### IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; and OVERLAND DEVELOPMENT CORPORATION, a California corporation, Appellants,	No. 83640 District Court Cas Nov 08 2021 05:21 p.m. Elizabeth A. Brown Clerk of Supreme Court DOCKETING STATEMENT CIVIL APPEALS
VS.	CIVIL APPEALS
BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; JERRY HERBST, an individual; and TIMOTHY P. HERBST, as Special Administrator of the ESTATE OF JERRY HERBST, deceased,	
Respondents.	

### **GENERAL INFORMATION**

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

### WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they

waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See KDI Sylvan Pools v. Workman*, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District <u>Second</u>	Department <u>6</u>				
County: Washoe	Judge Hon. Lynne K. Simons				
District Ct. Case No. <u>CV14-01</u>	712				
2. Attorney filing this docketing sta	tement•				
2. Theorney ming this docketing stu					
Attorney <u>Richard D. Williamson</u>	Telephone (775) 329-5600				
Firm <u>Robertson, Johnson, Miller &amp; Will</u>	iamson				
Address 50 West Liberty Street, Suite 60	0, Reno, Nevada 89501				
Clients <u>Larry J. Willard, individually and as Trustee of the Larry James Willard</u> <u>Trust Fund, and Overland Development Corporation</u>					
3. Attorney(s) representing respond	lents(s):				
Attorney Brian R. Irvine	Telephone (775) 343-7507				
Firm Dickinson Wright PLLC					
Address 100 West Liberty Street, Sui	te 940, Reno NV 89501				
Clients <u>Berry-Hinckley Industries</u> , Jer <u>Special Administrator of the Est</u>	rry Herbst, and Timothy P. Herbst, as tate of Jerry Herbst, deceased				
4. Nature of disposition below (cheo	ek all that apply):				
□ Judgment after bench trial	■ Dismissal:				
□ Judgment after jury verdict	□ Lack of jurisdiction				
□ Summary judgment	□ Failure to state a claim				
Default judgment	□ Failure to prosecute				
■ Grant/Denial of NRCP 60(b) relief	■ Other (specify): <u>Sanction</u>				
□ Grant/Denial of injunction	Divorce Decree:				

□ Grant/Denial of declaratory relief

□ Original □ Modification

 $\Box$  Review of agency determination

□ Other disposition (specify):

- 5. Does this appeal raise issues concerning any of the following? <u>No.</u>
  - □ Child Custody
  - □ Venue
  - □ Termination of parental rights
- 6. **Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

Willard v. Berry-Hinckley Industries, et al., docket number 77780.

7. **Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

N/A.

8. **Nature of the action**. Briefly describe the nature of the action and the result below:

This action involved a dispute over the Respondents' guarantee and strategic breach of a lease for Appellants' commercial property in Washoe County. Unfortunately, Appellants' prior counsel failed to comply with procedural and discovery requirements. As a result, the district court issued a discovery sanction consisting of dismissal of Appellants' claims. Appellants then retained new counsel to seek relief under NRCP 60(b)(1) in an effort to reach a determination on the merits. The district court denied that motion and then entered judgment.

Following the initial appeal, on August 6, 2020, this Court found that the district court abused its discretion and failed to apply the required factors set forth in *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982), and this Court remanded for further proceedings. On February 23, 2021, this Court entered an Order Denying En Banc Reconsideration. In that order, the Court clarified that "neither party may present any new arguments or evidence on remand; the district court's consideration of the factors set forth in *Yochum v. Davis*, 98 Nev. 484, 486,

653 P.2d 1215, 1216 (1982), is limited to the record currently before the court." On remand, instead of applying the *Yochum* factors and granting relief, the district court asked the parties to submit proposed orders. Respondents then submitted a proposed order that included approximately 17 pages of entirely new arguments and analysis. In violation of this Court's express limitation on the district court's scope of review on remand, the district court adopted that proposed order and again denied relief under NRCP 60(b)(1).

- 9. **Issues on appeal.** State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):
- A. Did the district court err in allowing Respondents to include new arguments, despite this Court's order precluding new arguments?
- B. Did the district court err in failing to find that Appellants' prior counsel abandoned them?
- C. Did the district court err in excluding admissible evidence supporting relief under NRCP 60(b)(1)?
- D. Did the district court err in otherwise denying Appellants' motion for relief under NRCP 60(b)(1)?
- 10.**Pending proceedings in this court raising the same or similar issues.** If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

Appellants are not aware of any such proceedings.

- 11.**Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?
  - N/A
    Yes
    No
    If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

□ Reversal of well-settled Nevada precedent (identify the case(s))

□ An issue arising under the United States and/or Nevada Constitutions

□ A substantial issue of first impression

■ An issue of public policy

 $\Box$  An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

 $\Box$  A ballot question

If so, explain:

Clients rely on their attorneys to guide them through the legal system. When those attorneys utterly fail to do their job despite repeated assurances that they would do so, innocent clients are harmed, guilty defendants are absolved of liability, and public trust in the judicial system weakens. Thus, this case presents an issue of incredibly important public policies.

In addition, although there is no conflict in the current case law, district courts do struggle to reconcile the extent of the recognized exceptions to the attorney agency rule, as discussed in the leading cases: *Passarelli v. J-Mar Dev., Inc.*, 102 Nev. 283, 286, 720 P.2d 1221, 1223-24 (1986); *NC-DSH, Inc. v. Garner*, 125 Nev. 647, 656, 218 P.3d 853, 860 (2009); *Huckabay Props. v. NC Auto Parts, LLC*, 130 Nev. 196, 203, 322 P.3d 429, 434 n.4 (2014). A published case affirming the effect and extent of the abandonment exclusion to the rule of attorney agency would provide district courts with important guidance.

13.Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance (s) that warrant retaining the case, and include an explanation of their importance or significance:

This appeal presents issues of statewide public importance involving clarification of law dealing with sanctions imposed on clients due solely to derelictions of counsel. Please see our answer to Question 12, above. Thus, the case should be retained by the Supreme Court under NRAP 17(a)(12).

14.**Trial.** If this action proceeded to trial, how many days did the trial last? N/A

Was it a bench or jury trial? \_\_\_\_\_ N/A

15.**Judicial Disqualification**. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

No.

### TIMELINESS OF NOTICE OF APPEAL

### 16.Date of entry of written judgment or order appealed from:

September 13, 2021.

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

# 17.Date written notice of entry of judgment or order was served:

September 14, 2021.

Was service by:

□ Delivery

■ Mail/electronic/fax

# 18.If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

□ NRCP 50(b)	Date of filing	
□ NRCP 52(b)	Date of filing	
□ NRCP 59	Date of filing	

**NOTE:** Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice

of appeal. See AA Primo Builders v. Washington, 126 Nev. Adv. Rep. 53, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion <u>N/A</u>

(c) Date written notice of entry of order resolving tolling motion was served N/A

Was service by:

□ Delivery

**19.Date notice of appeal filed** 

□ Mail

October 11, 2021.

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

20.**Specify statute or rule governing the time limit for filing the notice of** appeal, e.g., NRAP 4(a) or other \_\_\_\_\_\_ NRAP 4(a)(1)

# SUBSTANTIVE APPEALABILITY

- 21.Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:
  - (a)

■ NRAP 3A(b)(1)	□ NRS 38.205	
$\Box$ NRAP 3A(b)(2)	□ NRS 233B.150	
$\Box$ NRAP 3A(b)(3)	□ NRS 703.376	
■ Other (specify): NRAP 3A(b)(8)		

(b) Explain how each authority provides a basis for appeal from the judgment or order:

In this case, the district court judge denied Appellants' motion for relief under NRCP 60(b)(1) after the case had been remanded to the district court for further

proceedings. An order denying Rule 60(b) relief is appealable as a special order after final judgment under NRAP 3A(b)(8). *Milton v. Gesler*, 107 Nev. 767, 769 n. 2, 819 P.2d 245, 246 n. 2 (1991). To the extent that this is also an appeal from the prior final judgment, the appeal is authorized by NRAP 3A(b)(1).

# 22.List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

<u>Appellants/ Plaintiffs</u>: Larry J. Willard, individually and as Trustee of the Larry James Willard Trust Fund, and Overland Development Corporation

<u>Respondents/Defendants</u>: Berry-Hinckley Industries, Jerry Herbst, and Timothy P. Herbst, as Special Administrator of the Estate of Jerry Herbst, deceased.

<u>Additional Plaintiffs</u>: Edward E. Wooley and Judith A. Wooley, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000.

### Additional Defendant: JH, Inc.

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, e.g., formally dismissed, not served, or other:

Edward E. Wooley and Judith A. Wooley, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, stipulated to a dismissal of their claims on April 12, 2018.

Although Plaintiffs included JH, Inc. as a Defendant in their initial complaint filed on August 8, 2014, they removed JH, Inc. as a party in their amended complaint filed on January 21, 2015.

# 23.Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

All of the Plaintiffs jointly filed a Verified Complaint on August 8, 2014, and then a Verified Complaint on January 21, 2015. The operative complaint included claims for breaches of the Plaintiffs' respective lease agreements with

Defendant/Respondent Berry-Hinckley Industries, breaches of the personal guarantees that the Plaintiffs received from with Defendant/Respondent Jerry Herbst, breaches of fiduciary duties owed by Defendant/Respondent Jerry Herbst, claims for attachment, and injunctive relief. On January 4, 2018, the district court entered an order granting Respondents' motion for sanctions. The district court then entered findings of fact and conclusions of law on March 6, 2018, ordering that Plaintiffs' claims against the Defendants/Respondents are dismissed with prejudice. The district court entered final judgment on December 11, 2018, which Plaintiffs/Appellants timely and successfully appealed.

On April 21, 2015, Defendants/Respondents filed a counterclaim against Plaintiffs/Appellants for breach of contract and declaratory relief. On March 8, 2018, Defendants/Respondents filed a motion to dismiss their own counterclaims. On April 13, 2018, the district court entered an order granting that motion and dismissing the counterclaims. The district court entered final judgment on December 11, 2018. The district court also entered an order denying NRCP 60(b) relief on September 13, 2021, after a prior appeal and a remand from this Court.

## 24.Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

■ Yes

# 25.If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

□ Yes

# □ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

- □ Yes
- □ No

26.If you answered "No" to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

### 27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

# VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Larry J. Willard, individually and as Trustee of the Larry James Willard Trust Fund, and <u>Overland Development Corporation</u> Names of Appellants

Richard D. Williamson Name of counsel of record

November 8, 2021 Date /s/ Richard D. Williamson Signature of counsel of record

State of Nevada, County of Washoe State and county where signed

### **CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of Robertson, Johnson, Miller & Williamson, over the age of 18, and not a party within this action.

I further certify that on the 8<sup>th</sup> day of November, 2021, I electronically filed the foregoing **DOCKETING STATEMENT CIVIL APPEALS** with the Clerk of the Court by using the electronic filing system, which served the following parties electronically:

John P. Desmond, Esq. Brian R. Irvine, Esq. Anjali D. Webster, Esq. Dickinson Wright 100 West Liberty Street, Suite 940 Reno, NV 89501 *Attorneys Respondents* 

David Wasick PO Box 568 Glenbrook, NV 89413 Settlement Judge Robert L. Eisenberg, Esq. Lemons, Grundy & Eisenberg 6005 Plumas Street Third Floor Reno NV 89519 775-786-6868 *Attorneys for Appellants* 

/s/ Teresa Stovak

An Employee of Robertson, Johnson, Miller & Williamson

# **Index of Exhibits**

<u>Exhibit</u>	Description	Pages			
	Latest-filed complaint and counterclaim				
1	First Amended Complaint, filed on 01/21/15	18			
2	Defendants' Amended Answer to Plaintiffs' Amended	14			
	Complaint and Counterclaim, filed on 04/21/15				
	Orders of NRCP 41(a) voluntary dismissals				
3	Order Granting Defendants'/Counterclaimants' Motion to	3			
	Dismiss Counterclaims, filed on 04/13/18				
4	Order of Dismissal of Claims of Wooley Plaintiffs with	2			
	Prejudice, filed on 04/13/18				
	Other orders challenged on appeal				
5	Order Granting Defendants'/Counterclaimants' Motion for	5			
	Sanctions, filed on 01/04/18				
6	Order Granting Defendants'/Counterclaimants' Motion to	5			
	Strike and/or Motion in Limine to Exclude the Expert				
	Testimony of Daniel Gluhaich, filed on 01/04/18				
7	Order Granting Defendants'/Counterclaimants' Motion for	5			
	Partial Summary Judgment [Oral Argument Requested], filed				
	on 01/04/18				
8	Findings of Facts, Conclusions of Law and Order on	34			
	Defendants' Motion for Sanctions, filed on 03/06/18				
9	Order Denying Plaintiffs' Rule 60(b) Motion for Relief, filed	32			
	on 11/30/18				
10	Judgment, filed on 12/11/18	3			

Order After Remand Denying Plaintiffs' Rule 60(b) Motion for 46Relief, filed on 9/13/21

### Notices of entry for each attached order

- Notice of Entry of Order regarding the Order Granting 10
   Defendants'/Counterclaimants' Motion for Sanctions, filed on
   01/05/18
- Notice of Entry of Order regarding the Order Granting 10
   Defendants'/Counterclaimants' Motion to Strike and/or Motion
   in Limine to Exclude the Expert Testimony of Daniel Gluhaich,
   filed on 01/05/18
- 14 Notice of Entry of Order regarding the Order Granting 10
   Defendants'/Counterclaimants' Motion for Partial Summary
   Judgment [Oral Argument Requested], filed on 01/05/18
- 15 Notice of Entry of Findings of Facts, Conclusions of Law and 39Order, filed on 030618
- Notice of Entry of Order regarding the Order Granting 8
   Defendants'/Counterclaimants' Motion to Dismiss
   Counterclaims, filed on 04/16/18
- 17 Notice of Entry of Order regarding the Order of Dismissal of7 Claims of Wooley Plaintiffs with Prejudice, filed on 04/16/18
- 18 Notice of Entry of Order regarding the Order Denying 37Plaintiffs' Rule 60(b) Motion for Relief, filed on 12/03/18
- 19Notice of Entry of Judgment, filed on 12/11/188
- 20 Notice of Entry of Order regarding the Order After Remand 51
   Denying Plaintiffs' Rule 60(b) Motion for Relief, filed on
   9/14/21

# EXHIBIT "1"

# EXHIBIT "1"

# EXHIBIT "1"

FILED Electronically 2015-01-21 04:28:19 PM JacquelineBryant Clerk of the Court Transaction # 4782758 : ylloyd

		Transaction # 47
1 2 3 4 5 6 7 8 9 10	THE O'MARA LAW FIRM, P.C. DAVID C. O'MARA, ESQ. NEVADA BAR NO. 8599 311 East Liberty Street Reno, Nevada 89501 Telephone: 775/323-1321 Fax: 775/323-4082 LAW OFFICES OF BRIAN P. MOQUIN BRIAN P. MOQUIN, ESQ. Admitted <i>Pro Hac Vice</i> CALIFORNIA BAR NO. 247583 3506 La Castellet Court San Jose, CA 95148 Telephone: 408.300.0022 Fax: 408.843.1678 bmoquin@lawprism.com	
11	Attorneys for Plaintiffs	
12	LARRY J. WILLARD, OVERLAND DEVELOPMENT CORPORATIO	N,
13	EDWARD C. WOOLEY, and JUDITH A. WOOL	LEY
14	IN THE SECOND JUDICIAL DISTRIC	<b>F COURT OF THE STATE OF NEVADA</b>
15	IN AND FOR THE C	OUNTY OF WASHOE
<ol> <li>16</li> <li>17</li> <li>18</li> <li>19</li> <li>20</li> <li>21</li> <li>22</li> <li>23</li> <li>24</li> <li>25</li> <li>26</li> <li>27</li> <li>28</li> </ol>	LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD C. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, Plaintiffs, v. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual, Defendants.	Case No. CV14-01712 Dept. No. 6
		1 - IENDED COMPLAINT

-----

#### VERIFIED FIRST AMENDED COMPLAINT

### (EXEMPT FROM ARBITRATION-AMOUNT IN EXCESS OF \$40,000.00)

Plaintiffs LARRY J. WILLARD ("Willard"), individually and as trustee of the Larry James Willard Trust Fund ("the Willard Trust"), OVERLAND DEVELOPMENT CORPORATION ("Overland"), EDWARD C. WOOLEY and JUDITH A. WOOLEY ("the Wooleys"), individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000 ("the Wooley Trust"), by and through undersigned attorneys, hereby allege, aver, and complain of Defendants BERRY-HINCKLEY INDUSTRIES ("BHI") and JERRY HERBST ("Herbst") (collectively, "Defendants") as follows:

### JURISDICTION

1. This Court has jurisdiction over Defendants because Defendants are either citizens or residents of the State of Nevada or do business in the State of Nevada, County of Washoe.

2 Venue is proper in this Court because the properties at issue are located in this judicial district and because the leases at issue expressly provide for venue in this Court.

16

17

18

19

21

23

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

#### PARTIES

3. Plaintiff Larry J. Willard ("Willard") is, and at all times relevant herein was, a citizen of the United States and a resident of the State of California. At all times relevant herein Willard was trustee of the Larry James Willard Trust Fund ("the Willard Trust").

20 4. Plaintiff Overland Development Corporation ("Overland") is, and at all times relevant herein was, a corporation organized and existing under the laws of the State of California. Willard is the President of Overland. Willard, the Willard Trust, and Overland are 22 referred to hereinafter as "the Willard Plaintiffs."

5. 24 Plaintiffs Edward C. Wooley and Judith A Wooley (collectively, "the Wooleys") 25 are, and at all times relevant herein were, citizens of the United States of America and are 26 trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000 ("the 27 Wooley Trust") (collectively, "the Wooley Plaintiffs").

28

6. Defendant Berry-Hinckley Industries ("BHI") is, and at all times relevant herein

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

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

### FIRST CAUSE OF ACTION

(Breach of Lease Agreement) By the Willard Plaintiffs Against Berry-Hinckley Industries

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

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

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

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

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

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

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

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

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

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

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

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

#### - 4 -VERIFIED FIRST AMENDED COMPLAINT

1

2

3

4

5

6

7

8

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

SECOND CAUSE OF ACTION (Breach of Personal Guaranty) By the Willard Plaintiffs Against Jerry Herbst

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

Upon receiving notice from the Willard Plaintiffs that BHI was in default of the 20. Willard Lease, Herbst breached his duties under the Herbst-Willard Guaranty in failing to tender payment of rent due by BHI to the Willard Plaintiffs.

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

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

1

2

3

4

5

23

24

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

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

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

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

### THIRD CAUSE OF ACTION

(Breach of Lease Agreement) By the Wooley Plaintiffs Against Berry-Hinckley Industries

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

27 28. On December 2, 2005, BHI entered into a lease agreement ("Wooley Lease #1")
28 on the property owned by the Wooley Plaintiffs located at 1820 Highway 50 East, Carson City,

#### - 6 -ED EIDST AMENDEI

### VERIFIED FIRST AMENDED COMPLAINT

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

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

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

31. On March 12, 2007, the Wooley Plaintiffs agreed to amend Wooley Lease #1 and 19 Wooley Lease #2, thereby forgoing \$1,834,663.77 in rent through the shortening of the lease 20 terms by 30 months, in return for Herbst's personally guaranteeing that BHI would make all 21 lease payments through the term of the lease (the "Herbst-Wooley Guaranty Agreement"). A 22 true and correct copy of the Herbst-Wooley Guaranty Agreement regarding the Highway 50 23 24 Property is attached hereto as Exhibit 8. A true and correct copy of the Herbst-Wooley Guarantee is attached hereto as Exhibit 9. A true and correct copy of the amendment to Wooley 25 Lease #1 is attached hereto as Exhibit 10. A true and correct copy of the amendment to Wooley 26 Lease #2 is attached hereto as Exhibit 11. 2.7

28

1

2

3

4

5

6

7

8

9

10

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

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

1

2

3

4

5

6

7

8

9

15

16

17

18

19

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

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

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

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

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

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

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

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

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

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

FOURTH CAUSE OF ACTION (Breach of Personal Guaranty) By the Wooley Plaintiffs Against Jerry Herbst

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

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

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

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

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

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

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

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

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

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

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

28

54.

1

2

3

4

5

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

### VERIFIED FIRST AMENDED COMPLAINT

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

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

17

21

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

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

#### FIFTH CAUSE OF ACTION (Attachment) By All Plaintiffs Against All Defendants

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

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

Plaintiffs are informed and believe and on that basis allege that Defendants will 59. 18move, transfer or otherwise conceal these assets in order to defeat or otherwise hinder Plaintiff's 19 ability to collect after judgment is entered. 20

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

These allegations are further based on the fact that on March 28, 2013, 61. 25 Defendants attorney, Gerald M. Gordon of Gordon Silver, sent a letter to Plaintiffs' attorney 26 reiterating Defendants' threat of seeking bankruptcy protection and offering to pay a small 27 fraction of the amount due under the leases and Herbst's personal guaranty, an offer which 28

|| Plaintiffs rejected.

1

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

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

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

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

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

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

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

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

64. Pursuant to NRS Chapter 31, Plaintiffs seek issuance of a prejudgment writ of
attachment upon the assets of Defendant Berry-Hinckley Industries and Defendant Jerry Herbst,
to secure payment of Plaintiffs' claims against Defendants.

1	SIXTH CAUSE OF ACTION (Temporary Restraining Order)			
2	By All Plaintiffs Against All Defendants	i		
3	65. Paragraphs 1 through 65 above are hereby incorporated by reference as if fully se	et		
4	forth at this point.			
5	66. If Defendants are permitted the ability to transfer, sell, or otherwise conceal asse	ts		
6	during the pendency of this action, Plaintiffs will suffer irreparable harm.			
7	67. If Defendants are permitted to have the ability to transfer, sell, or otherwise			
8	conceal assets before this Court can issue a writ of attachment on the assets of Defendants, and			
9	each of them, Plaintiffs will be denied the extraordinary relief provided in NRS Chapter 31 to			
10	protect their rights.			
11	68. An interlocutory injunction preventing Defendants or any person with actual			
12	knowledge of the injunction is necessary to maintain the status quo until this Court can			
13	determine whether a writ of attachment should issue and/or until the conclusion of this action			
14	after trial.			
15	69. Plaintiffs are entitled to a temporary restraining order and preliminary injunction	L		
16	enjoining Defendants, and each of them, and any other person with notice of the injunction from	n		
17	transferring, selling, or otherwise encumbering any assets or property of Defendants.			
18	PRAYER FOR RELIEF			
19	WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:			
20	ON THE FIRST CAUSE OF ACTION:			
21	1. For direct damages in the discounted amount of \$15,766,991.73;			
22	2. For consequential damages in the amount of \$8,080,856.50;			
23	3. For late payment penalties of \$25,630.98 for the period of March 2013 through			
24	May 2013;			
25	4. For interest at a rate of 18% per annum as provided for under the Willard Lease	5		
26	from March 1, 2013 through entry of judgment; and			
27	5. For reasonable attorney's fees as provided for under the Willard Lease.			
28	111			
		2		
	- 13 - VERIFIED FIRST AMENDED COMPLAINT	_		
		]		

1	ON THE SEC	COND CAUSE OF ACTION:
2	1.	For direct damages in the discounted amount of \$15,766,991.73;
3	2.	For consequential damages in the amount of \$8,080,856.50;
4	3.	For late payment penalties of \$25,630.98 for the period of March 2013 through
5	May 2013;	
6	4.	For interest at a rate of 18% per annum as provided for under the Willard Lease
7	from March 1	, 2013 through entry of judgment; and
8	5.	For reasonable attorney's fees as provided for under the Willard Lease.
9	ON THE TH	IRD CAUSE OF ACTION:
10	1.	For direct damages in the discounted amount of \$3,323,543.49;
11	2.	For consequential damages in an amount to be proven at trial but which is at least
12	\$2,809,600.3	0;
13	3.	For interest at a rate of 18% per annum as provided for under the Wooley Leases
14	from March 1	1, 2013 through entry of judgment; and
15	4.	For reasonable attorney's fees as provided for under the Wooley Leases.
16	ON THE FO	URTH CAUSE OF ACTION:
17	1.	For direct damages in the discounted amount of \$3,323,543.49;
18	2.	For consequential damages in an amount to be proven at trial but which is at least
19	\$2,809,600.3	0;
20	3.	For interest at a rate of 18% per annum as provided for under the Wooley Leases
21	from March 1	1, 2013 through entry of judgment; and
22	4.	For reasonable attorney's fees as provided for under the Wooley Leases.
23	ON THE FIF	TH CAUSE OF ACTION:
24	1.	For issuance of a writ of attachment to impress a lien upon the assets of
25	Defendants, a	and each of them, in order to secure judgment in favor of Plaintiffs, which,
26	including inte	erest accrued through October 2014, will exceed \$ 38,480,184.14. Such assets
27	include the fo	ollowing:
28	•	the estate located at 1701 Enclave Court, Las Vegas, Nevada 89134, Parcel No.
		- 14 - VERIFIED FIRST AMENDED COMPLAINT
		VERTIER FINGLAMENDER COMI LAUNI

ı		
I		
-		

----

Parcel No. 311-23-031; • the property located at 10 Parcel No. 311-23-030; • the property located at 10	01 South California Avenue, Parker, Arizona 85334, 05 South California Avenue, Parker, Arizona 85344,	
Parcel No. 311-23-031; • the property located at 10 Parcel No. 311-23-030; • the property located at 10		
<ul> <li>the property located at 10</li> <li>Parcel No. 311-23-030;</li> <li>the property located at 10</li> </ul>	05 South California Avenue, Parker, Arizona 85344,	
Parcel No. 311-23-030; • the property located at 10	05 South California Avenue, Parker, Arizona 85344,	
• the property located at 10		
<b>—</b> — •		
Deres No. 211 22 028 A.	09 South California Avenue, Parker, Arizona 85334,	
Parcel No. 311-23-028A;		
• the property located at 515 Saddle View Way 23, Park City, Utah 84060, Parcel		
No. 01-923-06; and		
• such other and further assets and properties owned by Defendants sufficient to		
secure payment of Plaintiffs' claims aga	inst Defendants.	
ON THE SIXTH CAUSE OF ACTION:		
1. For a temporary restraini	ng order and preliminary injunction preventing	
Defendants, and each of them, and any	person with knowledge of the injunction from	
transferring, selling, or otherwise encumbering the assets of Defendants.		
ON ALL CAUSES OF ACTION:		
1. For pre-judgment interes	t upon such damages through entry of judgment at the	
rate of 18 percent per annum as provide	d for under the Lease Agreements;	
2. For costs of suit;		
3. For such other orders and	l further relief as the Court deems just and proper.	
	Respectfully submitted,	
	THE O'MARA LAW FIRM, P.C.	
	Mar M CAllera	
DATED: January 20, 2015	By: MULL UMULL DAVID C. O'MARA	
	Nevada Bar No. 8599 311 East Liberty Street	
	Reno, Nevada 89501	
	(775) 323-1321 (775) 323-4082 (facsimile)	
	- 15 -	
VERIFIED I	IRST AMENDED COMPLAINT	
	<ul> <li>arcel No. 311-23-028A;</li> <li>the property located at 51</li> <li>Io. 01-923-06; and</li> <li>such other and further assecure payment of Plaintiffs' claims against the sixth CAUSE OF ACTION</li> <li>1. For a temporary restraining of them, and any pransferring, selling, or otherwise encured on the sixth causes of the pre-judgment interessecure of 18 percent per annum as provide</li> <li>2. For costs of suit;</li> <li>3. For such other orders and</li> </ul>	

1		
2		LAW OFFICES OF BRIAN P. MOQUIN
3	DATED: January 20, 2015	Ву:
4	1511122. Validad y 20, 2010	BRIAN P. MOQUIN
5		<i>Pro Hac Vice</i> Application Pending California Bar No. 257583 3506 La Castellet Court
6		San Jose, CA 95148
7		(408) 300-0022 (408) 843-1678 (facsimile)
8		Attorneys for Plaintiffs
9 10		
10		
12		
12		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		
		- 16 -
	VERIFIED FI	RST AMENDED COMPLAINT

1	VERIFICATION			
2	Under penalty of perjury, the undersigned declares that he is the attorney for Larry J.			
3	Willard, Overland Development Corporation, Edward C. Wooley, and Judith A. Wooley,			
4	Plaintiffs in the foregoing First Amended Complaint and knows the contents thereof, that the			
5	pleading is true of his own knowledge, except as to those matters stated on information and			
6	belief, and that as to such matters he believes them to be true.			
7	Pursuant to NRS 15.010, the undersigned attorney verifies this First Amended Complaint			
8	for Plaintiffs Larry J. Willard, Overland Development Corporation, Edward C. Wooley, and			
9	Judith A. Wooley because Plaintiffs reside outside this County.			
10				
11	DATED: January 20, 2015			
12	BRIAN P. MOQUIN, ESQ.			
13				
14				
15				
16				
17				
18				
19				
20				
21				
22				
23				
24				
25				
26				
27				
28				
	- 17 - VERIFIED FIRST AMENDED COMPLAINT			

1	AFFIRMATION (Durawant to NIPS 230P 030)	
2	(Pursuant to NRS 239B.030)	
3	The undersigned does hereby affirm that the preceding document filed in the above-entitled matter	
4	X Document does not contain the social security number of any person	
5	-OR-	
6	Document contains the social security number of a person as required by:	
7	A specific state or federal law, to wit:	
8		
9	-or-	
10	For the administration of a public program	
11	-or-	
12	For an application for a federal or state grant	
13	-or-	
14	Confidential Family Court Information Sheet (NRS 125.130, NRS 125.230 and NRS 125B.055)	
15	DATED: January 21, 2015.	
16	THE O'MARA LAW FIRM, PC	
17	BY: Uand (UMara	
18	DĂVID C. O'MĂRĂ, ESQ.	
19		
20		
21		
22		
23		
24 25		
25		
27		
28		

# EXHIBIT "2"

# EXHIBIT "2"

# EXHIBIT "2"

FILED Electronically 2015-04-21 03:40:56 PM Jacqueline Bryant Clerk of the Court Fransaction # 4916942 : csulezic

1	1085	Jacqueline Bryant Clerk of the Court Transaction # 4916942 : cs
2	GORDON SILVER JOHN P. DESMOND	Tansacion # 4310342.03
3	Nevada Bar No. 5618	
	BRIAN R. IRVINE	
4	Nevada Bar No. 7758 KATHLEEN M. BRADY	
5	Nevada Bar No. 11525	
6	100 West Liberty Street Suite 940	
7	Reno, Nevada 89501	
	Tel: (775) 343-7500 Fax: (775) 786-0131	
8	Email: jdesmond@gordonsilver.com	
9	Email: <u>birvine@gordonsilver.com</u>	
10	Email: <u>kbrady@gordonsilver.com</u>	
11	Attorneys for Defendants	
12	Berry Hinckley Industries, and Jerry Herbst	
13	IN THE SECOND JUDICIAL DISTRIC	T COURT OF THE STATE OF NEVADA
14	IN AND FOR THE C	COUNTY OF WASHOE
15	LARRY J. WILLARD, individually and as	
16	trustee of the Larry James Willard Trust Fund;	
17	OVERLAND DEVELOPMENT	
	CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A.	
18	WOOLEY, individually and as trustees of the	
19	Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,	
20	incrvivos kevocable Trust 2000,	
21	Plaintiff,	CASE NO.: CV14-01712
	VS.	DEPT. NO.: 6
22	BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; JERRY HERBST, an	
23	individual; and JH, INC., a Nevada	
24	corporation,	
25	Defendants.	/
		2
26	BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an	
27	individual;	
28	Counterclaimants	
		-1-

1	VS.		
2	LARRY J. WILLARD, individually and as		
3	trustee of the Larry James Willard Trust Fund;		
4	and OVERLAND DEVELOPMENT CORPORATION, a California corporation;		
5	Counter-defendants		
6	DEFENDANTS' AMENDED ANSWER TO PLAINTIFFS' AMENDED COMPLAINT		
7	AND COUNTERCLAIM		
8	DEFENDANTS BERRY HINCKLEY INDUSTRIES and JERRY HERBST		
9	(collectively, "Defendants"), by and through their attorneys of record, GORDON SILVER,		
10	answer Plaintiffs' Amended Complaint as follows:		
11	JURISDICTION		
12	1. Defendants admit the allegations contained in Paragraph 1 of Plaintiffs'		
13	Complaint.		
14	2. To the extent Plaintiffs purport to quote or paraphrase from a document, the		
15	document speaks for itself. Defendants deny any statements inconsistent with the document.		
16	Defendants admit the remaining allegations contained in Paragraph 2 of Plaintiffs' Complaint.		
17	PARTIES		
18	3. Defendants are without knowledge or information sufficient to form a belief as to		
19	the truthfulness of the allegations contained in Paragraph 3 of Plaintiffs' Complaint, and thus		
20	deny the same.		
21	4. Defendants are without knowledge or information sufficient to form a belief as to		
22	the truthfulness of the allegations contained in Paragraph 4 of Plaintiffs' Complaint, and thus		
23	deny the same.		
24	5. Defendants are without knowledge or information sufficient to form a belief as to		
25	the truthfulness of the allegations contained in Paragraph 5 of Plaintiffs' Complaint, and thus		
26	deny the same.		
27	6. Defendants admit the allegations contained in Paragraph 6 of Plaintiffs'		
28	Complaint.		
	-2-		

7. Defendants admit the allegations contained in Paragraph 7 of Plaintiffs' 1 2 Complaint. FIRST CAUSE OF ACTION 3 (Breach of Lease Agreement) 4 8. Paragraphs 1 through 7 above are hereby incorporated by reference as if fully set 5 forth at this point. 6 9. To the extent Plaintiffs purport to quote or paraphrase from a document, the 7 document speaks for itself. Defendants deny any statements inconsistent with the document. 8 Additionally, Defendants are without knowledge or information sufficient to form a belief as to 9 the truthfulness of the remaining allegations contained in Paragraph 9 of Plaintiffs' Complaint, 10 and thus deny the same. 11 10. To the extent Plaintiffs purport to quote or paraphrase from a document, the 12 document speaks for itself. Defendants deny any statements inconsistent with the document and 13 deny any remaining allegations contained in Paragraph 10 of the Complaint. 14 11. To the extent Plaintiffs purport to quote or paraphrase from a document, the 15 document speaks for itself. Defendants deny any statements inconsistent with the document. 16 Additionally, Defendants are without knowledge or information sufficient to form a belief as to 17 the truthfulness of the remaining allegations contained in Paragraph 11 of Plaintiffs' Complaint, 18 and thus deny the same. 19 12. Defendants deny the allegations contained in Paragraph 12 of the Complaint. 20 13. To the extent Plaintiffs purport to quote or paraphrase from a document, the 21 document speaks for itself. Defendants deny any statements inconsistent with the document. 22 Additionally, Defendants are without knowledge or information sufficient to form a belief as to 23 the truthfulness of the remaining allegations contained in Paragraph 13 of Plaintiffs' Complaint, 24 and thus deny the same. 25 14. Defendants deny the allegations contained in Paragraph 14 of the Complaint. 26 15. Defendants deny the allegations contained in Paragraph 15 of the Complaint. 27 16. Defendants deny the allegations contained in Paragraph 16 of the Complaint. 28 -3-

1	17.	Defendants deny the allegations contained in Paragraph 17 of the Complaint.	
2	18. Defendants deny the allegations contained in Paragraph 18 of the Complaint.		
3 4	<b>SECOND CAUSE OF ACTION</b> (Breach of Personal Guaranty)		
<del>-</del> 5	19.	Paragraphs 1 through 18 above are hereby incorporated by reference as if fully set	
6	forth at this p	point.	
7	20.	Defendants deny the allegations contained in Paragraph 20 of the Complaint.	
8	21.	To the extent Plaintiffs purport to quote or paraphrase from a document, the	
9	document spe	eaks for itself. Defendants deny any statements inconsistent with the document and	
10	deny any rem	naining allegations contained in Paragraph 21 of the Complaint.	
10	22.	To the extent Plaintiffs purport to quote or paraphrase from a document, the	
12	document speaks for itself. Defendants deny any statements inconsistent with the document and		
13	deny any remaining allegations contained in Paragraph 22 of the Complaint.		
14	23.	Defendants deny the allegations contained in Paragraph 23 of the Complaint.	
15	24. Defendants deny the allegations contained in Paragraph 24 of the Complaint.		
16	25.	Defendants deny the allegations contained in Paragraph 25 of the Complaint.	
17	26.	Defendants deny the allegations contained in Paragraph 26 of the Complaint.	
18	THIRD CAUSE OF ACTION (Breach of Lease Agreement)		
19	27.	Paragraphs 1 through 26 above are hereby incorporated by reference as if fully set	
20	forth at this point.		
21	28.	To the extent Plaintiffs purport to quote or paraphrase from a document, the	
22	document speaks for itself. Defendants deny any statements inconsistent with the document.		
23	Additionally, Defendants are without knowledge or information sufficient to form a belief as to		
24	the truthfulness of the remaining allegations contained in Paragraph 28 of Plaintiffs' Complaint,		
25	and thus deny	y the same.	
26	29.	To the extent Plaintiffs purport to quote or paraphrase from a document, the	
27	document sp	eaks for itself. Defendants deny any statements inconsistent with the document.	
28	Additionally,	Defendants are without knowledge or information sufficient to form a belief as to -4-	

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

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

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

13 32. Defendants deny the allegations contained in Paragraph 32 of the Complaint. 33. Defendants deny the allegations contained in Paragraph 33 of the Complaint. 14 15 34. Defendants deny the allegations contained in Paragraph 34 of the Complaint. 35. Defendants deny the allegations contained in Paragraph 35 of the Complaint. 16 Defendants deny the allegations contained in Paragraph 36 of the Complaint. 36. 17 37. Defendants deny the allegations contained in Paragraph 37 of the Complaint. 18 38. 19 Defendants deny the allegations contained in Paragraph 38 of the Complaint. 20 39. Defendants deny the allegations contained in Paragraph 39 of the Complaint. 40. 21 Defendants deny the allegations contained in Paragraph 40 of the Complaint. 41. Defendants deny the allegations contained in Paragraph 41 of the Complaint. 22 42. Defendants deny the allegations contained in Paragraph 42 of the Complaint. 23 FOURTH CAUSE OF ACTION 24 (Breach of Personal Guaranty) 25 43. Paragraphs 1 through 42 above are hereby incorporated by reference as if fully set 26 forth at this point. 27 44. Defendants deny the allegations contained in Paragraph 44 of the Complaint. 28

1	45.	To the extent Plaintiffs purport to quote or paraphrase from a document, the
2	document speaks for itself. Defendants deny any statements inconsistent with the document and	
3	deny any remaining allegations contained in Paragraph 45 of the Complaint.	
4	46. To the extent Plaintiffs purport to quote or paraphrase from a document, the	
5	document speaks for itself. Defendants deny any statements inconsistent with the document and	
6	deny any rem	naining allegations contained in Paragraph 46 of the Complaint.
7	47.	Defendants deny the allegations contained in Paragraph 47 of the Complaint.
8	48.	Defendants deny the allegations contained in Paragraph 48 of the Complaint.
9	49.	Defendants deny the allegations contained in Paragraph 49 of the Complaint.
10	50.	Defendants deny the allegations contained in Paragraph 50 of the Complaint.
11	51.	Defendants deny the allegations contained in Paragraph 51 of the Complaint.
12	52.	Defendants deny the allegations contained in Paragraph 52 of the Complaint.
13	53.	Defendants deny the allegations contained in Paragraph 53 of the Complaint.
14	54.	Defendants deny the allegations contained in Paragraph 54 of the Complaint.
15	55.	Defendants deny the allegations contained in Paragraph 55 of the Complaint.
16	56.	Defendants deny the allegations contained in Paragraph 56 of the Complaint.
17	FIFTH CAUSE OF ACTION	
18		(Attachment)
19	57.	Paragraphs 1 through 56 above are hereby incorporated by reference as if fully set
20	forth at this p	boint.
21	58.	Defendants deny the allegations contained in Paragraph 58 of the Complaint.
22	59.	Defendants deny the allegations contained in Paragraph 59 of the Complaint.
23	60.	To the extent Plaintiffs purport to quote or paraphrase from a document, the
24	document sp	eaks for itself. Defendants deny any statements inconsistent with the document.
25	Additionally,	, Defendants are without knowledge or information sufficient to form a belief as to
26	the truthfulne	ess of the remaining allegations contained in Paragraph 60 of Plaintiffs' Complaint,
27	and thus deny the same.	
28		
		-6-

1	61.	To the extent Plaintiffs purport to quote or paraphrase from a document, the	
2	document speaks for itself. Defendants deny any statements inconsistent with the document.		
3	62.	Defendants deny the allegations contained in Paragraph 62 of the Complaint.	
4	63.	Defendants deny the allegations contained in Paragraph 63 of the Complaint.	
5	64.	Defendants deny the allegations contained in Paragraph 64 of the Complaint.	
6	<u>EIGHTH CAUSE OF ACTION</u> (Temporary Restraining Order)		
7 8	65.	Paragraphs 1 through 64 above are hereby incorporated by reference as if fully set	
° 9	forth at this p	point.	
9 10	66.	Defendants deny the allegations contained in Paragraph 66 of the Complaint.	
10	67.	Defendants deny the allegations contained in Paragraph 67 of the Complaint.	
11	68.	Defendants deny the allegations contained in Paragraph 68 of the Complaint.	
12	69.	Defendants deny the allegations contained in Paragraph 69 of the Complaint.	
13	AFFIRMATIVE DEFENSES		
15	In accordance with Nevada Rule of Civil Procedure 11, all possible affirmative defenses		
16	may or may not have been asserted herein insofar as sufficient facts were not available to		
17	Defendants after reasonable inquiry upon the filing of this pleading and therefore Defendants		
18	assert the following defenses based in fact or upon reasonable belief and hereby reserve the right		
19	to amend this Answer to allege appropriate or additional defenses, if subsequent investigation or		
20	discovery so	warrants:	
21		FIRST AFFIRMATIVE DEFENSE	
22	Defendants hereby incorporate by reference those affirmative defenses enumerated in		
23	Rule 8 of the Nevada Rules of Civil Procedure as if fully set forth herein. In the event further		
24	investigation or discovery reveals the applicability of any such defenses, Defendants reserve the		
25	right to seek	leave of the court to amend this Answer to specifically assert any such defense.	
26	Such defenses are herein incorporated by reference for the specific purpose of not waiving any		
27	such defense.		
28	SECOND AFFIRMATIVE DEFENSE		
		-7-	
	1		

1	The Complaint fails to state a claim upon which relief can be granted.	
2	THIRD AFFIRMATIVE DEFENSE	
3	Plaintiffs' claims are contrary to the terms of the agreement(s) between the parties.	
4	FOURTH AFFIRMATIVE DEFENSE	
5	Defendants are excused from performance.	
6	FIFTH AFFIRMATIVE DEFENSE	
7	Plaintiffs' claims are barred, in whole or in part, by the doctrine of laches, waiver,	
8	equitable estoppel, and ratification.	
9	SIXTH AFFIRMATIVE DEFENSE	
10	Plaintiffs' claims are barred, in whole or in part, because Plaintiff failed to adequately	
11	mitigate any injuries and damages that it allegedly suffered.	
12	SEVENTH AFFIRMATIVE DEFENSE	
13	Defendants are entitled to set-off, should any damages be awarded against them.	
14	EIGHTH AFFIRMATIVE DEFENSE	
15	Plaintiffs may not recover on the claims pled in the Complaint because the damages	
16	sought are too speculative and remote.	
17	NINTH AFFIRMATIVE DEFENSE	
18	Plaintiff has contractually waived the right to seek consequential, special, and indirect	
19	damages.	
20	TENTH AFFIRMATIVE DEFENSE	
21	Plaintiffs are not contractually entitled to accelerated rent.	
22	ELEVENTH AFFIRMATIVE DEFENSE	
23	Plaintiff's claims are barred, in whole or in part, by the applicable statutes of limitation.	
24	TWELFTH AFFIRMATIVE DEFENSE	
25	Plaintiff's claims are barred, in whole or in part, for failure to provide reasonable and	
26	adequate notice of any claimed breach.	
27	THIRTEENTH AFFIRMATIVE DEFENSE	
28	Plaintiffs' Complaint fails to state sufficient facts or claims to support punitive damages	
	-8-	

1	against Defendants.	
2	FOURTEENTH AFFIRMATIVE DEFENSE	
3	It has been necessary for Defendants to employ the services of an attorney to defend this	
4	action and a reasonable sum should be allowed Defendants as and for attorney's fees, together	
5	with their costs expended in this action.	
6	FIFTEENTH AFFIRMATIVE DEFENSE	
7	Plaintiffs' Complaint fails to allege facts, or a cause of action, sufficient to support a	
8	claim for attorney's fees, costs, or interest.	
9	PRAYER FOR RELIEF	
10	WHEREFORE, Defendants BERRY HINCKLEY INDUSTRIES and JERRY HERBST	
11	hereby pray for judgment against Plaintiffs as follows:	
12	1. That Plaintiffs take nothing by way of their Complaint and that the same be	
13	dismissed with prejudice.	
14	2. For costs of suit and reasonable attorneys' fees; and	
15	3. For such other and further relief as the Court deems just and proper in the	
16	circumstances.	
17	COUNTERCLAIM	
18	Counterclaimants Berry-Hinckley Industries and Jerry Herbst, by and through their	
19	counsel of record, Gordon Silver, allege as follows:	
20	PARTIES	
21	1. Berry-Hinckley Industries ("BHI") is a Nevada corporation.	
22	2. Jerry Herbst ("Herbst," and collectively with BHI, "Counterclaimants") is an	
23	individual and a resident of the State of Nevada.	
24	3. Counter-defendant Larry J. Willard ("Willard") is, on information and belief, a	
25	resident of California, and at all relevant times herein was trustee of the Larry James Willard	
26	Trust Fund (the "Willard Trust").	
27	4. Counter-defendant Overland Development Corporation, Inc., dba LJW	
28	Enterprises, Inc. ("Overland"), is, on information and belief, a California corporation.	
	-9-	
	-9-	

1	5. On information and belief, Willard is the president of Overland. Willard, the		
2	Willard Trust, and Overland are collectively referred to hereinafter as "Counter-defendants."		
3	GENERAL ALLEGATIONS		
4	6. On May 1, 2013, BHI entered into an Operation and Management Agreement (the		
5	"Operation Agreement") with Counter-defendants related to the real property located at 7695 S.		
6	Virginia Street in Reno, Nevada, which BHI had occupied pursuant to a Lease Agreement by and		
7	between BHI and Counter-defendants (the "Willard Lease"). A true and correct copy of the		
8	Operation Agreement is attached hereto as Exhibit 1.		
9	7. Pertinent to this Counterclaim, Section 4 of the Operation Agreement provided		
10	the following with respect to compensation to BHI, who is defined in the Operation Agreement		
11	as the "Operator":		
12	In consideration of Operator performing the Services and other mutual covenants		
13	set forth herein, Owner shall pay to Operator the sum of Ten Thousand and No/100ths Dollars (\$10,000.00) per month (the "Fee"), and Owner then shall be		
14	entitled to all Net Profits (below defined) generated at the Location during each month of the term of this Agreement. The Fee and Net Profits payment shall be		
15	payable as set forth below.		
16	Operator shall have fifty (50) days from the end of each month to tender the Net		
17	Profits to Owner and provide Owner with an accounting of the subject month's Net Profits. Based thereon, commencing on July 20, 2013, and continuing no later		
18	than the twentieth (20 <sup>th</sup> ) day of each month thereafter as necessary depending on the length of the term of this Agreement, Operator shall tender to Owner the		
19	subject month's Net Profits attributable to the Location, minus the Fee, which such Fee shall be retained by Operator. In the event that the Net Profits for any		
20	given month are negative or otherwise not sufficient to pay the Fee, Owner shall		
21	not be entitled to any payment and shall instead pay to Operator the amount of the negative Net Profits (if applicable) plus the balance of the Fee within three (3)		
22	days of receipt of written demand therefore. As used herein, the term Net Profits shall mean the gross receipts collected by Operator in operating the Location in		
23	any given month, minus any and all expenses incurred by Operator in operating the Location during such month including, but not limited to, the cost of all		
24	insurance required to be carried by Operator as well as the actual cost to Operator		
25	of all inventory sold during such month (regardless of whether Operator purchased such inventory during the subject month, or any previous month). Each		
26	payment of Net Profits to Owner hereunder (or alternatively, demand by Operator for payment of the Fee and/or negative Net Profits) shall be accompanied by		
27	documentation, certified by an officer of Operator to be accurate, supporting Operator's calculation of Net Profits for the subject month.		
28			
	10	1	

-10-

1	8. Section 5 of the Operation Agreement also provided that BHI had no obligation to		
2	make the rent payments set forth in the Willard Lease. Specifically:		
3	During the term of this Agreement, Operator shall have no obligation to make the		
4	rent payments set forth in the Lease. Owner hereby acknowledges and agrees that the continuous operation of the Location by Operator and the payment of the Net		
5	Profits to Owner (if any) constitutes sufficient consideration of Operator's occupation of the Location and shall be in lieu of any obligation to pay rent under		
6	the Lease during the term of this Agreement.		
7	9. Further, Section 9 of the Operation Agreement provides that Counter-defendants		
8	must indemnify BHI as follows:		
9	Owner shall indemnify and defend Operator, and its officers, directors, owners,		
10	employees, affiliates and agents against, and hold them harmless from, any and all costs, expenses, claims, suits, liabilities, loss and damages, including attorneys'		
11	fees arising out of or relating to this Agreement and/or the services provided by Operator under this Agreement, excepting therefrom costs, expenses, claims,		
12	suits, liabilities, loss and damages arising as a result of Operator's gross negligence. The indemnification obligations set forth herein shall survive the		
13	expiration or earlier termination of this Agreement.		
14	10. BHI incurred a negative Net Profit during the term of the Operation Agreement,		
15	which was also insufficient to pay the Fee contemplated in Section 4 of the Operation		
16	Agreement.		
17	11. However, Counter-defendants have failed to pay to BHI the amount of negative		
18	Net Profits plus the balance of the Fee as was required by Section 4 of the Operation Agreement.		
19	12. Further, Counter-defendants have brought suit against BHI, seeking, inter alia,		
20	rental payments under the Willard Lease that Counter-defendants claim were incurred during the		
21	term of the Operation Agreement.		
22	13. Counter-defendants have also brought suit against Herbst, claiming, inter alia,		
23	that Herbst is liable for rental payments under the Willard Lease that Counter-defendants claim		
24	were incurred during the term of the Operation Agreement by virtue of a guaranty between		
25	Herbst and Counter-defendants (the "Willard Guaranty").		
26	<u>FIRST CLAIM FOR RELIEF</u> (BREACH OF CONTRACT)		
27			
28	14. Counterclaimants incorporate by reference all allegations previously stated in this		
	-11-		

1	Counterclaim as though set forth fully herein.	
2	15. The Operation Agreement constitutes a binding legal contract.	
3	16. BHI performed under the terms of the Operation Agreement.	
4	17. Counter-defendants' failure to pay to BHI the amount of negative Net Profits plus	
5	the balance of the Fee as was required by Section 4 of the Operation Agreement constitutes a	
6	breach of the Operation Agreement.	
7	18. As a result of Counter-defendants' breach of the Operation Agreement, BHI has	
8	suffered damages in excess of \$10,000, plus interest, attorneys' fees, and costs.	
9	SECOND CLAIM FOR RELIEF (DECLARATORY RELIEF)	
10 11	19. Counterclaimants incorporate by reference all allegations previously stated in this	
11	Counterclaim as though set forth fully herein.	
12	20. Pursuant to NRS 30.040(1) and NRS 30.050, any person interested under a	
14	written contract, or whose rights, status, or other legal relations are affected by a contract, may	
15	have determined any question of construction or validity arising under the contract and obtain a	
16	declaration of rights, status, or other legal relations thereunder, regardless of whether or not a	
17	breach has occurred.	
18	21. Here, a controversy exists because Counter-defendants have brought suit against	
19	BHI seeking, inter alia, rental payments under the Willard Lease that Counter-defendants claim	
20	were incurred during the term of the Operation Agreement.	
21	22. Similarly, Counter-defendants have brought suit against Herbst, claiming, inter	
22	alia, that Herbst is liable for rental payments under the Willard Lease that Counter-defendants	
23	claim were incurred during the term of the Operation Agreement by virtue of the Willard	
24	Guaranty.	
25	23. While BHI and Herbst deny any liability under the Willard Lease and Willard	
26	Guaranty, BHI and Herbst request a declaration that BHI and Herbst are not responsible for any	
27	of the rental payments that Counter-defendants claim were incurred during the term of the	
28	Operation Agreement, as Section 5 of the Operation Agreement expressly provides that "[d]uring	
	-12-	

1	the term of this Agreement, Operator shall have no obligation to make the rent payments set		
2	forth in the Lease."		
2	PRAYER FOR RELIEF		
4	WHEREFORE, Counterclaimants pray for relief as follows against Counter-defendants:		
5	1. Judgment for damages in excess of \$10,000 in favor of BHI and against Counter-		
6	defendants.		
7	2. A judicial declaration that BHI and Herbst are not responsible for any of the rental		
8	payments that Counter-defendants claim were incurred during the term of the Operation		
9	Agreement.		
10	3. For all attorneys' fees, costs, and interest according to law; and		
11	4. For such other and further relief as this Court deems just and proper.		
12	AFFIRMATION Description 020		
13	Pursuant to NRS 239B.030		
14	The undersigned does hereby affirm that the preceding document does not contain the		
15	social security number of any person.		
16	DATED this 21 <sup>st</sup> day of April, 2015.		
17	GORDON SILVER		
18			
19	By: <u>/s/ Brian R. Irvine</u> JOHN P. DESMOND		
20	Nevada Bar No. 5618 BRIAN R. IRVINE		
21	Nevada Bar No. 7758 KATHLEEN M. BRADY		
22	Nevada Bar No. 11525 100 West Liberty Street, Suite 940		
23	Reno, Nevada 89501 Tel: (775) 343-7500		
24	Fax: (775) 786-0131 Email: jdesmond@gordonsilver.com		
25	Email: <u>birvine@gordonsilver.com</u> Email: kbrady@gordonsilver.com		
26	Attorneys for Defendants,		
27	Berry Hinckley Industries, and Jerry Herbst		
28	σειτη πετολι		
	-13-		

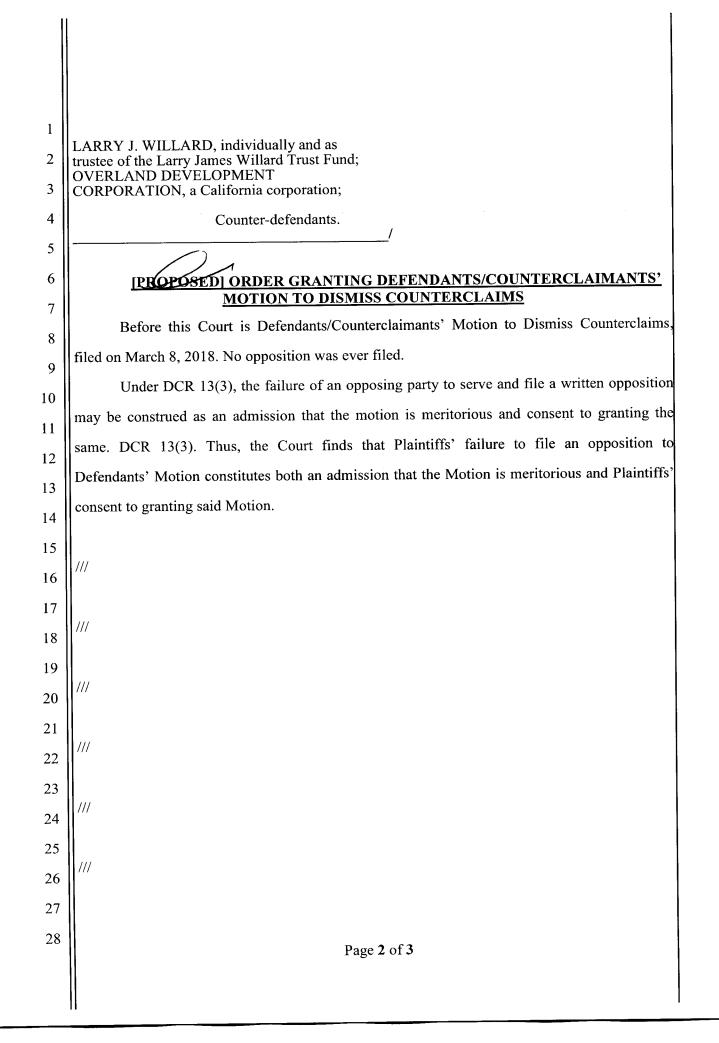
1	CERTIFICATE OF SERVICE		
2	I certify that I am an employee of GORDON SILVER, and that on this date, pursuant to		
3	NRCP 5(b), I am serving a true and correct copy of the attached DEFENDANTS' ANSWER		
4	TO PLAINTIFFS' AMENDED COMPLAINT AND COUNTERCLAIM on the parties as		
5	set forth below:		
6 7	XXX Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, Reno, Nevada, postage prepaid, following ordinary business practices		
8 9	Certified Mail, Return Receipt Requested		
10	Via Facsimile (Fax)		
10	Via E-Mail		
12	Placing an original or true copy thereof in a sealed envelope and causing the same to be personally Hand Delivered		
13 14	Federal Express (or other overnight delivery)		
15	Electronic Notification		
16	addressed as follows:		
17 18 19	David C. O'Mara THE O'MARA LAW FIRM, P.C. 311 E. Liberty Street Reno, Nevada 89501		
	DATED this 21 <sup>st</sup> day of April, 2015.		
20 21			
21			
23	/s/ Stephanie J. Glantz An Employee of GORDON SILVER		
24			
25			
26			
27			
28			
	-14-		

#### EXHIBIT "3"

## EXHIBIT "3"

# EXHIBIT "3"

2 3 4 5 6 7	3105 DICKINSON WRIGHT, PLLC JOHN P. DESMOND Nevada Bar No. 5618 BRIAN R. IRVINE Nevada Bar No. 7758 ANJALI D. WEBSTER Nevada Bar No. 12515 100 West Liberty Street, Suite 940 Reno, NV 89501 Tel: (775) 343-7500 Fax: (775) 786-0131 Email: Jdesmond@dickinsonwright.com Email: Birvine@dickinsonwright.com Email: Awebster@dickinsonwright.com Email: Awebster@dickinsonwright.com Email: Awebster@dickinsonwright.com Email: Awebster@dickinsonwright.com Imail: Awebster@dickinsonwright.com	FILED Electronical y CV14-01712 2018-04-13 11:091 Jacqueline Brya Clerk of the Cou Transaction # 6628	nt Irt
12	IN AND FOR THE COUNT	Y OF WASHOE	
<ol> <li>13</li> <li>14</li> <li>15</li> <li>16</li> <li>17</li> <li>18</li> <li>10</li> </ol>	LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD C. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, Plaintiff, VS.	CASE NO. CV14-01712 DEPT. 6	
19 20 21	BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual Defendants.		
22	/		
23 24	BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual;		
25	Counterclaimants,		
26			
27	vs		
28	Page 1 of 3		



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

### EXHIBIT "4"

## EXHIBIT "4"

# EXHIBIT "4"

FILED Electronically CV14-01712 2018-04-13 11:12 19 AM Jacqueline Bryant Clerk of the Court Transaction # 6628513

		Clerk of the C Transaction # 66
1	3105	
2	DICKINSON WRIGHT, PLLC JOHN P. DESMOND	
3	Nevada Bar No. 5618 BRIAN R. IRVINE	
4	Nevada Bar No. 7758 ANJALI D. WEBSTER	
	Nevada Bar No. 12515	
5	100 West Liberty Street, Suite 940 Reno, NV 89501	
6	Tel: (775) 343-7500 Fax: (775) 786-0131	
7	Email: Jdesmond@dickinsonwright.com	
8	Email: <u>Birvine@dickinsonwright.com</u> Email: <u>Awebster@dickinsonwright.com</u>	
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 CO	OUNTY OF WASHOE
13	TADDY T WITTADD in dividually	CASE NO. CV14-01712
14	LARRY J. WILLARD, individually and as trustee of the Larry James Willard	
15	Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;	DEPT. 6
16	EDWARD C. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the	
17	Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,	
18	Plaintiff,	
	vs.	
19	BERRY-HINCKLEY INDUSTRIES, a	
20	Nevada corporation; and JERRY HERBST, an individual	
21	Defendants.	
22	/	
23	BERRY-HINCKLEY INDUSTRIES, a	
24	Nevada corporation; and JERRY HERBST, an individual;	
25	Counterclaimants,	
26		
27	VS	
28	_	1 60
	Page	1 of 2

1 2 3	LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; Counter-defendants.	01D
4	OF CUAIMS OF WOOLEY PLA PROPOSED ORDER OF DISMISSAL WITH PREJUDICE	NTIFFS
6 7 8 9 10 11 12 13 14	Pursuant to the Stipulation for Dismissal with Prejudice of the parties and other good cause appearing therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that all of the claims of Plaintiffs EDWARD C. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000 asserted in the above-entitled action are dismissed with prejudice, the parties to bear their own costs and attorney's fees. IT IS SO ORDERED this $3$ day of $4pni$ , 2018.	
15	DISTRICT COURT JUDGE	
16	Respectfully submitted by:	
17	DICKINSON WRIGHT, PLLC	
<ol> <li>18</li> <li>19</li> <li>20</li> <li>21</li> <li>22</li> <li>23</li> <li>24</li> <li>25</li> <li>26</li> <li>27</li> </ol>	/s/ Brian R. Irvine         JOHN P. DESMOND         Nevada Bar No. 5618         BRIAN R. IRVINE         Nevada Bar No. 7758         ANJALI D. WEBSTER         Nevada Bar No. 11525         100 West Liberty Street, Suite 940         Reno, NV 89501         Tel: (775) 343-7500         Fax: (775) 786-0131         Email: Jdesmond@dickinsonwright.com         Email: Birvine@dickinsonwright.com         Email: Awebster@dickinsonwright.com         Attorneys for Defendants         Berry Hinckley Industries, and         Jerry Herbst	
28	Page 2 of 2	

#### EXHIBIT "5"

## EXHIBIT "5"

# EXHIBIT "5"

1		FILED Electronically CV14-01712 2018-01-04 05:30:42 PI Jacqueline Bryant Clerk of the Court Transaction # 6466861	
3	3		
4			
5			
6			
7		CV14-01712	
8	trustee of the Larry James Willard Trust Fund;		
9	<sup>9</sup> OVERLAND DEVELOPMENT Dept. No.	6	
10	EDWARD C. WOOLEY AND JUDITH A ORDER GI		
11	Edward C. Wooley and Judith A. Wooley COUNTER	CLAIMANTS' MOTION	
12 13		CTIONS [ORAL NT REQUESTED]	ł
13	Plaintiffs,		
15	VS		
16			
17	Corporation; and JERRY HERBST, an		
18	18 Defendants.		
19	19		
20	BERRY-HINCKLEY INDUSTRIES, a		
21	an individual.		
22	22 Countereleimente		
23	VS		
24	LARRY L WILLARD individually and as		
25	<sup>25</sup> trustee of the Larry James Willard Trust Fund;		
26	CORPORATION, a California corporation;		
27	Counter-defendants		
28	20 /		
	1		
		_	

#### ORDER GRANTING DEFENDANTS'/ COUNTERCLAIMANTS' MOTION FOR SANCTIONS

Before this Court is Defendants'/Counterclaimants' Motion for Sanctions [Oral Argument Requested] ("Motion"), filed November 15, 2017 by Defendants/Counterclaimants BERRY-HINCKLEY INDUSTRIES ("Berry-Hinckley") and JERRY HERBST ("Mr. Herbst") (collectively, "Defendants") by and through their counsel Brian Irvine, Esq. Also on November 14, 2017, Defendants filed Defendants/Counterclaimants' Motion to Exceed Page Limit on Defendants/Counterclaimants' Motion for Sanctions ("Motion to Exceed Page Limit"). Plaintiffs LARRY J. WILLARD, OVERLAND DEVELOPMENT CORPORATION, EDWARD C. WOOLEY and JUDITH WOOLEY (collectively, "Plaintiffs" unless individually referenced) failed to file an opposition to the Motion to Strike. As a result, Defendants filed a Notice of Non-Opposition to Defendants'/Counterclaimants' Motion for Sanctions ("Notice of Non-Opposition") on December 7, 2017 and submitted the matter for decision thereafter. On December 6, 2017, Plaintiffs filed Plaintiffs' Request for a Brief Extension of Time to Respond to Defendants' Three Pending Motions, and to Extend the Deadline for Submission of Dispositive Motions ("Request for Extension"), by and through their counsel, Brian P. Moquin, Esq. ("Mr. Moquin") and David C. O'Mara, Esq ("Mr. O'Mara").1 <sup>1</sup> Mr. Moquin is a California attorney who has been admitted to practice in Nevada pro hac vice and is litigating this case. Mr. O'Mara is serving as local counsel only.

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

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

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

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

 <sup>&</sup>lt;sup>21</sup> <sup>2</sup> The Court inquired as to why Plaintiffs' failed to oppose the *Motion to Strike*. Mr. Moquin informed the Court that his computer had malfunctioned, and his drafts of Plaintiffs' oppositions could not be recovered. Mr. Moquin further explained he is a sole practitioner without access to an IT department.

1	Accordingly, and good cause appearing therefor,
2	IT IS HEREBY ORDERED AND DECREED:
3	1. Defendants'/Counterclaimants' Motion for Sanctions [Oral Argument
4 5	Requested] is GRANTED.
6	2. Defendants/Counterclaimants' Motion to Exceed Page Limit on
7	Defendants/Counterclaimants' Motion for Sanctions is GRANTED.
8	3. Defendants shall submit a Proposed Order granting
9	Defendants'/Counterclaimants' Motion for Sanctions, including factual and
10 11	legal analysis and discussion, to Department 6 within twenty (20) days of the
12	date of this Order in accordance with WDCR 9.
13	Dated this day of January, 2018.
14	
15	DISTRICT JUDGE
16 17	
17	
19	
20	
21	
22	
23 24	
25	
26	
27	
28	
	4

1	CERTIFICATE OF SERVICE	
2	I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT;	
3	that on the 40 day of January, 2018, I electronically filed the foregoing with the Clerk	
4	of the Court system which will send a notice of electronic filing to the following:	
5		
6	BRIAN IRVINE, ESQ.	
7	JOHN P. DESMOND, ESQ.	
8	ANJALI D. WEBSTER, ESQ.	
9	BRIAN MOQUIN, ESQ.	
10	DAVID O'MARA, ESQ.	
11		
12		
13		
14		
15		
16	And, I deposited in the County mailing system for postage and mailing with the	
17	United States Postal Service in Reno, Nevada, a true and correct copy of the attached	
18	document addressed as follows:	
19		
20	Hidi Bre	
21		
22		
23		
24 25		
23 26		
20 27		
27		
20		

## EXHIBIT "6"

## EXHIBIT "6"

# EXHIBIT "6"

1 2 3	CODE NO. 3370	FILED Electronically CV14-01712 2018-01-04 04:53:56 Pl Jacqueline Bryant Clerk of the Court Transaction # 6466778
4		
5 6	IN THE SECOND JUDICIAL DISTRICT COUR	
7	IN AND FOR THE COUNTY	OF WASHOE
<ul> <li>8</li> <li>9</li> <li>10</li> <li>11</li> <li>12</li> <li>13</li> <li>14</li> <li>15</li> <li>16</li> <li>17</li> <li>18</li> <li>19</li> </ul>	LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD C. WOOLEY AND JUDITH A WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, Plaintiffs, vs. BERRY-HINCKLEY INDUSTRIES, a Nevada Corporation; and JERRY HERBST, an individual, Defendants.	Case No. CV14-01712 Dept. No. 6 ORDER GRANTING DEFENDANTS'/ COUNTERCLAIMANTS' MOTION TO STRIKE AND/OR MOTION IN LIMINE TO EXCLUDE THE EXPERT TESTIMONY OF DANIEL GLUHAICH
20 21 22	BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual;	
23	Counterclaimants, vs	
24	LARRY J. WILLARD, individually and as	
25 26	trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT	
20 27	CORPORATION, a California corporation;	
28	Counter-defendants.	
	/	
	1	

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

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

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

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

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

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

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

Accordingly, and good cause appearing therefor,

#### IT IS HEREBY ORDERED AND DECREED:

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

 <sup>&</sup>lt;sup>21</sup> <sup>2</sup> The Court inquired as to why Plaintiffs' failed to oppose the *Motion to Strike*. Mr. Moquin informed the Court that his computer had malfunctioned, and his drafts of Plaintiffs' oppositions could not be recovered. Mr. Moquin further explained he is a sole practitioner without access to an IT department.

2. Defendants' Motion to Exceed Page Limit is GRANTED. Dated this 4 day of January, 2018. DISTRICT JUDGE 

1	CERTIFICATE OF SERVICE	
2	I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT;	
3	that on theday of January, 2018, I electronically filed the foregoing with the Clerk	
4	of the Court system which will send a notice of electronic filing to the following:	
5		
6	BRIAN IRVINE, ESQ.	
7	JOHN P. DESMOND, ESQ.	
8	ANJALI D. WEBSTER, ESQ.	
9	BRIAN MOQUIN, ESQ.	
10	DAVID O'MARA, ESQ.	
11		
12		
13		
14		
15		
16	And, I deposited in the County mailing system for postage and mailing with the	
17	United States Postal Service in Reno, Nevada, a true and correct copy of the attached	
18	document addressed as follows:	
19		
20	Heidi Bre	
21	pull tore	
22		
23		
24		
25		
26		
27		
28		

l

## EXHIBIT "7"

## EXHIBIT "7"

# EXHIBIT "7"

1 2 3	CODE NO. 3370	FILED Electronically CV14-01712 2018-01-04 05:32:39 PM Jacqueline Bryant Clerk of the Court Transaction # 6466867
4		
5	IN THE SECOND JUDICIAL DISTRICT COURT	F OF THE STATE OF NEVADA
6	IN AND FOR THE COUNTY (	OF WASHOE
7		
8		Case No. CV14-01712
9	trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT	Dept. No. 6
10	CORPORATION, a California corporation; EDWARD C. WOOLEY AND JUDITH A	ORDER GRANTING DEFENDANTS'
11	WOOLEY, individually and as trustees of the	MOTION FOR PARTIAL SUMMARY JUDGMENT [ORAL ARGUMENT
12		REQUESTED]
13	Plaintiffs,	
14		
15		
16 17	Corporation; and JERRY HERBST, an	
18		
19		
20	BERRY-HINCKLEY INDUSTRIES, a	
21	Nevada corporation; and JERRY HERBST,	
22	an individual;	
23	Counterclaimants, vs	
24		
25	I trustee of the Larry James Willard Trust Fund,	
26	OVERLAND DEVELOPMENT CORPORATION, a California corporation;	
27	Counter-defendants	
28		
	/	
	1	

#### ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT [ORAL ARGUMENT REQUESTED]

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

13 14

Ι.

1

2

3

4

5

6

7

8

9

10

11

12

#### FACTUAL AND PROCEDURAL HISTORY

This case arises out of two commercial lease agreements entered into between 15 16 Plaintiffs, as lessors, and Defendants, as lessees, for the Subject Properties located at 1820 17 East U.S. Highway 50, Carson City, Nevada (the "Highway 50 Property") and 7605 - 7699 18 S. Virginia Street, Reno, Nevada (the "Virginia Property"). See Complaint, pp. 3-7. On 19 November 15, 2017, Defendants filed their *Motion*, seeking an Order of this Court granting 20 21 summary judgment for Defendants with respect to Plaintiffs' claim for "diminution in value" 22 damages arising out of Defendants' alleged breach of the lease agreements. See Motion, 23 generally. Plaintiffs failed to oppose the Motion. As a result, Defendants filed a Notice of 24 Non-Opposition and submitted the matter for decision on December 7, 2017. 25

27 | 11

11

26

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

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

Plaintiffs once again failed to respond to the Motion or request an extension. Defendants then filed a second Notice of Non-Opposition to Defendants'/Counterclaimants' Motion for Partial Summary Judgment ("Second Notice of Non-Opposition") and subsequent request for submission on December 18, 2017.

24

25

П.

