IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; JERRY HERBST, an individual; and TIMOTHY P. HERBST, as Special Administrator of the ESTATE OF JERRY HERBST, deceased,

Respondents.

No. 83640
District Court Case No. CV14-01712

APPENDIX TO APPELLANTS' OPENING BRIEF

VOLUME 17 OF 18

Submitted for all appellants by:

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ATTORNEYS FOR APPELLANTS LARRY J. WILLARD, et al.

CHRONOLOGICAL INDEX TO APPELLANTS' APPENDIX

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Clerk of the Court
Transaction # 8028006 : csulezic

EXHIBIT “3”

EXHIBIT “3”

EXHIBIT “3”

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF BRIAN MOQUIN, ESQ. CALIFORNIA BAR NO. 257583.

No. 78946

FILED

OCT 21 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER APPROVING CONDITIONAL GUILTY PLEA AGREEMENT AND ENJOINING ATTORNEY FROM PRACTICING LAW IN NEVADA

This is an automatic review of a Northern Nevada Disciplinary Board hearing panel's recommendation that this court approve, pursuant to SCR 113, a conditional guilty plea agreement in exchange for a stated form of discipline for California-licensed attorney Brian Moquin. Under the agreement, Moquin admitted to violating RPC 1.13 (diligence), RPC 1.4 (communication), and RPC 1.16 (declining or terminating representation) during his pro hac vice representation of a plaintiff in Nevada state court. The agreement provides for a two-year injunction on his practice of law in Nevada and requires him to pay the costs of the disciplinary proceeding.

Moquin has admitted to the facts and violations alleged in the complaint. The record therefore establishes that Moquin, who was admitted to practice law in this state pro hac vice to represent a plaintiff in a single matter proceeding in Nevada State District Court, failed to comply with NRCP 16.1 disclosure and discovery requirements and related court orders. Subsequently, on the defendant's unopposed motion, the district court dismissed the action with prejudice as a sanction for the discovery violations. Additionally, Moquin failed to adequately communicate with the client about the status of the case and after the client retained new counsel

19-43415

to pursue a motion for relief from the judgment, Moquin failed to provide new counsel with the client file and other documents that he had agreed to provide, which may have supported setting aside the judgment. As Moquin has admitted to the violations as part of the plea agreement, the issue for this court is whether the agreed-upon discipline sufficiently protects the public, the courts, and the legal profession. *State Bar of Nev. v. Claiborne*, 104 Nev. 115, 213, 756 P.2d 464, 527-28 (1988) (explaining purpose of attorney discipline).

Based on our review of the record, we conclude that the guilty plea agreement should be approved. *See* SCR 113(1); *see also* SCR 99(1); *Matter of Discipline of Droz*, 123 Nev. 163, 167-68, 160 P.3d 881, 884 (2007) (observing that this court has jurisdiction to impose discipline on an attorney practicing with pro hac vice status regardless of the fact he is not a member of the Nevada State Bar). Considering the duties violated, Moquin's mental state (knowing), the injury caused (dismissal of action with prejudice), the aggravating circumstance (substantial experience in the practice of law), and the mitigating circumstance (absence of prior discipline), we agree that a two-year injunction on the practice of law in Nevada is appropriate. *See In re Discipline of Lerner*, 124 Nev. 1232, 1246, 197 P.3d 1067, 1077 (2008) (identifying four factors that must be weighed in determining the appropriate discipline—"the duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating factors"); *cf.* ABA Standards for Imposing Lawyer Sanctions, *Compendium of Prof. Responsibility Rules and Standards*, Standard 4.42(a) (Am. Bar Ass'n 2017) (providing that suspension is appropriate when "a lawyer knowingly fails to perform services for a client and causes injury").

Accordingly, Moquin is hereby enjoined from the practice of law in Nevada for two years from the date of this order. Should Moquin wish to practice law in Nevada after that time, either as a Nevada attorney or through pro hac vice admission, he must disclose this disciplinary matter in any applications he may submit to the pertinent Nevada court or the State Bar of Nevada. As agreed, Moquin must pay the actual costs of the disciplinary proceedings, including $2,500 under SCR 120, within 90 days from the date of this order.

It is so ORDERED.

_____, C.J.
Gibbons

_____, J.
Pickering

_____, J.
Stiglich

_____, J.
Cadish

HARDESTY, J., with whom PARRAGUIRRE and SILVER, JJ., agree, dissenting:

I disagree that prohibiting Moquin from applying for admission to the Nevada Bar or seeking pro hac vice admission for two years is sufficient discipline, considering Moquin's admitted lack of diligence and communication, the gravity of the client's loss, and Moquin's knowing mental state. *See In re Discipline of Lerner*, 124 Nev. 1232, 1246, 197 P.3d 1067, 1077 (2008) (listing factors to be weighed in an attorney discipline determination); *In re Discipline of Schaefer*, 117 Nev. 496, 515, 25 P.3d 191, 204 (2001) (noting that "this court is not bound by the panel's findings and recommendation, and must examine the record anew and exercise independent judgment"). I therefore dissent.

The record establishes that Moquin was retained to represent a client in an action concerning breach of commercial lease agreements and in August 2014, Moquin arranged with a Nevada-licensed attorney to have a complaint filed in the Second Judicial District alleging damages of roughly $15 million plus interest. Moquin, who was admitted pro hac vice as the client's counsel, repeatedly failed to comply with NRCP 16.1 discovery requirements during the three-plus years that this matter was pending. In particular, he failed to provide (1) a damages computation in the initial disclosures, or any time thereafter despite the defendants' numerous requests for that information and court orders compelling such disclosure; (2) a proper expert witness disclosure; and (3) documents that responded to the defendants' discovery requests. Despite failing to comply with the district court's May 2017 order requiring service of the still undisclosed damages computation, Moquin filed a summary judgment motion with new damages categories and figures based on previously undisclosed documents and expert witness opinions. The defendants then filed a motion to dismiss the complaint as a sanction for discovery violations, which Moquin did not oppose within the extended time for doing so. In granting the motion and dismissing the complaint with prejudice, the district court pointed to the repeated failures to comply with orders and egregious discovery violations that persisted throughout the litigation.

The conditional guilty plea agreement also acknowledges that had the disciplinary matter proceeded to a formal hearing, the State Bar would have presented testimony that Moquin failed to adequately communicate with the client about the status of the case and blamed delays on opposing counsel instead of his own lack of diligence in meeting discovery obligations, while Moquin would have testified that he kept the client

informed about the progress of the case. Regardless, Moquin's communication shortcomings continued beyond that, as he failed to meaningfully respond to the client's numerous requests for his file and other documents that Moquin had agreed to provide to assist the client in salvaging the case. Because Moquin never gave the client the complete file or the documents to show that his neglect in handling the case may have been excusable, the district court denied the client's NRCP 60(b) motion for relief from the dismissal order, and the client was thus never able to test his complaint on the merits.

