decl. Wooley at ¶¶ 14, 15; Ex. 10.]

12 Consequently, it is beyond dispute that Herbst breached the Personal Guaranty and is
13 absolutely liable to the Wooley Plaintiffs for damages.

14 **D. BHI AND HERBST ARE LIABLE FOR DAMAGES**

15 “It is fundamental that contract damages are prospective in nature and are intended to
16 place the nonbreaching party in as good a position as if the contract had been performed.” *Colo.*
17 *Environments, Inc. v. Valley Grading Corp.*, 105 Nev. 464, 470, 779 P.2d 80, 84 (1989); *Eaton*
18 *v. J. H., Inc.*, 94 Nev. 446, 460, 581 P.2d 14, 16 (1978) (“The goal of a damage award for breach
19 of contract is that ‘the breaching party must place the nonbreaching party in as good a position
20 as if the contract were performed.’”).

21 By virtue of BHI’s breach of the Highway 50 Lease and the breach by Herbst of the
22 Personal Guaranty, the Wooley Plaintiffs incurred significant damages for which Defendants are
23 jointly and severally liable. The affidavits and exhibits attached hereto and submitted herewith
24 properly evidence the amount of Defendants’ liabilities to the Wooley Plaintiffs sufficient to
25 support summary judgment on the issue of damages. *GM Dev. Co. v. Community Am. Mortgage*
26 *Corp.*, 165 Ariz. 1, 5-6, 795 P.2d 827, 831-32 (App. 1990) (awarding summary judgment against
27 lessee and guarantor where landlord’s affidavit recited that it was made on personal knowledge
28 and business records and calculated the amount due and owing). These damages fall into three

categories: breach-induced expenses, accelerated rent, and diminution in value. Each category of damages is addressed below.

1. Breach-induced expenses.

The Wooley Plaintiffs are entitled to damages for operating expenses by virtue of the Highway 50 Lease, which allows recovery of “costs of operating the Property until relet.” [Ex. 2.17 at § 20(B)(i)(v).]

The Highway 50 Lease required BHI to maintain, at its sole expense, insurance on the Highway 50 Property and insurance related to its operations on the Highway 50 Property “throughout the Lease Term.” [Ex. 2.4–2.7 at § 10.] In the event that BHI failed to comply with the insurance-related terms of the Highway 50 Lease, the Wooley Plaintiffs are “entitled to procure such insurance” and “[a]ny sums expended by Lessor in procuring such insurance shall be Additional Rent and shall be repaid by Lessee, together with interest thereon at the Default Rate, from the time of payment by Lessor until fully paid by Lessee . . .” [Ex. 2.7; *see also* Ex. 2.3 at § 7.]

The Highway 50 Lease required BHI to pay all charges for utility services supplied to the Highway 50 Property during the Lease Term. Expenses incurred by the Wooley Plaintiffs due to failure of BHI to pay utility charges are deemed Additional Rent, with the Wooley Plaintiffs having the same rights and remedies as for a failure to pay Base Annual Rent. [Ex. 2.4 at § 9.] The Wooley Plaintiffs are further entitled to compensation for this expense by virtue of the Highway 50 Lease, which allows recovery of “costs of operating the Property until relet.” [Ex. 2.17 at § 20(B)(i)(v).]

The Highway 50 Lease required BHI, at its sole cost and expense, to handle all maintenance and repair activities on the Highway 50 Property. [Ex. 2.11 at § 13.]

The Wooley Plaintiffs incurred expenses as a result of Defendants’ breaches totaling \$58,762.99, not including attorney fees and costs incurred in the instant matter. [Decl. Wooley at ¶ 27.] These expenses are comprised of the following:

- \$1,051.01 for outstanding property taxes on the Highway 50 Property. [Decl. Wooley at ¶ 17; Ex. 12.]

- 1 • \$735.00 for the initial premium payment for replacement insurance on the Highway 50
2 Property. [Decl. Wooley at ¶ 18; Ex. 13.]
- 3 • \$12,822.53 in operating expenses, maintenance costs, property taxes, and property
4 insurance from July 17, 2013 through December 31, 2013. [Decl. Wooley at ¶ 20; Ex. 15.]
- 5 • \$9,824.63 in operating expenses, maintenance costs, property taxes, and property
6 insurance from January 1, 2014 through December 31, 2014. [Decl. Wooley at ¶ 21; Ex. 16.]
- 7 • \$12,165.99 in operating expenses, maintenance costs, property taxes, and property
8 insurance from January 1, 2015 through December 31, 2015. [Decl. Wooley at ¶ 23; Ex. 19.]
- 9 • \$11,098.66 in operating expenses, maintenance costs, property taxes, and property
10 insurance from January 1, 2016 through December 31, 2016. [Decl. Wooley at ¶ 24; Ex. 20.]
- 11 • \$8,065.17 in operating expenses, maintenance costs, property taxes, and property
12 insurance from January 1, 2017 through August 31, 2017. [Decl. Wooley at ¶ 25; Ex. 21.]
- 13 • \$3,000.00 for an appraisal of the Highway 50 Property on June 9, 2015. [Decl. Wooley at
14 ¶ 22; Exs. 17, 18.] The Highway 50 Lease expressly allows for recovery of this expense in
15 Section 7 and 20(B)(v). [Ex. 2.3 at § 7; Ex. 2.18 at § 20(B)(v).]

16 The Highway 50 Lease imposes a late payment charge of 5% for failure to pay within ten
17 days any payment required under its terms. [Ex. 2.2–2.3 at § 4.] The Highway 50 Lease also
18 imposes interest at the “Default Rate” of 18% on any payments required under its terms that are
19 not paid within ten days. [*Id.*] With the late payment charges and interest are applied, as of
20 October 16, 2017 the total damages for expenses is \$83,735.15. [Decl. Wooley at ¶ 27; Ex. 22.1
21 at Table II; Decl. Moquin at ¶¶ 3–5; Ex. 22.1 at Table II.]