#### LAW AND ANALYSIS

Under DCR 13(3), the failure of an opposing party to serve and file a written

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

However, in light of this Court's Order Granting Defendants/Counterclaimants' Motion for Sanctions [Oral Argument Requested], the Court finds Defendant's Motion is moot at this

1

Mr. Moguin is a California attorney who has been admitted to practice in Nevada pro hac vice and 26 is litigating this case. Mr. O'Mara is serving as local counsel only.

<sup>27</sup> <sup>2</sup> The Court inquired as to why Plaintiffs' failed to oppose the Motion to Strike. Mr. Moquin informed the Court that his computer had malfunctioned, and his drafts of Plaintiffs' oppositions could not be 28 recovered. Mr. Moquin further explained he is a sole practitioner without access to an IT department.

1	juncture.
2	Accordingly, and good cause appearing therefor,
3	IT IS HEREBY ORDERED Defendants' Motion for Partial Summary Judgment is
4	DENIED as moot.
5	Dated this day of January, 2018.
6 7	Dated this day of bandary, 2010.
7 8	
9	DISTRICT JUDGE
10	
11	
12	
13	
14	
15	
16	
17	
18 19	
20	
21	
22	
23	
24	
25	
26	
27	
28	
	4

<ul> <li>I certify that I am an employee of THE SECOND JUDICIAL DISTRICT Certify that on the <u>filled</u> day of January, 2018, I electronically filed the foregoing with the of the Court system which will send a notice of electronic filing to the following:</li> <li>BRIAN IRVINE, ESQ.</li> <li>JOHN P. DESMOND, ESQ.</li> <li>ANJALI D. WEBSTER, ESQ.</li> <li>BRIAN MOQUIN, ESQ.</li> <li>DAVID O'MARA, ESQ.</li> </ul>	
<ul> <li>that on the <u>4</u> day of January, 2018, I electronically filed the foregoing with the</li> <li>of the Court system which will send a notice of electronic filing to the following:</li> <li>BRIAN IRVINE, ESQ.</li> <li>JOHN P. DESMOND, ESQ.</li> <li>ANJALI D. WEBSTER, ESQ.</li> <li>BRIAN MOQUIN, ESQ.</li> </ul>	
<ul> <li>of the Court system which will send a notice of electronic filing to the following:</li> <li>BRIAN IRVINE, ESQ.</li> <li>JOHN P. DESMOND, ESQ.</li> <li>ANJALI D. WEBSTER, ESQ.</li> <li>BRIAN MOQUIN, ESQ.</li> </ul>	
<ul> <li>6 BRIAN IRVINE, ESQ.</li> <li>7 JOHN P. DESMOND, ESQ.</li> <li>8 ANJALI D. WEBSTER, ESQ.</li> <li>9 BRIAN MOQUIN, ESQ.</li> </ul>	
<ul> <li>JOHN P. DESMOND, ESQ.</li> <li>ANJALI D. WEBSTER, ESQ.</li> <li>BRIAN MOQUIN, ESQ.</li> </ul>	
8 ANJALI D. WEBSTER, ESQ. 9 BRIAN MOQUIN, ESQ.	
9 BRIAN MOQUIN, ESQ.	
DAVID O MANA, ESQ.	
11	
12	
13	
14	
15	
<sup>16</sup> And, I deposited in the County mailing system for postage and mailing w	
<sup>17</sup> United States Postal Service in Reno, Nevada, a true and correct copy of the at	tached
18 document addressed as follows:	
19	
20 21 bride Pore	
22	
23 24	
25	
26	
27	
28	

### EXHIBIT "8"

### EXHIBIT "8"

## EXHIBIT "8"

Docket 77780 Document 2019-02425

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

1 2 3	LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;	
4	Counter-defendants.	
5		
	(LO	
6 7	#PROPOSED   FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON	
8	<b>DEFENDANTS' MOTION FOR SANCTIONS</b>	
9	1. Plaintiffs in this matter are Larry J. Willard, individually and as trustee of the	
10	Larry James Willard Trust Fund; Overland Development Corporation, a California corporation	
11	(collectively, "Willard" or the "Willard Plaintiffs"); Edward E. Wooley and Judith A. Wooley,	
12	individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos	
13	Revocable Trust 2000 (collectively, "Wooley"). The Willard Plaintiffs are also counter-	ļ
14	defendants in this matter.	
15	2. Plaintiffs' counsel are Brian Moquin, a California attorney who has been	
16	admitted to practice in Nevada pro hac vice, and David O'Mara of the O'Mara Law Firm, P.C.,	
17	who is serving as local counsel.	
18	3. Defendants/counter-claimants in this matter are Berry-Hinckley Industries	
19	("BHI") and Jerry Herbst (collectively, "Defendants").	ĺ
20	4. The Motion before this Court is Defendants' Motion for Sanctions, wherein	
21	Defendants sought, in pertinent part, dismissal with prejudice of this action pursuant to NRCP	
22	16.1(e)(3), NRCP 37(b)(2), NRCP 41(b), and <i>Blanco v. Blanco</i> , 129 Nev, 311 P.3d 1170.	
23	(Defendants' Motion).	
24	5. Defendants' Motion was filed on November 15, 2017. Plaintiffs did not file an	
25	Opposition, despite Defendants and this Court granting several extensions. Defendants' Motion	
26	was submitted to this Court on December 18, 2017.	
27		
28		
	Page 2 of 34	

1	6. This Court, having considered the briefing, and being otherwise fully advised,
2	and GOOD CAUSE APPEARING, hereby finds the following facts and makes the following
3	conclusions of law:
4	FINDINGS OF FACT
5	<u>Plaintiffs' Complaint</u>
6	7. On August 8, 2014, Plaintiffs commenced this action against Defendants, filing a
7	joint complaint against them. (Complaint). <sup>1</sup>
8	8. Willard sought the following damages against Defendants for an alleged breach
9	of the lease between Willard and BHI: (1) "rental income" for \$19,443,836.94, discounted by
10	4% per the lease to \$15,741,360.75 as of March 1, 2013; and (2) certain property-related
11	damages, such as insurance and installation of a security fence. (First Amended Complaint
12	("FAC")).
13	9. Willard had also sought several other categories of damages which have since
14	been dismissed or withdrawn. (May 30, 2017, Order).
15	10. Wooley sought the following damages against Defendants for an alleged breach
16	of the lease between Wooley and BHI: (1) "rental income in the amount of \$4,420,244.00 that
17	[Wooley] otherwise would have received," discounted by a rate of 4% as specified in the
18	Wooley Lease to \$3,323,543.90 as of March 1, 2013; (2) a "diminution in value in an amount to
19	be proven at trial but which is at least \$2,000,000"; (3) property taxes in the amount of \$1,500;
20	(4) insurance for \$3,840; (5) maintenance costs of \$4,000; (6) management costs of \$2,500; and
21	(7) security deposit from subtenant for \$2,485.00. (FAC).
22	11. Wooley had also sought several other categories of damages which have since
23	been dismissed or withdrawn. (May 30, 2017, Order).
24	
25	<sup>1</sup> All of the referenced documents have been filed with this Court in this case, either as
26	pleadings/ briefings/ motions or as exhibits to the same. References to "Defendants' Motion" are to Defendants' Motion for Sanctions. References to "Willard Motion" or "Wooley Motion"
27	are to the Plaintiffs' respective Motions for Summary Judgment.
28	Page 3 of 34
	l

1

#### Plaintiffs' Initial Disclosures

2 12. On December 12, 2014, Plaintiffs provided their initial disclosures. (Exhibit 1 to
3 Defendants' Motion for Sanctions).

4 13. However, while Plaintiffs disclosed anticipated witnesses and documents, they
5 did not provide any computation of their claimed damages, notwithstanding the express
6 requirement to do so set forth in NRCP 16.1(a)(1)(C).

#### 7 Defendants' February 12, 2015, Letter

8 14. On February 12, 2015, Defendants wrote to Plaintiffs regarding the deficiencies
9 in their initial disclosures, and informing them that the disclosures did not include the damages
10 computations required by the Nevada Rules of Civil Procedure. (Exhibit 4 to Defendants'
11 Motion for Sanctions).

12 15. Defendants advised Plaintiffs that their failure to timely comply would result in
13 Defendants seeking sanctions. *Id*.

14 16. However, Plaintiffs did not comply with their NRCP 16.1 obligations upon15 receipt of this letter or any time thereafter.

16 Plaintiffs' Interrogatory Responses

17 17. In April of 2015, Defendants served Plaintiffs with written discovery. (June 23,
18 2015, Motion to Compel).

19 18. Defendants had not received any NRCP 16.1 damages disclosures from
20 Plaintiffs, and asked Plaintiffs in separate interrogatories to "[p]lease explain in detail how the
21 damages...alleged in your Amended Complaint were calculated." (Plaintiffs' Interrogatory
22 Responses, Exhibits 5 and 6 to Defendants' Motion for Sanctions).

19. Plaintiffs did not respond, even after Defendants granted them multiple
extensions, requiring Defendants to file a motion to compel. (June 23, 2015, Motion to
Compel).

- 27
- 28

20. This Court granted the Motion to Compel, which Plaintiffs failed to oppose.
 Therein, this Court ordered, in pertinent part, that Plaintiffs shall pay Defendants' reasonable
 expenses incurred in making the motion, including attorneys' fees. (July 1, 2015, Order).

4 21. Only then did Plaintiffs respond, and, in pertinent part, simply repeated the
5 allegations in their Complaint when discussing their damages. (Plaintiffs' Interrogatory
6 Responses, Exhibits 5 and 6 to Defendants' Motion for Sanctions).

7 22. Notably, these Court-ordered responses were the last time Plaintiffs provided
8 anything that even came close to a damages disclosure until October of 2017, and even these
9 did not comply with the requirements of NRCP 16.1.

10 23. Plaintiffs did not pay Defendants' reasonable expenses, despite the direct order
11 from this Court to do so.

12 24. Further, the fact that the Court imposed monetary sanctions on Plaintiffs in 2015
13 clearly did not deter any of their subsequent conduct in continuing to fail to comply with their
14 discovery obligations and Court orders.

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

16 25. On August 28, 2015, Defendants wrote to Plaintiffs, referencing Plaintiffs' 17 continued failure to comply with discovery obligations and resulting prejudice to Defendants, 18 and noting that Plaintiffs had also yet to comply with the promise they made during a status 19 conference before this Court to provide Defendants with discovery responses to Defendants' 20 outstanding discovery requests in advance of the parties' depositions scheduled to begin on 21 August 20, 2015. (Exhibit 7 to Defendants' Motion for Sanctions).

22 26. Plaintiffs' failure to comply with discovery obligations necessitated a
23 continuance of the trial date and an extension of all discovery deadlines. (September 3, 2015,
24 Stipulation and Order).

25

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

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

Page 5 of 34

to supplement their responses as necessary. (Exhibits 8 and 9 to Defendants' Motion for 1 2 Sanctions).

28. On April 20, 2016, Defendants continued to request the information that they 3 4 sought in their March 2016 letters, noting that Plaintiffs had promised to provide the documents but they had not done so. (Exhibit 10 to Defendants' Motion). 5

Defendants again requested Plaintiffs' NRCP 16.1 damages calculations, noting 29. 6 7 that "this is an issue which we have raised on multiple occasions." *Id.* 

8

30. Yet again, Plaintiffs did not provide their NRCP 16.1 calculations.

9 31. Defendants also stated that "[y]our clients' failure to provide us with the discovery documents ha[s] prejudiced our ability to prepare a defense on behalf of our clients. 10 11 Without such documents, we cannot depose several witnesses, and our experts are unable to 12 complete their opinions. This also jeopardizes our ability to submit dispositive motions with complete information in time for the Court to fully consider those motions." Id. 13

32. Due to Plaintiffs continued failure to meet discovery obligations, the parties 14 15 agreed to continue the trial date for a second time. The agreed-upon basis for a continuance was that Plaintiffs needed to provide Defendants with documents and information, and also needed 16 17 to provide "Plaintiffs' NRCP 16.1 damages calculations." (May 2, 2016, Stipulation and Order). This Court signed the Order, adding that "no further continuances will be granted." Id. 18

33. 19 Following the second continuance, trial was scheduled for May 2, 2017, and 20 discovery was set to close on March 2, 2017.

#### Plaintiffs' Unsuccessful Purported Disclosure of Daniel Gluhaich as a Non-Retained 21 **Expert Witness** 22

27

28

34. On December 2, 2016, Plaintiffs purported to disclose Daniel Gluhaich as a non-23 retained expert. (Exhibit 11 to Defendants' Motion). 24

35. However, while Plaintiffs' disclosure generally referenced the categories as to 25 which Mr. Gluhaich was expected to testify, Plaintiffs did not provide "a summary of the facts 26

Page 6 of 34

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

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

8 37. However, Plaintiffs did not provide an amended disclosure on December 8 or
9 any time thereafter.

#### 10 || The Parties' December 2016 Correspondence

38. On December 9, 2016, Defendants' counsel wrote that Defendants did not
receive the amended disclosure, or dates pursuant to which Defendants could depose Mr.
Gluhaich. (Exhibit 13 to Defendants' Motion). Defendants advised Plaintiffs' counsel that
"[o]bviously, we will be prejudiced by further delay in learning all of the expert opinion
testimony that plaintiffs intent to present at trial. Please provide that information immediately." *Id.*

39. Defendants also addressed Plaintiffs' continued failure to provide their NRCP
16.1 damages. *Id.* On December 5, 2016, Wooley had provided a spreadsheet of damages
expressly "for use in the ongoing informal settlement negotiations between Tim Herbst and Ed
Wooley," and asked Defendants' counsel to "forward...to Tim Herbst as [Defendants' counsel
saw] fit." (Exhibit 12 to Defendants' Motion). Plaintiffs' counsel also stated that he would "be

22

<sup>23</sup><sup>2</sup>In contrast, Defendants disclosed Michelle Salazar as an expert and served Plaintiffs with Ms. Salazar's report, which included, as required under NRCP 16.1(a)(2)(B) "a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years."

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

6

7

8

9

40. On December 23, 2016, Defendants' counsel discussed with Plaintiffs' counsel Plaintiffs' continued failure to properly disclose Mr. Gluhaich or even work with Defendants on expert deposition dates, even though Defendants had provided Plaintiffs an extension. (Exhibit 14 to Defendants' Motion).

10

11

41. Defendants also stated that this conduct was prejudicing Defendants and making it impossible for Defendants to comply with discovery deadlines for rebuttal experts. *Id*.

12 42. Next, Defendants expressed their concerns to Wooley that the damages 13 spreadsheet recently provided for settlement purposes only, which Defendants could not share 14 with their expert or use to prepare any defenses, contained a "new damages model that Plaintiffs 15 had never before utilized in the case," and prejudiced Defendants in that they were unable to 16 conduct discovery about this new computation of damages or the methodology used to arrive at 17 the purported numbers in the Wooley settlement-only spreadsheet. *Id*.

43. Defendants concluded that "[w]e still have never received an NRCP 16.1 damages computation from either set of Plaintiffs, despite numerous demands. Please ensure that Plaintiffs meet their obligations to provide such computations immediately, or we will seek to preclude Plaintiffs from seeking any non-disclosed damages at trial, including those contained in the Wooley spreadsheet you sent me on December 5." *Id.* Defendants also added that they reserved the right to provide Plaintiffs' damages disclosure to their expert so that she could provide new opinions about any new damages model. *Id.* 

44. On December 27, 2016, Plaintiffs' counsel responded. (Exhibit 15 to
Defendants' Motion). Plaintiffs did not address their failure to provide their damages
disclosures in any way, nor did they provide an expert disclosure of Mr. Gluhaich compliant

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

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

8 ||

#### This Court's January 10, 2017, Hearing

9 46. On January 10, 2017, this Court held a hearing on Defendants' motion for partial
10 summary judgment on Plaintiffs' overreaching consequential damages, which Messrs. Willard
11 and Wooley personally attended. (January 10, 2017, transcript).

47. At the hearing, in pertinent part, Defendants' counsel informed this Court that Defendants had never received a damages computation from the Plaintiffs pursuant to NRCP 14 16.1, despite Defendants' many demands. *Id.* at 18. Plaintiffs' counsel attempted to claim that 15 Plaintiffs' interrogatory responses satisfied Plaintiffs' requirements. *Id.* at 42-43. But Plaintiffs' 16 counsel admitted, in open court, that "with respect to Willard, they do not" have an up-to-date, 17 clear picture of Plaintiffs' damages claims. *Id.* 

48. Plaintiffs' counsel also represented to this Court that Wooley's damages 18 19 disclosures to Defendants were complete and up-to-date. Id. This was a misrepresentation, as 20 Wooley had never provided Defendants with any NRCP 16.1 damages disclosures, and 21 certainly had not provided any updated disclosures since the court-ordered discovery response in July of 2015. Further, the December 2016 damages spreadsheet was for use in settlement 22 negotiations only per Wooley's counsel's own words, and therefore was not a disclosure in this 23 24 litigation that could be utilized as contemplated by the Nevada Rules of Civil Procedure. 25 (Exhibit 12 to Defendants' Motion). Defendants' counsel apprised this Court of this fact during 26 the hearing. (January 10, 2017, transcript).

- 27
- 28

Page 9 of 34

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

4

#### The February 9, 2017, Stipulation and Order

5 50. In spite of the rapidly impending trial date (at the time, May 2, 2017) and close
6 of discovery (at the time, March 2, 2017), Plaintiffs did not provide Defendants with any
7 damages disclosures or otherwise supplement or update their discovery responses in any way.
8 Nor did Plaintiffs supplement their improper disclosure of Mr. Gluhaich or properly disclose
9 any expert.

10 51. On February 3, 2017, Defendants wrote Plaintiffs, prefacing their letter by stating that "as of the date of this letter, we have less than thirty (30) days to complete 11 12 discovery, less than sixty (60) days to fully-brief and submit dispositive motions to the Court for 13 decision and less than three months until the current trial date." (Exhibit 16 to Defendants' Motion). Defendants wrote this letter to inform Plaintiffs that because of their failure to comply 14 15 with their obligations, Defendants would not be able to timely complete discovery or submit 16 dispositive motions, all to Defendants' prejudice, and to inform Plaintiffs that their conduct 17 necessitated yet another continuance of the trial date. Id.

52. In the letter, Defendants first addressed Plaintiffs' obstinate refusal to comply 18 19 with expert disclosure requirements. Id. Defendants reminded Plaintiffs that Plaintiffs "were 20 indisputably aware of the fact that Plaintiffs' disclosures did not comply with the Nevada Rules 21 of Civil Procedure at the time [they] served the deficient disclosure or immediately thereafter, as 2.2. demonstrated by [the parties'] December 5, 2016, telephonic conversation." Id. However, 23 despite Defendants having granted Plaintiffs an extension, Plaintiffs had not even attempted to 24 comply with the Nevada Rules of Civil Procedure more than two months after the deadline, 25 "without any justification whatsoever." Id.

26 53. Defendants further informed Plaintiffs that their "failure to comply with the 27 Nevada Rules of Civil Procedure in the first instance, or to rectify their failure by providing an

1 amended disclosure, is severely prejudicing Defendants." Id. With the close of discovery being 2 one month away, "regardless of what Plaintiffs do at this point, this discovery deadline would 3 need to be extended to enable the Defendants to complete discovery and disclose rebuttal 4 experts in the time permitted by the rule, the parties' joint case conference report, and the stipulation and order on file with the Court." Id. 5

6

54. Defendants also addressed Plaintiffs' continued failure to provide Defendants 7 with an NRCP 16.1 damages computation. Id. Defendants stated that it would be "patently 8 prejudicial to Defendants to receive Plaintiffs' damages model within mere days of the close of 9 discovery," and it would be impossible for Defendants' expert to opine on any new damages theories under the current discovery deadlines if Plaintiffs were to seek any additional or 10 different types of damages. Id. 11

Finally, Defendants requested that Plaintiffs also provide other outstanding 12 55. discovery, stating that Plaintiffs "have been promising to disclose these documents for more 13 than 10 months, but have yet to do so." Id. 14

Based on these issues, Defendants asked for a continuance of the trial date so 15 56. that Plaintiffs could comply with their obligations such that Defendants could receive time to 16 prepare their defenses in the timeline entitled to them by the Nevada Rules of Civil Procedure 17 and the parties' agreements. Id. 18

Plaintiffs agreed to a third trial continuance, and on February 9, 2017, the parties 19 57. signed a stipulation which contained several express recitals and stipulations regarding 20 Plaintiffs' ongoing failure to comply with discovery obligations. 21

22

23

24

25

26

27

28

First, Plaintiffs agreed that they never properly disclosed Mr. Gluhaich and that 58. this conduct had been prejudicial to Defendants:

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

Page 11 of 34

1 2	5. Because Plaintiffs' disclosure of Mr. Gluhaich did not include a summary of the facts and opinions to which the witness is expected to testify as required by NRCP 16.1(a)(2)(B), Defendants have been unable to conduct a meaningful deposition
3	of Mr. Gluhaich or to retain experts to rebut Mr. Gluhaich's opinions, because those opinions remain unknown to Defendants.
4	6. Following receipt of Plaintiffs' supplemental
5	disclosure of Mr. Gluhaich, if any, which includes a summary of the facts and opinions to which the witness is expected to testify as required by NRCP $16.1(a)(2)(B)$ , Defendants intend to depose
6	Mr. Gluhaich and retain experts to rebut his opinions.
7	10[B]ecause Plaintiffs have not yet provided an expert disclosure of Mr. Gluhaich that includes a summary of the
8 9	facts and opinions to which the witness is expected to testify as required by NRCP $16.1(a)(2)(B)$ , Defendants will be unable to
10	complete the deposition of Mr. Gluhaich or to retain and disclose experts to rebut Mr. Gluhaich's opinions within the time currently allowed for discovery.
11	
12	(February 9, 2017, Stipulation and Order).
13	59. Second, Plaintiffs stipulated that they had not properly provided their NRCP 16.1
14	damages disclosures:
15	7. On January 10, 2017, the parties appeared in this Court for a hearing on Defendants' Motion for Partial Summary Judgment. At the hearing, the parties discussed with the Court
16	Plaintiffs' obligation to provide, pursuant to NRCP 16.1(a)(1)(C), "[a] computation of any category of damages claimed by the
17	disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary matter, not
18	privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered." (January 10, 2017 Hearing
19 20	Transcript at 18, 42-43 and 61-62). Plaintiffs conceded at the hearing that they have not yet provided Defendants with a
21	complete damages disclosure pursuant to NRCP 16.1(a)(1)(C), and the Court ordered Plaintiffs "to serve, within 15 days after the
	entry of the summary judgment, an updated 16.1 damage disclosure." <i>Id.</i> at 68.
22	8. Upon receipt of Plaintiffs' NRCP 16.1 damages
23 24	disclosure, Defendants intend to have Michelle Salazar supplement her initial expert report to include any opinions about
	any new or revised damages claims or calculations submitted by Plaintiffs, and Defendants may also need to conduct additional
25	fact discovery on any new or revised damages claims or calculations submitted by Plaintiffs.
26	
27	
28	Page 12 of 34

1 2 3 4 5	<ul> <li>9. Discovery in this matter currently is scheduled to close on March 2, 2017, and dispositive motions must be filed and submitted for decision no later than March 31, 2017.</li> <li>10. Because Plaintiffs have not yet provided a complete NRCP 16.1 damages disclosure, Defendants will not be able to complete necessary fact discovery on Plaintiffs' damages, or to disclose an updated expert report of Michelle Salazar within the time currently allowed for discovery</li> </ul>
6	Id.
7	60. Plaintiffs stipulated that this Court should enter an order which, in pertinent part,
8	requires "Plaintiffs to serve Defendants with an updated initial expert disclosure of Dan
9	Gluhaich that is fully-compliant with NRCP 16.1 and NRCP 26 within thirty (30) days of the
10	date of the Order approving this Stipulation." Id.
11	61. Plaintiffs also stipulated to other pertinent deadlines:
12 13	3. The deadline for Defendants to serve a supplemental expert disclosure of Michelle Salazar providing any opinions about any new or revised damages claims or calculations submitted by Plaintiffs shall be extended until sixty (60) days
14	before the close of discovery
15 16 17	5. The deadline for Defendants to serve any rebuttal expert disclosures shall be extended until forty-five (45) days after Plaintiffs serve Defendants with an updated initial expert disclosure of Dan Gluhaich that is fully-compliant with NRCP 16.1 and NRCP 26.
18	Id.
19	62. The Stipulation also included a certification from counsel that "[u]ndersigned
20	counsel certifies that their respective clients have been advised that a stipulation for continuance
21	is to be submitted on their behalf and that the parties have no objection thereto." Id.
22	63. This Court entered an Order consistent with the stipulation on February 9, 2017.
23	Id.
24	64. However, Plaintiffs did nothing as required by the Stipulation since the entry of
25	this Order or the stipulation of the parties to rectify their failure to meet their outstanding
26	discovery obligations.
27	
28	Page 13 of 34

165. The parties set a trial date of January 29, 2018, meaning that, per the Stipulation2and Order, discovery was set to close on November 15, 2017.

3 This Court's May 30, 2017, Order

4 66. On May 30, 2017, this Court entered an Order granting Defendants' motion for 5 partial summary judgment. (Order).

6 67. In pertinent part, this Court stated that "[i]t is further ordered Plaintiffs shall
7 serve, within fifteen (15) days of entry of this order, an updated NRCP 16.1 damage
8 disclosure." *Id.*

9 68. Again, Plaintiffs completely ignored the requirements and obligations imposed
10 by this order. They have failed to both properly disclose Mr. Gluhaich or to provide damages
11 computations, despite the express requirements of the NRCP and this Court's Orders.

12 || Plaintiffs' Motions for Summary Judgment

69. After three years of obstinate refusal to provide Defendants with an NRCP 16.1
damages calculation or to supplement any damages calculations, and after nearly one year of
refusing to comply with the requirements to properly disclose an expert, Plaintiffs filed motions
for summary judgment in which they requested brand new, never-disclosed types, categories,
and amounts of damages with only four weeks remaining in discovery. (Motions for Summary
Judgment).

19 70. Further, their calculations were based upon opinions of Mr. Gluhaich, an expert
20 witness who was never properly disclosed, and who primarily based his opinions on appraisals
21 that were also never disclosed. *Id*.

71. These Motions were filed with only four weeks remaining in discovery—putting
Defendants in the exact same predicament that they were placed in February of 2017—
Defendants could not engage in the discovery (fact and expert) necessary to adequately respond
to Plaintiffs' brand new information, untimely disclosures, and new requests for relief. (Exhibit
16 to Defendants' Motion; February 9, 2017, Stipulation and Order).

28

27

Page 14 of 34

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

#### Willard's Motion

5

16

27

28

73. In Willard's Motion, Willard sought more than triple the amount of damages
(nearly \$40 million more) than he sought in the complaint and ostensibly throughout this case.

8 74. Willard also had a brand new, different basis for his claimed "rent" damages: the
9 liquidated damages provision in the Lease. Unlike the damages sought in his Complaint, the
10 liquidated damages clause contains a variable—reasonable rental value—that would necessarily
11 require Willard to provide expert opinion to support his request and meet his burden of proof.
12 (Willard Lease; Willard Motion).

- 13 75. Willard also had a brand new claim for diminution in value damages that would
  14 also require Willard to offer expert opinions to meet his burden of proof. (Willard's Motion for
  15 Summary Judgment).
  - 76. Default interest was a brand new component of Willard's claimed damages. *Id.*
- 17
  17. The property-related damages now had a different purported value and amount.
  18
  18.
- 19 78. Willard's damages were based upon the opinions of Mr. Gluhaich, an
  20 undisclosed expert witness, and therefore Defendants did not have the chance to explore Mr.
  21 Gluhaich's opinions or rebut them as they are expressly entitled to do under Nevada law. *Id.*
- 79. Willard and his purported expert witness relied upon appraisals from 2008 and
  2014 which were never disclosed in this litigation, despite Willard's NRCP 16.1 and NRCP
  24 26(e) obligations and affirmative discovery requests served by Defendants. *See also* (Exhibit 17
  25 to Defendants' Motion ("Please produce any and all appraisals for the Property from January 1,
  26 2012 through present.")).
  - Page 15 of 34

#### **Wooley's Motion**

1

2 Wooley sought nearly double the amount of damages that he sought in his 80. complaint and ostensibly throughout this case. (Wooley Motion). 3

4 81. Wooley used different bases for his claimed "rent" damages. Unlike the damages 5 sought in his Complaint, the liquidated damages clause contains a variable-reasonable rental 6 value—that would necessarily require Wooley to introduce an expert opinion to meet his burden 7 of proof, which Defendants would be entitled to rebut under Nevada law. (Id.: Exhibit 19 to 8 Defendants' Motion). Wooley's basis for these damages was also different because Mr. Wooley 9 had testified at his deposition that he had not yet terminated the lease and that it was ongoing, 10 yet termination is a prerequisite to utilizing the liquidated damages formula per the parties' 11 lease. (Exhibit 18 to Defendants' Motion; Exhibit 19 to Defendants' Motion). Thus, Wooley 12 was proceeding on an entirely new theory.

82. Default interest was also a brand new component of Wooley's claimed damages. 13 (Wooley Motion). 14

15 83. The property-related damages were based in part upon new damages and 16 documents that were not disclosed to Defendants. Id.

17 84. Wooley's damages were based upon the opinions of Mr. Gluhaich, an undisclosed expert, and therefore Defendants did not have the chance to explore Mr. Gluhaich's 18 19 opinions or rebut them as they were entitled to do. Id.; (February 9, 2017, Stipulation and 20 Order).

Wooley and his purported expert relied upon an appraisal to establish "value" 21 85. that was not previously disclosed in this litigation, despite Wooley's NRCP 16.1 and NRCP 22 23 26(e) obligations. (Exhibit 18 to Defendants' Motion (wherein Wooley stated that he had an appraisal performed when he bought the property, but had not produced that to his lawyer)). 24

25

26 27

28

Page 16 of 34

#### **<u>Timing of the Motions</u>**

1

2 86. At this point in discovery, Defendants had obviously only been able to prepare
3 defenses to the claimed bases for damages that Plaintiffs asserted in the Complaint and
4 Interrogatory responses, not Plaintiffs' brand new, previously undisclosed, bases for damages.

5 87. This timing of these Motions undeniably deprived Defendants of the process that
6 the parties expressly agreed was necessary to rebut any properly-disclosed expert opinions or
7 properly-disclosed NRCP 16.1 damages calculations, as ordered by this Court. (February 9,
8 2017, Stipulation and Order).

88. Indeed, the conduct discussed herein is part of a larger pattern of Plaintiffs to
ignore their discovery obligations. Defendants have been forced to file two motions to compel
and a motion for contempt and sanctions, simply to have Plaintiffs comply with their discovery
obligations.

13 89. Defendants have been required repeatedly to go to extraordinary lengths to
14 attempt to force Plaintiffs to comply with basic obligations and deadlines imposed by the
15 NRCP. (Exhibits 20-23 to Defendants' Motion).

16 90. This Court has also issued several Orders requiring Plaintiffs to meet their
17 discovery obligations, but Plaintiffs have blatantly ignored those Orders.

18 91. Plaintiffs never submitted their Motions for Summary Judgment by the
19 December 15, 2017 deadline to submit dispositive motions, or any time thereafter.

20 || This Court's December 12, 2017, Hearing

21 92. On November 15, 2017, Defendants filed, *inter alia*, Defendants' Motion for
22 Sanctions.<sup>3</sup>

23 93. Therein, Defendants requested that this Court dismiss Plaintiffs' case with
24 prejudice as a sanction for Plaintiffs' discovery violations.

25

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

94. 1 On December 6, 2017, Plaintiffs' filed a Request for a Brief Extension of Time 2 to Respond to Defendants' Three Pending Motions, and to Extend the Deadline for Submission of Dispositive Motions. 3 4 95. At the Pre-Trial Status Conference on December 12, 2017, this Court granted 5 Plaintiffs' Request for Extension and directed Plaintiffs to respond no later than Monday, December 18, 2017, at 10 AM.<sup>4</sup> This Court further directed Defendants to reply no later than 6 7 January 8, 2018, and set the parties' Motions for oral argument on January 12, 2018. 8 96. This Court also admonished Plaintiffs that "you need to know going into these 9 oppositions, that I'm very seriously considering granting all of it." (December 12, 2017, 10 transcript). 97. This Court also admonished Plaintiffs that "you know going into this motion for 11 12 sanctions that you're-I haven't decided it, but I need to see compelling opposition not to grant it." Id. 13 98. 14 However, Plaintiffs did not file any opposition to Defendants' Motions by 15 December 18 or any time thereafter, nor did Plaintiffs request any further extension. In fact, this 16 Court and Defendants' counsel have not heard anything from Plaintiffs or their counsel since 17 the December 12, 2017, hearing. 99. Defendants filed a notice of non-opposition to their Motions and request for 18 19 submission of their Motions on December 18. 20 **CONCLUSIONS OF LAW** 21 Legal standard NRCP 16.1(a)(1)(A)(C) provides that "a party must, without awaiting a 22 100. discovery request, provide to other parties...[a] computation of any category of damages 23 24 claimed by the disclosing party, making available for inspection and copying as under Rule 34 25 <sup>4</sup>This Court inquired as to why Plaintiffs failed to oppose Defendants' Motions. Mr. Moquin informed this Court that his computer had malfunctioned, and his drafts of Plaintiffs' 26 oppositions could not be recovered. Mr. Moquin further explained that he is a sole practitioner 27 without access to an IT department. 28 Page 18 of 34

1 the documents or other evidentiary matter, not privileged or protected from disclosure, on which such a computation is based, including materials bearing on the nature and extent of injuries 2 suffered...." "The use of the word 'must' means that the rule's requirements are mandatory." 3 Vanguard Piping v. Eighth Jud. Dist. Ct., 129 Nev. , , 309 P.3d 1017, 1020 (2013) 4 5 (discussing the NRCP 16.1(a)(1)(D) requirements).

101. Further, "the rule requires a computation supported by documents.... A plaintiff 6 is required to provide its assessment of damages in its initial disclosure in light of the 7 8 information currently available to it in sufficient detail so as to enable each defendant to 9 understand the contours of its potential exposure and make informed decisions as to settlement 10 and discovery." 10 Fed. Proc., L. Ed. § 26:44 (discussing FRCP 26); see generally Vanguard Piping, 129 Nev. at \_\_\_\_, 309 P.3d at 1020 ("Because of the similarity in the language, federal 11 cases interpreting [the FRCP corollary to NRCP 16.1(A)(1)(D)] are strong persuasive 12 13 authority."). Indeed, it is the plaintiff's burden to prove damages, see generally Gibellini v. Klindt, 110 Nev. 1201, 1206, 885 P.2d 540, 543-44 (1994) ("The party seeking damages has the 14 15 burden of proving the fact that he was damaged and the amount thereof."), and "the plaintiff cannot shift to the defendant the burden of attempting to determine the amount of the plaintiff's 16 17 damages." 10 Fed. Proc., L. Ed. § 26:44.

18 102. Also pertinent, NRCP 16.1(a)(2)(B) requires that, with regard to a non-retained expert witness, a party must disclose, *inter alia*, a summary of the facts and opinions to which 19 20 the witness is expected to testify. References to broad categories as to what the expert will testify are insufficient. See Jones v. Colorado Cas. Ins. Co., 2015 WL 6123125, at \*3 (D. Ariz. 21 2015). 22

23

24

25

26

27

28

103. Further, NRCP 26(e) requires that:

> A party who has made a disclosure under Rule 16.1 or 16.2 or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired, if ordered by the court or in the following circumstances:

> > Page 19 of 34

1 2	(1) A party is under a duty to supplement at appropriate intervals its disclosures under Rule 16.1(a) or 16.2(a) if the party learns that in some material respect the information disclosed is
3	incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other
4	parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under Rule
5	16.1(a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the
6	expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule
7	16.1(a)(3) are due.
8	(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production or request for
9	admission, if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective
10	information has not otherwise been made known to the other
11	parties during the discovery process or in writing.
12	104. Failure to comply with NRCP 16.1's requirements shall result in sanctions.
13	Pursuant to NRCP 16.1(e)(3):
14	If an attorney fails to reasonably comply with <b>any</b> provision in
15	[NRCP 16.1], or if an attorney or a party fails to comply with an order entered pursuant to [NRCP 16.1(d)], the court, upon motion
16 17	or upon its own initiative, <b>shall</b> impose upon a party or a party's attorney, or both, appropriate sanctions in regard to the failure(s) as are just, including the following:
18	(A) Any of the sanctions available pursuant to Rule $37(b)(2)$ and Rule $27(b)$ .
19	Rule 37(f);
20	(B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced,
21	exhibited, or exchanged pursuant to Rule 16.1(a).
22	Emphases added).
23	105. In turn, NRCP 37(b)(2) provides that a court may make: "(B) an order refusing
24	to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting
25	hat party from introducing designated matters into evidence", or "(C) striking out pleadings or
26	parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a
27	udgment by default against the disobedient party."
28	Page 20 of 34

1 106. Further, NRCP 37(c)(1) provides that "[a] party that without substantial 2 justification fails to disclose information required by Rule 16.1, 16.2, or 26(e)(1), or to amend a 3 prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial...any witness or information not so disclosed." NRCP 4 37(c)(1) also provides that "[i]n addition to or in lieu of this sanction, the court, on motion and 5 after affording an opportunity to be heard, may impose other appropriate sanctions. In addition 6 7 to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and 8 (C)." 9

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

13 108. In addition to the rule-based authority discussed herein, the Nevada Supreme
14 Court has also recognized that "the court has inherent power to enter defaults and dismiss
15 actions for abusive litigation practices." *Blanco v. Blanco*, 129 Nev. \_\_\_\_, \_\_\_, 311 P.3d 1170,
16 1174 (2013).

17 109. The Nevada Supreme Court has also expressly held that "the factual nature of the 18 underlying case is not an appropriate measure to evaluate whether a [case] should be dismissed 19 for violations of court rules and/or orders." *Huckabay Props. v. NC Auto Parts*, 130 Nev. \_\_\_\_\_, 20 \_\_\_\_\_, 322 P.3d 429, 433 (2014) (discussing this in the context of dismissing an appeal, and also 21 disapproving of prior case law "to the extent it indicates that a fact-based assessment of the 22 underlying civil action should be made before determining whether to dismiss an appeal on 23 procedural grounds.").

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

27

28

Page 21 of 34

#### Plaintiffs' Conduct Demands Dismissal with Prejudice

2

3

4

5

1

111. When considering the issuance of dismissal with prejudice as a sanction, the Nevada Supreme Court has held that "[p]rocedural due process considerations require that such case-concluding discovery sanctions be just and that they relate to the claims at issue in the violated discovery order." *Blanco*, 129 Nev. at \_\_\_\_, 311 P.3d at 1174.

6 112. Further, the Court must consider pertinent factors, including the extent of the 7 offending party's willfulness, whether the non-offending party would be prejudiced by 8 imposition of a lesser sanction, whether dismissal is too severe for the particular discovery 9 abuse, the feasibility and fairness of less severe sanctions, the policy favoring adjudication of 10 cases on their merits, and the need for deterring similar abusive conduct. *Id*. Dismissal should 11 only occur in the most extreme of cases. *Id*.

12 113. However, district courts are not required to consider every factor, so long as the
13 district court's analysis is thoughtfully performed. *See generally Young v. Johnny Ribeiro Bldg.*,
14 *Inc.*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990).

15 114. Here, the factors readily demonstrate that dismissal with prejudice is warranted,
16 and that there is no due process violation in so doing.

17

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

18 115. It must be emphasized as a threshold matter that Plaintiffs never opposed19 Defendants' Motion.

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

117. Thus, this Court finds that Plaintiffs' failure to file an opposition constitutes both
an admission that the Motion is meritorious and Plaintiffs' consent to granting Defendants'
Motion.

26 118. However, separate from this consideration, good cause exists to dismiss this27 case.

28

Page 22 of 34

12

3

4

#### Case-concluding discovery sanctions are just and relate to the claims at issue

119. Plaintiffs' failure to provide damages disclosures are so central to this litigation, and to Defendants' rights and ability to defend this case, that dismissal of the entire case is necessary.

120. Plaintiffs have also completely failed to properly disclose an expert witness,
waiting instead until the virtual end of discovery to attempt to utilize an undisclosed expert
witness to support their Motions for Summary Judgment without complying with the
requirements of the Nevada Rules of Civil Procedure, when it was too late for Defendants to
disclose rebuttal expert testimony or otherwise defend against Plaintiffs' claims for damages.

10 121. Plaintiffs have also ignored or failed to comply with multiple separate discovery 11 obligations throughout this case, forcing Defendants to repeatedly file motions to compel, and 12 necessitating that the trial and discovery deadlines be extended on three occasions to 13 accommodate for Plaintiffs' continued noncompliance.

14 122. Further, Plaintiffs have ignored this Court's express admonition to Plaintiffs that
15 this Court was "seriously considering" dismissal and that Plaintiff's Oppositions would need to
16 be "compelling." Plaintiffs did not even attempt to file oppositions, even after this warning.

17 123. Indeed, Plaintiffs have exhibited complete disregard for this Court's Orders,
18 deadlines imposed by this Court, and the judicial process in general.

19

28

#### Plaintiffs' violations are willful

20 124. Plaintiffs' violations are willful. In addition to the plain language of NRCP 16.1,
21 Plaintiffs have been on direct notice for three years that they have not complied with NRCP
22 16.1(a)(1)(C), yet have not attempted to rectify their wrongdoing. *Supra*.

- 125. This Court has ordered Plaintiffs to provide their damages disclosures, but
  Plaintiffs blatantly disregarded these orders. (January 10, 2017, Transcript at 68; May 30, 2017,
  Order); *see also Perez v. Siragusa*, 2008 WL 2704402, at \*4 (E.D.N.Y. July 3, 2008) (dismissal
  under FRCP 37 and 41, noting that "[n]on-compliance with discovery orders will be deemed
  - Page 23 of 34

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

126. Plaintiffs acknowledged in two stipulations that they have not complied with
NRCP 16.1, yet have not even attempted to do so, despite promising and being ordered to
comply. *See, e.g.*, (January 10, 2017, Transcript (for Willard); February 9, 2017, Stipulation
and Order; May 2, 2016, Stipulation and Order).

Further, Wooley misrepresented to this Court that he had provided complete and
up-to-date disclosures to Defendants when he had not. (January 10, 2017, Transcript). If
anything, Wooley had only provided a spreadsheet that was, per Wooley's own words, for use
in "settlement negotiations." *See* NRS 48.105(1). Defendants have informed Wooley repeatedly,
including in open court, that this document provided for settlement negotiations does not equate
to a disclosure, and Plaintiffs have never authorized Defendants to use that spreadsheet for
litigation purposes in any manner. *See, e.g.*, (January 10, 2017, Transcript 62).

14 128. Plaintiffs' bad faith motives in waiting to ambush Defendants are also plainly 15 evidenced by their eleventh-hour Motions requesting brand-new, different, categories and 16 amounts of damages for double and triple what was originally sought, while such alleged 17 damages were based upon information that has been in Plaintiffs' possession for the entire 18 pendency of this case. Plaintiffs' strategic decision to only disclose their damages in their 19 Motions for Summary Judgment prejudiced Defendants by depriving them of the opportunity to 20 defend against damages that had never been previously disclosed.

129. Plaintiffs' failure to properly disclose an expert witness is similarly willful.
Plaintiffs acknowledged immediately after the initial purported "disclosure" that the disclosure
did not comply with Nevada law. *See* (December 5, 2016, email (three days after disclosures
due) (wherein Plaintiffs' counsel stated that "[Defendants] agreed to allow Plaintiffs to provide
an amended witness disclosure by mid-afternoon Thursday, December 8, 2016 to include the
facts and conclusions to which Mr. Gluhaich will be testifying...."), Exhibit 12 to Defendants'
Motion; Exhibits 14 and to Defendants' Motion).

28

Page 24 of 34

1 130. Plaintiffs agreed that they failed to comply with NRCP 16.1(a)(2)(B) and agreed
 2 to the entry of a Court order requiring them to properly disclose an expert by March 11, 2017.
 3 (February 9, 2017, Stipulation and Order).

4 131. Yet, Plaintiffs did not even attempt to provide a proper disclosure of Mr.
5 Gluhaich at any time in 2017.

132. Then, on October 17 and 18, 2017, less than four weeks prior to the close of
discovery, Plaintiffs filed Motions for Summary Judgment, referring to Mr. Gluhaich as their
"designated expert," (Willard Motion at 19-20; Wooley Motion at 12-13), without even
acknowledging their noncompliance, much less providing justification for it.

10 133. Further, even a cursory review of Mr. Gluhaich's Affidavits in support of the 11 Motions demonstrates that the purported facts and opinions that he provided could have been 12 timely disclosed in December of 2016, further demonstrating that there was no justification 13 other than willful noncompliance. (Gluhaich Affidavit re: Willard (relying exclusively on events 14 that occurred in 2014 or earlier); Gluhaich Affidavit re: Wooley (relying exclusively on events 15 that occurred in 2015 or earlier)).

16 134. These Motions and Mr. Gluhaich's Affidavits were filed at a point in the case
17 where it was too late for Defendants to properly explore or rebut Mr. Gluhaich's conclusions
18 and the bases therefor, a fact that Plaintiffs acknowledged in February with approximately four
19 weeks left in discovery. (February 9, 2017, Stipulation and Order).

20 135. In addition, it is clear that Plaintiffs' failure to disclose the appraisals upon which
21 many of their calculations were based was also willful.

136. With respect to Willard, Willard relies upon an appraisal from 2008 to determine
the purported "original" fair market value of the property. (Willard Motion at 19). According to
Willard, this appraisal was "commissioned in 2008 by the Willard Plaintiffs." *Id.* Indeed, Mr.
Gluhaich avers that "in September 2008 Willard commissioned an appraisal of the Virginia
Property...from CB Richard Ellis..., a copy of which was sent directly to me by Jason
Buckholz of CBRE on October 17, 2008." (Gluhaich Aff. re: Willard ¶5). Willard also relies

28

Page 25 of 34

upon, inter alia, an appraisal from 2014 to establish the purported "fair rental value" of the 1 2 property in 2014 for purposes of his newly-sought liquidated damages relief, and the purported 3 "post-breach" value of the property in 2014. Id. at 19-20. Mr. Gluhaich averred that "The 2014 4 Appraisal was issued on February 11, 2014," and he "received [this appraisal] directly from Rob 5 Cashell." (Gluhaich Aff. re: Willard ¶15). Mr. Gluhaich's purported opinions were heavily based on these appraisals. Id. ¶9 ("In my opinion, the 2008 Appraisal presents a thorough, 6 7 detailed, professional, and highly compelling analysis of the market value of the Virginia Property as leased."); ¶16 (relying on the appraisal to opine on the purported "as-is" fair market 8 9 value); ¶17 (relying upon the appraisal to establish the purported fair market rental value). However, these appraisals were never disclosed to Defendants at any time before the present 10 motion. (Decl. of B. Irvine, Exhibit 1 to Willard Opposition). This is despite the fact that 11 Defendants requested Willard to "produce any and all appraisals for the Property from January 12 13 1, 2012, through present," (Exhibit 17 to Defendants' Motion), and that Willard had an obligation to disclose this material pursuant to NRCP 16.1(a)(1)(C) and NRCP 26. Given that 14 15 Willard freely admits that these appraisals were commissioned prior to the commencement of the case, and were in his possession, this is clearly willful omission. 16

17 137. With respect to Wooley, Wooley relies upon an appraisal that the Wooley Plaintiffs commissioned in August 2006. (Wooley Motion at 2). This appraisal is the basis for 18 Gluhaich's opinion as to the "original" fair market value in Wooley's diminution in value claim. 19 (Gluhaich Aff. Re: Wooley ("In my opinion, the 2006 Appraisal presents a thorough, detailed, 20 professional, and highly compelling analysis of the market value of the Highway 50 Property as 21 leased.")). Defendants even asked about the appraisal during Wooley's deposition. (Exhibit 18 22 to Defendants' Motion at 125 (wherein Wooley stated that he had not given this appraisal to his 23 lawyer)). Yet, this appraisal was never disclosed to Defendants until Wooley filed his Motion, 24 which is a willful omission and is in complete derogation of Wooley's NRCP 16.1 and NRCP 25 26 obligations. 26

27

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

6

7

139. Finally, as noted, this is part of a larger pattern and practice by Plaintiffs to disregard their discovery obligations at every point in this litigation. (Motions to Compel).

8 140. Indeed, Plaintiffs completely failed to even respond to Defendants' Motion for
9 Sanctions, even when this Court gave them an additional extension and expressly warned them,
10 in open court, that "you need to know going into these oppositions, that I'm very seriously
11 considering granting all of it," and "you know going into this motion for sanctions that you're—
12 I haven't decided it, but I need to see compelling opposition not to grant it." (December 12,
13 2017, transcript).

- 14
- 15

#### Defendants have been prejudiced by Plaintiffs' conduct and would be prejudiced by the imposition of a lesser sanction

141. Plaintiffs' repeated and willful delay in providing necessary information to 16 Defendants has necessarily prejudiced Defendants. Cf. generally Foster v. Dingwall, 126 Nev. 17 56, 66, 227 P.3d 1042, 1049 (2010) (concluding that "appellants' continued discovery abuses 18 and failure to comply with the district court's first sanction order evidences their willful and 19 recalcitrant disregard of the judicial process, which presumably prejudiced [the non-offending 20 party"); Hamlett v. Reynolds, 114 Nev. 863, 865, 963 P.2d 457, 458 (1998) (cited in Foster as 21 "upholding the district court's strike order where the defaulting party's 'constant failure to 22 follow [the court's] orders was unexplained and unwarranted"); In re Phenylpropanolamine 23 (PPA) Products, 460 F.3d 1217, 1236 (9th Cir.2006) (cited in Foster as "holding that, with 24 respect to discovery abuses, '[p]rejudice from unreasonable delay is presumed' and failure to 25 comply with court orders mandating discovery 'is sufficient prejudice'"); Perez, 2008 WL 26 2704402 at \*6 ("The behavior exhibited by plaintiffs has prejudiced defendants by delaying the 27

28

Page 27 of 34

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

4 142. In fact, this is Plaintiffs' second case against Defendants based on the same set of
5 facts.

6 143. Plaintiffs attempted to prosecute this case against Defendants in California,
7 which was dismissed for a lack of personal jurisdiction.

8 144. Defendants are entitled to resolution, not to Plaintiffs languidly holding
9 Defendants in litigation while simultaneously failing to meet their obligations under the NRCP
10 to provide threshold information necessary to defend this case and to comply with the other
11 obligations imposed by the NRCP.

12 145. Further, Plaintiffs' collective new requests and bases are not harmless additions:
13 they would require Defendants to engage in additional fact discovery, retain direct and rebuttal
14 experts, take depositions, re-open the briefing schedule, and again delay the trial for tasks that
15 could, and should, have been accomplished during a discovery period that was already extended
16 three times to account for Plaintiffs' continued noncompliance.

17

18

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

19 146. Plaintiffs' damages disclosures are central to this case, and dismissal is not too
20 severe for Plaintiffs' repeated and willful noncompliance with Court orders and with Nevada
21 law.

147. The Plaintiffs have been sanctioned for other discovery violations, (Order
Granting Motion to Compel), yet remain undeterred, demonstrating that less severe sanctions
have had no effect on Plaintiffs' recalcitrant conduct.

148. For example, in the context of granting Defendants' Motion to Compel
Discovery Responses, this Court ordered Plaintiffs to pay Defendants' reasonable expenses
incurred in making the motion, including attorneys' fees. (July 1, 2015, Order).

28

Page 28 of 34

1 149. Not only have Plaintiffs not ever paid these expenses, but it is incontrovertible
 2 that this Court's imposition of monetary sanctions on Plaintiffs in 2015 had absolutely no
 3 deterrent effect on Plaintiffs' conduct, as Plaintiffs continued to commit discovery violations
 4 and continued to violate and ignore this Court's orders well after the issuance of the July 1,
 5 2015, Order, completely undeterred by the imposition of monetary sanctions.

6 150. Further, Plaintiffs' conduct has already caused three continuances of the trial
7 date, all to accommodate for Plaintiffs' continued disregard for Nevada discovery procedure.
8 (Stipulations and Orders).

9 151. Given that this Court has already issued lesser sanctions, ordered continuances,
10 and given Plaintiffs repeated admonitions about complying with deadlines and their NRCP
11 obligations, all to no avail, it is clear that lesser sanctions have had no effect on Plaintiffs'
12 conduct, and the issuance of lesser sanctions would only serve to encourage Plaintiffs'
13 misconduct.

14 152. The fact that this Court granted Plaintiffs an additional extension to oppose
15 Defendants' Motions, including their Motion for Sanctions, and Plaintiffs failed to do so
16 without any excuse whatsoever further demonstrates that this Court's orders, and any lesser
17 sanctions, have no effect on Plaintiffs' conduct. Given Plaintiffs' repeated failure to heed the
18 court's warnings in the past, issuing additional warnings would be futile.

19 153. Nor would a less severe sanction be fair to Defendants, who have been
20 continually prejudiced by Plaintiffs' willful disregard of their obligations despite their continued
21 efforts to work with Plaintiffs and provide extensions to Plaintiffs.

154. Additionally, it must be noted that the Nevada Supreme Court has noted that "a
party cannot seek to avoid a dismissal based on arguments that his or her attorney's acts or
omissions led to the dismissal." *Huckabay Props v. NC Auto Parts*, 130 Nev. \_\_\_\_, 322
P.3d 429, 432 (2014) (also discussing that "[t]he United States Supreme Court has recognized
that when an action is dismissed for failure to comply with court rules, the litigant cannot seek a
do-over of their dismissed action based on arguments that dismissal is too harsh a penalty for

28

Page 29 of 34

counsel's unexcused conduct, as to do so would offend general agency principles"); see also, 1 2 e.g., Link v. Wabash R. Co., 370 U.S. 626, 634 n.10 (1962) ("Surely if a criminal defendant may 3 be convicted because he did not have the presence of mind to repudiate his attorney's conduct in 4 the course of a trial, a civil plaintiff may be deprived of his claim if he failed to see to it that his lawyer acted with dispatch in the prosecution of his lawsuit. And if an attorney's conduct falls 5 substantially below what is reasonable under the circumstances, the client's remedy is against 6 7 the attorney in a suit for malpractice. But keeping this suit alive merely because plaintiff should 8 not be penalized for the omissions of his own attorney would be visiting the sins of plaintiff's 9 lawyer upon the defendant.").

10

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

11 155. Although there is a policy favoring adjudication on the merits, Plaintiffs
12 themselves have frustrated this policy by refusing to provide Defendants with their damages
13 calculations or proper expert disclosures. Defendants have not frustrated this policy; instead, the
14 record is clear that Defendants, and this Court, have repeatedly attempted to force Plaintiffs to
15 comply with basic discovery obligations, to no avail.

16 156. Indeed, Defendants have served multiple rounds of written discovery upon
17 Plaintiffs, in an attempt to obtain basic information on Plaintiffs' damages; have taken multiple
18 depositions, and have been requesting compliant disclosures throughout this case so that they
19 can address the merits. (Exhibits 24-35 of Defendants' Motion).

20 157. Plaintiffs should not be permitted to hide behind the policy of adjudicating cases
21 on the merits when it is they who have frustrated this policy throughout the litigation.
22 Defendants cannot reach the merits when they must spend the entire case asking Plaintiffs for
23 threshold information and receiving no meaningful responses.

24 158. As the Nevada Supreme Court has held, the policy favoring adjudication on the 25 merits "is not boundless and must be weighed against other policy considerations, including the 26 public's interest in expeditious...resolution, which coincides with the parties' interests in 27 bringing litigation to a final and stable judgment, prejudice to the opposing party; and

28

Page 30 of 34

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

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

9

#### Dismissal is required to deter similar abusive conduct

10 160. The need to deter similar abusive conduct also weighs heavily in favor of11 dismissal.

12

13

161. The discovery rules are in place for a reason, and are mandatory.

162. Compliance with this Court's Orders is also mandatory.

14 163. Yet, Plaintiffs have completely ignored multiple Orders from this Court,
15 deadlines imposed by this Court, and their obligations pursuant to the Nevada Rules of Civil
16 Procedure.

17 164. Plaintiffs have received multiple opportunities and extensions to rectify their18 noncompliance, but have not even attempted to do so.

19 165. If Plaintiffs are permitted to continue prosecuting this case without severe 20 consequences, then this type of abusive litigation practice will continue to the prejudice of defending parties and will make a mockery of the Nevada Rules of Civil Procedure and court 21 orders. Cf. generally Foster, 126 Nev. at 66, 227 P.3d at 1049 (noting that "[i]n light of 22 appellants' repeated and continued abuses, the policy of adjudicating cases on the merits would 23 not have been furthered in this case, and the ultimate sanctions were necessary to demonstrate to 24 future litigants that they are not free to act with wayward disregard of a court's orders."); see 25 also Langermann v. Prop. & Cas. Ins. Co., 2015 WL 4714512 at \*5 (D. Nev. 2015) (failing "to 26

1 comply with a scheduling order is not harmless, and re-opening discovery after the expiration of 2 the deadlines only encourages cavalier treatment of deadlines"). 3 166. Plaintiffs' disregard for this Court's orders and docket, Nevada law, and 4 Defendants' rights to prepare a defense necessitates dismissal. Dismissal would not violate Plaintiffs' due process rights 5 167. There is also no issue of due process deprivation upon dismissal. 6 Plaintiffs' response to Defendants' Motions, including Defendants' Motion for 7 168. 8 Sanctions, was originally due on December 4, 2017. 9 169. There is no dispute that Plaintiffs were served with the Motions. (December 12, 2017, transcript). 10 11 170. Through extensions granted by Defendants, and ultimately this Court, Plaintiffs were given until December 18, 2017, to file Oppositions. Id. 12 13 171. Defendants were expressly warned that this Court was seriously considering dismissal, and that Plaintiffs' oppositions needed to be "compelling." Id. 14 172. However, Plaintiffs did not file any Opposition by that time or any time 15 thereafter; nor did Plaintiffs request another extension. 16 17 173. Thus, Plaintiffs, in voluntarily choosing to not respond to Defendants' Motions, are not being deprived of any due process. See DCR 13(3); Huckabay, 130 Nev. at , 322 18 P.3d at 436. No evidentiary hearing was needed. See Nevada Power Co. v. Fluor Illinois, 108 19 Nev. 638 (1992) ("If a party against whom dismissal may be imposed raises a question of fact 20 as to any of [the] factors [for dismissal], the court must allow the parties to address the relevant 21 factors in an evidentiary hearing."). 22 Indeed, this Court held a hearing on December 12, 2017, which was attended by 23 174. both of Plaintiffs' counsel. As Plaintiffs have not filed anything with this Court since that 24 hearing, or otherwise provided any new information, there would be nothing new to discuss at 25 another hearing. See DCR 13(3). 26 27 28 Page 32 of 34

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

1	CERTIFICATE OF SERVICE
2	I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT;
3	that on the $\underline{\mu}^{\text{T}}$ day of March, 2018, I electronically filed the foregoing with the Clerk of
4	the Court system which will send a notice of electronic filing to the following:
5	BRIAN IRVINE, ESQ.
6	DAVID O'MARA, ESQ.
7	BRIAN MOQUIN, ESQ.
8	JOHN DESMOND, ESQ.
9	ANJALI WEBSTER, ESQ.
10	
11	
12	
13	
14	
15	And, I deposited in the County mailing system for postage and mailing with the
16	United States Postal Service in Reno, Nevada, a true and correct copy of the attached
17	document addressed as follows:
18	
19 20	
20 21	HideBe
21	
23	
24	
25	
26	
27	
28	

### EXHIBIT "9"

### EXHIBIT "9"

# EXHIBIT "9"

Docket 77780 Document 2019-02425

		FILED Electronically CV14-01712 2018-11-30 04:08:13 PM Jacqueline Bryant
1	Code:	Clerk of the Court Transaction # 7001598
2		
3		
4		
5	IN THE SECOND JUDICIAL DISTRICT COUI	RT OF THE STATE OF NEVADA
6	IN AND FOR THE COUNTY	OF WASHOE
7	LARRY J. WILLARD, individually and as	
8	trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT	CASE NO. CV14-01712
9	CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the	DEPT. 6
10	Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,	
11 12	Plaintiffs,	ORDER DENYING PLAINTIFFS' RULE 60(b)
13	VS.	MOTION FOR RELIEF
14	BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an Individual;	
15	Defendants.	
16	/	
17 18	BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual;	
19	Counterclaimants,	
20	VS	
21	LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund;	
22	OVERLAND DEVELOPMENT CORPORATION, a California corporation;	
23	Counter-defendants <sup>1</sup> .	
24	/	
25		
26		
27 28	<sup>1</sup> On April 13, 2018, this Court entered its Order of Disr. <i>Prejudice</i> . On the same date, this Court entered its Ord <i>Counterclaimants' Motion to Dismiss Counterclaims</i> . A Order.	der Granting Defendants/

1	ORDER DENYING PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF
2	Before this Court is Plaintiffs' Rule 60(b) Motion for Relief ("Rule 60(b) Motion")
3 4	filed by PLAINTIFFS LARRY J. WILLARD, INDIVIDUALLY AND AS TRUSTEE OF THE
4 5	LARRY JAMES WILLARD TRUST FUND AND OVERLAND DEVELOPMENT
6	CORPORATION, A CALIFORNIA CORPORATION (collectively, "Willard" or the
7	"Plaintiffs"), by and through counsel, Robertson, Johnson, Miller & Williamson. <sup>2</sup> By
8	their Rule 60(b) Motion, Plaintiffs seek, pursuant to NRCP 60(b), to set aside: (a) this
9	Court's January 4, 2018, Order Granting Defendants/Counterclaimants' Motion to Strike
10	and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich; (b) this
11 12	Court's January 4, 2018, Order Granting Defendants' Motion for Sanctions; and (c) this
12	Court's March 6, 2018, Findings of Fact, Conclusions of Law, and Order on Defendants'
14	Motion for Sanctions.
15	Thereafter, DEFENDANTS BERRY-HINCKLEY INDUSTRIES ("BHI") AND
16	JERRY HERBST (collectively, "Defendants"), filed their Opposition to Rule 60(b) Motion
17	for Relief, by and through their counsel, Dickinson Wright, PLLC.
18	Plaintiffs then filed their Reply in Support of the Willard Plaintiffs Rule 60(b)
19 20	Motion for Relief and the parties set the matter for hearing.
20	This Court carefully considered the papers submitted, the arguments of counsel,
22	the entire court file herein, and is fully advised in the premises, and enters its order as
23	follows.
24	
25	
26	<sup>2</sup> Plaintiffs' former local counsel was David O'Mara of the O'Mara Law Firm, P.C. Mr. O'Mara filed a <i>Notice of Withdrawal of Local Counsel</i> (" <i>Notice"</i> ), on March 15, 2018. Brian Moquin
27	remains counsel of record as he has not withdrawn; however, he is not indicated as counsel filing the <i>Rule 60(b) Motion</i> .
28	1

	FINDINGS OF FACT
1	The Court makes the following Findings of Fact:
2	Plaintiffs' Complaint
4	1. On August 8, 2014, Plaintiffs commenced this action by filing their
5	Complaint against Defendants. <sup>3</sup> Complaint, generally.
6	2. By way of their <i>Complaint</i> and subsequent <i>First Amended Complaint</i> ,
7	
8	Plaintiffs sought the following damages against Defendants for an alleged breach of the
9	lease between Willard and BHI: (1) "rental income" for \$19,443,836.94, discounted by
10	4% per the lease to \$15,741,360.75 as of March 1, 2013; and (2) certain property-
11	related damages, such as insurance and installation of a security fence. First Amended
12	Complaint ("FAC"), generally.
13	3. Willard also sought several other categories of damages which have since
14	been dismissed or withdrawn. May 30, 2017, Order.
15 16	Plaintiffs' Failure to Comply with the Nevada Rules of Civil Procedure and this Court's Orders
17	4. Plaintiffs failed to provide a compliant damages disclosure in this action.
18	5. Plaintiffs failed to provide a damages computation in their initial
19	disclosures, as required under NRCP 16.1(a)(1)(C). <i>Findings of Fact, Conclusions of</i>
20	Law, and Order on Defendants' Motion for Sanctions ("Sanctions Order") ¶ 12, and
21 22	failed to provide damages computations at any time despite numerous demands on
22	both Mr. Moquin and Mr. O'Mara. Sanctions Order ¶¶ 14-16, 25, 27-33, 39, 43-44 and
24	51-54.
25	
26	<sup>3</sup> Willard filed the initial complaint jointly with Edward E. Wooley and Judith A. Wooley,
27	individually and as Trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000 (collectively, "Wooley"). However, Defendants and Wooley entered into a settlement agreement and stipulation for dismissal. This Court entered its Order on April 13,
28	2018 dismissing Wooley's claims with prejudice.
	2

6. Plaintiffs failed to provide complete and adequate responses to 1 interrogatories requesting information about Plaintiffs' damages in the normal course of 2 3 discovery. 4 7. Plaintiffs failed to provide complete and adequate responses to 5 interrogatories in violation of this Court's Order Granting Defendants' Motion to Compel 6 and failed to comply with this Court's Order ("January Hearing Order") issued after the 7 parties discussed Plaintiffs' failure to provide damages computations at the January 10, 8 2017 hearing attended by Mr. Moguin, Mr. O'Mara and Mr. Willard. Sanctions Order 9 ¶¶ 17-25. 10 11 8. The January Hearing Order required Plaintiffs to provide damages 12 computations and supporting materials. Sanctions Order ¶¶ 46-49, 54, 59-64 and 67-68; 13 Defendants' Opposition Plaintiffs' Rule 60(b) Motion, Ex. 2, Transcript of January 10, 14 2017 Hearing at pp. 61-63 and 68; January Hearing Order. 15 9. Plaintiffs failed to properly disclose Daniel Gluhaich as an expert witness 16 as required by NRCP 16.1(a)(2). Sanctions Order ¶¶ 34-37. 17 10. In contravention of this Court's January Hearing Order, Plaintiffs failed to 18 19 provide an amended disclosure of Mr. Gluhaich, although Defendants' counsel made 20 multiple requests. Sanctions Order ¶¶ 38-45, ¶¶ 50-64. 21 Plaintiffs' Summary Judgment Motion 22 Pursuant to the February 9, 2017, Stipulation and Order to Continue Trial, 11. 23 discovery closed in mid-November, 2017. 24 12. On October 18, 2017, less than a month before the close of discovery, 25 Plaintiffs filed their Motion for Summary Judgment asserting they were entitled, as a 26 27 28 3

·	
1	matter of law, to more than triple the amount of damages alleged in and requested by
2	their First Amended Complaint. Sanctions Order ¶¶ 69 and 73.
3	13. The damages asserted in Plaintiffs' <i>Motion for Summary Judgment</i> were
4	not previously disclosed. The motion was also supported by previously undisclosed
5	expert opinions and documents. Sanctions Order ¶¶ 74-79.
6	14. On November 13, 2017, Defendants filed their Opposition to Plaintiffs'
7	Motion for Summary Judgment.
8 9	15. Plaintiffs' did not submit the <i>Motion for Summary Judgment</i> for decision.
10	Defendants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich and Motion for Sanctions
11	16. On November 14, 2017, Defendants filed their Motion to Strike and/or
12 13	Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich ("Motion to
14	Strike").
15	17. In the <i>Motion to Strike</i> , Defendants maintained this Court should preclude
16	Plaintiffs from offering Mr. Gluhaich's testimony on the grounds: (a) Plaintiffs failed to
17	adequately disclose Mr. Gluhaich as an expert because they failed to provide "a
18	summary of the facts and opinions to which the witness is expected to testify" as
19	required by NRCP 16.1(a)(2)(B); (b) the opinions offered by Mr. Gluhaich in support of
20	Plaintiffs' Motion for Summary Judgment were based upon inadmissible hearsay and
21 22	were based solely on the opinions of others; and (c) Mr. Gluhaich was not qualified to
23	offer the opinions included in his Declaration attached to and filed in support of
24	Plaintiffs' Motion for Summary Judgment.
25	18. On November 15, 2017, Defendants filed their <i>Motion for Sanctions</i>
26	("Sanctions Motion").
27	
28	
	4

19. In the Sanctions Motion, Defendants argued this Court should sanction
 Plaintiffs for their continued and intentional conduct in failing to comply with the Nevada
 Rules of Civil Procedure and this Court's orders requiring Plaintiffs to provide damages
 computations and full and adequate expert disclosures, and dismiss Plaintiffs' claims
 with prejudice, or, in the alternative, preclude Plaintiffs from seeking new damages or
 relying upon their undisclosed expert and appraisals.

- 20. Defendants agreed to give Plaintiffs' several extensions of time to oppose the Motion to Strike and Sanctions Motion, but no oppositions were filed.
- 21. On December 6, 2017, Plaintiffs requested relief from the Court by
  extension to respond until "December 7, 2017 at 4:29 p.m." *Sanctions Order* ¶ 94; *Plaintiffs' Request for a Brief Extension of Time ("Brief Extension Request"*), generally.
- 13 22. This Court held a status conference on December 12, 2017, attended by 14 Defendants' counsel and Plaintiffs' counsel, Mr. Moguin and Mr. O'Mara. At the status 15 conference, after observing Mr. Moquin, having significant dialog with Mr. Moquin, and 16 over vehement objection by the Defendants' counsel, this Court granted Plaintiffs' Brief 17 Extension Request plus granted more time than that requested. The Court directed 18 19 Plaintiffs to respond to the outstanding motions no later than Monday, December 18, 20 2017, at 10:00 am. Sanctions Order ¶ 95.
- 21 23. Tis Court further directed Defendants to file their reply briefs no later than
   22 January 8, 2018. The Court set the parties' outstanding Motions for oral argument on
   23 January 12, 2018. Sanctions Order ¶ 96.

11

11

25

26

27

28

1	24.	This Court admonished Plaintiffs, stating "you need to know going into
2	these oppos	itions, that I'm very seriously considering granting all of it I haven't
3	decided it, b	ut I need to see compelling opposition not to grant it." Opposition to Rule
4	60(b) Motior	n, Ex. 3, December 12, 2017, <i>Transcript of Status Conference</i> , in part.
5	25.	Plaintiffs did not file an opposition or response to the Motion to Strike or
6	Motion for S	anctions by December 18, 2017 or any time thereafter, nor did Plaintiffs
7 8	request any	further extension.
о 9	26.	This Court entered its Order Granting Defendants'/Counterclaimants'
10	Motion to St	rike and/or Motion in Limine to Exclude the Expert Testimony of Daniel
11	<i>Gluhaich</i> on	January 4, 2018 ("Order Granting Motion to Strike").
12	27.	This Court entered its Order Granting Defendants'/Counterclaimants'
13	Motion for S	Canctions on January 4, 2018 ("Order Granting Sanctions").
14	28.	This Court entered its Findings of Fact, Conclusions of Law, and Order on
15	Defendants'	Motion for Sanctions on March 6, 2018. ("Sanctions Order") <sup>4</sup>
16 17	With	drawal of Local Counsel
18	29.	Mr. O'Mara's Notice of Withdrawal of Local Counsel, ("Notice") filed
19	March 15, 2	018, states, "Mr. Moquin was unresponsive during the time in which this
20	Court was d	eciding the pending motions, even after counsel begged him for a
21	response to	be filed with the Court and was told he would provide such a response."
22	Notice, 1.	
23		
24	4 The Order (	Granting Sanctions ordered sanctions and directed Defendants to "submit a
25 26	Proposed Or	der granting Defendants //Counterclaimants' Motion for Sanctions, including factual alysis and discussion, to Department 6 within twenty (20) days of the date of this
20	Order in acco	ordance with WDCR 9." Order Granting Sanctions, 4. For purposes of the instant Court considers the Order Granting Sanctions and Sanctions Order, as one for
28		he analysis herein.
		6

1	30. The <i>Notice</i> describes the terms of retention of Mr. O'Mara as,
2	"Undersigned Counsel was retained solely as local counsel, and provided Mr. Moquin
3	with the necessary information related to the Court's filing requirement and timelines.
4	Undersigned Counsel was retained only to provide services as directed by Mr. Moquin,
5	and would be relieved of services if Mr. Moquin was removed." Notice, 1.
6	Plaintiffs' Rule 60(b) Motion
7 8	31. On March 26, 2018, Robertson, Johnson, Miller & Williamson filed a
о 9	notice of appearance on behalf of Plaintiffs.
10	32. On April 18, 2018, Plaintiffs filed the <i>Rule 60(b) Motion</i> . In the <i>Rule 60(b)</i>
11	Motion. Plaintiffs argue this Court should set aside its Order Granting the Motion to
12	Strike, Order Granting Sanctions, and Sanctions Order, based upon Mr. Moquin's
13	excusable neglect. Plaintiff's further argue the underlying Sanctions Order was
14	insufficient under Young v. Johnny Ribeiro, 106 Nev. 88, 787 P.2d 777 (1990) because
15 16	the Court did not consider whether sanctions unfairly operate to penalize Plaintiffs for
10	the misconduct of their attorney.
18	33. Plaintiffs argue their failure to provide the damages computations and
19	adequate expert disclosures, as required by both the Nevada Rules of Civil Procedure
20	and this Court's orders, as well as their failure to file oppositions to the Motion to Strike
21	and Motion for Sanctions were all due to Mr. Moquin failing "to properly prosecute this
22	case due to a serious mental illness and a personal life that was apparently in
23	shambles." <i>Rule 60(b) Motion,</i> 1.
24 25	
23 26	
27	
28	
	7

1 34. The *Rule 60(b) Motion* purports to support its arguments primarily through 2 the *Declaration of Larry J. Willard. Rule 60(b) Motion,* Ex. 1 ("*Willard Declaration" and* 3 *"WD"* in citations to the record)<sup>5</sup>.