When we are faced with misconduct by an attorney practicing in Nevada without a Nevada law license, we do not have the benefit of all the sanctions available to us in responding to the same misconduct by a Nevada-licensed attorney. *See Matter of Discipline of Droz*, 123 Nev. 163, 168, 160 P.3d 881, 885 (2007) (acknowledging limitations on discipline that can be imposed on an attorney who engages in misconduct in Nevada but does not have a Nevada law license). In particular, we cannot impose the traditional forms of attorney discipline that directly affect an attorney's licensure, such as suspension and disbarment, on a non-Nevada-licensed attorney. *See id.* (discussing case where Indiana court observed that a "law license issued by California was not subject to sanction by the Indiana court"). As a result, when we look to the ABA Standards for Imposing Lawyer Sanctions for guidance in determining the appropriate discipline, we must keep in mind that those standards are focused on the appropriate discipline for an attorney who is licensed in the jurisdiction and in many instances recommend discipline that cannot be imposed on an attorney who is not licensed in the jurisdiction. Thus, when considering the appropriate discipline for misconduct by a non-Nevada-licensed attorney for which the

ABA Standards call for a sanction directly affecting licensure, we must be aware of the shortcomings in the standards and "fashion practice limitations through our injunctive and equitable powers that are equivalent to license suspension, disbarment, or other sanctions related to an attorney's license." *Attorney Disciplinary Bd. v. Carpenter*, 781 N.W.2d 263, 269-70 (Iowa 2010). Doing so is important not just to protect Nevada citizens but also to adequately convey to the licensing state the seriousness of the professional misconduct the attorney has committed in Nevada.

In my opinion, the conditional guilty plea agreement and hearing panel recommendation fall short of fashioning a practice limitation that is equivalent to the appropriate sanction if Moquin had a Nevada law license. I am particularly concerned with the reliance on ABA Standard 4.42 as the starting point. When an attorney "knowingly fails to perform services for a client," the line between suspension and disbarment under the ABA Standards depends on the level of injury to the client—"serious or potentially serious injury to a client" warrants disbarment whereas "injury or potential injury to a client" warrants suspension. *Compare* ABA Standard 4.41(b) (disbarment), *with* ABA Standard 4.42(a) (suspension). The record here suggests that the injury to Moquin's client was serious. In presenting the matter, bar counsel stated that this was a legally clear breach of contract matter, and although there is no guarantee that the client would have recovered, he should have had the benefit of diligent representation that would have allowed his claims to be heard. Bar counsel further explained that although Moquin did not provide an NRCP 16.1 damages computation, the claims were based on loss of lease payments of around $50,000 per month and the client was seeking millions of dollars in damages. As such, I believe the court is being asked to look to the wrong

standard as a starting point to fashion a limit on Moquin's opportunity to practice in Nevada that would be equivalent to the license restrictions that would be placed on a Nevada-licensed attorney for similar misconduct. Based on the record currently before the court, I would look to ABA Standard 4.41(b) and fashion a limit on Moquin's practice that is equivalent to disbarment.

Even if ABA Standard 4.42(a) were the appropriate starting point, I am not convinced that the agreed-upon two-year injunction is equivalent to a license suspension. Moquin is merely being limited in his ability to apply for regular or pro hac vice admission for a two-year period. There is no suggestion, however, that Moquin ever intends to seek regular admission to the Nevada bar, so in that respect the two-year restriction is of little moment. And SCR 42(6)(a) already presumptively limits the number of pro hac vice admissions an attorney may be granted, thus diminishing the practical impact of a two-year restriction on any such admissions. We also cannot be sure what discipline, if any, will be imposed in California, where Moquin is licensed. In particular, while California law provides that this court's decision that a California-licensed attorney committed misconduct in Nevada is "conclusive evidence that the [California] licensee is culpable of professional misconduct in [California]," Cal. Bus. & Prof. Code § 6049.1(a), it does not require that California impose the same or similar discipline as this court, *see id.* § 6049.1(b)(1) (providing that the disciplinary board shall determine in an expedited proceeding "[t]he degree of discipline to impose"). For these reasons, I am concerned that the agreed-upon discipline approved by the majority does not sufficiently serve the purpose of attorney discipline. *See State Bar of Nev. v. Claiborne*, 104 Nev. 115, 213, 756 P.2d 464, 527-28 (1988) (recognizing

that the purpose of attorney discipline is to protect the public, courts, and the legal profession). I would reject the conditional guilty plea agreement and remand for proceedings before a hearing panel so it may fully assess this matter and recommend discipline in light of the factors outlined in *Lerner* and consistent with the purpose of attorney discipline.

_____, J.
Hardesty

We concur:

_____, J.
Parraguirre

_____, J.
Silver

cc: Chair, Northern Nevada Disciplinary Board
Brian Moquin, Esq.
Bar Counsel, State Bar of Nevada
Executive Director, State Bar of Nevada
Admissions Office, U.S. Supreme Court

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CODE NO. 3370

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, A California Corporation; et. al.,

Plaintiffs,

vs.

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

Defendants.
_____/

AND RELATED ACTIONS

_____/

Case No. CV14-01712

Dept. No. 6

ORDER TO SET STATUS CONFERENCE

The Court having reviewed the Supreme Court Order Partially Dismissing Appeal and Reinstating Briefing filed on August 26, 2020, IT IS HEREBY ORDERED:

Counsel shall contact the Administrative Assistant in Department 6 within fifteen (15) days to schedule a status hearing to discuss further proceedings in this action.

Dated this 17th day of September, 2020.

_____
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 18th day of September, 2020, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

RICHARD WILLIAMSON, ESQ.
JONATHAN TEW, ESQ.
ANJALI WEBSTER, ESQ.
JOHN DESMOND, ESQ.
BRIAN IRVINE, ESQ.

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

Heidi Boe

IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY J. WILLARD,INDIVIDUALLY AND AS TRUSTEE OF THE LARRY JAMES WILLARD TRUST FUND; AND OVERLAND DEVELOPMENT CORPORATION, A CALIFORNIA CORPORATION,
Appellants,
vs.
BERRY-HINCKLEY INDUSTRIES, A NEVADA CORPORATION; AND JERRY HERBST, AN INDIVIDUAL,
Respondents.