22 **2. Accelerated rent damages.**

23 The Highway 50 Lease provides that in the event of a default, the Wooley Plaintiffs are
24 entitled to damages for accelerated rent, the amount thereof being “the present value of the
25 balance of the Base Annual Rental for the remainder of the Lease Term using a discount rate of
26 four percent (4%), less the present value of the reasonable rental value of the Property for the
27 balance of the Term remaining after a one-year period following repossession using a discount
28 rate of four percent (4%).” [Ex. 2.17 at § 20(B)(i)(iv).] Applying the specified discount rate of

1 4%, the net present value of future rent from March 1, 2013 through the end of the Lease Term,
2 including 2% increases per annum as specified in the Highway 50 Lease [Ex. 2.2 at § 4(B)] is
3 \$3,173,863.70. [Decl. Wooley at ¶ 28; Decl. Moquin at ¶ 8; Ex. 22.1–22.5 at Table III.] The fair
4 rental value of the Highway 50 Property is \$7,500 per month. [Decl. Gluhaich at ¶ 8.] The net
5 present value of the fair rental value applied for the period one year following repossession of
6 the Highway 50 Property through the end of the Lease Term is \$366,947.05. [Decl. Wooley at ¶
7 28; Decl. Moquin at ¶ 9; Ex. 22.1–22.5 at Table IV.] Hence, the amount of accelerated rent
8 damages is \$2,777,087.05. Including interest at the Default Rate as authorized by Section 4 of
9 the Wooley Lease, as of October 16, 2017, total damages for accelerated rent is \$5,091,579.88.
10 [Decl. Wooley at ¶ 30; Ex. 22.5]

11 **3. Damages for diminution in value.**

12 Under Nevada law, a landlord can recover damages for the diminution in value of a
13 property due to a tenant's breach of a lease. *Hornwood v. Smith's Food King No. 1* ("Hornwood
14 I"), 105 Nev. 188, 190, 772 P.2d 1284, 1286 (1989), *aff'd*, *Hornwood v. Smith's Food King No.*
15 *I* ("Hornwood II"), 107 Nev. 80, 807 P.2d 208 (1991). Damages for diminution in value are
16 measured by "the difference between the 'present worth of the property with the lease less the
17 present worth of the property without the lease.'" *Hornwood II*, 107 Nev. at 84 (*citing*
18 *Washington Trust Bank v. Circle K Corp.*, 15 Wash.App. 89, 546 P.2d 1249 (1976)). In the
19 instant case, BHI expressly indemnified the Wooley Plaintiffs against losses in the form of
20 diminution in value in the event that BHI defaulted or otherwise breached the Highway 50
21 Lease. [Ex. 2.13 at § 15; Ex. 2.35 at def. of "Losses."]

22 The fair market value of the Highway 50 Property with the lease was determined to be
23 \$3,430,000.00 through an appraisal commissioned in 2007 by the Wooley Plaintiffs. [Decl.
24 Wooley at ¶ 6; Decl. Gluhaich at ¶ 5; Ex. 3.] Based on his knowledge of the market and his
25 experience in marketing the Highway 50 Property, the Wooley Plaintiffs' designated expert
26 Daniel Gluhaich found the fair market value of the Highway 50 Property immediately prior to
27 BHI's breach of the Highway 50 Lease on March 1, 2013 to be \$3,430,000.00. [Decl. Gluhaich
28 at ¶ 6.]

1 The fair market value of the Highway 50 Property without the lease was determined to be
2 \$765,000.00 through an appraisal commissioned in 2007 by the Wooley Plaintiffs. (the “2015
3 Appraisal”). [Decl. Wooley at ¶ 29; Ex. 17; Decl. Gluhaich at ¶ 9.] Based on his review of the
4 2015 Appraisal, his experience in marketing the Highway 50 Property, and his knowledge of the
5 real estate market in Northern Nevada, the Wooley Plaintiffs’ designated expert Daniel Gluhaich
6 found the fair market value of the Highway 50 Property without the lease following BHI’s
7 breach of the Highway 50 Lease to be \$765,000.00. [Decl. Gluhaich at ¶ 10.]

8 Accordingly, the diminution in value damages sustained by the Wooley Plaintiffs due to
9 BHI’s breach of the Highway 50 Lease are \$2,665,000.00. [Decl. Wooley at ¶ 29; Decl. Moquin
10 at ¶¶ 11, 12(d), 12(f).] With interest applied at the Default Rate as authorized under the
11 Highway 50 Lease, as of October 16, 2017, the total amount for diminution in value is
12 \$4,886,076.71. [*Id.*; Ex. 22.5.]

13 **4. Summary of damages.**

14 The damages caused by Defendants’ breaches of the Highway 50 Lease and Personal
15 Guaranty to which the Wooley Plaintiffs are entitled are summarized including interest accrued
16 through October 16, 2017 as follows:

DESCRIPTION	AMOUNT	INTEREST	TOTAL
Accelerated Rent Damages	\$ 2,777,087.05	\$ 2,314,492.82	\$ 5,091,579.88
Diminution in Value	\$ 2,665,000.00	\$ 2,221,076.71	\$ 4,886,076.71
Expenses and Late Payment Charges	\$ 61,701.14	\$ 22,034.01	\$ 83,735.15
TOTALS:	\$ 5,503,788.19	\$ 4,557,603.55	<u>\$10,061,391.74</u>

20 [Decl. Wooley at ¶ 30; Decl. Moquin at ¶ 12; Ex. 22.5 at Table VII.]

21 Interest is accruing at a rate of \$2,714.20 per day. [Decl. Wooley at ¶ 31; Decl. Moquin
22 at ¶ 13; Ex. 22.5 at Table VIII.]

23 **IV.**

24 **CONCLUSION**

25 Based on the foregoing, the Wooley Plaintiffs respectfully request that the Court grant
26 summary judgment with respect to the issue of liability of defendant Berry-Hinckley Industries
27 for breach of the Highway 50 Lease and with respect to the issue of liability of defendant Jerry
28

1 Herbst for breach of the Personal Guaranty and award the Wooley Plaintiffs damages in the
2 amount of \$10,061,391.74 plus additional interest of \$2,714.20 per day for every day after
3 October 16, 2017 through entry of judgment.

4 Respectfully submitted,

5 LAW OFFICES OF BRIAN P. MOQUIN

6
7 DATED: October 16, 2017

By: 

8 BRIAN P. MOQUIN

9 *Attorneys for Plaintiffs*

10 *EDWARD C. WOOLEY and JUDITH A. WOOLEY*

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AFFIRMATION

(Pursuant to NRS 239B.030)

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

LAW OFFICES OF BRIAN P. MOQUIN

DATED: October 17, 2017

By: 

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CERTIFICATE OF SERVICE

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

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

DATED: October 17, 2017



BRIAN P. MOQUIN

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19 LARRY J. WILLARD,
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23 **IN AND FOR THE COUNTY OF WASHOE**

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

Plaintiffs,

v.

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

Defendants.