4 35. The Willard Declaration includes several statements about Mr. Moguin's 5 alleged mental disorder. It states Mr. Willard is "convinced" Mr. Moguin was dealing 6 with issues and demons beyond his control. WD ¶ 66. It further states he "learned" 7 that Mr. Moguin was struggling with constant marital conflict that greatly interfered with 8 his work. WD ¶ 67. The Willard Declaration states Mr. Moguin suffered a "total mental 9 breakdown." WD ¶ 68. It states Mr. Moguin explained to Mr. Willard he had been 10 11 diagnosed with bipolar disorder. WD ¶ 70. He declares he believes Mr. Moquin's 12 disorder to be "severe and debilitating." WD ¶ 73. He states he now sees "that Mr. 13 Moguin was suffering from [symptoms of bipolar disorder] throughout his work on the 14 case." WD ¶ 76. And, Mr. Willard declares he can now see how Mr. Moguin's alleged 15 psychological issues affected Plaintiffs' case. WD ¶ 87 (emphasis supplied). 16 36. The Rule 60(b) Motion also includes an internet printout purporting to list 17 symptoms of bipolar disorder (*Rule 60(b) Motion*, Ex. 5), and several documents 18 19 related to alleged spousal abuse by Mr. Moguin, some of which reference Mr. Moguin's 20 alleged bipolar disorder, and which include an Emergency Protective Order from a 21 California proceeding (Rule 60(b) Motion, Ex. 6), a Pre-Booking Information Sheet from 22 a California proceeding (Rule 60(b) Motion, Ex. 7) and a Request for Domestic 23 Violence Restraining Order, also from a California proceeding (Rule 60(b) Motion, 24 25 26 <sup>5</sup> The Willard Declaration includes paragraphs discussing the underlying facts of the action and 27 the initial filing of the suit in California. These paragraphs are not relevant to the Court's determination of the Rule 60(b) Motion and are not considered. See e.g., WD ¶¶ 1-51, 100.

8

Ex. 8). The documents from the California proceedings are not certified by the clerk of the court.

3 37. Defendants filed their Opposition to Rule 60(b) Motion Relief on May 18,
4 2018 ("Opposition").

5 Plaintiffs filed their Reply in Support of the Willard Plaintiffs' Rule 60(b) 38. 6 Motion on May 29, 2018 ("Reply"). The Reply attached eleven (11) new exhibits, 7 including the new Declaration of Larry J. Willard in Response to Defendants' 8 Opposition to Rule 60(b) Motion for Relief. Reply, Ex. 1 ("Reply Willard Declaration" 9 and "*RWD*" for citations).<sup>6</sup> The Reply's exhibits include copies of text messages 10 11 between Mr. Willard and Mr. Moquin (*Reply*, Ex. 2, 4 and 7), copies of emails between 12 Mr. Willard and his counsel (*Reply, Ex.* 3, 6, 8 and 10), a receipt detailing an alleged 13 payment made by Mr. Willard to Mr. Moquin's doctor on March 13, 2018 (Reply, Ex. 5), 14 and a letter from Mr. Williamson to Mr. Moguin dated May 14, 2018 (*Reply*, Ex. 9). 15 39. On June 6, 2018, Defendants filed their Motion to Strike, or in the 16 Alternative, Motion for Leave to File Sur-Reply, arguing this Court should strike Exhibits 17 1-10 to the Reply because: (a) Defendants did not have the opportunity to respond to 18 19 those exhibits in their Opposition to the Rule 60(b) Motion; (b) exhibits contained 20 inadmissible hearsay and/or inadmissible lay opinion testimony; and (c) a number of 21 exhibits were not relevant to this Court's determination of excusable neglect. 22 40. Defendants' Motion to Strike, or in the Alternative, Motion for Leave to 23 File Sur-Reply was fully-briefed and submitted to this Court for decision on June 29, 24 25 26 <sup>6</sup> The Court disregards the paragraphs included in the Willard Declaration and the Reply Willard 27 Declaration that can be construed to be stated appeal to the Court's sympathy. See e.g., WD ¶ 28 91 -100; RWD ¶ 67 9

2018. Subsequently, Plaintiffs' counsel stipulated to the filing of a sur-reply. No sur reply was filed by Defendants.

<b>Z</b>		L
3	41. In its Sanctions Order, the Court made the following findings of fact and	
4	conclusions of law, among others: First, Plaintiffs failed to provide damages disclosures	
5	and failed to properly disclose an expert witness in violation of this Court's express	
6	Orders. Sanctions Order ¶¶ 67, 68. Plaintiffs acknowledged their failure to properly	
7	disclose an expert witness in accordance with NRCP 16.1(a)(2)(B). Stipulation and	
8	<i>Order</i> , February 9, 2017. Plaintiffs did not thereafter attempt to properly disclose the	
9	expert witness for the entirety of 2017. Plaintiffs failed to comply with multiple orders of	
10		
11	this Court. Thereafter, Defendants filed several motions to compel and Plaintiffs' non-	
12 13	compliance forced extension of trial and discovery deadlines on three separate	
13	occasions. This Court sanctioned Plaintiffs by ordering payment of Defendants'	
15	expenses incurred in filing the Motion to Compel.	
16	42. Plaintiffs did not oppose the Sanctions Motion despite this Court's	
17	express admonitions that the Court was "seriously considering" dismissal.	
18	43. If any of the following Conclusions of Law contain or may be construed to	
19	contain Findings of Fact, they are incorporated here and shall be treated as	
20	appropriately identified and designated.	
21	CONCLUSIONS OF LAW	
22	Based on the Court's Findings of Fact, the Court makes its Conclusions of Law	
23	as follows.	
24	1. If any the foregoing Findings of Fact contain or may be construed to	
25		
26	contain Conclusions of Law, they are incorporated here and shall be treated as	
27	appropriately identified and designated.	
28	10	

Rule	60(b)	Standard	

1	Rule 60(b) Standard	
2	2. Under NRCP 60(b)(1), on motion, this Court may relieve a party from an	
3	order or final judgment <sup>7</sup> on grounds of mistake, inadvertence, surprise, or excusable	
4	neglect. NRCP 60(b)(1).	
5	3. A party who seeks to set aside an order pursuant to NRCP 60(b)(1) "has	
6	the burden to prove mistake, inadvertence, surprise, or excusable neglect by a	
7	preponderance of the evidence." <i>Polivka v. Kuller</i> , 128 Nev. 926, 381 P.3d 651 (2012)	
8 9	(citations omitted); see also Britz v. Consolidated Casinos Corp., 87 Nev. 441, 446, 488	
10	P.2d 911, 915 (1971) ("'[t]he burden of proof on [a motion to set aside under Rule 60(b)]	
11	is on the moving party who must establish his position by a preponderance of the	
12	evidence.'") (quoting <i>Luz v. Lopes</i> , 55 Cal.2d 54, 10 Cal.Rptr. 161, 166, 358 P.2d 289,	
13	294 (1960)).	
14	The Rule 60(b) Motion is not Supported by	
15	Competent, Admissible and Substantial Evidence.	
16	4. Plaintiffs' ground asserted to set aside the Order Granting Defendants'	
17	Motion to Strike, Order Granting the Motion for Sanctions, and Sanctions Order <sup>8</sup> is Mr.	
18 19	Moquin "failed to properly prosecute this case due to a serious mental illness and a	
20	personal life that was apparently in shambles." Rule 60(b) Motion, 1.	
21	5. While this Court "has wide discretion in deciding whether to grant or deny	
22	a motion to set aside a judgment under NRCP 60(b)," Stoecklein v. Johnson Electric,	
23		
24	<sup>7</sup> This Court entered its Order re Request for Entry of Judgment on June 4, 2018, declining to enter judgment as the Court deemed it appropriate to consider the <i>Rule 60(b) Motion</i> on the	
25	underlying Sanctions Order.	
26	<sup>8</sup> Plaintiffs argue that the <i>Sanctions Order</i> was insufficient under <i>Young v. Johnny Ribeiro</i> , 106 Nev. 88, 93, 787 P.2d 777, 780 (1990) because the <i>Sanctions Order</i> did not consider "whether	
27	sanctions unfairly operate to penalize a party for the misconduct of his or her attorney." <i>Rule</i> 60(b) <i>Motion</i> , 12. This is addressed by the Court hereinafter.	
28		
	11	

Inc., 109 Nev. 268, 271, 849 P.2d 305, 307 (1993), "this discretion is a legal discretion 1 and cannot be sustained where there is no competent evidence to justify the court's 2 action." Id. (emphasis added) (citing Lukey v. Thomas, 75 Nev. 20, 22, 333 P.2d 979 3 4 (1959)); see also Otak Nev., LLC v. Eighth Judicial Dist. Court, 129 Nev. 799, 805, 312 5 P.3d 491, 496 (2013) (holding a court abuses its discretion when its decision is not 6 supported by substantial evidence; substantial evidence "defined as that which a 7 reasonable mind might accept as adequate to support a conclusion" (internal quotation 8 marks omitted)). 9

6. The *Rule 60(b) Motion* purports to provide substantial evidence to support
 its legal argument through the *Willard Declaration* and the *Reply Willard Declaration* together with the attached exhibits, all of which contain statements and documents that
 are inadmissible, and in some instances, inadmissible on multiple grounds.

14 The Willard Declaration includes several statements about Mr. Moguin's 7. 15 alleged mental disorder. As set forth in the Findings of Fact, supra, Mr. Willard declares 16 he is "convinced" Mr. Moguin was dealing with issues and demons beyond his control 17 (WD ¶ 66); he "learned" Mr. Moquin was struggling with constant marital conflict that 18 19 areatly interfered with his work (WD ¶ 67; RWD ¶ 15); Mr. Moquin suffered a "total 20 mental breakdown" (WD ¶ 68; RWD ¶16); Mr. Moquin explained to Mr. Willard he had 21 been diagnosed with bipolar disorder (WD ¶ 70; RWD ¶ 37); Mr. Willard believes Mr. 22 Moguin's disorder to be "severe and debilitating" (WD ¶ 73); Mr. Willard now sees "that 23 Mr. Moquin was suffering from [symptoms of bipolar disorder] throughout his work on 24 25 26

12

27

1		′D¶ 76);	and, Mr. Willard c	an now s	see how Mr. Moquin's alleged	
2	psychologic	al issues	affected his case	(WD ¶ 8	7). <sup>9</sup>	
3	8.				s Mr. Moquin's private life, including his	
4	personal me		us and the conflict			
5	9.				based on his own perceptions.	
6	10.				ubject matter, Mr. Willard could not have	
7		-				5
8			s information by ob	-		
9	11.	Mr. Wil	lard lacks persona	l knowle	dge to testify to the assertions included	
10	in the <i>Willar</i>	d Declar	a <i>tion</i> and the Repl	y Willard	Declaration regarding Mr. Moquin's	
11	mental diso	rder, priv	ate personal life, a	nd priva	te marital conflicts.	
12	12.	It furthe	er logically follows,	Mr. Will	ard could only have obtained this	
13	information	by comm	unication from Mr.	Moquin	(or Mr. Moquin's wife), although he doe	es
14	not overtly s	tate this.				
15						
16			on and the Reply W	illard Dec	claration contain many nearly identical	
17	Willia	-	Reply Willard			
18	Decla	aration	Declaration			
19	53	graph	Paragraph 7			
20	54		8			
	59 63		9 11			
21	64		12 (slightly differs)	)		
22	65		13			
23	67		15			
	68 69		16 35			
24	70		38			
25	71 82		39 10 (Similar - not	exact)		
26	89		3			
27	91		67			
28						
				13		

The Willard Declaration and Reply Willard Declaration include 13. 1 inadmissible hearsay and under NRS 51.035 and 51.065. See Agnello v. Walker, 306 2 S.W.3d 666, 675 (Mo. App. 2010), as modified, (Apr. 27, 2018) (hearsay testimony or 3 4 documentation cannot serve as the evidence necessary to meet movant's burden of 5 persuasion to set aside judgment under Rule 60); New Image Indus. v. Rice, 603 So.2d 6 895, 897 (Ala. 1992) (affirming trial court's refusal to grant Rule 60 relief where the only 7 evidence of excusable neglect was an affidavit containing inadmissible hearsay and 8 speculation). 9

Separate and apart from the challenge to the Willard Declaration and the 14. 10 11 Reply Willard Declaration on hearsay grounds, Mr. Willard's statements are also 12 speculative and therefore inadmissible. He does not declare he personally observed 13 Mr. Moquin's alleged condition until he draws this unqualified conclusion late in the 14 case, and, even if he had, he speculates what the mental disorder could cause and 15 caused, offering an internet article to boost his credibility, which is also hearsay with no 16 applicable exception offered. 17

15. The assertion describing Mr. Moguin's statement to Mr. Willard that Dr. 18 19 Mar diagnosed Mr. Moquin with bipolar disorder (WD ¶ 69; RWD ¶35) is inadmissible 20 hearsay with no exception under NRS 51.105(1) because the Mr. Willard's declaration 21 does not constitute Mr. Moquin's declaration of "then existing state of mind, emotion, 22 sensation or physical condition, such as intent, plan, motive, design, mental feeling, 23 pain and bodily health." Instead, Dr. Mar, purportedly diagnosed Mr. Moquin; Mr. 24 Moquin told Mr. Willard of Dr. Mar's purported diagnosis; and Mr. Willard makes the 25 statement of Mr. Moquin's diagnosis. The statements were not spontaneous and 26 27 instead were a basis for Mr. Moguin to request monetary assistance.

28

_1	16. Even if it is construed that Mr. Moquin's report of Dr. Mar's diagnosis	
2	constituted Mr. Moquin's statement of then existing mental condition. Mr. Willard's	
3	statements are not admissible as contemporaneous statements Mr. Moquin made about	
4	his own present physical symptoms or feelings. See 2 McCormick on Evid. §273 (7th	
5	ed.) ("[s]tatements of the declarant's present bodily condition and symptoms, including	
6	pain and other feelings, offered to prove the truth of the statements, have been	
7 8	generally recognized as an exception to the hearsay rule. Special reliability is provided	
9	by the spontaneous quality of the declarations, assured by the requirement that the	
10	declaration purport to describe a condition presently existing at the time of the	
11	statement."). No spontaneous statement of Mr. Moquin, as the declarant, were offered.	
12	17. The Willard Declaration and the Reply Willard Declaration also contains	
13	hearsay within hearsay, which is inadmissible under NRS 51.067.	
14	18. Mr. Willard also purports to declare Mr. Moquin had a complete mental	
15 16	breakdown, how Mr. Moquin's symptoms of his alleged bipolar disorder might manifest,	
17	and how those symptoms may have affected Mr. Moquin's work. WD ¶¶ 68, 73-76 and	
18	87-88; <i>RWD</i> ¶ 16, 38.	
19	19. These statements are inadmissible as impermissible lay opinion under	
20	NRS 50.265. Mr. Willard is not a licensed health care provider qualified to opine on Mr.	
21	Moquin's mental condition, mental disorder, or symptoms of any disorder or condition	
22	that manifested.	
23 24	20. Mr. Willard surmises, speculates and draws conclusions. He is not	
25	qualified to testify about what medical, physical, or mental condition Mr. Moquin may	
26	have, or the effect of that condition on his work. White v. Corn, 616 S.E.2d 49, 54, 46	
27	Va. App. 123, 134 (2005) ("While lay witnesses may testify to the attitude and demeanor	
28		
	15	

1	of the defendant, lay witnesses cannot express an opinion as to the existence of a particular mental disease or condition.") (Citations omitted).
2	particular mental disease or condition.") (Citations omitted).

21. 3 Plaintiffs contend Mr. Willard's opinions of how Mr. Moguin's alleged 4 condition might manifest with symptoms and how those symptoms may have affected 5 Mr. Moquin's work are appropriate because "lay witnesses can offer testimony as to a 6 person's sanity." Reply, 2. Plaintiffs cite Criswell v. State, 84 Nev. 459, 464, 443 P.2d 7 552, 555 (1968) for the proposition that lay witnesses can offer testimony as to a 8 person's sanity. However, Criswell was overruled in 2001. See Finger v. State, 117 Nev. 9 548, 576-77, 27 P.3d 66, 85 (2001) (en banc decision regarding the legal insanity 10 11 defense and statutorily created "guilty, but mentally ill plea" and holding the legislative 12 abolishment of insanity as a complete defense to a criminal offense unconstitutional, 13 among other holdings, including that lay witnesses cannot testify as to "insanity" 14 because the term has a precise and narrow definition under Nevada law). 15 22. The Court concludes the *Finger* holdings are not applicable here. First, 16 the *Finger* case involves a defense to criminal charges. Second, Mr. Willard did not 17 testify that Mr. Moquin was sane or insane; he testified about the diagnosis of bipolar 18 19 disorder, possible symptoms of bipolar disorder and how those symptoms, if present, 20 might have affected Mr. Moquin's work. 21 23. The Nevada Revised Statutes (Evidence Code) provides: 22 A lay witness may testify to opinions or inferences that are "[r]ationally 23 based on the perception of the witness; and ... [h]elpful to a clear understanding of the testimony of the witness or the determination of a 24 fact in issue." NRS 50.265. A gualified expert may testify to matters within their "special knowledge, skill, experience, training or education" when 25 "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. 26 27 28

1	NRS 50.275; <i>Burnside v. State,</i> 131 Nev. Adv. Op. 40,, 352 P.3d 627, 636	
2	(death penalty case detective allowed to testify about cell phone records as lay	
3	witness). Further,	
4	[t]he key to determining whether testimony constitutes lay or expert	
5	testimony lies with a careful consideration of the substance of the testimony—does the testimony concern information within the common	
6	knowledge of or capable of perception by the average layperson or does it require some specialized knowledge or skill beyond the realm of everyday	
7	experience? See Randolph v. Collectramatic, Inc., 590 F.2d 844, 846 (10th Cir.1979) (observing that lay witness may not express opinion "as to	
8	matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness"); Fed.R.Evid.	
9	701 advisory committee's note (2000 amend.) ("[T]he distinction between	
10	lay and expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony	
11	results from a process of reasoning which can be mastered only by specialists in the field." (internal quotation marks omitted)); <i>State v</i> .	
12	<i>Tierney,</i> 150 N.H. 339, 839 A.2d 38, 46 (2003) ("Lay testimony must be confined to personal observations that any layperson would be capable of	
13 14	making.").	
14	ld.	
16	24. While the Nevada Supreme Court and Court of Appeals have not	
17	addressed lay witness testimony, such as that contained in the Willard Declaration and	
18	Reply Willard Declaration, regarding bipolar disorder, this has been specifically	
19	addressed by the Pennsylvania court and is persuasive here. In the case of <i>In re</i>	
20	Petition for Involuntary Commitment of Joseph R. Barbour, the Superior Court of	
21	Pennsylvania held, "Lay witness and non-expert could not provide expert testimony	
22	regarding involuntary committee's medical diagnosis, specifically the existence of mood	
23	disorder known as bipolar disorder." In re Petition for Involuntary Commitment of	
24 25	Joseph R. Barbour, 733 A.2d 1286 (PA. 1999). This Court therefore concludes such	
25 26	testimony is inadmissible to support the Rule 60(b) Motion.	
20 27		
27		
20	17	

1	25. The documents attached as Exhibits 6, 7 and 8 to the <i>Rule 60(b) Motion</i> ,
2	which purport to detail Mr. Moquin's alleged domestic abuse of his family, and which
3	also contain statements about Mr. Moquin's alleged bipolar condition, are inadmissible
4	as discussed, <i>supra</i> , with regard to bipolar disorder.
5	26. Exhibits 6, 7 and 8 to the <i>Rule 60(b) Motion</i> are not, and cannot be,
6	authenticated by Mr. Willard. Mr. Willard is not the author of the documents and has no
7 8	personal knowledge of their authenticity. He therefore cannot authenticate or identify
0 9	the documents pursuant to NRS 52.015(1) or NRS 52.025.
10	27. Exhibits 6, 7 and 8 do not meet the requirements for presumed
11	authenticity under NRS 52.125, as the exhibits are not certified copies of public records.
12	28. Pursuant to NRS 47.150, a judge or court may take judicial notice,
13	whether requested to or not. Further, a judge or court shall take judicial notice if
14	requested by a party and supplied with the necessary information. NRS 47.150. Here,
15	no party requested this Court to take judicial notice of the California court records
16 17	contained in the exhibits Exhibit 6 to the <i>Rule 60(b) Motion</i> and the <i>Reply</i> based on
18	certified copies. The Court exercises its discretion and declines to take judicial notice
19	here.
20	29. Moreover, even if Exhibits 6, 7 and 8 could be authenticated, the
21	statements contained in those exhibits regarding Mr. Moquin's alleged mental disorder
22	and condition, are inadmissible lay opinion about bipolar disorder and would still be
23	inadmissible hearsay, as they were apparently authored by Mr. Moquin's wife, and
24	Plaintiffs are offering them to prove that Mr. Moquin suffers from bipolar disorder and his
25	life was in "shambles."
26 27	
27	
	18

1	30. A number of <i>Reply</i> Exhibits and discussed in <i>Reply Willard Declaration</i>
2	also contain inadmissible hearsay.
3	31. All of the texts and emails offered by Plaintiffs and authored by Mr. Moquin
4	or Mr. O'Mara constitute inadmissible hearsay under NRS 51.035 and 51.065.
5	32. Specifically, Exhibit 2 and 3 to the <i>Reply</i> , the text messages authored by
6	Mr. Moquin in Exhibit 4, the text messages authored by Mr. Moquin in Exhibit 7, the
7 8	email authored by Mr. Moquin in Exhibit 8, and the emails authored by Mr. Moquin in
9	Exhibit 10 are therefore disregarded as inadmissible hearsay.
10	33. Exhibits attached to the <i>Reply</i> also contain communications occurring
11	after this Court issued its Order Granting Motion to Strike and its Order Granting
12	Sanctions.
13	34. All of statements in the Reply Willard Declaration set forth after Paragraph
14	37 detail events and communications from late January, 2018 through late May, 2018,
15 16	all of which occurred after this Court issued its Order Granting Motion to Strike, Order
17	Granting Sanctions, and Sanctions Order. Willard Declaration ¶¶ 37-67.
18	35. Exhibits 5, 6, 7, 8, 9, and 10 to the <i>Reply</i> contain only communications
19	and descriptions of events that occurred after this Court issued its Order Granting
20	Motion to Strike, Order Granting Sanctions, and Sanctions Order.
21	36. Logically, relevant events asserted to support Plaintiffs' argument of
22	excusable neglect must have necessarily occurred prior to the entry of the orders
23 24	Plaintiffs seek to set aside.
24 25	37. Statements in the <i>Reply Willard Declaration</i> after Paragraph 37 and
26	Exhibits 5, 6, 7, 8, 9, and 10 to the <i>Reply</i> are not relevant to this Court's determination of
27	
28	
	19
I	

1	whether Plaintiffs have met their burden of proving excusable neglect under NRCP
2	60(b).
3	38. Competent and substantial evidence has not been presented to establish
4	Rule 60(b) Relief.
5	Notwithstanding Plaintiff's Lack of Admissible Evidence,
6	Plaintiffs Fail to Meet their Burden under Rule 60(b) to Set <u>Aside the Sanctions Order and Order Granting Motion to Strike.</u>
7 8	39. Under Nevada law, "clients must be held accountable for the acts and
9	omissions of their attorneys.'" Huckabay Props. v. NC Auto Parts, 130 Nev. 196, 204,
10	322 P.3d 429, 433 (2014) (citing Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd.
11	<i>P'ship</i> , 507 U.S. 380, 396-97, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993)). The client
12	"voluntarily chose this attorney as his representative in the action, and he cannot now
13	avoid the consequences of the acts of omissions of this freely selected agent."
14	Huckabay Props., 130 Nev. at 204, 322 P.3d at 433 (citing Link v. Wabash R.R. Co.,
15 16	370 U.S. 626, 633-34, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) (rejecting the argument that
17	petitioner's claim should not have been dismissed based on counsel's unexcused
18	conduct because petitioner voluntarily chose his attorney).
19	40. In <i>Huckabay Props.</i> , the Nevada Supreme Court dismissed an appeal
20	where appellant's counsel failed to file an opening brief following two granted
21	extensions and a court order granting appellants a final extension. Huckabay Props.,
22 23	130 Nev. 209, 322 P.3d at 437. In Huckabay Props., the appellant was represented by
23	
25	11
26	11
27	
28	
	20

1	two attorneys. In dismissing the appeal, and applicable to civil litigation at the trial court
2	level here, the Court held:
3	Nevada's jurisprudence expresses a policy preference for merits-based
4	resolution of appeals, and our appellate procedure rules embody this policy, among others, litigants should not read the rules or any of this
5	court's decisions as endorsing noncompliance with court rules and directives, as to do so risks forfeiting appellate relief. In these appeals,
6	appellants failed to timely file the opening brief and appendix after having been warned that failure to do so could result in the appeals' dismissals.
7	Appellants actually had two attorneys who received copies of this court's
8	notices and orders regarding the briefing deadline, but they nevertheless failed to comply with briefing deadlines and court rules and orders and
9	an appeal may be dismissed for failure to comply with court rules and orders and still be consistent with the court's preference for deciding cases
10	on their merits, as that policy must be balanced against other policies, including the public's interest in an expeditious appellate process, the
11	parties' interests in bringing litigation to a final and stable judgment, prejudice to the opposing side, and judicial administration considerations,
12	such as case and docket management. As for declining to dismiss the
13	appeal because the dilatory conduct was occasioned by counsel, and not the client, that reasoning does not comport with general agency principles,
14	under which a client is bound by its civil attorney's actions or inactions.
15	Huckabay Props. v. NC Auto Parts, 130 Nev. at 209, 322 P.3d at 437.
16	41. In <i>Huckabay Props.,</i> however, the court recognized exceptional
17	circumstances providing two possible exceptions "to the general agency rule that the
18 19	'sins' of the lawyer are visited upon his client where the lawyer's addictive disorder and
20	abandonment of his legal practice or criminal conduct justified relief for the victimized
21	client." <i>Id</i> . at 204 n.4, 322 P.3d at 434 n.4 (citing <i>Passarelli</i> , 102 Nev. at 286). Notably,
22	these exceptions noted by the court in <i>Huckabay Props</i> . are not present here, as the
23	facts of <i>Pasarelli</i> are readily distinguishable.
24	42. First, in <i>Passarelli</i> , the record included evidence the attorney suffered from
25	a substance abuse disorder that resulted in missed office days and appointments and
26	an inability to function. <i>Passarelli</i> , 102 Nev. at 285. Second, the attorney voluntarily
27	
28	
	21

[		
1	closed his law practice. Id. Third, the attorney was placed on disability inactive status	
2	by the Nevada Bar. Id. Finally, the client in Passarelli had only one attorney. Id.	
3	43. None of these facts are present in this case. As concluded, <i>supra</i> , no	
4	competent, reliable and admissible evidence of Mr. Moquin's claimed mental disorder is	
5	before this Court. Further, there is no evidence of missed meetings or absences from	
6	office due to the claimed conditions. There is no evidence that Mr. Moquin closed his	
7	law practice.	
8 9	44. Mr. Moquin is on active status with the California Bar. <i>Opposition to Rule</i>	
10	60(b) Motion, Ex. 5; <u>Attorney Search</u> , The State Bar of California,	
11	http://members.calbar.ca.gov/fal/LicenseeSearch (last visited Nov. 30, 2018).	
12	45. Pursuant to NRS 47.150, the Court may take judicial notice, whether	
13	requested or not. A fact subject to judicial notice must be either (1) generally known	
14	within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready	
15 16	determination by resort to sources whose accuracy cannot be reasonably questioned.	
17	NRS 47.130. It follows that the State Bar of California provides accurate information	
18	regarding licensing of attorneys which cannot be reasonably questioned. The Court	
19	takes judicial notice of Mr. Moquin's active status.	
20	46. Applied here, the Huckabay Props./Passarelli analysis compels denial of	
21	the Rule 60(b) Motion. The standard for "excusable neglect" based on activities of a	
22	party's attorney requires the attorney be completely unable to respond or appear in the	
23	proceedings. See Passarelli, 102 Nev. at 285 (court found excusable neglect where	
24 25	attorney failed to attend trial due to psychiatric disorder which caused him to shut down	
26	his practice and was placed on disability inactive status by the State Bar of Nevada);	
27	see also Cicerchia v. Cicerchia, 77 Nev. 158, 160-61, 360 P.2d 839, 841 (1961) (court	
28		
	22	
		I

found excusable neglect where respondent lived out of state and suffered a nervous
 breakdown shortly after retaining out of state counsel, who was unaware and
 uninformed of the time to appear).

4 47. Here, Plaintiffs' attorneys did not completely abandon the case. Rather,
5 the Nevada Rules of Civil Procedure, this Court's express orders, and Defendants'
6 requests for damages computations and expert disclosures were ignored. Further, this
7 Court granted, upon was also ignored.

Plaintiffs attempt to excuse this conduct in their Rule 60(b) Motion by 48. 9 claiming Mr. Moguin had suffered a complete mental breakdown and his personal life 10 11 was "in shambles." In addition, to the preclusion of evidence discussed, supra, the 12 evidence is vague at best regarding these assertions and vague regarding if, and when, 13 Mr. Moguin's alleged disorder impaired him and are vague in asserting when any of the 14 alleged events took place. Plaintiffs do attach additional exhibits to their Reply that offer 15 some information on timing but are inadequate for the Court's determination. 16

49. Specifically, Exhibit 2 to the *Reply* appears to be a text string between Mr.
Willard and Mr. Moquin from December 2, 2017 through December 6, 2017, in which
Mr. Willard inquires about the status of Plaintiffs' filing in response to the *Motion for Sanctions. Reply*, Ex. 2. The text messages reflect Mr. Willard was aware of the initial
deadline, December 4, 2017, for Plaintiffs to respond to the *Motion for Sanctions* (based
on the November 15, 2017 filing date and electronic service).

24
50. Defendants agreed to extensions through 3:00 pm on December 6, 2017
25
a for Plaintiffs to file their oppositions.

26 27

28

51.

23

The Court granted an additional extension through December 18, 2018.

1	52. Plaintiffs had knowledge of the initial filing deadline. They were aware no
2	opposition papers were filed. Mr. Willard continued to communicate with both Mr.
3	Moquin and Mr. O'Mara from December 11 until December 25, 2017 regarding the
4	delinquent filings ( <i>Reply</i> , Ex. 3, 4), well after this Court's final filing deadline of
5	December 18, 2017. <i>Sanctions Order</i> ¶ 95.
6	53. Despite knowing no oppositions had been filed, neither Mr. Willard
7	(through Mr. O'Mara), Mr. Moquin, nor Mr. O'Mara contacted Defendants' counsel or
8 9	this Court to address the status of this case. Sanctions Order ¶ 98.
9 10	54. Plaintiffs did nothing to apprise this Court of any issues until they filed the
11	Rule 60(b) Motion.
12	55. Plaintiffs started looking for attorneys who might be able to help. <i>Reply</i>
13	<i>Willard Declaration</i> ¶ 36. Plaintiffs instead provided personal financial assistance to Mr.
14	Moquin and did not terminate his services. <i>WD</i> ¶ 71; <i>RWD</i> ¶ 39.
15	56. Plaintiffs knew timely oppositions were not filed.
16	57. Plaintiffs chose to retain Mr. Moquin and did not terminate his
17	representation, even after becoming aware that he did not file a timely response to the
18 19	
20	Motion for Sanctions. Plaintiffs cannot now avoid the consequences of the acts of
21	omissions of their freely selected agent.
22	58. Plaintiffs voluntarily chose to stop seeking new counsel to assist and
23	chose to continue to rely on Mr. Moquin solely for financial reasons. Willard Declaration
24	¶ 81.
25	59. Plaintiffs' multiple instances of non-compliance, including the Plaintiffs
26	failure to provide a compliant damages disclosure in this action, is reflected in the court
27	file for this proceeding, occurring well before Mr. Moquin's purported breakdown in
28	
	24

1	December, 2017 or January, 2018 asserted as preventing him from opposing the	
2	motions.	
3	60. Mr. O'Mara was counsel of record and did not report any issues related to	
4	Mr. Moquin to this Court until the filing of his Notice in March. Notice, 1.	
5	61. The Court gave counsel notice of the seriousness of Plaintiffs' violations	
6	and expressed it was considering dismissal based on those violations. Opposition to	
7	Rule 60(b) Motion. Ex. 3, December 12, 2017 Transcript ("you need to know going into	
8 9	these oppositions, that I'm very seriously considering granting all of it I haven't	
	decided it, but I need to see compelling opposition not to grant it."). Plaintiffs and their	
11	attorneys were given notice of the potential consequence of failing to file an opposition	
12	to the Sanctions Motion.	
13	62. Mr. Moquin did not abandon Plaintiffs. He appeared at status hearings,	
14	participated in depositions, filed motions and other papers, including a lengthy	
15	opposition to Defendants' motion for partial summary judgment. Mr. Moquin	
16	participated in oral arguments and filed two summary judgment motions with substantial	
17 18	supporting exhibits and detailed declarations.	
19	63. A party "cannot be relieved from a judgment [order] taken against him in	
20		
21	consequence of the neglect, carelessness, forgetfulness, or inattention of his attorney,"	
22	<i>Cicerchia</i> , 77 Nev. at 161.	
23	Plaintiffs Knew of Mr. Moquin's Alleged Condition and Alleged Non-responsiveness prior to the Sanctions Order and	
24	did Nothing and, therefore, Cannot Establish Excusable Neglect.	
25	64. In the Willard Declaration and Reply Willard Declaration, Mr. Willard	
26	admits he knew Mr. Moquin was having personal financial difficulties and that he	
27	borrowed money from friends and family to fund Mr. Moquin's personal expenses. WD	
28		
	25	
I		·

1 ¶¶ 63-65; *RWD* ¶ 11-13. Mr. Willard also admits that he recommended a psychiatrist to
2 Mr. Moquin and he again borrowed money from a friend to pay for Mr. Moquin's
3 treatment. *WD* ¶¶ 68-71; *RWD* ¶ 11-13. Mr. Willard was aware of Mr. Moquin's alleged
4 problems prior to this Court's Order Granting Motion to Strike and Sanctions Order, yet
5 continued to allow Mr. Moquin to represent Plaintiffs.

6 65. Mr. Willard was aware of Mr. Moquin's inaction which distinguishes this 7 case from the cases upon which Plaintiffs rely in the Rule 60(b) Motion, where the 8 parties were unaware of their attorneys' problems. See e.g., Passarelli, 102 Nev. at 286 g ("Passarelli was effectually and unknowingly deprived of legal representation") 10 (emphasis added); U.S. v. Cirami, 563 F.2d 26, 29-31 (2d Cir. 1977) (client discovered 11 12 that attorney had a mental disorder that prevented him from opposing summary 13 judgment more than two years later); Boehner v. Heise, 2009 WL 1360975 at \*2 14 (S.D.N.Y. 2009) (client did not learn case had been dismissed or and did not learn of 15 attorney's mental condition until several months after dismissal). Here, Mr. Willard 16 knew of the actions that supported the Sanctions Order. 17

Mr. Willard admits he was informed by Mr. O'Mara prior to the dismissal of
 the Plaintiffs' claims that Mr. Moquin was not responsive. Plaintiffs failed to replace Mr.
 Moquin or take other action due to perceived financial reasons. *Willard Declaration* ¶81.
 Plaintiffs' knowledge and inaction vitiates excuse for neglect.

22

28

67. The *Rule 60(b) Motion* cites authority for the proposition that even "where
an attorney's mishandling of a movant's case stems from the attorney's mental illness,"
which might justify relief under Rule 60(b). However, "client diligence must still be
shown." *Cobos v. Adelphi Univ.*, 179 F.R.D. 381, 388 (E.D.N.Y. 1998); see also *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350, 357 (5th Cir. 1993) ("A party has a

1	duty of diligence to inquire about the status of a case"); Pryor v. U.S. Postal Service,
2	769 F.2d 281, 287 (5th Cir. 1985) ("This Court has pointedly announced that a party has
3	a duty of diligence to inquire about the status of a case").
4	68. Mr. Willard's claim that he had no choice but to continue working with Mr.
5	Moquin due to financial issues lacks credibility as he admits he was able to borrow
6	money to fund Mr. Moquin's personal life and medical treatment. It logically follows he
7 8	had resources to retain new attorneys at the time.
9	69. Plaintiffs have not established by substantial evidence that they exercise
10	diligence to rectify representation in their case despite ample knowledge of Mr.
11	Moquin's non-responsiveness.
12	The <i>Rule 60(b) Motion</i> should be Denied because Two Attorneys
13	Represented Plaintiffs had an Obligation to Ensure Compliance with the Nevada Rules of Civil Procedure and this Court's Orders.
14	70. Plaintiffs' Rule 60(b) Motion ignores the fact David O'Mara served as local
15   16	counsel. In Nevada, the responsibilities of local counsel are clearly defined, and
17	encompass active responsibility to represent the client and manage the case:
18	(a) The Nevada attorney of record shall be responsible for and actively participate in the representation of a client in any proceeding that is
19	subject to this rule.
20	(b) The Nevada attorney of record shall be present at all motions, pre- trials, or any matters in open court unless otherwise ordered by the court.
21	(c) The Nevada attorney of record shall be responsible to the courtfor the administration of any proceeding that is subject to this rule and for
22	compliance with all state and local rules of practice. It is the responsibility of Nevada counsel to ensure that the proceeding is tried and managed in
23 24	accordance with all applicable Nevada procedural and ethical rules.
25	SCR 42(14). Mr. O'Mara's representation, even if contractually limited, was governed
26	by this rule.
27	
28	
	27

1	71. Mr. O'Mara expressly "consent[ed] as Nevada Counsel of Record to the
2	designation of Petitioner to associate in this cause pursuant to SCR 42" as part of his
3	Motion to Associate Counsel. Motion to Associate Counsel.
4	72. Mr. O'Mara attended every hearing and court conference in this case.
5	And, among other things, Mr. O'Mara signed the Verified Complaint and the First
6	Amended Verified Complaint. Complaint; FAC.
7 8	73. WDCR 23(1) provides:
9	Counsel who has appeared for any party shall represent that party
10	in the case and shall be recognized by the court and by all parties as having control of the client's case, until counsel withdraws, another
11	attorney is substituted, or until counsel is discharged by the client in writing, filed with the filing office, in accordance with SCR 46 and this rule.
12	WDCR 23.
13	74. Mr. O'Mara was the sole signatory on Plaintiffs' deficient initial disclosures,
14	(Opposition to Rule 60(b) Motion, Ex. 6), the uncured deficiencies of which were a basis
15	for sanction of dismissal. Sanctions Order.
16 17	75. Mr. O'Mara also signed and filed the <i>Brief Extension Request</i> with
18	this Court representing,
19	Counsel has been diligently working for weeks to respond to Defendant's
20	serial motions, which include seeking dismissal of Plaintiffs' case. With the full intention of submitting said responses, Counsel for Plaintiffs
21	encountered unforeseen computer issues Counsel for Plaintiffs is confident that with a one-day extension they will be able to recreate and
22	submit the oppositions to Defendants' three motions.
23	Brief Extension Request.
24	76. Mr. O'Mara's involvement precludes a conclusion of excusable neglect
25	here.
26	
27	
28	
	28

The Sanctions Order	was Sufficient under Nevada Law

28

77. Plaintiffs assert that the Sanctions Order was insufficient under Young v. 2 Johnny Ribeiro, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990) because the Sanctions 3 4 Order did not consider "whether sanctions unfairly operate to penalize a party for the 5 misconduct of his or her attorney." Rule 60(b) Motion at 12. However, consideration of 6 this factor is discretionary, not mandatory. See Young v. Johnny Ribeiro, 106 Nev. at 93 7 ("The factors a court **may** properly consider include . . . whether sanctions unfairly 8 operate to penalize a party for the misconduct of his or her attorney") (emphasis 9 supplied). 10

11 78. The Court concludes factors enumerated in Young v. Johnny Ribeiro 12 Bldg., Inc. were met by the Sanctions Order. Specifically, the Nevada Supreme Court 13 held where a court issues an order of dismissal with prejudice as a discovery sanction a 14 court may consider, among others, the degree of willfulness of the offending party, the 15 extent to which the non-offending party would be prejudiced by a lesser sanction, the 16 severity of the sanction of dismissal relative to the severity of the discovery abuse, and 17 the feasibility and fairness of alternative, less severe sanctions. Young v. Johnny 18 Ribeiro Bldg., Inc., 106 Nev. at 93. The factors are not mandatory so long as the Court 19 20 supports the order with "an express, careful and preferably written explanation of the 21 court's analysis of the pertinent factors." Id.

22
79. While each suggested factor discussion in the Sanctions Order was not
23
24
24

80. In light of the circumstances in this case, the dismissal of Plaintiffs' claims
did not unfairly penalize Plaintiffs based on the factors analyzed in the *Sanctions Order*.
80.

1	81. Plaintiffs assert this Court must address the additional factors set forth in
2	Yochum v. Davis, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982). Yochum involves
3	relief from a default judgment and not an order, as here, where judgment has not been
4	entered. Yochum does not preclude denial of the motion.
5	The Rule 60(b) Motion should be Denied.
6	82. After weighing the credibility and admissibility of the evidence provided in
7	support of the Rule 60(b) Motion, substantial evidence has not been presented to
8 9	establish excusable neglect.
9 10	83. Plaintiffs have failed to meet their burden of proving, by a preponderance
11	of the evidence, excusable neglect so as to justify relief under NRCP 60(b).
12	ORDER
13	Based upon the foregoing, Plaintiffs' <i>Rule 60(b) Motion</i> is <b>DENIED</b> , in its entirety.
14	DATED this $\underline{J}^{th}$ day of November, 2018.
15	DATED this $\underline{\bigcirc \ell}$ day of November, 2018.
16	- Action
16 17	DISTRICT JUDGE
	DISTRICT JUDGE
17 18 19	DISTRICT JUDGE
17 18 19 20	DISTRICT JUDGE
17 18 19 20 21	DISTRICT JUDGE
17 18 19 20 21 22	DISTRICT JUDGE
<ol> <li>17</li> <li>18</li> <li>19</li> <li>20</li> <li>21</li> <li>22</li> <li>23</li> </ol>	DISTRICT JUDGE
<ol> <li>17</li> <li>18</li> <li>19</li> <li>20</li> <li>21</li> <li>22</li> <li>23</li> <li>24</li> </ol>	DISTRICT JUDGE
<ol> <li>17</li> <li>18</li> <li>19</li> <li>20</li> <li>21</li> <li>22</li> <li>23</li> <li>24</li> <li>25</li> </ol>	DISTRICT JUDGE
<ol> <li>17</li> <li>18</li> <li>19</li> <li>20</li> <li>21</li> <li>22</li> <li>23</li> <li>24</li> </ol>	DISTRICT JUDGE
<ol> <li>17</li> <li>18</li> <li>19</li> <li>20</li> <li>21</li> <li>22</li> <li>23</li> <li>24</li> <li>25</li> <li>26</li> </ol>	DISTRICT JUDGE
<ol> <li>17</li> <li>18</li> <li>19</li> <li>20</li> <li>21</li> <li>22</li> <li>23</li> <li>24</li> <li>25</li> <li>26</li> <li>27</li> </ol>	DISTRICT JUDGE

1	CERTIFICATE OF SERVICE
2	I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT;
3	that on the $30$ day of November, 2018, I electronically filed the foregoing with the
4	Clerk of the Court system which will send a notice of electronic filing to the following:
5	RICHARD WILLIAMSON, ESQ.
6	JONATHAN TEW, ESQ.
7	BRIAN IRVINE, ESQ.
8	ANJALI WEBSTER, ESQ.
9	JOHN DESMOND, ESQ.
10	
11	
12	
13	
14	
15	
16	And, I deposited in the County mailing system for postage and mailing with the
17	United States Postal Service in Reno, Nevada, a true and correct copy of the attached
18	document addressed as follows:
19	
20 21	Min Dot
22	VMU 400
22	
24	
25	
26	
27	
28	

## EXHIBIT "10"

## EXHIBIT "10"

## EXHIBIT "10"

Docket 77780 Document 2019-02425

FILED Electronically CV14-01712 2018-12-11 03:23:03 PM **Jacqueline Bryant** Clerk of the Court 1 1880 Transaction # 7018896 DICKINSON WRIGHT, PLLC 2 JOHN P. DESMOND Nevada Bar No. 5618 3 BRIAN R. IRVINE Nevada Bar No. 7758 4 ANJALI D. WEBSTER Nevada Bar No. 12515 5 100 West Liberty Street, Suite 940 Reno, NV 89501 6 Tel: (775) 343-7500 Fax: (844) 670-6009 7 Email: Jdesmond@dickinsonwright.com Email: Birvine@dickinsonwright.com 8 Email: Awebster@dickinsonwright.com 9 Attorney for Defendants Berry Hinckley Industries and 10 Jerry Herbst 11 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA 12 IN AND FOR THE COUNTY OF WASHOE 13 CASE NO. CV14-01712 LARRY J. WILLARD, individually 14 and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT DEPT. 6 CORPORATION, a California corporation; 15 EDWARD C. WOOLEY AND JUDITH A. 16 WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley 17 Intervivos Revocable Trust 2000, 18 Plaintiff, vs. 19 BERRY-HINCKLEY INDUSTRIES, a 20 Nevada corporation; and JERRY HERBST, an individual 21 Defendants. 22 23 **BERRY-HINCKLEY INDUSTRIES, a** Nevada corporation; and JERRY HERBST, 24 an individual; 25 Counterclaimants, 26 vs 27 28 Page 1 of 3

1	LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund;	
2	OVERLAND DEVELOPMENT CORPORATION, a California corporation;	
3	Counter-defendants.	
4		
5	IPROPOSED JUDGMENT	
6	This action, having come before this Court, the Honorable Lynne K. Simons presiding,	
7 8	and all of the claims of Plaintiffs Larry J. Willard, individually and as trustee of the Larry James	
° 9	Willard Trust (the "Willard Plaintiffs"), having been dismissed by this Court with prejudice in	
10	its Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions filed	
10	herein on March 6, 2018, this Court having denied the Willard Plaintiffs' NRCP 60(b) Motion	
12	for Relief on November 30, 2018, and all of the counterclaims of Defendants Berry-Hinckley	
12	Industries ("BHI") and Jerry Herbst having been dismissed by this Court in its Order granting	
13	Defendants' Motion for voluntary dismissal filed herein on April 13, 2018,	
14	IT IS ORDERED AND ADJUDGED that Judgment is entered in favor of Defendants	
16	and against the Willard Plaintiffs on all of the Willard Plaintiffs' claims and that such claims are	
17	dismissed with prejudice.	
18		
19	///	
20		
21	///	
22		
23	///	
24		
25	///	
26		
27	///	
28		
	Page 2 of 3	
		1

1 IT IS FURTHER ORDERED AND ADJUDGED that Defendants' counterclaims are dismissed without prejudice. 2 DATED this <u>May of December</u>, 2018. 3 4 5 6 DISTRICT COURT JUDGE 7 8 Respectfully submitted by: 9 DICKINSON WRIGHT, PLLC 10 11 /s/ Brian R. Irvine 12 JOHN P. DESMOND Nevada Bar No. 5618 13 BRIAN R. IRVINE Nevada Bar No. 7758 14 ANJALI D. WEBSTER Nevada Bar No. 11525 15 100 West Liberty Street, Suite 940 Reno, NV 89501 16 Tel: (775) 343-7500 Fax: (844) 670-6009 17 Email: Jdesmond@dickinsonwright.com Email: Birvine@dickinsonwright.com 18 Email: Awebster@dickinsonwright.com 19 Attorneys for Defendants Berry Hinckley Industries, and 20 Jerry Herbst 21 22 23 24 25 26 27 28 Page 3 of 3

## EXHIBIT "11"

# EXHIBIT "11"

		FILED Electronically CV14-01712 2021-09-13 04:27:48 PM Alicia L. Lerud
1	CODE NO. 2842	Clerk of the Court Transaction # 8643933
2		
3		
4		
5	IN THE SECOND JUDICIAL DISTRICT CO	OURT OF THE STATE OF NEVADA
6	IN AND FOR THE COUN	ITY OF WASHOE
7		
8	LARRY J. WILLARD, individually and as	Case No. CV14-01712
9	trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT	Dept. No. 6
10	CORPORATION, a California corporation; EDWARD C. WOOLEY AND JUDITH A	
11	WOOLEY, individually and as trustees of the	ORDER AFTER REMAND
12	Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,	DENYING PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF
13	Plaintiffs,	
14		
15	VS.	
16	BERRY-HINCKLEY INDUSTRIES, a Nevada	
17	Corporation; and JERRY HERBST, an individual,	
18	Defendants.	
19	/	
20		
21	BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST,	
22	an individual,	
23	Counterclaimants,	
24	VS	
25	LARRY J. WILLARD, individually and as	
26	trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT	
27	CORPORATION, a California corporation,	
28	Counter-defendants.	
-	/	

1 2

3

4

5

#### ORDER AFTER REMAND DENYING PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF

Before this Court is Plaintiffs' Rule 60(b) Motion for Relief ("60(b) Motion") filed by Plaintiffs Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund and Overland Development Corporation, a California Corporation (collectively, "Willard" or "Plaintiffs"), by and through counsel, Robertson, Johnson, Miller & Williamson. Pursuant to NRCP 60(b), Plaintiffs seek to set aside: (1) this Court's January 4, 2018, Order Granting Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich; (2) this Court's January 4, 2018, Order Granting Defendants'/Counterclaimants' Motion for Sanctions; and (3) this Court's March 6, 2018, Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions. (60(b) Motion).

In opposition, Defendants Berry-Hinckley Industries ("BHI") and Jerry Herbst (collectively, "Defendants") filed their *Opposition to Rule 60(b) Motion for Relief ("60(b) Opposition")*, by and through their counsel, Dickinson Wright PLLC.

Plaintiffs then filed their *Reply in Support of the Willard Plaintiffs' Rule 60(b) Motion for Relief.* Prior to remand, oral arguments were held before this Court on September 4, 2018.

After consideration of the papers submitted, the arguments of counsel, and the entire court file, this Court entered its *Order Denying Plaintiffs' Rule 60(b) Motion for Relief* (the *"Prior 60(b) Order"*).

Plaintiffs appealed the *Prior 60(b) Order*. On August 6, 2020, the Nevada Supreme Court entered its Opinion (the "*Opinion*") in which it reversed the *Prior 60(b) Order* and remanded the case to this Court, with instructions the Court issue explicit and detailed written findings on each of the factors identified in *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982).

After consideration of the instant papers submitted, the arguments of counsel, and the entire court file, and in compliance with the Nevada Supreme Court's instructions, the

1	Court makes the following findings of fact, conclusions of law and orders as follows:				
2	I. <u>FINDINGS OF FACT</u> .				
3	The Court makes the following Findings of Fact:				
4	Α.	PLAINTIFFS' COMPLAINT.			
5	1.	On August 8, 2014, Plaintiffs commenced this action by filing their Complaint			
6	against Defendants. <sup>1</sup> Complaint, generally.				
7	2.	By the Complaint and the First Amended Complaint ("FAC"), Plaintiffs sought			
8	the following damages against Defendants for an alleged breach of the lease between				
9	Willard and	and BHI: (1) "rental income" for \$19,443,836.94, discounted by 4% per the lease to			
10	\$15,741,360	5,741,360.75 as of March 1, 2013; and (2) certain property-related damages, such as			
11 12	insurance ar	nce and installation of a security fence. FAC.			
12	3.	Willard also sought several other categories of damages which have since			
14	been dismissed or withdrawn. May 30, 2017, <i>Order</i> .				
15 16	В.	PLAINTIFFS FAILED TO COMPLY WITH THE NEVADA RULES OF CIVIL PROCEDURE AND THIS COURT'S ORDERS.			
17	4.	Plaintiffs failed to provide a compliant damages disclosure in this action <sup>2</sup> .			
18	5.	Plaintiffs failed to provide a damages computation in their initial disclosures, as			
19	required unc	required under NRCP 16.1(a)(1)(C). Findings of Fact, Conclusions of Law, and Order on			
20	Defendants' Motion for Sanctions ("Sanctions Order") ¶ 12. Plaintiffs also failed to provide				
21	damages computations at any time despite numerous demands on both Brian Moquin and				
22	David O'Mara, of which Plaintiffs personally were aware. Sanctions Order ¶¶ 14-16, 25, 27-				
23	33, 39, 43-44 and 51-54; <i>January 10, 2017, Transcript</i> .				
24					
25	<sup>1</sup> Willard filed the initial complaint jointly with Edward E. Wooley and Judith A. Wooley, individually				
26 27	and as Trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000 (collectively, "Wooley"). However, Defendants and Wooley entered into a settlement agreement and stipulation for dismissal. This Court entered its Order on April 13, 2018 dismissing Wooley's claims with prejudice.				

 <sup>28
 &</sup>lt;sup>2</sup> The Court numbers the Findings of Fact sequentially after each sub-point and continuing through the next sub-point, rather than beginning the sequence with "1" again.

6. Plaintiffs failed to provide complete and adequate responses to interrogatories requesting information about Plaintiffs' damages in the normal course of discovery.

7. Plaintiffs failed to provide complete and adequate responses to interrogatories in violation of this Court's *Order Granting Defendants' Motion to Compel* and failed to comply with this Court's *Order* (*"January Hearing Order"*) issued after the parties discussed Plaintiffs' failure to provide damages computations at the January 10, 2017, hearing attended by Mr. Moquin, Mr. O'Mara, and Plaintiff Larry J. Willard. *Sanctions Order* ¶¶ 17-25.

The January Hearing Order required Plaintiffs to provide damages
 computations and supporting materials. Sanctions Order ¶¶ 46-49, 54, 59-64, 67-68;
 Defendants' Opposition to Plaintiffs' Rule 60(b) Motion, Ex. 2; January 10, 2017, Transcript
 at 61-63, 68; January Hearing Order.

9. Plaintiffs failed to properly disclose Daniel Gluhaich as an expert witness as required by NRCP 16.1(a)(2). *Sanctions Order*  $\P$  34-37.

10. In contravention of this Court's *January Hearing Order*, Plaintiffs failed to provide an amended disclosure of Mr. Gluhaich, although Defendants' counsel made multiple requests. *Sanctions Order* ¶¶ 38-45, 50-64.

C.

### PLAINTIFFS' SUMMARY JUDGMENT MOTION.

11. Pursuant to the February 9, 2017, *Stipulation and Order to Continue Trial*, discovery closed in mid-November, 2017.

12. On October 18, 2017, less than a month before the close of discovery, Plaintiffs filed their *Motion of Summary Judgment* asserting they were entitled, as a matter of law, to more than triple the amount of damages alleged in and requested by their *First Amended Complaint. Sanctions Order* ¶¶ 69, 73.

28

1

2

3

4

5

6

7

8

9

10

11

12

13

14

1 13. The damages asserted in Plaintiffs' *Motion for Summary Judgment* were not
 2 previously disclosed. The motion was also supported by previously undisclosed expert
 3 opinions and documents. *Sanctions Order* ¶¶ 74-79.

14. The expert's documents had been in Plaintiffs' possession throughout the pendency of this case, but had not been previously disclosed, despite Defendants' requests for such documents. *Id.* at ¶¶ 79, 136.

15. On November 13, 2017, Defendants filed their Opposition to Plaintiffs' *Motion for Summary Judgment*.

16. Plaintiffs did not submit the *Motion for Summary Judgment* for decision.

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

#### D. DEFENDANTS' MOTION TO STRIKE AND/OR MOTION IN LIMINE TO EXCLUDE THE EXPERT TESTIMONY OF DANIEL GLUHAICH AND MOTION FOR SANCTIONS.

17. On November 14, 2017, Defendants filed their Motion to Strike and/or Motion in Limine to Exclude Expert Testimony of Daniel Gluhaich ("Motion to Strike").

18. In the *Motion to Strike*, Defendants maintained this Court should preclude Plaintiffs from offering Mr. Gluhaich's testimony on the grounds: (1) Plaintiffs failed to adequately disclose Mr. Gluhaich as an expert witness because they failed to provide "a summary of the facts and opinions to which the witness is expected to testify" as required by NRCP 16.1(a)(2)(B); (2) the opinions offered by Mr. Gluhaich in support of Plaintiffs' *Motion for Summary Judgment* were based upon inadmissible hearsay and were based solely on the opinions of others; and (3) Mr. Gluhaich was not qualified to offer the opinions included in his declaration filed in support of Plaintiffs' *Motion for Summary Judgment*.

19. On November 15, 2017, Defendants filed their *Motion for Sanctions* (the "Sanctions Motion").

20. In the *Sanctions Motion*, Defendants argued this Court should sanction Plaintiffs for their continued and intentional conduct in failing to comply with the Nevada Rules of Civil Procedure and this Court's orders requiring Plaintiffs to provide damages computations and full and adequate expert disclosures, and dismiss Plaintiffs' claims with

prejudice or, in the alternative, preclude Plaintiffs from seeking new damages or relying upon their undisclosed expert and appraisals.

21. Defendants agreed to give Plaintiffs several extensions of time to oppose the *Motion to Strike* and *Sanctions Motion*, but no oppositions were filed.

22. On December 6, 2017, Plaintiffs, through Mr. O'Mara, requested relief from the Court by extension to respond until "December 7, 2017 at 4:29 p.m." *Sanctions Order* 94; *Plaintiffs' Request for a Brief Extension of Time* (the "*Extension Request*").

23. In the *Extension Request*, Mr. O'Mara also represented that "[c]ounsel has been diligently working for weeks to respond to Defendant's (sic) serial motions, which include seeking dismissal with prejudice of Plaintiffs' case." *Id.* at 2.

24. This Court held a status conference on December 12, 2017, attended by Defendants' counsel and Plaintiffs' counsel, Mr. Moquin and Mr. O'Mara. At the status conference, after observing Mr. Moquin, having a significant dialogue with Mr. Moquin, and over vehement objection by Defendants' counsel, this Court granted *Plaintiffs' Brief Extension Request* plus granted more time than was requested. The Court directed Plaintiffs to respond to the outstanding motions no later than Monday, December 18, 2017, at 10:00 am. *Sanctions Order* ¶ 95.

25. This Court further directed Defendants to file their reply briefs no later than January 8, 2018. The Court set the parties' outstanding Motions for oral argument on January 12, 2018. *Sanctions Order* ¶ 96.

26. This Court admonished Plaintiffs, stating "you need to know going into these oppositions, that I'm very seriously considering granting all of it…I haven't decided it, but I need to see compelling opposition not to grant it." *Opposition to Rule 60(b) Motion*, Ex. 3, December 12, 2017, *Transcript of Status Conference*, in part.

27. Plaintiffs did not file an opposition or response to the *Motion to Strike* or *Sanctions Motion* by December 18, 2017, or any time thereafter, nor did Plaintiffs request any further extension.

28. This Court entered its Order Granting Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich on January 4, 2018 ("Order Granting Motion to Strike").

29. This Court entered its Order Granting Defendants'/Counterclaimants' Motion for Sanctions on January 4, 2018 ("Order Granting Sanctions Motion").

30. This Court entered its Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions on March 6, 2018 ("Sanctions Order").<sup>3</sup>

E.

1

#### WITHDRAWAL OF LOCAL COUNSEL.

31. On March 15, 2018, Mr. O'Mara filed a Notice of Withdrawal of Local Counsel ("Notice"). The Notice states, "[c]ounsel has had no contact with lead counsel Mr. Moguin for many months with a total failure just prior to the Court's first decisions being filed in this case," and "Mr. Moguin was unresponsive during the time in which this Court was deciding the pending motions, even after counsel begged him for a response to be filed with the Court and was told he would provide such a response." *Notice*, 1.

32. The *Notice* describes the terms of retention of Mr. O'Mara as "undersigned counsel was retained solely as local counsel, and provided Mr. Moquin with the necessary information related to the Court's filing requirement and timelines. Undersigned Counsel was retained only to provide services as directed by Mr. Moquin, and would be relieved of services if Mr. Moquin was removed." Id.

#### F. PLAINTIFFS' RULE 60(B) MOTION.

33. On March 26, 2018, Robertson, Johnson, Miller & Williamson filed a notice of appearance on behalf of Plaintiffs.

34. On April 18, 2018, Plaintiffs filed the prior *Rule 60(b) Motion*. Plaintiffs argued this Court should set aside its Order Granting the Motion to Strike, Order Granting Sanctions

<sup>&</sup>lt;sup>3</sup>The Order Granting Sanctions imposed sanctions and directed Defendants to "submit a Proposed Order granting Defendants'/Counterclaimants' Motion for Sanctions, including factual and legal analysis and discussion, to Department 6 within twenty (20) days of the date of this Order in 28 accordance with WDCR 9." Order Granting Sanctions Motion, 4. For purposes of the instant motion, the Court considers the Order Granting Sanctions Motion and Sanctions Order, as one for the

purposes of the analysis herein.

Motion, and Sanctions Order, based upon Mr. Moguin's excusable neglect. Plaintiffs further argued the Sanctions Order was insufficient under Young v. Johnny Ribeiro, 106 Nev. 88, 787 P.2d 777 (1990), because the Court did not consider whether sanctions unfairly operate to penalize Plaintiffs for the misconduct of their attorney.

35. Plaintiffs argued their failure to provide the damages computations and adequate expert disclosures, as required by the Nevada Rules of Civil Procedure and this Court's orders and their failure to file oppositions to the *Motion to Strike* and *Sanctions Motion* were all due to Mr. Moquin's failure "to properly prosecute this case due to a serious mental illness and a personal life that was apparently in shambles." (Rule 60(b) Motion 1).

36. The *Rule 60(b) Motion* purported to support its arguments primarily through the Declaration of Larry J. Willard (the "Willard Declaration" and "WD" in citations to the record).<sup>4</sup>

37. The Willard Declaration included several statements about Mr. Moguin's alleged mental disorder. It stated that Mr. Willard is "**convinced**" Mr. Moguin was dealing with issues and demons beyond his control. WD ¶ 66. It further stated that he "learned" that Mr. Moquin was struggling with constant marital conflict that greatly interfered with his work. Id. The Willard Declaration stated that Mr. Moguin suffered a "total mental breakdown." WD ¶ 68. It stated that Mr. Moquin explained to Mr. Willard he had been diagnosed with bipolar disorder. WD ¶ 70. Mr. Willard also declared that he believed Mr. Moquin's disorder to be "severe and debilitating." WD ¶ 73. He stated that he **now sees** "that Mr. Moquin was suffering from [symptoms of bipolar disorder] throughout his work on the case." WD ¶ 76. And, Mr. Willard declared that he can now see how Mr. Moguin's alleged psychological issues affected Plaintiffs' case. WD ¶ 87. (Bolded emphasis supplied 25 on all paragraphs cited).

26 27

28

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

<sup>&</sup>lt;sup>4</sup>The Willard Declaration includes paragraphs discussing the underlying facts of the action and the initial filing of the suit in California. These paragraphs are not relevant to the Court's determination of the Rule 60(b) Motion and are not considered. See e.g., WD ¶¶ 1-51, 100.

38. The *Rule 60(b) Motion* also included an internet printout purporting to list symptoms of bipolar disorder, (Rule 60(b) Motion, Ex. 5), and several documents related to alleged spousal abuse by Mr. Moguin, some of which referenced Mr. Moguin's alleged bipolar disorder, and which included an Emergency Protective Order from a California proceeding, (Rule 60(b) Motion, Ex. 6), a Pre-Booking Information Sheet from a California proceeding (*Rule 60(b) Motion*, Ex. 7), and a Request for Domestic Violence Restraining Order, also from a California proceeding (*Rule 60(b) Motion*, Ex. 8). The documents from the California proceedings were not certified by the clerk of the court.

39. The *Rule 60(b) Motion* did not include any supporting declaration by Mr. O'Mara, even though Mr. O'Mara was a counsel of record for Plaintiffs from the inception of the case through March 15, 2018. See generally id.

40. Defendants filed their Opposition to the Rule 60(b) Motion on May 18, 2018 (the "Opposition").

41. Plaintiffs filed their Reply in Support of the Willard Plaintiffs' Rule 60(b) Motion on May 29, 2018 (the "Reply"). The Reply attached 11 new exhibits, including a new Declaration of Larry J. Willard in Response to Defendants' Opposition to Rule 60(b) Motion for Relief. Reply, Ex. 1 ("Reply Willard Declaration" and "RWD" for record citations).<sup>5</sup> The *Reply* exhibits included copies of text messages between Mr. Willard and Mr. Moguin, (*Reply*, Exs. 3, 6, 8, and 10), a receipt detailing an alleged payment made by Mr. Willard to Mr. Moguin's doctor on March 13, 2018 (*Reply*, Ex. 5), and a letter from Mr. Williamson to Mr. Moguin dated May 14, 2018. (Reply, Ex. 9).

23 42. On June 6, 2018, Defendants filed their *Motion to Strike, or in the Alternative,* 24 Motion for Leave to File Sur-Reply, arguing this Court should strike Exhibits 1-10 to the 25 Reply because (a) Defendants did not have the opportunity to respond to those exhibits in their Opposition to the Rule 60(b) Motion; (b) exhibits contained inadmissible hearsay and/or

27

26

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

<sup>28</sup> <sup>5</sup>The Court disregards the paragraphs included in the Willard Declaration and the Reply Willard Declaration that can be construed to be stated appeal to the Court's sympathy. See e.g., WD 1-100; *RWD* ¶67.

inadmissible lay opinion testimony; and (c) a number of exhibits were not relevant to this Court's determination of excusable neglect.

43. Defendants' *Motion to Strike, or in the Alternative, Motion for Leave to File Sur-Reply* was fully briefed and submitted to this Court for decision on June 29, 2018. Subsequently, Plaintiffs' counsel stipulated to the filing of a sur-reply.

44. In its *Sanctions Order*, the Court made the following findings of fact and conclusions of law, among others: First, plaintiffs failed to provide damages disclosures and failed to properly disclose an expert witness in violation of this Court's express Orders. *Sanctions Order* ¶¶ 67, 68. Plaintiffs acknowledged their failure to properly disclose an expert witness in accordance with NRCP 16.1(a)(2)(B). *Stipulation and Order*, February 9, 2017. Plaintiffs did not thereafter attempt to properly disclose the expert witness for the entirety of 2017. Plaintiffs failed to comply with multiple orders of this Court. Defendants filed several motions to compel, and Plaintiffs' non-compliance forced extension of trial and discovery deadlines on three separate occasions. This Court sanctioned Plaintiffs by ordering payment of Defendants' expenses incurred in filing the *Motion to Compel*.

45. Plaintiffs did not oppose the *Sanctions Motion* despite this Court's express admonitions that the Court was "seriously considering" dismissal.

G.

#### PLAINTIFFS' APPEAL,

46. On November 30, 2018, this Court entered its *Prior 60(b) Order*, wherein this Court denied Plaintiffs' *Rule 60(b) Motion*.

47. Plaintiffs timely appealed this Court's *Prior 60(b) Order*.

48. On August 6, 2020, the Nevada Supreme Court entered its published opinion (the "*Opinion*").

49. B the *Opinion*, the Nevada Supreme Court reversed this Court's *Prior 60(b) Order*, concluding that this Court abused its discretion by failing to address the factors articulated in *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982), *overruled in* 

part on other grounds by Epstein v. Epstein, 113 Nev. 1401, 1405, 950 P.2d 771, 773 (1997), when ruling on the Plaintiffs' *Rule 60(b) Motion*.

50. The Nevada Supreme Court remanded the proceedings back to this Court for further consideration consistent with the *Opinion* and directed this Court to issue explicit and detailed written findings with respect to each of the four *Yochum* factors in considering the Plaintiffs' *Rule 60(b) Motion*.

51. The Nevada Supreme Court subsequently clarified "neither party may present any new arguments or evidence on remand; the district court's consideration of the factors set forth in *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982), is limited to the record currently before the court." (*Order Denying En Banc Reconsideration*).

52. If any of the following Conclusions of Law contain or may be construed to contain Findings of Fact, they are incorporated here and shall be treated as appropriately identified and designated.

### 

II.

#### CONCLUSIONS OF LAW.

Based on the Court's Findings of Fact, the Court makes its Conclusions of Law as follows.

18 53. If any of the foregoing Findings of Fact contain or may be construed to contain
19 Conclusions of Law, they are incorporated here and shall be treated as appropriately
20 identified and designated.

Α.

#### RULE 60(B) STANDARD.

54. NRCP 60(b)(1) is a remedial rule that gives due consideration to our court system's preference to adjudicate cases on the merits, without compromising the dignity of the court process. *Opinion*.

55. Under NRCP 60(b)(1), on motion, this Court may relieve a party from an order or final judgment on grounds of mistake, inadvertence, surprise, or excusable neglect. NRCP 60(b)(1); *Opinion*.

56. A party who seeks to set aside an order pursuant to NRCP 60(b)(1) "has the burden to prove mistake, inadvertence, surprise, or excusable neglect by a preponderance of the evidence." *Polivka v. Kuller*, 128 Nev. 926, 381 P.3d 651 (2012) (citations omitted); see also Britz v. Consolidated Casinos Corp., 87 Nev. 441, 446, 488 P.2d 911, 915 (1971) ("the burden of proof on [a motion to set aside under Rule 60(b)] is on the moving party who must establish his position by a preponderance of the evidence." (quoting *Luz v. Lopes*, 55 Cal. 2d 54, 10 Cal. Rptr. 161, 166, 358 P.2d 289, 294 (1960)).

57. A district court must address the factors set forth in *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982), *overruled in part on other grounds by Epstein v. Epstein*, 113 Nev. 1401, 1405, 950 P.2d 771, 773 (1997), when determining if the NRCP 60(b)(1) movant established, by a preponderance of the evidence, that sufficient grounds exist to set aside a final judgment, order, or proceeding. *Opinion*.

#### B. THE RULE 60(B) MOTION IS NOT SUPPORTED BY COMPETENT, ADMISSIBLE, AND SUBSTANTIAL EVIDENCE.

58. Plaintiffs moved to set aside the Order Granting Defendants' Motion to Strike, Order Granting the Motion for Sanctions, and Sanctions Order<sup>6</sup> because Mr. Moquin "failed to properly prosecute this case due to a serious mental illness and a personal life that was apparently in shambles." *Rule 60(b) Motion* 1.

59. While this Court "has wide discretion in deciding whether to grant or deny a
motion to set aside a judgment under NRCP 60(b)," *Stoecklein v. Johnson Electric, Inc.*, 109
Nev. 268, 271, 849 P.2d 305, 307 (1993), *holding modified by Willard v. Berry-Hinckley Indus.*, 136 Nev. Adv. Op. 53, 469 P.3d 176 (2020), this discretion is "a legal discretion and **cannot be sustained where there is no competent evidence** to justify the court's action. *Id.* (emphasis added) (citing *Lukey v. Thomas*, 75 Nev. 20, 22, 333 P.2d 979 (1959)); *cf.*

<sup>&</sup>lt;sup>6</sup>Plaintiffs argue that the Sanctions Order was insufficient under Young v. Johnny Ribeiro, 106 Nev.
88, 93, 787 P.2d 777, 780 (1990) because the Sanctions Order did not consider "whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney." *Rule 60(b) Motion*, 12. This is addressed by the Court hereinafter.

generally Otak Nev. LLC v. Eighth Judicial Dist. Ct., 129 Nev. 799, 805, 312 P.3d 491, 496 (2013) (a court abuses its discretion when its decision is not supported by substantial evidence).