No. 77780

FILED

NOV 03 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

_____, J.
Parraguirre

_____, J.
Hardesty

_____, J.
Cadish

cc: Hon. Lynne K. Simons, District Judge
Robertson, Johnson, Miller & Williamson
Lemons, Grundy & Eisenberg
Dickinson Wright PLLC
Washoe District Court Clerk

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IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY J. WILLARD, INDIVIDUALLY AND AS TRUSTEE OF THE LARRY JAMES WILLARD TRUST FUND; AND OVERLAND DEVELOPMENT CORPORATION, A CALIFORNIA CORPORATION,
Appellants,
vs.
BERRY-HINCKLEY INDUSTRIES, A NEVADA CORPORATION; AND JERRY HERBST, AN INDIVIDUAL,
Respondents.

No. 77780

FILED
FEB 23 2021
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING EN BANC RECONSIDERATION

On August 6, 2020, this court issued an opinion that reversed the district court's order denying an NRCP 60(b)(1) motion and remanded the matter for further proceedings. Respondents have petitioned for en banc reconsideration of that opinion and seek clarification on whether any new arguments or evidence can be presented on remand. Having considered the petition, we have concluded that en banc reconsideration is not warranted. NRAP 40A. However, we clarify 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.

21-05280

It is so ORDERED.

_____, C.J.
Hardesty

_____, J.
Parraguirre

_____, J.
Stiglich

_____, J.
Cadish

_____, J.
Silver

_____, J.
Pickering

_____, J.
Herndon

cc: Hon. Lynne K. Simons, District Judge
Robertson, Johnson, Miller & Williamson
Lemons, Grundy & Eisenberg
Dickinson Wright PLLC
Washoe District Court Clerk

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, Plaintiffs, vs. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual Defendants.	Case No. CV14-01712 Dept. No. 6
BERRY-HINCKLEY INDUSTRIES a Nevada corporation; and JERRY HERBST, an individual, Counterclaimants, vs. LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation, Counterdefendants.	

NOTICE OF ASSOCIATION OF COUNSEL

PLEASE TAKE NOTICE that Robert L. Eisenberg, Esq. of the law firm Lemons, Grundy & Eisenberg, will be associating with Robertson, Johnson, Miller & Williamson as counsel for Plaintiffs/Counterdefendants. Any notices to Robert L. Eisenberg, Esq. may be sent to the address below:

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6005 Plumas Street, Third Floor
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Facsimile: (775) 786-9716
rle@lge.net

AFFIRMATION

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

DATED this 29th day of March, 2021.

ROBERTSON, JOHNSON,
MILLER & WILLIAMSON

By: *\/s/ Richard D. Williamson*
G. David Robertson, Esq.
Richard D. Williamson, Esq.
Jonathan Joel Tew, Esq.
Attorneys for Plaintiffs/Counterdefendants

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Robertson, Johnson, Miller & Williamson, 50 West Liberty Street, Suite 600, Reno, Nevada 89501, over the age of 18, and not a party within this action. I further certify that on the 29th day of March, 2021, I electronically filed the foregoing **NOTICE OF ASSOCIATION OF COUNSEL** with the Clerk of the Court by using the ECF 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 for Defendants/Counterclaimants

/s/ Stefanie E. Smith
An Employee of Robertson, Johnson, Miller & Williamson

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Transaction # 8368965 : csulezic

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Attorneys for Plaintiffs

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation, Plaintiffs, vs. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual, Defendants.	Case No. CV14-01712 Dept. No. 6
AND ALL RELATED MATTERS.	

REQUEST FOR STATUS CONFERENCE

On August 6, 2020, the Nevada Supreme Court filed a published opinion in this matter, which included the following findings:

- "NRCP 60(b)(1) provides that a district court may grant relief 'from a final judgment, order, or proceeding' based on a showing of 'mistake, inadvertence, surprise, or excusable neglect.'" *Willard v. Berry-Hinckley Indus.*, 136 Nev. ____, Adv. Op. 53, 469 P.3d 176, 177-78 (2020).

- "[T]he district court reasoned that it need not consider the factors announced in *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982), *overruled in part by Epstein v. Epstein*, 113 Nev. 1401, 1405, 950 P.2d 771, 773 (1997), to determine if appellants established excusable neglect because *Yochum* concerned relief from a default judgment, as opposed to relief from an order." *Willard*, Adv. Op. at 2, 469 P.3d at 178.

- "As we review for abuse of discretion, we now clarify that district courts must issue express factual findings, preferably in writing, pursuant to each *Yochum* factor to facilitate our appellate review." *Willard*, Adv. Op. at 2-3, 469 P.3d at 178.

- "Accordingly, we reverse the district court's order denying the NRCP 60(b)(1) motion and remand to the district court for further consideration." *Willard*, Adv. Op. at 2-3, 469 P.3d at 178.

- "[Former counsel Brian] Moquin, on behalf of Willard, failed to comply with NRCP 16.1 disclosure requirements, discovery requests, and court orders." *Id*.

- "We note that Moquin's conduct in this case resulted in disciplinary action. *See In re Discipline of Moquin*, Docket No. 78946 (Order Approving Conditional Guilty Plea Agreement and Enjoining Attorney From Practicing Law in Nevada, Oct. 21, 2019)." *Willard*, Adv. Op. at 3, 469 P.3d at 178 n.3.

- "Based on these discovery violations, Respondents filed an unopposed motion for sanctions in which they requested that the district court dismiss the case with prejudice. The district court granted Respondents' motion for sanctions and dismissed Willard's claims with prejudice. Thereafter, Willard retained new counsel and filed the NRCP 60(b)(1) motion, requesting that the district court set aside its sanctions order." *Willard*, Adv. Op. at 3-4, 469 P.3d at 178.

- "Specifically, Willard maintained that Moquin's alleged psychological disorder resulted in his abandonment of Willard, which justified NRCP 60(b)(1) relief based on excusable neglect." *Willard*, Adv. Op. at 4, 469 P.3d at 178.

- "At the outset of Willard's argument, the district court requested that Willard 'stick really, really, really close to the NRCP 60(b) standards,' and Willard proceeded to structure his argument within the framework of the factors announced in *Yochum*, 98 Nev. at 486, 653 P.2d at 1216." *Willard*, Adv. Op. at 4, 469 P.3d at 178.

- "After declining to consider the *Yochum* factors, the district court found that Willard failed to prove excusable neglect by a preponderance of the evidence." *Willard*, Adv. Op. at 4, 469 P.3d at 179.

- "While we generally afford the district court wide discretion in ruling on an NRCP 60(b)(1) motion, *see id.*, a district court nevertheless abuses that discretion when it disregards established legal principles, *McKnight Family, LLP*

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v. Adept Mgmt. Servs., Inc., 129 Nev. 610, 617, 310 P.3d 555, 559 (2013)." *Willard*, Adv. Op. at 5, 469 P.3d at 179.

- "NRCP 60(b)(1) operates as 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." *Willard*, Adv. Op. at 5, 469 P.3d at 179.