Case No. CV14-01712

Dept. 6

INDEX OF EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>PAGES</u>
1	<i>Purchase and Sale Agreement</i> dated July 1, 2005 for purchase of the Highway 50 Property	13
2	<i>Lease Agreement</i> dated December 2, 2005 for the Highway 50 Property	45
3	<i>Complete Appraisal, Summary Report Format</i> for the Highway 50 Property issued December 8, 2006 by Birch REA Partners, Inc.	151
4	Letter and Attachments from Sujata Yalamanchili, Esq. to Landlords dated February 17, 2007 re Herbst Acquisition of BHI	4
5	<i>Landlord's Estoppel Certificate</i> for the Highway 50 Property executed on or about March 9, 2007	2
6	<i>First Amendment to Lease Agreement</i> dated March 12, 2007 for the Highway 50 Property	9
7	<i>Guaranty Agreement</i> dated March 12, 2007 for the Highway 50 Property	4
8	<i>Memorandum of Lease</i> , Carson City Recorder File No. 367708, filed May 11, 2007	3
9	<i>Second Amendment to Lease</i> dated June 29, 2011 for the Highway 50 Property	2
10	Letter dated March 18, 2013 from Gerald M. Gordon, Esq. to Edward C. and Judith A. Wooley	2
11	Letter dated June 3, 2013 from John P. Desmond to L. Steven Goldblatt with attached <i>Standard Multi-Tenant Shopping Center Lease – Net</i> dated October 12, 2012 between Berry Hinckley Industries and B&J Pizza, Inc.	15
12	Receipt and supporting documents for payment of property taxes on July 15, 2013 on the Highway 50 Property by Edward Wooley	3
13	Invoice dated July 2, 2013 from Riverport Insurance Company	1
14	<i>Professional Management Agreement</i> dated July 17, 2013 for the Highway 50 Property between Coldwell Banker Commercial and Ed Wooley	5
15	<i>Monthly Operating Report</i> for December 2013 on the Highway 50 Property	20

NO.	DESCRIPTION	PAGES
16	<i>Monthly Operating Report</i> for December 2014 on the Highway 50 Property	19
17	<i>Appraisal Report</i> on the Highway 50 Property prepared by Evaluations Services issued June 19, 2015	100
18	Bank of America <i>Account Activity Transaction Details</i> for wire transfer dated June 9, 2015 to Meadows Bank	1
19	<i>Monthly Operating Report</i> for December 2015 on the Highway 50 Property	21
20	<i>Monthly Operating Report</i> for December 2016 on the Highway 50 Proper	23
21	<i>Monthly Operating Report</i> for August 2017 on the Highway 50 Property	5
22	<i>Wooley Plaintiffs Computation of Damages</i> spreadsheet	12

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By:  _____

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

DATED: October 17, 2017



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Defendants.

Case No. CV14-01712

Dept. 6

AFFIDAVIT OF BRIAN P. MOQUIN

I, Brian P. Moquin, declare:

1. I am an attorney licensed to practice law in the State of California and admitted *pro hac vice* to this Court to represent the plaintiffs in the above-captioned matter. I am over the age of eighteen years and am otherwise *sui juris*. I have personal knowledge of the following facts, and if called and sworn as a witness I could and would testify to the veracity thereof.

2. Plaintiffs Edward C. Wooley ("Wooley") and Judith A. Wooley (collectively, the "Wooley Plaintiffs") seek recovery of damages sustained by virtue of the breach of a long-term corporate lease (the "Highway 50 Lease") on a commercial property they own located at 1820 East William Street, U.S. Highway 50, Carson City, Nevada (the "Highway 50 Property") by Defendant Berry-Hinckley Industries ("BHI") and breach by Defendant Jerry Herbst ("Herbst") of the personal guaranty (the "Herbst Guaranty") securing BHI's payment and performance under the Highway 50 Lease

3. Attached hereto as Exhibit 22 is a true and correct copy of the spreadsheet (the "damages spreadsheet") that Wooley and I collaborated on to compute the damages due and owing by virtue of the breach of the Highway 50 Lease and the Herbst Guaranty. The damages spreadsheet was created using Apple's Numbers application, which is similar in nature to Microsoft Excel.

4. Table I ("Computation Parameters") of the damages spreadsheet contains values used in formulae within the spreadsheet to calculate damage amounts. [Ex. 22.1]

a. The value in the row of Table I marked *1 ("Interest Rate upon Default") was obtained from the Highway 50 Lease. [Ex 2.29 at def. of "Default Rate."]

b. The value in row *2 ("Discount Rate") was obtained from the formula specified in the Highway 50 Lease for computing accelerated rent damages. [Ex. 2.17 at § 20(B)(i)(iv).]

c. The value in row *3 ("Interest Through Date") represents the date through which interest on damages was calculated.

1 d. The values in rows *4 ("Lease Term Start") and *5 ("Lease Term End")
2 were obtained from the Highway 50 Lease and the Memorandum of Lease recorded May
3 11, 2007, which as a temporal range denote the "Lease Term." [Ex. 2.1 at § 3; Ex. 8.1.]

4 e. The value in row *6 ("Date of Abandonment") is the undisputed date
5 on which BHI abandoned the Highway 50 Property. [Decl. Edward C. Wooley at ¶ 14.]

6 f. The value in row *7 ("Fair Market Value with Lease") was obtained
7 from the 2006 appraisal of the Highway 50 Property prepared by Birch|REA Partners, Inc.
8 as corroborated by the expert opinion of Daniel Gluhaich. [Ex. 3.3; Decl. Daniel Gluhaich at
9 ¶¶ 5, 6.]

10 g. The value in row *8 ("Fair Market Value without Lease") was obtained
11 from the appraisal prepared by Evaluation Services (the "2015 Appraisal") as corroborated
12 by the expert opinion of Daniel Gluhaich. [Ex. 17.3; Decl. Gluhaich at ¶¶ 9, 10.]

13 h. The value in row *9 ("Fair Rental Value") was obtained from the
14 expert opinion of Daniel Gluhaich. [Decl. Gluhaich at ¶ 8.]

15 i. The value in row *10 ("B&J Pizza Rent per Month") was obtained from
16 the sublease agreement between B&J Pizza, Inc. d/b/a Little Caesar's Pizza ("B&J Pizza")
17 and Berry-Hinckley Industries. [Ex. 11.1.]

18 5. Table II ("Expenses") of the damages spreadsheet lists recoverable expenses
19 incurred by Wooley and Overland as a result of Defendants' breaches.

20 a. The data appearing in row *1 was obtained from the receipt from the
21 City of Carson City, Nevada Assessor's Office. [Ex. 12.1.]

22 b. The data appearing in row *2 was obtained from the invoice from
23 Riverport Insurance Company. [Ex. 13.1.]

24 c. The data appearing in row *3 was obtained from the Monthly
25 Operating Report on the Highway 50 Property for December 2013. [Ex. 15.4.]