60. A party who seeks to set aside an order pursuant to NRCP 60(b)(1) bears the burden of proof to show excusable neglect "by a preponderance of the evidence." *Kahn v. Orme*, 108 Nev. 510, 835 P.2d 790 (1992), *overruled on other grounds by Epstein v. Epstein*, 113 Nev. 1401, 950 P.2d 771 (1997); *Britz v. Consolidated Casinos Corp.*, 87 Nev. 441, 446, 448 P.2d 911, 915 (1971). In fact, "before a…judgment may be set aside under NRCP 60(b) (1), the party so moving **must show to the court** that his neglect was excusable." *McClellan v. David*, 84 Nev. 283, 439 P.2d 673 (1968) (emphasis added).

61. Where "there was no credible evidence before the lower court to show that the neglect of the movant was excusable under the circumstances," the Nevada Supreme Court reversed a district court's order setting aside a judgment, stating "no excusable neglect was shown as a matter of law." *McClellan*, 84 Nev. at 284, 289, 439 P.2d at 674, 677.

62. The *Rule 60(b) Motion* purports to provide substantial evidence to support its legal argument through the *Willard Declaration* and the *Reply Willard Declaration* together with the attached exhibits, all of which contain inadmissible statements, some inadmissible on multiple grounds.

63. The *Willard Declaration* includes several statements about Mr. Moquin's alleged mental disorder. As set forth in the Findings of Fact, *supra*, Mr. Willard declares that he is "convinced" that Mr. Moquin was dealing with issues and demons beyond his control (*WD* ¶ 66); he "learned" Mr. Moquin was struggling with constant marital conflict that greatly interfered with his work (*WD* ¶ 67; *RWD* ¶ 15); Mr. Moquin suffered a "total mental breakdown") (*WD* ¶ 68; *RWD* ¶ 16); Mr. Moquin explained to Mr. Willard he had been diagnosed with bipolar disorder (*WD* ¶ 70; *RWD* ¶ 37); Mr. Willard believes Mr. Moquin's disorder to be "severe and debilitating" (*WD* ¶ 73); Mr. Willard now sees that "Mr. Moquin was suffering from [symptoms of bipolar disorder] throughout his work on the case (*WD* ¶

1 76); and, Mr. Willard can now see how Mr. Moquin's alleged psychological issues affected 2 his case (*WD* ¶ 87).<sup>7</sup>

64. The Willard Declaration addresses Mr. Moquin's private life, including his personal mental status and conflict in his marriage.

65. Mr. Willard's statements are not derived from his own perceptions.

66. The nature of the subject matter, itself, establishes Mr. Willard could not have obtained this information by personal observation.

67. Mr. Willard lacks personal knowledge to testify to the assertions included in the Willard Declaration and the Reply Willard Declaration regarding Mr. Moquin's mental disorder, private personal life, and private marital conflicts.

<sup>7</sup>The Willard Declaration and the Reply Willard Declaration contain many nearly identical statements. They compare as follows:

14 15	Willard Declaration Paragraph	Reply Willard Declaration
16	53	7
17	54	8
18	59	9
19	63	11
20	64	12 (slightly differs)
21	65	13
	67	15
22	68	16
23	69	35
24	70	38
25	71	39
26	82	10 Similar – not exact)
	89	3
27	91	67
28		

3

4

5

6

7

8

9

10

11

12

68. It also logically follows that Mr. Willard could only have obtained this information by communication from Mr. Moquin (or Mr. Moquin's wife), although not overtly stated.

69. The *Willard Declaration* and *Reply Willard Declaration* include inadmissible hearsay under NRS 51.035 and 51.065. *See New Image Indus. v. Rice*, 603 So.2d 895 (Ala. 1992) (affirming denial of 60(b) relief where the only evidence of excusable neglect was an affidavit containing inadmissible hearsay and speculation); *Agnello v. Walker*, 306 S.W.3d 666, 673 (Mo. Ct. App. 2010), *as modified* (Apr. 27, 2010) (a motion to set aside a default judgment is not a "self-proving motion," and "[i]t is not sufficient to attach hearsay testimonial documentation in support of a motion to set aside....")).

70. Separate and apart from the challenge to the *Willard Declaration* and the *Reply Willard Declaration* on hearsay grounds, Mr. Willard's statements are also speculative and therefore inadmissible. He does not declare that he personally observed Mr. Moquin's alleged condition until he draws this unqualified conclusion late in the case, and, even if he had, he speculates what the mental disorder could cause and caused, offering an internet article to boost his credibility, which is also hearsay with no applicable exception offered.

71. The assertion describing Mr. Moquin's statement to Mr. Willard that Dr. Mar diagnosed Mr. Moquin with bipolar disorder (*WD* ¶ 69; *RWD* ¶ 35) is inadmissible hearsay with no exception under NRS 51.105(1) because Mr. Willard's declaration does not constitute Mr. Moquin's declaration of "then existing state of mind, emotion, sensation or physical condition, such as intent, plan, motive, design, mental feeling, pain and bodily health." Instead, Dr. Mar purportedly diagnosed Mr. Moquin; Mr. Moquin told Mr. Willard of Dr. Mar's purported diagnosis; and Mr. Willard makes the statement of Mr. Moquin's diagnosis. The statements were not spontaneous and instead were a basis for Mr. Moquin to request monetary assistance.

72. Even if Mr. Moquin's report of Dr. Mar's diagnosis is construed as constituting Mr. Moquin's statement of then-existing mental condition, Mr. Willard's statements are not

admissible as contemporaneous statements made by Mr. Moquin about his own present physical symptoms or feelings. See 2 McCormick on Evid. 273 (7th ed.) ("Statements of the declarant's present bodily condition and symptoms, including pain and other feelings, offered to prove the truth of the statements, have been generally recognized as an exception to the hearsay rule. Special reliability is provided by the spontaneous quality of the declarations, assured by the requirement that the declaration purport to describe a condition presently existing at the time of the statement."). No spontaneous statement of Mr. Moquin, as the declarant, was offered.

73. The *Willard Declaration* and the *Reply Willard Declaration* also contain hearsay within hearsay, which is inadmissible under NRS 51.067.

74. Mr. Willard purports to declare Mr. Moquin had a complete mental breakdown, how Mr. Moquin's symptoms of his alleged bipolar disorder might manifest, and how those symptoms might have affected Mr. Moquin's work. (*WD* ¶ 68, 73-76, 87-88; *RWD* ¶ 16, 38).

75. These statements are inadmissible as impermissible lay opinion under NRS 50.265. Mr. Willard is not a licensed healthcare provider qualified to opine on Mr. Moquin's mental condition, mental disorder, or symptoms of any disorder or condition that manifested.

76. Mr. Willard surmises, speculates, and draws conclusions. He is not qualified to testify about any medical, physical, or mental condition Mr. Moquin may have, or the effect of that condition on his work. *White v. Com*, 616 S.E.2d 49, 54 (Va. Ct. App. 2005) ("While lay witnesses may testify to the attitude and demeanor of the defendant, lay witnesses cannot express an opinion as to the existence of a particular mental disease or condition.") (citations omitted).

77. Plaintiffs contend Mr. Willard's opinions of how Mr. Moquin's alleged condition might manifest with symptoms and how these symptoms may have affected Mr. Moquin's work are appropriate because "lay witnesses can offer testimony as to a person's sanity." *Reply*, 2. Plaintiffs cite *Criswell v. State*, 84 Nev. 459, 464, 443 P.2d 552, 555 (1968) for the proposition that lay witnesses can offer testimony as to a person's sanity.

*Criswell* was overruled in 2001. *See Finger v. State*, 117 Nev. 548, 576-77, 27 P.3d 66, 85 (2001) (en banc decision regarding the legal insanity defense and statutorily-created "guilty, but mentally ill plea" and holding the legislative abolishment of insanity as a complete defense to a criminal offense unconstitutional, among other holdings, that lay witnesses cannot testify as to "insanity" because the term has a precise and narrow definition under Nevada law).

78. The *Finger* holdings are not applicable here. First, the *Finger* case involves a defense to criminal charges. Second, Mr. Willard did not testify that Mr. Moquin was sane or insane; rather, he testified about the diagnosis of bipolar disorder, possible symptoms of bipolar disorder, and how those symptoms, if present, might have affected Mr. Moquin's work.

79. Section 50.265 of the Nevada Revised Statutes provides a lay witness may testify to opinions or inferences that are "[r]ationally based on the perception of the witness; and...[h]elpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." NRS 50.265. A qualified expert may testify to matters within his/her "special knowledge, skill, experience, training or education" when "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." NRS 50.275; *Burnside v. State*, 131 Nev. 371, 382, 352 P.3d 627, 636 (death penalty case detective allowed to testify about cell phone records as lay witness). Further,

The key to determining whether testimony constitutes lay or expert testimony lies with a careful consideration of the substance of the testimony—does the testimony concern information within the common knowledge of or capable of perception by the average layperson or does it require some specialized knowledge or skill beyond the realm of everyday experience? See Randolph v. *Collectramatic, Inc.*, 590 F.2d 844, 846 (10th Cir. 1979) (observing that lay witness may not express opinion 'as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness"); Fed. R. Evid. 701 advisory committee's note (2000 amend.) ("[T]he distinction between lay and expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday life, while

ld.

expert testimony results from a process of reasoning which can be mastered only be specialists in the field." (internal quotation marks omitted)); *State v. Tierrney*, 389 A.2d 38, 46 (N.H. 2003) ("Lay testimony must be confined to personal observations that any layperson would be capable of making.").

80. While the Nevada Supreme Court and Nevada Court of Appeals have not addressed lay witness testimony, like that contained in the *Willard Declaration* and *Reply Willard Declaration*, regarding bipolar disorder, it has been specifically addressed by the Pennsylvania court and is persuasive here. In the case of *In re Petition for Involuntary Commitment of Joseph R. Barbour*, the Superior Court of Pennsylvania held a "[I]ay witness and non-expert could not provide expert testimony regarding involuntary committee's medical diagnosis, specifically the existence of mood disorder known as bipolar disorder." *In re Petition for Involuntary Commitment of Joseph R. Barbour*, the Superior R. *Barbour*, 733 A.2d 1286 (Pa. 1999). This Court therefore concludes such testimony is inadmissible to support the *Rule 60(b) Motion*.

81. Exhibits 6, 7, and 8 to the *Rule 60(b) Motion* which purport to detail Mr. Moquin's alleged domestic abuse of his family and contain statements about Mr. Moquin's alleged bipolar condition, are inadmissible as discussed, *supra*, to establish he had bipolar disorder.

82. Exhibits 6, 7, and 8 to the *Rule 60(b) Motion* are not, and cannot be, authenticated by Mr. Willard. Mr. Willard is not the author of the documents and has no personal knowledge of their authenticity. He therefore cannot authenticate or identify the documents pursuant to NRS 52.015(1) or NRS 52.025.

83. Exhibits 6, 7, and 8 do not meet the requirements for presumed authenticity under NRS 52.125, as the exhibits are not certified copies of public records.

84. Pursuant to NRS 47.150, a judge or court may take judicial notice, whether requested or not. Further, a judge or court shall take judicial notice if requested by a party and supplied with the necessary information. NRS 47.150. Here, no party requested this Court to take judicial notice based on certified copies of the California court records,
 contained in the exhibits to the *Rule 60(b) Motion* and the *Reply*. The Court exercises its
 discretion and declines to take judicial notice here.

85. Moreover, even if Exhibits 6, 7, and 8 could be authenticated, the statements contained in those exhibits regarding Mr. Moquin's alleged mental disorder and condition are inadmissible lay opinion about bipolar disorder and would still constitute inadmissible hearsay, as they were apparently authored by Mr. Moquin's wife, and Plaintiffs offer them to prove that Mr. Moquin suffers from bipolar disorder and his life was in "shambles."

86. Several *Reply* Exhibits discussed in the *Reply Willard Declaration* also contain inadmissible hearsay.

87. All the texts and emails offered by Plaintiffs and authored by Mr. Moquin or Mr. O'Mara constitute inadmissible hearsay under NRS 51.035 and NRS 51.065.

88. Specifically, Exhibits 2 and 3 to the *Reply*, the text messages authored by Mr. Moquin in Exhibit 4, the text messages authored by Mr. Moquin in Exhibit 7, the email authored by Mr. Moquin in Exhibit 8, and the emails authored by Mr. Moquin in exhibit 10 are inadmissible hearsay.

89. Exhibits attached to the *Reply* also contain communications occurring after this Court issued its *Order Granting Motion to Strike* and its *Order Granting Sanctions*.

90. Competent and substantial evidence has not been presented to establish *Rule 60(b)* relief.

C.

#### PLAINTIFFS FAILED TO ESTABLISH EXCUSABLE NEGLECT UNDER THE YOCHUM V. DAVIS FACTORS.

91. In Yochum v. Davis, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982), overruled *in part on other grounds by Epstein v. Epstein*, 113 Nev. 1401, 1405, 950 P.2d 771, 773
(1997), the Nevada Supreme Court held, to determine whether grounds for NRCP 60(b)(1)
relief exist, a district court must apply four factors: (1) a prompt application to remove the

judgment; (2) the absence of an intent to delay the proceedings; (3) a lack of knowledge of
procedural requirements; and (4) good faith.

92. The burden of proof is on the movant, in this case, Plaintiffs, who must show "mistake, inadvertence, surprise or excusable neglect, either singly or in combination... 'by a preponderance of the evidence....'" *Kahn v. Orme*, 108 Nev. 510, 513–14, 835 P.2d 790, 793 (1992) (quoting *Britz v. Consolidated Casinos Corp.*, 87 Nev. at 446, 488 P.2d at 911).

93. A district court must issue explicit findings on each of the *Yochum* factors in rendering its decision. *Opinion*.

94. A district court must also consider Nevada's bedrock policy to decide cases on the merits whenever feasible when evaluating an NRCP 60(b)(1) motion. *Id*.

95. However, other policy concerns are also considered, such as the swift administration of justice and enforcement of procedural requirements, "even when the result is dismissal of a plaintiff's case." *Rodriguez v. Fiesta Palms, LLC*, 134 Nev. 654, 654, 428 P.3d 255, 256 (2018), *holding modified by Willard v. Berry-Hinckley Indus.*, 136 Nev. Adv. Op. 53, 469 P.3d 176 (2020); NRCP 1.

96. Here, while considering Nevada's policy to decide cases on the merits when feasible, this Court determines, by the following detailed and explicit findings on each *Yochum v. Davis* factor, NRCP 60(b)(1) relief is not warranted.

(1) A prompt application to remove the judgment:

97. A motion for NRCP 60(b)(1) relief must be filed "within a reasonable time" and "not more than 6 months after the proceeding was taken or the date that written notice of entry of the judgment or order was served." *Rodriguez*, 134 Nev. at 657, 428 P.3d at 257.

98. "[The six-month period represents the **extreme limit** of reasonableness." *Id*. (emphasis added) (quotations omitted).

99. As such, even in cases in which a movant has filed an NRCP 60(b) Motion within six (6) months, it may nevertheless be found to have not acted promptly. *See, e.g.*,

*Kahn v. Orme*, 108 Nev. 510, 514, 835 P.2d 790, 793 (1992) (concluding that a movant failed to act promptly where a default judgment was entered against him in February, he knew as early as March, did not seek counsel until late May, and did not move to set aside the default judgment until August, nearly six months after the judgment).

100. Here, Plaintiffs and O'Mara were contemporaneously aware of Plaintiffs' failure to oppose the *Sanctions Motion*.

101. Specifically, Exhibit 2 to the *Reply* appears to be a text string between Mr. Willard and Mr. Moquin from December 2, 2017, through December 6, 2017, in which Mr. Willard inquires about the status of Plaintiffs' filing in response to the *Motion for Sanctions*. *Reply*, Exhibit 2. The text messages reflect Mr. Willard was aware of the initial deadline, December 4, 2017, for Plaintiffs to respond to the *Motion for Sanctions* (based on the November 15, 2017, filing date and electronic service). *Prior 60(b) Order* 23 ¶49.

102. Defendants agreed to extensions through 3:00 pm on December 6, 2017, for Plaintiffs to file their oppositions. *Prior 60(b) Order* 23 ¶50.

103. This Court granted an additional extension through December 18, 2018. *Prior 60(b) Order* 23 ¶51.

104. Plaintiffs knew of the initial filing deadline. They were aware no opposition papers were filed. Mr. Willard continued to communicate with both Mr. Moquin and Mr. O'Mara from December 11 until December 25, 2017, regarding the delinquent filings (*Reply* Exs. 3, 4), well after this Court's final filing deadline of December 18, 2017. *Prior 60(b) Order* 24 ¶52, 56; *Sanctions Order* ¶95.

105. Despite knowing no oppositions had been filed, neither Mr. Willard (through Mr. O'Mara), Mr. Moquin, nor Mr. O'Mara contacted Defendants' counsel or this Court to address the status of this case. *Prior 60(b) Order* 24 ¶53; *Sanctions Order* ¶98.

106. On January 4, 2018, this Court entered its Order Granting Defendants' Counterclaimants' Motion for Sanctions (the "Initial Sanctions Order").

107. The Initial Sanctions Order granted Defendants' Motion for Sanctions based upon (1) DCR 13(3) and Plaintiffs' failure to oppose Defendants' *Motion*; and (2) the fact that Defendants' *Motion* had merit "due to Plaintiffs' egregious discovery violations" throughout the pendency of this litigation and repeated failure to comply with this Court's orders." Id. at 3.

Therefore, this Court found, "Plaintiffs' conduct warrants dismissal of this 108. action under NRCP 16.1(e)(3), NRCP 37(b)(2), NRCP 41(b), and the Nevada Supreme Court's decision in Bianco v. Bianco, 129 Nev. Adv. Op. 77, 311 P.3d 1170." Id. at 3-4. The Initial Sanctions Order was served upon both Mr. Moguin and Mr. O'Mara. Id.

109. The Initial Sanctions Order directed Defendants to submit to the Court within twenty (20) days a proposed order granting the Sanctions Motion, including factual and legal analysis and discussion, in accordance with WDCR 9.

1

2

3

4

5

6

7

8

110. This Court entered its Sanctions Order on March 6, 2018. (Sanctions Order).

111. On March 15, 2018, Mr. O'Mara filed his Notice of Withdrawal of Local *Counsel.* Therein, he stated, "[c]ounsel has had no contact with lead counsel Mr. Moquin for many months with a total failure just prior to the Court's first decisions being filed in this case." *Notice*, 1 (emphases added).

112. Plaintiffs took no action to request that Mr. O'Mara, who remained Plaintiffs' counsel of record until March 15, 2018, promptly inform this Court—on even a cursory basis—of Plaintiffs' alleged circumstances.

113. Plaintiffs did nothing to apprise this Court of any issues until they filed the *Rule* 60(b) Motion in April, 2018. Prior 60(b) Order 24 ¶54.

114. Mr. O'Mara did not report any issues to this Court until the filing of his Notice on March 15, 2018. Prior 60(b) Order 25 ¶60; Notice, 1.

115. This failure to promptly notify the Court is another act in the continuum of Plaintiffs' repeated delay throughout this case with respect to each of Plaintiffs' obligations, as discussed infra.

116. While Plaintiffs should and could have acted in a more prompt manner, Plaintiffs filed their *Rule 60(b) Motion* within a reasonable amount of time of the *Initial Sanctions Order* and the *Sanctions Order*. Thus, this Court finds that the first *Yochum* factor is satisfied here.<sup>8</sup>

117. Although the Plaintiffs met this factor, the remaining three *Yochum* factors, weigh strongly against NRCP 60(b) relief. *Cf., e.g., Rodriguez,* 134 Nev. at 659, 428 P.3d at 259 ("Even assuming Rodriguez acted in good faith, we affirm the district court's decision based on the first three *Yochum* factors, all of which favor denial of Rodriguez's NRCP 60(b)(1) motion.").

10 11

12

13

14

15

16

17

18

19

20

21

22

1

2

3

4

5

6

7

8

9

#### (2) The absence of intent to delay the proceedings:

118. The next Yochum factor is the absence of intent to delay the proceedings.

119. "As to [this] factor, an intent to delay the proceedings may be inferred from the parties' prior actions." *ABD Holdings, Inc. v. JMR Inv. Properties, LLC*, 441 P.3d 548 (Nev. 2019) (unpublished) (citing *Rodriguez*, 134 Nev. at 657, 428 P.3d at 258).

120. The Nevada Supreme Court has inferred intent to delay where the movant "exhibited a pattern of repeatedly requesting continuances [of the trial date] and filed his NRCP 60(b)(1) motion just before the six-month outer limit," exhibited conduct which "differed markedly from that of a litigant who wishes to swiftly move toward trial," and exhibited conduct which "indicate[d] that he intended to delay trial until he secured new counsel, rather than proceeding without representation." *Rodriguez*, 134 Nev. at 658, 428 P.3d at 258.

<sup>23</sup> 24

<sup>&</sup>lt;sup>8</sup> This Court also notes that all of the statements in the *Reply Willard Declaration* set forth after Paragraph 37 detail events and communications from late January, 2018 through late May, 2018, all of which occurred after this Court issued its *Order Granting Motion to Strike, Order Granting Sanctions, and Sanctions Order.* RWD ¶¶ 37-67. Exhibits 5, 6, 7, 8, 9, and 10 to the *Reply* contain only communications and descriptions of events that occurred after this Court issued its *Order Granting Motion to Strike, Order Granting Sanctions, and Sanctions Order.* Logically, relevant events asserted to support Plaintiffs' argument of excusable neglect must have necessarily occurred prior to the entry of the orders Plaintiffs seek to set aside. Thus, while these Exhibits may support a finding of promptness under the first *Yochum* factor, which this Court has already found that Plaintiffs have satisfied, they are irrelevant to Plaintiffs' arguments that excusable neglect occurred.

121. The Nevada Supreme Court has also inferred intent to delay where, among other things, "[t]he record demonstrate[d] a pattern of delay from the case's inception: [the defendants] asked for extensions of the time to file their answer, hired an attorney the day the answer was due and then subsequently filed an untimely demand for securities of costs instead of answering the complaint—and thereafter still failed to answer the complaint." *ABD*, 441 P.3d 548 (unpublished).

122. Additionally, the Nevada Supreme Court has concluded that there was evidence of a movant's intent to delay because, in part, the movant "failed to file a single motion" in opposition to the respondent's motions. *Kahn*, 108 Nev. at 514, 835 P.2d at 793.

123. The Plaintiffs have not demonstrated an absence of intent to delay the proceedings for multiple, independent reasons.

124. First, Plaintiffs' sole asserted basis for satisfying this factor is that "Mr. Moquin's mental illness demonstrates that Plaintiffs have at all times acted...without the intent to delay the proceedings," and that "Plaintiffs are, in fact, the victims of Mr. Moquin's assurances." *60(b) Motion* 11.

125. However, as discussed, Plaintiffs provided no admissible evidence in support of their *60(b) Motion*, and certainly provided no admissible evidence demonstrating that Moquin had a mental illness, or the effect of such mental illness, if any, on Plaintiffs' case. *See supra*.

126. Accordingly, Plaintiffs have failed to satisfy their burden to demonstrate an absence of intent to delay proceedings.

127. Second, even beyond the evidentiary shortcomings, which alone are fatal to Plaintiffs' argument, the record before this Court demonstrates a repeated delays in the proceedings at the hands of the Plaintiffs.

128. Although Plaintiffs satisfied the first *Yochum* factor by promptly moving to remove the judgment, the totality of the record before this Court, prior to Plaintiffs seeking NRCP 60(b) relief, is replete with evidence of willful delay.

This Court has previously ruled on Plaintiffs' numerous egregious and 129. intentional delays from the inception of this case. As reflected in the court file, Plaintiffs' multiple instances of non-compliance, including the Plaintiffs' failure to provide a compliant damages disclosure, occurred well before Mr. Moquin's purported breakdown in December 2017, or January 2018, which was asserted as preventing him from opposing the motions. *Prior 60(b) Order* 24 ¶59.

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

19

20

21

22

23

24

25

26

27

28

The Court's prior findings include: 130.

a. Plaintiffs have exhibited a longstanding pattern of failure to ignore fundamental discovery obligations and deadlines imposed by this Court and the Nevada Rules of Civil Procedure. Sanctions Order ¶¶ 13-79, 124-141, 153.

b. Plaintiffs' conduct of ignoring or failing to comply with multiple separate discovery obligations throughout this case forced Defendants to repeatedly file motions to compel, and necessitated extensions of trial and discovery deadlines on three occasions to accommodate Plaintiffs' continued non-compliance. Sanctions Order ¶ 121.

Plaintiffs willfully failed to timely disclose the appraisals upon which many of C. their damages calculations were based. (*Sanctions Order* ¶ 133, 135-136, 139).

d. "Plaintiffs' repeated and **willful delay** in providing necessary information to 18 Defendants has necessarily prejudiced Defendants." Sanctions Order ¶ 141 (emphasis added).

Before the present case, Plaintiffs filed a case against Defendants in e. California, based upon the same set of facts, which was dismissed for a lack of personal jurisdiction. Sanctions Order ¶ 142-144.

131. The conduct of Plaintiffs' freely-selected attorney is attributable to Plaintiffs personally (particularly where, as here, Plaintiffs have provided no admissible evidence to demonstrate otherwise) and, therefore, willful delay is personally attributable to Plaintiffs.

132. For example, Plaintiffs had personal and contemporaneous knowledge of their failure to disclose their NRCP 16.1 damages, (Sanctions Order ¶ 46-47, 125), which was a

critical basis for dismissal. *Sanctions Order* ¶ 146; *see also infra* (discussing the absence of good faith).

133. This failure was also a critical basis for the continued delay of the trial date. See, e.g., Stipulation and Order to Continue Trial (Third Request) ¶ 7, 10 (stipulating Plaintiffs had not yet provided a compliant NRCP 16.1 damages disclosure as discussed at the January 10, 2017, hearing, "[b]ecause Plaintiffs have not yet provided a complete NRCP 16.1 damages disclosure, Defendants will not be able to complete necessary fact discovery on Plaintiffs' damages, or to disclose an updated expert report...within the time currently allowed for discovery... Moreover, any further extension of the discovery deadlines would prevent the parties from being able to [timely] file and submit dispositive motions [prior to trial]," and the "[u]ndersigned counsel certifies that their respective clients have been advised that a stipulation for continuance is to be submitted on their behalf and that the parties have no objection thereto"); Sanctions Order ¶ 150.

134. Plaintiffs have similarly failed to demonstrate an absence of intent to delay the proceedings with respect to the entry of the *Sanctions Order*.

135. Specifically, as discussed *supra*, Plaintiffs knew of the initial filing and resulting opposition deadline. They were aware no opposition papers were filed. Mr. Willard continued to communicate with both Mr. Moquin and Mr. O'Mara from December 11 until December 25, 2017, regarding the delinquent filings (*Reply* Exs. 3, 4), well after this Court's final filing deadline of December 18, 2017. *Prior 60(b) Order* 24 ¶52, 56; *Sanctions Order* ¶95.

136. Despite knowing no oppositions had been filed, neither Mr. Willard (through Mr. O'Mara), Mr. Moquin, nor Mr. O'Mara contacted Defendants' counsel or this Court to address the status of this case. *Prior 60(b) Order* 24 ¶53; *Sanctions Order* ¶98.

137. Indeed, in his March 15, 2018, *Notice*, Mr. O'Mara stated "[c]ounsel has had no contact with lead counsel Mr. Moquin for **many months** with a **total failure just prior to the Court's first decisions being filed in this case**." *Notice*, 1 (emphases added).

138. Plaintiffs did nothing to apprise this Court of any issues until they filed the *Rule 60(b) Motion* in April, 2018.<sup>9</sup> *Prior 60(b) Order* 24 ¶54.

139. Similarly, Mr. O'Mara did not report any issues to this Court until the filing of his *Notice* on March 15, 2018. *Prior 60(b) Order* 25 **¶**60; *Notice*, 1.

140. Finally, Plaintiffs have failed to demonstrate an absence of intent to delay the proceedings with respect to their claims about Mr. Moquin.

141. In fact, Mr. Willard admits he was informed by Mr. O'Mara **prior to the dismissal** of Plaintiffs' claims that Mr. Moquin was not responsive. *Prior 60(b) Order* 26 ¶66. Plaintiffs failed to replace Mr. Moquin or take other action due to perceived financial reasons. *Prior 60(b) Order* 26 ¶66; *WD* ¶ 81. Plaintiffs' knowledge and inaction vitiates excuse for neglect. *Prior 60(b) Order* 26 ¶66; *see also 60(b) Motion* 15 ("It was only in **late 2017** that it became clear to Mr. Willard that something was terribly wrong and that Mr. Moquin was suffering from mental illness.").

142. Plaintiffs started looking for attorneys who might be able to help.  $RWD \ \mbox{\P}$  36. Plaintiffs instead provided personal financial assistance to Mr. Moquin and did not terminate his services. *Prior 60(b) Order* 24  $\ \mbox{\P}$ 55;  $WD \ \mbox{\P}$  71;  $RWD \ \mbox{\P}$  39.

143. Plaintiffs chose to retain Mr. Moquin and did not terminate his representation,
 even after becoming aware he did not file a timely response to the *Motion for Sanctions*.
 Plaintiffs cannot now avoid the consequences of the acts or omissions of their freely
 selected agent. *Prior 60(b) Order* 24 ¶57.

<sup>9</sup>Plaintiffs had contemporaneous knowledge of the *Sanctions Order*. Yet, rather than appeal from the *Sanctions Order* within thirty days of the *Notice of Entry of Sanctions Order*, filed on March 6, 2018, Plaintiffs instead improperly challenged the propriety of the *Sanctions Order* in their *Rule 60(b) Motion*, which was filed on April 18, 2018, more than thirty days after the *Notice of Entry of the Sanctions Order*. *Cf. generally, e.g., Mathews v. Carreira*, 770 N.E.2d 560 (Ma. App. 2002) ("Rule 60(b) cannot be used as a substitute for the regular appeal procedure."); *Carrabine v. Brown*, 1993
WL 318809 (Ohio Ct. App. 1993) (A motion for relief from judgment under Civ.R. 60(B)(1) cannot be predicated upon the argument that the trial court made a mistake in rendering its decision); *Morgan v. Estate of Morgan*, 688 So. 2d 862, 864 (Ala. Civ. App. 1997).

144. Plaintiffs voluntarily chose to stop looking for new counsel to assist and chose to continue to rely on Mr. Moquin solely for financial reasons. *Prior 60(b) Order* 24 ¶58; *WD* ¶81.

145. Indeed, Mr. Willard was aware of Mr. Moquin's alleged problems prior to this Court's *Order Granting Motion to Strike and Sanctions Order* yet continued to allow Mr. Moquin to represent Plaintiffs. *Prior 60(b) Order* 25-26 **¶**64.

146. Plaintiffs have not established by substantial evidence that they exercised diligence to rectify representation in their case despite ample knowledge of Mr. Moquin's non-responsiveness. *Prior 60(b) Order* 27 ¶69. As discussed *supra*, all of Plaintiffs' proffered evidence regarding Mr. Moquin's alleged mental condition is inadmissible and does not establish Mr. Moquin had any mental illness or that any alleged mental illness affected Plaintiffs' case.

147. Further, Mr. Willard's claim he had no choice but to continue working with Mr. Moquin due to financial issues lacks credibility, as he admits he was able to borrow money to fund Mr. Moquin's personal life needs and medical treatment. It logically follows he had the resources to retain new attorneys at the time. *Prior 60(b) Order* 27 ¶68.

148. Thus, as in *Rodriguez*, Plaintiffs' conduct—both pre- and post- *Sanctions Order*—has "differed markedly from that of a litigant who wishes to swiftly move toward trial." 134 Nev. at 658, 428 P.3d at 258.

149. In sum, Plaintiffs have failed to establish the absence of an intent to delay the proceedings.

#### (3) A lack of knowledge of procedural requirements:

150. The next *Yochum* factor is whether the movant lacks knowledge of the procedural requirements.

151. "As to the third factor, a party is generally deemed to have knowledge of the procedural requirements where the facts establish either knowledge or legal notice, where

under the facts the party should have inferred the consequences of failing to act, or where the party's attorney acquired legal notice or knowledge." *ABD Holdings, Inc. v. JMR Inv. Properties, LLC*, 441 P.3d 548 (Nev. 2019) (unpublished) (citing *Rodriguez*, 428 P.3d at 258, and *Stoecklein*, 109 Nev. at 273, 849 P.2d at 308).

152. The Nevada Supreme Court has also explained "[t]o condone the actions of a party who has sat on its rights only to make a last-minute rush to set aside judgment would be to turn NRCP 60(b) into a device for delay rather than the means for relief from an oppressive judgment that it was intended to be." *Union Petrochemical Corp. of Nevada v. Scott*, 96 Nev. 337, 339, 609 P.2d 323, 324 (1980).

153. The Nevada Supreme Court has concluded a movant has failed to satisfy this factor when the movant "personally witnessed the court grant [the defendant's] motion in limine because he did not file a written opposition." *Rodriguez*, 134 Nev. at 658, 428 P.3d at 258. The Court explained under such circumstances, the movant "should have inferred the consequences of not opposing the motion to dismiss, especially in light of the court's express warning to take action." *Id.* 

154. The Nevada Supreme Court has also concluded (albeit in an unpublished order) this factor disfavored NRCP 60(b)(1) relief where the movants "knew the answer was due, knew it was not timely filed, knew [the plaintiff] was seeking a default and money damages, and should have inferred that failing to file their answer and losing on the subsequent motions would result in a default judgment." *ABD Holdings*, 441 P.3d 548.

155. Here, the record reflects Plaintiffs have unequivocally failed to establish a lack of knowledge of procedural requirements.

156. As a threshold matter, Plaintiffs have admitted as much, conceding "this is, candidly, a little bit of a difficult one," and that Mr. Willard "did, candidly, know that things needed to be filed, he knew that. He knew that trial was coming up and he knew that they were both motions that he wanted to see filed and oppositions that he understood needed to

be filed because he was an active participant in this case and he wants to continue to be." *60(b) Transcript* 9, 11.

157. Additionally, the record before this Court is replete with evidence demonstrating Plaintiffs had knowledge of the pertinent procedural requirements.

158. This Court previously found Mr. Willard had **knowledge** of the initial filing deadline to oppose BHI's Sanctions Motion. Plaintiffs **knew** timely oppositions were not filed. *Prior 60(b) Order* 24 ¶52, 55.

159. Further, as this Court found, Mr. Willard was **aware** of Mr. Moquin's inaction which distinguishes this case from the cases upon which Plaintiffs rely in the *Rule* 60(b) *Motion*. *Prior* 60(b) *Order* 26 ¶65.

160. Plaintiffs also had personal knowledge of procedural requirements leading to the Sanctions Order. Prior 60(b) Order 26 ¶65.

161. For example, Mr. Willard attended the hearing in which Defendants' counsel informed this Court "[w]e've never received a specific damages computation from any of the plaintiffs in this case under 16.1, as they are required to do, **despite multiple demands** from us." Sanctions Order ¶46; January 10, 2017, Hearing Transcript 18.

162. Plaintiffs' counsel admitted, in open court, "with respect to Willard, they do not" have an up-to-date, clear picture of Plaintiffs' damages claims." *Sanctions Order* ¶47; *January 10, 2017, Hearing Transcript* 42-43.

163. This Court ordered, during the hearing, that Plaintiffs "serve, within 15 days after the entry of summary judgment, an updated 16.1 damages disclosure." *Sanctions Order* ¶49; *January 10, 2017, Hearing Transcript* 68.

164. Thus, Plaintiffs indisputably had personal knowledge of this procedural requirement, their failure to comply therewith, and this Court's order they comply by a particular deadline.

165. Further, the failure to comply with this requirement was a critical basis for the *Sanctions Order*. As this Court found, "Plaintiffs' failure to provide damages disclosures are

so central to this litigation, and to Defendants' rights and ability to defend this case, that dismissal of the entire case is necessary." *Sanctions Order* **1**19, 146.

166. Finally, even beyond Plaintiffs' personal knowledge of the salient procedural requirements and procedural facts, Plaintiffs were represented by **two** attorneys **throughout** the proceedings who, as this Court found, did not abandon Plaintiffs. *Prior* 60(b) Order 25 ¶ 62; see also infra (discussing that a party cannot seek to avoid a dismissal based on arguments that his or her attorney's acts or omissions led to the dismissal).

167. It is unequivocal, both Mr. Moquin and Mr. O'Mara had ample knowledge of every salient procedural requirement and procedural fact. This cannot be overstated: even beyond the general procedural knowledge expected of a practicing attorney, Defendants' counsel wrote numerous letters detailing the pertinent procedural requirements and their application to this case, and Plaintiffs' failures to comply therewith. *See generally Sanctions Order*. Plaintiffs also entered into three stipulations which plainly reflected their knowledge of the pertinent deadlines and procedural requirements. *See, e.g., id.* ¶126. This Court also entered multiple orders directly informing Plaintiffs of the pertinent procedural requirements and deadlines. *See generally Sanctions Order* (discussing other orders entered by this Court).

168. In sum, Plaintiffs' clear knowledge of salient procedural requirements strongly disfavors NRCP 60(b)(1) relief.

#### (4) Good faith:

169. "Good faith is an intangible and abstract quality with no technical meaning or definition and encompasses, among other things, an honest belief, the absence of malice, and absence of design to defraud." *Rodriguez*, 134 Nev. at 659, 428 P.3d at 259 (quoting *Stoecklein*, 109 Nev. at 273, 849 P.2d at 309).

170. The Nevada Supreme Court has noted (albeit by unpublished order), "[t]he facts evidencing an intent to delay the proceedings [can] likewise support the district court's

findings that [the movants] did not act in good faith...." ABD Holdings, 441 P.3d 458
(concluding that applied and this factor disfavored NRCP 60(b)(1) relief).

171. In this case, Plaintiffs have unequivocally failed to demonstrate they acted in good faith.

172. As a threshold matter, once again, Plaintiffs provided no admissible evidence in support of their position.

173. Specifically, Plaintiffs' sole asserted basis for allegedly satisfying this factor is, "Mr. Moquin's mental illness demonstrates that Plaintiffs have at all times acted in good faith," and that "Plaintiffs are, in fact, the victims of Mr. Moquin's assurances." *60(b) Motion* 11.

174. However, as this Court has ruled, Plaintiffs provided no admissible evidence in support of their *60(b) Motion*, and certainly provided no admissible evidence demonstrating that Moquin had a mental illness, or the effect of such mental illness, if any, on Plaintiffs' case. *See supra*.

175. Thus, Plaintiffs have unequivocally failed to satisfy their burden to demonstrate, by a preponderance of evidence, they acted in good faith. See Kahn v. Orme, 108 Nev. 510, 513–14, 835 P.2d 790, 793.

176. Further, even beyond the lack of admissible evidentiary support, the record clearly demonstrates Plaintiffs have failed to establish they acted in good faith.

177. First, the findings discussed *supra* evidencing an intent to delay the proceedings and knowledge of procedural requirements likewise support the finding Plaintiffs did not act in good faith.

178. This Court previously found "Willard's claim that he had no choice but to continue working with Mr. Moquin due to financial issues **lacks credibility**....," (*Prior 60(b) Order* 27 ¶68), and in light of the circumstances of this case, dismissal of Willard's claims did not unfairly penalize Willard for Moquin's alleged conduct. *Id.* at 29 ¶ 80.

179. Second, Plaintiffs committed multiple willful violations throughout the proceedings, which compelled issuance of the *Sanctions Order* in the first instance.

180. Among other things, this Court found that Plaintiffs' eleventh-hour request for nearly \$40 million more in damages based on information which had been in Plaintiffs' possession but not disclosed was willful and in bad faith.

181. Specifically, this Court found that after three (3) years of delay due to Plaintiffs' "obstinate refusal" to comply with the Nevada Rules of Civil Procedure, Plaintiffs filed their *Motion for Summary Judgment* with only four (4) weeks remaining in discovery, in which they requested "brand new, never-disclosed types, categories, and amounts of damages." *Sanctions Order* ¶ 69, 71; *Willard's Motion for Summary Judgment*.

182. Indeed, "Willard sought more than triple the amount of damages (nearly \$40 million more) than he sought in the complaint and ostensibly throughout the case," and had new claims and new alleged bases for his alleged damages. *Sanctions Order* ¶ 73-79.

183. This Court found the timing of the *Motion for Summary Judgment* was such it put "Defendants in the exact same predicament that they were placed in February of 2017— Defendants could not engage in the discovery (fact or expert) necessary to adequately respond to Plaintiffs' brand new information, untimely disclosures, and new requests for relief." *Id.* at ¶ 69, 87-88.

184. "This timing of these Motions undeniably deprived Defendants of the process that the parties expressly agreed was necessary to rebut any properly-disclosed expert opinions or properly-disclosed NRCP 16.1 damages calculations, as ordered by this Court." *Id*.

185. This Court also found "Willard and his purported witness relied upon appraisals from 2008 and 2014 which were never disclosed in this litigation, despite Willard's NRCP 16.1 and NRCP 26(e) obligations and affirmative discovery requests served by Defendants" asking Willard to "[p]lease produce any and all appraisals for the Property from January 1, 2012 through present." *Sanctions Order* ¶ 79.

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

187. This Court found this conduct was intentional, strategic, and in bad faith. See generally Sanctions Order.

188. Specifically, this Court found that this conduct evidenced "Plaintiffs' bad faith motives in waiting to ambush Defendants," and, "Plaintiffs' strategic decision to only disclose their damages in their Motion for Summary Judgment prejudiced Defendants by depriving them of the opportunity to defend against damages that had never previously been disclosed." *Sanctions Order* ¶ 128.

189. This Court found "it is clear that Plaintiffs' failure to disclose the appraisals upon which many of their calculations were based was...willful." *Sanctions Order* ¶ 135.

190. This Court also found "[g]iven that Willard freely admits that these appraisals were commissioned prior to the commencement of the case, and were in his possession, this is clearly willful omission." *Sanctions Order* ¶ 136.

191. Further, it may be logically inferred Willard, who authored a 15-page affidavit in support of his *Motion for Summary Judgment*, averred "[m]y counsel and I collaborated to create" the damages spreadsheet in support of the *Motion for Summary Judgment*, and personally described his new damages in detail, was aware the damages he sought in the motion were significantly different than those ostensibly sought in the *Complaint* which was verified by Mr. O'Mara, or in his Interrogatory Responses which he personally verified. *Affidavit of Larry J. Willard in Support of Motion for Summary Judgment.* 

192. The record before this Court clearly demonstrates Plaintiffs have acted in bad faith. This Court gave Plaintiffs' counsel, including Mr. O'Mara, notice of the seriousness of Plaintiffs' repeated violations and expressed it was considering dismissal based on those

dar des e si Mr. *Lar* T Cou pea

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

violations even before Plaintiffs failed to oppose the *Sanctions Motion*. *Opposition to Rule 60(b) Motion* Ex. 3; *December 12, 2017, Transcript* ("you need to know going into these oppositions, that I'm very seriously considering granting all of it…I haven't decided it, but I need to see compelling opposition not to grant it.").

193. As an independent basis, this Court also found Plaintiffs' failure to disclose their NRCP 16.1 damages was done in bad faith. *Sanctions Order* ¶ 124-126.

194. Indeed, this Court found that "[t]his Court has ordered Plaintiffs to provide their damages disclosures, but Plaintiffs blatantly disregarded these orders." Sanctions Order ¶ 125.

195. Again, this conduct is personally attributable to Plaintiffs, who attended the January 10, 2017, hearing wherein Plaintiffs admitted they had failed to provide compliant NRCP 16.1 damages disclosures and heard this Court order them to do so.

196. In sum, Plaintiffs have unequivocally failed to satisfy their burden to demonstrate good faith. To the contrary, the record before this Court is replete with evidence of Plaintiffs' bad faith. Indeed, as this Court has found, "Plaintiffs have exhibited complete disregard for this Court's Orders, deadlines imposed by this Court, and the judicial process in general." *Sanctions Order, see also id.* ¶ 31 (finding "Plaintiffs have completely ignored multiple Orders from this Court, deadlines imposed by this Court, and their obligations pursuant to the Nevada Rules of Civil Procedure," and, "Plaintiffs have received multiple opportunities and extensions to rectify their noncompliance, but have not even attempted to do so").

#### (5) Consideration of the case on the merits:

197. Finally, Nevada's bedrock policy that cases be considered on the merits wherever possible does not warrant the relief Plaintiffs seek here.

198. This Court has already addressed this factor in detail in the *Sanctions Order*, concluding, in part:

Although there is a policy favoring adjudication on the merits, Plaintiffs a. themselves have frustrated this policy by refusing to provide Defendants with their damages calculations or proper expert disclosures. Defendants have not frustrated this policy; instead, the record is clear that Defendants, and this Court, have repeatedly attempted to force Plaintiffs to comply with basic discovery obligations, to no avail. Sanctions Order ¶155.

b. Indeed, Defendants have served multiple rounds of written discovery upon Plaintiffs to obtain basic information on Plaintiffs' damages, have taken multiple depositions, and have been requesting compliant disclosures throughout this case so that they can address the merits. Id. ¶156; Exhibits 24-35 to Defendants' Sanctions Motion.

C. Plaintiffs should not be permitted to hide behind the policy of adjudicating cases on the merits when it is they who have frustrated this policy throughout the litigation. Defendants cannot reach the merits when they must spend the entire case asking Plaintiffs for threshold information and receiving no meaningful responses. Id. ¶157.

d. As the Nevada Supreme Court has held, the policy favoring adjudication on 15 the merits "is not boundless and must be weighed against any other policy considerations, including the public's interest in expeditious...resolution, which coincides with the parties' interests in bringing litigation to a final and stable judgment, prejudice to the opposing party; and administration concerns, such as the court's need to manage its large and growing docket." Huckabay Props v. NC Auto Parts, 130 Nev. 196, 203, 322 P.3d 429, 432 (2014).

199. The Nevada Supreme Court has similarly so held in the context of upholding the denial of an NRCP 60(b) motion to set aside a default judgment based upon alleged excusable neglect. Kahn v. Orme, 108 Nev. 510, 516, 835 P.2d 790, 794 (1992).

200. The Nevada Supreme Court explained:

1

2

3

4

5

6

7

8

9

10

11

12

13

14

16

17

18

19

20

21

22

23

24

25

26

27

28

We wish not to be understood, however, that this judicial tendency to grant relief from a default judgment implies that the trial court should always grant relief from a default judgment. Litigants and their counsel may not properly be allowed to disregard process or procedural rules with impunity. Lack of good faith or diligence...may very well warrant a denial of the motion for relief from the judgment.

*Id.* (quotations omitted); *see also ABD Holdings*, 441 P.3d 548 ("We conclude the district court did not abuse its discretion by concluding that the policy in favor of resolving cases on the merits does not warrant reversal here, given the facts demonstrating that Barra and Giebler disregarded the process and procedural rules by failing to timely answer the complaint.").

201. In sum, after a careful consideration of each of the *Yochum* factors, and on explicit findings, this Court concludes analysis of the *Yochum* factors precludes NRCP 60(b)(1) relief here.

D.

#### PLAINTIFFS' ASSERTED BASES FOR SEEKING NRCP 60(B) RELIEF DO NOT WARRANT THE RELIEF PLAINTIFFS SEEK.

202. Under Nevada law, "clients must be held accountable for the acts and omissions of their attorneys." *Huckabay Props*, 130 Nev. at 204, 322 P.3d at 433 (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396-97 (1993)). The client "voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent." *Huckabay Props*, 130 Nev. at 204, 322 P.3d at 433 (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34 (1962) (rejecting the argument that petitioner's claim should not have been dismissed based on counsel's unexcused conduct because petitioner voluntarily chose his attorney).

203. In *Huckabay Props*, the Nevada Supreme Court dismissed an appeal where
 appellant's counsel failed to file an opening brief following two granted extensions and a
 court order granting appellants a final extension. 130 Nev. at 209, 322 P.3d at 437. The
 appellant was represented by two attorneys. In dismissing the appeal, and applicable to
 civil litigation at the trial court level here, the Court held:

While Nevada's jurisprudence expresses a policy preference for merits-based resolution of appeals, and our appellate procedure rules embody this policy, among others, litigants should not read the rules or any of this court's

decisions as endorsing noncompliance with court rules and directives, as to do so risks forfeiting appellate relief. In these appeals, appellants failed to timely file the opening brief and appendix after having been warned that failure to do so could result in the appeals' dismissals. Appellants actually had two attorneys who received copies of this court's notices and orders regarding the briefing deadline, but they nevertheless failed to comply with briefing deadlines and court rules and orders. Although they assert that Hansen v. Universal Health Services of Nevada, Inc., 112 Nev. 1245, 924 P.2d 1345 (1996), mandates reconsideration and reinstatement of their appeals. Hansen was a fact-specific decision to some extent, and an appeal may be dismissed for failure to comply with court rules and orders and still be consistent with the court's preference for deciding cases on their merits, as that policy must be balanced against other policies, including the public's interest in an expeditious appellate process, the parties' interests in bringing litigation to a final and stable judgment, prejudice to the opposing side, and judicial administration considerations, such as case and docket management. As for declining to dismiss the appeal because the dilatory conduct was occasioned by counsel, and not the client, that reasoning does not comport with general agency principles, under which a client is bound by its civil attorney's actions or inactions....

13 14

21

22

23

24

25

26

27

28

1

2

3

4

5

6

7

8

9

10

11

12

Huckabay Props, 130 Nev. at 209, 322 P.3d at 437.

15 204. In *Huckabay Props.*, however, the court recognized exceptional circumstances
providing two possible exceptions "to the general agency rule that the 'sins' of the lawyer
are visited upon his client where the lawyer's addictive disorder and abandonment of his
legal practice or criminal conduct justified relief for the victimized client." *Id.* at 204 n.4, 322
P.3d at 434 n.4 (citing *Passarelli*, 102 Nev. at 286). Notably, these exceptions noted in *Huckabay Props.* are not present here, as the facts of *Passarelli* are readily distinguishable.

205. First, in *Passarelli*, the record included evidence the attorney suffered from a substance abuse disorder that resulted in missed office days and appointments and an inability to function. *Passarelli*, 102 Nev. at 285. Second, the attorney voluntarily closed his law practice. *Id.* Third, the attorney was placed on disability inactive status by the Nevada Bar. *Id.* Finally, the client in *Passarelli* had only one attorney. *Id.* 

206. None of these facts are present in this case. As concluded *supra*, no competent, reliable, and admissible evidence of Mr. Moquin's claimed mental disorder is before this Court. Further, there is no evidence of missed meetings or absence from office

due to the claimed conditions. There is no evidence that Mr. Moquin closed his law practice at the times pertinent to the *60(b) Motion*.

207. As of the date of the *Prior 60(b) Order*, and on the record before this Court, Mr. Moquin was on active status with the California Bar. *Opposition to Rule 60(b) Motion*, Ex. 5; *Attorney Search, State Bar of California*, http://members.calbar.ca.gov/fal/Licensee/ Detail/257583 (last visited November 30, 2018).

208. Applied here, the *Huckabay Props./Passarelli* analysis compels denial of the *Rule 60(b) Motion*. The standard for "excusable neglect" based on activities of a party's attorney requires the attorney to be completely unable to respond or appear in the proceedings. *See Passarelli*, 102 Nev. at 285 (court found excusable neglect where attorney failed to attend trial due to psychiatric disorder which caused him to shut down his practice and was placed on disability inactive status by the State Bar of Nevada); *see also Cicerchia v. Cicerchia*, 77 Nev. 158, 160-61, 360 P.2d 839, 841 (1961) (court found excusable neglect where respondent lived out of state and suffered a nervous breakdown shortly after retaining out of state counsel, who was unaware and uninformed of the time to appear).

209. Here, Plaintiffs' attorneys did not completely abandon the case. Rather, the Nevada Rules of Civil Procedure, this Court's express orders, and Defendants' requests for damages computations and exert disclosures were willfully ignored.

210. Plaintiffs attempt to excuse this conduct in their *Rule 60(b) Motion* by claiming Mr. Moquin suffered a complete mental breakdown, and his personal life was "in shambles." In addition to the preclusion of evidence discussed *supra*, the evidence is vague at best regarding these assertions and vague regarding if, and when, Mr. Moquin's alleged disorder impaired him and vague in asserting when any of the alleged events took place. Plaintiffs attached additional exhibits to their *Reply* to offer some information on timing but are inadequate for the Court's determination.

211. Mr. Moquin did not abandon Plaintiffs. He appeared at status hearings, participated in depositions, and filed motions and other papers, including a lengthy opposition to Defendants' motion for partial summary judgment. Mr. Moquin participated in oral arguments and filed two summary judgment motions with substantial supporting exhibits and detailed declarations.

212. As discussed *supra*, Plaintiffs had contemporaneous notice of the deadline to oppose the *Sanctions Motion*, of Plaintiffs' failure to oppose the *Sanctions Motion*, and of the *Sanctions Order*. Yet, Plaintiffs did nothing to apprise this Court of any issues until they filed the *Rule 60(b) Motion*. *Prior 60(b) Order* ¶¶ 49-60.

213. Additionally, the Court gave counsel, including Mr. O'Mara, notice of the seriousness of Plaintiffs' violations and expressed it was considering dismissal based on those violations. *Opposition to Rule 60(b) Motion* Ex. 3; *December 12, 2017, Transcript* ("you need to know going into these oppositions, that I'm very seriously considering granting all of it...I haven't decided it, but I need to see compelling opposition not to grant it."). Plaintiffs and their attorneys were given notice of the potential consequences of failing to file an opposition to the *Sanctions Motion*.

214. A party "cannot be relieved from a judgment [order] taken against him in consequence of the neglect, carelessness, forgetfulness, or inattention of his attorney."
 *Cicerchia*, 77 Nev. at 161.

#### F. PLAINTIFFS KNEW OF MR. MOQUIN'S ALLEGED CONDITION AND ALLEGED NON-RESPONSIVENESS PRIOR TO THE SANCTIONS ORDER AND DID NOTHING; THEREFORE PLAINTIFFS CANNOT ESTABLISH EXCUSABLE NEGLECT.

215. Even if Mr. Moquin's statements were admissible, which they are not, such statements would only go to show that Mr. Willard should have acted more diligently than he did so here.

216. In the *Willard Declaration* and the *Reply Willard Declaration*, Mr. Willard admits he knew Mr. Moquin was having personal financial difficulties and that he borrowed

money from friends and family to fund Mr. Moguin's personal expenses. WD ¶¶ 63-65; RWD ¶¶ 11-13. Mr. Willard also admits that he recommended a psychiatrist to Mr. Moquin, and he again borrowed money from a friend to pay for Mr. Moguin's treatment. WD ¶¶ 68-71; RWD ¶¶ 11-13. Mr. Willard was aware of Mr. Moquin's alleged problems prior to this Court's Order Granting Motion to Strike and Sanctions Order yet continued to allow Mr. Moguin to represent Plaintiffs. Mr. Willard was aware of Mr. Moquin's inaction which distinguishes this case 217. from the cases upon which Plaintiffs rely in the *Rule 60(b) Motion*, where the parties were 

unaware of their attorneys' problems. *See, e.g., Passarelli*, 102 Nev. at 286 ("Passarelli was effectually and unknowingly deprived of legal representation"); *US v. Cirami*, 563 F.2d 26, 29-31 (2d Cir. 1977) (client discovered that attorney had a mental disorder that prevented him from opposing summary judgment more than two years later); *Boehner v. Heise*, 2009 WL 1360975 at \*2 (S.D.N.Y. 2009) (client did not learn case had been dismissed or and did not learn of attorney's mental condition until several months after dismissal). Here, Mr. Willard knew of the actions that supported the *Sanctions Order*.

218. Mr. Willard admits that he was informed by Mr. O'Mara **prior to the dismissal** of Plaintiffs' claims that Mr. Moquin was not responsive. Plaintiffs failed to replace Mr. Moquin or take other action due to perceived financial reasons. *WD* **¶** 81. Plaintiffs' knowledge and inaction vitiates excuse for neglect.

219. The *Rule 60(b) Motion* cites authority for the proposition "where an attorney's mishandling of a movant's case stems from the attorney's mental illness," this might justify relief under Rule 60(b). However, "client diligence must still be shown." *Cobos v. Adelphi Univ.*, 179 F.R.D. 381, 388 (E.D.N.Y. 1998); *see also Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350, 357 (5th Cir. 1993) ("A party has a duty of diligence to inquire about the status of a case...."); *Pryor v. U.S. Postal Service*, 769 F.2d 281, 287 (5th Cir. 1985) ("This Court has pointedly announced that a party has a duty of diligence to inquire about the status of a case....").

1 220. Mr. Willard's claim that he had no choice but to continue working with Mr. 2 Moquin due to financial issues lacks credibility as he admits he was able to borrow money to 3 fund Mr. Moquin's personal life and medical treatment. It logically follows he had resources 4 to retain new attorneys at the time. 5 221. Plaintiffs have not established by substantial evidence that they exercised 6 diligence to rectify representation in their case despite ample knowledge of Mr. Moguin's 7 non-responsiveness. 8 G. PLAINTIFFS ARE NOT ENTITLED TO 60(B) RELIEF BECAUSE TWO 9 ATTORNEYS REPRESENTED PLAINTIFFS WHO BOTH HAD AN **OBLIGATION TO ENSURE COMPLIANCE WITH THE NEVADA** 10 RULES OF CIVIL PROCEDURE AND THIS COURT'S ORDERS. 11 222. Plaintiffs' *Rule 60(b) Motion* ignores the fact David O'Mara served as local 12 counsel. In Nevada, the responsibilities of local counsel are clearly defined, and 13 encompass active responsibility to represent the client and manage the case: 14 15 (a) The Nevada attorney of record shall be responsible for and actively participate in the representation of a client in any proceeding that is subject to 16 this rule. 17 (b) The Nevada attorney of record shall be present at all motions, pre-trials, or 18 any matters in open court unless otherwise ordered by the court. 19 (c) The Nevada attorney of record shall be responsible to the court...for the administration of any proceeding that is subject to this rule and for compliance 20 with all state and local rules of practice. It is the responsibility of Nevada 21 counsel to ensure that the proceeding is tried and managed in accordance with all applicable Nevada procedural and ethical rules. 22 Supreme Court Rule ("SCR") 42(14). 23 24 223. Mr. O'Mara's representation, even if contractually limited, was governed by 25 this rule. 26 Mr. O'Mara expressly "consent[ed] as Nevada Counsel of Record to the 224. 27 designation of Petitioner to associate in this cause pursuant to SCR 42" as part of his 28 Motion to Associate Counsel.

1	225.	Mr. O'Mara attended every hearing and court conference in this case. And,	
2	among other things, Mr. O'Mara signed the Verified Complaint and the First Amended		
3	Verified Complaint. <i>Complaint</i> ; FAC.		
4	226.	WDCR 23(1) provides:	
5	Counsel who has appeared for any party shall represent that party in the case		
6	and shall be recognized by the court and by all parties as having control of the		
7 8	client's case, until counsel withdraws, another attorney is substituted, or until counsel is discharged by the client in writing, filed with the filing office, in accordance with SCR 46 and this rule.		
9	WDCR 23.		
10	227.	Mr. O'Mara was the sole signatory on Plaintiffs' deficient initial disclosure,	
11	(Opposition	to Rule 60(b) Motion, Ex. 6), the uncured deficiencies of which were a basis for	
12	sanction of dismissal. Sanctions Order.		
13	228.	Mr. O'Mara also signed and filed the Brief Extension Request with this Court,	
14	representing that:		
15	Coun	sel has been diligently working for weeks to respond to Defendant's	
16 17	serial motions, which include seeking dismissal of Plaintiffs' case. With the full intention of submitting said responses, Counsel for Plaintiffs encountered		
18	unforeseen computer issues Counsel for Plaintiffs is confident that with a one-day extension they will be able to recreate and submit the oppositions to		
19	Defendants' three motions.		
20	229.	Plaintiffs do not provide any declaration by Mr. O'Mara in support of their Rule	
21	60(b) Motion.		
22	230.	Mr. O'Mara's involvement precludes a conclusion of excusable neglect here.	
23	Н.	THE SANCTIONS ORDER WAS SUFFICIENT UNDER NEVADA LAW.	
24	231.	Plaintiffs assert that the Sanctions Order was insufficient under Young v.	
25	Johnny Ribe	eiro, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990) because the Sanctions Order	
26	did not consider "whether sanctions unfairly operate to penalize a party for the misconduct		
27	of his or her attorney." <i>Rule 609b) Motion</i> at 12. However, consideration of this factor is		
28	discretionary, not mandatory. See Young, 106 Nev. at 93 ("The factors a court may		

properly consider include...whether sanctions unfairly operate to penalize a party for the
misconduct of his or her attorney") (emphasis added).

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

232. The Court concludes the factors enumerated in *Young v. Johnny Ribeiro Bldg. Inc.* were met by the *Sanctions Order*. Specifically, the Nevada Supreme Court held where a court issues an order of dismissal with prejudice as a discovery sanction, a court may consider, among others, the degree of willfulness of the offending party, the extent to which the non-offending party would be prejudiced by a lesser sanction, the severity of the sanction of dismissal relative to the severity of the discovery abuse, and the feasibility and fairness of alternative, less severe sanctions. *Young*, 106 Nev. at 93. The factors are not mandatory so long as the Court supports the order with "an express, careful and preferably written explanation of the court's analysis of the pertinent factors." *Id*.

233. While each suggested factor discussed in the *Sanctions Order* was not labeled by factor, the Court addressed the factors it deemed appropriate.

234. In the circumstances of this case, the dismissal of Plaintiffs' claims did not unfairly penalize Plaintiffs based on the factors analyzed in the *Sanctions Order*.

I.

#### THE RULE 60(B) MOTION SHOULD BE DENIED.

235. After weighing the credibility and admissibility of the evidence provided in support of the *Rule 60(b) Motion*, substantial evidence has not been presented to establish excusable neglect.

236. Plaintiffs have failed to meet their burden of proving, by a preponderance of the evidence, excusable neglect sufficient to justify relief under NRCP 60(b).

237. Similarly, careful analysis of each *Yochum* factor demonstrates that the *Yochum* factors warrant, if not compel, denial of NRCP 60(b)(1) relief.

11

11

1	III.	<u>ORDER</u> .	
2		Based upon the foregoing, and good cause appearing therefor,	
3		IT IS HEREBY ORDERED Plaintiffs' Rule 60(b) Motion is DENIED in its entirety.	
4		DATED this 13th day of September, 2021.	
5			
6			
7 8		DISTRICT JUDGE	
0 9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			

1	<b>CERTIFICATE OF SERVICE</b>		
2	I certify that I am an employee of THE SECOND JUDICIAL DISTRICT		
3	COURT; that on the 13th day of September, 2021, I electronically filed the foregoing		
4	with the Clerk of the Court system which will send a notice of electronic filing to the		
5	following:		
6	ROBERT EISENBERG, ESQ.		
7	BRIAN IRVINE, ESQ. ANJALI WEBSTER, ESQ. RICHARD WILLIAMSON, ESQ. JONATHAN TEW, ESQ.		
8			
9	JOHN DESMOND, ESQ.		
10	And, I deposited in the County mailing system for postage and mailing with the		
11	United States Postal Service in Reno, Nevada, a true and correct copy of the attached		
12	document addressed as follows:		
13			
14			
15			
16			
17			
18	Holly Longe		
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			

## EXHIBIT "12"

# EXHIBIT "12"

Docket 83640 Document 2021-32123

1 2 3 4 5 6 7 8 9 10 11	2540 DICKINSON WRIGHT JOHN P. DESMOND Nevada Bar No. 5618 BRIAN R. IRVINE Nevada Bar No. 7758 ANJALI D. WEBSTER Nevada Bar No. 12515 100 West Liberty Street, Suite 940 Reno, NV 89501 Tel: (775) 343-7500 Fax: (775) 786-0131 Email: Jdesmond@dickinsonwright.com Email: <u>Birvine@dickinsonwright.com</u> Email: <u>Birvine@dickinsonwright.com</u> Email: <u>Awebster@dickinsonwright.com</u> Mttorney for Defendants Berry Hinckley Industries, and Jerry Herbst IN THE SECOND JUDICIAL DISTRICT IN AND FOR THE CO	
12		
13 14	LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund;	CASE NO. CV14-01712
15	OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A.	DEPT. 6
16 17	WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,	
18	Plaintiff,	NOTICE OF ENTRY OF ORDER
19	VS.	MOTICE OF ENTRY OF ORDER
20	BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an Individual;	
21 22	Defendants.	
22	/	
24	BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST,	
25	an individual;	
26	Counterclaimants, vs	
27		
28	Page 1	of4

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

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

EXHIBIT LIST		
Exhibit	Description	Pages
1	Order Granting Defendants'/Counterclaimants' Motion for Sanctions [Oral Argument Requested], January 4, 2018	5
	,·,,·,,·,	
Exhibit page co	unt is exclusive of exhibit slip sheet.	

FILED Electronically CV14-01712 2018-01-05 01:46:18 PM Jacqueline Bryant Clerk of the Court Transaction # 6468357

47

## **EXHIBIT 1**

### **EXHIBIT 1**

		FILED Electronically CV14-01712 2018-01-04 05:30:42 PM Jacqueline Bryant
1		Clerk of the Court Transaction # 6466861
2		
4		
5	5 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE	OF NEVADA
6	6 IN AND FOR THE COUNTY OF WASHOE	
7	7	
8		01712
9	<ul> <li>trustee of the Larry James Willard Trust Fund;</li> <li>OVERLAND DEVELOPMENT</li> <li>Dept. No. 6</li> </ul>	
10	10 CORPORATION, a California corporation; EDWARD C. WOOLEY AND JUDITH A ORDER GRANT	ING
11	11 WOOLEY, individually and as trustees of the DEFENDANTS'	
12	<sup>12</sup> Intervivos Revocable Trust 2000, FOR SANCTION	-
13	13 ARGUMENT RE Plaintiffs,	QUESTED]
14	14	
15		
16	Corporation; and JERRY HERBST, an	
17		
18	Defendants.	
19		
20	BERRY-HINCKLEY INDUSTRIES, a	
21 22	an individual:	
23		
24	vs 24	
25	LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund;	
26		
27	27	
28	28 Counter-defendants.	
	/	
	1	

#### ORDER GRANTING DEFENDANTS'/ COUNTERCLAIMANTS' MOTION FOR SANCTIONS

2	COUNTERCLAIMANTS' MOTION FOR SANCTIONS		
3	Before this Court is Defendants'/Counterclaimants' Motion for Sanctions [Oral		
4	Argument Requested] ("Motion"), filed November 15, 2017 by Defendants/Counterclaimants		
5	BERRY-HINCKLEY INDUSTRIES ("Berry-Hinckley") and JERRY HERBST ("Mr. Herbst")		
6	(collectively, "Defendants") by and through their counsel Brian Irvine, Esq. Also on		
7 8	November 14, 2017, Defendants filed Defendants/Counterclaimants' Motion to Exceed		
о 9	Page Limit on Defendants/Counterclaimants' Motion for Sanctions ("Motion to Exceed Page		
10	Limit"). Plaintiffs LARRY J. WILLARD, OVERLAND DEVELOPMENT CORPORATION,		
11	EDWARD C. WOOLEY and JUDITH WOOLEY (collectively, "Plaintiffs" unless individually		
12			
13	referenced) failed to file an opposition to the <i>Motion to Strike</i> . As a result, Defendants filed		
14	a Notice of Non-Opposition to Defendants'/Counterclaimants' Motion for Sanctions ("Notice		
15	of Non-Opposition") on December 7, 2017 and submitted the matter for decision thereafter.		
16	On December 6, 2017, Plaintiffs filed Plaintiffs' Request for a Brief Extension of Time		
17	to Respond to Defendants' Three Pending Motions, and to Extend the Deadline for		
18 19	Submission of Dispositive Motions ("Request for Extension"), by and through their counsel,		
20	Brian P. Moquin, Esq. ("Mr. Moquin") and David C. O'Mara, Esq ("Mr. O'Mara"). <sup>1</sup>		
21	11		
22	11		
23			
24	//		
25	//		
26	11		
27			
28	<sup>1</sup> Mr. Moquin is a California attorney who has been admitted to practice in Nevada <i>pro hac vice</i> and is litigating this case. Mr. O'Mara is serving as local counsel only.		
	2		

1

3

4

5

6 7

8

9

10

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

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

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

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

- 25 //
- 26

 <sup>&</sup>lt;sup>27</sup> The Court inquired as to why Plaintiffs' failed to oppose the *Motion to Strike*. Mr. Moquin informed the Court that his computer had malfunctioned, and his drafts of Plaintiffs' oppositions could not be recovered. Mr. Moquin further explained he is a sole practitioner without access to an IT department.

1	Accordingly, and good cause appearing therefor,		
2	IT IS HEREBY ORDERED AND DECREED:		
3	1. Defendants'/Counterclaimants' Motion for Sanctions [Oral Argument		
4	Requested] is GRANTED.		
5 6	2. Defendants/Counterclaimants' Motion to Exceed Page Limit on		
7	Defendants/Counterclaimants' Motion for Sanctions is GRANTED.		
8			
9	3. Defendants shall submit a Proposed Order granting		
10	Defendants'/Counterclaimants' Motion for Sanctions, including factual and		
11	legal analysis and discussion, to Department 6 within twenty (20) days of the		
12	date of this Order in accordance with WDCR 9.		
13	Dated this day of January, 2018.		
14			
15	DISTRICT		
16			
17 18			
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			
	4		

1	CERTIFICATE OF SERVICE	
2	I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT;	
3	that on theday of January, 2018, I electronically filed the foregoing with the Clerk	
4	of the Court system which will send a notice of electronic filing to the following:	
5		
6	BRIAN IRVINE, ESQ.	
7	JOHN P. DESMOND, ESQ.	
8	ANJALI D. WEBSTER, ESQ.	
9	BRIAN MOQUIN, ESQ.	
10	DAVID O'MARA, ESQ.	
11		
12		
13		
14		
15		
16	And, I deposited in the County mailing system for postage and mailing with the	
17	United States Postal Service in Reno, Nevada, a true and correct copy of the attached	
18	document addressed as follows:	
19		
20	Heidi Bre	
21	pual rare	
22		
23		
24		
25		
26		
27		
28		

## EXHIBIT "13"

# EXHIBIT "13"

Docket 83640 Document 2021-32123

1 2 3 4 5 6 7 8 9 10 11	2540 DICKINSON WRIGHT JOHN P. DESMOND Nevada Bar No. 5618 BRIAN R. IRVINE Nevada Bar No. 7758 ANJALI D. WEBSTER Nevada Bar No. 12515 100 West Liberty Street, Suite 940 Reno, NV 89501 Tel: (775) 343-7500 Fax: (775) 786-0131 Email: Jdesmond@dickinsonwright.com Email: Birvine@dickinsonwright.com Email: <u>Birvine@dickinsonwright.com</u> Email: <u>Awebster@dickinsonwright.com</u> <i>Attorney for Defendants</i> Berry Hinckley Industries, and Jerry Herbst IN THE SECOND JUDICIAL DISTRICT	FILED Electronically CV14-01712 2018-01-05 01:39:14 PM Jacqueline Bryan Clerk of the Cour Transaction # 6468337
12	IN AND FOR THE CO	OUNTY OF WASHOE
13	LARRY J. WILLARD, individually and as	
14	trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT	CASE NO. CV14-01712 DEPT. 6
15	CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the	
16 17	Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,	
18	Disinging	NOTICE OF ENTRY OF ORDER
19	Plaintiff, vs.	NOTICE OF ENTRY OF ORDER
20	BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an	
21	Individual; Defendants.	
22	/	
23	BERRY-HINCKLEY INDUSTRIES, a	
24	Nevada corporation; and JERRY HERBST, an individual;	
25	Counterclaimants,	
26 27	VS	
27		
20	Page	1 of 4

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

1		
1	<u>CERTIFICATE OF SERVICE</u>	
2 3	I certify that I am an employee of DICKINSON WRIGHT, and that on this date, pursuant	
4	to NRCP 5(b); I am serving a true and correct copy of the attached NOTICE OF ENTRY OF	
5	ORDER on the parties through the Second Judicial District Court's EFlex filing system to the	
6	following:	
7	Brian P. Moquin David C. O'Mara	
8	LAW OFFICES OF BRIAN P. MOQUINTHE O'MARA LAW FIRM3287 Ruffino Lane311 E. Liberty Street	
9	San Jose, California 95148 Reno, Nevada 89501	
10	DATED this 5th day of January, 2018.	
11	/s/ Cindy S. Grinstead An employee of DICKINSON WRIGHT	
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28	Page 3 of 4	

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

FILED Electronically CV14-01712 2018-01-05 01:39:14 PM Jacqueline Bryant Clerk of the Court Transaction # 6468337

:

57

### **EXHIBIT 1**

### **EXHIBIT 1**

		FILED Electronically CV14-01712 2018-01-04 04:53:56 PM Jacqueline Bryant
1 2	CODE NO. 3370	Clerk of the Court Transaction # 6466778
3		
4		
5	IN THE SECOND JUDICIAL DISTRICT (	COURT OF THE STATE OF NEVADA
6	IN AND FOR THE COU	UNTY OF WASHOE
7		
8	LARRY J. WILLARD, individually and as	Case No. CV14-01712
9	trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT	Dept. No. 6
10	CORPORATION, a California corporation; EDWARD C. WOOLEY AND JUDITH A	ORDER GRANTING
11	WOOLEY, individually and as trustees of the	DEFENDANTS'/
12	Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,	COUNTERCLAIMANTS' MOTION
13	Plaintiffs,	LIMINE TO EXCLUDE THE EXPERT TESTIMONY OF DANIEL
14		GLUHAICH
15	VS.	
16	BERRY-HINCKLEY INDUSTRIES, a Nevada Corporation; and JERRY HERBST, an	
17	individual,	
18	Defendants.	
19	/	
20	BERRY-HINCKLEY INDUSTRIES, a	
21	Nevada corporation; and JERRY HERBST, an individual;	
22		
23	Counterclaimants, vs	
24	LARRY L MILLARD individually and as	
25	LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund;	
26	OVERLAND DEVELOPMENT CORPORATION, a California corporation;	
27	Counter-defendants.	
28	/	
	1	

**ORDER GRANTING DEFENDANTS'/ COUNTERCLAIMANTS' MOTION TO STRIKE AND/OR** MOTION IN LIMINE TO EXCLUDE THE EXPERT TESTIMONY OF DANIEL GLUHAICH Before this Court is Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Glubaich ("Motion to Strike"), filed November 14, 2017 by Defendants/Counterclaimants BERRY-HINCKLEY INDUSTRIES ("Berry-Hinckley") and JERRY HERBST ("Mr. Herbst") (collectively, "Defendants") by and through their counsel Brian Irvine, Esg. Also on November 14, 2017, Defendants filed a Motion to Exceed Page Limit in conjunction with their Motion to Strike. Plaintiffs LARRY J. WILLARD, OVERLAND DEVELOPMENT CORPORATION, EDWARD C. WOOLEY and JUDITH WOOLEY (collectively, "Plaintiffs" unless individually referenced) failed to file an opposition to the Motion to Strike. As a result, Defendants filed a Notice of Non-Opposition to Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich ("Notice of Non-Opposition") on December 7, 2017 and submitted the matter for decision thereafter. On December 6, 2017, Plaintiffs filed Plaintiffs' Request for a Brief Extension of Time to Respond to Defendants' Three Pending Motions, and to Extend the Deadline for Submission of Dispositive Motions ("Request for Extension"), by and through their counsel, Brian P. Moguin, Esg. ("Mr. Moguin") and David C. O'Mara, Esg ("Mr. O'Mara").1 <sup>1</sup> Mr. Moguin is a California attorney who has been admitted to practice in Nevada pro hac vice and is litigating this case. Mr. O'Mara is serving as local counsel only.