- "In *Yochum*, this court held that, to determine whether such grounds for NRCP 60(b)(1) relief exist, the 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.' 98 Nev. at 486, 653 P.2d at 1216." *Willard*, Adv. Op. at 6, 469 P.3d at 179.

- "The district court must also consider this state's bedrock policy to decide cases on their merits whenever feasible when evaluating an NRCP 60(b)(1) motion." *Willard*, Adv. Op. at 6, 469 P.3d at 179.

- "Because the district court here failed to apply the *Yochum* factors in denying Willard's NRCP 60(b)(1) motion, we conclude that the district court abused its discretion." *Willard*, Adv. Op. at 7, 469 P.3d at 180.

Defendants sought rehearing of that opinion. On November 3, 2020, however, the Nevada Supreme Court entered an Order Denying Rehearing. Defendants then sought en banc reconsideration of the published opinion. On February 23, 2021, however, the Nevada Supreme Court entered an Order Denying En Banc Reconsideration. Moreover, 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."

For the Court's convenience, the parties' previous arguments regarding the *Yochum* factors are contained in *Willard Plaintiffs' Rule 60(b) Motion for Relief*, filed on April 18, 2018, *Defendants/Counterclaimants' Opposition to Rule 60(b) Motion for Relief*, filed on May 18, 2018, and *Willard Plaintiffs' Reply in Support of Willard Plaintiffs' Rule 60(b) Motion for Relief*, filed on May 29, 2018.

In accordance with the Order Denying En Banc Reconsideration, Plaintiffs Larry J. Willard, individually and as Trustee of the Larry James Willard Trust Fund and Overland Development Corporation (the "Willard Plaintiffs") have not attached any new evidence

Robertson, Johnson,
Miller & Williamson
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regarding Brian Moquin, any disciplinary proceedings against him, or his status with either the State Bar of Nevada or the State Bar of California. The Willard Plaintiffs reaffirm their existing arguments and evidence in the record.

So that the Court and the parties can determine how to best move forward, the Willard Plaintiffs request a status conference. Moreover, as explained in the Rule 60 motion, Mr. Willard was 71 when the Defendants breached the lease, and he turned 76 in 2018. (Mot. at 8:21-23, 10:11, 14:11, Ex. 1 at ¶¶ 94 & 100.) Accordingly, consistent with NRS 16.025(1), Mr. Willard respectfully requests that the Court schedule the status conference and any other proceedings at its earliest convenience.

Affirmation

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

DATED this 30th day of March, 2021.

ROBERTSON, JOHNSON,
MILLER & WILLIAMSON
50 West Liberty Street, Suite 600
Reno, Nevada 89501

By: */s/ Richard D. Williamson*
Richard D. Williamson, Esq.
Jonathan Joel Tew, Esq.
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Robertson, Johnson, Miller & Williamson, 50 West Liberty Street, Suite 600, Reno, Nevada 89501, over the age of 18, and not a party within this action. I further certify that on the 30th day of March, 2021, I electronically filed the foregoing **REQUEST FOR STATUS CONFERENCE** with the Clerk of the Court by using the ECF 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 for Defendants/Counterclaimants

/s/ *Stefanie E. Smith*
An Employee of Robertson, Johnson, Miller & Williamson

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Transaction # 8458742 : csulezic

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Attorneys for Plaintiffs/Counterdefendants

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation, Plaintiffs, vs. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual, Defendants.	Case No. CV14-01712 Dept. No. 6
BERRY-HINCKLEY INDUSTRIES a Nevada corporation; and JERRY HERBST, an individual, Counterclaimants, vs. LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation, Counterdefendants.	

NOTICE OF SUBMISSION OF PROPOSED ORDER

PLEASE TAKE NOTICE that, pursuant to the Court's direction on April 21, 2021, Plaintiffs Larry J. Willard, individually and as Trustee of the Larry James Willard Trust Fund, and Overland Development Corporation (collectively, the "Willard Plaintiffs") hereby file a proposed Order Granting in Part and Denying in Part the Willard Plaintiffs' Rule 60(b)(1) Motion for Relief.

Affirmation

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

DATED this 21st day of May, 2021.

ROBERTSON, JOHNSON,
MILLER & WILLIAMSON
50 West Liberty Street, Suite 600
Reno, Nevada 89501

By: /s/ Richard D. Williamson
Richard D. Williamson, Esq.
Jonathan Joel Tew, Esq.
Attorneys for Plaintiffs/Counterdefendants

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Robertson, Johnson, Miller & Williamson, 50 West Liberty Street, Suite 600, Reno, Nevada 89501, over the age of 18, and not a party within this action. I further certify that on the 21st day of May, 2021, I electronically filed the foregoing **NOTICE OF NON-OPPOSITION TO SUBSTITUTION** with the Clerk of the Court by using the ECF system which served the following parties electronically:

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Index of Exhibits

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, Plaintiffs, vs. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual Defendants.	Case No. CV14-01712 Dept. No. 6
BERRY-HINCKLEY INDUSTRIES a Nevada corporation; and JERRY HERBST, an individual, Counterclaimants, vs. LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation, Counterdefendants.	

ORDER GRANTING IN PART AND DENYING IN PART

THE WILLARD PLAINTIFFS' RULE 60(b)(1) MOTION FOR RELIEF

On April 18, 2018, Plaintiffs LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund ("Mr. Willard") and OVERLAND DEVELOPMENT CORPORATION ("Overland") (collectively, "Willard Plaintiffs") filed the *Willard Plaintiffs' Rule 60(b) Motion for Relief* ("Rule 60(b)(1) Motion") pursuant to NRCP 60(b)(1). On May 18, 2018, Defendants BERRY-HINCKLEY INDUSTRIES ("BHI") and JERRY HERBST ("Mr. Herbst") (collectively, "Defendants") filed their *Opposition to Rule 60(b) Motion for Relief* ("Rule 60 Opposition"). The Willard Plaintiffs filed their *Reply in Support of the Willard Plaintiffs' Rule 60(b) Motion for Relief* ("Rule 60(b)(1) Reply") on May 29, 2018, and the matter was submitted for decision on May 30, 2018. On June 6, 2018, Defendants filed a *Sur-Reply in Support of Opposition to the Willard Plaintiffs' Rule 60(b) Motion for Relief* ("Rule 60(b)(1) Sur-Reply"). The Court heard this matter on Tuesday, September 4, 2018, and then entered an Order Denying Plaintiffs' Rule 60(b) Motion ("Rule 60(b)(1) Order") on November 30, 2018.

The Willard Plaintiffs appealed the Rule 60 Order on several grounds. Ultimately, however, the Nevada Supreme Court did not reach most of those grounds. Willard v. Berry-Hinckley Indus., 136 Nev. ____, Adv. Op. 53, 469 P.3d 176, 180 n.7 (2020). Instead, the Supreme Court remanded the case on the basis that the Rule 60 Order failed to apply the factors announced in Yochum v. Davis, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982). Willard, 469 P.3d at 180.