26 d. The data appearing in row *4 was obtained from the Monthly
27 Operating Report on the Highway 50 Property for December 2014 by taking the total
28 expenses of \$19,894.01 and subtracting the Common Area Maintenance fees paid by B&J

1 Pizza, Inc. in the amount of \$9,507.24. [Ex. 16.4.]

2 e. The data appearing in row *5 was obtained from the Wire
3 Transaction Detail receipt for payment of the 2015 Appraisal. [Ex. 18.1.]

4 f. The data appearing in row *6 was obtained from the Monthly
5 Operating Report on the Highway 50 Property for December 2015 by taking the total
6 expenses of \$21,958.23 and subtracting the Common Area Maintenance fees paid by B&J
7 Pizza, Inc. in the amount of \$9,507.24 and their reimbursement of \$285.00. [Ex. 19.4.]

8 g. The data appearing in row *7 was obtained from the Monthly
9 Operating Report on the Highway 50 Property for December 2016 by taking the total
10 expenses of \$20,818.40 and subtracting the Common Area Maintenance fees paid by B&J
11 Pizza, Inc. in the amount of \$9,507.24 and reimbursement of \$212.50. [Ex. 20.4.]

12 h. The data appearing in row *8 was obtained from the Monthly
13 Operating Report on the Highway 50 Property for August 2017 by taking the total
14 expenses of \$13,094.13 and subtracting the Common Area Maintenance fees paid by B&J
15 Pizza, Inc. in the amount of \$5,028.96. [Ex. 21.4.]

16 i. Interest at the Default Rate (Table I at *1) for each line item was
17 applied from the date on which each expense was incurred.

18 6. With respect to the calculation of the amount of accelerated rent damages
19 due and owing for the remainder of the lease term following Defendants' breaches, we
20 used the method specified in the Highway 50 Lease, which states that Lessor shall be
21 entitled to recover the "present value of the balance of the Base annual Rental for the
22 remainder of the Lease Term using a discount rate of four percent (4%), less the present
23 value of the reasonable rental value of the Property for the balance of the Term remaining
24 after a one-year period following repossession using a discount rate of four percent (4%)." [Ex. 2.17 at §20(B)(i)(iv).]

26 7. The "net present value" of future periodic income is the sum of all future
27 payments reduced by a "discount rate" to remove the compound interest that would have
28 accrued had the future payments been received and invested, resulting in the "present

1 value” of such future payments.

2 8. Table III (“Present Value of Future Rent”) of the damages spreadsheet
3 contains an amortized computation of the net present value of rent payments from the
4 date of BHI’s breach of the Highway 50 Lease through the end of the Lease Term, per the
5 formula specified in the Highway 50 Lease. [Ex. 2.17 at § 20(B)(i)(iv).] The “Rent Due”
6 column contains the amount of rent due for month listed in the “Month” column. Rows *2
7 through *13 identify the months in which the 2% annual Rent Adjustment [Ex. 2.2 at §
8 4(B)] to the Base Month Rental [*Id.* at § 4(A)] have applied. The “Net Present Value
9 (Running Total)” column shows the running total of the results of calculating the net
10 present value of future rent payments from the date of the breach through any given
11 month, calculated using the Apple Numbers application’s built-in NPV (i.e., “Net Present
12 Value”) function with a discount rate of 4% per annum [Table I at *2]. To confirm the
13 results, I had an associate who is an attorney and a Certified Public Accountant verify that
14 the calculation of the net present value of future rent was correct.

15 9. Table IV (“Present Value of Fair Rental Value”) of the damages spreadsheet
16 contains an amortized computation of the net present value of the fair rental value of the
17 Highway 50 Property for the period starting one year after BHI’s abandonment through the
18 end of the Lease Term, per the formula specified in the Highway 50 Lease. [Ex. 2.17 at §
19 20(B)(i)(iv).] Row *2 indicates the row at which the net present value of the fair rental
20 value starts to be applied, with all prior rows representing months for which the formula
21 specified in the Highway 50 Lease provides for the full amount of discounted future rent to
22 be recovered. The “Net Present Value (“Running Total”)” column shows the running total
23 of the results of calculating the net present value of the fair rental value from one year
24 following the date of abandonment through any given month, calculated using the Apple
25 Numbers application’s built-in NPV function with a discount rate of 4% per annum.

26 10. Table V (“Accelerated Rent Damages”) of the damages spreadsheet shows
27 the calculation of the total accelerated rent damages recoverable per the formula specified
28 in the Highway 50 Lease. [Ex. 2.17 at § 20(B)(i)(iv).] The total was obtained by taking the

1 net present value of future rent computed in Table III and subtracting the net present value
2 of fair rental value for the period one year following abandonment of the Highway 50
3 Property through the end of the Lease Term computed in Table IV and crediting rent
4 income received from B&J Pizza during the first year following BHI's breach.

5 11. Table VI ("Diminution in Value") of the damages spreadsheet shows the
6 calculation of the damages arising from diminution in value of the Highway 50 Property
7 due to Defendants' breaches. The total was obtained by taking the fair market value of the
8 Highway 50 Property with the lease in place [Table I at * 7] and subtracting the fair market
9 value of the Highway 50 Property without the lease [Table I at *8].

10 12. Table VII ("Total Damages") of the damages spreadsheet provides a
11 summary of all damages due and owing as a result of Defendants' breaches.

12 a. Row *1 contains the total for accelerated rent damages computed in
13 Table V.

14 b. Row *2 contains the total for damages arising from diminution in
15 value computed in Table VI.

16 c. Row *3 contains the total for expenses computed in Table II.

17 d. Interest at the Default Rate [Table I at *1] was applied as provided for
18 in the Highway 50 Lease from the date on which each item of damage was actually
19 incurred through the date specified in Table I at *3.

20 13. Table VIII ("Interest Accrual Rate") of the damages spreadsheet shows the
21 rate of accrual of interest on the damages due and owing as a result of Defendants'
22 breaches. The interest per day was calculated by taking the total interest accrued through
23 October 16, 2017 and subtracting the total interest accrued through the previous day. The
24 interest per month was calculated by multiplying the interest per day value by 365 and
25 then dividing by 12. The interest per year was calculated multiplying the interest per day
26 value by 365.