2 3

4

5

6

7

8

9

10

11

1

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

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

Under DCR 13(3), the failure of an opposing party to serve and file a written 12 13 opposition may be construed as an admission that the motion is meritorious and consent to 14 granting the same. DCR 13(3). Thus, the Court finds Plaintiffs' failure to file an opposition 15 to Defendants' Motion to Strike constitutes both an admission that the Motion to Strike is 16 meritorious and Plaintiffs' consent to granting said motion. In addition, the Court finds 17 18 Defendants' Motion to Strike has merit. As such, the Court finds both the Motion to Strike 19 and the Motion to Exceed Page Limit are granted. 20

Accordingly, and good cause appearing therefor,

22

21

23 24

25

26

IT IS HEREBY ORDERED AND DECREED:

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

<sup>27</sup> The Court inquired as to why Plaintiffs' failed to oppose the *Motion to Strike*. Mr. Moquin informed the Court that his computer had malfunctioned, and his drafts of Plaintiffs' oppositions could not be recovered. Mr. Moquin further explained he is a sole practitioner without access to an IT department.

Defendants' Motion to Exceed Page Limit is GRANTED. 2. Dated this the day of January, 2018. DISTRICT JUDGE 

1	CERTIFICATE OF SERVICE	
2		
3	I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 400 day of January, 2018, I electronically filed the foregoing with the Clerk	
4	of the Court system which will send a notice of electronic filing to the following:	
5		
6	BRIAN IRVINE, ESQ.	
7	JOHN P. DESMOND, ESQ.	
8	ANJALI D. WEBSTER, ESQ.	
9	BRIAN MOQUIN, ESQ.	
10	DAVID O'MARA, ESQ.	
11		
12		
13		
14		
15		
16	And, I deposited in the County mailing system for postage and mailing with the	
17	United States Postal Service in Reno, Nevada, a true and correct copy of the attached	
18	document addressed as follows:	
19		
20	Kini Bre	
21	Full me	
22		
23		
24		
25		
26		
27		
28		

## EXHIBIT "14"

# EXHIBIT "14"

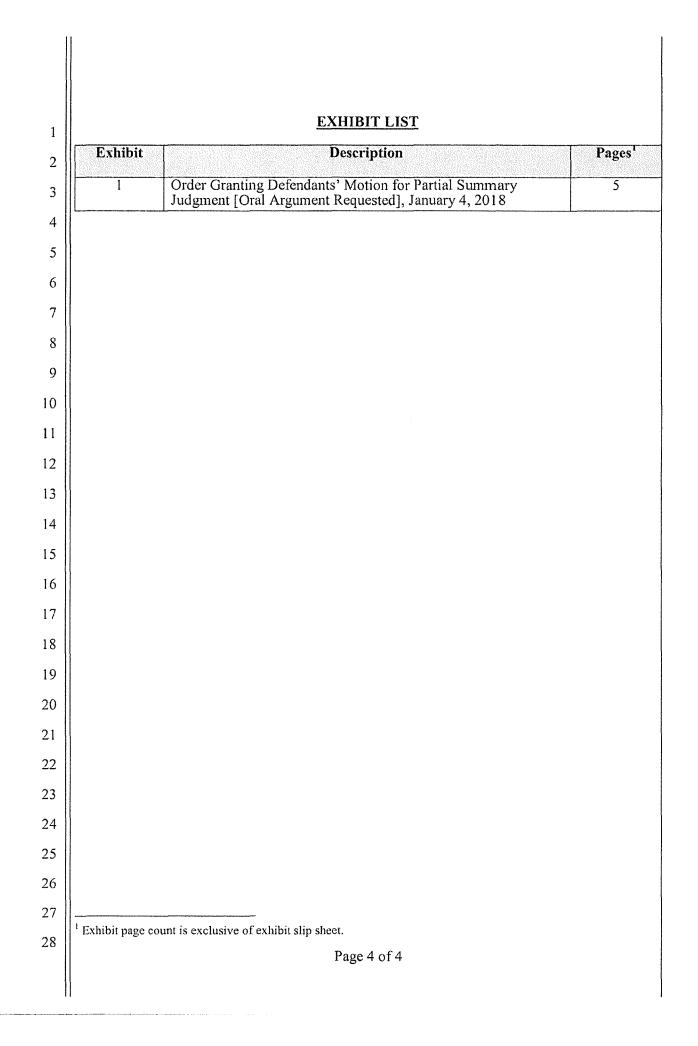
Docket 83640 Document 2021-32123

1 2 3 4 5 6 7 8 9 10 11 12	2540 DICKINSON WRIGHT JOHN P. DESMOND Nevada Bar No. 5618 BRIAN R. IRVINE Nevada Bar No. 7758 ANJALI D. WEBSTER Nevada Bar No. 12515 100 West Liberty Street, Suite 940 Reno, NV 89501 Tel: (775) 343-7500 Fax: (775) 786-0131 Email: Jdesmond@dickinsonwright.com Email: <u>Birvine@dickinsonwright.com</u> Email: <u>Birvine@dickinsonwright.com</u> Email: <u>Awebster@dickinsonwright.com</u> Attorney for Defendants Berry Hinckley Industries, and Jerry Herbst IN THE SECOND JUDICIAL DISTRICT O IN AND FOR THE COU		
<ol> <li>13</li> <li>14</li> <li>15</li> <li>16</li> <li>17</li> </ol>	Trustee of the Larry James willard Trust Fund;	- CASE NO. CV14-01712 DEPT. 6	
18 19	Plaintiff, vs.	NOTICE OF ENTRY OF ORDER	
20 21	BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an Individual;		
22	Defendants.		
23			
24	BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual;		
25	Counterclaimants,		
26 27	VS		
28	Page 1	of 4	

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

,

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



FILED Electronically CV14-01712 2018-01-05 01:43:22 PM Jacqueline Bryant Clerk of the Court Transaction # 6468348

.

47

.

•••

## **EXHIBIT 1**

.

## **EXHIBIT 1**

		FILED Electronically CV14-01712 2018-01-04 05:32:39 PM Jacqueline Bryant
1		Clerk of the Court Transaction # 6466867
2 3		
4		
5	IN THE SECOND JUDICIAL DISTRICT COURT O	OF THE STATE OF NEVADA
6	IN AND FOR THE COUNTY OF	WASHOE
7		
8		ase No. CV14-01712
9	trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT Development	ept. No. 6
10	CORPORATION, a California corporation; EDWARD C. WOOLEY AND JUDITH A	RDER GRANTING DEFENDANTS'
11	WOOLEY, individually and as trustees of the Mo	OTION FOR PARTIAL SUMMARY
12		EQUESTED]
13	Plaintiffs,	
14	Ve	
15		
16 17	Corporation; and JERRY HERBST, an	
18	Defendants.	
19	/	
20	BERRY-HINCKLEY INDUSTRIES, a	
21	Nevada corporation; and JERRY HERBST,	
22		
23	vs	
24	LAPPY LIMULARD individually and as	
25 26	trustee of the Larry James Willard Trust Fund;	
26 27	CORPORATION, a California corporation;	
28	Counter defendants	
	/	
	1	
		1

#### ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT [ORAL ARGUMENT REQUESTED]

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

13 14

Ι.

1

2

3

4 5

6

7

8

9

10

11

12

#### FACTUAL AND PROCEDURAL HISTORY

This case arises out of two commercial lease agreements entered into between 15 16 Plaintiffs, as lessors, and Defendants, as lessees, for the Subject Properties located at 1820 17 East U.S. Highway 50, Carson City, Nevada (the "Highway 50 Property") and 7605 - 7699 18 S. Virginia Street, Reno, Nevada (the "Virginia Property"). See Complaint, pp. 3-7. On 19 November 15, 2017, Defendants filed their Motion, seeking an Order of this Court granting 20 21 summary judgment for Defendants with respect to Plaintiffs' claim for "diminution in value" 22 damages arising out of Defendants' alleged breach of the lease agreements. See Motion, 23 generally. Plaintiffs failed to oppose the Motion. As a result, Defendants filed a Notice of 24 Non-Opposition and submitted the matter for decision on December 7, 2017. 25

26 //

27 //

28

1 On December 6, 2017, Plaintiffs filed Plaintiffs' Request for a Brief Extension of Time 2 to Respond to Defendants' Three Pending Motions, and to Extend the Deadline for 3 Submission of Dispositive Motions ("Request for Extension"), by and through their counsel. 4 Brian P. Moguin, Esg. ("Mr. Moguin") and David C. O'Mara, Esg ("Mr. O'Mara").<sup>1</sup> 5 At a Status Hearing on December 12, 2017, the Court granted Plaintiffs' Request for 6 7 Extension and directed Plaintiffs to respond no later than Monday, December 18, 2017 at 8 10:00 A.M.<sup>2</sup> The Court further directed Defendants to reply no later than January 8, 2018 9 and set the Motion for oral argument on January 12, 2018. 10 Plaintiffs once again failed to respond to the *Motion* or request an extension. 11 Defendants then filed a second Notice of Non-Opposition to Defendants'/Counterclaimants' 12 13 Motion for Partial Summary Judgment ("Second Notice of Non-Opposition") and subsequent 14 request for submission on December 18, 2017. 15 H. LAW AND ANALYSIS 16 Under DCR 13(3), the failure of an opposing party to serve and file a written 17 18 opposition may be construed as an admission that the motion is meritorious and consent to 19 granting the same. DCR 13(3). Thus, the Court finds Plaintiffs' failure to file an opposition 20 to Defendants' Motion constitutes both an admission that the Motion is meritorious and 21 Plaintiffs' consent to granting said Motion. 22 However, in light of this Court's Order Granting Defendants/Counterclaimants' Motion 23 24 for Sanctions [Oral Argument Requested], the Court finds Defendant's Motion is moot at this 25 <sup>1</sup> Mr. Moquin is a California attorney who has been admitted to practice in Nevada pro hac vice and 26 is litigating this case. Mr. O'Mara is serving as local counsel only. 27 <sup>2</sup> The Court inquired as to why Plaintiffs' failed to oppose the Motion to Strike. Mr. Moquin informed the Court that his computer had malfunctioned, and his drafts of Plaintiffs' oppositions could not be 28 recovered. Mr. Moguin further explained he is a sole practitioner without access to an IT department. 3

1	juncture.
2	Accordingly, and good cause appearing therefor,
3	IT IS HEREBY ORDERED Defendants' Motion for Partial Summary Judgment is
4	
5	DENIED as moot.
6	Dated this day of January, 2018.
7	
8 9	DISTRICT JUDGE
9 10	
11	
12	
13	
14	
15	
16	
17	
18	
19 20	
21	
22	
23	
24	
25	
26	
27	
28	
	4

1	CERTIFICATE OF SERVICE
2	I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT;
3	that on the 4th day of January, 2018, I electronically filed the foregoing with the Clerk
4	of the Court system which will send a notice of electronic filing to the following:
5	
6	BRIAN IRVINE, ESQ.
7	JOHN P. DESMOND, ESQ.
8	ANJALI D. WEBSTER, ESQ.
9	BRIAN MOQUIN, ESQ.
10	DAVID O'MARA, ESQ.
11	
12	
13	
14	
15	
16	And, I deposited in the County mailing system for postage and mailing with the
17	United States Postal Service in Reno, Nevada, a true and correct copy of the attached
18	document addressed as follows:
19	
20	bride Pore
21	
22	
23	
24 25	
25 26	
26 27	
27 28	
20	

## EXHIBIT "15"

# **EXHIBIT "15"**

Docket 83640 Document 2021-32123

1 2 3 4 5 6 7 8 9 10	FILED Electronically CV14-01712 2018-03-06 05:45:12 PM Jacqueline Bryant Clerk of the Court Transaction # 6564438 DICKINSON WRIGHT JOHN P. DESMOND Nevada Bar No. 5618 BRIAN R. IRVINE Nevada Bar No. 7758 ANJALI D. WEBSTER Nevada Bar No. 12515 100 West Liberty Street, Suite 940 Reno, NV 89501 Tel: (775) 343-7500 Fax: (775) 786-0131 Email: Jdesmond@dickinsonwright.com Email: Jdesmond@dickinsonwright.com Email: <u>Jdesmond@dickinsonwright.com</u> Email: <u>Awebster@dickinsonwright.com</u> Email: <u>Awebster@dickinsonwright.com</u> Attorney for Defendants 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 and as
14	LARCE J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;CASE NO. CV14-01712 DEPT. 6
15 16 17	EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,
18	Plaintiff, NOTICE OF ENTRY OF FINDINGS
19	vs. OF FACTS, CONCLUSIONS OF LAW AND ORDER
20 21	BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an Individual;
22	Defendants.
23	
24	BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST,
25	an individual;
26	Counterclaimants, vs
27	
28	Page 1 of 4

1 2 3 4 5 6 7 8	LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; Counter-defendants. / PLEASE TAKE NOTICE that on March 6, 2018, this Court entered its Findings of Facts, Conclusions of Law and Order on Defendant's Motion for Sanctions ("Findings and Conclusions"). A true and correct copy of the Findings and Conclusions is attached hereto as		
9	Exhibit 1.		
10	AFFIRMATION		
11	Pursuant to NRS 239B.030		
12	The undersigned does hereby affirm that the preceding document does not contain the		
13	social security number of any person.		
14	DATED this 6th day of March, 2018.		
15	DICKINSON WRIGHT		
16			
17	/s/ Brian R. Irvine DICKINSON WRIGHT		
18	JOHN P. DESMOND Nevada Bar No. 5618		
19 20	BRIAN R. IRVINE Nevada Bar No. 7758		
20	ANJALI D. WEBSTER Nevada Bar No. 12515 100 West Liberty Street Suite 040		
21	100 West Liberty Street, Suite 940 Reno, NV 89501 Email: Jdesmond@dickinsonwright.com		
23	Email: <u>Jdesmond@dickinsonwright.com</u> Email: <u>Birvine@dickinsonwright.com</u> Email: Awebster@dickinsonwright.com		
24	Attorney for Defendants Berry Hinckley		
25	Industries, and Jerry Herbst		
26			
27			
28	Page 2 of 4		

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

1	EXHIBIT LIST	
2	Exhibit Description	Pages <sup>1</sup>
3	1         Findings of Fact, Conclusions of Law and Order on Defendant's Motion for Sanctions	34
4		****
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19 20		
20		
21		
23		
24		
25		
26		
27		
28	<sup>1</sup> Exhibit page count is exclusive of exhibit slip sheet.	
	Page 4 of 4	

FILED Electronically CV14-01712 2018-03-06 05:45:12 PM Jacqueline Bryant Clerk of the Court Transaction # 6564488

57

...

### **EXHIBIT 1**

-

## **EXHIBIT 1**

FILED Electronically CV14-01712 2018-03-06 04:22:28 PM Jacqueline Bryant Clerk of the Court Transaction # 6564287

			Jacqueline Brya
1	3060 DICKINSON WRIGHT		Clerk of the Co Transaction # 656
2	JOHN P. DESMOND		
3	Nevada Bar No. 5618 BRIAN R. IRVINE		
3	Nevada Bar No. 7758		
4	ANJALI D. WEBSTER Nevada Bar No. 12515		
5	100 West Liberty Street, Suite 940		
	Reno, NV 89501 Tel: (775) 343-7500		
6	Fax: (775) 786-0131		
7	Email: Jdesmond@dickinsonwright.com Email: Birvine@dickinsonwright.com		
8	Email: Awebster@dickinsonwright.com		
	Attorney for Defendants		
9	Berry Hinckley Industries, and		
10	Jerry Herbst		
11	IN THE SECOND JUDICIAL DISTRICT	COURT OF THE STATE	OF NEVADA
12	IN AND FOR THE CO	DUNTY OF WASHOE	
13			
	LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund;	CASE NO. CV14-01712	
14	OVERLAND DEVELOPMENT	DEPT. 6	
15	CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A.		
16	WOOLEY, individually and as trustees of the		
	Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,		
17			
18	Plaintiff,		
19	vs.		
	BERRY-HINCKLEY INDUSTRIES, a Nevada		
20	corporation; and JERRY HERBST, an		
21	Individual;		
22	Defendants.		
	/		
23	BERRY-HINCKLEY INDUSTRIES, a		
24	Nevada corporation; and JERRY HERBST,		
25	an individual;		
26	Counterclaimants,		
20	vs		
27			
28			
	Page	1 of 34	
•			

1	LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT
2	CORPORATION, a California corporation;
3	Counter-defendants.
4	· · · · · · · · · · · ·
5	
6	B
7	<b>PROPOSED</b> FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON
8	DEFENDANTS' MOTION FOR SANCTIONS
9	1. Plaintiffs in this matter are Larry J. Willard, individually and as trustee of the
10	Larry James Willard Trust Fund; Overland Development Corporation, a California corporation
11	(collectively, "Willard" or the "Willard Plaintiffs"); Edward E. Wooley and Judith A. Wooley,
12	individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos
13	Revocable Trust 2000 (collectively, "Wooley"). The Willard Plaintiffs are also counter-
14	defendants in this matter.
15	2. Plaintiffs' counsel are Brian Moquin, a California attorney who has been
16	admitted to practice in Nevada pro hac vice, and David O'Mara of the O'Mara Law Firm, P.C.,
17	who is serving as local counsel.
18	3. Defendants/counter-claimants in this matter are Berry-Hinckley Industries
19	("BHI") and Jerry Herbst (collectively, "Defendants").
20	4. The Motion before this Court is Defendants' Motion for Sanctions, wherein
21	Defendants sought, in pertinent part, dismissal with prejudice of this action pursuant to NRCP
22	16.1(e)(3), NRCP 37(b)(2), NRCP 41(b), and Blanco v. Blanco, 129 Nev, 311 P.3d 1170.
23	(Defendants' Motion).
24	5. Defendants' Motion was filed on November 15, 2017. Plaintiffs did not file an
25	Opposition, despite Defendants and this Court granting several extensions. Defendants' Motion
26	was submitted to this Court on December 18, 2017.
27	
28	
	Page 2 of 34

1	6. This Court, having considered the briefing, and being otherwise fully advised,
2	and GOOD CAUSE APPEARING, hereby finds the following facts and makes the following
3	conclusions of law:
4.	FINDINGS OF FACT
5	<u>Plaintiffs' Complaint</u>
6	7. On August 8, 2014, Plaintiffs commenced this action against Defendants, filing a
7	joint complaint against them. (Complaint). <sup>1</sup>
8	8. Willard sought the following damages against Defendants for an alleged breach
9	of the lease between Willard and BHI: (1) "rental income" for \$19,443,836.94, discounted by
10	4% per the lease to \$15,741,360.75 as of March 1, 2013; and (2) certain property-related
11	damages, such as insurance and installation of a security fence. (First Amended Complaint
12	("FAC")).
13	9. Willard had also sought several other categories of damages which have since
14	been dismissed or withdrawn. (May 30, 2017, Order).
15	10. Wooley sought the following damages against Defendants for an alleged breach
16	of the lease between Wooley and BHI: (1) "rental income in the amount of \$4,420,244.00 that
17	[Wooley] otherwise would have received," discounted by a rate of 4% as specified in the
18	Wooley Lease to \$3,323,543.90 as of March 1, 2013; (2) a "diminution in value in an amount to
19	be proven at trial but which is at least \$2,000,000"; (3) property taxes in the amount of \$1,500;
20	(4) insurance for \$3,840; (5) maintenance costs of \$4,000; (6) management costs of \$2,500; and
21	(7) security deposit from subtenant for \$2,485.00. (FAC).
22	11. Wooley had also sought several other categories of damages which have since
23	been dismissed or withdrawn. (May 30, 2017, Order).
24	
25	<sup>1</sup> All of the referenced documents have been filed with this Court in this case, either as
26	pleadings/ briefings/ motions or as exhibits to the same. References to "Defendants' Motion" are to Defendants' Motion for Sanctions. References to "Willard Motion" or "Wooley Motion"
27	are to the Plaintiffs' respective Motions for Summary Judgment.
28	Page 3 of 34
ł	1

#### Plaintiffs' Initial Disclosures

1

2 12. On December 12, 2014, Plaintiffs provided their initial disclosures. (Exhibit 1 to
3 Defendants' Motion for Sanctions).

4 13. However, while Plaintiffs disclosed anticipated witnesses and documents, they
5 did not provide any computation of their claimed damages, notwithstanding the express
6 requirement to do so set forth in NRCP 16.1(a)(1)(C).

#### 7 Defendants' February 12, 2015, Letter

8 14. On February 12, 2015, Defendants wrote to Plaintiffs regarding the deficiencies
9 in their initial disclosures, and informing them that the disclosures did not include the damages
10 computations required by the Nevada Rules of Civil Procedure. (Exhibit 4 to Defendants'
11 Motion for Sanctions).

## 12 15. Defendants advised Plaintiffs that their failure to timely comply would result in 13 Defendants seeking sanctions. *Id.*

14 16. However, Plaintiffs did not comply with their NRCP 16.1 obligations upon
15 receipt of this letter or any time thereafter.

#### 16 Plaintiffs' Interrogatory Responses

17 17. In April of 2015, Defendants served Plaintiffs with written discovery. (June 23,
18 2015, Motion to Compel).

19 18. Defendants had not received any NRCP 16.1 damages disclosures from
20 Plaintiffs, and asked Plaintiffs in separate interrogatories to "[p]lease explain in detail how the
21 damages...alleged in your Amended Complaint were calculated." (Plaintiffs' Interrogatory
22 Responses, Exhibits 5 and 6 to Defendants' Motion for Sanctions).

Plaintiffs did not respond, even after Defendants granted them multiple
extensions, requiring Defendants to file a motion to compel. (June 23, 2015, Motion to
Compel).

26

27 28

Page 4 of 34

20. This Court granted the Motion to Compel, which Plaintiffs failed to oppose.
 Therein, this Court ordered, in pertinent part, that Plaintiffs shall pay Defendants' reasonable
 expenses incurred in making the motion, including attorneys' fees. (July 1, 2015, Order).

4 21. Only then did Plaintiffs respond, and, in pertinent part, simply repeated the
5 allegations in their Complaint when discussing their damages. (Plaintiffs' Interrogatory
6 Responses, Exhibits 5 and 6 to Defendants' Motion for Sanctions).

7 22. Notably, these Court-ordered responses were the last time Plaintiffs provided
8 anything that even came close to a damages disclosure until October of 2017, and even these
9 did not comply with the requirements of NRCP 16.1.

10 23. Plaintiffs did not pay Defendants' reasonable expenses, despite the direct order
11 from this Court to do so.

12 24. Further, the fact that the Court imposed monetary sanctions on Plaintiffs in 2015
13 clearly did not deter any of their subsequent conduct in continuing to fail to comply with their
14 discovery obligations and Court orders.

- 15 The September 3, 2015, Stipulation and Order to Continue Trial Date
- 16 25. On August 28, 2015, Defendants wrote to Plaintiffs, referencing Plaintiffs'
  17 continued failure to comply with discovery obligations and resulting prejudice to Defendants,
  18 and noting that Plaintiffs had also yet to comply with the promise they made during a status
  19 conference before this Court to provide Defendants with discovery responses to Defendants'
  20 outstanding discovery requests in advance of the parties' depositions scheduled to begin on
  21 August 20, 2015. (Exhibit 7 to Defendants' Motion for Sanctions).

22 26. Plaintiffs' failure to comply with discovery obligations necessitated a
23 continuance of the trial date and an extension of all discovery deadlines. (September 3, 2015,
24 Stipulation and Order).

25

28

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

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

Page 5 of 34

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

3 28. On April 20, 2016, Defendants continued to request the information that they
4 sought in their March 2016 letters, noting that Plaintiffs had promised to provide the documents
5 but they had not done so. (Exhibit 10 to Defendants' Motion).

6 29. Defendants again requested Plaintiffs' NRCP 16.1 damages calculations, noting
7 that "this is an issue which we have raised on multiple occasions." *Id*.

30. Yet again, Plaintiffs did not provide their NRCP 16.1 calculations.

9 31. Defendants also stated that "[y]our clients' failure to provide us with the
10 discovery documents ha[s] prejudiced our ability to prepare a defense on behalf of our clients.
11 Without such documents, we cannot depose several witnesses, and our experts are unable to
12 complete their opinions. This also jeopardizes our ability to submit dispositive motions with
13 complete information in time for the Court to fully consider those motions." *Id.*

32. Due to Plaintiffs continued failure to meet discovery obligations, the parties
agreed to continue the trial date for a second time. The agreed-upon basis for a continuance was
that Plaintiffs needed to provide Defendants with documents and information, and also needed
to provide "Plaintiffs' NRCP 16.1 damages calculations." (May 2, 2016, Stipulation and Order).
This Court signed the Order, adding that "no further continuances will be granted." *Id.*

19 33. Following the second continuance, trial was scheduled for May 2, 2017, and
20 discovery was set to close on March 2, 2017.

#### 21 Plaintiffs' Unsuccessful Purported Disclosure of Daniel Glubaich as a Non-Retained Expert Witness

L-1 ----

28

8

34. On December 2, 2016, Plaintiffs purported to disclose Daniel Gluhaich as a nonretained expert. (Exhibit 11 to Defendants' Motion).

35. However, while Plaintiffs' disclosure generally referenced the categories as to
which Mr. Gluhaich was expected to testify, Plaintiffs did not provide "a summary of the facts

Page 6 of 34

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

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

8 37. However, Plaintiffs did not provide an amended disclosure on December 8 or
9 any time thereafter.

10

#### The Parties' December 2016 Correspondence

38. On December 9, 2016, Defendants' counsel wrote that Defendants did not
receive the amended disclosure, or dates pursuant to which Defendants could depose Mr.
Gluhaich. (Exhibit 13 to Defendants' Motion). Defendants advised Plaintiffs' counsel that
"[o]bviously, we will be prejudiced by further delay in learning all of the expert opinion
testimony that plaintiffs intent to present at trial. Please provide that information immediately."
Id.

39. Defendants also addressed Plaintiffs' continued failure to provide their NRCP
16.1 damages. *Id.* On December 5, 2016, Wooley had provided a spreadsheet of damages
expressly "for use in the ongoing informal settlement negotiations between Tim Herbst and Ed
Wooley," and asked Defendants' counsel to "forward...to Tim Herbst as [Defendants' counsel
saw] fit." (Exhibit 12 to Defendants' Motion). Plaintiffs' counsel also stated that he would "be

22

<sup>&</sup>lt;sup>23</sup><sup>2</sup>In contrast, Defendants disclosed Michelle Salazar as an expert and served Plaintiffs with Ms. Salazar's report, which included, as required under NRCP 16.1(a)(2)(B) "a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years."

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

6 40. On December 23, 2016, Defendants' counsel discussed with Plaintiffs' counsel
7 Plaintiffs' continued failure to properly disclose Mr. Gluhaich or even work with Defendants on
8 expert deposition dates, even though Defendants had provided Plaintiffs an extension. (Exhibit
9 14 to Defendants' Motion).

1041. Defendants also stated that this conduct was prejudicing Defendants and making11it impossible for Defendants to comply with discovery deadlines for rebuttal experts. *Id*.

42. Next, Defendants expressed their concerns to Wooley that the damages spreadsheet recently provided for settlement purposes only, which Defendants could not share with their expert or use to prepare any defenses, contained a "new damages model that Plaintiffs had never before utilized in the case," and prejudiced Defendants in that they were unable to conduct discovery about this new computation of damages or the methodology used to arrive at the purported numbers in the Wooley settlement-only spreadsheet. *Id*.

18 43. Defendants concluded that "[w]e still have never received an NRCP 16.1 19 damages computation from either set of Plaintiffs, despite numerous demands. Please ensure 20 that Plaintiffs meet their obligations to provide such computations immediately, or we will seek 21 to preclude Plaintiffs from seeking any non-disclosed damages at trial, including those 22 contained in the Wooley spreadsheet you sent me on December 5." *Id.* Defendants also added 23 that they reserved the right to provide Plaintiffs' damages disclosure to their expert so that she 24 could provide new opinions about any new damages model. *Id.* 

44. On December 27, 2016, Plaintiffs' counsel responded. (Exhibit 15 to
Defendants' Motion). Plaintiffs did not address their failure to provide their damages
disclosures in any way, nor did they provide an expert disclosure of Mr. Gluhaich compliant

28

Page 8 of 34

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

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

This Court's January 10, 2017, Hearing

9 46. On January 10, 2017, this Court held a hearing on Defendants' motion for partial
10 summary judgment on Plaintiffs' overreaching consequential damages, which Messrs. Willard
11 and Wooley personally attended. (January 10, 2017, transcript).

47. At the hearing, in pertinent part, Defendants' counsel informed this Court that Defendants had never received a damages computation from the Plaintiffs pursuant to NRCP 14 16.1, despite Defendants' many demands. *Id.* at 18. Plaintiffs' counsel attempted to claim that 15 Plaintiffs' interrogatory responses satisfied Plaintiffs' requirements. *Id.* at 42-43. But Plaintiffs' 16 counsel admitted, in open court, that "with respect to Willard, they do not" have an up-to-date, 17 clear picture of Plaintiffs' damages claims. *Id.* 

Plaintiffs' counsel also represented to this Court that Wooley's damages 48. 18 disclosures to Defendants were complete and up-to-date. Id. This was a misrepresentation, as 19 Wooley had never provided Defendants with any NRCP 16.1 damages disclosures, and 20 certainly had not provided any updated disclosures since the court-ordered discovery response 21 in July of 2015. Further, the December 2016 damages spreadsheet was for use in settlement 22 negotiations only per Wooley's counsel's own words, and therefore was not a disclosure in this 23 litigation that could be utilized as contemplated by the Nevada Rules of Civil Procedure. 24 (Exhibit 12 to Defendants' Motion). Defendants' counsel apprised this Court of this fact during 25 the hearing. (January 10, 2017, transcript). 26

27 28

8

Page 9 of 34

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

#### The February 9, 2017, Stipulation and Order

5 50. In spite of the rapidly impending trial date (at the time, May 2, 2017) and close 6 of discovery (at the time, March 2, 2017), Plaintiffs did not provide Defendants with any 7 damages disclosures or otherwise supplement or update their discovery responses in any way. 8 Nor did Plaintiffs supplement their improper disclosure of Mr. Gluhaich or properly disclose 9 any expert.

On February 3, 2017, Defendants wrote Plaintiffs, prefacing their letter by 10 51. stating that "as of the date of this letter, we have less than thirty (30) days to complete 11 discovery, less than sixty (60) days to fully-brief and submit dispositive motions to the Court for 12 decision and less than three months until the current trial date." (Exhibit 16 to Defendants' 13 Motion). Defendants wrote this letter to inform Plaintiffs that because of their failure to comply 14 with their obligations, Defendants would not be able to timely complete discovery or submit 15 dispositive motions, all to Defendants' prejudice, and to inform Plaintiffs that their conduct 16 17 necessitated yet another continuance of the trial date. Id.

10

28

1

2

3

4

52. In the letter, Defendants first addressed Plaintiffs' obstinate refusal to comply 18 19 with expert disclosure requirements. Id. Defendants reminded Plaintiffs that Plaintiffs "were indisputably aware of the fact that Plaintiffs' disclosures did not comply with the Nevada Rules 20 of Civil Procedure at the time [they] served the deficient disclosure or immediately thereafter, as 21 demonstrated by [the parties'] December 5, 2016, telephonic conversation." Id. However, 22 despite Defendants having granted Plaintiffs an extension, Plaintiffs had not even attempted to 23 comply with the Nevada Rules of Civil Procedure more than two months after the deadline, 24 25 "without any justification whatsoever." Id.

2653. Defendants further informed Plaintiffs that their "failure to comply with the27Nevada Rules of Civil Procedure in the first instance, or to rectify their failure by providing an

Page 10 of 34

amended disclosure, is severely prejudicing Defendants." Id. With the close of discovery being 1 one month away, "regardless of what Plaintiffs do at this point, this discovery deadline would 2 need to be extended to enable the Defendants to complete discovery and disclose rebuttal 3 4 experts in the time permitted by the rule, the parties' joint case conference report, and the 5 stipulation and order on file with the Court." Id.

54. Defendants also addressed Plaintiffs' continued failure to provide Defendants 6 7 with an NRCP 16.1 damages computation. Id. Defendants stated that it would be "patently prejudicial to Defendants to receive Plaintiffs' damages model within mere days of the close of 8 discovery," and it would be impossible for Defendants' expert to opine on any new damages 9 10 theories under the current discovery deadlines if Plaintiffs were to seek any additional or 11 different types of damages. Id.

- 55. Finally, Defendants requested that Plaintiffs also provide other outstanding 12 discovery, stating that Plaintiffs "have been promising to disclose these documents for more 13 than 10 months, but have yet to do so." Id. 14
- 56. Based on these issues, Defendants asked for a continuance of the trial date so 15 that Plaintiffs could comply with their obligations such that Defendants could receive time to 16 17 prepare their defenses in the timeline entitled to them by the Nevada Rules of Civil Procedure and the parties' agreements. Id. 18
- Plaintiffs agreed to a third trial continuance, and on February 9, 2017, the parties 19 57. signed a stipulation which contained several express recitals and stipulations regarding 20 Plaintiffs' ongoing failure to comply with discovery obligations. 21
- 22

24

25

26

27

28

First, Plaintiffs agreed that they never properly disclosed Mr. Gluhaich and that 58. this conduct had been prejudicial to Defendants: 23

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

> > Page 11 of 34

	5 Because Plaintiffs' disclosure of Mr. Clubsish did				
1	5. Because Plaintiffs' disclosure of Mr. Gluhaich did not include a summary of the facts and opinions to which the witness is expected to testify as required by NRCP 16.1(a)(2)(B),				
2 3	Defendants have been unable to conduct a meaningful deposition of Mr. Gluhaich or to retain experts to rebut Mr. Gluhaich's opinions, because those opinions remain unknown to Defendants.				
4	6. Following receipt of Plaintiffs' supplemental				
5	disclosure of Mr. Gluhaich, if any, which includes a summary of the facts and opinions to which the witness is expected to testify as required by NRCP $16.1(a)(2)(B)$ , Defendants intend to depose				
6	Mr. Gluhaich and retain experts to rebut his opinions.				
7	10[B]ecause Plaintiffs have not yet provided an				
8	expert disclosure of Mr. Gluhaich that includes a summary of the facts and opinions to which the witness is expected to testify as required by NRCP $16.1(a)(2)(B)$ , Defendants will be unable to				
9 10	complete the deposition of Mr. Gluhaich or to retain and disclose experts to rebut Mr. Gluhaich's opinions within the time currently allowed for discovery.				
11	anowed for discovery.				
12	(February 9, 2017, Stipulation and Order).				
13	59. Second, Plaintiffs stipulated that they had not properly provided their NRCP 16.1				
ľ	damages disclosures:				
14	7. On January 10, 2017, the parties appeared in this				
15	Court for a hearing on Defendants' Motion for Partial Summary Judgment. At the hearing, the parties discussed with the Court Plaintiffs' obligation to provide, pursuant to NRCP 16.1(a)(1)(C),				
16 17	"[a] computation of any category of damages claimed by the disclosing party, making available for inspection and copying as				
18	under Rule 34 the documents or other evidentiary matter, not privileged or protected from disclosure, on which such				
19	computation is based, including materials bearing on the nature and extent of injuries suffered." (January 10, 2017 Hearing Transcript at 18, 42-43 and 61-62). Plaintiffs conceded at the				
20	hearing that they have not yet provided Defendants with a complete damages disclosure pursuant to NRCP 16.1(a)(1)(C),				
21	and the Court ordered Plaintiffs "to serve, within 15 days after the entry of the summary judgment, an updated 16.1 damage				
22	disclosure." Id. at 68.				
23	8. Upon receipt of Plaintiffs' NRCP 16.1 damages disclosure, Defendants intend to have Michelle Salazar				
24	supplement her initial expert report to include any opinions about any new or revised damages claims or calculations submitted by				
25	Plaintiffs, and Defendants may also need to conduct additional fact discovery on any new or revised damages claims or				
26	calculations submitted by Plaintiffs.				
27					
28	Page 12 of 34				
		ł			

1 2 3 4 5 6 7	<ul> <li>9. Discovery in this matter currently is scheduled to close on March 2, 2017, and dispositive motions must be filed and submitted for decision no later than March 31, 2017.</li> <li>10. Because Plaintiffs have not yet provided a complete NRCP 16.1 damages disclosure, Defendants will not be able to complete necessary fact discovery on Plaintiffs' damages, or to disclose an updated expert report of Michelle Salazar within the time currently allowed for discovery</li> <li>10. Plaintiffs stipulated that this Court should enter an order which, in pertinent part,</li> </ul>		
8	requires "Plaintiffs to serve Defendants with an updated initial expert disclosure of Dan		
° 9	Gluhaich that is fully-compliant with NRCP 16.1 and NRCP 26 within thirty (30) days of the		
10	date of the Order approving this Stipulation." <i>Id.</i>		
11	61. Plaintiffs also stipulated to other pertinent deadlines:		
12	3. The deadline for Defendants to serve a		
12 13 14	supplemental expert disclosure of Michelle Salazar providing any opinions about any new or revised damages claims or calculations submitted by Plaintiffs shall be extended until sixty (60) days before the close of discovery		
15 16 17	5. The deadline for Defendants to serve any rebuttal expert disclosures shall be extended until forty-five (45) days after Plaintiffs serve Defendants with an updated initial expert disclosure of Dan Gluhaich that is fully-compliant with NRCP 16.1 and NRCP 26.		
18	Id.		
19	62. The Stipulation also included a certification from counsel that "[u]ndersigned		
20	counsel certifies that their respective clients have been advised that a stipulation for continuance		
21	is to be submitted on their behalf and that the parties have no objection thereto." Id.		
22	63. This Court entered an Order consistent with the stipulation on February 9, 2017.		
23	Id.		
24	64. However, Plaintiffs did nothing as required by the Stipulation since the entry of		
25	this Order or the stipulation of the parties to rectify their failure to meet their outstanding		
26	discovery obligations.		
27			
28	Page 13 of 34		

165. The parties set a trial date of January 29, 2018, meaning that, per the Stipulation2and Order, discovery was set to close on November 15, 2017.

#### This Court's May 30, 2017, Order

66. On May 30, 2017, this Court entered an Order granting Defendants' motion for
partial summary judgment. (Order).

6 67. In pertinent part, this Court stated that "[i]t is further ordered Plaintiffs shall
7 serve, within fifteen (15) days of entry of this order, an updated NRCP 16.1 damage
8 disclosure." *Id.*

9 68. Again, Plaintiffs completely ignored the requirements and obligations imposed
10 by this order. They have failed to both properly disclose Mr. Gluhaich or to provide damages
11 computations, despite the express requirements of the NRCP and this Court's Orders.

12

27

28

3

#### **Plaintiffs' Motions for Summary Judgment**

69. After three years of obstinate refusal to provide Defendants with an NRCP 16.1
damages calculation or to supplement any damages calculations, and after nearly one year of
refusing to comply with the requirements to properly disclose an expert, Plaintiffs filed motions
for summary judgment in which they requested brand new, never-disclosed types, categories,
and amounts of damages with only four weeks remaining in discovery. (Motions for Summary
Judgment).

19 70. Further, their calculations were based upon opinions of Mr. Gluhaich, an expert
20 witness who was never properly disclosed, and who primarily based his opinions on appraisals
21 that were also never disclosed. *Id.*

These Motions were filed with only four weeks remaining in discovery—putting
Defendants in the exact same predicament that they were placed in February of 2017—
Defendants could not engage in the discovery (fact and expert) necessary to adequately respond
to Plaintiffs' brand new information, untimely disclosures, and new requests for relief. (Exhibit
16 to Defendants' Motion; February 9, 2017, Stipulation and Order).

Page 14 of 34

1 72. Plaintiffs' new damages and new expert opinions were all based upon 2 information that was in Plaintiffs' possession throughout this case, meaning that there was no 3 reason that Plaintiffs could not have timely disclosed a computation of their damages and the 4 documents on which such computations are based.

W

5

#### Willard's Motion

6 73. In Willard's Motion, Willard sought more than triple the amount of damages
7 (nearly \$40 million more) than he sought in the complaint and ostensibly throughout this case.

8 74. Willard also had a brand new, different basis for his claimed "rent" damages: the 9 liquidated damages provision in the Lease. Unlike the damages sought in his Complaint, the 10 liquidated damages clause contains a variable—reasonable rental value—that would necessarily 11 require Willard to provide expert opinion to support his request and meet his burden of proof. 12 (Willard Lease; Willard Motion).

13 75. Willard also had a brand new claim for diminution in value damages that would
14 also require Willard to offer expert opinions to meet his burden of proof. (Willard's Motion for
15 Summary Judgment).

- 76. Default interest was a brand new component of Willard's claimed damages. *Id.*
- 77. The property-related damages now had a different purported value and amount.
- 18 || *Id*.

16

17

19 78. Willard's damages were based upon the opinions of Mr. Gluhaich, an
20 undisclosed expert witness, and therefore Defendants did not have the chance to explore Mr.
21 Gluhaich's opinions or rebut them as they are expressly entitled to do under Nevada law. *Id.*

79. Willard and his purported expert witness relied upon appraisals from 2008 and
2014 which were never disclosed in this litigation, despite Willard's NRCP 16.1 and NRCP
26(e) obligations and affirmative discovery requests served by Defendants. *See also* (Exhibit 17
to Defendants' Motion ("Please produce any and all appraisals for the Property from January 1,
2012 through present.")).

28

27

Page 15 of 34

#### Wooley's Motion

1

25

26

27

28

80. Wooley sought nearly double the amount of damages that he sought in his
complaint and ostensibly throughout this case. (Wooley Motion).

4 81. Wooley used different bases for his claimed "rent" damages. Unlike the damages 5 sought in his Complaint, the liquidated damages clause contains a variable-reasonable rental 6 value-that would necessarily require Wooley to introduce an expert opinion to meet his burden 7 of proof, which Defendants would be entitled to rebut under Nevada law. (Id.; Exhibit 19 to 8 Defendants' Motion). Wooley's basis for these damages was also different because Mr. Wooley 9 had testified at his deposition that he had not yet terminated the lease and that it was ongoing, yet termination is a prerequisite to utilizing the liquidated damages formula per the parties' 10 lease. (Exhibit 18 to Defendants' Motion; Exhibit 19 to Defendants' Motion). Thus, Wooley 11 12 was proceeding on an entirely new theory.

13 82. Default interest was also a brand new component of Wooley's claimed damages.
14 (Wooley Motion).

15 83. The property-related damages were based in part upon new damages and
16 documents that were not disclosed to Defendants. *Id.*

17 84. Wooley's damages were based upon the opinions of Mr. Gluhaich, an
18 undisclosed expert, and therefore Defendants did not have the chance to explore Mr. Gluhaich's
19 opinions or rebut them as they were entitled to do. *Id.*; (February 9, 2017, Stipulation and
20 Order).

85. Wooley and his purported expert relied upon an appraisal to establish "value"
that was not previously disclosed in this litigation, despite Wooley's NRCP 16.1 and NRCP
26(e) obligations. (Exhibit 18 to Defendants' Motion (wherein Wooley stated that he had an
appraisal performed when he bought the property, but had not produced that to his lawyer)).

Page 16 of 34

#### **<u>Timing of the Motions</u>**

1

86. At this point in discovery, Defendants had obviously only been able to prepare
defenses to the claimed bases for damages that Plaintiffs asserted in the Complaint and
Interrogatory responses, not Plaintiffs' brand new, previously undisclosed, bases for damages.

5 87. This timing of these Motions undeniably deprived Defendants of the process that
6 the parties expressly agreed was necessary to rebut any properly-disclosed expert opinions or
7 properly-disclosed NRCP 16.1 damages calculations, as ordered by this Court. (February 9,
8 2017, Stipulation and Order).

88. Indeed, the conduct discussed herein is part of a larger pattern of Plaintiffs to
ignore their discovery obligations. Defendants have been forced to file two motions to compel
and a motion for contempt and sanctions, simply to have Plaintiffs comply with their discovery
obligations.

13 89. Defendants have been required repeatedly to go to extraordinary lengths to
14 attempt to force Plaintiffs to comply with basic obligations and deadlines imposed by the
15 NRCP. (Exhibits 20-23 to Defendants' Motion).

90. This Court has also issued several Orders requiring Plaintiffs to meet their
discovery obligations, but Plaintiffs have blatantly ignored those Orders.

18 91. Plaintiffs never submitted their Motions for Summary Judgment by the
19 December 15, 2017 deadline to submit dispositive motions, or any time thereafter.

20 This Court's December 12, 2017, Hearing

21 92. On November 15, 2017, Defendants filed, *inter alia*, Defendants' Motion for
22 Sanctions.<sup>3</sup>

23 93. Therein, Defendants requested that this Court dismiss Plaintiffs' case with
24 prejudice as a sanction for Plaintiffs' discovery violations.

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

Page 17 of 34

28

1	94. On December 6, 2017, Plaintiffs' filed a Request for a Brief Extension of Time		
2	to Respond to Defendants' Three Pending Motions, and to Extend the Deadline for Submission		
3	of Dispositive Motions.		
4	95. At the Pre-Trial Status Conference on December 12, 2017, this Court granted		
5	Plaintiffs' Request for Extension and directed Plaintiffs to respond no later than Monday,		
6	December 18, 2017, at 10 AM. <sup>4</sup> This Court further directed Defendants to reply no later than		
7	January 8, 2018, and set the parties' Motions for oral argument on January 12, 2018.		
8	96. This Court also admonished Plaintiffs that "you need to know going into these		
9	oppositions, that I'm very seriously considering granting all of it." (December 12, 2017,		
10	transcript).		
11	97. This Court also admonished Plaintiffs that "you know going into this motion for		
12	sanctions that you're-I haven't decided it, but I need to see compelling opposition not to grant		
13	it." <i>Id.</i>		
14	98. However, Plaintiffs did not file any opposition to Defendants' Motions by		
15	December 18 or any time thereafter, nor did Plaintiffs request any further extension. In fact, this		
16	Court and Defendants' counsel have not heard anything from Plaintiffs or their counsel since		
17	the December 12, 2017, hearing.		
18	99. Defendants filed a notice of non-opposition to their Motions and request for		
19	submission of their Motions on December 18.		
20	CONCLUSIONS OF LAW		
21	Legal standard		
22	100. NRCP 16.1(a)(1)(A)(C) provides that "a party must, without awaiting a		
23	discovery request, provide to other parties[a] computation of any category of damages		
24	claimed by the disclosing party, making available for inspection and copying as under Rule 34		
25	<sup>4</sup> This Court inquired as to why Plaintiffs failed to oppose Defendants' Motions. Mr.		
26	Moquin informed this Court that his computer had malfunctioned, and his drafts of Plaintiffs' oppositions could not be recovered. Mr. Moquin further explained that he is a sole practitioner		
27	without access to an IT department.		
28	Page 18 of 34		
1	1		

the documents or other evidentiary matter, not privileged or protected from disclosure, on which
such a computation is based, including materials bearing on the nature and extent of injuries
suffered...." "The use of the word 'must' means that the rule's requirements are mandatory." *Vanguard Piping v. Eighth Jud. Dist. Ct.*, 129 Nev. \_\_\_\_, 309 P.3d 1017, 1020 (2013)
(discussing the NRCP 16.1(a)(1)(D) requirements).

Further, "the rule requires a computation supported by documents.... A plaintiff 6 101. 7 is required to provide its assessment of damages in its initial disclosure in light of the information currently available to it in sufficient detail so as to enable each defendant to 8 9 understand the contours of its potential exposure and make informed decisions as to settlement 10 and discovery." 10 Fed. Proc., L. Ed. § 26:44 (discussing FRCP 26); see generally Vanguard Piping, 129 Nev. at , 309 P.3d at 1020 ("Because of the similarity in the language, federal 11 cases interpreting [the FRCP corollary to NRCP 16.1(A)(1)(D)] are strong persuasive 12 13 authority."). Indeed, it is the plaintiff's burden to prove damages, see generally Gibellini v. Klindt, 110 Nev. 1201, 1206, 885 P.2d 540, 543-44 (1994) ("The party seeking damages has the 14 15 burden of proving the fact that he was damaged and the amount thereof."), and "the plaintiff cannot shift to the defendant the burden of attempting to determine the amount of the plaintiff's 16 damages." 10 Fed. Proc., L. Ed. § 26:44. 17

18 102. Also pertinent, NRCP 16.1(a)(2)(B) requires that, with regard to a non-retained 19 expert witness, a party must disclose, *inter alia*, a summary of the facts and opinions to which 20 the witness is expected to testify. References to broad categories as to what the expert will 21 testify are insufficient. *See Jones v. Colorado Cas. Ins. Co.*, 2015 WL 6123125, at \*3 (D. Ariz. 22 2015).

23

24

25

26

27

28

103. Further, NRCP 26(e) requires that:

A party who has made a disclosure under Rule 16.1 or 16.2 or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired, if ordered by the court or in the following circumstances:

Page 19 of 34

<ul> <li>(1) A party is under a duty to supplement at appropriate intervals its disclosures under Rule 16.1(a) or 16.2(a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under Rule 16.1(a)(2)(3) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 16.1(a)(3) are due.</li> <li>(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production or request for radmission, if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.</li> <li>104. Failure to comply with NRCP 16.1's requirements shall result in sanctions. Pursuant to NRCP 16.1(g)(3):</li> <li>If an attorney fails to reasonably comply with any provision in [NRCP 16.1], or if an attorney or a party fails to comply with a or upon its own initiative, shall impose upon a party or a party's attorney, or both, appropriate sanctions in regard to the failure(s) as as are just, including the following:</li> <li>(A) Any of the sanctions available pursuant to Rule 37(b)(2) and Rule 37(f);</li> <li>(B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).</li> <li>(Emphases added).</li> <li>105. In turn, NRCP 37(b)(2) provides that a court may make: "(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from</li></ul>				
<ul> <li>learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under Rule 16.1(a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 16.1(a)(3) are due.</li> <li>(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production or request for admission, if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.</li> <li>104. Failure to comply with NRCP 16.1's requirements shall result in sanctions. Pursuant to NRCP 16.1(e)(3):</li> <li>117 If an attorney fails to reasonably comply with <b>any</b> provision in [NRCP 16.1], or if an attorney or a party fails to comply with an order entered pursuant to [NRCP 16.1(d)], the court, upon motion or upon its own initiative, shall impose upon a party or a party's attorney, or both, appropriate sanctions in regard to the failure(s) as are just, including the following:</li> <li>(A) Any of the sanctions available pursuant to Rule 37(b)(2) and Rule 37(b);</li> <li>(B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).</li> <li>(Emphases added).</li> <li>105. In turn, NRCP 37(b)(2) provides that a court may make: "(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting tha party from introducing designated matters into evidence", or "(C) stri</li></ul>	1			
<ul> <li>information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under Rule 16.1(a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 16.1(a)(3) are due.</li> <li>(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production or request for admission, if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.</li> <li>104. Failure to comply with NRCP 16.1's requirements shall result in sanctions.</li> <li>Pursuant to NRCP 16.1(e)(3):</li> <li>If an attorney fails to reasonably comply with <b>any</b> provision in [NRCP 16.1], or if an attorney or a party fails to comply with an order entered pursuant to [NRCP 16.1(d)], the court, upon motion or upon its own initiative, shall impose upon a party or a party's attorney, or both, appropriate sanctions in regard to the failure(s) as are just, including the following:</li> <li>(A) Any of the sanctions available pursuant to Rule 37(b)(2) and Rule 37(b);</li> <li>(B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).</li> <li>(Emphases added).</li> <li>105. In turn, NRCP 37(b)(2) provides that a court may make: "(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence", or "(C) striking out pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a judgment</li></ul>	2		learns that in some material respect the information disclosed is	
<ul> <li>testimony of an expert from whom a report is required under Rule 16.1(a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 16.1(a)(3) are due.</li> <li>(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production or request for admission, if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.</li> <li>104. Failure to comply with NRCP 16.1's requirements shall result in sanctions.</li> <li>Pursuant to NRCP 16.1(e)(3):</li> <li>If an attorney fails to reasonably comply with any provision in [NRCP 16.1], or if an attorney or a party fails to comply with an order entered pursuant to [NRCP 16.1(d)], the court, upon motion or upon its own initiative, shall impose upon a party or a party's attorney, or both, appropriate sanctions in regard to the failure(s) as are just, including the following:</li> <li>(A) Any of the sanctions available pursuant to Rule 37(b)(2) and Rule 37(b);</li> <li>(B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).</li> <li>(Emphases added).</li> <li>105. In turn, NRCP 37(b)(2) provides that a court may make: "(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence", or "(C) striking out pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."</li> </ul>	3		information has not otherwise been made known to the other	
5       the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 16.1(a)(3) are due.         7       (2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production or request for admission, if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.         10       respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.         12       104. Failure to comply with NRCP 16.1's requirements shall result in sanctions.         13       Pursuant to NRCP 16.1(e)(3):         14       If an attorney fails to reasonably comply with <b>any</b> provision in [NRCP 16.1], or if an attorney or a party fails to comply with an order entered pursuant to [NRCP 16.1(d)], the court, upon motion or upon its own initiative, shall impose upon a party or a party's attorney, or both, appropriate sanctions in regard to the failure(s) as are just, including the following:         18       (A) Any of the sanctions available pursuant to Rule 37(b)(2) and Rule 37(f);         20       (B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).         21       (Emphases added).       105. In turn, NRCP 37(b)(2) provides that a court may ma	4	. *	testimony of an expert from whom a report is required under Rule	
shall be disclosed by the time the party's disclosures under Rule         16.1(a)(3) are due.         8       (2) A party is under a duty seasonably to amend a prior         9       admission, if the party learns that the response is in some material         10       respect incomplete or incorrect and if the additional or corrective         11       information has not otherwise been made known to the other         12       104. Failure to comply with NRCP 16.1's requirements shall result in sanctions.         13       Pursuant to NRCP 16.1(e)(3):         14       If an attorney fails to reasonably comply with <b>any</b> provision in         15       Order entered pursuant to [NRCP 16.1(d)], the court, upon motion         16       order entered pursuant to [NRCP 16.1(d)], the court, upon motion         17       as are just, including the following:         18       (A) Any of the sanctions available pursuant to Rule 37(b)(2) and         19       (B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).         22       (Emphases added).       105. In turn, NRCP 37(b)(2) provides that a court may make: "(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence", or "(C) striking out pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or re	5		the report and to information provided through a deposition of the	
<ul> <li>(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production or request for admission, if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.</li> <li>104. Failure to comply with NRCP 16.1's requirements shall result in sanctions.</li> <li>Pursuant to NRCP 16.1(e)(3):</li> <li>If an attorney fails to reasonably comply with any provision in [NRCP 16.1], or if an attorney or a party fails to comply with an order entered pursuant to [NRCP 16.1(d)], the court, upon motion or upon its own initiative, shall impose upon a party or a party's attorney, or both, appropriate sanctions in regard to the failure(s) as are just, including the following: <ul> <li>(A) Any of the sanctions available pursuant to Rule 37(b)(2) and Rule 37(1);</li> <li>(B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).</li> </ul> </li> <li>(Emphases added). <ul> <li>105. In turn, NRCP 37(b)(2) provides that a court may make: "(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence", or "(C) striking out pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."</li> </ul></li></ul>			shall be disclosed by the time the party's disclosures under Rule	
<ul> <li>response to an interrogatory, request for production or request for admission, if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.</li> <li>104. Failure to comply with NRCP 16.1's requirements shall result in sanctions.</li> <li>Pursuant to NRCP 16.1(e)(3):</li> <li>If an attorney fails to reasonably comply with any provision in [NRCP 16.1], or if an attorney or a party fails to comply with an order entered pursuant to [NRCP 16.1(d)], the court, upon motion or upon its own initiative, shall impose upon a party or a party's attorney, or both, appropriate sanctions in regard to the failure(s) as are just, including the following:</li> <li>(A) Any of the sanctions available pursuant to Rule 37(b)(2) and Rule 37(f);</li> <li>(B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).</li> <li>(Emphases added).</li> <li>105. In turn, NRCP 37(b)(2) provides that a court may make: "(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence", or "(C) striking out pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."</li> </ul>	7		16.1(a)(3) are due.	
<ul> <li>admission, if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.</li> <li>104. Failure to comply with NRCP 16.1's requirements shall result in sanctions.</li> <li>Pursuant to NRCP 16.1(e)(3):</li> <li>If an attorney fails to reasonably comply with any provision in [NRCP 16.1], or if an attorney or a party fails to comply with an order entered pursuant to [NRCP 16.1(d)], the court, upon motion or upon its own initiative, shall impose upon a party or a party's attorney, or both, appropriate sanctions in regard to the failure(s) as are just, including the following:</li> <li>(A) Any of the sanctions available pursuant to Rule 37(b)(2) and Rule 37(f);</li> <li>(B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).</li> <li>(Emphases added).</li> <li>105. In turn, NRCP 37(b)(2) provides that a court may make: "(B) an order refusing that party from introducing designated matters into evidence", or "(C) striking out pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."</li> </ul>	8			
10       information has not otherwise been made known to the other parties during the discovery process or in writing.         11       104. Failure to comply with NRCP 16.1's requirements shall result in sanctions.         13       Pursuant to NRCP 16.1(e)(3):         14       If an attorney fails to reasonably comply with <b>any</b> provision in [NRCP 16.1], or if an attorney or a party fails to comply with an order entered pursuant to [NRCP 16.1(d)], the court, upon motion or upon its own initiative, <b>shall</b> impose upon a party or a party's attorney, or both, appropriate sanctions in regard to the failure(s) as are just, including the following: <ul> <li>(A) Any of the sanctions available pursuant to Rule 37(b)(2) and Rule 37(f);</li> <li>(B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).</li> <li>(Emphases added).</li> <li>105. In turn, NRCP 37(b)(2) provides that a court may make: "(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence", or "(C) striking out pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."</li></ul>	9		admission, if the party learns that the response is in some material	
<ul> <li>12</li> <li>104. Failure to comply with NRCP 16.1's requirements shall result in sanctions.</li> <li>Pursuant to NRCP 16.1(e)(3):</li> <li>14</li> <li>15</li> <li>16 an attorney fails to reasonably comply with any provision in [NRCP 16.1], or if an attorney or a party fails to comply with an order entered pursuant to [NRCP 16.1(d)], the court, upon motion or upon its own initiative, shall impose upon a party or a party's attorney, or both, appropriate sanctions in regard to the failure(s) as are just, including the following:</li> <li>(A) Any of the sanctions available pursuant to Rule 37(b)(2) and Rule 37(f);</li> <li>(B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).</li> <li>(Emphases added).</li> <li>105. In turn, NRCP 37(b)(2) provides that a court may make: "(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence", or "(C) striking out pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."</li> </ul>	10		information has not otherwise been made known to the other	
<ul> <li>104. Failure to comply with NRCP 16.1's requirements shall result in sanctions.</li> <li>Pursuant to NRCP 16.1(e)(3):</li> <li>If an attorney fails to reasonably comply with any provision in [NRCP 16.1], or if an attorney or a party fails to comply with an order entered pursuant to [NRCP 16.1(d)], the court, upon motion or upon its own initiative, shall impose upon a party or a party's attorney, or both, appropriate sanctions in regard to the failure(s) as are just, including the following:</li> <li>(A) Any of the sanctions available pursuant to Rule 37(b)(2) and Rule 37(f);</li> <li>(B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).</li> <li>(Emphases added).</li> <li>105. In turn, NRCP 37(b)(2) provides that a court may make: "(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence", or "(C) striking out pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."</li> </ul>	11		parties during the discovery process or in writing.	
<ul> <li>Pursuant to NRCP 16.1(e)(3):</li> <li>If an attorney fails to reasonably comply with any provision in [NRCP 16.1], or if an attorney or a party fails to comply with an order entered pursuant to [NRCP 16.1(d)], the court, upon motion or upon its own initiative, shall impose upon a party or a party's attorney, or both, appropriate sanctions in regard to the failure(s) as are just, including the following:</li> <li>(A) Any of the sanctions available pursuant to Rule 37(b)(2) and Rule 37(f);</li> <li>(B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).</li> <li>(Emphases added).</li> <li>105. In turn, NRCP 37(b)(2) provides that a court may make: "(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence", or "(C) striking out pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."</li> </ul>		104.	Failure to comply with NRCP 16.1's requirements shall result in sanctions.	
<ul> <li>15</li> <li>16</li> <li>17</li> <li>18</li> <li>(A) Any of the sanctions available pursuant to Rule 37(b)(2) and Rule 37(f);</li> <li>20</li> <li>(B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).</li> <li>(Emphases added).</li> <li>105. In turn, NRCP 37(b)(2) provides that a court may make: "(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence", or "(C) striking out pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."</li> </ul>	13	Pursuant to NRCP 16.1(e)(3):		
13       order entered pursuant to [NRCP 16.1(d)], the court, upon motion         16       or upon its own initiative, shall impose upon a party or a party's attorney, or both, appropriate sanctions in regard to the failure(s)         17       as are just, including the following:         18       (A) Any of the sanctions available pursuant to Rule 37(b)(2) and Rule 37(f);         20       (B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).         21       (Emphases added).         23       105. In turn, NRCP 37(b)(2) provides that a court may make: "(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence", or "(C) striking out pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."	14			
17attorney, or both, appropriate sanctions in regard to the failure(s) as are just, including the following:18(A) Any of the sanctions available pursuant to Rule 37(b)(2) and Rule 37(f);20(B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).21(Emphases added).23105. In turn, NRCP 37(b)(2) provides that a court may make: "(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence", or "(C) striking out pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."	15		order entered pursuant to [NRCP 16.1(d)], the court, upon motion	
<ul> <li>(A) Any of the sanctions available pursuant to Rule 37(b)(2) and Rule 37(f);</li> <li>(B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).</li> <li>(Emphases added).</li> <li>105. In turn, NRCP 37(b)(2) provides that a court may make: "(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence", or "(C) striking out pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."</li> </ul>				
<ul> <li>(A) Any of the saliculus available pursuant to Rule 37(0)(2) and Rule 37(f);</li> <li>(B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).</li> <li>(Emphases added).</li> <li>105. In turn, NRCP 37(b)(2) provides that a court may make: "(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence", or "(C) striking out pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."</li> </ul>			as are just, including the following:	
<ul> <li>(B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).</li> <li>(Emphases added).</li> <li>105. In turn, NRCP 37(b)(2) provides that a court may make: "(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence", or "(C) striking out pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."</li> </ul>				
<ul> <li>tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).</li> <li>(Emphases added).</li> <li>105. In turn, NRCP 37(b)(2) provides that a court may make: "(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence", or "(C) striking out pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."</li> </ul>				
<ul> <li>(Emphases added).</li> <li>105. In turn, NRCP 37(b)(2) provides that a court may make: "(B) an order refusing</li> <li>to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting</li> <li>that party from introducing designated matters into evidence", or "(C) striking out pleadings or</li> <li>parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a</li> <li>judgment by default against the disobedient party."</li> </ul>			tangible thing which should have been disclosed, produced,	
<ul> <li>(Emphases added).</li> <li>105. In turn, NRCP 37(b)(2) provides that a court may make: "(B) an order refusing</li> <li>to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting</li> <li>that party from introducing designated matters into evidence", or "(C) striking out pleadings or</li> <li>parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a</li> <li>judgment by default against the disobedient party."</li> </ul>		-	exhibited, or exchanged pursuant to Rule 16.1(a).	
<ul> <li>In turn, NRCP 37(b)(2) provides that a court may make: "(B) an order refusing</li> <li>to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting</li> <li>that party from introducing designated matters into evidence", or "(C) striking out pleadings or</li> <li>parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a</li> <li>judgment by default against the disobedient party."</li> </ul>		(Emphases added).		
<ul> <li>to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting</li> <li>that party from introducing designated matters into evidence", or "(C) striking out pleadings or</li> <li>parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a</li> <li>judgment by default against the disobedient party."</li> </ul>		105.	In turn, NRCP 37(b)(2) provides that a court may make: "(B) an order refusing	
<ul> <li>that party from introducing designated matters into evidence", or "(C) striking out pleadings or</li> <li>parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a</li> <li>judgment by default against the disobedient party."</li> </ul>		to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting		
<ul> <li>27</li> <li>27</li> <li>28</li> <li>28</li> <li>28</li> <li>28</li> </ul>		that party from introducing designated matters into evidence", or "(C) striking out pleadings or		
28 Judgment by default against the disobedient party."		parts thereof,	, or dismissing the action or proceeding or any part thereof, or rendering a	
28 Page 20 of 34		judgment by	default against the disobedient party."	
	28		Page 20 of 34	

1	106. Further, NRCP 37(c)(1) provides that "[a] party that without substantial		
2	justification fails to disclose information required by Rule 16.1, 16.2, or 26(e)(1), or to amend a		
3	prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless,		
4	permitted to use as evidence at a trialany witness or information not so disclosed." NRCP		
5	37(c)(1) also provides that "[i]n addition to or in lieu of this sanction, the court, on motion and		
6	after affording an opportunity to be heard, may impose other appropriate sanctions. In addition		
7	to requiring payment of reasonable expenses, including attorney's fees, caused by the failure,		
8	these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and		
9	(C)."		
10	107. Similarly, pursuant to NRCP 41(b), "[f]or failure of the plaintiff to comply with		
11	[the Nevada Rules of Civil Procedure] or any order of court, a defendant may move for		
12	dismissal of an action or of any claim against the defendant."		
13	108. In addition to the rule-based authority discussed herein, the Nevada Supreme		
14	Court has also recognized that "the court has inherent power to enter defaults and dismiss		
15	actions for abusive litigation practices." Blanco v. Blanco, 129 Nev,, 311 P.3d 1170,		
16	1174 (2013).		
17	109. The Nevada Supreme Court has also expressly held that "the factual nature of the		
18	underlying case is not an appropriate measure to evaluate whether a [case] should be dismissed		
19	for violations of court rules and/or orders." Huckabay Props. v. NC Auto Parts, 130 Nev,		
20	, 322 P.3d 429, 433 (2014) (discussing this in the context of dismissing an appeal, and also		
21	disapproving of prior case law "to the extent it indicates that a fact-based assessment of the		
22	underlying civil action should be made before determining whether to dismiss an appeal on		
23	procedural grounds.").		
24	110. Finally, pursuant to DCR 13(3), the failure of an opposing party to serve and file		
25	a written opposition may be construed as an admission that the motion is meritorious and		
26	consent to granting the same.		
27			
28	Page 21 of 34		
	1 age 21 01 JT		

1

#### Plaintiffs' Conduct Demands Dismissal with Prejudice

When considering the issuance of dismissal with prejudice as a sanction, the 2 111. 3 Nevada Supreme Court has held that "[p]rocedural due process considerations require that such 4 case-concluding discovery sanctions be just and that they relate to the claims at issue in the violated discovery order." Blanco, 129 Nev. at \_\_\_\_, 311 P.3d at 1174. 5 Further, the Court must consider pertinent factors, including the extent of the 6 112. 7 offending party's willfulness, whether the non-offending party would be prejudiced by imposition of a lesser sanction, whether dismissal is too severe for the particular discovery 8 9 abuse, the feasibility and fairness of less severe sanctions, the policy favoring adjudication of 10 cases on their merits, and the need for deterring similar abusive conduct. Id. Dismissal should 11 only occur in the most extreme of cases. Id. 12 113. However, district courts are not required to consider every factor, so long as the district court's analysis is thoughtfully performed. See generally Young v. Johnny Ribeiro Bldg., 13 14 Inc., 106 Nev. 88, 93, 787 P.2d 777, 780 (1990). Here, the factors readily demonstrate that dismissal with prejudice is warranted, 15 114. and that there is no due process violation in so doing. 16 Plaintiffs did not oppose Defendants' motion or any of the points discussed therein. 17 It must be emphasized as a threshold matter that Plaintiffs never opposed 18 115. Defendants' Motion. 19 Under DCR 13(3), the failure of an opposing party to serve and file a written 20 116. opposition may be construed as an admission that the motion is meritorious and consent to 21 granting the same. 22 Thus, this Court finds that Plaintiffs' failure to file an opposition constitutes both 23 117. an admission that the Motion is meritorious and Plaintiffs' consent to granting Defendants' 24 25 Motion. However, separate from this consideration, good cause exists to dismiss this 118. 26 27 case. 28 Page 22 of 34

1 2

3

4

### Case-concluding discovery sanctions are just and relate to the claims at issue

119. Plaintiffs' failure to provide damages disclosures are so central to this litigation, and to Defendants' rights and ability to defend this case, that dismissal of the entire case is necessary.

120. Plaintiffs have also completely failed to properly disclose an expert witness,
waiting instead until the virtual end of discovery to attempt to utilize an undisclosed expert
witness to support their Motions for Summary Judgment without complying with the
requirements of the Nevada Rules of Civil Procedure, when it was too late for Defendants to
disclose rebuttal expert testimony or otherwise defend against Plaintiffs' claims for damages.

10 121. Plaintiffs have also ignored or failed to comply with multiple separate discovery 11 obligations throughout this case, forcing Defendants to repeatedly file motions to compel, and 12 necessitating that the trial and discovery deadlines be extended on three occasions to 13 accommodate for Plaintiffs' continued noncompliance.

14 122. Further, Plaintiffs have ignored this Court's express admonition to Plaintiffs that
15 this Court was "seriously considering" dismissal and that Plaintiff's Oppositions would need to
16 be "compelling." Plaintiffs did not even attempt to file oppositions, even after this warning.