Accordingly, this Court must apply the following four factors in evaluating the Rule 60(b)(1) Motion: "(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." Yochum, 98 Nev. at 486, 653 P.2d at 1216. In addition, as the Nevada Supreme Court's opinion emphasized, this Court "must also consider this state's bedrock policy to decide cases on their merits whenever feasible when evaluating an NRCP 60(b)(1) motion." Willard, 469 P.3d at 179.

Background

The Court will not recount the entire history, but will discuss certain events that bear on the Yochum factors.

On August 8, 2014, the Willard Plaintiffs and Edward E. Wooley and Judith A. Wooley, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000 (collectively, "Wooley Plaintiffs") commenced this action against Defendants. Brian Moquin, a California attorney who had been admitted to practice in Nevada *pro hac vice*, was lead counsel representing the Willard Plaintiffs and the Wooley Plaintiffs (collectively, "Plaintiffs").

On December 2, 2016, Plaintiffs disclosed Daniel Gluhaich as an un-retained expert witness. The parties submitted a proposed *Stipulation and Order to Continue Trial (Third Request)*, which included an agreement that Plaintiffs would "serve Defendants with an updated initial expert disclosure of Dan Gluhaich that is fully-compliant with NRCP 16.1 and NRCP 26 within thirty (30) days of the date of the Order approving this Stipulation." On February 9, 2017, the Court approved and filed the *Stipulation and Order to Continue Trial (Third Request).*

On May 30, 2017, this Court entered an *Order Granting Partial Summary Judgment in Favor of Defendants*, which denied Plaintiffs' claims for certain damages and further ordered Plaintiffs to serve an updated NRCP 16.1 damage disclosure within fifteen days from the notice of entry of that order. Defendants filed a notice of entry of that order on May 31, 2017.

On October 18, 2017, the Willard Plaintiffs filed a *Motion for Summary Judgment of Plaintiffs Larry J. Willard and Overland Development Corporation*, which contained a detailed description of the damages they were seeking. These damages included previously-disclosed rent damages and also damages for diminution in value and other categories of damages. Some of these claimed damages were based upon the opinions of Mr. Gluhaich.

On November 13, 2017, Defendants filed *Defendants'/Counterclaimants' Opposition to Larry Willard and Overland Development Corporation's Motion for Summary Judgment.* The next day, on November 14, 2017, Defendants filed a *Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich*, and a separate motion seeking permission for that motion to exceed the Court's page limits. The following day, on November 15, 2017, Defendants filed three more motions: *Defendants' Motion for Partial Summary Judgment*;

Defendants/Counterclaimants' Motion to Exceed Page Limit on Defendants/Counterclaimants' Motion for Sanctions; and *Defendants/Counterclaimants' Motion for Sanctions*.

On December 6, 2017, Plaintiffs (through Mr. Moquin) filed a *Request for a Brief Extension of Time to Respond to Defendants' Three Pending Motions, and to Extend the Deadline for Submission of Dispositive Motions*. Defendants did not oppose that motion, but Mr. Moquin did not file any further documents regarding any of the pending motions.

On December 12, 2017, the parties appeared for a Pre-Trial Conference. In that conference, the parties discussed the pending motions and Mr. Moquin's failure to file oppositions. Mr. Moquin represented to the Court that on the day the oppositions were due he had computer problems and all of his work was lost. (Pre-Trial Conference Tr., dated 12/12/17, at 14-15.) Mr. Moquin requested additional time to respond in light of these circumstances. (Id. at 15.) Ultimately, the Court granted Mr. Moquin until December 18, 2017, in which to file oppositions to the Defendants' pending motions. (Id. at 16.) Each party was represented by counsel, but the parties were not actually present at this conference. (Id. at 2-3.)

Mr. Moquin never filed the oppositions to the Defendants' pending motions. In fact, Mr. Moquin never filed another document in this case.

On January 4, 2018, the Court entered three orders. One of those orders granted *Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* pursuant to DCR 13(3). A separate order granted *Defendants'/Counterclaimants' Motion for Sanctions* pursuant to DCR 13(3). A third order noted Plaintiffs' failure to respond, but found that *Defendants'/Counterclaimants' Motion for Summary Judgment* is moot.

Defendants prepared and proposed Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions. To the Court's knowledge, Mr. Moquin did not object to those proposed findings. On March 6, 2018, pursuant to WDCR 9 and DCR 13(3), the Court entered the proposed *Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions*.

On March 15, 2018, attorney David O'Mara filed a *Notice of Withdrawal of Local Counsel*, in which he explained:

> Counsel has had no contact with lead counsel Mr. Moquin for many months with a total failure just prior to the Court's first decisions being filed in this case. Mr. Moquin was unresponsive during the time in which this Court was deciding the pending motions, even after counsel begged him for a response to be filed with the Court and was told he would provide such response.

On April 18, 2018, new counsel filed Willard Plaintiffs' Rule 60(b)(1) Motion.

Analysis of the Rule 60(b)(1) Motion

According to NRCP 60(b), on "just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: . . . (1) mistake, inadvertence, surprise, or excusable neglect . . . ."[1] The purpose of Rule 60(b) is "to redress any injustices that may have resulted because of excusable neglect." Nev. Indus. Dev. v. Benedetti, 103 Nev. 360, 364, 741 P.2d 802, 805 (1987). "Rule 60 should be liberally construed to effectuate that purpose." Id. Indeed, "NRCP 60(b)(1) operates as 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." Willard, 469 P.3d at 179.

This Court has wide discretion in determining what constitutes excusable neglect. Cicerchia v. Cicerchia, 77 Nev. 158, 161-62, 360 P.2d 839, 841 (1961). Yet, as discussed above, the Yochum case sets forth four factors that a trial court must consider in determining whether relief should be granted based upon excusable neglect, including: (1) whether the party seeking relief promptly moved for relief, (2) the absence of an intent to delay proceedings; (3) a lack of knowledge of the procedural requirements, and (4) good faith.

The Nevada Supreme Court has stated that "[e]ach case depends upon its own facts." Stoecklein v. Johnson Elec., 109 Nev. 268, 273, 849 P.2d 305, 308 (1993). Moreover, the rule is guided by "the state's sound basic policy of resolving cases on their merits whenever possible." Id., 109 Nev. at 274, 849 P.2d at 309.

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[1] The Nevada Rules of Civil Procedure were amended effective March 1, 2019. For this reason, and consistent with the Nevada Supreme Court's approach on appeal, the Court cites to the current version of NRCP 60 throughout this order.