27 //

28 //

1 I swear under penalty of perjury under the laws of the State of Nevada that the
2 foregoing is true and correct.

3 Executed this 16th day of October 2017.

4
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6 BRIAN P. MOQUIN
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LAW OFFICES OF BRIAN P. MOQUIN

DATED: October 17, 2017

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AND RELATED COUNTERCLAIM

Case No. CV14-01712

Dept. 6

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1 6. In my opinion, the 2006 Appraisal presents a thorough, detailed, professional, and
2 highly compelling analysis of the market value of the Highway 50 Property as leased. I believe
3 that the conclusion reached therein that the fair market value of the Highway 50 Property as
4 leased was \$3,430,000.00 as of August 8, 2006 is well supported both by the facts and analyses
5 included in the 2006 Appraisal and by my personal knowledge of the commercial real estate
6 market in Northern Nevada. Based on my knowledge of the market and my experience serving
7 as broker for the Wooley Plaintiffs regarding the Highway 50 Property, my professional opinion
8 is that the fair market value of the Highway 50 Property immediately prior to BHI's breach of
9 the Highway 50 Lease on March 1, 2013 was \$3,430,000.00.

10 7. In March 2013, the Wooley Plaintiffs contacted me to relate that BHI had
11 breached the Highway 50 Lease. BHI had subleased 33.7% of the Highway 50 Property to B&J
12 Pizza, Inc. d/b/a Little Caesar's Pizza ("B&J Pizza") at a rental rate of \$2,485.80 per month.
13 The Wooley Plaintiffs engaged me to find a tenant for the vacant portion of the Highway 50
14 Property, which I did by listing the Highway 50 Property with several well-established real
15 estate marketing venues. While I have received numerous Letters of Intent expressing interest in
16 the leasing the vacant portion of the property, to date we have not been able to engage a tenant.

17 8. Based on my experience in marketing the Highway 50 Property for lease and my
18 experience and knowledge of the real estate market in Northern Nevada, my professional
19 opinion is that the fair rental value of the entire Highway 50 Property is \$7,500.00 per month.

20 9. In late Spring 2015, I assisted the Wooley Plaintiffs with their efforts to refinance
21 the mortgage they held on the Highway 50 Property. As part of their application to refinance the
22 mortgage with Meadows Bank, the Wooley Plaintiffs commissioned an appraisal of the
23 Highway 50 Property. The appraisal was conducted by Evaluation Services of Reno, Nevada
24 and was issued on June 19, 2015 (the "2015 Appraisal"), a copy of which is attached hereto as
25 Exhibit 17. The 2015 Appraisal concluded that the "as is" market value of the Highway 50
26 Property as of June 19, 2015 was \$765,000.00. [Ex. 17.3]

27 10. Based on my review of the 2015 Appraisal, my experience in marketing the
28 Highway 50 Property following the breach of the Highway 50 Lease by BHI, and my knowledge

1 of the commercial real estate market in Northern Nevada, I believe the "as is" fair market value
2 figure of \$765,000.00 to be accurate and well supported. It is my professional opinion that the
3 "as is" fair market value of the Highway 50 Property immediately following the breach of the
4 Highway 50 Lease by BHI on March 1, 2013 was \$765,000.00.

5 I swear under penalty of perjury under the laws of the State of Nevada that the foregoing
6 is true and correct.

7 Executed this 16th day of October 2017.

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11 DANIEL GLUHAICH
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AFFIRMATION

(Pursuant to NRS 239B.030)

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

LAW OFFICES OF BRIAN P. MOQUIN

DATED: October 17, 2017

By:  _____

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CERTIFICATE OF SERVICE

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

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

DATED: October 17, 2017



BRIAN P. MOQUIN

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18 *Attorneys for Plaintiffs*

19 LARRY J. WILLARD,
20 OVERLAND DEVELOPMENT CORPORATION,
21 EDWARD C. WOOLEY, and JUDITH A. WOOLEY

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

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

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

Plaintiffs,

v.

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

Defendants.

Case No. CV14-01712

Dept. 6

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1 store assets, which included the Highway 50 Property. A true and correct copy of the February
2 17, 2007 offer letter is attached hereto as Exhibit 4.

3 8. In the offer letter, Herbst offered to personally guarantee BHI's payments and
4 performance under the Highway 50 Lease if we agreed to amend the Highway 50 Lease. [Ex.
5 4.4.] Included with the offer letter was a statement from Johnson Jacobson Wilcox dated
6 January 31, 2007 attesting to the fact that Herbst's net worth was in excess of \$200 million. [Ex.
7 4.2.]

8 9. On or about March 9, 2007, we executed and sent to counsel for defendant Jerry
9 Herbst a Landlord's Estoppel Certificate, which stated that the Lease on the Highway 50
10 Property commenced in November 2005 and would expire in November 2025. We also
11 indicated in Paragraph 2 of the Landlord's Estoppel Certificate that there was mortgage
12 financing on the Highway 50 Property. A true and correct copy of the Landlord's Estoppel
13 Certificate is attached hereto as Exhibit 5.

14 10. In consideration for Herbst providing a personal guaranty of the Highway 50
15 Lease, on March 12, 2007, we executed an Amendment to the Highway 50 Lease, which
16 modified certain provisions of the original Highway 50 Lease but did not change the Lease Term
17 nor did it substantively modify the remedies available in the event of a breach. A true and
18 correct copy of this instrument is attached hereto as Exhibit 6.

19 11. Also on March 12, 2007, Herbst executed a Guaranty Agreement (the "Herbst
20 Guaranty") regarding the Highway 50 Property, a true and correct copy of which is attached
21 hereto as Exhibit 7.

22 12. On April 20, 2007, we signed a Memorandum of Lease confirming that the lease
23 term on the Highway 50 Property commenced on December 1, 2005 and continued until
24 November 30, 2025. This Memorandum of Lease was also signed by the corporate secretary of
25 Berry-Hinckley Industries and was duly notarized. A true and correct copy of this Memorandum
26 of Lease is attached hereto as Exhibit 8.

27 13. On June 29, 2011, BHI and we executed a Second Amendment to the Highway
28 50 Lease, which freed up moneys held in escrow for BHI to build out the property and which

1 changed the Base Monthly Rent from \$25,000.00 per month to \$20,025.82 per month. This
2 Second Amendment did not modify the terms of the Herbst Guaranty, nor did it substantively
3 modify the Lease Term or the remedies available in the event of a breach. However, Section 4
4 changed to May the month in which the Base Monthly Rent would increase by 2% per annum as
5 provided for by Section 4(B) of the Highway 50 Lease. A true and correct copy of the Second
6 Amendment to the Highway 50 Lease is attached hereto as Exhibit 9.

7 14. On March 1, 2013, BHI failed to tender rent payments under the Highway 50
8 Lease. As a result, we engaged an attorney to contact BHI and Herbst to demand payment.