17 123. Indeed, Plaintiffs have exhibited complete disregard for this Court's Orders,
18 deadlines imposed by this Court, and the judicial process in general.

19

27

28

#### Plaintiffs' violations are willful

20 124. Plaintiffs' violations are willful. In addition to the plain language of NRCP 16.1,
21 Plaintiffs have been on direct notice for three years that they have not complied with NRCP
22 16.1(a)(1)(C), yet have not attempted to rectify their wrongdoing. *Supra*.

125. This Court has ordered Plaintiffs to provide their damages disclosures, but
Plaintiffs blatantly disregarded these orders. (January 10, 2017, Transcript at 68; May 30, 2017,
Order); see also Perez v. Siragusa, 2008 WL 2704402, at \*4 (E.D.N.Y. July 3, 2008) (dismissal
under FRCP 37 and 41, noting that "[n]on-compliance with discovery orders will be deemed

Page 23 of 34

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

3

4

5

6

126. Plaintiffs acknowledged in two stipulations that they have not complied with NRCP 16.1, yet have not even attempted to do so, despite promising and being ordered to comply. *See, e.g.*, (January 10, 2017, Transcript (for Willard); February 9, 2017, Stipulation and Order; May 2, 2016, Stipulation and Order).

Further, Wooley misrepresented to this Court that he had provided complete and up-to-date disclosures to Defendants when he had not. (January 10, 2017, Transcript). If anything, Wooley had only provided a spreadsheet that was, per Wooley's own words, for use in "settlement negotiations." *See* NRS 48.105(1). Defendants have informed Wooley repeatedly, including in open court, that this document provided for settlement negotiations does not equate to a disclosure, and Plaintiffs have never authorized Defendants to use that spreadsheet for litigation purposes in any manner. *See, e.g.*, (January 10, 2017, Transcript 62).

14 128. Plaintiffs' bad faith motives in waiting to ambush Defendants are also plainly 15 evidenced by their eleventh-hour Motions requesting brand-new, different, categories and 16 amounts of damages for double and triple what was originally sought, while such alleged 17 damages were based upon information that has been in Plaintiffs' possession for the entire 18 pendency of this case. Plaintiffs' strategic decision to only disclose their damages in their 19 Motions for Summary Judgment prejudiced Defendants by depriving them of the opportunity to 20 defend against damages that had never been previously disclosed.

129. Plaintiffs' failure to properly disclose an expert witness is similarly willful.
Plaintiffs acknowledged immediately after the initial purported "disclosure" that the disclosure
did not comply with Nevada law. *See* (December 5, 2016, email (three days after disclosures
due) (wherein Plaintiffs' counsel stated that "[Defendants] agreed to allow Plaintiffs to provide
an amended witness disclosure by mid-afternoon Thursday, December 8, 2016 to include the
facts and conclusions to which Mr. Gluhaich will be testifying...."), Exhibit 12 to Defendants'
Motion; Exhibits 14 and to Defendants' Motion).

28

Page 24 of 34

1 130. Plaintiffs agreed that they failed to comply with NRCP 16.1(a)(2)(B) and agreed
 2 to the entry of a Court order requiring them to properly disclose an expert by March 11, 2017.
 3 (February 9, 2017, Stipulation and Order).

4 131. Yet, Plaintiffs did not even attempt to provide a proper disclosure of Mr.
5 Gluhaich at any time in 2017.

132. Then, on October 17 and 18, 2017, less than four weeks prior to the close of
discovery, Plaintiffs filed Motions for Summary Judgment, referring to Mr. Gluhaich as their
"designated expert," (Willard Motion at 19-20; Wooley Motion at 12-13), without even
acknowledging their noncompliance, much less providing justification for it.

10 133. Further, even a cursory review of Mr. Gluhaich's Affidavits in support of the 11 Motions demonstrates that the purported facts and opinions that he provided could have been 12 timely disclosed in December of 2016, further demonstrating that there was no justification 13 other than willful noncompliance. (Gluhaich Affidavit re: Willard (relying exclusively on events 14 that occurred in 2014 or earlier); Gluhaich Affidavit re: Wooley (relying exclusively on events 15 that occurred in 2015 or earlier)).

16 134. These Motions and Mr. Gluhaich's Affidavits were filed at a point in the case
17 where it was too late for Defendants to properly explore or rebut Mr. Gluhaich's conclusions
18 and the bases therefor, a fact that Plaintiffs acknowledged in February with approximately four
19 weeks left in discovery. (February 9, 2017, Stipulation and Order).

20 135. In addition, it is clear that Plaintiffs' failure to disclose the appraisals upon which
21 many of their calculations were based was also willful.

136. With respect to Willard, Willard relies upon an appraisal from 2008 to determine
the purported "original" fair market value of the property. (Willard Motion at 19). According to
Willard, this appraisal was "commissioned in 2008 by the Willard Plaintiffs." *Id.* Indeed, Mr.
Gluhaich avers that "in September 2008 Willard commissioned an appraisal of the Virginia
Property...from CB Richard Ellis..., a copy of which was sent directly to me by Jason
Buckholz of CBRE on October 17, 2008." (Gluhaich Aff. re: Willard ¶5). Willard also relies

28

Page 25 of 34

1 upon, inter alia, an appraisal from 2014 to establish the purported "fair rental value" of the 2 property in 2014 for purposes of his newly-sought liquidated damages relief, and the purported 3 "post-breach" value of the property in 2014. Id. at 19-20. Mr. Gluhaich averred that "The 2014 4 Appraisal was issued on February 11, 2014," and he "received [this appraisal] directly from Rob Cashell." (Gluhaich Aff. re: Willard ¶15). Mr. Gluhaich's purported opinions were heavily 5 based on these appraisals. Id. ¶9 ("In my opinion, the 2008 Appraisal presents a thorough, 6 7 detailed, professional, and highly compelling analysis of the market value of the Virginia Property as leased."); ¶16 (relying on the appraisal to opine on the purported "as-is" fair market 8 9 value); ¶17 (relying upon the appraisal to establish the purported fair market rental value). 10 However, these appraisals were never disclosed to Defendants at any time before the present 11 motion. (Decl. of B. Irvine, Exhibit 1 to Willard Opposition). This is despite the fact that Defendants requested Willard to "produce any and all appraisals for the Property from January 12 1, 2012, through present," (Exhibit 17 to Defendants' Motion), and that Willard had an 13 obligation to disclose this material pursuant to NRCP 16.1(a)(1)(C) and NRCP 26. Given that 14 Willard freely admits that these appraisals were commissioned prior to the commencement of 15 the case, and were in his possession, this is clearly willful omission. 16

17 137. With respect to Wooley, Wooley relies upon an appraisal that the Wooley 18 Plaintiffs commissioned in August 2006. (Wooley Motion at 2). This appraisal is the basis for Gluhaich's opinion as to the "original" fair market value in Wooley's diminution in value claim. 19 (Gluhaich Aff. Re: Wooley ("In my opinion, the 2006 Appraisal presents a thorough, detailed, 20 professional, and highly compelling analysis of the market value of the Highway 50 Property as 21 leased.")). Defendants even asked about the appraisal during Wooley's deposition. (Exhibit 18 22 to Defendants' Motion at 125 (wherein Wooley stated that he had not given this appraisal to his 23 lawyer)). Yet, this appraisal was never disclosed to Defendants until Wooley filed his Motion, 24 which is a willful omission and is in complete derogation of Wooley's NRCP 16.1 and NRCP 25 26 obligations. 26

27 28

Page 26 of 34

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

6

7

139. Finally, as noted, this is part of a larger pattern and practice by Plaintiffs to disregard their discovery obligations at every point in this litigation. (Motions to Compel).

8 140. Indeed, Plaintiffs completely failed to even respond to Defendants' Motion for
9 Sanctions, even when this Court gave them an additional extension and expressly warned them,
10 in open court, that "you need to know going into these oppositions, that I'm very seriously
11 considering granting all of it," and "you know going into this motion for sanctions that you're—
12 I haven't decided it, but I need to see compelling opposition not to grant it." (December 12,
13 2017, transcript).

14

15

28

#### Defendants have been prejudiced by Plaintiffs' conduct and would be prejudiced by the imposition of a lesser sanction

Plaintiffs' repeated and willful delay in providing necessary information to 141. 16 Defendants has necessarily prejudiced Defendants. Cf. generally Foster v. Dingwall, 126 Nev. 17 56, 66, 227 P.3d 1042, 1049 (2010) (concluding that "appellants' continued discovery abuses 18 and failure to comply with the district court's first sanction order evidences their willful and 19 recalcitrant disregard of the judicial process, which presumably prejudiced [the non-offending 20 party"); Hamlett v. Reynolds, 114 Nev. 863, 865, 963 P.2d 457, 458 (1998) (cited in Foster as 21 "upholding the district court's strike order where the defaulting party's 'constant failure to 22 follow [the court's] orders was unexplained and unwarranted""); In re Phenylpropanolamine 23 (PPA) Products, 460 F.3d 1217, 1236 (9th Cir.2006) (cited in Foster as "holding that, with 24 respect to discovery abuses, '[p]rejudice from unreasonable delay is presumed' and failure to 25 comply with court orders mandating discovery 'is sufficient prejudice'"); Perez, 2008 WL 26 2704402 at \*6 ("The behavior exhibited by plaintiffs has prejudiced defendants by delaying the 27

Page 27 of 34

1 resolution of the claims and increasing the costs of litigation. The parties have not made any 2 progress with discovery or moved closer to trial readiness. This factor...weighs in favor of 3 dismissing the action."). 4 142. In fact, this is Plaintiffs' second case against Defendants based on the same set of facts. 5 6 Plaintiffs attempted to prosecute this case against Defendants in California, 143. which was dismissed for a lack of personal jurisdiction. 7 144. Defendants are entitled to resolution, not to Plaintiffs languidly holding 8 9 Defendants in litigation while simultaneously failing to meet their obligations under the NRCP 10 to provide threshold information necessary to defend this case and to comply with the other 11 obligations imposed by the NRCP. 145. Further, Plaintiffs' collective new requests and bases are not harmless additions: 12 they would require Defendants to engage in additional fact discovery, retain direct and rebuttal 13 14 experts, take depositions, re-open the briefing schedule, and again delay the trial for tasks that could, and should, have been accomplished during a discovery period that was already extended 15 three times to account for Plaintiffs' continued noncompliance. 16 Dismissal is not too severe for these discovery abuses, and lesser sanctions are not 17 feasible or fair 18 146. Plaintiffs' damages disclosures are central to this case, and dismissal is not too 19 severe for Plaintiffs' repeated and willful noncompliance with Court orders and with Nevada 20 law. 21 147. The Plaintiffs have been sanctioned for other discovery violations, (Order 22 Granting Motion to Compel), yet remain undeterred, demonstrating that less severe sanctions 23 have had no effect on Plaintiffs' recalcitrant conduct. 24 For example, in the context of granting Defendants' Motion to Compel 148. 25 Discovery Responses, this Court ordered Plaintiffs to pay Defendants' reasonable expenses 26 incurred in making the motion, including attorneys' fees. (July 1, 2015, Order). 27 28 Page 28 of 34

1 149. Not only have Plaintiffs not ever paid these expenses, but it is incontrovertible 2 that this Court's imposition of monetary sanctions on Plaintiffs in 2015 had absolutely no 3 deterrent effect on Plaintiffs' conduct, as Plaintiffs continued to commit discovery violations 4 and continued to violate and ignore this Court's orders well after the issuance of the July 1, 5 2015, Order, completely undeterred by the imposition of monetary sanctions.

6 150. Further, Plaintiffs' conduct has already caused three continuances of the trial
7 date, all to accommodate for Plaintiffs' continued disregard for Nevada discovery procedure.
8 (Stipulations and Orders).

9 151. Given that this Court has already issued lesser sanctions, ordered continuances,
and given Plaintiffs repeated admonitions about complying with deadlines and their NRCP
obligations, all to no avail, it is clear that lesser sanctions have had no effect on Plaintiffs'
conduct, and the issuance of lesser sanctions would only serve to encourage Plaintiffs'
misconduct.

14 152. The fact that this Court granted Plaintiffs an additional extension to oppose 15 Defendants' Motions, including their Motion for Sanctions, and Plaintiffs failed to do so 16 without any excuse whatsoever further demonstrates that this Court's orders, and any lesser 17 sanctions, have no effect on Plaintiffs' conduct. Given Plaintiffs' repeated failure to heed the 18 court's warnings in the past, issuing additional warnings would be futile.

19 153. Nor would a less severe sanction be fair to Defendants, who have been
20 continually prejudiced by Plaintiffs' willful disregard of their obligations despite their continued
21 efforts to work with Plaintiffs and provide extensions to Plaintiffs.

154. Additionally, it must be noted that the Nevada Supreme Court has noted that "a
party cannot seek to avoid a dismissal based on arguments that his or her attorney's acts or
omissions led to the dismissal." *Huckabay Props v. NC Auto Parts*, 130 Nev. \_\_\_\_\_, 322
P.3d 429, 432 (2014) (also discussing that "[t]he United States Supreme Court has recognized
that when an action is dismissed for failure to comply with court rules, the litigant cannot seek a
do-over of their dismissed action based on arguments that dismissal is too harsh a penalty for

28

Page 29 of 34

counsel's unexcused conduct, as to do so would offend general agency principles"); see also, 1 e.g., Link v. Wabash R. Co., 370 U.S. 626, 634 n.10 (1962) ("Surely if a criminal defendant may 2 3 be convicted because he did not have the presence of mind to repudiate his attorney's conduct in 4 the course of a trial, a civil plaintiff may be deprived of his claim if he failed to see to it that his 5 lawyer acted with dispatch in the prosecution of his lawsuit. And if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against 6 the attorney in a suit for malpractice. But keeping this suit alive merely because plaintiff should 7 not be penalized for the omissions of his own attorney would be visiting the sins of plaintiff's 8 lawyer upon the defendant."). 9

10

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

11 155. Although there is a policy favoring adjudication on the merits, Plaintiffs 12 themselves have frustrated this policy by refusing to provide Defendants with their damages 13 calculations or proper expert disclosures. Defendants have not frustrated this policy; instead, the 14 record is clear that Defendants, and this Court, have repeatedly attempted to force Plaintiffs to 15 comply with basic discovery obligations, to no avail.

16 156. Indeed, Defendants have served multiple rounds of written discovery upon
17 Plaintiffs, in an attempt to obtain basic information on Plaintiffs' damages; have taken multiple
18 depositions, and have been requesting compliant disclosures throughout this case so that they
19 can address the merits. (Exhibits 24-35 of Defendants' Motion).

20 157. Plaintiffs should not be permitted to hide behind the policy of adjudicating cases
21 on the merits when it is they who have frustrated this policy throughout the litigation.
22 Defendants cannot reach the merits when they must spend the entire case asking Plaintiffs for
23 threshold information and receiving no meaningful responses.

24

25

26

27

158. As the Nevada Supreme Court has held, the policy favoring adjudication on the merits "is not boundless and must be weighed against other policy considerations, including the public's interest in expeditious...resolution, which coincides with the parties' interests in bringing litigation to a final and stable judgment, prejudice to the opposing party; and

28

Page 30 of 34

1	administration concerns, such as the court's need to manage its large and growing docket."		
2	Huckabay Props v. NC Auto Parts, 130 Nev,, 322 P.3d 429, 432 (2014) (also holding,		
3	in the context of a dismissal of an appeal, that "a party cannot rely on the preference for		
4	deciding cases on the merits to the exclusion of all other policy considerations, and when an		
5	appellant fails to adhere to Nevada's appellate procedure.		
6	159. Again, this is Plaintiffs' second time prosecuting this case against Defendants		
7	without undertaking the necessary conduct and requirements imposed by court rules to reach the		
8	merits.		
9	Dismissal is required to deter similar abusive conduct		
10	160. The need to deter similar abusive conduct also weighs heavily in favor of		
11	dismissal.		
12	161. The discovery rules are in place for a reason, and are mandatory.		
13	162. Compliance with this Court's Orders is also mandatory.		
14	163. Yet, Plaintiffs have completely ignored multiple Orders from this Court,		
15	deadlines imposed by this Court, and their obligations pursuant to the Nevada Rules of Civil		
16	Procedure.		
17	164. Plaintiffs have received multiple opportunities and extensions to rectify their		
18	noncompliance, but have not even attempted to do so.		
19	165. If Plaintiffs are permitted to continue prosecuting this case without severe		
20	consequences, then this type of abusive litigation practice will continue to the prejudice of		
21	defending parties and will make a mockery of the Nevada Rules of Civil Procedure and court		
22	orders. Cf. generally Foster, 126 Nev. at 66, 227 P.3d at 1049 (noting that "[i]n light of		
23	appellants' repeated and continued abuses, the policy of adjudicating cases on the merits would		
24	not have been furthered in this case, and the ultimate sanctions were necessary to demonstrate to		
25	future litigants that they are not free to act with wayward disregard of a court's orders."); see		
26	also Langermann v. Prop. & Cas. Ins. Co., 2015 WL 4714512 at *5 (D. Nev. 2015) (failing "to		
27			
28			
	Page 31 of 34		

1	comply with a scheduling order is not harmless, and re-opening discovery after the expiration of		
2	the deadlines only encourages cavalier treatment of deadlines").		
3	166. Plaintiffs' disregard for this Court's orders and docket, Nevada law, and		
4	Defendants' rights to prepare a defense necessitates dismissal.		
5	Dismissal would not violate Plaintiffs' due process rights		
6	167. There is also no issue of due process deprivation upon dismissal.		
7	168. Plaintiffs' response to Defendants' Motions, including Defendants' Motion for		
8	Sanctions, was originally due on December 4, 2017.		
9	169. There is no dispute that Plaintiffs were served with the Motions. (December 12,		
10	2017, transcript).		
11	170. Through extensions granted by Defendants, and ultimately this Court, Plaintiffs		
12	were given until December 18, 2017, to file Oppositions. Id.		
13	171. Defendants were expressly warned that this Court was seriously considering		
14	dismissal, and that Plaintiffs' oppositions needed to be "compelling." Id.		
15	172. However, Plaintiffs did not file any Opposition by that time or any time		
16	thereafter; nor did Plaintiffs request another extension.		
17	173. Thus, Plaintiffs, in voluntarily choosing to not respond to Defendants' Motions,		
18	are not being deprived of any due process. See DCR 13(3); Huckabay, 130 Nev. at, 322		
19	P.3d at 436. No evidentiary hearing was needed. See Nevada Power Co. v. Fluor Illinois, 108		
20	Nev. 638 (1992) ("If a party against whom dismissal may be imposed raises a question of fact		
21	as to any of [the] factors [for dismissal], the court must allow the parties to address the relevant		
22	factors in an evidentiary hearing.").		
23	174. Indeed, this Court held a hearing on December 12, 2017, which was attended by		
24	both of Plaintiffs' counsel. As Plaintiffs have not filed anything with this Court since that		
25	hearing, or otherwise provided any new information, there would be nothing new to discuss at		
26	another hearing. See DCR 13(3).		
27			
28	Page 32 of 34		
	rage 52 or 54		

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

1	CERTIFICATE OF SERVICE
2	certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT;
3	that on the $\underline{i\ell^{n}}$ day of March, 2018, I electronically filed the foregoing with the Clerk of
4	the Court system which will send a notice of electronic filing to the following:
5	BRIAN IRVINE, ESQ.
6	DAVID O'MARA, ESQ.
7	BRIAN MOQUIN, ESQ.
8	JOHN DESMOND, ESQ.
9	ANJALI WEBSTER, ESQ.
10	
11	
12	
13	
14	
15	And, I deposited in the County mailing system for postage and mailing with the
16	United States Postal Service in Reno, Nevada, a true and correct copy of the attached
17	document addressed as follows:
18	
19	
20	Hide Bro
21	fuictor
22	
23	
24	
25	
26	
27	
28	

## EXHIBIT "16"

# EXHIBIT "16"

FILED Electronically CV14-01712 2018-04-16 09:34:29 AM Jacqueline Bryant Clerk of the Court Transaction # 6630162

		Jacqueline Brya Clerk of the Cou
1	2540 DICKINSON WRIGHT	Transaction # 6630
2	JOHN P. DESMOND	
	Nevada Bar No. 5618 BRIAN R. IRVINE	
3	Nevada Bar No. 7758	
4	ANJALI D. WEBSTER Nevada Bar No. 12515	
5	100 West Liberty Street, Suite 940	
_	Reno, NV 89501 Tel: (775) 343-7500	
6	Fax: (775) 786-0131	
7	Email: <u>Jdesmond@dickinsonwright.com</u> Email: Birvine@dickinsonwright.com	
8	Email: Awebster@dickinsonwright.com	
9	Attorney for Defendants	
10	Berry Hinckley Industries, and Jerry Herbst	
11	IN THE SECOND JUDICIAL DISTRIC	Γ COURT OF THE STATE OF NEVADA
12	IN AND FOR THE C	OUNTY OF WASHOE
13	LARRY J. WILLARD, individually and as	 CASE NO. CV14-01712
14	trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT	DEPT. 6
15	CORPORATION, a California corporation;	
16	EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the	
	Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,	
17	Intervivos Revocable Trust 2000,	
18	Plaintiff,	NOTICE OF ENTRY OF ORDER
19	vs.	
20	BERRY-HINCKLEY INDUSTRIES, a Nevada	
	corporation; and JERRY HERBST, an Individual;	
21		
22	Defendants.	
23		
24	BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST,	
25	an individual;	
	Counterclaimants,	
26	vs	
27		
28		
	Page	1 of 4

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

1	CERTIFICATE OF SERVICE		
2 3	I certify that I am an employee of DICKINSON WRIGHT, and that on this date, pursuant		
	to NRCP 5(b); I am serving a true and correct copy of the attached NOTICE OF ENTRY OF		
4 5	ORDER on the parties through the Second Judicial District Court's EFlex filing system to the		
6	following:		
7	Richard D. Williamson, Esq.		
8	Jonathan Joel Tew, Esq. ROBERTSON, JOHNSON, MILLER &		
9	WILLIAMSON 50 West Liberty Street, Suite 600		
10	Reno, Nevada 89501 Attorneys for Plaintiffs/Counterdefendants		
11	DATED this 16th day of April, 2018.		
12	/s/ Mina Reel		
13	An employee of DICKINSON WRIGHT		
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			
27			
28	Page 3 of 4		

EXHIBIT LIST <b>Exhibit Description Page 1 1 1 1 1 1 1 1 1</b> <th></th> <th colspan="4"></th>					
1       Order Granting Defendants/Counterclaimants' Motion to       3         Dismiss Counterclaims, April 13, 2018       3		<u>EXHIBIT LIST</u>			
<sup>1</sup> Exhibit page count is exclusive of exhibit slip sheet.			Pages <sup>1</sup>		
<sup>1</sup> Exhibit page count is exclusive of exhibit slip sheet.	1	Order Granting Defendants/Counterclaimants' Motion to Dismiss Counterclaims, April 13, 2018	3		
• Exhibit page count is exclusive of exhibit slip sheet.					
I       Exhibit page count is exclusive of exhibit slip sheet.					
I       Exhibit page count is exclusive of exhibit slip sheet.					
I       Exhibit page count is exclusive of exhibit slip sheet.					
I       Exhibit page count is exclusive of exhibit slip sheet.					
I       Exhibit page count is exclusive of exhibit slip sheet.					
Image: second					
Image: second					
<sup>1</sup> Exhibit page count is exclusive of exhibit slip sheet.					
<sup>1</sup> Exhibit page count is exclusive of exhibit slip sheet.					
<sup>1</sup> Exhibit page count is exclusive of exhibit slip sheet.					
Image: second					
<sup>1</sup> Exhibit page count is exclusive of exhibit slip sheet.					
Image: state of the state					
<sup>1</sup> Exhibit page count is exclusive of exhibit slip sheet.					
<sup>1</sup> Exhibit page count is exclusive of exhibit slip sheet.					
<sup>1</sup> Exhibit page count is exclusive of exhibit slip sheet.					
$\frac{1}{1}$ Exhibit page count is exclusive of exhibit slip sheet.					
<sup>1</sup> Exhibit page count is exclusive of exhibit slip sheet.					
<sup>1</sup> Exhibit page count is exclusive of exhibit slip sheet.					
Page 4 OI 4					
		Page 4 01 4			

FILED Electronically CV14-01712 2018-04-16 09:34:29 AM Jacqueline Bryant Clerk of the Court Transaction # 6630162

15

### **EXHIBIT** 1

### **EXHIBIT 1**

	1	1
		FILED Electronical y CV14-01712 2018-04-13 11:09:14 AM Jacqueline Bryant
		Clerk of the Court
1	3105	Transaction # 6628496
2	DICKINSON WRIGHT, PLLC	
	JOHN P. DESMOND Nevada Bar No. 5618	
3	BRIAN R. IRVINE	
4	Nevada Bar No. 7758 ANJALI D. WEBSTER	
5	Nevada Bar No. 12515 100 West Liberty Street, Suite 940	
6	Reno, NV 89501	
	Tel: (775) 343-7500 Fax: (775) 786-0131	
7	Email: Jdesmond@dickinsonwright.com	
8	Email: <u>Birvine@dickinsonwright.com</u> Email: <u>Awebster@dickinsonwright.com</u>	
9		
10	Attorney for Defendants Berry Hinckley Industries and Jerry Herbst	
11	IN THE SECOND JUDICIAL DISTRICT CO	OURT OF THE STATE OF NEVADA
12	IN AND FOR THE COUN	ITY OF WASHOF
13	IN AND FOR THE COUL	in or washed
14	LARRY J. WILLARD, individually	CASE NO. CV14-01712
14	and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT	DEPT. 6
15	CORPORATION, a California corporation;	DEF1.0
16	EDWARD C. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the	
17	Edward C. Wooley and Judith A. Wooley	
	Intervivos Revocable Trust 2000,	
18	Plaintiff,	
19	VS.	
20	BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an	
21	individual	
22	Defendants.	
23	//	
	BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST,	
24	an individual;	
25	Counterclaimants,	
26		-
27	vs	
28	Page 1 of	3
	87.	

£.

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; Counter-defendants. [PROPOSED] ORDER GRANTING DEFENDANTS/COUNTERCLAIMANTS' MOTION TO DISMISS COUNTERCLAIMS Before this Court is Defendants/Counterclaimants' Motion to Dismiss Counterclaims, filed on March 8, 2018. No opposition was ever filed. Under DCR 13(3), the failure of an opposing party to serve and file a written opposition may be construed as an admission that the motion is meritorious and consent to granting the same. DCR 13(3). Thus, the Court finds that Plaintiffs' failure to file an opposition to Defendants' Motion constitutes both an admission that the Motion is meritorious and Plaintiffs' consent to granting said Motion. Page 2 of 3

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

## EXHIBIT "17"

# **EXHIBIT "17"**

FILED Electronically CV14-01712 2018-04-16 09:31:03 AM Jacqueline Bryant Clerk of the Court Transaction # 6630140

		Jacqueline Brya Clerk of the Cou
1	2540	Transaction # 6630
2	DICKINSON WRIGHT JOHN P. DESMOND	
2	Nevada Bar No. 5618	
3	BRIAN R. IRVINE Nevada Bar No. 7758	
4	ANJALI D. WEBSTER Nevada Bar No. 12515	
5	100 West Liberty Street, Suite 940 Reno, NV 89501	
6	Tel: (775) 343-7500 Fax: (775) 786-0131	
7	Email: <u>Jdesmond@dickinsonwright.com</u> Email: <u>Birvine@dickinsonwright.com</u>	
8	Email: <u>Awebster@dickinsonwright.com</u>	
9 10	Attorney for Defendants Berry Hinckley Industries, and Jerry Herbst	
11	IN THE SECOND JUDICIAL DISTRIC	Γ COURT OF THE STATE OF NEVADA
	IN AND FOR THE C	OUNTY OF WASHOE
12		
13	LARRY J. WILLARD, individually and as	 CASE NO. CV14-01712
14	trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT	DEPT. 6
15	CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A.	
16	WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley	
17	Intervivos Revocable Trust 2000,	
18	Plaintiff,	NOTICE OF ENTRY OF ORDER
19	VS.	
20	BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an	
21	Individual;	
22	Defendants.	
23		
24	BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST,	
25	an individual;	
26	Counterclaimants,	
27		
28	_	
	Page	1 of 4

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

1	CERTIFICATE OF SERVICE		
2	I certify that I am an employee of DICKINSON WRIGHT, PLLC and that on this date,		
3	pursuant to NRCP 5(b), I am serving a true and correct copy of the attached NOTICE OF		
4	ENTRY on the parties as set forth below:		
5	X Placing an original or true copy thereof in a sealed envelope placed for collection and		
6	mailing in the United States Mail, Reno, Nevada, postage prepaid, following ordinary business practices.		
7	addressed as follows:		
8	Edward C. and Judith A. Wooley		
9	1173 Via Casa Palermo Henderson, NV 89011		
10			
11			
12	Flex system, which will electronically mail the filing to the following individuals. addressed as follows:		
13			
14	Richard D. Williamson, Esq. Jonathan Joel Tew, Esq.		
15 16	ROBERTSON, JOHNSON, MILLER & WILLIAMSON		
10	50 West Liberty Street, Suite 600 Reno, Nevada 89501		
17	Attorneys for Plaintiffs/Counterdefendants		
19	DATED this 16th day of April, 2018.		
20			
21	/s/ Mina Reel		
22	An employee of Dickinson Wright, PLLC		
23			
24			
25			
26			
27			
28	$\mathbf{D}_{2} = 2 - 5 \mathbf{A}$		
	Page 3 of 4		

1	<u>EXHIBIT LIST</u>		
2	Exhibit	Description	Pages <sup>1</sup>
3	1	Order dismissing the claims of Wooley plaintiffs with prejudice, April 13, 2018	2
4			
5			
6			
7			
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19 20			
20			
21 22			
22			
23 24			
24			
23 26			
20			
28	<sup>1</sup> Exhibit page count is exclusive of exhibit slip sheet.		
		Page 4 of 4	

FILED Electronically CV14-01712 2018-04-16 09:31:03 AM Jacqueline Bryant Clerk of the Court Transaction # 6630140

24

## **EXHIBIT** 1

### **EXHIBIT 1**

FILED Electronically CV14-01712 2018-04-13 11:12 19 AM Jacqueline Bryant Clerk of the Court Transaction # 6628513

		Transaction # 66
1	3105	
2	DICKINSON WRIGHT, PLLC JOHN P. DESMOND	2
	Nevada Bar No. 5618	
3	BRIAN R. IRVINE	
4	Nevada Bar No. 7758 ANJALI D. WEBSTER	4 IL
	Nevada Bar No. 12515	
5	100 West Liberty Street, Suite 940	
6	Reno, NV 89501 Tel: (775) 343-7500	
	Fax: (775) 786-0131	
7	Email: Jdesmond@dickinsonwright.com	
8	Email: <u>Birvine@dickinsonwright.com</u> Email: <u>Awebster@dickinsonwright.com</u>	
9		
4	Attorney for Defendants Berry Hinckley Industries and	
10	Jerry Herbst	
11	IN THE SECOND JUDICIAL DISTRICT C	OURT OF THE STATE OF NEVADA
12	IN AND FOR THE COUR	NTY OF WASHOE
13		
	LARRY J. WILLARD, individually	CASE NO. CV14-01712
14	and as trustee of the Larry James Willard	DDDT (
15	Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;	DEPT. 6
	EDWARD C. WOOLEY AND JUDITH A.	
16	WOOLEY, individually and as trustees of the	
17	Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,	
18	Plaintiff,	
	VS.	
19	NED	
20	BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an	
Sec. 1	individual	
21		
22	Defendants.	
23	BERRY-HINCKLEY INDUSTRIES, a	
24	Nevada corporation; and JERRY HERBST, an individual;	
25		
	Counterclaimants,	
26		
27	vs	
28		
20	Page 1 of	12
	1	

1 LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; 2 OVERLAND DEVELOPMENT CORPORATION, a California corporation; 3 Counter-defendants. 4 OF CLAIMS OF WOOLEY PLANNTIFFS OF LUAIMS OF WOO PROPOSED ORDER OF DISMISSAL WITH PREJUDICE 5 6 Pursuant to the Stipulation for Dismissal with Prejudice of the parties and other good 7 cause appearing therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that all 8 of the claims of Plaintiffs EDWARD C. WOOLEY AND JUDITH A. WOOLEY, individually 9 and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000 10 asserted in the above-entitled action are dismissed with prejudice, the parties to bear their own 11 costs and attorney's fees. 12 IT IS SO ORDERED this 2 day of April , 2018. 13 14 DISTRICT COURT JUDGE 15 16 Respectfully submitted by: 17 DICKINSON WRIGHT, PLLC 18 /s/ Brian R. Irvine JOHN P. DESMOND 19 Nevada Bar No. 5618 BRIAN R. IRVINE 20 Nevada Bar No. 7758 ANJALI D. WEBSTER 21 Nevada Bar No. 11525 100 West Liberty Street, Suite 940 22 Reno, NV 89501 Tel: (775) 343-7500 23 Fax: (775) 786-0131 Email: Jdesmond@dickinsonwright.com 24 Email: Birvine@dickinsonwright.com Email: Awebster@dickinsonwright.com 25 Attorneys for Defendants 26 Berry Hinckley Industries, and Jerry Herbst 27 28 Page 2 of 2

## EXHIBIT "18"

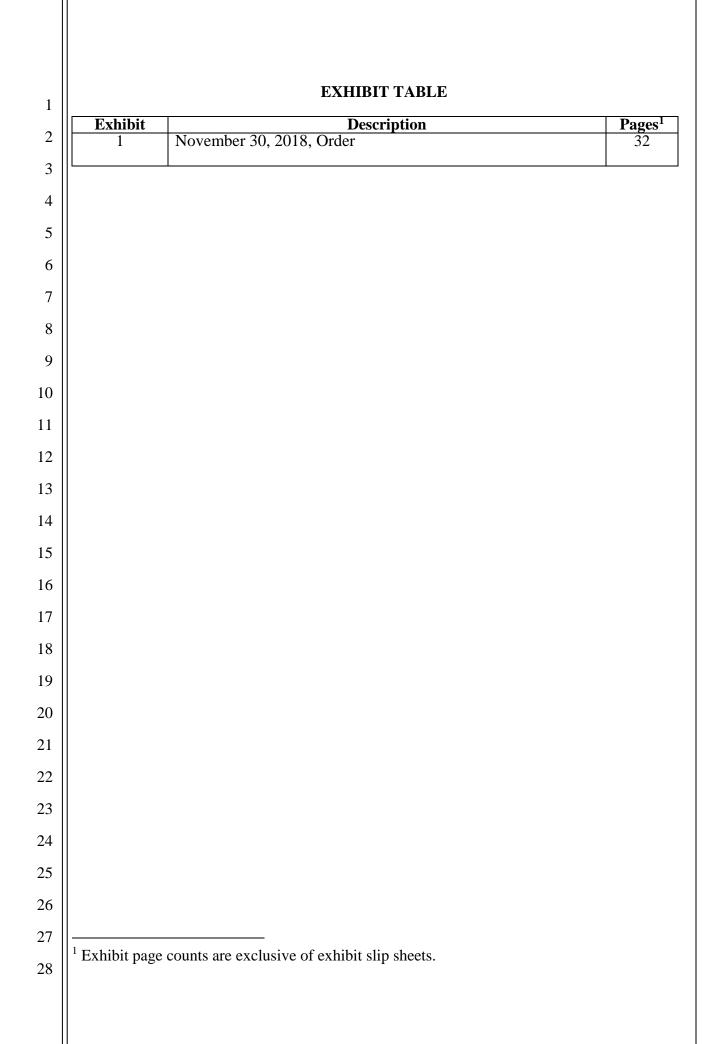
# **EXHIBIT "18"**

FILED Electronically CV14-01712 2018-12-03 11:17:39 AM Jacqueline Bryant Clerk of the Court Transaction # 7002654

1		Jacqueline Bry Clerk of the C Transaction # 70	วน
1	2540 DICKINISON WDICHT, DLLC		-
2	DICKINSON WRIGHT, PLLC JOHN P. DESMOND		
3	Nevada Bar No. 5618 BRIAN R. IRVINE		
4	Nevada Bar No. 7758 ANJALI D. WEBSTER		
5	Nevada Bar No. 12515 100 West Liberty Street, Suite 940		
6	Reno, NV 89501 Tel: (775) 343-7500		
7	Fax: (775) 786-0131		
8	Email: <u>Jdesmond@dickinsonwright.com</u> Email: <u>Birvine@dickinsonwright.com</u> Email: Awebster@dickinsonwright.com		
9	Attorney for Berry Hinckley Industries and Jerry	Herbst	
10	IN THE SECOND JUDICIAL DISTRICT	COURT OF THE STATE OF NEVADA	
11	IN AND FOR THE CO	DUNTY OF WASHOE	
12			
13	LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund;	 CASE NO. CV14-01712	
14	OVERLAND DEVELOPMENT CORPORATION, a California corporation;	DEPT. 6	
15	EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the		
16	Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,		
17			
18	Plaintiffs, vs.		
19			
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	LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund;		
28	OVERLAND DEVELOPMENT CORPORATION, a California corporation;		

1	Counter-defendants.		
2	/		
3	NOTICE OF ENTRY OF ORDER		
4	PLEASE TAKE NOTICE that on November 30, 2018, an Order was entered in the		
5	above-captioned matter denying Plaintiffs' Rule 60(b) Motion for Relief. A true and correct		
6	copy of the order is attached hereto as <b>Exhibit 1.</b>		
7	AFFIRMATION		
8			
9	Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding		
10	document does not contain the social security number of any person.		
11	DATED this 3rd day of December, 2018.		
12	DICKINSON WRIGHT, PLLC		
13			
14	/s/ Brian R. Irvine JOHN P. DESMOND		
15	Nevada Bar No. 5618 BRIAN R. IRVINE		
16	Nevada Bar No. 7758 ANJALI D. WEBSTER		
17	Nevada Bar No. 12515 100 West Liberty Street, Suite 940		
18	Reno, NV 89501 Tel: (775) 343-7500		
19	Fax: (775) 786-0131 Email: Jdesmond@dickinsonwright.com		
20	Email: <u>Birvine@dickinsonwright.com</u> Email: <u>Awebster@dickinsonwright.com</u>		
21			
22			
23			
24			
25			
26			
27			
28			
	Page 1		

1	CERTIFICATE OF SERVICE		
2	I certify that I am an employee of DICKINSON WRIGHT PLLC, and that on this date,		
3	pursuant to NRCP 5(b); I am serving a true and correct copy of the attached NOTICE OF		
4			
5	<b>ENTRY OF ORDER</b> on the parties through the Second Judicial District Court's E-Flex filing		
6	system to the following:		
7	Richard D. Williamson, Esq. Brian P. Moquin		
8	Jonathan Joel Tew, Esq.LAW OFFICES OF BRIAN P. MOQUINROBERTSON, JOHNSON, MILLER &3287 Ruffino Lane		
9	WILLIAMSON San Jose, California 95148		
10	50 West Liberty Street, Suite 600 Reno, Nevada 89501		
11	Attorneys for Plaintiffs/Counterdefendants		
12	DATED this 3rd day of December, 2018.		
13			
14	/s/ Mina Reel An employee of DICKINSON WRIGHT PLLC		
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			



FILED Electronically CV14-01712 2018-12-03 11:17:39 AM Jacqueline Bryant Clerk of the Court Transaction # 7002654

 $z_{ij}$ 

## **EXHIBIT 1**

## **EXHIBIT 1**

		FILED Electronically CV14-01712 2018-11-30 04:08:13 PM Jacqueline Bryant	
1	Code:	Clerk of the Court Transaction # 7001598	
2			
3			
4			
5	IN THE SECOND JUDICIAL DISTRICT COU	RT OF THE STATE OF NEVADA	
6	IN AND FOR THE COUNTY OF WASHOE		
7	LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund;		
8	OVERLAND DEVELOPMENT CORPORATION, a California corporation;	CASE NO. CV14-01712	
9	EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the	DEPT. 6	
10	Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,		
11 12	Plaintiffs, vs.	ORDER DENYING PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF	
13	BERRY-HINCKLEY INDUSTRIES, a Nevada		
14	corporation; and JERRY HERBST, an Individual;		
15	Defendants.		
16	/		
17 18	BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual;		
19	Counterclaimants,		
20	VS		
21	LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund;		
22	OVERLAND DEVELOPMENT CORPORATION, a California corporation;		
23	Counter-defendants <sup>1</sup> .		
24	/		
25			
26			
27 28	<sup>1</sup> On April 13, 2018, this Court entered its Order of Dis. Prejudice. On the same date, this Court entered its Of Counterclaimants' Motion to Dismiss Counterclaims. A Order.	rder Granting Defendants/	

1	ORDER DENYING PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF
2	Before this Court is Plaintiffs' Rule 60(b) Motion for Relief ("Rule 60(b) Motion")
3	filed by PLAINTIFFS LARRY J. WILLARD, INDIVIDUALLY AND AS TRUSTEE OF THE
4 5	LARRY JAMES WILLARD TRUST FUND AND OVERLAND DEVELOPMENT
6	CORPORATION, A CALIFORNIA CORPORATION (collectively, "Willard" or the
7	"Plaintiffs"), by and through counsel, Robertson, Johnson, Miller & Williamson. <sup>2</sup> By
8	their <i>Rule 60(b) Motion</i> , Plaintiffs seek, pursuant to NRCP 60(b), to set aside: (a) this
9	Court's January 4, 2018, Order Granting Defendants/Counterclaimants' Motion to Strike
10	and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich; (b) this
11	Court's January 4, 2018, Order Granting Defendants' Motion for Sanctions; and (c) this
12 13	Court's March 6, 2018, Findings of Fact, Conclusions of Law, and Order on Defendants'
14	Motion for Sanctions.
15	Thereafter, DEFENDANTS BERRY-HINCKLEY INDUSTRIES ("BHI") AND
16	JERRY HERBST (collectively, "Defendants"), filed their Opposition to Rule 60(b) Motion
17	for Relief, by and through their counsel, Dickinson Wright, PLLC.
18	Plaintiffs then filed their Reply in Support of the Willard Plaintiffs Rule 60(b)
19	<i>Motion for Relief</i> and the parties set the matter for hearing.
20 21	This Court carefully considered the papers submitted, the arguments of counsel,
21	the entire court file herein, and is fully advised in the premises, and enters its order as
23	follows.
24	
25	
26	<sup>2</sup> Plaintiffs' former local counsel was David O'Mara of the O'Mara Law Firm, P.C. Mr. O'Mara
27	filed a <i>Notice of Withdrawal of Local Counsel</i> (" <i>Notice"), on March 15, 2018.</i> Brian Moquin remains counsel of record as he has not withdrawn; however, he is not indicated as counsel filing the <i>Rule 60(b) Motion.</i>
28	
	1

	FINDINGS OF FACT							
1	The Court makes the following Findings of Fact:							
2								
3	Plaintiffs' Complaint							
4	1. On August 8, 2014, Plaintiffs commenced this action by filing their							
5 6	Complaint against Defendants. <sup>3</sup> Complaint, generally.							
7	2. By way of their <i>Complaint</i> and subsequent <i>First Amended Complaint</i> ,							
8	Plaintiffs sought the following damages against Defendants for an alleged breach of the							
9	lease between Willard and BHI: (1) "rental income" for \$19,443,836.94, discounted by							
10	4% per the lease to \$15,741,360.75 as of March 1, 2013; and (2) certain property-							
11	related damages, such as insurance and installation of a security fence. First Amended							
12	Complaint ("FAC"), generally.							
13	3. Willard also sought several other categories of damages which have since							
14 15	been dismissed or withdrawn. May 30, 2017, <i>Order</i> .							
16	Plaintiffs' Failure to Comply with the Nevada <u>Rules of Civil Procedure and this Court's Orders</u>							
17	4. Plaintiffs failed to provide a compliant damages disclosure in this action.							
18	5. Plaintiffs failed to provide a damages computation in their initial							
19 20	disclosures, as required under NRCP 16.1(a)(1)(C). Findings of Fact, Conclusions of							
21	Law, and Order on Defendants' Motion for Sanctions ("Sanctions Order") $\P$ 12, and							
22	failed to provide damages computations at any time despite numerous demands on							
23	both Mr. Moquin and Mr. O'Mara. Sanctions Order ¶¶ 14-16, 25, 27-33, 39, 43-44 and							
24	51-54.							
25								
26	<sup>3</sup> Willard filed the initial complaint jointly with Edward E. Wooley and Judith A. Wooley, individually and as Trustees of the Edward C. Wooley and Judith A. Wooley Intervivos							
27 28	Revocable Trust 2000 (collectively, "Wooley"). However, Defendants and Wooley entered into a settlement agreement and stipulation for dismissal. This Court entered its Order on April 13, 2018 dismissing Wooley's claims with prejudice.							
	2							

6. Plaintiffs failed to provide complete and adequate responses to 1 interrogatories requesting information about Plaintiffs' damages in the normal course of 2 3 discovery. 4 7. Plaintiffs failed to provide complete and adequate responses to 5 interrogatories in violation of this Court's Order Granting Defendants' Motion to Compel 6 and failed to comply with this Court's Order ("January Hearing Order") issued after the 7 parties discussed Plaintiffs' failure to provide damages computations at the January 10, 8 2017 hearing attended by Mr. Moguin, Mr. O'Mara and Mr. Willard. Sanctions Order 9 ¶¶ 17-25. 10 8. 11 The January Hearing Order required Plaintiffs to provide damages 12 computations and supporting materials. Sanctions Order ¶¶ 46-49, 54, 59-64 and 67-68; 13 Defendants' Opposition Plaintiffs' Rule 60(b) Motion, Ex. 2, Transcript of January 10, 14 2017 Hearing at pp. 61-63 and 68; January Hearing Order. 15 9. Plaintiffs failed to properly disclose Daniel Gluhaich as an expert witness 16 as required by NRCP 16.1(a)(2). Sanctions Order ¶¶ 34-37. 17 10. In contravention of this Court's January Hearing Order, Plaintiffs failed to 18 19 provide an amended disclosure of Mr. Gluhaich, although Defendants' counsel made 20 multiple requests. Sanctions Order ¶¶ 38-45, ¶¶ 50-64. 21 **Plaintiffs' Summary Judgment Motion** 22 11. Pursuant to the February 9, 2017, Stipulation and Order to Continue Trial, 23 discovery closed in mid-November, 2017. 24 12. On October 18, 2017, less than a month before the close of discovery, 25 Plaintiffs filed their Motion for Summary Judgment asserting they were entitled, as a 26 27 28 3

1	matter of law, to more than triple the amount of damages alleged in and requested by						
2	their <i>First Amended Complaint. Sanctions Order</i> ¶¶ 69 and 73.						
3	13. The damages asserted in Plaintiffs' <i>Motion for Summary Judgment</i> were						
4	not previously disclosed. The motion was also supported by previously undisclosed						
5	expert opinions and documents. Sanctions Order ¶¶ 74-79.						
6	14. On November 13, 2017, Defendants filed their Opposition to Plaintiffs'						
7	Motion for Summary Judgment.						
8 9	15. Plaintiffs' did not submit the <i>Motion for Summary Judgment</i> for decision.						
10	Defendants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Glubaich and Motion for Senations						
11	the Expert Testimony of Daniel Gluhaich and Motion for Sanctions						
12	16. On November 14, 2017, Defendants filed their <i>Motion to Strike and/or</i>						
13	Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich ("Motion to						
14	Strike").						
15	17. In the <i>Motion to Strike</i> , Defendants maintained this Court should preclude						
16	Plaintiffs from offering Mr. Gluhaich's testimony on the grounds: (a) Plaintiffs failed to						
17	adequately disclose Mr. Gluhaich as an expert because they failed to provide "a						
18 19	summary of the facts and opinions to which the witness is expected to testify" as						
20	required by NRCP 16.1(a)(2)(B); (b) the opinions offered by Mr. Gluhaich in support of						
21	Plaintiffs' Motion for Summary Judgment were based upon inadmissible hearsay and						
22	were based solely on the opinions of others; and (c) Mr. Gluhaich was not qualified to						
23	offer the opinions included in his Declaration attached to and filed in support of						
24	Plaintiffs' Motion for Summary Judgment.						
25	18. On November 15, 2017, Defendants filed their <i>Motion for Sanctions</i>						
26							
27	("Sanctions Motion").						
28							
	4						
		l					

19. In the Sanctions Motion, Defendants argued this Court should sanction 1 Plaintiffs for their continued and intentional conduct in failing to comply with the Nevada 2 Rules of Civil Procedure and this Court's orders requiring Plaintiffs to provide damages 3 4 computations and full and adequate expert disclosures, and dismiss Plaintiffs' claims 5 with prejudice, or, in the alternative, preclude Plaintiffs from seeking new damages or 6 relying upon their undisclosed expert and appraisals.

20. Defendants agreed to give Plaintiffs' several extensions of time to oppose 8 the Motion to Strike and Sanctions Motion, but no oppositions were filed. 9

7

11

11

25

26

27

28

21. On December 6, 2017, Plaintiffs requested relief from the Court by 10 11 extension to respond until "December 7, 2017 at 4:29 p.m." Sanctions Order ¶ 94; 12

Plaintiffs' Request for a Brief Extension of Time ("Brief Extension Request"), generally.

13 22. This Court held a status conference on December 12, 2017, attended by 14 Defendants' counsel and Plaintiffs' counsel, Mr. Moguin and Mr. O'Mara. At the status 15 conference, after observing Mr. Moquin, having significant dialog with Mr. Moquin, and 16 over vehement objection by the Defendants' counsel, this Court granted Plaintiffs' Brief 17 *Extension Request* plus granted more time than that requested. The Court directed 18 19 Plaintiffs to respond to the outstanding motions no later than Monday, December 18, 20 2017, at 10:00 am. Sanctions Order ¶ 95.

21 23. Tis Court further directed Defendants to file their reply briefs no later than 22 January 8, 2018. The Court set the parties' outstanding Motions for oral argument on 23 January 12, 2018. Sanctions Order ¶ 96. 24

1	24. This Court admonished Plaintiffs, stating "you need to know going into					
2	these oppositions, that I'm very seriously considering granting all of it I haven't					
3	decided it, but I need to see compelling opposition not to grant it." Opposition to Rule					
4	60(b) Motion, Ex. 3, December 12, 2017, Transcript of Status Conference, in part.					
5	25. Plaintiffs did not file an opposition or response to the <i>Motion to Strike</i> or					
6	Motion for Sanctions by December 18, 2017 or any time thereafter, nor did Plaintiffs					
7	request any further extension.					
9	26. This Court entered its Order Granting Defendants'/Counterclaimants'					
10	Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel					
11	Gluhaich on January 4, 2018 ("Order Granting Motion to Strike").					
12	27. This Court entered its Order Granting Defendants'/Counterclaimants'					
13	Motion for Sanctions on January 4, 2018 ("Order Granting Sanctions").					
14	28. This Court entered its Findings of Fact, Conclusions of Law, and Order on					
15 16	Defendants' Motion for Sanctions on March 6, 2018. ("Sanctions Order") <sup>4</sup>					
17	Withdrawal of Local Counsel					
18	29. Mr. O'Mara's Notice of Withdrawal of Local Counsel, ("Notice") filed					
19	March 15, 2018, states, "Mr. Moquin was unresponsive during the time in which this					
20	Court was deciding the pending motions, even after counsel begged him for a					
21	response to be filed with the Court and was told he would provide such a response."					
22	Notice, 1.					
23						
24 25	<sup>4</sup> The Order Granting Sanctions ordered sanctions and directed Defendants to "submit a					
26	Proposed Order granting <i>Defendants'/Counterclaimants' Motion for Sanctions</i> , including factual and legal analysis and discussion, to Department 6 within twenty (20) days of the date of this					
27	<i>Order</i> in accordance with WDCR 9." <i>Order Granting Sanctions, 4.</i> For purposes of the instant motion, the Court considers the <i>Order Granting Sanctions</i> and <i>Sanctions Order</i> , as one for					
28	purposes of the analysis herein.					
	6					

<ul> <li>30. The Notice describes the terms of retention of Mr. O'Mara as,</li> <li>"Undersigned Counsel was retained solely as local counsel, and provided Mr. Moquin</li> <li>with the necessary information related to the Court's filing requirement and timelines.</li> <li>Undersigned Counsel was retained only to provide services as directed by Mr. Moquin,</li> <li>and would be relieved of services if Mr. Moquin was removed." Notice, 1.</li> <li>Plaintiffs' Rule 60(b) Motion</li> <li>31. On March 26, 2018, Robertson, Johnson, Miller &amp; Williamson filed a</li> <li>notice of appearance on behalf of Plaintiffs.</li> <li>32. On April 18, 2018, Plaintiffs filed the Rule 60(b) Motion. In the Rule 60(b)</li> <li>Motion. Plaintiffs argue this Court should set aside its Order Granting the Motion to</li> <li>Strike, Order Granting Sanctions, and Sanctions Order, based upon Mr. Moquin's</li> <li>excusable neglect. Plaintiff's further argue the underlying Sanctions Order was</li> <li>insufficient under Young v. Johnny Ribeiro, 106 Nev. 88, 787 P.2d 777 (1990) because</li> <li>the Court did not consider whether sanctions unfairly operate to penalize Plaintiffs for</li> <li>the misconduct of their attorney.</li> <li>33. Plaintiffs argue their failure to provide the damages computations and</li> <li>adequate expert disclosures, as required by both the Nevada Rules of Civil Procedure</li> <li>and Motion for Sanctions were all due to Mr. Moquin failing "to properly prosecute this</li> <li>case due to a serious mental illness and a personal life that was apparently in</li> <li>shambles." Rule 60(b) Motion, 1.</li> </ul>								
with the necessary information related to the Court's filing requirement and timelines.         Undersigned Counsel was retained only to provide services as directed by Mr. Moquin,         and would be relieved of services if Mr. Moquin was removed." Notice, 1.         Plaintiffs' Rule 60(b) Motion         31.       On March 26, 2018, Robertson, Johnson, Miller & Williamson filed a         notice of appearance on behalf of Plaintiffs.         32.       On April 18, 2018, Plaintiffs filed the Rule 60(b) Motion. In the Rule 60(b)         Motion.       Plaintiffs argue this Court should set aside its Order Granting the Motion to         Strike, Order Granting Sanctions, and Sanctions Order, based upon Mr. Moquin's         excusable neglect.       Plaintiff's further argue the underlying Sanctions Order was         insufficient under Young v. Johnny Ribeiro, 106 Nev. 88, 787 P.2d 777 (1990) because         the Court did not consider whether sanctions unfairly operate to penalize Plaintiff's for         the misconduct of their attorney.         33.       Plaintiff's argue their failure to provide the damages computations and         adequate expert disclosures, as required by both the Nevada Rules of Civil Procedure         and Motion for Sanctions were all due to Mr. Moquin failing "to properly prosecute this         case due to a serious mental illness and a personal life that was apparently in         shambles." Rule 60(b) Motion, 1.	1	30. The <i>Notice</i> describes the terms of retention of Mr. O'Mara as,						
4       Undersigned Counsel was retained only to provide services as directed by Mr. Moquin,         5       and would be relieved of services if Mr. Moquin was removed." Notice, 1.         6       Plaintiffs' Rule 60(b) Motion         7       31. On March 26, 2018, Robertson, Johnson, Miller & Williamson filed a         9       notice of appearance on behalf of Plaintiffs.         32. On April 18, 2018, Plaintiffs filed the Rule 60(b) Motion. In the Rule 60(b)         11       Motion. Plaintiffs argue this Court should set aside its Order Granting the Motion to         12       Strike, Order Granting Sanctions, and Sanctions Order, based upon Mr. Moquin's         13       excusable neglect. Plaintiff's further argue the underlying Sanctions Order was         16       the Court did not consider whether sanctions unfairly operate to penalize Plaintiff's for         16       the Court did not consider whether sanctions unfairly operate to penalize Plaintiff's for         17       the misconduct of their attorney.         33. Plaintiff's argue their failure to provide the damages computations and         18       adequate expert disclosures, as required by both the Nevada Rules of Civil Procedure         19       adequate of a serious mental illness and a personal life that was apparently in         19       shambles." Rule 60(b) Motion, 1.         12       Santians and a personal life that was apparently in         s	2	"Undersigned Counsel was retained solely as local counsel, and provided Mr. Moquin						
and would be relieved of services if Mr. Moquin was removed." Notice, 1.         Plaintiffs' Rule 60(b) Motion         31.       On March 26, 2018, Robertson, Johnson, Miller & Williamson filed a         notice of appearance on behalf of Plaintiffs.         32.       On April 18, 2018, Plaintiffs filed the Rule 60(b) Motion. In the Rule 60(b)         Motion.       Plaintiffs argue this Court should set aside its Order Granting the Motion to         Strike, Order Granting Sanctions, and Sanctions Order, based upon Mr. Moquin's         excusable neglect.       Plaintiff's further argue the underlying Sanctions Order was         insufficient under Young v. Johnny Ribeiro, 106 Nev. 88, 787 P.2d 777 (1990) because         the Court did not consider whether sanctions unfairly operate to penalize Plaintiffs for         the misconduct of their attorney.         33.       Plaintiffs argue their failure to provide the damages computations and         adequate expert disclosures, as required by both the Nevada Rules of Civil Procedure         and Motion for Sanctions were all due to Mr. Moquin failing "to properly prosecute this         case due to a serious mental illness and a personal life that was apparently in         shambles." Rule 60(b) Motion, 1.	3	with the necessary information related to the Court's filing requirement and timelines.						
and would be releved of services in Mi. Moduli was removed.       Notice, 1.         Plaintiffs' Rule 60(b) Motion         31.       On March 26, 2018, Robertson, Johnson, Miller & Williamson filed a         notice of appearance on behalf of Plaintiffs.         32.       On April 18, 2018, Plaintiffs filed the Rule 60(b) Motion. In the Rule 60(b)         Motion.       Plaintiffs argue this Court should set aside its Order Granting the Motion to         Strike, Order Granting Sanctions, and Sanctions Order, based upon Mr. Moquin's         excusable neglect.       Plaintiff's further argue the underlying Sanctions Order was         insufficient under Young v. Johnny Ribeiro, 106 Nev. 88, 787 P.2d 777 (1990) because         the Court did not consider whether sanctions unfairly operate to penalize Plaintiffs for         the misconduct of their attorney.         33.       Plaintiffs argue their failure to provide the damages computations and         adequate expert disclosures, as required by both the Nevada Rules of Civil Procedure         and this Court's orders, as well as their failure to file oppositions to the Motion to Strike         and Motion for Sanctions were all due to Mr. Moquin failing "to properly prosecute this         case due to a serious mental illness and a personal life that was apparently in         shambles." Rule 60(b) Motion, 1.	4	Undersigned Counsel was retained only to provide services as directed by Mr. Moquin,						
Plaintiffs' Rule 60(b) Motion         31.       On March 26, 2018, Robertson, Johnson, Miller & Williamson filed a         notice of appearance on behalf of Plaintiffs.         32.       On April 18, 2018, Plaintiffs filed the Rule 60(b) Motion. In the Rule 60(b)         Motion.       Plaintiffs argue this Court should set aside its Order Granting the Motion to         Strike, Order Granting Sanctions, and Sanctions Order, based upon Mr. Moquin's         excusable neglect.       Plaintiff's further argue the underlying Sanctions Order was         insufficient under Young v. Johnny Ribeiro, 106 Nev. 88, 787 P.2d 777 (1990) because         the Court did not consider whether sanctions unfairly operate to penalize Plaintiffs for         the misconduct of their attorney.         33.       Plaintiffs argue their failure to provide the damages computations and         adequate expert disclosures, as required by both the Nevada Rules of Civil Procedure         and this Court's orders, as well as their failure to file oppositions to the Motion to Strike         and Motion for Sanctions were all due to Mr. Moquin failing "to properly prosecute this         case due to a serious mental illness and a personal life that was apparently in         shambles." Rule 60(b) Motion, 1.		and would be relieved of services if Mr. Moquin was removed." Notice, 1.						
31.       On March 26, 2018, Robertson, Johnson, Miller & Williamson filed a         notice of appearance on behalf of Plaintiffs.       32.         32.       On April 18, 2018, Plaintiffs filed the <i>Rule 60(b) Motion</i> . In the <i>Rule 60(b)</i> Motion.       Plaintiffs argue this Court should set aside its Order Granting the Motion to         Strike, Order Granting Sanctions, and Sanctions Order, based upon Mr. Moquin's         excusable neglect.       Plaintiffs further argue the underlying Sanctions Order was         insufficient under Young v. Johnny Ribeiro, 106 Nev. 88, 787 P.2d 777 (1990) because         the Court did not consider whether sanctions unfairly operate to penalize Plaintiffs for         the misconduct of their attorney.         33.       Plaintiffs argue their failure to provide the damages computations and         adequate expert disclosures, as required by both the Nevada Rules of Civil Procedure         and this Court's orders, as well as their failure to file oppositions to the Motion to Strike         and Motion for Sanctions were all due to Mr. Moquin failing "to properly prosecute this         case due to a serious mental illness and a personal life that was apparently in         shambles." Rule 60(b) Motion, 1.		Plaintiffs' Rule 60(b) Motion						
9notice of appearance on behalf of Plaintiffs.32. On April 18, 2018, Plaintiffs filed the Rule 60(b) Motion. In the Rule 60(b)11Motion. Plaintiffs argue this Court should set aside its Order Granting the Motion to12Strike, Order Granting Sanctions, and Sanctions Order, based upon Mr. Moquin's13excusable neglect. Plaintiff's further argue the underlying Sanctions Order was14insufficient under Young v. Johnny Ribeiro, 106 Nev. 88, 787 P.2d 777 (1990) because16the Court did not consider whether sanctions unfairly operate to penalize Plaintiffs for17the misconduct of their attorney.1833. Plaintiffs argue their failure to provide the damages computations and19adequate expert disclosures, as required by both the Nevada Rules of Civil Procedure20and this Court's orders, as well as their failure to file oppositions to the Motion to Strike21and Motion for Sanctions were all due to Mr. Moquin failing "to properly prosecute this22case due to a serious mental illness and a personal life that was apparently in23shambles." Rule 60(b) Motion, 1.24		31. On March 26, 2018, Robertson, Johnson, Miller & Williamson filed a						
Motion. Plaintiffs argue this Court should set aside its Order Granting the Motion to         Strike, Order Granting Sanctions, and Sanctions Order, based upon Mr. Moquin's         excusable neglect. Plaintiff's further argue the underlying Sanctions Order was         insufficient under Young v. Johnny Ribeiro, 106 Nev. 88, 787 P.2d 777 (1990) because         the Court did not consider whether sanctions unfairly operate to penalize Plaintiffs for         the misconduct of their attorney.         33.       Plaintiffs argue their failure to provide the damages computations and         adequate expert disclosures, as required by both the Nevada Rules of Civil Procedure         and this Court's orders, as well as their failure to file oppositions to the Motion to Strike         and Motion for Sanctions were all due to Mr. Moquin failing "to properly prosecute this         case due to a serious mental illness and a personal life that was apparently in         shambles." Rule 60(b) Motion, 1.		notice of appearance on behalf of Plaintiffs.						
12       Strike, Order Granting Sanctions, and Sanctions Order, based upon Mr. Moquin's         13       excusable neglect. Plaintiff's further argue the underlying Sanctions Order was         14       insufficient under Young v. Johnny Ribeiro, 106 Nev. 88, 787 P.2d 777 (1990) because         16       the Court did not consider whether sanctions unfairly operate to penalize Plaintiffs for         17       the misconduct of their attorney.         18       33. Plaintiffs argue their failure to provide the damages computations and         19       adequate expert disclosures, as required by both the Nevada Rules of Civil Procedure         20       and this Court's orders, as well as their failure to file oppositions to the Motion to Strike         21       and Motion for Sanctions were all due to Mr. Moquin failing "to properly prosecute this         22       case due to a serious mental illness and a personal life that was apparently in         23       shambles." Rule 60(b) Motion, 1.         25       26         27       28	10	32. On April 18, 2018, Plaintiffs filed the <i>Rule 60(b) Motion</i> . In the <i>Rule 60(b)</i>						
<ul> <li>current of the formation of the series of the ser</li></ul>	11	Motion. Plaintiffs argue this Court should set aside its Order Granting the Motion to						
<ul> <li>excusable neglect. Plaintin's further argue the underlying Sanctions Order was</li> <li>insufficient under Young v. Johnny Ribeiro, 106 Nev. 88, 787 P.2d 777 (1990) because</li> <li>the Court did not consider whether sanctions unfairly operate to penalize Plaintiffs for</li> <li>the misconduct of their attorney.</li> <li>33. Plaintiffs argue their failure to provide the damages computations and</li> <li>adequate expert disclosures, as required by both the Nevada Rules of Civil Procedure</li> <li>and this Court's orders, as well as their failure to file oppositions to the Motion to Strike</li> <li>and Motion for Sanctions were all due to Mr. Moquin failing "to properly prosecute this</li> <li>case due to a serious mental illness and a personal life that was apparently in</li> <li>shambles." Rule 60(b) Motion, 1.</li> </ul>	12	Strike, Order Granting Sanctions, and Sanctions Order, based upon Mr. Moquin's						
<ul> <li>insufficient under Young v. Johnny Ribeiro, 106 Nev. 88, 787 P.2d 777 (1990) because</li> <li>the Court did not consider whether sanctions unfairly operate to penalize Plaintiffs for</li> <li>the misconduct of their attorney.</li> <li>33. Plaintiffs argue their failure to provide the damages computations and</li> <li>adequate expert disclosures, as required by both the Nevada Rules of Civil Procedure</li> <li>and this Court's orders, as well as their failure to file oppositions to the <i>Motion to Strike</i></li> <li>and <i>Motion for Sanctions</i> were all due to Mr. Moquin failing "to properly prosecute this</li> <li>case due to a serious mental illness and a personal life that was apparently in</li> <li>shambles." <i>Rule 60(b) Motion</i>, 1.</li> </ul>		excusable neglect. Plaintiff's further argue the underlying Sanctions Order was						
16the Court did not consider whether sanctions unfairly operate to penalize Plaintiffs for17the misconduct of their attorney.1833. Plaintiffs argue their failure to provide the damages computations and19adequate expert disclosures, as required by both the Nevada Rules of Civil Procedure20and this Court's orders, as well as their failure to file oppositions to the Motion to Strike21and Motion for Sanctions were all due to Mr. Moquin failing "to properly prosecute this22case due to a serious mental illness and a personal life that was apparently in23shambles." Rule 60(b) Motion, 1.26272828		insufficient under Young v. Johnny Ribeiro, 106 Nev. 88, 787 P.2d 777 (1990) because						
17the misconduct of their attorney.1833. Plaintiffs argue their failure to provide the damages computations and19adequate expert disclosures, as required by both the Nevada Rules of Civil Procedure20and this Court's orders, as well as their failure to file oppositions to the Motion to Strike21and Motion for Sanctions were all due to Mr. Moquin failing "to properly prosecute this22case due to a serious mental illness and a personal life that was apparently in23shambles." Rule 60(b) Motion, 1.26272828		the Court did not consider whether sanctions unfairly operate to penalize Plaintiffs for						
adequate expert disclosures, as required by both the Nevada Rules of Civil Procedure and this Court's orders, as well as their failure to file oppositions to the <i>Motion to Strike</i> and <i>Motion for Sanctions</i> were all due to Mr. Moquin failing "to properly prosecute this case due to a serious mental illness and a personal life that was apparently in shambles." <i>Rule 60(b) Motion</i> , 1.		the misconduct of their attorney.						
<ul> <li>and this Court's orders, as well as their failure to file oppositions to the <i>Motion to Strike</i></li> <li>and <i>Motion for Sanctions</i> were all due to Mr. Moquin failing "to properly prosecute this</li> <li>case due to a serious mental illness and a personal life that was apparently in</li> <li>shambles." <i>Rule 60(b) Motion</i>, 1.</li> </ul>	18	33. Plaintiffs argue their failure to provide the damages computations and						
<ul> <li>and <i>Motion for Sanctions</i> were all due to Mr. Moquin failing "to properly prosecute this</li> <li>case due to a serious mental illness and a personal life that was apparently in</li> <li>shambles." <i>Rule 60(b) Motion,</i> 1.</li> </ul>	19	adequate expert disclosures, as required by both the Nevada Rules of Civil Procedure						
<ul> <li>and <i>Motion for Sanctions</i> were all due to Mr. Moquin failing "to properly prosecute this</li> <li>case due to a serious mental illness and a personal life that was apparently in</li> <li>shambles." <i>Rule 60(b) Motion</i>, 1.</li> </ul>		and this Court's orders, as well as their failure to file oppositions to the Motion to Strike						
<ul> <li>case due to a serious mental illness and a personal life that was apparently in</li> <li>shambles." <i>Rule 60(b) Motion</i>, 1.</li> <li>25</li> <li>26</li> <li>27</li> <li>28</li> </ul>		and Motion for Sanctions were all due to Mr. Moquin failing "to properly prosecute this						
<ul> <li>24</li> <li>25</li> <li>26</li> <li>27</li> <li>28</li> </ul>		case due to a serious mental illness and a personal life that was apparently in						
25 26 27 28		shambles." Rule 60(b) Motion, 1.						
27 28								
28	26							
	27							
7	28							
		7						

1 34. The *Rule 60(b) Motion* purports to support its arguments primarily through 2 the *Declaration of Larry J. Willard. Rule 60(b) Motion,* Ex. 1 ("*Willard Declaration" and* 3 *"WD"* in citations to the record)<sup>5</sup>.

4 35. The Willard Declaration includes several statements about Mr. Moguin's 5 alleged mental disorder. It states Mr. Willard is "convinced" Mr. Moguin was dealing 6 with issues and demons beyond his control. WD ¶ 66. It further states he "learned" 7 that Mr. Moguin was struggling with constant marital conflict that greatly interfered with 8 his work. WD ¶ 67. The Willard Declaration states Mr. Moguin suffered a "total mental 9 breakdown." WD ¶ 68. It states Mr. Moquin explained to Mr. Willard he had been 10 11 diagnosed with bipolar disorder. WD ¶ 70. He declares he believes Mr. Moquin's 12 disorder to be "severe and debilitating." WD ¶ 73. He states he now sees "that Mr. 13 Moguin was suffering from [symptoms of bipolar disorder] throughout his work on the 14 case." WD ¶ 76. And, Mr. Willard declares he can now see how Mr. Moguin's alleged 15 psychological issues affected Plaintiffs' case. WD ¶ 87 (emphasis supplied). 16 36. The Rule 60(b) Motion also includes an internet printout purporting to list 17 symptoms of bipolar disorder (Rule 60(b) Motion, Ex. 5), and several documents 18 19 related to alleged spousal abuse by Mr. Moguin, some of which reference Mr. Moguin's 20 alleged bipolar disorder, and which include an Emergency Protective Order from a 21 California proceeding (Rule 60(b) Motion, Ex. 6), a Pre-Booking Information Sheet from 22 a California proceeding (Rule 60(b) Motion, Ex. 7) and a Request for Domestic 23 Violence Restraining Order, also from a California proceeding (Rule 60(b) Motion, 24 25 26 <sup>5</sup> The Willard Declaration includes paragraphs discussing the underlying facts of the action and 27 the initial filing of the suit in California. These paragraphs are not relevant to the Court's

determination of the *Rule 60(b) Motion* and are not considered. See e.g., WD ¶¶ 1-51, 100.

Ex. 8). The documents from the California proceedings are not certified by the clerk of
 the court.

3 37. Defendants filed their Opposition to Rule 60(b) Motion Relief on May 18,
4 2018 ("Opposition").