General Grounds for Excusable Neglect

One of the primary disputes in considering the Rule 60(b)(1) Motion is whether attorney Moquin's repeated failures to respond to motions and satisfy other procedural requirements constitute excusable neglect.

Under general principles of agency, civil litigants are bound by the acts and omissions of their chosen attorneys. Yet, both the Nevada Supreme Court and the United States Supreme Court have recognized exceptions to this rule. See Huckabay Props. v. NC Auto Parts, LLC, 130 Nev. 196, 203, 322 P.3d 429, 434 n.4 (2014). One exception is where the attorney abandons his or her client without notice. Id. A second exception is where the lawyer's failures stem from substantial personal problems such as substance abuse, mental illness, or criminal conduct. Id.; Passarelli v. J-Mar Dev., Inc., 102 Nev. 283, 286, 720 P.2d 1221, 1223-24 (1986). The Court finds that both exceptions apply to the present case.

When an attorney abandons his or her client without notice, it severs the principal-agent relationship, which means that the attorney's actions and omissions cannot be fairly attributed to the client. Huckabay Props., 130 Nev. at 203, 322 P.3d at 434 n.4. As the record in this case indicates, and as the Court has personally perceived, Mr. Moquin stopped communicating with clients, counsel, and the Court. Mr. Moquin not only missed deadlines, but completely failed to respond to numerous motions and court orders. He completely abandoned the case and his clients. Mr. Moquin's failures inconvenienced the Court and the Defendants, caused needless expenses and delays, and severely prejudiced the Willard Plaintiffs. The Court finds that the Willard Plaintiffs' failures to respond should be excused due to Mr. Moquin's abandonment of his clients.

The Nevada Supreme Court also recognizes excusable neglect where an attorney's mental illness causes procedural harm to his or her client. See Passarelli, 102 Nev. at 286, 720 P.2d at 1224. This holding is in line with other jurisdictions. See, e.g., United States v. Cirami, 563 F.2d 26, 34 (2d Cir. 1977); Boehner v. Heise, 2009 U.S. Dist. LEXIS 41471, at *9 (S.D.N.Y. May 14, 2009); Cobos v. Adelphi Univ., 179 F.R.D. 381, 388 (E.D.N.Y. 1998). Defendants do

not dispute the existence of this exception, but challenge whether the Willard Plaintiffs have provided competent evidence to justify its application in this case.

The Willard Plaintiffs provided extensive evidence demonstrating their attempts to cooperate with Mr. Moquin, their desire to be responsive to deadlines in the case, their dismay at learning the case had been dismissed, their efforts to address the underlying merits, and the extremely harmful effect that Mr. Moquin's conduct has had on them.

Defendants challenge some of the Willard Plaintiffs' exhibits. The Rule 60(b)(1) Motion included nine exhibits, of which Defendants only challenged Exhibits 6, 7, 8, and portions of Exhibit 1. With respect to Exhibit 1, Mr. Willard's declaration appears primarily based on his personal knowledge. Moreover, affidavits and declarations are commonly accepted to support motions for relief.

Mr. Willard's impressions of Mr. Moquin's behavior constitute lay opinions admissible under NRS 50.265. Criswell v. State, 84 Nev. 459, 464, 443 P.2d 552, 555 (1968). Mr. Willard's declaration also states that Mr. Moquin admitted to being diagnosed with bipolar disorder. While this statement is hearsay, it falls within the exception for statements of the declarant's then existing state of mind, emotion, mental feeling, and bodily health under NRS 51.105(1). Moreover, the special circumstances under which this statement was made offer assurances of accuracy that are not likely to be enhanced by calling Mr. Moquin as a witness. In addition, Mr. Moquin is unavailable to be called as a witness. Therefore, the Court finds that this statement also falls within the general exceptions of NRS 51.075(1) and NRS 51.315(1).

Defendants also assert that Exhibits 6, 7, and 8 to the Rule 60(b)(1) Motion constitute hearsay. Exhibit 6 purports to be an Emergency Protective Order entered against Mr. Moquin. Exhibit 7 is a Pre Booking Information Sheet regarding Mr. Moquin. Exhibit 8 is a Request for Domestic Violence Restraining Order that Mr. Moquin's wife apparently filed against him. The Willard Plaintiffs argue that Exhibits 6 and 7 are not offered for the truth of the facts stated in them, but rather as examples of the personal turmoil that Mr. Moquin was facing. In addition, Defendants have not meaningfully challenged the authenticity of these documents. Therefore,

even to the extent that they would qualify as hearsay, it appears that they would still be admissible under NRS 51.075 and NRS 51.155.

Exhibit 8 to the Rule 60(b)(1) Motion presents a more difficult question. Again, the Willard Plaintiffs assert that the exhibit is not necessarily offered for the truth of the statements in it, but the Rule 60(b)(1) Motion does include several quotations from the exhibit. It appears that Mrs. Moquin's statements about Mr. Moquin's mental health would constitute hearsay, but that the general fact that she filed a request for a restraining order, and any inferences as to the effect that may have had on Mr. Moquin, do not constitute hearsay. Therefore, the Court admits Exhibit 8 subject to the limitation that none of Mrs. Moquin's statements are accepted for their truth.

Defendants also challenge several of the exhibits attached to the Rule 60 Reply. Exhibits 1 through 10 are all challenged on the grounds of relevance and as new evidence improperly attached to a reply brief. The Court finds that all of the exhibits are relevant to the issues before the Court. The Court also finds that the exhibits constitute appropriate rebuttal evidence given the matters raised in Defendant's Rule 60 Opposition. In addition, in light of the Court's acceptance of the Rule 60 Sur-Reply, Defendants have been given a full opportunity to respond to these exhibits. Therefore, the Court overrules the Defendants' objections on those grounds.

Defendants also object to portions of Exhibits 1, 3, 4, 7, 8, and 10 to the Rule 60 Reply as containing hearsay. For the reasons stated above, the Court will accept Exhibit 1, which is Mr. Willard's declaration. The Defendants also challenge any of the emails or text messages from Mr. O'Mara or Mr. Moquin contained in Exhibits 3, 4, 7, 8, and 10. Yet, these exhibits do not actually constitute hearsay. For instance, statements that Mr. Moquin was "close" to completing opposition briefs and that they "will be filed" on December 11, 2017, are plainly not offered for their truth, but to show the Willard Plaintiffs' diligence and the effect of Mr. Moquin's statements on Mr. O'Mara and the Willard Plaintiffs. Similarly, Mr. Moquin's abusive and combative statements toward Mr. Willard are obviously not offered for the truth of the underlying statements, but as evidence of Mr. Moquin's abnormal conduct. Therefore, they do not constitute hearsay under NRS 51.035.