9 15. On March 18, 2013, counsel for Defendants sent a letter to our attorney
10 confirming that BHI and Herbst had in fact breached the Highway 50 Lease and the Herbst
11 Guaranty, respectively, and had no intention of curing their breaches. A true and correct copy of
12 that letter is attached hereto as Exhibit 10.

13 16. On June 3, 2013, counsel for Defendants sent a letter to our attorney informing us
14 for the first time that BHI had subleased 33.7% of the Highway 50 Property to B&J Pizza, Inc.
15 d/b/a Little Caesar's Pizza ("B&J Pizza") at a rental rate of \$2,485.80 per month. Shortly
16 thereafter, B&J Pizza paid us rent and late fees for the months of March, April, and May 2013.
17 A true and correct copy of the letter and attached B&J Pizza sublease is attached hereto as
18 Exhibit 11.

19 17. Because BHI failed to pay the property taxes due on the Highway 50 Property, in
20 direct violation of Section 8 of the Highway 50 Lease, on July 15, 2013 we paid \$1,051.01 to the
21 City of Carson City, Nevada Assessor's Office. A true and correct copy of the receipt of this
22 payment along with true and correct copies of the Highway 50 Property's parcel details and
23 secured tax payment history is attached hereto as Exhibit 12.

24 18. Because BHI allowed insurance on the Highway 50 Property to lapse, in direct
25 violation of Section 10 of the Highway 50 Lease, on June 28, 2013 we obtained replacement
26 insurance on the Highway 50 Property. On July 19, 2013, we paid the initial premium payment
27 of \$735.00. A true and correct copy of the Riverport Insurance Company invoice dated July 2,
28 2013 is attached hereto as Exhibit 13.

1 19. On July 17, 2013, we engaged Coldwell Banker Commercial (the “property
2 manager”) to serve as the property manager for the Highway 50 Property. We subsequently
3 renewed this engagement several times and the engagement is currently active. Throughout our
4 engagement, in addition to reimbursing payments made by the property manager for property
5 taxes, insurance, maintenance, and repairs on the Highway 50 Property, we have paid the
6 property manager \$500.00 per month each and every month for their property management
7 services. A true and correct copy of the Professional Management Agreement dated July 17,
8 2013 is attached hereto as Exhibit 14.

9 20. We incurred expenses totaling \$12,822.53 in operating expenses, maintenance
10 costs, property taxes, and property insurance from July 17, 2013 through December 31, 2013.
11 These expenses were advanced by the property manager and then reimbursed by us. A true and
12 correct copy of the December 2013 Monthly Operating Report for the Highway 50 Property is
13 attached hereto as Exhibit 15. A summary of expenses appears at Exhibit 15.2. A detailed
14 general ledger of all transactions in 2013 is shown at Exhibit 15.9–15.10.

15 21. We incurred expenses totaling \$9,824.63 in operating expenses, maintenance
16 costs, property taxes, and property insurance from January 1, 2014 through December 31, 2014,
17 after crediting the Common Area Maintenance (“CAM”) fees that were paid by B&J Pizza.
18 These expenses were advanced by the property manager and then reimbursed by us. A true and
19 correct copy of the December 2014 Monthly Operating Report for the Highway 50 Property is
20 attached hereto as Exhibit 16. A summary of expenses appears at Exhibit 16.2. A detailed
21 general ledger of all transactions in 2014 is shown at Exhibit 16.9–16.13.

22 22. In late Spring 2015, being confronted with the threat of foreclosure due to the fact
23 that we could not afford to pay the mortgage on the Highway 50 Property as a result of BHI’s
24 breach and the resulting lack of income, we began efforts to refinance the mortgage we held on
25 the Highway 50 Property. As part of our application to refinance the mortgage with Meadows
26 Bank, on June 9, 2015, we paid \$3,000.00 for an appraisal of the Highway 50 Property. The
27 appraisal was conducted by Evaluations Services of Reno, Nevada and was issued on June 19,
28 2015 (the “2015 Appraisal”). The 2015 Appraisal concluded that the “as is” value of the

1 Highway 50 Property following the breach was \$765,000.00. A true and correct copy of the
2 2015 Appraisal is attached hereto as Exhibit 17. The Engagement Letter for the 2015 Appraisal
3 is shown at Exhibit 17.79–17.89, with the appraisal fee appearing at Exhibit 17.81 § III. A true
4 and correct copy of the wire transaction detail report showing our payment to Meadows Bank for
5 the 2015 Appraisal is attached hereto as Exhibit 18.

6 23. We incurred expenses totaling \$12,165.99 in operating expenses, maintenance
7 costs, property taxes, and property insurance from January 1, 2015 through December 31, 2015,
8 after crediting the CAM fees that were paid by B&J Pizza. These expenses were advanced by
9 the property manager and then reimbursed by us. A true and correct copy of the December 2015
10 Monthly Operating Report for the Highway 50 Property is attached hereto as Exhibit 19. A
11 summary of expenses appears at Exhibit 19.2. A detailed general ledger of all transactions in
12 2015 is shown at Exhibit 19.13–19.16.

13 24. We incurred expenses totaling \$11,098.66 in operating expenses, maintenance
14 costs, property taxes, and property insurance from January 1, 2016 through December 31, 2016,
15 after crediting the CAM fees that were paid by B&J Pizza. These expenses were advanced by
16 the property manager and then reimbursed by us. A true and correct copy of the December 2016
17 Monthly Operating Report for the Highway 50 Property is attached hereto as Exhibit 20. A
18 summary of expenses appears at Exhibit 20.2. A detailed general ledger of all transactions in
19 2016 is shown at Exhibit 20.9–20.12.

20 25. We incurred expenses totaling \$8,065.17 in operating expenses, maintenance
21 costs, property taxes, and property insurance from January 1, 2017 through August 31, 2017,
22 after crediting the CAM fees that were paid by B&J Pizza. These expenses were advanced by
23 the property manager and then reimbursed by us. A true and correct copy of the August 2017
24 Monthly Operating Report for the Highway 50 Property is attached hereto as Exhibit 21. A
25 summary of expenses appears at Exhibit 21.2. A detailed general ledger of all transactions for
26 January through August 2017 is shown at Exhibit 21.12–21.15.

27 26. My counsel and I collaborated to create a spreadsheet (the “damages
28 spreadsheet”) summarizing the damages sustained as a result of BHI and Herbst’s breaches of

1 the Highway 50 Lease and the Personal Guaranty. A true and correct copy of the damages
2 spreadsheet is attached hereto as Exhibit 22.