5 38. Plaintiffs filed their Reply in Support of the Willard Plaintiffs' Rule 60(b) 6 *Motion* on May 29, 2018 ("*Reply*"). The *Reply* attached eleven (11) new exhibits, 7 including the new Declaration of Larry J. Willard in Response to Defendants' 8 Opposition to Rule 60(b) Motion for Relief. Reply, Ex. 1 ("Reply Willard Declaration" 9 and "RWD" for citations).<sup>6</sup> The Reply's exhibits include copies of text messages 10 11 between Mr. Willard and Mr. Moquin (*Reply*, Ex. 2, 4 and 7), copies of emails between 12 Mr. Willard and his counsel (Reply, Ex. 3, 6, 8 and 10), a receipt detailing an alleged 13 payment made by Mr. Willard to Mr. Moquin's doctor on March 13, 2018 (Reply, Ex. 5), 14 and a letter from Mr. Williamson to Mr. Moquin dated May 14, 2018 (Reply, Ex. 9). 15 39. On June 6, 2018, Defendants filed their *Motion to Strike, or in the* 16 Alternative, Motion for Leave to File Sur-Reply, arguing this Court should strike Exhibits 17 1-10 to the Reply because: (a) Defendants did not have the opportunity to respond to 18 19 those exhibits in their Opposition to the Rule 60(b) Motion; (b) exhibits contained 20 inadmissible hearsay and/or inadmissible lay opinion testimony; and (c) a number of 21 exhibits were not relevant to this Court's determination of excusable neglect. 22 40. Defendants' Motion to Strike, or in the Alternative, Motion for Leave to 23 *File Sur-Reply* was fully-briefed and submitted to this Court for decision on June 29, 24 25 26 27 <sup>6</sup> The Court disregards the paragraphs included in the Willard Declaration and the Reply Willard Declaration that can be construed to be stated appeal to the Court's sympathy. See e.g., WD ¶ 28 91 -100; RWD ¶ 67

2018. Subsequently, Plaintiffs' counsel stipulated to the filing of a sur-reply. No surreply was filed by Defendants.

~							
3	41. In its Sanctions Order, the Court made the following findings of fact and						
4	conclusions of law, among others: First, Plaintiffs failed to provide damages disclosures						
5	and failed to properly disclose an expert witness in violation of this Court's express						
6	Orders. Sanctions Order ¶¶ 67, 68. Plaintiffs acknowledged their failure to properly						
7	disclose an expert witness in accordance with NRCP 16.1(a)(2)(B). Stipulation and						
8 9	Order, February 9, 2017. Plaintiffs did not thereafter attempt to properly disclose the						
9 10	expert witness for the entirety of 2017. Plaintiffs failed to comply with multiple orders of						
11	this Court. Thereafter, Defendants filed several motions to compel and Plaintiffs' non-						
12	compliance forced extension of trial and discovery deadlines on three separate						
13	occasions. This Court sanctioned Plaintiffs by ordering payment of Defendants'						
14							
15	expenses incurred in filing the <i>Motion to Compel</i> .						
16	42. Plaintiffs did not oppose the <i>Sanctions Motion</i> despite this Court's						
17	express admonitions that the Court was "seriously considering" dismissal.						
18	43. If any of the following Conclusions of Law contain or may be construed to						
19	contain Findings of Fact, they are incorporated here and shall be treated as						
20	appropriately identified and designated.						
21	CONCLUSIONS OF LAW						
22	Based on the Court's Findings of Fact, the Court makes its Conclusions of Law						
23 24	as follows.						
25	1. If any the foregoing Findings of Fact contain or may be construed to						
26	contain Conclusions of Law, they are incorporated here and shall be treated as						
27	appropriately identified and designated.						
28							
3	10						
1							

1	Rule 60(b) Standard					
2	2. Under NRCP 60(b)(1), on motion, this Court may relieve a party from an					
3	order or final judgment <sup>7</sup> on grounds of mistake, inadvertence, surprise, or excusable					
4	neglect. NRCP 60(b)(1).					
5	3. A party who seeks to set aside an order pursuant to NRCP 60(b)(1) "has					
6	the burden to prove mistake, inadvertence, surprise, or excusable neglect by a					
7	preponderance of the evidence." <i>Polivka v. Kuller</i> , 128 Nev. 926, 381 P.3d 651 (2012)					
8 9	(citations omitted); see also Britz v. Consolidated Casinos Corp., 87 Nev. 441, 446, 488					
10	P.2d 911, 915 (1971) ("'[t]he burden of proof on [a motion to set aside under Rule 60(b)]					
11	is on the moving party who must establish his position by a preponderance of the					
12	evidence.'") (quoting <i>Luz v. Lopes</i> , 55 Cal.2d 54, 10 Cal.Rptr. 161, 166, 358 P.2d 289,					
13	294 (1960)).					
14 15	The Rule 60(b) Motion is not Supported by <u>Competent, Admissible and Substantial Evidence.</u>					
16	4. Plaintiffs' ground asserted to set aside the Order Granting Defendants'					
17	Motion to Strike, Order Granting the Motion for Sanctions, and Sanctions Order <sup>8</sup> is Mr.					
18	Moquin "failed to properly prosecute this case due to a serious mental illness and a					
19	personal life that was apparently in shambles." <i>Rule 60(b) Motion</i> , 1.					
20	5. While this Court "has wide discretion in deciding whether to grant or deny					
21 22	a motion to set aside a judgment under NRCP 60(b)," Stoecklein v. Johnson Electric,					
22						
24	<sup>7</sup> This Court entered its Order re Request for Entry of Judgment on June 4, 2018, declining to					
25	enter judgment as the Court deemed it appropriate to consider the <i>Rule 60(b) Motion</i> on the underlying <i>Sanctions Order</i> .					
26	<sup>8</sup> Plaintiffs argue that the Sanctions Order was insufficient under Young v. Johnny Ribeiro, 106					
27	Nev. 88, 93, 787 P.2d 777, 780 (1990) because the <i>Sanctions Order</i> did not consider "whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney." <i>Rule</i>					
28	<i>60(b) Motion,</i> 12. This is addressed by the Court hereinafter.					
	11					
ļ		'				

1	<i>Inc</i> ., 109 Nev. 268, 271, 849 P.2d 305, 307 (1993), "this discretion is a legal discretion
2	and cannot be sustained where there is no competent evidence to justify the court's
3	action." Id. (emphasis added) (citing Lukey v. Thomas, 75 Nev. 20, 22, 333 P.2d 979
4	(1959)); see also Otak Nev., LLC v. Eighth Judicial Dist. Court, 129 Nev. 799, 805, 312
5	P.3d 491, 496 (2013) (holding a court abuses its discretion when its decision is not
6	supported by substantial evidence; substantial evidence "defined as that which a
7 8	reasonable mind might accept as adequate to support a conclusion" (internal quotation
9	marks omitted)).
10	6. The <i>Rule 60(b) Motion</i> purports to provide substantial evidence to support
11	its legal argument through the Willard Declaration and the Reply Willard Declaration
12	together with the attached exhibits, all of which contain statements and documents that
13	are inadmissible, and in some instances, inadmissible on multiple grounds.
14	7. The <i>Willard Declaration</i> includes several statements about Mr. Moquin's
15 16	alleged mental disorder. As set forth in the Findings of Fact, <i>supra,</i> Mr. Willard declares
17	he is "convinced" Mr. Moquin was dealing with issues and demons beyond his control
18	( <i>WD</i> ¶ 66); he "learned" Mr. Moquin was struggling with constant marital conflict that
19	greatly interfered with his work (WD ¶ 67; <i>RWD</i> ¶ 15); Mr. Moquin suffered a "total
20	mental breakdown" ( <i>WD</i> ¶ 68; <i>RWD</i> ¶16); Mr. Moquin explained to Mr. Willard he had
21	been diagnosed with bipolar disorder ( <i>WD</i> ¶ 70; <i>RWD</i> ¶ 37); Mr. Willard believes Mr.
22	Moquin's disorder to be "severe and debilitating" ( $WD \ \P 73$ ); Mr. Willard now sees "that
23	Moquin's disorder to be "severe and debilitating" ( <i>WD</i> ¶ 73); Mr. Willard now sees "that Mr. Moquin was suffering from [symptoms of bipolar disorder] throughout his work on
23 24	
23	
23 24 25	

1	the case (WD ¶ 76); and, Mr. Willard can now see how Mr. Moquin's alleged					
2	psychological issues affected his case (WD ¶ 87).9					
3	8. T	he Willard Declara	ation addresses Mr. Moquin's private life, including his			
4	personal mental status and the conflict in his marriage.					
5	9. N	Ir. Willard stateme	ents are not all based on his own perceptions.			
6	10. lt	logically follows, b	based on the subject matter, Mr. Willard could not have			
7	credibly obtaine	ed this information	n by observing it.			
8 9	11. N	lr. Willard lacks pe	ersonal knowledge to testify to the assertions included			
10	in the Willard D	<i>eclaration</i> and the	e Reply Willard Declaration regarding Mr. Moquin's			
11	mental disorde	r, private personal	l life, and private marital conflicts.			
12	12. It	further logically fo	ollows, Mr. Willard could only have obtained this			
13	information by	communication fro	om Mr. Moquin (or Mr. Moquin's wife), although he does			
14						
15	not overtly state this.					
16			eply Willard Declaration contain many nearly identical			
16 17	statements. The	<i>claration and the Re</i> claration and the Re compare as follow				
	statements. The <b>Willlard</b>	ey compare as follow	ws: ard			
17	statements. The Willlard Declarat Paragrap	ey compare as follow Reply Willa ion Declaration oh Paragraph	ws: ard n			
17 18 19	statements. The Willlard Declarat	ey compare as follow Reply Willa ion Declaration	ws: ard n			
17 18 19 20	statements. The Willlard Declarat Paragray 53 54 59	ey compare as follow ion Declaration ph Paragraph 7 8 9	ws: ard n			
17 18 19	statements. The Willlard Declarat 53 54 59 63	ey compare as follow ion Declaration ph Paragraph 7 8 9 11	ws: ard n			
17 18 19 20	statements. The Willlard Declarat Paragray 53 54 59 63 64 64 65	ey compare as follow <b>Reply Willa</b> <b>Declaration</b> <b>Paragraph</b> 7 8 9 11 12 (slightly 13	ws: ard n			
17 18 19 20 21 22	statements. The Willlard Declarat Paragray 53 54 59 63 64 65 67	ey compare as follow Reply Willa Declaration Paragraph 7 8 9 11 12 (slightly 13 15	ws: ard n			
17 18 19 20 21 22 23	statements. The Willlard Declarat Paragray 53 54 59 63 64 64 65	ey compare as follow <b>Reply Willa</b> <b>Declaration</b> <b>Paragraph</b> 7 8 9 11 12 (slightly 13	ws: ard n			
17 18 19 20 21 22	statements. The <i>Willlard</i> <i>Declarat</i> <i>Paragraf</i> 53 54 59 63 64 65 67 68 69 70	ey compare as follow Reply Willa Declaration Paragraph 7 8 9 11 12 (slightly 13 15 16 35 38	ws: ard n			
17 18 19 20 21 22 23	statements. The <i>Willlard</i> <i>Declarat</i> <i>Paragraf</i> 53 54 59 63 64 65 67 68 69 70 71	ey compare as follow Reply Willa Declaration Paragraph 7 8 9 11 12 (slightly 13 15 16 35 38 39	ws: ard n 			
17 18 19 20 21 22 23 24	statements. The Willlard Declarat Paragray 53 54 59 63 64 65 67 68 69 70 71 82 89	ey compare as follow Reply Willa Declaration Paragraph 7 8 9 11 12 (slightly 13 15 16 35 38 39 10 (Similar 3	ws: ard n			
17 18 19 20 21 22 23 24 25	statements. The <i>Willlard</i> <i>Declarat</i> <i>Paragraf</i> 53 54 59 63 64 65 67 68 69 70 71 82	ey compare as follow Reply Willa Declaration Paragraph 7 8 9 11 12 (slightly 13 15 16 35 38 39 10 (Similar	ws: ard n 			
<ol> <li>17</li> <li>18</li> <li>19</li> <li>20</li> <li>21</li> <li>22</li> <li>23</li> <li>24</li> <li>25</li> <li>26</li> <li>27</li> </ol>	statements. The Willlard Declarat Paragray 53 54 59 63 64 65 67 68 69 70 71 82 89	ey compare as follow Reply Willa Declaration Paragraph 7 8 9 11 12 (slightly 13 15 16 35 38 39 10 (Similar 3	ws: ard n 			
<ol> <li>17</li> <li>18</li> <li>19</li> <li>20</li> <li>21</li> <li>22</li> <li>23</li> <li>24</li> <li>25</li> <li>26</li> </ol>	statements. The Willlard Declarat Paragray 53 54 59 63 64 65 67 68 69 70 71 82 89	ey compare as follow Reply Willa Declaration Paragraph 7 8 9 11 12 (slightly 13 15 16 35 38 39 10 (Similar 3	ws: ard n differs) - not exact)			
<ol> <li>17</li> <li>18</li> <li>19</li> <li>20</li> <li>21</li> <li>22</li> <li>23</li> <li>24</li> <li>25</li> <li>26</li> <li>27</li> </ol>	statements. The Willlard Declarat Paragray 53 54 59 63 64 65 67 68 69 70 71 82 89	ey compare as follow Reply Willa Declaration Paragraph 7 8 9 11 12 (slightly 13 15 16 35 38 39 10 (Similar 3	ws: ard n 			

13. The Willard Declaration and Reply Willard Declaration include 1 inadmissible hearsay and under NRS 51.035 and 51.065. See Agnello v. Walker, 306 2 S.W.3d 666, 675 (Mo. App. 2010), as modified, (Apr. 27, 2018) (hearsay testimony or 3 4 documentation cannot serve as the evidence necessary to meet movant's burden of 5 persuasion to set aside judgment under Rule 60); New Image Indus. v. Rice, 603 So.2d 6 895, 897 (Ala. 1992) (affirming trial court's refusal to grant Rule 60 relief where the only 7 evidence of excusable neglect was an affidavit containing inadmissible hearsay and 8 speculation). 9 14. Separate and apart from the challenge to the Willard Declaration and the 10 11 Reply Willard Declaration on hearsay grounds, Mr. Willard's statements are also 12 speculative and therefore inadmissible. He does not declare he personally observed 13 Mr. Moquin's alleged condition until he draws this unqualified conclusion late in the 14 case, and, even if he had, he speculates what the mental disorder could cause and 15 caused, offering an internet article to boost his credibility, which is also hearsay with no 16 applicable exception offered. 17 15. The assertion describing Mr. Moguin's statement to Mr. Willard that Dr. 18 19 Mar diagnosed Mr. Moguin with bipolar disorder (WD ¶ 69; RWD ¶35) is inadmissible 20 hearsay with no exception under NRS 51.105(1) because the Mr. Willard's declaration 21 does not constitute Mr. Moquin's declaration of "then existing state of mind, emotion, 22 sensation or physical condition, such as intent, plan, motive, design, mental feeling, 23 pain and bodily health." Instead, Dr. Mar, purportedly diagnosed Mr. Moquin; Mr. 24 Moguin told Mr. Willard of Dr. Mar's purported diagnosis; and Mr. Willard makes the 25 statement of Mr. Moquin's diagnosis. The statements were not spontaneous and 26 27 instead were a basis for Mr. Moguin to request monetary assistance. 28 14

1	16. Even if it is construed that Mr. Moquin's report of Dr. Mar's diagnosis	
2	constituted Mr. Moquin's statement of then existing mental condition. Mr. Willard's	
3	statements are not admissible as contemporaneous statements Mr. Moquin made about	
4	his own present physical symptoms or feelings. See 2 McCormick on Evid. §273 (7th	
5	ed.) ("[s]tatements of the declarant's present bodily condition and symptoms, including	
6	pain and other feelings, offered to prove the truth of the statements, have been	
7 8	generally recognized as an exception to the hearsay rule. Special reliability is provided	
9	by the spontaneous quality of the declarations, assured by the requirement that the	
10	declaration purport to describe a condition presently existing at the time of the	
11	statement."). No spontaneous statement of Mr. Moquin, as the declarant, were offered.	
12	17. The Willard Declaration and the Reply Willard Declaration also contains	
13	hearsay within hearsay, which is inadmissible under NRS 51.067.	
14	18. Mr. Willard also purports to declare Mr. Moquin had a complete mental	
15 16	breakdown, how Mr. Moquin's symptoms of his alleged bipolar disorder might manifest,	
17	and how those symptoms may have affected Mr. Moquin's work. WD ¶¶ 68, 73-76 and	
18	87-88; <i>RWD</i> ¶ 16, 38.	
19	19. These statements are inadmissible as impermissible lay opinion under	
20	NRS 50.265. Mr. Willard is not a licensed health care provider qualified to opine on Mr.	
21	Moquin's mental condition, mental disorder, or symptoms of any disorder or condition	
22	that manifested.	
23 24	20. Mr. Willard surmises, speculates and draws conclusions. He is not	
25	qualified to testify about what medical, physical, or mental condition Mr. Moquin may	
26	have, or the effect of that condition on his work. White v. Corn, 616 S.E.2d 49, 54, 46	
27	Va. App. 123, 134 (2005) ("While lay witnesses may testify to the attitude and demeanor	
28		
	15	ļ
I	•	

1	of the defendant, lay witnesses cannot express an opinion as to the existence of a particular mental disease or condition.") (Citations omitted).
2	particular mental disease or condition.") (Citations omitted).

21. 3 Plaintiffs contend Mr. Willard's opinions of how Mr. Moguin's alleged 4 condition might manifest with symptoms and how those symptoms may have affected 5 Mr. Moquin's work are appropriate because "lay witnesses can offer testimony as to a 6 person's sanity." Reply, 2. Plaintiffs cite Criswell v. State, 84 Nev. 459, 464, 443 P.2d 7 552, 555 (1968) for the proposition that lay witnesses can offer testimony as to a 8 person's sanity. However, Criswell was overruled in 2001. See Finger v. State, 117 Nev. 9 548, 576-77, 27 P.3d 66, 85 (2001) (en banc decision regarding the legal insanity 10 11 defense and statutorily created "guilty, but mentally ill plea" and holding the legislative 12 abolishment of insanity as a complete defense to a criminal offense unconstitutional, 13 among other holdings, including that lay witnesses cannot testify as to "insanity" 14 because the term has a precise and narrow definition under Nevada law). 15 22. The Court concludes the *Finger* holdings are not applicable here. First, 16 the *Finger* case involves a defense to criminal charges. Second, Mr. Willard did not 17 testify that Mr. Moquin was sane or insane; he testified about the diagnosis of bipolar 18 19 disorder, possible symptoms of bipolar disorder and how those symptoms, if present, 20 might have affected Mr. Moquin's work. 21 23. The Nevada Revised Statutes (Evidence Code) provides: 22 A lay witness may testify to opinions or inferences that are "[r]ationally 23 based on the perception of the witness; and ... [h]elpful to a clear understanding of the testimony of the witness or the determination of a 24 fact in issue." NRS 50.265. A gualified expert may testify to matters within their "special knowledge, skill, experience, training or education" when 25 "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. 26 27 28

1	NRS 50.275; <i>Burnside v. State,</i> 131 Nev. Adv. Op. 40,, 352 P.3d 627, 636						
2	(death penalty case detective allowed to testify about cell phone records as lay						
3	witness). Further,						
4	[t]he key to determining whether testimony constitutes lay or expert						
5	testimony lies with a careful consideration of the substance of the testimony—does the testimony concern information within the common						
6	knowledge of or capable of perception by the average layperson or does it require some specialized knowledge or skill beyond the realm of everyday						
7	experience? See Randolph v. Collectramatic, Inc., 590 F.2d 844, 846 (10th Cir 1979) (observing that lay witness may not express opinion "as to						
8	(10th Cir.1979) (observing that lay witness may not express opinion "as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness"); Fed.R.Evid.						
9	701 advisory committee's note (2000 amend.) ("[T]he distinction between						
10	lay and expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony						
11	results from a process of reasoning which can be mastered only by specialists in the field." (internal quotation marks omitted)); <i>State v</i> .						
12	<i>Tierney,</i> 150 N.H. 339, 839 A.2d 38, 46 (2003) ("Lay testimony must be confined to personal observations that any layperson would be capable of						
13 14	making.").						
14	ld.						
16	24. While the Nevada Supreme Court and Court of Appeals have not						
17	addressed lay witness testimony, such as that contained in the Willard Declaration and						
18	Reply Willard Declaration, regarding bipolar disorder, this has been specifically						
19	addressed by the Pennsylvania court and is persuasive here. In the case of <i>In re</i>						
20	Petition for Involuntary Commitment of Joseph R. Barbour, the Superior Court of						
21	Pennsylvania held, "Lay witness and non-expert could not provide expert testimony						
22	regarding involuntary committee's medical diagnosis, specifically the existence of mood						
23 24	disorder known as bipolar disorder." In re Petition for Involuntary Commitment of						
24 25	Joseph R. Barbour, 733 A.2d 1286 (PA. 1999). This Court therefore concludes such						
26	testimony is inadmissible to support the <i>Rule 60(b) Motion</i> .						
27							
28							
	17						
	1						

1	25. The documents attached as Exhibits 6, 7 and 8 to the <i>Rule 60(b) Motion</i> ,
2	which purport to detail Mr. Moquin's alleged domestic abuse of his family, and which
3	also contain statements about Mr. Moquin's alleged bipolar condition, are inadmissible
4	as discussed, <i>supra</i> , with regard to bipolar disorder.
5	26. Exhibits 6, 7 and 8 to the <i>Rule 60(b) Motion</i> are not, and cannot be,
6	authenticated by Mr. Willard. Mr. Willard is not the author of the documents and has no
7 8	personal knowledge of their authenticity. He therefore cannot authenticate or identify
9	the documents pursuant to NRS 52.015(1) or NRS 52.025.
10	27. Exhibits 6, 7 and 8 do not meet the requirements for presumed
11	authenticity under NRS 52.125, as the exhibits are not certified copies of public records.
12	28. Pursuant to NRS 47.150, a judge or court may take judicial notice,
13	whether requested to or not. Further, a judge or court shall take judicial notice if
14	requested by a party and supplied with the necessary information. NRS 47.150. Here,
15	no party requested this Court to take judicial notice of the California court records
16 17	contained in the exhibits Exhibit 6 to the <i>Rule 60(b) Motion</i> and the <i>Reply</i> based on
18	certified copies. The Court exercises its discretion and declines to take judicial notice
19	here.
20	29. Moreover, even if Exhibits 6, 7 and 8 could be authenticated, the
21	statements contained in those exhibits regarding Mr. Moquin's alleged mental disorder
22	and condition, are inadmissible lay opinion about bipolar disorder and would still be
23	inadmissible hearsay, as they were apparently authored by Mr. Moquin's wife, and
24	Plaintiffs are offering them to prove that Mr. Moquin suffers from bipolar disorder and his
25	life was in "shambles."
26 27	
28	
	18

1	30. A number of <i>Reply</i> Exhibits and discussed in <i>Reply Willard Declaration</i>
2	also contain inadmissible hearsay.
3	31. All of the texts and emails offered by Plaintiffs and authored by Mr. Moquin
4	or Mr. O'Mara constitute inadmissible hearsay under NRS 51.035 and 51.065.
5	32. Specifically, Exhibit 2 and 3 to the <i>Reply</i> , the text messages authored by
6	Mr. Moquin in Exhibit 4, the text messages authored by Mr. Moquin in Exhibit 7, the
7	email authored by Mr. Moquin in Exhibit 8, and the emails authored by Mr. Moquin in
8 9	Exhibit 10 are therefore disregarded as inadmissible hearsay.
10	33. Exhibits attached to the <i>Reply</i> also contain communications occurring
11	after this Court issued its Order Granting Motion to Strike and its Order Granting
12	Sanctions.
13	34. All of statements in the <i>Reply Willard Declaration</i> set forth after Paragraph
14	37 detail events and communications from late January, 2018 through late May, 2018,
15	all of which occurred after this Court issued its Order Granting Motion to Strike, Order
16 17	Granting Sanctions, and Sanctions Order. Willard Declaration ¶¶ 37-67.
18	35. Exhibits 5, 6, 7, 8, 9, and 10 to the <i>Reply</i> contain only communications
19	and descriptions of events that occurred after this Court issued its Order Granting
20	Motion to Strike, Order Granting Sanctions, and Sanctions Order.
21	36. Logically, relevant events asserted to support Plaintiffs' argument of
22	excusable neglect must have necessarily occurred prior to the entry of the orders
23	Plaintiffs seek to set aside.
24 25	37. Statements in the <i>Reply Willard Declaration</i> after Paragraph 37 and
26	Exhibits 5, 6, 7, 8, 9, and 10 to the <i>Reply</i> are not relevant to this Court's determination of
27	
28	
	19
ļ	

1	whether Plaintiffs have met their burden of proving excusable neglect under NRCP
2	60(b).
3	38. Competent and substantial evidence has not been presented to establish
4	Rule 60(b) Relief.
5	Notwithstanding Plaintiff's Lack of Admissible Evidence,
6	Plaintiffs Fail to Meet their Burden under Rule 60(b) to Set <u>Aside the Sanctions Order and Order Granting Motion to Strike.</u>
7 8	39. Under Nevada law, "clients must be held accountable for the acts and
о 9	omissions of their attorneys.'" Huckabay Props. v. NC Auto Parts, 130 Nev. 196, 204,
10	322 P.3d 429, 433 (2014) (citing Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd.
11	<i>P'ship</i> , 507 U.S. 380, 396-97, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993)). The client
12	"voluntarily chose this attorney as his representative in the action, and he cannot now
13	avoid the consequences of the acts of omissions of this freely selected agent."
14	Huckabay Props., 130 Nev. at 204, 322 P.3d at 433 (citing Link v. Wabash R.R. Co.,
15 16	370 U.S. 626, 633-34, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) (rejecting the argument that
17	petitioner's claim should not have been dismissed based on counsel's unexcused
18	conduct because petitioner voluntarily chose his attorney).
19	40. In <i>Huckabay Props.</i> , the Nevada Supreme Court dismissed an appeal
20	where appellant's counsel failed to file an opening brief following two granted
21	extensions and a court order granting appellants a final extension. Huckabay Props.,
22	130 Nev. 209, 322 P.3d at 437. In Huckabay Props., the appellant was represented by
23 24	11
25	11
26	11
27	
28	
	20

1	two attorneys. In dismissing the appeal, and applicable to civil litigation at the trial court
2	level here, the Court held:
3	Nevada's jurisprudence expresses a policy preference for merits-based
4	resolution of appeals, and our appellate procedure rules embody this policy, among others, litigants should not read the rules or any of this
5	court's decisions as endorsing noncompliance with court rules and directives, as to do so risks forfeiting appellate relief. In these appeals,
6	appellants failed to timely file the opening brief and appendix after having been warned that failure to do so could result in the appeals' dismissals.
7	Appellants actually had two attorneys who received copies of this court's notices and orders regarding the briefing deadline, but they nevertheless
8	failed to comply with briefing deadlines and court rules and orders and
9	an appeal may be dismissed for failure to comply with court rules and orders and still be consistent with the court's preference for deciding cases
10	on their merits, as that policy must be balanced against other policies, including the public's interest in an expeditious appellate process, the
11	parties' interests in bringing litigation to a final and stable judgment, prejudice to the opposing side, and judicial administration considerations,
12	such as case and docket management. As for declining to dismiss the
13	appeal because the dilatory conduct was occasioned by counsel, and not the client, that reasoning does not comport with general agency principles,
14	under which a client is bound by its civil attorney's actions or inactions.
15	Huckabay Props. v. NC Auto Parts, 130 Nev. at 209, 322 P.3d at 437.
16	41. In <i>Huckabay Props.,</i> however, the court recognized exceptional
17	circumstances providing two possible exceptions "to the general agency rule that the
18 19	'sins' of the lawyer are visited upon his client where the lawyer's addictive disorder and
20	abandonment of his legal practice or criminal conduct justified relief for the victimized
21	client." <i>Id</i> . at 204 n.4, 322 P.3d at 434 n.4 (citing <i>Passarelli</i> , 102 Nev. at 286). Notably,
22	these exceptions noted by the court in <i>Huckabay Props</i> . are not present here, as the
23	facts of <i>Pasarelli</i> are readily distinguishable.
24	42. First, in <i>Passarelli</i> , the record included evidence the attorney suffered from
25	a substance abuse disorder that resulted in missed office days and appointments and
26	an inability to function. <i>Passarelli</i> , 102 Nev. at 285. Second, the attorney voluntarily
27	
28	
	21
I	

1	closed his law practice. Id. Third, the attorney was placed on disability inactive status	
2	by the Nevada Bar. Id. Finally, the client in Passarelli had only one attorney. Id.	
3	43. None of these facts are present in this case. As concluded, <i>supra</i> , no	
4	competent, reliable and admissible evidence of Mr. Moquin's claimed mental disorder is	
5	before this Court. Further, there is no evidence of missed meetings or absences from	
6	office due to the claimed conditions. There is no evidence that Mr. Moquin closed his	
7	law practice.	
8 9	44. Mr. Moquin is on active status with the California Bar. <i>Opposition to Rule</i>	
10	60(b) Motion, Ex. 5; <u>Attorney Search</u> , The State Bar of California,	
11	http://members.calbar.ca.gov/fal/LicenseeSearch (last visited Nov. 30, 2018).	
12	45. Pursuant to NRS 47.150, the Court may take judicial notice, whether	
13	requested or not. A fact subject to judicial notice must be either (1) generally known	
14	within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready	
15 16	determination by resort to sources whose accuracy cannot be reasonably questioned.	
17	NRS 47.130. It follows that the State Bar of California provides accurate information	
18	regarding licensing of attorneys which cannot be reasonably questioned. The Court	
19	takes judicial notice of Mr. Moquin's active status.	
20	46. Applied here, the Huckabay Props./Passarelli analysis compels denial of	
21	the Rule 60(b) Motion. The standard for "excusable neglect" based on activities of a	
22	party's attorney requires the attorney be completely unable to respond or appear in the	
23 24	proceedings. See Passarelli, 102 Nev. at 285 (court found excusable neglect where	
24	attorney failed to attend trial due to psychiatric disorder which caused him to shut down	
26	his practice and was placed on disability inactive status by the State Bar of Nevada);	
27	see also Cicerchia v. Cicerchia, 77 Nev. 158, 160-61, 360 P.2d 839, 841 (1961) (court	
28		
	22	

found excusable neglect where respondent lived out of state and suffered a nervous
breakdown shortly after retaining out of state counsel, who was unaware and
uninformed of the time to appear).

4 47. Here, Plaintiffs' attorneys did not completely abandon the case. Rather,
5 the Nevada Rules of Civil Procedure, this Court's express orders, and Defendants'
6 requests for damages computations and expert disclosures were ignored. Further, this
7 Court granted, upon was also ignored.

48. Plaintiffs attempt to excuse this conduct in their Rule 60(b) Motion by 9 claiming Mr. Moquin had suffered a complete mental breakdown and his personal life 10 11 was "in shambles." In addition, to the preclusion of evidence discussed, supra, the 12 evidence is vague at best regarding these assertions and vague regarding if, and when, 13 Mr. Moguin's alleged disorder impaired him and are vague in asserting when any of the 14 alleged events took place. Plaintiffs do attach additional exhibits to their Reply that offer 15 some information on timing but are inadequate for the Court's determination. 16

49. Specifically, Exhibit 2 to the *Reply* appears to be a text string between Mr.
Willard and Mr. Moquin from December 2, 2017 through December 6, 2017, in which
Mr. Willard inquires about the status of Plaintiffs' filing in response to the *Motion for Sanctions. Reply*, Ex. 2. The text messages reflect Mr. Willard was aware of the initial
deadline, December 4, 2017, for Plaintiffs to respond to the *Motion for Sanctions* (based
on the November 15, 2017 filing date and electronic service).

24 50. Defendants agreed to extensions through 3:00 pm on December 6, 2017
25 for Plaintiffs to file their oppositions.

26 27

28

23

51. The Court granted an additional extension through December 18, 2018.

1	52. Plaintiffs had knowledge of the initial filing deadline. They were aware no
2	opposition papers were filed. Mr. Willard continued to communicate with both Mr.
3	Moquin and Mr. O'Mara from December 11 until December 25, 2017 regarding the
4	delinquent filings ( <i>Reply,</i> Ex. 3, 4), well after this Court's final filing deadline of
5	December 18, 2017. <i>Sanctions Order</i> ¶ 95.
6	53. Despite knowing no oppositions had been filed, neither Mr. Willard
7 8	(through Mr. O'Mara), Mr. Moquin, nor Mr. O'Mara contacted Defendants' counsel or
9	this Court to address the status of this case. <i>Sanctions Order</i> ¶ 98.
10	54. Plaintiffs did nothing to apprise this Court of any issues until they filed the
11	Rule 60(b) Motion.
12	55. Plaintiffs started looking for attorneys who might be able to help. <i>Reply</i>
13	Willard Declaration ¶ 36. Plaintiffs instead provided personal financial assistance to Mr.
14	Moquin and did not terminate his services. WD ¶ 71; RWD ¶ 39.
15 16	56. Plaintiffs knew timely oppositions were not filed.
17	57. Plaintiffs chose to retain Mr. Moquin and did not terminate his
18	representation, even after becoming aware that he did not file a timely response to the
19	Motion for Sanctions. Plaintiffs cannot now avoid the consequences of the acts of
20	omissions of their freely selected agent.
21	58. Plaintiffs voluntarily chose to stop seeking new counsel to assist and
22	chose to continue to rely on Mr. Moquin solely for financial reasons. Willard Declaration
23 24	¶ 81.
25	59. Plaintiffs' multiple instances of non-compliance, including the Plaintiffs
26	failure to provide a compliant damages disclosure in this action, is reflected in the court
27	file for this proceeding, occurring well before Mr. Moquin's purported breakdown in
28	
	24

1	December, 2017 or January, 2018 asserted as preventing him from opposing the	
2	motions.	
3	60. Mr. O'Mara was counsel of record and did not report any issues related to	
4	Mr. Moquin to this Court until the filing of his Notice in March. Notice, 1.	
5	61. The Court gave counsel notice of the seriousness of Plaintiffs' violations	
6	and expressed it was considering dismissal based on those violations. Opposition to	
7 8	Rule 60(b) Motion. Ex. 3, December 12, 2017 Transcript ("you need to know going into	
9	these oppositions, that I'm very seriously considering granting all of it I haven't	
10	decided it, but I need to see compelling opposition not to grant it."). Plaintiffs and their	
11	attorneys were given notice of the potential consequence of failing to file an opposition	
12	to the Sanctions Motion.	
13	62. Mr. Moquin did not abandon Plaintiffs. He appeared at status hearings,	
14	participated in depositions, filed motions and other papers, including a lengthy	
15 16	opposition to Defendants' motion for partial summary judgment. Mr. Moquin	
17	participated in oral arguments and filed two summary judgment motions with substantial	
18	supporting exhibits and detailed declarations.	
19	63. A party "cannot be relieved from a judgment [order] taken against him in	
20	consequence of the neglect, carelessness, forgetfulness, or inattention of his attorney,"	
21	<i>Cicerchia</i> , 77 Nev. at 161.	
22	Plaintiffs Knew of Mr. Moquin's Alleged Condition and	
23	Alleged Non-responsiveness prior to the Sanctions Order and did Nothing and, therefore, Cannot Establish Excusable Neglect.	
24	64. In the Willard Declaration and Reply Willard Declaration, Mr. Willard	
25 26	admits he knew Mr. Moquin was having personal financial difficulties and that he	
27	borrowed money from friends and family to fund Mr. Moquin's personal expenses. WD	
28		
	25	
	I	

¶¶ 63-65; *RWD* ¶ 11-13. Mr. Willard also admits that he recommended a psychiatrist to
Mr. Moquin and he again borrowed money from a friend to pay for Mr. Moquin's
treatment. *WD* ¶¶ 68-71; *RWD* ¶ 11-13. Mr. Willard was aware of Mr. Moquin's alleged
problems prior to this Court's *Order Granting Motion to Strike and Sanctions Order*, yet
continued to allow Mr. Moquin to represent Plaintiffs.

6 65. Mr. Willard was aware of Mr. Moquin's inaction which distinguishes this 7 case from the cases upon which Plaintiffs rely in the Rule 60(b) Motion, where the 8 parties were unaware of their attorneys' problems. See e.g., Passarelli, 102 Nev. at 286 9 ("Passarelli was effectually and unknowingly deprived of legal representation") 10 11 (emphasis added); U.S. v. Cirami, 563 F.2d 26, 29-31 (2d Cir. 1977) (client discovered 12 that attorney had a mental disorder that prevented him from opposing summary 13 judgment more than two years later); Boehner v. Heise, 2009 WL 1360975 at \*2 14 (S.D.N.Y. 2009) (client did not learn case had been dismissed or and did not learn of 15 attorney's mental condition until several months after dismissal). Here, Mr. Willard 16 knew of the actions that supported the Sanctions Order. 17

Mr. Willard admits he was informed by Mr. O'Mara prior to the dismissal of
 the Plaintiffs' claims that Mr. Moquin was not responsive. Plaintiffs failed to replace Mr.
 Moquin or take other action due to perceived financial reasons. *Willard Declaration* ¶81.
 Plaintiffs' knowledge and inaction vitiates excuse for neglect.

67. The *Rule 60(b) Motion* cites authority for the proposition that even "where
an attorney's mishandling of a movant's case stems from the attorney's mental illness,"
which might justify relief under Rule 60(b). However, "client diligence must still be
shown." *Cobos v. Adelphi Univ.*, 179 F.R.D. 381, 388 (E.D.N.Y. 1998); see also *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350, 357 (5th Cir. 1993) ("A party has a

28

1	duty of diligence to inquire about the status of a case"); Pryor v. U.S. Postal Service,
2	769 F.2d 281, 287 (5th Cir. 1985) ("This Court has pointedly announced that a party has
3	a duty of diligence to inquire about the status of a case").
4	68. Mr. Willard's claim that he had no choice but to continue working with Mr.
5	Moquin due to financial issues lacks credibility as he admits he was able to borrow
6 7	money to fund Mr. Moquin's personal life and medical treatment. It logically follows he
8	had resources to retain new attorneys at the time.
9	69. Plaintiffs have not established by substantial evidence that they exercise
10	diligence to rectify representation in their case despite ample knowledge of Mr.
11	Moquin's non-responsiveness.
12	The <i>Rule 60(b) Motion</i> should be Denied because Two Attorneys
13	Represented Plaintiffs had an Obligation to Ensure Compliance with the Nevada Rules of Civil Procedure and this Court's Orders.
14	70. Plaintiffs' <i>Rule 60(b) Motion</i> ignores the fact David O'Mara served as local
15	counsel. In Nevada, the responsibilities of local counsel are clearly defined, and
16 17	encompass active responsibility to represent the client and manage the case:
18	(a) The Nevada attorney of record shall be responsible for and actively
19	participate in the representation of a client in any proceeding that is subject to this rule.
20	(b) The Nevada attorney of record shall be present at all motions, pre- trials, or any matters in open court unless otherwise ordered by the court.
21	(c) The Nevada attorney of record shall be responsible to the courtfor the administration of any proceeding that is subject to this rule and for
22	compliance with all state and local rules of practice. It is the responsibility
23	of Nevada counsel to ensure that the proceeding is tried and managed in accordance with all applicable Nevada procedural and ethical rules.
24	SCR 42(14). Mr. O'Mara's representation, even if contractually limited, was governed
25	by this rule.
26	
27	
28	07
	27

1	71. Mr. O'Mara expressly "consent[ed] as Nevada Counsel of Record to the
2	designation of Petitioner to associate in this cause pursuant to SCR 42" as part of his
3	Motion to Associate Counsel. Motion to Associate Counsel.
4	72. Mr. O'Mara attended every hearing and court conference in this case.
5	And, among other things, Mr. O'Mara signed the Verified Complaint and the First
6	Amended Verified Complaint. Complaint; FAC.
7 8	73. WDCR 23(1) provides:
9	Counsel who has appeared for any party shall represent that party in the case and shall be recognized by the court and by all parties as
10	having control of the client's case, until counsel withdraws, another attorney is substituted, or until counsel is discharged by the client in
11	writing, filed with the filing office, in accordance with SCR 46 and this rule.
12	WDCR 23.
13	74. Mr. O'Mara was the sole signatory on Plaintiffs' deficient initial disclosures,
14 15	(Opposition to Rule 60(b) Motion, Ex. 6), the uncured deficiencies of which were a basis
15	for sanction of dismissal. Sanctions Order.
17	75. Mr. O'Mara also signed and filed the <i>Brief Extension Request</i> with
18	this Court representing,
19	Counsel has been diligently working for weeks to respond to Defendant's
20	serial motions, which include seeking dismissal of Plaintiffs' case. With the full intention of submitting said responses, Counsel for Plaintiffs
21	encountered unforeseen computer issues Counsel for Plaintiffs is confident that with a one-day extension they will be able to recreate and
22	submit the oppositions to Defendants' three motions.
23	Brief Extension Request.
24   25	76. Mr. O'Mara's involvement precludes a conclusion of excusable neglect
26	here.
27	
28	
	28
	l i

1	The Sanctions Order was Sufficient under Nevada Law
2	77. Plaintiffs assert that the Sanctions Order was insufficient under Young v.
3	Johnny Ribeiro, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990) because the Sanctions
4	Order did not consider "whether sanctions unfairly operate to penalize a party for the
5	misconduct of his or her attorney." Rule 60(b) Motion at 12. However, consideration of
6	this factor is discretionary, not mandatory. See Young v. Johnny Ribeiro, 106 Nev. at 93
7 8	("The factors a court may properly consider include whether sanctions unfairly
9	operate to penalize a party for the misconduct of his or her attorney") (emphasis
10	supplied).
11	78. The Court concludes factors enumerated in Young v. Johnny Ribeiro
12	Bldg., Inc. were met by the Sanctions Order. Specifically, the Nevada Supreme Court
13	held where a court issues an order of dismissal with prejudice as a discovery sanction a
14	court may consider, among others, the degree of willfulness of the offending party, the
15 16	extent to which the non-offending party would be prejudiced by a lesser sanction, the
17	severity of the sanction of dismissal relative to the severity of the discovery abuse, and
18	the feasibility and fairness of alternative, less severe sanctions. Young v. Johnny
19	Ribeiro Bldg., Inc., 106 Nev. at 93. The factors are not mandatory so long as the Court
20	supports the order with "an express, careful and preferably written explanation of the
21	court's analysis of the pertinent factors." <i>Id.</i>
22	79. While each suggested factor discussion in the Sanctions Order was not
23 24	labeled by factor, the Court addressed the factors it deemed appropriate.
25	80. In light of the circumstances in this case, the dismissal of Plaintiffs' claims
26	did not unfairly penalize Plaintiffs based on the factors analyzed in the Sanctions Order.
27	80.
28	
	29

1	81. Plaintiffs assert this Court must address the additional factors set forth in
2	Yochum v. Davis, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982). Yochum involves
3	relief from a default judgment and not an order, as here, where judgment has not been
4	entered. Yochum does not preclude denial of the motion.
5	The Rule 60(b) Motion should be Denied.
6	82. After weighing the credibility and admissibility of the evidence provided in
7	support of the Rule 60(b) Motion, substantial evidence has not been presented to
8 9	establish excusable neglect.
10	83. Plaintiffs have failed to meet their burden of proving, by a preponderance
11	of the evidence, excusable neglect so as to justify relief under NRCP 60(b).
12	ORDER
13	Based upon the foregoing, Plaintiffs' <i>Rule 60(b) Motion</i> is <b>DENIED</b> , in its entirety.
14	DATED this $\frac{\mathcal{I}}{\mathcal{I}}$ day of November, 2018.
15	
16	DISTRICT JUDGE
17	
18 19	
20	
21	
22	
23	
24	
25	
26	
27	
28	30

1	<u>CERTIFICATE OF SERVICE</u>
2	I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT;
3	that on the $30$ day of November, 2018, I electronically filed the foregoing with the
4	Clerk of the Court system which will send a notice of electronic filing to the following:
5	RICHARD WILLIAMSON, ESQ.
6	JONATHAN TEW, ESQ.
7	BRIAN IRVINE, ESQ.
8	ANJALI WEBSTER, ESQ.
9	JOHN DESMOND, ESQ.
10	
11	
12	
13	
14	
15	
16	And, I deposited in the County mailing system for postage and mailing with the
17	United States Postal Service in Reno, Nevada, a true and correct copy of the attached
18	document addressed as follows:
19	
20 21	MIA RA
21	VMU 4DO
22	
23	
25	
26	
27	
28	

## EXHIBIT "19"

## EXHIBIT "19"

1		FILED Electronically CV14-01712 2018-12-11 04:41:00 PM Jacqueline Bryant Clerk of the Court Transaction # 7019340
	2535 DICKINSON WRIGHT, PLLC	
2	JOHN P. DESMOND	
3	Nevada Bar No. 5618 BRIAN R. IRVINE	
4	Nevada Bar No. 7758 ANJALI D. WEBSTER	
5	Nevada Bar No. 12515	
6	100 West Liberty Street, Suite 940 Reno, NV 89501	
7	Tel: (775) 343-7500 Fax: (844) 670-6009	
8	Email: <u>Jdesmond@dickinsonwright.com</u> Email: <u>Birvine@dickinsonwright.com</u>	
9	Email: Awebster@dickinsonwright.com	
10	Attorney for Berry Hinckley Industries and Jerry	Herbst
11	IN THE SECOND JUDICIAL DISTRICT	COURT OF THE STATE OF NEVADA
	IN AND FOR THE CO	DUNTY OF WASHOE
12	LADDY L WILLADD in dividently and a	
13	LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund;	CASE NO. CV14-01712
14	OVERLAND DEVELOPMENT CORPORATION, a California corporation;	DEPT. 6
15	EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the	
16	Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,	
17		
18	Plaintiffs, vs.	
19		
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	LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund;	
28	OVERLAND DEVELOPMENT CORPORATION, a California corporation;	

1	Counter-defendants.	
2	/	
3	NOTICE OF ENTRY OF JUDGMENT	
4	PLEASE TAKE NOTICE that on December 11, 2018, a Judgment was entered in the	
5	above-captioned matter in favor of Defendants and against the Willard Plaintiffs on all of the	
6	Willard Plaintiffs' claims and that such claims are dismissed with prejudice. A true and correct	
7	copy of the order is attached hereto as Exhibit 1.	
8	AFFIRMATION	
9	Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding	
10	document does not contain the social security number of any person.	
11	DATED this 11th day of December, 2018.	
12	DICKINSON WRIGHT, PLLC	
13		
14	/s/ Brian R. Irvine	
15	JOHN P. DESMOND Nevada Bar No. 5618	
16	BRIAN R. IRVINE Nevada Bar No. 7758	
17	ANJALI D. WEBSTER Nevada Bar No. 12515	
18	100 West Liberty Street, Suite 940 Reno, NV 89501	
19	Tel: (775) 343-7500 Fax: (844) 670-6009	
20	Email: <u>Jdesmond@dickinsonwright.com</u> Email: <u>Birvine@dickinsonwright.com</u>	
21	Email: <u>Awebster@dickinsonwright.com</u>	
22		
23		
24		
25		
26 27		
27		
20	Page 1	

1			
2	CERTIFICATE OF SERVICE		
2	I certify that I am an employee of DICKINSON WRIGHT PLLC, and that on this date,		
4	pursuant to NRCP 5(b); I am serving a true and correct copy of the attached NOTICE OF ENTRY OF JUDGMENT on the parties through the Second Judicial District Court's E-Flex		
5			
6	filing system to the following:		
7			
8	Richard D. Williamson, Esq.Brian P. MoquinJonathan Joel Tew, Esq.LAW OFFICES OF BRIAN P. MOQUIN		
9	ROBERTSON, JOHNSON, MILLER & WILLIAMSON3287 Ruffino Lane San Jose, California 95148		
10	50 West Liberty Street, Suite 600 Reno, Nevada 89501		
11	Attorneys for Plaintiffs/Counterdefendants		
12	DATED this 11th day of December, 2018.		
13			
14	/s/ Mina Reel An employee of DICKINSON WRIGHT PLLC		
15	An employee of Dickinson whom file		
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			

EXHIBIT TABLE			
Exhibit	Description December 11, 2018, Judgment	Page 3	
1	December 11, 2018, Judgment	3	
1	e counts are exclusive of exhibit slip sheets.		

FILED Electronically CV14-01712 2018-12-11 04:41:00 PM Jacqueline Bryant Clerk of the Court Transaction # 7019340

 $z_{2}$ 

## **EXHIBIT 1**

.

## **EXHIBIT 1**

1 2 3 4 5 6 7 8 9 10	FILE D Electronically CV14-01712 2018-12-11 03:23:03 P Jacqueline Bryant Clerk of the Court Transaction # 701889 DICKINSON WRIGHT, PLLC JOHN P. DESMOND Nevada Bar No. 5618 BRIAN R. IRVINE Nevada Bar No. 758 ANJALI D. WEBSTER Nevada Bar No. 12515 100 West Liberty Street, Suite 940 Reno, NV 89501 Tel: (775) 343-7500 Fax: (844) 670-6009 Email: <u>Idesmond@dickinsonwright.com</u> Email: <u>Birvine@dickinsonwright.com</u> Email: <u>Birvine@dickinsonwright.com</u> Email: <u>Awebster@dickinsonwright.com</u> <i>Attorney for Defendants</i> <i>Berry Hinckley Industries and</i> <i>Jerry Herbst</i>	
11	IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA	
12	IN AND FOR THE COUNTY OF WASHOE	
13		
14	LARRY J. WILLARD, individually CASE NO. CV14-01712 and as trustee of the Larry James Willard	
15	Trust Fund; OVERLAND DEVELOPMENT DEPT. 6 CORPORATION, a California corporation; EDWARD C. WOOLEY AND JUDITH A.	
16 17	WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,	
18	Plaintiff,	
19	VS.	
20	BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual	
21	Defendants.	
22	/	
23 24	BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST,	
25	an individual; Counterclaimants,	
26	Counciciaimants,	
27	vs	
28	Page 1 of 3	

1 2	LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;	
3	Counter-defendants.	
4	/	
5	TPROPOSED JUDGMENT	
7	This action, having come before this Court, the Honorable Lynne K. Simons presiding,	
8	and all of the claims of Plaintiffs Larry J. Willard, individually and as trustee of the Larry James	
9	Willard Trust (the "Willard Plaintiffs"), having been dismissed by this Court with prejudice in	
10	its Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions filed	
11	herein on March 6, 2018, this Court having denied the Willard Plaintiffs' NRCP 60(b) Motion	
12	for Relief on November 30, 2018, and all of the counterclaims of Defendants Berry-Hinckley	
13	Industries ("BHI") and Jerry Herbst having been dismissed by this Court in its Order granting	
14	Defendants' Motion for voluntary dismissal filed herein on April 13, 2018,	
15	IT IS ORDERED AND ADJUDGED that Judgment is entered in favor of Defendants	
16	and against the Willard Plaintiffs on all of the Willard Plaintiffs' claims and that such claims are	
17	dismissed with prejudice.	
18		
19	///	
20		
21	///	
22		
23	///	
24		
24	///	
26		
20	///	ł
28		
	Page 2 of 3	

1 IT IS FURTHER ORDERED AND ADJUDGED that Defendants' counterclaims are 2 dismissed without prejudice. DATED this 11 day of December, 2018. 3 4 5 6 DISTRICT COURT JUDGE 7 8 Respectfully submitted by: 9 DICKINSON WRIGHT, PLLC 10 11 /s/ Brian R. Irvine 12 JOHN P. DESMOND Nevada Bar No. 5618 13 BRIAN R. IRVINE Nevada Bar No. 7758 14 ANJALI D. WEBSTER Nevada Bar No. 11525 15 100 West Liberty Street, Suite 940 Reno, NV 89501 16 Tel: (775) 343-7500 Fax: (844) 670-6009 17 Email: Jdesmond@dickinsonwright.com Email: Birvine@dickinsonwright.com 18 Email: Awebster@dickinsonwright.com 19 Attorneys for Defendants Berry Hinckley Industries, and 20 Jerry Herbst 21 22 23 24 25 26 27 28 Page 3 of 3

## EXHIBIT "20"

# EXHIBIT "20"

Docket 83640 Document 2021-32123

FILED Electronically CV14-01712 2021-09-14 09:59:31 AM Alicia L. Lerud Clerk of the Court Transaction # 8644717

		Alicia L. Lerud
	2540	Clerk of the Cour
1	DICKINSON WRIGHT PLLC	Transaction # 86447
2	JOHN P. DESMOND	
2	<sup>2</sup> Nevada Bar No. 5618	
3	BRIAN R. IRVINE	
	Nevada Bar No. 7758	
4	ANJALI D. WEBSTER	
5	Nevada Bar No. 12515	
	100 West Liberty Street, Suite 940	
6	Reno, NV 89501 Tel: (775) 343-7500	
7	Fax: (844) 670-6009	
	Email: <u>Jdesmond@dickinsonwright.com</u>	
8	Email: Birvine@dickinsonwright.com	
9	Email: <u>Awebster@dickinsonwright.com</u> Attorney for Berry Hinckley Industries and Jerry	Herbst
10	IN THE SECOND JUDICIAL DISTRICT	COURT OF THE STATE OF NEVADA
11	IN AND FOR THE CO	DUNTY OF WASHOE
12	LARRY J. WILLARD, individually and as	CASE NO. CV14 01712
13	trustee of the Larry James Willard Trust Fund;	CASE NO. CV14-01712
	OVERLAND DEVELOPMENT CORPORATION, a California corporation;	DEPT. 6
14	EDWARD E. WOOLEY AND JUDITH A.	
15	WOOLEY, individually and as trustees of the	
	Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,	
16		
17	Plaintiffs,	
	VS.	
18	BERRY-HINCKLEY INDUSTRIES, a Nevada	
19	corporation; and JERRY HERBST, an	
	Individual; Defendants.	
20		
21	BERRY-HINCKLEY INDUSTRIES, a	
	Nevada corporation; and JERRY HERBST,	
22	an individual;	
23	Counterclaimants,	
	vs	
24		
25	LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund;	
	OVERLAND DEVELOPMENT	
26	CORPORATION, a California corporation;	
27	Counter-defendants.	
28	/	

1	NOTICE OF ENTRY OF ORDER
2	PLEASE TAKE NOTICE that on September 13, 2021, an Order After Remand
3	Denying Plaintiffs' Rule 60(B) Motion For Relief was entered in the above-captioned matter.
4	A true and correct copy of the Order is attached hereto as <b>Exhibit 1.</b>
5	AFFIRMATION
6	Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding
7	document does not contain the social security number of any person.
8	DATED this 14th day of September 2021.
9	DICKINSON WRIGHT, PLLC
10	
11	<u>/s/ Brian R. Irvine</u> JOHN P. DESMOND
12	Nevada Bar No. 5618 BRIAN R. IRVINE
13	Nevada Bar No. 7758 ANJALI D. WEBSTER
14	Nevada Bar No. 12515 100 West Liberty Street, Suite 940
15	Reno, NV 89501 Tel: (775) 343-7500
16	Fax: (844) 670-6009 Email: Jdesmond@dickinsonwright.com
17	Email: <u>Birvine@dickinsonwright.com</u> Email: Awebster@dickinsonwright.com
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	
	Page 1

1	CERTIFICATE OF SERVICE	
2	I certify that I am an employee of DICKINSON WRIGHT PLLC, and that on this date,	
3	pursuant to NRCP 5(b); I am serving a true and correct copy of the attached NOTICE OF	
4	ENTRY OF ORDER on the parties through the Second Judicial District Court's E-Flex filing	
5	system to the following:	
6 7 8 9 10	Richard D. Williamson, Esq.Robert L. Eisenberg, Esq.Jonathan Joel Tew, Esq.LEMONS, GRUNDY & EISENBERGROBERTSON, JOHNSON, MILLER &6005 Plumas Street, Third FloorWILLIAMSONReno, NV 8951950 West Liberty Street, Suite 600Telephone: (775) 786-6868Reno, Nevada 89501Facsimile: (775) 786-9716rich@nvlawyers.comrle@lge.net	
10	jon@nvlawyers.com	
11	Attorneys for Plaintiffs/CounterdefendantsAttorneys for Plaintiffs/Counterdefendants	
13		
14	DATED this 14th day of September 2021.	
15		
16	<u>/s/ Mina Reel</u> An employee of DICKINSON WRIGHT PLLC	
17	All elliployee of DICKINSON WRIGHT FLLC	
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1     ORDER AFTER REMAND DENVING PLAINTIFFS'     46       1     RULE 60(b) MOTION FOR RELIEF     46			
RULE 60(b) MOTION FOR RELIEF	Exhibit		Pages <sup>1</sup>
<sup>1</sup> Exhibit Page counts are exclusive of exhibit slip sheets.	1	ORDER AFTER REMAND DENYING PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF	46
<sup>1</sup> Exhibit Page counts are exclusive of exhibit slip sheets.			
<sup>1</sup> Exhibit Page counts are exclusive of exhibit slip sheets.			
<sup>1</sup> Exhibit Page counts are exclusive of exhibit slip sheets.			
<sup>1</sup> Exhibit Page counts are exclusive of exhibit slip sheets.			
<sup>1</sup> Exhibit Page counts are exclusive of exhibit slip sheets.			
<sup>1</sup> Exhibit Page counts are exclusive of exhibit slip sheets.			
<sup>1</sup> Exhibit Page counts are exclusive of exhibit slip sheets.			
<sup>1</sup> Exhibit Page counts are exclusive of exhibit slip sheets.			
<sup>1</sup> Exhibit Page counts are exclusive of exhibit slip sheets.			
<sup>1</sup> Exhibit Page counts are exclusive of exhibit slip sheets.			
<sup>1</sup> Exhibit Page counts are exclusive of exhibit slip sheets.			
<sup>1</sup> Exhibit Page counts are exclusive of exhibit slip sheets.			
<sup>1</sup> Exhibit Page counts are exclusive of exhibit slip sheets.			
<sup>1</sup> Exhibit Page counts are exclusive of exhibit slip sheets.			
<sup>1</sup> Exhibit Page counts are exclusive of exhibit slip sheets.			
<sup>1</sup> Exhibit Page counts are exclusive of exhibit slip sheets.			
<sup>1</sup> Exhibit Page counts are exclusive of exhibit slip sheets.			
<sup>1</sup> Exhibit Page counts are exclusive of exhibit slip sheets.			
<sup>1</sup> Exhibit Page counts are exclusive of exhibit slip sheets.			
<sup>1</sup> Exhibit Page counts are exclusive of exhibit slip sheets.			
<sup>1</sup> Exhibit Page counts are exclusive of exhibit slip sheets.			
<sup>-</sup> Exhibit Page counts are exclusive of exhibit slip sheets.			
	+ Exhibit Page	counts are exclusive of exhibit slip sheets.	

FILED Electronically CV14-01712 2021-09-14 09:59:31 AM Alicia L. Lerud Clerk of the Court Transaction # 8644717

## **EXHIBIT 1**

....

 $z_{2}$ 

## EXHIBIT 1

		FILED Electronically CV14-01712 2021-09-13 04:27:48 PM Alicia L. Lerud
1	CODE NO. 2842	Clerk of the Court Transaction # 8643933
2		
3		
4		
5	IN THE SECOND JUDICIAL DISTRICT CO	OURT OF THE STATE OF NEVADA
6	IN AND FOR THE COUN	ITY OF WASHOE
7		
8	LARRY J. WILLARD, individually and as	Case No. CV14-01712
9	trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT	Dept. No. 6
10	CORPORATION, a California corporation; EDWARD C. WOOLEY AND JUDITH A	
11	WOOLEY, individually and as trustees of the	ORDER AFTER REMAND
12	Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,	DENYING PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF
13	Plaintiffs,	
14		
15	VS.	
16	BERRY-HINCKLEY INDUSTRIES, a Nevada	
17	Corporation; and JERRY HERBST, an individual,	
18	Defendants.	
19	/	
20		
21	BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST,	
22	an individual,	
23	Counterclaimants,	
24	VS	
25	LARRY J. WILLARD, individually and as	
26	trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT	
27	CORPORATION, a California corporation,	
28	Counter-defendants.	
-	/	

1 2

3

4

5

#### ORDER AFTER REMAND DENYING PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF

Before this Court is Plaintiffs' Rule 60(b) Motion for Relief ("60(b) Motion") filed by Plaintiffs Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund and Overland Development Corporation, a California Corporation (collectively, "Willard" or "Plaintiffs"), by and through counsel, Robertson, Johnson, Miller & Williamson. Pursuant to NRCP 60(b), Plaintiffs seek to set aside: (1) this Court's January 4, 2018, Order Granting Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich; (2) this Court's January 4, 2018, Order Granting Defendants'/Counterclaimants' Motion for Sanctions; and (3) this Court's March 6, 2018, Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions. (60(b) Motion).

In opposition, Defendants Berry-Hinckley Industries ("BHI") and Jerry Herbst (collectively, "Defendants") filed their *Opposition to Rule 60(b) Motion for Relief ("60(b) Opposition")*, by and through their counsel, Dickinson Wright PLLC.

Plaintiffs then filed their *Reply in Support of the Willard Plaintiffs' Rule 60(b) Motion for Relief.* Prior to remand, oral arguments were held before this Court on September 4, 2018.

After consideration of the papers submitted, the arguments of counsel, and the entire court file, this Court entered its *Order Denying Plaintiffs' Rule 60(b) Motion for Relief* (the *"Prior 60(b) Order"*).

Plaintiffs appealed the *Prior 60(b) Order*. On August 6, 2020, the Nevada Supreme Court entered its Opinion (the "*Opinion*") in which it reversed the *Prior 60(b) Order* and remanded the case to this Court, with instructions the Court issue explicit and detailed written findings on each of the factors identified in *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982).

After consideration of the instant papers submitted, the arguments of counsel, and the entire court file, and in compliance with the Nevada Supreme Court's instructions, the

1	Court makes the following findings of fact, conclusions of law and orders as follows:		
2	I. <u>FINDINGS OF FACT</u> .		
3	The Court makes the following Findings of Fact:		
4	Α.	PLAINTIFFS' COMPLAINT.	
5	1.	On August 8, 2014, Plaintiffs commenced this action by filing their Complaint	
6	against Defe	endants. <sup>1</sup> <i>Complaint</i> , generally.	
7	2.	By the Complaint and the First Amended Complaint ("FAC"), Plaintiffs sought	
8	the following	damages against Defendants for an alleged breach of the lease between	
9	Willard and	BHI: (1) "rental income" for \$19,443,836.94, discounted by 4% per the lease to	
10	\$15,741,360	0.75 as of March 1, 2013; and (2) certain property-related damages, such as	
11 12	insurance ar	nd installation of a security fence. FAC.	
12	3.	Willard also sought several other categories of damages which have since	
14	been dismis	sed or withdrawn. May 30, 2017, <i>Order</i> .	
15 16	B. PLAINTIFFS FAILED TO COMPLY WITH THE NEVADA RULES OF CIVIL PROCEDURE AND THIS COURT'S ORDERS.		
17	4.	Plaintiffs failed to provide a compliant damages disclosure in this action <sup>2</sup> .	
18	5.	Plaintiffs failed to provide a damages computation in their initial disclosures, as	
19	required unc	ler NRCP 16.1(a)(1)(C). Findings of Fact, Conclusions of Law, and Order on	
20	Defendants' Motion for Sanctions ("Sanctions Order") ¶ 12. Plaintiffs also failed to provide		
21	damages computations at any time despite numerous demands on both Brian Moquin and		
22	David O'Mara, of which Plaintiffs personally were aware. Sanctions Order ¶¶ 14-16, 25, 27-		
23	33, 39, 43-44 and 51-54; <i>January 10, 2017, Transcript</i> .		
24			
25	<sup>1</sup> Willard filed the initial complaint jointly with Edward E. Wooley and Judith A. Wooley, individually		
26 27	and as Trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000 (collectively, "Wooley"). However, Defendants and Wooley entered into a settlement agreement and stipulation for dismissal. This Court entered its Order on April 13, 2018 dismissing Wooley's claims with prejudice.		

 <sup>28
 &</sup>lt;sup>2</sup> The Court numbers the Findings of Fact sequentially after each sub-point and continuing through the next sub-point, rather than beginning the sequence with "1" again.

6. Plaintiffs failed to provide complete and adequate responses to interrogatories requesting information about Plaintiffs' damages in the normal course of discovery.

7. Plaintiffs failed to provide complete and adequate responses to interrogatories in violation of this Court's *Order Granting Defendants' Motion to Compel* and failed to comply with this Court's *Order* (*"January Hearing Order"*) issued after the parties discussed Plaintiffs' failure to provide damages computations at the January 10, 2017, hearing attended by Mr. Moquin, Mr. O'Mara, and Plaintiff Larry J. Willard. *Sanctions Order* ¶¶ 17-25.

The January Hearing Order required Plaintiffs to provide damages
 computations and supporting materials. Sanctions Order ¶¶ 46-49, 54, 59-64, 67-68;
 Defendants' Opposition to Plaintiffs' Rule 60(b) Motion, Ex. 2; January 10, 2017, Transcript
 at 61-63, 68; January Hearing Order.

9. Plaintiffs failed to properly disclose Daniel Gluhaich as an expert witness as required by NRCP 16.1(a)(2). *Sanctions Order*  $\P$  34-37.

10. In contravention of this Court's *January Hearing Order*, Plaintiffs failed to provide an amended disclosure of Mr. Gluhaich, although Defendants' counsel made multiple requests. *Sanctions Order* ¶¶ 38-45, 50-64.

C.

### PLAINTIFFS' SUMMARY JUDGMENT MOTION.

11. Pursuant to the February 9, 2017, *Stipulation and Order to Continue Trial*, discovery closed in mid-November, 2017.

12. On October 18, 2017, less than a month before the close of discovery, Plaintiffs filed their *Motion of Summary Judgment* asserting they were entitled, as a matter of law, to more than triple the amount of damages alleged in and requested by their *First Amended Complaint. Sanctions Order* ¶¶ 69, 73.

28

1

2

3

4

5

6

7

8

9

10

11

12

13

14

1 13. The damages asserted in Plaintiffs' *Motion for Summary Judgment* were not
 2 previously disclosed. The motion was also supported by previously undisclosed expert
 3 opinions and documents. *Sanctions Order* ¶¶ 74-79.

14. The expert's documents had been in Plaintiffs' possession throughout the pendency of this case, but had not been previously disclosed, despite Defendants' requests for such documents. *Id.* at ¶¶ 79, 136.

15. On November 13, 2017, Defendants filed their Opposition to Plaintiffs' *Motion for Summary Judgment*.

16. Plaintiffs did not submit the *Motion for Summary Judgment* for decision.

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

#### D. DEFENDANTS' MOTION TO STRIKE AND/OR MOTION IN LIMINE TO EXCLUDE THE EXPERT TESTIMONY OF DANIEL GLUHAICH AND MOTION FOR SANCTIONS.

17. On November 14, 2017, Defendants filed their Motion to Strike and/or Motion in Limine to Exclude Expert Testimony of Daniel Gluhaich ("Motion to Strike").

18. In the *Motion to Strike*, Defendants maintained this Court should preclude Plaintiffs from offering Mr. Gluhaich's testimony on the grounds: (1) Plaintiffs failed to adequately disclose Mr. Gluhaich as an expert witness because they failed to provide "a summary of the facts and opinions to which the witness is expected to testify" as required by NRCP 16.1(a)(2)(B); (2) the opinions offered by Mr. Gluhaich in support of Plaintiffs' *Motion for Summary Judgment* were based upon inadmissible hearsay and were based solely on the opinions of others; and (3) Mr. Gluhaich was not qualified to offer the opinions included in his declaration filed in support of Plaintiffs' *Motion for Summary Judgment*.

19. On November 15, 2017, Defendants filed their *Motion for Sanctions* (the "Sanctions Motion").

20. In the *Sanctions Motion*, Defendants argued this Court should sanction Plaintiffs for their continued and intentional conduct in failing to comply with the Nevada Rules of Civil Procedure and this Court's orders requiring Plaintiffs to provide damages computations and full and adequate expert disclosures, and dismiss Plaintiffs' claims with

prejudice or, in the alternative, preclude Plaintiffs from seeking new damages or relying upon their undisclosed expert and appraisals.

21. Defendants agreed to give Plaintiffs several extensions of time to oppose the *Motion to Strike* and *Sanctions Motion*, but no oppositions were filed.

22. On December 6, 2017, Plaintiffs, through Mr. O'Mara, requested relief from the Court by extension to respond until "December 7, 2017 at 4:29 p.m." *Sanctions Order* 94; *Plaintiffs' Request for a Brief Extension of Time* (the "*Extension Request*").

23. In the *Extension Request*, Mr. O'Mara also represented that "[c]ounsel has been diligently working for weeks to respond to Defendant's (sic) serial motions, which include seeking dismissal with prejudice of Plaintiffs' case." *Id.* at 2.

24. This Court held a status conference on December 12, 2017, attended by Defendants' counsel and Plaintiffs' counsel, Mr. Moquin and Mr. O'Mara. At the status conference, after observing Mr. Moquin, having a significant dialogue with Mr. Moquin, and over vehement objection by Defendants' counsel, this Court granted *Plaintiffs' Brief Extension Request* plus granted more time than was requested. The Court directed Plaintiffs to respond to the outstanding motions no later than Monday, December 18, 2017, at 10:00 am. *Sanctions Order* ¶ 95.

25. This Court further directed Defendants to file their reply briefs no later than January 8, 2018. The Court set the parties' outstanding Motions for oral argument on January 12, 2018. *Sanctions Order* ¶ 96.

26. This Court admonished Plaintiffs, stating "you need to know going into these oppositions, that I'm very seriously considering granting all of it…I haven't decided it, but I need to see compelling opposition not to grant it." *Opposition to Rule 60(b) Motion*, Ex. 3, December 12, 2017, *Transcript of Status Conference*, in part.

27. Plaintiffs did not file an opposition or response to the *Motion to Strike* or *Sanctions Motion* by December 18, 2017, or any time thereafter, nor did Plaintiffs request any further extension.

28. This Court entered its Order Granting Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich on January 4, 2018 ("Order Granting Motion to Strike").

29. This Court entered its Order Granting Defendants'/Counterclaimants' Motion for Sanctions on January 4, 2018 ("Order Granting Sanctions Motion").

30. This Court entered its Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions on March 6, 2018 ("Sanctions Order").<sup>3</sup>

E.

1

#### WITHDRAWAL OF LOCAL COUNSEL.

31. On March 15, 2018, Mr. O'Mara filed a Notice of Withdrawal of Local Counsel ("Notice"). The Notice states, "[c]ounsel has had no contact with lead counsel Mr. Moguin for many months with a total failure just prior to the Court's first decisions being filed in this case," and "Mr. Moguin was unresponsive during the time in which this Court was deciding the pending motions, even after counsel begged him for a response to be filed with the Court and was told he would provide such a response." *Notice*, 1.

32. The *Notice* describes the terms of retention of Mr. O'Mara as "undersigned counsel was retained solely as local counsel, and provided Mr. Moquin with the necessary information related to the Court's filing requirement and timelines. Undersigned Counsel was retained only to provide services as directed by Mr. Moquin, and would be relieved of services if Mr. Moquin was removed." Id.

#### F. PLAINTIFFS' RULE 60(B) MOTION.

33. On March 26, 2018, Robertson, Johnson, Miller & Williamson filed a notice of appearance on behalf of Plaintiffs.

34. On April 18, 2018, Plaintiffs filed the prior *Rule 60(b) Motion*. Plaintiffs argued this Court should set aside its Order Granting the Motion to Strike, Order Granting Sanctions

<sup>&</sup>lt;sup>3</sup>The Order Granting Sanctions imposed sanctions and directed Defendants to "submit a Proposed Order granting Defendants'/Counterclaimants' Motion for Sanctions, including factual and legal analysis and discussion, to Department 6 within twenty (20) days of the date of this Order in 28 accordance with WDCR 9." Order Granting Sanctions Motion, 4. For purposes of the instant motion, the Court considers the Order Granting Sanctions Motion and Sanctions Order, as one for the

purposes of the analysis herein.

Motion, and Sanctions Order, based upon Mr. Moguin's excusable neglect. Plaintiffs further argued the Sanctions Order was insufficient under Young v. Johnny Ribeiro, 106 Nev. 88, 787 P.2d 777 (1990), because the Court did not consider whether sanctions unfairly operate to penalize Plaintiffs for the misconduct of their attorney.

35. Plaintiffs argued their failure to provide the damages computations and adequate expert disclosures, as required by the Nevada Rules of Civil Procedure and this Court's orders and their failure to file oppositions to the *Motion to Strike* and *Sanctions Motion* were all due to Mr. Moquin's failure "to properly prosecute this case due to a serious mental illness and a personal life that was apparently in shambles." (Rule 60(b) Motion 1).