Ideally, the Willard Plaintiffs would have provided a formal diagnosis from a psychiatrist or an affidavit from Mr. Moquin confirming that he suffers from bipolar disorder. Yet, the Willard Plaintiffs do not have any means to compel discovery from Mr. Moquin in the context of this case. Moreover, lay witnesses can offer testimony as to a person's mental status. See, e.g., Criswell v. State, 84 Nev. 459, 464, 443 P.2d 552, 555 (1968).

Mr. Willard's declarations alone, which appear to be based on his own personal knowledge and his personal experiences with Mr. Moquin, substantiate the Willard Plaintiffs' inadvertence, surprise, and excusable neglect. As one court explained in an analogous context:

> It does not require medical expertise to know that when a competent veteran attorney suddenly fails to perform, and covers up his non-performance by lying to his clients and his colleagues, something is obviously wrong with him. There is no reason to demand medical proof when the facts speak for themselves.

In re Benhil Shirt Shops, Inc., 87 B.R. 275, 278 (S.D.N.Y. 1988).

In addition to the proffered exhibits, the Court has personally and directly observed Mr. Moquin's conduct, and has witnessed this case devolve through his lack of action. Of course, the Court should not be placed in a position of evaluating which mental illnesses qualify for relief and which do not. Yet, from a review of the case law, it is clear that the mental illness exception is not focused on the former attorney's specific diagnosis. Rather, the question is whether the client "was effectually and unknowingly deprived of legal representation." Passarelli, 102 Nev. at 286, 720 P.2d at 1224. With respect to the Willard Plaintiffs, the Court answers this question in the affirmative.

Defendants argue that the Court should not look at Mr. Moquin's conduct "in a vacuum," and should also consider the actions or inactions of Mr. Willard and his local counsel, David O'Mara ("Mr. O'Mara"). The Court agrees that its analysis cannot be limited to Mr. Moquin's conduct alone, but concludes based upon the record that Mr. Willard was still effectually and unknowingly deprived of legal representation. First, Mr. Willard's declarations show that he diligently attempted to ensure that Mr. Moquin would oppose the critical motions that ultimately ended the Willard Plaintiffs' case. And second, while Mr. O'Mara owed various duties of advocacy under the Supreme Court Rules, the record reflects that he too was led to believe that

Mr. Moquin would respond to the Defendants' motions and was effectively unaware that Mr. Moquin had abandoned the case. (See, e.g., Not. Withdrawal of Local Counsel, filed 3/15/18.)

The *Yochum* Factors

1. A Prompt Application to Remove the Judgment.

On January 4, 2018, the Court entered orders granting *Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* and *Defendants'/Counterclaimants' Motion for Sanctions*, both pursuant to DCR 13(3). On March 6, 2018, again pursuant to DCR 13(3), the Court entered the *Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions* that Defendants had proposed. On April 18, 2018, new counsel filed the Rule 60(b)(1) Motion.

Thus, the Willard Plaintiffs sought relief within three-and-one-half months after the first sanctions orders and in barely over one month after the findings of fact and conclusions of law.

The Willard Plaintiffs were required to file their excusable neglect motion under Rule 60(b)(1) "within a reasonable time" and "not more than 6 months after the date of the proceeding or the date of service of written notice of entry of the judgment or order, whichever date is later." NRCP 60(c)(1).

In summary, upon discovering that Mr. Moquin failed to do what he promised, Mr. Willard promptly located replacement counsel, who filed the Rule 60(b)(1) Motion within a reasonable time and well within the six (6) months required under Rule 60(b). Thus, the Willard Plaintiffs have promptly moved for relief.

2. The Absence of an Intent to Delay the Proceedings.

There is no doubt that Mr. Moquin's failures to abide by the procedural rules have caused extensive delay in this case. Yet, Mr. Moquin's failures do not translate into an *intent* by the Willard Plaintiffs to delay the proceedings. In fact, there is no logical reason why the Willard Plaintiffs would have wanted to delay the case, and based on the record, it appears that the Willard Plaintiffs wanted to avoid unnecessary delays. (See, e.g., Ex. 1 to Rule 60(b)(1) Motion at ¶¶ 58-59; Ex. 1 to Rule 60(b)(1) Reply at ¶¶ 9-10; Ex. 2 to Rule 60(b)(1) Reply; Ex. 4 to Rule 60(b)(1) Reply; Ex. 10 to Rule 60(b)(1) Reply.)

Moreover, while there have been at least three continuances of the trial, all three were based on stipulations between the parties, rather than a motion from one side or the other. Moreover, all three stipulations to continue trial (filed 9/3/15, 5/2/16, and 2/9/17, respectively) were on the Defendants' attorneys' pleading paper. Therefore, it would be unjust to solely blame the Willard Plaintiffs for all of the delays in this case, or to find any intent to delay against them.

The evidence shows that Larry Willard and the Willard Plaintiffs have at all times tried to move the case forward and urged their lawyers to do the same. The Defendants have provided no evidence to the contrary. It is clear that the Willard Plaintiffs are, in fact, the victims of Mr. Moquin's false assurances. Therefore, the Court finds that the Willard Plaintiffs have no intent to delay the proceedings.

3. A lack of knowledge of procedural requirements.

The third factor is a lack of knowledge of the procedural requirements. This factor is a little more difficult as the record reveals that the Willard Plaintiffs, who are not lawyers, were aware of some case deadlines, but were also actively urging their lawyers to meet those deadlines. (See, e.g., Ex. 1 to Rule 60(b)(1) Motion at ¶¶ 58-59; Ex. 1 to Rule 60(b)(1) Reply at ¶¶ 9-10; Ex. 2 to Rule 60(b)(1) Reply; Ex. 4 to Rule 60(b)(1) Reply.)

Moreover, "[a] lack of procedural knowledge on the part of the moving party is not always necessary to show excusable neglect under NRCP 60(b)(1)." Stoecklein, 109 Nev. at 273, 849 P.2d at 308. The Nevada Supreme Court has stated that "[e]ach case depends upon its own facts," and the "lack of procedural knowledge on the part of the moving party is but one persuasive factor to justify the granting of relief under NRCP 60(b)(1)." Id.

Finally, the record demonstrates that Mr. Willard relied upon Mr. Moquin's promises that Moquin was satisfying the Court's procedural requirements. For instance, Mr. Willard explained that Mr. Moquin was assuring the Willard Plaintiffs that Mr. Moquin was working on this case. (Ex. 1 to Rule 60(b)(1) Motion at ¶ 80.) In addition, Mr. Moquin repeatedly assured Mr. Willard that they "would prevail and that the case was proceeding fine." (Id. at ¶ 82.) According to Mr. Willard, he "was making ongoing efforts on an almost daily basis to push the case forward, provide Mr. Moquin with what he needed, and to pursue our case against the Defendants for

breach of lease agreements that were backed up with a personal guarantee." (Id. at ¶ 83; see also Ex. 1 to Rule 60(b)(1) Reply at ¶¶ 17-31; Ex. 2 to Rule 60(b)(1) Reply; Ex. 4 to Rule 60(b)(1) Reply.) Thus, the Court finds the Willard Plaintiffs did lack critical knowledge that the procedural rules were not being satisfied.