3 27. As shown in Table II (“Expenses”) of the damages spreadsheet, we incurred a
4 total of \$58,762.99 in compensable expenses as a direct result of BHI and Herbst’s breaches.
5 [Ex. 22.1.] With interest applied at the Default Rate of 18% per annum as specified in Exhibit A
6 to the Highway 50 Lease from the date on which each line item of damage was incurred, as of
7 October 16, 2017 the total amount of costs and losses is \$83,735.15. [*Id.*]

8 28. Table III (“Present Value of Future Rent”) and Table IV (“Present Value of Fair
9 Rental Value”) of the damages spreadsheet [Ex. 22.1-5] show the amortized calculation of
10 salient values required by Section 20(B)(i)(iv) for determining the amount of accelerated rent
11 due under the Highway 50 Lease. [Ex. 2.17.] Applying the specified discount rate of 4%, the net
12 present value of future rent from June 1, 2013 through the end of the Lease Term, including 2%
13 increases per annum as specified in Section 4(B) of the Highway 50 Lease [Ex. 2.2] is
14 \$3,173,863.70. [Ex. 22.5.] The fair rental value of the Highway 50 Property of \$7,500.00 was
15 established by our real estate broker, Daniel Gluhaich, on the basis of his substantial expertise
16 handling commercial leases in the Northern Nevada region as well as his experience as our
17 broker of record in attempting over the past four years to obtain a tenant for the unleased portion
18 of the Highway 50 Property. The net present value of the fair rental value of the Highway 50
19 Property after one year following the breach through the end of the Lease Term using a discount
20 rate of 4% is \$366,947.05. [Ex. 22.5.] Table V (“Accelerated Rent Damages”) of the damages
21 spreadsheet shows the calculation of accelerated rent damages due and owing. This was
22 calculated by subtracting the net present value of the fair rental value of the Highway 50
23 Property after one year following the breach from the net present value of future rent from
24 March 1, 2013 through the end of the Lease Term and also crediting the rental income received
25 from B&J Pizza from March 2013 through February 2014, resulting in a total for accelerated
26 rent damages of \$2,777,087.05. [*Id.*]

27 29. Table VI (“Diminution in Value”) of the damages spreadsheet shows the
28 calculation of the losses we incurred as a result of BHI and Herbst’s breaches having resulted in

1 a decrease in the value of the Highway 50 Property. Using the fair market value of the Highway
2 50 Property “as leased” of \$3,430,000.00 as determined in the 2006 Appraisal [Ex. 3.3] and
3 subtracting the fair market value of the Highway 50 Property without the lease in the amount of
4 \$765,000.00 as determined in the 2015 Appraisal [Ex. 17.3] yields a total for diminution in value
5 damages of \$2,665,000.00.


6 30. Table VII (“Total Damages”) of the damages spreadsheet summarizes all
7 damages incurred as a result of BHI and Herbst’s breaches. [Ex. 22.5.] Before interest is applied
8 as authorized by the Highway 50 Lease, our damages total \$5,500,850.04. With interest at the
9 Default Rate of 18% being applied from the respective dates on which each item of damage was
10 incurred, as of October 16, 2017 the total amount of damages due and owing is \$10,061,391.74.
11 [*Id.*]

12 31. As shown in Table VIII (“Interest Accrual Rate”) of the damages spreadsheet,
13 interest is accruing at a rate of \$2,712.75 per day. [Ex. 22.5.]

14 32. In addition to the damages shown in the damages spreadsheet, we have incurred
15 significant attorney’s fees and costs in this matter. The amount of attorney’s fees and costs that
16 we have incurred is ongoing and will be pursued through a separate motion.

17 I swear under penalty of perjury under the laws of the State of Nevada that the foregoing
18 is true and correct.

19 Dated this 16th day of October 2017.

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22 EDWARD C. WOOLEY
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AFFIRMATION

(Pursuant to NRS 239B.030)

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

LAW OFFICES OF BRIAN P. MOQUIN

DATED: October 17, 2017

By:  _____

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CERTIFICATE OF SERVICE

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

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

DATED: October 17, 2017



BRIAN P. MOQUIN

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Email: Birvine@dickinsonwright.com
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9 *Attorney for Defendants*
10 *Berry Hinckley Industries and*
Jerry Herbst

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

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

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

CASE NO. CV14-01712

DEPT. 6

18 Plaintiff,
19 vs.

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

21 Defendants.
22 _____/

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

25 Counterclaimants,

26 vs.
27
28

1 LARRY J. WILLARD, individually and as
2 trustee of the Larry James Willard Trust Fund;
3 OVERLAND DEVELOPMENT
4 CORPORATION, a California corporation;
5
6 Counter-defendants.
7 _____/

8 **NOTICE OF NON-OPPOSITION TO**
9 **DEFENDANTS/COUNTERCLAIMANTS'**
10 **MOTION FOR PARTIAL SUMMARY JUDGMENT**

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

- 14 • The opposition to the Motion was originally due to be filed on or before December 4,
15 2017.
- 16 • On December 4, 2017, Defendants granted Plaintiffs an extension through December 5,
17 2017 to file the opposition.
- 18 • On December 5, 2017, Defendants granted Plaintiffs an extension through 10:00 a.m. on
19 December 6, 2017 to file the opposition.
- 20 • On December 6, 2017, Defendants granted Plaintiffs an extension through 3:00 p.m. on
21 December 6, 2017 to file the opposition, but Defendants declined to provide further
22 extensions so as to allow themselves adequate time to prepare reply briefs and submit the
23 Motion by the December 15, 2017 deadline for the submission of dispositive motions.
- 24 • On December 6, 2017 at 3:05 p.m., Plaintiffs filed a Request for Extension of Time to
25 respond to the Motion, seeking an Order from this Court granting Plaintiffs an extension
26 through December 7, 2017 at 4:29 p.m. to file their opposition to the Motion. Plaintiffs
27 did not file an opposition to the Motion by December 7, 2017 at 4:29 p.m.
- 28 • The parties appeared before this Court for a Pretrial Status Conference on December 12,
2017. At the Status Conference, the Court granted Plaintiffs an extension to file any
opposition to the Motion until December 18, 2017 at 10:00 a.m.

- 1 • As of the date and time of this filing, Plaintiffs have failed to file any opposition, despite
2 the multiple extensions set forth herein.

3 The deadline for filing an opposition has passed and no opposition has been filed. As
4 such, Defendants/Counterclaimants hereby submit this Notice of Non-Opposition to
5 Defendants/Counterclaimants' Motion for Partial Summary Judgment.