36. The *Rule 60(b)* Motion purported to support its arguments primarily through the Declaration of Larry J. Willard (the "Willard Declaration" and "WD" in citations to the record).<sup>4</sup>

37. The Willard Declaration included several statements about Mr. Moguin's alleged mental disorder. It stated that Mr. Willard is "**convinced**" Mr. Moguin was dealing with issues and demons beyond his control. WD ¶ 66. It further stated that he "learned" that Mr. Moquin was struggling with constant marital conflict that greatly interfered with his work. Id. The Willard Declaration stated that Mr. Moguin suffered a "total mental breakdown." WD ¶ 68. It stated that Mr. Moquin explained to Mr. Willard he had been diagnosed with bipolar disorder. WD ¶ 70. Mr. Willard also declared that he believed Mr. Moquin's disorder to be "severe and debilitating." WD ¶ 73. He stated that he **now sees** "that Mr. Moquin was suffering from [symptoms of bipolar disorder] throughout his work on the case." WD ¶ 76. And, Mr. Willard declared that he can now see how Mr. Moguin's alleged psychological issues affected Plaintiffs' case. WD ¶ 87. (Bolded emphasis supplied 25 on all paragraphs cited).

26 27

28

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

<sup>&</sup>lt;sup>4</sup>The Willard Declaration includes paragraphs discussing the underlying facts of the action and the initial filing of the suit in California. These paragraphs are not relevant to the Court's determination of the Rule 60(b) Motion and are not considered. See e.g., WD ¶¶ 1-51, 100.

38. The *Rule 60(b) Motion* also included an internet printout purporting to list symptoms of bipolar disorder, (Rule 60(b) Motion, Ex. 5), and several documents related to alleged spousal abuse by Mr. Moguin, some of which referenced Mr. Moguin's alleged bipolar disorder, and which included an Emergency Protective Order from a California proceeding, (Rule 60(b) Motion, Ex. 6), a Pre-Booking Information Sheet from a California proceeding (*Rule 60(b) Motion*, Ex. 7), and a Request for Domestic Violence Restraining Order, also from a California proceeding (*Rule 60(b) Motion*, Ex. 8). The documents from the California proceedings were not certified by the clerk of the court.

39. The *Rule 60(b) Motion* did not include any supporting declaration by Mr. O'Mara, even though Mr. O'Mara was a counsel of record for Plaintiffs from the inception of the case through March 15, 2018. See generally id.

40. Defendants filed their Opposition to the Rule 60(b) Motion on May 18, 2018 (the "Opposition").

41. Plaintiffs filed their Reply in Support of the Willard Plaintiffs' Rule 60(b) Motion on May 29, 2018 (the "Reply"). The Reply attached 11 new exhibits, including a new Declaration of Larry J. Willard in Response to Defendants' Opposition to Rule 60(b) Motion for Relief. Reply, Ex. 1 ("Reply Willard Declaration" and "RWD" for record citations).<sup>5</sup> The *Reply* exhibits included copies of text messages between Mr. Willard and Mr. Moguin, (*Reply*, Exs. 3, 6, 8, and 10), a receipt detailing an alleged payment made by Mr. Willard to Mr. Moguin's doctor on March 13, 2018 (*Reply*, Ex. 5), and a letter from Mr. Williamson to Mr. Moguin dated May 14, 2018. (Reply, Ex. 9).

23 42. On June 6, 2018, Defendants filed their *Motion to Strike, or in the Alternative,* 24 Motion for Leave to File Sur-Reply, arguing this Court should strike Exhibits 1-10 to the 25 Reply because (a) Defendants did not have the opportunity to respond to those exhibits in their Opposition to the Rule 60(b) Motion; (b) exhibits contained inadmissible hearsay and/or

27

26

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

<sup>28</sup> <sup>5</sup>The Court disregards the paragraphs included in the Willard Declaration and the Reply Willard Declaration that can be construed to be stated appeal to the Court's sympathy. See e.g., WD 1-100; *RWD* ¶67.

inadmissible lay opinion testimony; and (c) a number of exhibits were not relevant to this Court's determination of excusable neglect.

43. Defendants' *Motion to Strike, or in the Alternative, Motion for Leave to File Sur-Reply* was fully briefed and submitted to this Court for decision on June 29, 2018. Subsequently, Plaintiffs' counsel stipulated to the filing of a sur-reply.

44. In its *Sanctions Order*, the Court made the following findings of fact and conclusions of law, among others: First, plaintiffs failed to provide damages disclosures and failed to properly disclose an expert witness in violation of this Court's express Orders. *Sanctions Order* ¶¶ 67, 68. Plaintiffs acknowledged their failure to properly disclose an expert witness in accordance with NRCP 16.1(a)(2)(B). *Stipulation and Order*, February 9, 2017. Plaintiffs did not thereafter attempt to properly disclose the expert witness for the entirety of 2017. Plaintiffs failed to comply with multiple orders of this Court. Defendants filed several motions to compel, and Plaintiffs' non-compliance forced extension of trial and discovery deadlines on three separate occasions. This Court sanctioned Plaintiffs by ordering payment of Defendants' expenses incurred in filing the *Motion to Compel*.

45. Plaintiffs did not oppose the *Sanctions Motion* despite this Court's express admonitions that the Court was "seriously considering" dismissal.

G.

#### PLAINTIFFS' APPEAL,

46. On November 30, 2018, this Court entered its *Prior 60(b) Order*, wherein this Court denied Plaintiffs' *Rule 60(b) Motion*.

47. Plaintiffs timely appealed this Court's *Prior 60(b) Order*.

48. On August 6, 2020, the Nevada Supreme Court entered its published opinion (the "*Opinion*").

49. B the *Opinion*, the Nevada Supreme Court reversed this Court's *Prior 60(b) Order*, concluding that this Court abused its discretion by failing to address the factors articulated in *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982), *overruled in* 

part on other grounds by Epstein v. Epstein, 113 Nev. 1401, 1405, 950 P.2d 771, 773 (1997), when ruling on the Plaintiffs' *Rule 60(b) Motion*.

50. The Nevada Supreme Court remanded the proceedings back to this Court for further consideration consistent with the *Opinion* and directed this Court to issue explicit and detailed written findings with respect to each of the four *Yochum* factors in considering the Plaintiffs' *Rule 60(b) Motion*.

51. The Nevada Supreme Court subsequently clarified "neither party may present any new arguments or evidence on remand; the district court's consideration of the factors set forth in *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982), is limited to the record currently before the court." (*Order Denying En Banc Reconsideration*).

52. If any of the following Conclusions of Law contain or may be construed to contain Findings of Fact, they are incorporated here and shall be treated as appropriately identified and designated.

### 

II.

#### CONCLUSIONS OF LAW.

Based on the Court's Findings of Fact, the Court makes its Conclusions of Law as follows.

18 53. If any of the foregoing Findings of Fact contain or may be construed to contain
19 Conclusions of Law, they are incorporated here and shall be treated as appropriately
20 identified and designated.

Α.

#### RULE 60(B) STANDARD.

54. NRCP 60(b)(1) is a remedial rule that gives due consideration to our court system's preference to adjudicate cases on the merits, without compromising the dignity of the court process. *Opinion*.

55. Under NRCP 60(b)(1), on motion, this Court may relieve a party from an order or final judgment on grounds of mistake, inadvertence, surprise, or excusable neglect. NRCP 60(b)(1); *Opinion*.

56. A party who seeks to set aside an order pursuant to NRCP 60(b)(1) "has the burden to prove mistake, inadvertence, surprise, or excusable neglect by a preponderance of the evidence." *Polivka v. Kuller*, 128 Nev. 926, 381 P.3d 651 (2012) (citations omitted); see also Britz v. Consolidated Casinos Corp., 87 Nev. 441, 446, 488 P.2d 911, 915 (1971) ("the burden of proof on [a motion to set aside under Rule 60(b)] is on the moving party who must establish his position by a preponderance of the evidence." (quoting *Luz v. Lopes*, 55 Cal. 2d 54, 10 Cal. Rptr. 161, 166, 358 P.2d 289, 294 (1960)).

57. A district court must address the factors set forth in *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982), *overruled in part on other grounds by Epstein v. Epstein*, 113 Nev. 1401, 1405, 950 P.2d 771, 773 (1997), when determining if the NRCP 60(b)(1) movant established, by a preponderance of the evidence, that sufficient grounds exist to set aside a final judgment, order, or proceeding. *Opinion*.

#### B. THE RULE 60(B) MOTION IS NOT SUPPORTED BY COMPETENT, ADMISSIBLE, AND SUBSTANTIAL EVIDENCE.

58. Plaintiffs moved to set aside the Order Granting Defendants' Motion to Strike, Order Granting the Motion for Sanctions, and Sanctions Order<sup>6</sup> because Mr. Moquin "failed to properly prosecute this case due to a serious mental illness and a personal life that was apparently in shambles." *Rule 60(b) Motion* 1.

59. While this Court "has wide discretion in deciding whether to grant or deny a
motion to set aside a judgment under NRCP 60(b)," *Stoecklein v. Johnson Electric, Inc.*, 109
Nev. 268, 271, 849 P.2d 305, 307 (1993), *holding modified by Willard v. Berry-Hinckley Indus.*, 136 Nev. Adv. Op. 53, 469 P.3d 176 (2020), this discretion is "a legal discretion and **cannot be sustained where there is no competent evidence** to justify the court's action. *Id.* (emphasis added) (citing *Lukey v. Thomas*, 75 Nev. 20, 22, 333 P.2d 979 (1959)); *cf.*

<sup>&</sup>lt;sup>6</sup>Plaintiffs argue that the Sanctions Order was insufficient under Young v. Johnny Ribeiro, 106 Nev.
88, 93, 787 P.2d 777, 780 (1990) because the Sanctions Order did not consider "whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney." *Rule 60(b) Motion*, 12. This is addressed by the Court hereinafter.

generally Otak Nev. LLC v. Eighth Judicial Dist. Ct., 129 Nev. 799, 805, 312 P.3d 491, 496 (2013) (a court abuses its discretion when its decision is not supported by substantial evidence).

60. A party who seeks to set aside an order pursuant to NRCP 60(b)(1) bears the burden of proof to show excusable neglect "by a preponderance of the evidence." *Kahn v. Orme*, 108 Nev. 510, 835 P.2d 790 (1992), *overruled on other grounds by Epstein v. Epstein*, 113 Nev. 1401, 950 P.2d 771 (1997); *Britz v. Consolidated Casinos Corp.*, 87 Nev. 441, 446, 448 P.2d 911, 915 (1971). In fact, "before a…judgment may be set aside under NRCP 60(b) (1), the party so moving **must show to the court** that his neglect was excusable." *McClellan v. David*, 84 Nev. 283, 439 P.2d 673 (1968) (emphasis added).

61. Where "there was no credible evidence before the lower court to show that the neglect of the movant was excusable under the circumstances," the Nevada Supreme Court reversed a district court's order setting aside a judgment, stating "no excusable neglect was shown as a matter of law." *McClellan*, 84 Nev. at 284, 289, 439 P.2d at 674, 677.

62. The *Rule 60(b) Motion* purports to provide substantial evidence to support its legal argument through the *Willard Declaration* and the *Reply Willard Declaration* together with the attached exhibits, all of which contain inadmissible statements, some inadmissible on multiple grounds.

63. The *Willard Declaration* includes several statements about Mr. Moquin's alleged mental disorder. As set forth in the Findings of Fact, *supra*, Mr. Willard declares that he is "convinced" that Mr. Moquin was dealing with issues and demons beyond his control (*WD* ¶ 66); he "learned" Mr. Moquin was struggling with constant marital conflict that greatly interfered with his work (*WD* ¶ 67; *RWD* ¶ 15); Mr. Moquin suffered a "total mental breakdown") (*WD* ¶ 68; *RWD* ¶ 16); Mr. Moquin explained to Mr. Willard he had been diagnosed with bipolar disorder (*WD* ¶ 70; *RWD* ¶ 37); Mr. Willard believes Mr. Moquin's disorder to be "severe and debilitating" (*WD* ¶ 73); Mr. Willard now sees that "Mr. Moquin was suffering from [symptoms of bipolar disorder] throughout his work on the case (*WD* ¶

1 76); and, Mr. Willard can now see how Mr. Moquin's alleged psychological issues affected 2 his case (*WD* ¶ 87).<sup>7</sup>

64. The Willard Declaration addresses Mr. Moquin's private life, including his personal mental status and conflict in his marriage.

65. Mr. Willard's statements are not derived from his own perceptions.

66. The nature of the subject matter, itself, establishes Mr. Willard could not have obtained this information by personal observation.

67. Mr. Willard lacks personal knowledge to testify to the assertions included in the Willard Declaration and the Reply Willard Declaration regarding Mr. Moquin's mental disorder, private personal life, and private marital conflicts.

<sup>7</sup>The Willard Declaration and the Reply Willard Declaration contain many nearly identical statements. They compare as follows:

14 15	Willard Declaration Paragraph	Reply Willard Declaration
16	53	7
17	54	8
18	59	9
19	63	11
20	64	12 (slightly differs)
21	65	13
	67	15
22	68	16
23	69	35
24	70	38
25	71	39
26	82	10 Similar – not exact)
	89	3
27	91	67
28		

3

4

5

6

7

8

9

10

11

12

68. It also logically follows that Mr. Willard could only have obtained this information by communication from Mr. Moquin (or Mr. Moquin's wife), although not overtly stated.

69. The *Willard Declaration* and *Reply Willard Declaration* include inadmissible hearsay under NRS 51.035 and 51.065. *See New Image Indus. v. Rice*, 603 So.2d 895 (Ala. 1992) (affirming denial of 60(b) relief where the only evidence of excusable neglect was an affidavit containing inadmissible hearsay and speculation); *Agnello v. Walker*, 306 S.W.3d 666, 673 (Mo. Ct. App. 2010), *as modified* (Apr. 27, 2010) (a motion to set aside a default judgment is not a "self-proving motion," and "[i]t is not sufficient to attach hearsay testimonial documentation in support of a motion to set aside....")).

70. Separate and apart from the challenge to the *Willard Declaration* and the *Reply Willard Declaration* on hearsay grounds, Mr. Willard's statements are also speculative and therefore inadmissible. He does not declare that he personally observed Mr. Moquin's alleged condition until he draws this unqualified conclusion late in the case, and, even if he had, he speculates what the mental disorder could cause and caused, offering an internet article to boost his credibility, which is also hearsay with no applicable exception offered.

71. The assertion describing Mr. Moquin's statement to Mr. Willard that Dr. Mar diagnosed Mr. Moquin with bipolar disorder (*WD* ¶ 69; *RWD* ¶ 35) is inadmissible hearsay with no exception under NRS 51.105(1) because Mr. Willard's declaration does not constitute Mr. Moquin's declaration of "then existing state of mind, emotion, sensation or physical condition, such as intent, plan, motive, design, mental feeling, pain and bodily health." Instead, Dr. Mar purportedly diagnosed Mr. Moquin; Mr. Moquin told Mr. Willard of Dr. Mar's purported diagnosis; and Mr. Willard makes the statement of Mr. Moquin's diagnosis. The statements were not spontaneous and instead were a basis for Mr. Moquin to request monetary assistance.

72. Even if Mr. Moquin's report of Dr. Mar's diagnosis is construed as constituting Mr. Moquin's statement of then-existing mental condition, Mr. Willard's statements are not

admissible as contemporaneous statements made by Mr. Moquin about his own present physical symptoms or feelings. See 2 McCormick on Evid. 273 (7th ed.) ("Statements of the declarant's present bodily condition and symptoms, including pain and other feelings, offered to prove the truth of the statements, have been generally recognized as an exception to the hearsay rule. Special reliability is provided by the spontaneous quality of the declarations, assured by the requirement that the declaration purport to describe a condition presently existing at the time of the statement."). No spontaneous statement of Mr. Moquin, as the declarant, was offered.

73. The *Willard Declaration* and the *Reply Willard Declaration* also contain hearsay within hearsay, which is inadmissible under NRS 51.067.

74. Mr. Willard purports to declare Mr. Moquin had a complete mental breakdown, how Mr. Moquin's symptoms of his alleged bipolar disorder might manifest, and how those symptoms might have affected Mr. Moquin's work. (*WD* ¶ 68, 73-76, 87-88; *RWD* ¶ 16, 38).

75. These statements are inadmissible as impermissible lay opinion under NRS 50.265. Mr. Willard is not a licensed healthcare provider qualified to opine on Mr. Moquin's mental condition, mental disorder, or symptoms of any disorder or condition that manifested.

76. Mr. Willard surmises, speculates, and draws conclusions. He is not qualified to testify about any medical, physical, or mental condition Mr. Moquin may have, or the effect of that condition on his work. *White v. Com*, 616 S.E.2d 49, 54 (Va. Ct. App. 2005) ("While lay witnesses may testify to the attitude and demeanor of the defendant, lay witnesses cannot express an opinion as to the existence of a particular mental disease or condition.") (citations omitted).

77. Plaintiffs contend Mr. Willard's opinions of how Mr. Moquin's alleged condition might manifest with symptoms and how these symptoms may have affected Mr. Moquin's work are appropriate because "lay witnesses can offer testimony as to a person's sanity." *Reply*, 2. Plaintiffs cite *Criswell v. State*, 84 Nev. 459, 464, 443 P.2d 552, 555 (1968) for the proposition that lay witnesses can offer testimony as to a person's sanity.

*Criswell* was overruled in 2001. *See Finger v. State*, 117 Nev. 548, 576-77, 27 P.3d 66, 85 (2001) (en banc decision regarding the legal insanity defense and statutorily-created "guilty, but mentally ill plea" and holding the legislative abolishment of insanity as a complete defense to a criminal offense unconstitutional, among other holdings, that lay witnesses cannot testify as to "insanity" because the term has a precise and narrow definition under Nevada law).

78. The *Finger* holdings are not applicable here. First, the *Finger* case involves a defense to criminal charges. Second, Mr. Willard did not testify that Mr. Moquin was sane or insane; rather, he testified about the diagnosis of bipolar disorder, possible symptoms of bipolar disorder, and how those symptoms, if present, might have affected Mr. Moquin's work.

79. Section 50.265 of the Nevada Revised Statutes provides a lay witness may testify to opinions or inferences that are "[r]ationally based on the perception of the witness; and...[h]elpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." NRS 50.265. A qualified expert may testify to matters within his/her "special knowledge, skill, experience, training or education" when "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." NRS 50.275; *Burnside v. State*, 131 Nev. 371, 382, 352 P.3d 627, 636 (death penalty case detective allowed to testify about cell phone records as lay witness). Further,

The key to determining whether testimony constitutes lay or expert testimony lies with a careful consideration of the substance of the testimony—does the testimony concern information within the common knowledge of or capable of perception by the average layperson or does it require some specialized knowledge or skill beyond the realm of everyday experience? See Randolph v. *Collectramatic, Inc.*, 590 F.2d 844, 846 (10th Cir. 1979) (observing that lay witness may not express opinion 'as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness"); Fed. R. Evid. 701 advisory committee's note (2000 amend.) ("[T]he distinction between lay and expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday life, while

ld.

expert testimony results from a process of reasoning which can be mastered only be specialists in the field." (internal quotation marks omitted)); *State v. Tierrney*, 389 A.2d 38, 46 (N.H. 2003) ("Lay testimony must be confined to personal observations that any layperson would be capable of making.").

80. While the Nevada Supreme Court and Nevada Court of Appeals have not addressed lay witness testimony, like that contained in the *Willard Declaration* and *Reply Willard Declaration*, regarding bipolar disorder, it has been specifically addressed by the Pennsylvania court and is persuasive here. In the case of *In re Petition for Involuntary Commitment of Joseph R. Barbour*, the Superior Court of Pennsylvania held a "[I]ay witness and non-expert could not provide expert testimony regarding involuntary committee's medical diagnosis, specifically the existence of mood disorder known as bipolar disorder." *In re Petition for Involuntary Commitment of Joseph R. Barbour*, the Superior R. *Barbour*, 733 A.2d 1286 (Pa. 1999). This Court therefore concludes such testimony is inadmissible to support the *Rule 60(b) Motion*.

81. Exhibits 6, 7, and 8 to the *Rule 60(b) Motion* which purport to detail Mr. Moquin's alleged domestic abuse of his family and contain statements about Mr. Moquin's alleged bipolar condition, are inadmissible as discussed, *supra*, to establish he had bipolar disorder.

82. Exhibits 6, 7, and 8 to the *Rule 60(b) Motion* are not, and cannot be, authenticated by Mr. Willard. Mr. Willard is not the author of the documents and has no personal knowledge of their authenticity. He therefore cannot authenticate or identify the documents pursuant to NRS 52.015(1) or NRS 52.025.

83. Exhibits 6, 7, and 8 do not meet the requirements for presumed authenticity under NRS 52.125, as the exhibits are not certified copies of public records.

84. Pursuant to NRS 47.150, a judge or court may take judicial notice, whether requested or not. Further, a judge or court shall take judicial notice if requested by a party and supplied with the necessary information. NRS 47.150. Here, no party requested this Court to take judicial notice based on certified copies of the California court records,
 contained in the exhibits to the *Rule 60(b) Motion* and the *Reply*. The Court exercises its
 discretion and declines to take judicial notice here.

85. Moreover, even if Exhibits 6, 7, and 8 could be authenticated, the statements contained in those exhibits regarding Mr. Moquin's alleged mental disorder and condition are inadmissible lay opinion about bipolar disorder and would still constitute inadmissible hearsay, as they were apparently authored by Mr. Moquin's wife, and Plaintiffs offer them to prove that Mr. Moquin suffers from bipolar disorder and his life was in "shambles."

86. Several *Reply* Exhibits discussed in the *Reply Willard Declaration* also contain inadmissible hearsay.

87. All the texts and emails offered by Plaintiffs and authored by Mr. Moquin or Mr. O'Mara constitute inadmissible hearsay under NRS 51.035 and NRS 51.065.

88. Specifically, Exhibits 2 and 3 to the *Reply*, the text messages authored by Mr. Moquin in Exhibit 4, the text messages authored by Mr. Moquin in Exhibit 7, the email authored by Mr. Moquin in Exhibit 8, and the emails authored by Mr. Moquin in exhibit 10 are inadmissible hearsay.

89. Exhibits attached to the *Reply* also contain communications occurring after this Court issued its *Order Granting Motion to Strike* and its *Order Granting Sanctions*.

90. Competent and substantial evidence has not been presented to establish *Rule 60(b)* relief.

C.

#### PLAINTIFFS FAILED TO ESTABLISH EXCUSABLE NEGLECT UNDER THE YOCHUM V. DAVIS FACTORS.

91. In Yochum v. Davis, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982), overruled *in part on other grounds by Epstein v. Epstein*, 113 Nev. 1401, 1405, 950 P.2d 771, 773
(1997), the Nevada Supreme Court held, to determine whether grounds for NRCP 60(b)(1)
relief exist, a district court must apply four factors: (1) a prompt application to remove the

judgment; (2) the absence of an intent to delay the proceedings; (3) a lack of knowledge of
procedural requirements; and (4) good faith.

92. The burden of proof is on the movant, in this case, Plaintiffs, who must show "mistake, inadvertence, surprise or excusable neglect, either singly or in combination... 'by a preponderance of the evidence....'" *Kahn v. Orme*, 108 Nev. 510, 513–14, 835 P.2d 790, 793 (1992) (quoting *Britz v. Consolidated Casinos Corp.*, 87 Nev. at 446, 488 P.2d at 911).

93. A district court must issue explicit findings on each of the *Yochum* factors in rendering its decision. *Opinion*.

94. A district court must also consider Nevada's bedrock policy to decide cases on the merits whenever feasible when evaluating an NRCP 60(b)(1) motion. *Id*.

95. However, other policy concerns are also considered, such as the swift administration of justice and enforcement of procedural requirements, "even when the result is dismissal of a plaintiff's case." *Rodriguez v. Fiesta Palms, LLC*, 134 Nev. 654, 654, 428 P.3d 255, 256 (2018), *holding modified by Willard v. Berry-Hinckley Indus.*, 136 Nev. Adv. Op. 53, 469 P.3d 176 (2020); NRCP 1.

96. Here, while considering Nevada's policy to decide cases on the merits when feasible, this Court determines, by the following detailed and explicit findings on each *Yochum v. Davis* factor, NRCP 60(b)(1) relief is not warranted.

(1) A prompt application to remove the judgment:

97. A motion for NRCP 60(b)(1) relief must be filed "within a reasonable time" and "not more than 6 months after the proceeding was taken or the date that written notice of entry of the judgment or order was served." *Rodriguez*, 134 Nev. at 657, 428 P.3d at 257.

98. "[The six-month period represents the **extreme limit** of reasonableness." *Id*. (emphasis added) (quotations omitted).

99. As such, even in cases in which a movant has filed an NRCP 60(b) Motion within six (6) months, it may nevertheless be found to have not acted promptly. *See, e.g.*,

*Kahn v. Orme*, 108 Nev. 510, 514, 835 P.2d 790, 793 (1992) (concluding that a movant failed to act promptly where a default judgment was entered against him in February, he knew as early as March, did not seek counsel until late May, and did not move to set aside the default judgment until August, nearly six months after the judgment).

100. Here, Plaintiffs and O'Mara were contemporaneously aware of Plaintiffs' failure to oppose the *Sanctions Motion*.

101. Specifically, Exhibit 2 to the *Reply* appears to be a text string between Mr. Willard and Mr. Moquin from December 2, 2017, through December 6, 2017, in which Mr. Willard inquires about the status of Plaintiffs' filing in response to the *Motion for Sanctions*. *Reply*, Exhibit 2. The text messages reflect Mr. Willard was aware of the initial deadline, December 4, 2017, for Plaintiffs to respond to the *Motion for Sanctions* (based on the November 15, 2017, filing date and electronic service). *Prior 60(b) Order* 23 ¶49.

102. Defendants agreed to extensions through 3:00 pm on December 6, 2017, for Plaintiffs to file their oppositions. *Prior 60(b) Order* 23 ¶50.

103. This Court granted an additional extension through December 18, 2018. *Prior 60(b) Order* 23 ¶51.

104. Plaintiffs knew of the initial filing deadline. They were aware no opposition papers were filed. Mr. Willard continued to communicate with both Mr. Moquin and Mr. O'Mara from December 11 until December 25, 2017, regarding the delinquent filings (*Reply* Exs. 3, 4), well after this Court's final filing deadline of December 18, 2017. *Prior 60(b) Order* 24 ¶52, 56; *Sanctions Order* ¶95.

105. Despite knowing no oppositions had been filed, neither Mr. Willard (through Mr. O'Mara), Mr. Moquin, nor Mr. O'Mara contacted Defendants' counsel or this Court to address the status of this case. *Prior 60(b) Order* 24 ¶53; *Sanctions Order* ¶98.

106. On January 4, 2018, this Court entered its Order Granting Defendants' Counterclaimants' Motion for Sanctions (the "Initial Sanctions Order").

107. The Initial Sanctions Order granted Defendants' Motion for Sanctions based upon (1) DCR 13(3) and Plaintiffs' failure to oppose Defendants' *Motion*; and (2) the fact that Defendants' *Motion* had merit "due to Plaintiffs' egregious discovery violations" throughout the pendency of this litigation and repeated failure to comply with this Court's orders." Id. at 3.

Therefore, this Court found, "Plaintiffs' conduct warrants dismissal of this 108. action under NRCP 16.1(e)(3), NRCP 37(b)(2), NRCP 41(b), and the Nevada Supreme Court's decision in Bianco v. Bianco, 129 Nev. Adv. Op. 77, 311 P.3d 1170." Id. at 3-4. The Initial Sanctions Order was served upon both Mr. Moguin and Mr. O'Mara. Id.

109. The Initial Sanctions Order directed Defendants to submit to the Court within twenty (20) days a proposed order granting the Sanctions Motion, including factual and legal analysis and discussion, in accordance with WDCR 9.

1

2

3

4

5

6

7

8

110. This Court entered its Sanctions Order on March 6, 2018. (Sanctions Order).

111. On March 15, 2018, Mr. O'Mara filed his Notice of Withdrawal of Local *Counsel.* Therein, he stated, "[c]ounsel has had no contact with lead counsel Mr. Moquin for many months with a total failure just prior to the Court's first decisions being filed in this case." *Notice*, 1 (emphases added).

112. Plaintiffs took no action to request that Mr. O'Mara, who remained Plaintiffs' counsel of record until March 15, 2018, promptly inform this Court—on even a cursory basis—of Plaintiffs' alleged circumstances.

113. Plaintiffs did nothing to apprise this Court of any issues until they filed the *Rule* 60(b) Motion in April, 2018. Prior 60(b) Order 24 ¶54.

114. Mr. O'Mara did not report any issues to this Court until the filing of his Notice on March 15, 2018. Prior 60(b) Order 25 ¶60; Notice, 1.

115. This failure to promptly notify the Court is another act in the continuum of Plaintiffs' repeated delay throughout this case with respect to each of Plaintiffs' obligations, as discussed infra.

116. While Plaintiffs should and could have acted in a more prompt manner, Plaintiffs filed their *Rule 60(b) Motion* within a reasonable amount of time of the *Initial Sanctions Order* and the *Sanctions Order*. Thus, this Court finds that the first *Yochum* factor is satisfied here.<sup>8</sup>

117. Although the Plaintiffs met this factor, the remaining three *Yochum* factors, weigh strongly against NRCP 60(b) relief. *Cf., e.g., Rodriguez,* 134 Nev. at 659, 428 P.3d at 259 ("Even assuming Rodriguez acted in good faith, we affirm the district court's decision based on the first three *Yochum* factors, all of which favor denial of Rodriguez's NRCP 60(b)(1) motion.").

10 11

12

13

14

15

16

17

18

19

20

21

22

1

2

3

4

5

6

7

8

9

#### (2) The absence of intent to delay the proceedings:

118. The next Yochum factor is the absence of intent to delay the proceedings.

119. "As to [this] factor, an intent to delay the proceedings may be inferred from the parties' prior actions." *ABD Holdings, Inc. v. JMR Inv. Properties, LLC*, 441 P.3d 548 (Nev. 2019) (unpublished) (citing *Rodriguez*, 134 Nev. at 657, 428 P.3d at 258).

120. The Nevada Supreme Court has inferred intent to delay where the movant "exhibited a pattern of repeatedly requesting continuances [of the trial date] and filed his NRCP 60(b)(1) motion just before the six-month outer limit," exhibited conduct which "differed markedly from that of a litigant who wishes to swiftly move toward trial," and exhibited conduct which "indicate[d] that he intended to delay trial until he secured new counsel, rather than proceeding without representation." *Rodriguez*, 134 Nev. at 658, 428 P.3d at 258.

<sup>23</sup> 24

<sup>&</sup>lt;sup>8</sup> This Court also notes that all of the statements in the *Reply Willard Declaration* set forth after Paragraph 37 detail events and communications from late January, 2018 through late May, 2018, all of which occurred after this Court issued its *Order Granting Motion to Strike, Order Granting Sanctions, and Sanctions Order.* RWD ¶¶ 37-67. Exhibits 5, 6, 7, 8, 9, and 10 to the *Reply* contain only communications and descriptions of events that occurred after this Court issued its *Order Granting Motion to Strike, Order Granting Sanctions, and Sanctions Order.* Logically, relevant events asserted to support Plaintiffs' argument of excusable neglect must have necessarily occurred prior to the entry of the orders Plaintiffs seek to set aside. Thus, while these Exhibits may support a finding of promptness under the first *Yochum* factor, which this Court has already found that Plaintiffs have satisfied, they are irrelevant to Plaintiffs' arguments that excusable neglect occurred.

121. The Nevada Supreme Court has also inferred intent to delay where, among other things, "[t]he record demonstrate[d] a pattern of delay from the case's inception: [the defendants] asked for extensions of the time to file their answer, hired an attorney the day the answer was due and then subsequently filed an untimely demand for securities of costs instead of answering the complaint—and thereafter still failed to answer the complaint." *ABD*, 441 P.3d 548 (unpublished).

122. Additionally, the Nevada Supreme Court has concluded that there was evidence of a movant's intent to delay because, in part, the movant "failed to file a single motion" in opposition to the respondent's motions. *Kahn*, 108 Nev. at 514, 835 P.2d at 793.

123. The Plaintiffs have not demonstrated an absence of intent to delay the proceedings for multiple, independent reasons.

124. First, Plaintiffs' sole asserted basis for satisfying this factor is that "Mr. Moquin's mental illness demonstrates that Plaintiffs have at all times acted...without the intent to delay the proceedings," and that "Plaintiffs are, in fact, the victims of Mr. Moquin's assurances." *60(b) Motion* 11.

125. However, as discussed, Plaintiffs provided no admissible evidence in support of their *60(b) Motion*, and certainly provided no admissible evidence demonstrating that Moquin had a mental illness, or the effect of such mental illness, if any, on Plaintiffs' case. *See supra*.

126. Accordingly, Plaintiffs have failed to satisfy their burden to demonstrate an absence of intent to delay proceedings.

127. Second, even beyond the evidentiary shortcomings, which alone are fatal to Plaintiffs' argument, the record before this Court demonstrates a repeated delays in the proceedings at the hands of the Plaintiffs.

128. Although Plaintiffs satisfied the first *Yochum* factor by promptly moving to remove the judgment, the totality of the record before this Court, prior to Plaintiffs seeking NRCP 60(b) relief, is replete with evidence of willful delay.

This Court has previously ruled on Plaintiffs' numerous egregious and 129. intentional delays from the inception of this case. As reflected in the court file, Plaintiffs' multiple instances of non-compliance, including the Plaintiffs' failure to provide a compliant damages disclosure, occurred well before Mr. Moquin's purported breakdown in December 2017, or January 2018, which was asserted as preventing him from opposing the motions. Prior 60(b) Order 24 ¶59.

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

19

20

21

22

23

24

25

26

27

28

The Court's prior findings include: 130.

a. Plaintiffs have exhibited a longstanding pattern of failure to ignore fundamental discovery obligations and deadlines imposed by this Court and the Nevada Rules of Civil Procedure. Sanctions Order ¶¶ 13-79, 124-141, 153.

b. Plaintiffs' conduct of ignoring or failing to comply with multiple separate discovery obligations throughout this case forced Defendants to repeatedly file motions to compel, and necessitated extensions of trial and discovery deadlines on three occasions to accommodate Plaintiffs' continued non-compliance. Sanctions Order ¶ 121.

Plaintiffs willfully failed to timely disclose the appraisals upon which many of C. their damages calculations were based. (*Sanctions Order* ¶ 133, 135-136, 139).

d. "Plaintiffs' repeated and **willful delay** in providing necessary information to 18 Defendants has necessarily prejudiced Defendants." Sanctions Order ¶ 141 (emphasis added).

Before the present case, Plaintiffs filed a case against Defendants in e. California, based upon the same set of facts, which was dismissed for a lack of personal jurisdiction. Sanctions Order ¶ 142-144.

131. The conduct of Plaintiffs' freely-selected attorney is attributable to Plaintiffs personally (particularly where, as here, Plaintiffs have provided no admissible evidence to demonstrate otherwise) and, therefore, willful delay is personally attributable to Plaintiffs.

132. For example, Plaintiffs had personal and contemporaneous knowledge of their failure to disclose their NRCP 16.1 damages, (Sanctions Order ¶ 46-47, 125), which was a

critical basis for dismissal. *Sanctions Order* ¶ 146; *see also infra* (discussing the absence of good faith).

133. This failure was also a critical basis for the continued delay of the trial date. See, e.g., Stipulation and Order to Continue Trial (Third Request) ¶ 7, 10 (stipulating Plaintiffs had not yet provided a compliant NRCP 16.1 damages disclosure as discussed at the January 10, 2017, hearing, "[b]ecause Plaintiffs have not yet provided a complete NRCP 16.1 damages disclosure, Defendants will not be able to complete necessary fact discovery on Plaintiffs' damages, or to disclose an updated expert report...within the time currently allowed for discovery... Moreover, any further extension of the discovery deadlines would prevent the parties from being able to [timely] file and submit dispositive motions [prior to trial]," and the "[u]ndersigned counsel certifies that their respective clients have been advised that a stipulation for continuance is to be submitted on their behalf and that the parties have no objection thereto"); Sanctions Order ¶ 150.

134. Plaintiffs have similarly failed to demonstrate an absence of intent to delay the proceedings with respect to the entry of the *Sanctions Order*.

135. Specifically, as discussed *supra*, Plaintiffs knew of the initial filing and resulting opposition deadline. They were aware no opposition papers were filed. Mr. Willard continued to communicate with both Mr. Moquin and Mr. O'Mara from December 11 until December 25, 2017, regarding the delinquent filings (*Reply* Exs. 3, 4), well after this Court's final filing deadline of December 18, 2017. *Prior 60(b) Order* 24 ¶52, 56; *Sanctions Order* ¶95.

136. Despite knowing no oppositions had been filed, neither Mr. Willard (through Mr. O'Mara), Mr. Moquin, nor Mr. O'Mara contacted Defendants' counsel or this Court to address the status of this case. *Prior 60(b) Order* 24 ¶53; *Sanctions Order* ¶98.

137. Indeed, in his March 15, 2018, *Notice*, Mr. O'Mara stated "[c]ounsel has had no contact with lead counsel Mr. Moquin for **many months** with a **total failure just prior to the Court's first decisions being filed in this case**." *Notice*, 1 (emphases added).

138. Plaintiffs did nothing to apprise this Court of any issues until they filed the *Rule 60(b) Motion* in April, 2018.<sup>9</sup> *Prior 60(b) Order* 24 ¶54.

139. Similarly, Mr. O'Mara did not report any issues to this Court until the filing of his *Notice* on March 15, 2018. *Prior 60(b) Order* 25 **¶**60; *Notice*, 1.

140. Finally, Plaintiffs have failed to demonstrate an absence of intent to delay the proceedings with respect to their claims about Mr. Moquin.

141. In fact, Mr. Willard admits he was informed by Mr. O'Mara **prior to the dismissal** of Plaintiffs' claims that Mr. Moquin was not responsive. *Prior 60(b) Order* 26 ¶66. Plaintiffs failed to replace Mr. Moquin or take other action due to perceived financial reasons. *Prior 60(b) Order* 26 ¶66; *WD* ¶ 81. Plaintiffs' knowledge and inaction vitiates excuse for neglect. *Prior 60(b) Order* 26 ¶66; *see also 60(b) Motion* 15 ("It was only in **late 2017** that it became clear to Mr. Willard that something was terribly wrong and that Mr. Moquin was suffering from mental illness.").

142. Plaintiffs started looking for attorneys who might be able to help.  $RWD \ \mbox{\P}$  36. Plaintiffs instead provided personal financial assistance to Mr. Moquin and did not terminate his services. *Prior 60(b) Order* 24  $\ \mbox{\P}$ 55;  $WD \ \mbox{\P}$  71;  $RWD \ \mbox{\P}$  39.

143. Plaintiffs chose to retain Mr. Moquin and did not terminate his representation,
 even after becoming aware he did not file a timely response to the *Motion for Sanctions*.
 Plaintiffs cannot now avoid the consequences of the acts or omissions of their freely
 selected agent. *Prior 60(b) Order* 24 ¶57.

<sup>9</sup>Plaintiffs had contemporaneous knowledge of the *Sanctions Order*. Yet, rather than appeal from the *Sanctions Order* within thirty days of the *Notice of Entry of Sanctions Order*, filed on March 6, 2018, Plaintiffs instead improperly challenged the propriety of the *Sanctions Order* in their *Rule 60(b) Motion*, which was filed on April 18, 2018, more than thirty days after the *Notice of Entry of the Sanctions Order*. *Cf. generally, e.g., Mathews v. Carreira*, 770 N.E.2d 560 (Ma. App. 2002) ("Rule 60(b) cannot be used as a substitute for the regular appeal procedure."); *Carrabine v. Brown*, 1993
WL 318809 (Ohio Ct. App. 1993) (A motion for relief from judgment under Civ.R. 60(B)(1) cannot be predicated upon the argument that the trial court made a mistake in rendering its decision); *Morgan v. Estate of Morgan*, 688 So. 2d 862, 864 (Ala. Civ. App. 1997).

144. Plaintiffs voluntarily chose to stop looking for new counsel to assist and chose to continue to rely on Mr. Moquin solely for financial reasons. *Prior 60(b) Order* 24 ¶58; *WD* ¶81.

145. Indeed, Mr. Willard was aware of Mr. Moquin's alleged problems prior to this Court's *Order Granting Motion to Strike and Sanctions Order* yet continued to allow Mr. Moquin to represent Plaintiffs. *Prior 60(b) Order* 25-26 **¶**64.

146. Plaintiffs have not established by substantial evidence that they exercised diligence to rectify representation in their case despite ample knowledge of Mr. Moquin's non-responsiveness. *Prior 60(b) Order* 27 ¶69. As discussed *supra*, all of Plaintiffs' proffered evidence regarding Mr. Moquin's alleged mental condition is inadmissible and does not establish Mr. Moquin had any mental illness or that any alleged mental illness affected Plaintiffs' case.

147. Further, Mr. Willard's claim he had no choice but to continue working with Mr. Moquin due to financial issues lacks credibility, as he admits he was able to borrow money to fund Mr. Moquin's personal life needs and medical treatment. It logically follows he had the resources to retain new attorneys at the time. *Prior 60(b) Order* 27 ¶68.

148. Thus, as in *Rodriguez*, Plaintiffs' conduct—both pre- and post- *Sanctions Order*—has "differed markedly from that of a litigant who wishes to swiftly move toward trial." 134 Nev. at 658, 428 P.3d at 258.

149. In sum, Plaintiffs have failed to establish the absence of an intent to delay the proceedings.

# (3) A lack of knowledge of procedural requirements:

150. The next *Yochum* factor is whether the movant lacks knowledge of the procedural requirements.

151. "As to the third factor, a party is generally deemed to have knowledge of the procedural requirements where the facts establish either knowledge or legal notice, where

under the facts the party should have inferred the consequences of failing to act, or where the party's attorney acquired legal notice or knowledge." *ABD Holdings, Inc. v. JMR Inv. Properties, LLC*, 441 P.3d 548 (Nev. 2019) (unpublished) (citing *Rodriguez*, 428 P.3d at 258, and *Stoecklein*, 109 Nev. at 273, 849 P.2d at 308).

152. The Nevada Supreme Court has also explained "[t]o condone the actions of a party who has sat on its rights only to make a last-minute rush to set aside judgment would be to turn NRCP 60(b) into a device for delay rather than the means for relief from an oppressive judgment that it was intended to be." *Union Petrochemical Corp. of Nevada v. Scott*, 96 Nev. 337, 339, 609 P.2d 323, 324 (1980).

153. The Nevada Supreme Court has concluded a movant has failed to satisfy this factor when the movant "personally witnessed the court grant [the defendant's] motion in limine because he did not file a written opposition." *Rodriguez*, 134 Nev. at 658, 428 P.3d at 258. The Court explained under such circumstances, the movant "should have inferred the consequences of not opposing the motion to dismiss, especially in light of the court's express warning to take action." *Id.* 

154. The Nevada Supreme Court has also concluded (albeit in an unpublished order) this factor disfavored NRCP 60(b)(1) relief where the movants "knew the answer was due, knew it was not timely filed, knew [the plaintiff] was seeking a default and money damages, and should have inferred that failing to file their answer and losing on the subsequent motions would result in a default judgment." *ABD Holdings*, 441 P.3d 548.

155. Here, the record reflects Plaintiffs have unequivocally failed to establish a lack of knowledge of procedural requirements.

156. As a threshold matter, Plaintiffs have admitted as much, conceding "this is, candidly, a little bit of a difficult one," and that Mr. Willard "did, candidly, know that things needed to be filed, he knew that. He knew that trial was coming up and he knew that they were both motions that he wanted to see filed and oppositions that he understood needed to

be filed because he was an active participant in this case and he wants to continue to be." *60(b) Transcript* 9, 11.

157. Additionally, the record before this Court is replete with evidence demonstrating Plaintiffs had knowledge of the pertinent procedural requirements.

158. This Court previously found Mr. Willard had **knowledge** of the initial filing deadline to oppose BHI's Sanctions Motion. Plaintiffs **knew** timely oppositions were not filed. *Prior 60(b) Order* 24 ¶52, 55.

159. Further, as this Court found, Mr. Willard was **aware** of Mr. Moquin's inaction which distinguishes this case from the cases upon which Plaintiffs rely in the *Rule* 60(b) *Motion*. *Prior* 60(b) *Order* 26 ¶65.

160. Plaintiffs also had personal knowledge of procedural requirements leading to the Sanctions Order. Prior 60(b) Order 26 ¶65.

161. For example, Mr. Willard attended the hearing in which Defendants' counsel informed this Court "[w]e've never received a specific damages computation from any of the plaintiffs in this case under 16.1, as they are required to do, **despite multiple demands** from us." Sanctions Order ¶46; January 10, 2017, Hearing Transcript 18.

162. Plaintiffs' counsel admitted, in open court, "with respect to Willard, they do not" have an up-to-date, clear picture of Plaintiffs' damages claims." *Sanctions Order* ¶47; *January 10, 2017, Hearing Transcript* 42-43.

163. This Court ordered, during the hearing, that Plaintiffs "serve, within 15 days after the entry of summary judgment, an updated 16.1 damages disclosure." *Sanctions Order* ¶49; *January 10, 2017, Hearing Transcript* 68.

164. Thus, Plaintiffs indisputably had personal knowledge of this procedural requirement, their failure to comply therewith, and this Court's order they comply by a particular deadline.

165. Further, the failure to comply with this requirement was a critical basis for the *Sanctions Order*. As this Court found, "Plaintiffs' failure to provide damages disclosures are

so central to this litigation, and to Defendants' rights and ability to defend this case, that dismissal of the entire case is necessary." *Sanctions Order* **1**19, 146.

166. Finally, even beyond Plaintiffs' personal knowledge of the salient procedural requirements and procedural facts, Plaintiffs were represented by **two** attorneys **throughout** the proceedings who, as this Court found, did not abandon Plaintiffs. *Prior* 60(b) Order 25 ¶ 62; see also infra (discussing that a party cannot seek to avoid a dismissal based on arguments that his or her attorney's acts or omissions led to the dismissal).

167. It is unequivocal, both Mr. Moquin and Mr. O'Mara had ample knowledge of every salient procedural requirement and procedural fact. This cannot be overstated: even beyond the general procedural knowledge expected of a practicing attorney, Defendants' counsel wrote numerous letters detailing the pertinent procedural requirements and their application to this case, and Plaintiffs' failures to comply therewith. *See generally Sanctions Order*. Plaintiffs also entered into three stipulations which plainly reflected their knowledge of the pertinent deadlines and procedural requirements. *See, e.g., id.* ¶126. This Court also entered multiple orders directly informing Plaintiffs of the pertinent procedural requirements and deadlines. *See generally Sanctions Order* (discussing other orders entered by this Court).

168. In sum, Plaintiffs' clear knowledge of salient procedural requirements strongly disfavors NRCP 60(b)(1) relief.

# (4) Good faith:

169. "Good faith is an intangible and abstract quality with no technical meaning or definition and encompasses, among other things, an honest belief, the absence of malice, and absence of design to defraud." *Rodriguez*, 134 Nev. at 659, 428 P.3d at 259 (quoting *Stoecklein*, 109 Nev. at 273, 849 P.2d at 309).

170. The Nevada Supreme Court has noted (albeit by unpublished order), "[t]he facts evidencing an intent to delay the proceedings [can] likewise support the district court's

findings that [the movants] did not act in good faith...." ABD Holdings, 441 P.3d 458
(concluding that applied and this factor disfavored NRCP 60(b)(1) relief).

171. In this case, Plaintiffs have unequivocally failed to demonstrate they acted in good faith.

172. As a threshold matter, once again, Plaintiffs provided no admissible evidence in support of their position.

173. Specifically, Plaintiffs' sole asserted basis for allegedly satisfying this factor is, "Mr. Moquin's mental illness demonstrates that Plaintiffs have at all times acted in good faith," and that "Plaintiffs are, in fact, the victims of Mr. Moquin's assurances." *60(b) Motion* 11.

174. However, as this Court has ruled, Plaintiffs provided no admissible evidence in support of their *60(b) Motion*, and certainly provided no admissible evidence demonstrating that Moquin had a mental illness, or the effect of such mental illness, if any, on Plaintiffs' case. *See supra*.

175. Thus, Plaintiffs have unequivocally failed to satisfy their burden to demonstrate, by a preponderance of evidence, they acted in good faith. See Kahn v. Orme, 108 Nev. 510, 513–14, 835 P.2d 790, 793.

176. Further, even beyond the lack of admissible evidentiary support, the record clearly demonstrates Plaintiffs have failed to establish they acted in good faith.

177. First, the findings discussed *supra* evidencing an intent to delay the proceedings and knowledge of procedural requirements likewise support the finding Plaintiffs did not act in good faith.

178. This Court previously found "Willard's claim that he had no choice but to continue working with Mr. Moquin due to financial issues **lacks credibility**....," (*Prior 60(b) Order* 27 ¶68), and in light of the circumstances of this case, dismissal of Willard's claims did not unfairly penalize Willard for Moquin's alleged conduct. *Id.* at 29 ¶ 80.

179. Second, Plaintiffs committed multiple willful violations throughout the proceedings, which compelled issuance of the *Sanctions Order* in the first instance.

180. Among other things, this Court found that Plaintiffs' eleventh-hour request for nearly \$40 million more in damages based on information which had been in Plaintiffs' possession but not disclosed was willful and in bad faith.

181. Specifically, this Court found that after three (3) years of delay due to Plaintiffs' "obstinate refusal" to comply with the Nevada Rules of Civil Procedure, Plaintiffs filed their *Motion for Summary Judgment* with only four (4) weeks remaining in discovery, in which they requested "brand new, never-disclosed types, categories, and amounts of damages." *Sanctions Order* ¶ 69, 71; *Willard's Motion for Summary Judgment*.

182. Indeed, "Willard sought more than triple the amount of damages (nearly \$40 million more) than he sought in the complaint and ostensibly throughout the case," and had new claims and new alleged bases for his alleged damages. *Sanctions Order* ¶ 73-79.

183. This Court found the timing of the *Motion for Summary Judgment* was such it put "Defendants in the exact same predicament that they were placed in February of 2017— Defendants could not engage in the discovery (fact or expert) necessary to adequately respond to Plaintiffs' brand new information, untimely disclosures, and new requests for relief." *Id.* at ¶ 69, 87-88.

184. "This timing of these Motions undeniably deprived Defendants of the process that the parties expressly agreed was necessary to rebut any properly-disclosed expert opinions or properly-disclosed NRCP 16.1 damages calculations, as ordered by this Court." *Id*.

185. This Court also found "Willard and his purported witness relied upon appraisals from 2008 and 2014 which were never disclosed in this litigation, despite Willard's NRCP 16.1 and NRCP 26(e) obligations and affirmative discovery requests served by Defendants" asking Willard to "[p]lease produce any and all appraisals for the Property from January 1, 2012 through present." *Sanctions Order* ¶ 79.

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

187. This Court found this conduct was intentional, strategic, and in bad faith. See generally Sanctions Order.

188. Specifically, this Court found that this conduct evidenced "Plaintiffs' bad faith motives in waiting to ambush Defendants," and, "Plaintiffs' strategic decision to only disclose their damages in their Motion for Summary Judgment prejudiced Defendants by depriving them of the opportunity to defend against damages that had never previously been disclosed." *Sanctions Order* ¶ 128.

189. This Court found "it is clear that Plaintiffs' failure to disclose the appraisals upon which many of their calculations were based was...willful." *Sanctions Order* ¶ 135.

190. This Court also found "[g]iven that Willard freely admits that these appraisals were commissioned prior to the commencement of the case, and were in his possession, this is clearly willful omission." *Sanctions Order* ¶ 136.

191. Further, it may be logically inferred Willard, who authored a 15-page affidavit in support of his *Motion for Summary Judgment*, averred "[m]y counsel and I collaborated to create" the damages spreadsheet in support of the *Motion for Summary Judgment*, and personally described his new damages in detail, was aware the damages he sought in the motion were significantly different than those ostensibly sought in the *Complaint* which was verified by Mr. O'Mara, or in his Interrogatory Responses which he personally verified. *Affidavit of Larry J. Willard in Support of Motion for Summary Judgment.* 

192. The record before this Court clearly demonstrates Plaintiffs have acted in bad faith. This Court gave Plaintiffs' counsel, including Mr. O'Mara, notice of the seriousness of Plaintiffs' repeated violations and expressed it was considering dismissal based on those

dar des e si Mr. *Lar* T Cou pea

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

violations even before Plaintiffs failed to oppose the *Sanctions Motion*. *Opposition to Rule 60(b) Motion* Ex. 3; *December 12, 2017, Transcript* ("you need to know going into these oppositions, that I'm very seriously considering granting all of it…I haven't decided it, but I need to see compelling opposition not to grant it.").

193. As an independent basis, this Court also found Plaintiffs' failure to disclose their NRCP 16.1 damages was done in bad faith. *Sanctions Order* ¶ 124-126.

194. Indeed, this Court found that "[t]his Court has ordered Plaintiffs to provide their damages disclosures, but Plaintiffs blatantly disregarded these orders." *Sanctions Order* ¶ 125.

195. Again, this conduct is personally attributable to Plaintiffs, who attended the January 10, 2017, hearing wherein Plaintiffs admitted they had failed to provide compliant NRCP 16.1 damages disclosures and heard this Court order them to do so.

196. In sum, Plaintiffs have unequivocally failed to satisfy their burden to demonstrate good faith. To the contrary, the record before this Court is replete with evidence of Plaintiffs' bad faith. Indeed, as this Court has found, "Plaintiffs have exhibited complete disregard for this Court's Orders, deadlines imposed by this Court, and the judicial process in general." *Sanctions Order, see also id.* ¶ 31 (finding "Plaintiffs have completely ignored multiple Orders from this Court, deadlines imposed by this Court, and their obligations pursuant to the Nevada Rules of Civil Procedure," and, "Plaintiffs have received multiple opportunities and extensions to rectify their noncompliance, but have not even attempted to do so").

### (5) Consideration of the case on the merits:

197. Finally, Nevada's bedrock policy that cases be considered on the merits wherever possible does not warrant the relief Plaintiffs seek here.

198. This Court has already addressed this factor in detail in the *Sanctions Order*, concluding, in part:

Although there is a policy favoring adjudication on the merits, Plaintiffs a. themselves have frustrated this policy by refusing to provide Defendants with their damages calculations or proper expert disclosures. Defendants have not frustrated this policy; instead, the record is clear that Defendants, and this Court, have repeatedly attempted to force Plaintiffs to comply with basic discovery obligations, to no avail. Sanctions Order ¶155.

b. Indeed, Defendants have served multiple rounds of written discovery upon Plaintiffs to obtain basic information on Plaintiffs' damages, have taken multiple depositions, and have been requesting compliant disclosures throughout this case so that they can address the merits. Id. ¶156; Exhibits 24-35 to Defendants' Sanctions Motion.

C. Plaintiffs should not be permitted to hide behind the policy of adjudicating cases on the merits when it is they who have frustrated this policy throughout the litigation. Defendants cannot reach the merits when they must spend the entire case asking Plaintiffs for threshold information and receiving no meaningful responses. Id. ¶157.

d. As the Nevada Supreme Court has held, the policy favoring adjudication on 15 the merits "is not boundless and must be weighed against any other policy considerations, including the public's interest in expeditious...resolution, which coincides with the parties' interests in bringing litigation to a final and stable judgment, prejudice to the opposing party; and administration concerns, such as the court's need to manage its large and growing docket." Huckabay Props v. NC Auto Parts, 130 Nev. 196, 203, 322 P.3d 429, 432 (2014).

199. The Nevada Supreme Court has similarly so held in the context of upholding the denial of an NRCP 60(b) motion to set aside a default judgment based upon alleged excusable neglect. Kahn v. Orme, 108 Nev. 510, 516, 835 P.2d 790, 794 (1992).

200. The Nevada Supreme Court explained:

1

2

3

4

5

6

7

8

9

10

11

12

13

14

16

17

18

19

20

21

22

23

24

25

26

27

28

We wish not to be understood, however, that this judicial tendency to grant relief from a default judgment implies that the trial court should always grant relief from a default judgment. Litigants and their counsel may not properly be allowed to disregard process or procedural rules with impunity. Lack of good faith or diligence...may very well warrant a denial of the motion for relief from the judgment.

*Id.* (quotations omitted); *see also ABD Holdings*, 441 P.3d 548 ("We conclude the district court did not abuse its discretion by concluding that the policy in favor of resolving cases on the merits does not warrant reversal here, given the facts demonstrating that Barra and Giebler disregarded the process and procedural rules by failing to timely answer the complaint.").

201. In sum, after a careful consideration of each of the *Yochum* factors, and on explicit findings, this Court concludes analysis of the *Yochum* factors precludes NRCP 60(b)(1) relief here.

D.

# PLAINTIFFS' ASSERTED BASES FOR SEEKING NRCP 60(B) RELIEF DO NOT WARRANT THE RELIEF PLAINTIFFS SEEK.

202. Under Nevada law, "clients must be held accountable for the acts and omissions of their attorneys." *Huckabay Props*, 130 Nev. at 204, 322 P.3d at 433 (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396-97 (1993)). The client "voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent." *Huckabay Props*, 130 Nev. at 204, 322 P.3d at 433 (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34 (1962) (rejecting the argument that petitioner's claim should not have been dismissed based on counsel's unexcused conduct because petitioner voluntarily chose his attorney).

203. In *Huckabay Props*, the Nevada Supreme Court dismissed an appeal where
 appellant's counsel failed to file an opening brief following two granted extensions and a
 court order granting appellants a final extension. 130 Nev. at 209, 322 P.3d at 437. The
 appellant was represented by two attorneys. In dismissing the appeal, and applicable to
 civil litigation at the trial court level here, the Court held:

While Nevada's jurisprudence expresses a policy preference for merits-based resolution of appeals, and our appellate procedure rules embody this policy, among others, litigants should not read the rules or any of this court's

decisions as endorsing noncompliance with court rules and directives, as to do so risks forfeiting appellate relief. In these appeals, appellants failed to timely file the opening brief and appendix after having been warned that failure to do so could result in the appeals' dismissals. Appellants actually had two attorneys who received copies of this court's notices and orders regarding the briefing deadline, but they nevertheless failed to comply with briefing deadlines and court rules and orders. Although they assert that Hansen v. Universal Health Services of Nevada, Inc., 112 Nev. 1245, 924 P.2d 1345 (1996), mandates reconsideration and reinstatement of their appeals. Hansen was a fact-specific decision to some extent, and an appeal may be dismissed for failure to comply with court rules and orders and still be consistent with the court's preference for deciding cases on their merits, as that policy must be balanced against other policies, including the public's interest in an expeditious appellate process, the parties' interests in bringing litigation to a final and stable judgment, prejudice to the opposing side, and judicial administration considerations, such as case and docket management. As for declining to dismiss the appeal because the dilatory conduct was occasioned by counsel, and not the client, that reasoning does not comport with general agency principles, under which a client is bound by its civil attorney's actions or inactions....

13 14

21

22

23

24

25

26

27

28

1

2

3

4

5

6

7

8

9

10

11

12

Huckabay Props, 130 Nev. at 209, 322 P.3d at 437.

15 204. In *Huckabay Props.*, however, the court recognized exceptional circumstances
providing two possible exceptions "to the general agency rule that the 'sins' of the lawyer
are visited upon his client where the lawyer's addictive disorder and abandonment of his
legal practice or criminal conduct justified relief for the victimized client." *Id.* at 204 n.4, 322
P.3d at 434 n.4 (citing *Passarelli*, 102 Nev. at 286). Notably, these exceptions noted in *Huckabay Props.* are not present here, as the facts of *Passarelli* are readily distinguishable.

205. First, in *Passarelli*, the record included evidence the attorney suffered from a substance abuse disorder that resulted in missed office days and appointments and an inability to function. *Passarelli*, 102 Nev. at 285. Second, the attorney voluntarily closed his law practice. *Id.* Third, the attorney was placed on disability inactive status by the Nevada Bar. *Id.* Finally, the client in *Passarelli* had only one attorney. *Id.* 

206. None of these facts are present in this case. As concluded *supra*, no competent, reliable, and admissible evidence of Mr. Moquin's claimed mental disorder is before this Court. Further, there is no evidence of missed meetings or absence from office

due to the claimed conditions. There is no evidence that Mr. Moquin closed his law practice at the times pertinent to the *60(b) Motion*.

207. As of the date of the *Prior 60(b) Order*, and on the record before this Court, Mr. Moquin was on active status with the California Bar. *Opposition to Rule 60(b) Motion*, Ex. 5; *Attorney Search, State Bar of California*, http://members.calbar.ca.gov/fal/Licensee/ Detail/257583 (last visited November 30, 2018).

208. Applied here, the *Huckabay Props./Passarelli* analysis compels denial of the *Rule 60(b) Motion*. The standard for "excusable neglect" based on activities of a party's attorney requires the attorney to be completely unable to respond or appear in the proceedings. *See Passarelli*, 102 Nev. at 285 (court found excusable neglect where attorney failed to attend trial due to psychiatric disorder which caused him to shut down his practice and was placed on disability inactive status by the State Bar of Nevada); *see also Cicerchia v. Cicerchia*, 77 Nev. 158, 160-61, 360 P.2d 839, 841 (1961) (court found excusable neglect where respondent lived out of state and suffered a nervous breakdown shortly after retaining out of state counsel, who was unaware and uninformed of the time to appear).

209. Here, Plaintiffs' attorneys did not completely abandon the case. Rather, the Nevada Rules of Civil Procedure, this Court's express orders, and Defendants' requests for damages computations and exert disclosures were willfully ignored.

210. Plaintiffs attempt to excuse this conduct in their *Rule 60(b) Motion* by claiming Mr. Moquin suffered a complete mental breakdown, and his personal life was "in shambles." In addition to the preclusion of evidence discussed *supra*, the evidence is vague at best regarding these assertions and vague regarding if, and when, Mr. Moquin's alleged disorder impaired him and vague in asserting when any of the alleged events took place. Plaintiffs attached additional exhibits to their *Reply* to offer some information on timing but are inadequate for the Court's determination.

211. Mr. Moquin did not abandon Plaintiffs. He appeared at status hearings, participated in depositions, and filed motions and other papers, including a lengthy opposition to Defendants' motion for partial summary judgment. Mr. Moquin participated in oral arguments and filed two summary judgment motions with substantial supporting exhibits and detailed declarations.

212. As discussed *supra*, Plaintiffs had contemporaneous notice of the deadline to oppose the *Sanctions Motion*, of Plaintiffs' failure to oppose the *Sanctions Motion*, and of the *Sanctions Order*. Yet, Plaintiffs did nothing to apprise this Court of any issues until they filed the *Rule 60(b) Motion*. *Prior 60(b) Order* ¶¶ 49-60.

213. Additionally, the Court gave counsel, including Mr. O'Mara, notice of the seriousness of Plaintiffs' violations and expressed it was considering dismissal based on those violations. *Opposition to Rule 60(b) Motion* Ex. 3; *December 12, 2017, Transcript* ("you need to know going into these oppositions, that I'm very seriously considering granting all of it...I haven't decided it, but I need to see compelling opposition not to grant it."). Plaintiffs and their attorneys were given notice of the potential consequences of failing to file an opposition to the *Sanctions Motion*.

214. A party "cannot be relieved from a judgment [order] taken against him in consequence of the neglect, carelessness, forgetfulness, or inattention of his attorney." *Cicerchia*, 77 Nev. at 161.

### F. PLAINTIFFS KNEW OF MR. MOQUIN'S ALLEGED CONDITION AND ALLEGED NON-RESPONSIVENESS PRIOR TO THE SANCTIONS ORDER AND DID NOTHING; THEREFORE PLAINTIFFS CANNOT ESTABLISH EXCUSABLE NEGLECT.

215. Even if Mr. Moquin's statements were admissible, which they are not, such statements would only go to show that Mr. Willard should have acted more diligently than he did so here.

216. In the *Willard Declaration* and the *Reply Willard Declaration*, Mr. Willard admits he knew Mr. Moquin was having personal financial difficulties and that he borrowed

1 money from friends and family to fund Mr. Moguin's personal expenses. WD ¶¶ 63-65; 2 RWD ¶¶ 11-13. Mr. Willard also admits that he recommended a psychiatrist to Mr. Moquin, 3 and he again borrowed money from a friend to pay for Mr. Moguin's treatment. WD ¶¶ 68-4 71; RWD ¶¶ 11-13. Mr. Willard was aware of Mr. Moquin's alleged problems prior to this 5 Court's Order Granting Motion to Strike and Sanctions Order yet continued to allow Mr. 6 Moguin to represent Plaintiffs. 7 Mr. Willard was aware of Mr. Moquin's inaction which distinguishes this case 217. 8 from the cases upon which Plaintiffs rely in the *Rule 60(b) Motion*, where the parties were 9

unaware of their attorneys' problems. See, e.g., Passarelli, 102 Nev. at 286 ("Passarelli was effectually and unknowingly deprived of legal representation"); US v. Cirami, 563 F.2d 26, 29-31 (2d Cir. 1977) (client discovered that attorney had a mental disorder that prevented him from opposing summary judgment more than two years later); Boehner v. Heise, 2009 WL 1360975 at \*2 (S.D.N.Y. 2009) (client did not learn case had been dismissed or and did not learn of attorney's mental condition until several months after dismissal). Here, Mr. Willard knew of the actions that supported the Sanctions Order.

218. Mr. Willard admits that he was informed by Mr. O'Mara prior to the dismissal of Plaintiffs' claims that Mr. Moguin was not responsive. Plaintiffs failed to replace Mr. Moguin or take other action due to perceived financial reasons. WD ¶ 81. Plaintiffs' knowledge and inaction vitiates excuse for neglect.

219. The *Rule 60(b) Motion* cites authority for the proposition "where an attorney's mishandling of a movant's case stems from the attorney's mental illness," this might justify relief under Rule 60(b). However, "client diligence must still be shown." Cobos v. Adelphi Univ., 179 F.R.D. 381, 388 (E.D.N.Y. 1998); see also Edward H. Bohlin Co., Inc. v. Banning Co., Inc., 6 F.3d 350, 357 (5th Cir. 1993) ("A party has a duty of diligence to inquire about the status of a case...."); *Pryor v. U.S. Postal Service*, 769 F.2d 281, 287 (5th Cir. 1985) ("This Court has pointedly announced that a party has a duty of diligence to inquire about the status of a case....").

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

1 220. Mr. Willard's claim that he had no choice but to continue working with Mr. 2 Moquin due to financial issues lacks credibility as he admits he was able to borrow money to 3 fund Mr. Moquin's personal life and medical treatment. It logically follows he had resources 4 to retain new attorneys at the time. 5 221. Plaintiffs have not established by substantial evidence that they exercised 6 diligence to rectify representation in their case despite ample knowledge of Mr. Moguin's 7 non-responsiveness. 8 G. PLAINTIFFS ARE NOT ENTITLED TO 60(B) RELIEF BECAUSE TWO 9 ATTORNEYS REPRESENTED PLAINTIFFS WHO BOTH HAD AN **OBLIGATION TO ENSURE COMPLIANCE WITH THE NEVADA** 10 RULES OF CIVIL PROCEDURE AND THIS COURT'S ORDERS. 11 222. Plaintiffs' *Rule 60(b) Motion* ignores the fact David O'Mara served as local 12 counsel. In Nevada, the responsibilities of local counsel are clearly defined, and 13 encompass active responsibility to represent the client and manage the case: 14 15 (a) The Nevada attorney of record shall be responsible for and actively participate in the representation of a client in any proceeding that is subject to 16 this rule. 17 (b) The Nevada attorney of record shall be present at all motions, pre-trials, or 18 any matters in open court unless otherwise ordered by the court. 19 (c) The Nevada attorney of record shall be responsible to the court...for the administration of any proceeding that is subject to this rule and for compliance 20 with all state and local rules of practice. It is the responsibility of Nevada 21 counsel to ensure that the proceeding is tried and managed in accordance with all applicable Nevada procedural and ethical rules. 22 Supreme Court Rule ("SCR") 42(14). 23 24 223. Mr. O'Mara's representation, even if contractually limited, was governed by 25 this rule. 26 Mr. O'Mara expressly "consent[ed] as Nevada Counsel of Record to the 224. 27 designation of Petitioner to associate in this cause pursuant to SCR 42" as part of his 28 Motion to Associate Counsel.

1	225.	Mr. O'Mara attended every hearing and court conference in this case. And,	
2	among other things, Mr. O'Mara signed the Verified Complaint and the First Amended		
3	Verified Complaint. <i>Complaint</i> ; FAC.		
4	226.	WDCR 23(1) provides:	
5	Counsel who has appeared for any party shall represent that party in the case		
6	and shall be recognized by the court and by all parties as having control of the client's case, until counsel withdraws, another attorney is substituted, or until counsel is discharged by the client in writing, filed with the filing office, in		
7 8			
9	WDCR 23.		
10	227.	Mr. O'Mara was the sole signatory on Plaintiffs' deficient initial disclosure,	
11	(Opposition to Rule 60(b) Motion, Ex. 6), the uncured deficiencies of which were a basis for		
12	sanction of dismissal. Sanctions Order.		
13	228.	Mr. O'Mara also signed and filed the Brief Extension Request with this Court,	
14	representing that:		
15	Counsel has been diligently working for weeks to respond to Defendant's serial motions, which include seeking dismissal of Plaintiffs' case. With the full		
16 17			
18	unforeseen computer issues Counsel for Plaintiffs is confident that with a one-day extension they will be able to recreate and submit the oppositions to		
19	Defendants' three motions		
20	229.	Plaintiffs do not provide any declaration by Mr. O'Mara in support of their Rule	
21	60(b) Motion.		
22	230.	Mr. O'Mara's involvement precludes a conclusion of excusable neglect here.	
23	Н.	THE SANCTIONS ORDER WAS SUFFICIENT UNDER NEVADA LAW.	
24	231.	Plaintiffs assert that the Sanctions Order was insufficient under Young v.	
25	Johnny Ribeiro, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990) because the Sanctions Order		
26	did not consider "whether sanctions unfairly operate to penalize a party for the misconduct		
27	of his or her attorney." Rule 609b) Motion at 12. However, consideration of this factor is		
28	discretionary, not mandatory. See Young, 106 Nev. at 93 ("The factors a court <b>may</b>		

properly consider include...whether sanctions unfairly operate to penalize a party for the
misconduct of his or her attorney") (emphasis added).

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

232. The Court concludes the factors enumerated in *Young v. Johnny Ribeiro Bldg. Inc.* were met by the *Sanctions Order*. Specifically, the Nevada Supreme Court held where a court issues an order of dismissal with prejudice as a discovery sanction, a court may consider, among others, the degree of willfulness of the offending party, the extent to which the non-offending party would be prejudiced by a lesser sanction, the severity of the sanction of dismissal relative to the severity of the discovery abuse, and the feasibility and fairness of alternative, less severe sanctions. *Young*, 106 Nev. at 93. The factors are not mandatory so long as the Court supports the order with "an express, careful and preferably written explanation of the court's analysis of the pertinent factors." *Id*.

233. While each suggested factor discussed in the *Sanctions Order* was not labeled by factor, the Court addressed the factors it deemed appropriate.

234. In the circumstances of this case, the dismissal of Plaintiffs' claims did not unfairly penalize Plaintiffs based on the factors analyzed in the *Sanctions Order*.

I.

# THE RULE 60(B) MOTION SHOULD BE DENIED.

235. After weighing the credibility and admissibility of the evidence provided in support of the *Rule 60(b) Motion*, substantial evidence has not been presented to establish excusable neglect.

236. Plaintiffs have failed to meet their burden of proving, by a preponderance of the evidence, excusable neglect sufficient to justify relief under NRCP 60(b).

237. Similarly, careful analysis of each *Yochum* factor demonstrates that the *Yochum* factors warrant, if not compel, denial of NRCP 60(b)(1) relief.

11

11

1	III.	<u>ORDER</u> .
2		Based upon the foregoing, and good cause appearing therefor,
3		IT IS HEREBY ORDERED Plaintiffs' Rule 60(b) Motion is DENIED in its entirety.
4		DATED this 13th day of September, 2021.
5		
6		
7 8		DISTRICT JUDGE
0 9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1	CERTIFICATE OF SERVICE	
2	I certify that I am an employee of THE SECOND JUDICIAL DISTRICT	
3	COURT; that on the 13th day of September, 2021, I electronically filed the foregoing	
4	with the Clerk of the Court system which will send a notice of electronic filing to the	
5	following:	
6	ROBERT EISENBERG, ESQ.	
7	BRIAN IRVINE, ESQ. ANJALI WEBSTER, ESQ. RICHARD WILLIAMSON, ESQ. JONATHAN TEW, ESQ.	
8		
9	JOHN DESMOND, ESQ.	
10	And, I deposited in the County mailing system for postage and mailing with the	
11	United States Postal Service in Reno, Nevada, a true and correct copy of the attached	
12	document addressed as follows:	
13		
14		
15		
16		
17		
18	Holly Longe	
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		