6 **AFFIRMATION**

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

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

10 DATED this 18th day of December, 2017.

11 DICKINSON WRIGHT, PLLC

12 /s/ Brian R. Irvine
13 JOHN P. DESMOND
14 Nevada Bar No. 5618
15 BRIAN R. IRVINE
16 Nevada Bar No. 7758
17 ANJALI D. WEBSTER
18 Nevada Bar No. 12515
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26 *Attorney for Defendants*
27 *Berry Hinckley Industries and Jerry Herbst*

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1 **2501**

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9 *Attorney for Defendants*
10 *Berry Hinckley Industries and*
Jerry Herbst

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

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

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

CASE NO. CV14-01712

DEPT. 6

17
18 Plaintiff,

19 vs.

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

21 Defendants.
22 _____/

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

25 Counterclaimants,

26 vs
27
28

1 LARRY J. WILLARD, individually and as
2 trustee of the Larry James Willard Trust Fund;
3 OVERLAND DEVELOPMENT
4 CORPORATION, a California corporation;
5
6 Counter-defendants.
7 _____/

8
9 **NOTICE OF NON-OPPOSITION TO**
10 **DEFENDANTS/COUNTERCLAIMANTS' MOTION FOR SANCTIONS**

11 PLEASE TAKE NOTICE that on November 15, 2017, Defendants/Counterclaimants Berry-
12 Hinckley Industries ("BHI") and Jerry Herbst filed Defendants/Counterclaimants' Motion for
13 Sanctions.
14

- 15 • The opposition to the Motion was originally due to be filed on or before December 4,
16 2017.
- 17 • On December 4, 2017, Defendants granted Plaintiffs an extension through December 5,
18 2017 to file the opposition.
- 19 • On December 5, 2017, Defendants granted Plaintiffs an extension through 10:00 a.m. on
20 December 6, 2017 to file the opposition.
- 21 • On December 6, 2017, Defendants granted Plaintiffs an extension through 3:00 p.m. on
22 December 6, 2017 to file the opposition, but Defendants declined to provide further
23 extensions so as to allow themselves adequate time to prepare reply briefs and submit the
24 Motion by the December 15, 2017 deadline for the submission of dispositive motions.
- 25 • On December 6, 2017 at 3:05 p.m., Plaintiffs filed a Request for Extension of Time to
26 respond to the Motion, seeking an Order from this Court granting Plaintiffs an extension
27 through December 7, 2017 at 4:29 p.m. to file their opposition to the Motion. Plaintiffs
28 did not file an opposition to the Motion by December 7, 2017 at 4:29 p.m.
- The parties appeared before this Court for a Pretrial Status Conference on December 12,
2017. At the Status Conference, the Court granted Plaintiffs an extension to file any
opposition to the Motion until December 18, 2017 at 10:00 a.m.
- As of the date and time of this filing, Plaintiffs have failed to file any opposition, despite
the multiple extensions set forth herein.

1 The deadline for filing an opposition has passed and no opposition has been filed. As
2 such, Defendants/Counterclaimants hereby submit this Notice of Non-Opposition to
3 Defendants/Counterclaimants' Motion for Sanctions.

4 **AFFIRMATION**

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

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

8 DATED this 18th day of December, 2017.

9 DICKINSON WRIGHT, PLLC

10 /s/ Brian R. Irvine

11 JOHN P. DESMOND

12 Nevada Bar No. 5618

13 BRIAN R. IRVINE

14 Nevada Bar No. 7758

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23 Email: Awebster@dickinsonwright.com

24 *Attorney for Defendants*

25 *Berry Hinckley Industries and*

26 *Jerry Herbst*

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1 **2501**

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Email: Awebster@dickinsonwright.com

9 *Attorney for Defendants*
10 *Berry Hinckley Industries and*
Jerry Herbst

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

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

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

CASE NO. CV14-01712

DEPT. 6

17
18 Plaintiff,
19 vs.

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

21 Defendants.
22 _____/

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

25 Counterclaimants,

26 vs.
27
28

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

Counter-defendants.

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

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

- The opposition to the Motion was originally due to be filed on or before December 4, 2017.
- On December 4, 2017, Defendants granted Plaintiffs an extension through December 5, 2017 to file the opposition.
- On December 5, 2017, Defendants granted Plaintiffs an extension through 10:00 a.m. on December 6, 2017 to file the opposition.
- On December 6, 2017, Defendants granted Plaintiffs an extension through 3:00 p.m. on December 6, 2017 to file the opposition, but Defendants declined to provide further extensions so as to allow themselves adequate time to prepare reply briefs and submit the Motion by the December 15, 2017 deadline for the submission of dispositive motions.
- On December 6, 2017 at 3:05 p.m., Plaintiffs filed a Request for Extension of Time to respond to the Motion, seeking an Order from this Court granting Plaintiffs an extension through December 7, 2017 at 4:29 p.m. to file their opposition to the Motion. Plaintiffs did not file an opposition to the Motion by December 7, 2017 at 4:29 p.m.
- The parties appeared before this Court for a Pretrial Status Conference on December 12, 2017. At the Status Conference, the Court granted Plaintiffs an extension to file any opposition to the Motion until December 18, 2017 at 10:00 a.m.

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Via E-Mail

Federal Express (or other overnight delivery) Electronic Notification

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

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Attorney for Berry Hinckley Industries and Jerry Herbst

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

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

CASE NO. CV14-01712
DEPT. 6

Plaintiffs,

vs.

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

Defendants.

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

Counterclaimants,

vs

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

Counter-defendants.

SUGGESTION OF DEATH

Defendant Berry-Hinckley Industries and Timothy P. Herbst, Special Administrator of the Estate of Jerry Herbst, the deceased party, suggests upon the record, pursuant to Rule 25(a)(1), the death of Defendant Jerry Herbst during the pendency of this action. Jerry Herbst passed away on November 27, 2018.

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 22nd day of February, 2019.

DICKINSON WRIGHT, PLLC

/s/ Brian R. Irvine

JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
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Email: birvine@dickinsonwright.com
Email: awebster@dickinsonwright.com

CERTIFICATE OF SERVICE

I certify that I am an employee of DICKINSON WRIGHT PLLC, and that on this date, pursuant to NRCP 5(b); I am serving a true and correct copy of the attached **SUGGESTION OF DEATH** on the parties through the Second Judicial District Court's E-Flex filing system to the following:

Richard D. Williamson, Esq.
Jonathan Joel Tew, Esq.
ROBERTSON, JOHNSON, MILLER &
WILLIAMSON
50 West Liberty Street, Suite 600
Reno, Nevada 89501
Attorneys for Plaintiffs/Counterdefendants

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

DATED this 22nd day of February, 2019.

/s/ Mina Reel
An employee of DICKINSON WRIGHT PLLC