4. Good faith.

It is likewise clear from the record that the Willard Plaintiffs are proceeding in good faith. As the plaintiffs in this case, they had every motivation to see their case move forward, and no motivation to delay the case or to proceed in bad faith. Again, there is no doubt that Mr. Moquin's conduct caused extensive delays, not any conduct by the Willard Plaintiffs. Once they discovered Mr. Moquin's conduct, however, the Willard Plaintiffs repeatedly pleaded with him to move the case forward. (See, e.g., Ex. 1 to Rule 60(b)(1) Motion at ¶¶ 80-83; Ex. 1 to Rule 60(b)(1) Reply at ¶¶ 17-31; Ex. 2 to Rule 60(b)(1) Reply; Ex. 4 to Rule 60(b)(1) Reply.) Moreover, once the Court entered sanctions orders, the Willard Plaintiffs proposed various ways to minimize any prejudice to the Defendants. (Rule 60(b)(1) Motion at 1:13-15, 2:3-6; Rule 60(b)(1) Reply at 5:11-20; Oral Arg. Tr. at 73:2-76:15.) Therefore, it is evident from the record that the Willard Plaintiffs have acted in good faith.

Based on the evidence and the other materials in the record, it is clear that the Willard Plaintiffs promptly moved for relief, have no intent to delay these proceedings, generally lacked knowledge of many of the procedural requirements at issue, and have been trying to proceed in good faith. Moreover, the Court finds that reinstating this case would further "the state's sound basic policy of resolving cases on their merits whenever possible." Stoecklein, 109 Nev. at 274, 849 P.2d at 309. Accordingly, the Court finds that the Willard Plaintiffs are entitled to some relief pursuant to NRCP 60(b)(1).

The Court is sympathetic that the Willard Plaintiffs relied on their attorney and expected him to competently prosecute this case, but the Court is also concerned that the Defendants were somewhat negatively impacted by Mr. Moquin's conduct in this case. Delay alone, however, is not generally considered substantial prejudice. Lemoge v. United States, 587 F.3d 1188, 1196 (9th Cir. 2009). Nonetheless, the Court must make some attempt to compensate for the cost and

delays that Defendants have had to endure. Moreover, the Court is not granting the Willard Plaintiffs a 'do over' or a reset of this case. The remaining proceedings of this case are hereby limited as set forth below.

Accordingly, and good cause appearing,

IT IS HEREBY ORDERED that the Willard Plaintiffs' Rule 60(b)(1) Motion is granted in part and denied in part.

IT IS FURTHER ORDERED that the Court hereby reconsiders, sets aside, and grants the Willard Plaintiffs relief from the *Order Granting Defendants'/Counterclaimants' Motion for Sanctions*, filed on January 4, 2018, the *Order Granting Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich*, filed on January 4, 2018, and the *Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions*, filed on March 6, 2018.

IT IS FURTHER ORDERED, however, that the Willard Plaintiffs shall be limited to seeking recovery for only the following categories of damages, which were identified in the Verified First Amended Complaint: City of Reno fines; insurance premiums; security fence costs; utility fees; past and future rent; late charges; interest; and (if applicable) costs and attorneys' fees.

IT IS FURTHER ORDERED, that all other categories of damages are hereby denied and dismissed.

IT IS FURTHER ORDERED that the Willard Plaintiffs shall provide to Defendants, within thirty (30) days after entry of this order, a summary of the facts and opinions to which Daniel Gluhaich is expected to testify at trial.

IT IS FURTHER ORDERED that within thirty (30) days after entry of this order, the parties shall meet and confer as to whether there is any outstanding discovery and establish a timeline for providing such discovery. If they disagree over the scope or necessity of any discovery, the parties shall immediately schedule a hearing with the Discovery Commissioner to resolve such dispute and promptly and expeditiously provide any outstanding discovery.

IT IS FURTHER ORDERED that Brian Moquin shall show cause why sanctions should not be entered personally against him for the amount of attorneys' fees that Defendants have incurred in responding to the Rule 60(b)(1) Motion.

IT IS FURTHER ORDERED that within thirty (30) days after entry of this order, the parties shall contact the Judicial Assistant of Department 6 to set this case for trial. To the extent they may apply to such trial date, the parties are hereby excused from the deadlines set forth in NRCP 41, but the Court warns all parties that the trial date shall not be continued again without a substantial showing of good cause.

Dated this _____day of _____, 2021.

_____
DISTRICT COURT JUDGE

Respectfully submitted by:

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

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, Plaintiffs, vs. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an Individual; Defendants.	CASE NO. CV14-01712 DEPT. 6

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

Counterclaimants,

vs

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

Counter-defendants.

NOTICE OF SUBMISSION OF PROPOSED ORDER

PLEASE TAKE NOTICE that, pursuant to the Court's direction on April 21, 2021, Defendants Berry-Hinckley Industries and Jerry Herbst (collectively "BHI Defendants") hereby file a proposed Order Denying Plaintiffs' Rule 60(b) Motion for Relief on Remand.

AFFIRMATION

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

DATED this 21st day of May, 2021.

DICKINSON WRIGHT, PLLC

/s/ Brian R. Irvine

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CERTIFICATE OF SERVICE

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

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DATED this 21st day of May, 2021.

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

EXHIBIT TABLE

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1	[Proposed] Order Denying Plaintiffs' Rule 60(b) Motion for Relief on Remand	45

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EXHIBIT 1

EXHIBIT 1

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

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, Plaintiffs, vs. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an Individual; Defendants.	CASE NO. CV14-01712 DEPT. 6

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

Counterclaimants,

vs

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

Counter-defendants.

[PROPOSED] ORDER DENYING PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF ON REMAND

Before this Court is Plaintiffs' Rule 60(b) Motion for Relief ("*Rule 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. By their *Rule 60(b) Motion*, Plaintiffs seek, pursuant to NRCP 60(b), 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*).

Thereafter, Defendants Berry-Hinckley Industries ("BHI") and Jerry Herbst (collectively, "Defendants"), filed their *Opposition to Rule 60(b) Motion for Relief*, 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*, and the parties argued their respective positions at a hearing before this Court on September 4, 2018.

Upon considering 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 from that Order to the Nevada Supreme Court. On August 6, 2020, the Nevada Supreme Court entered an Opinion (the "*Opinion*") in which it reversed the *Prior 60(b) Order* and remanded the case to this Court, with instructions to this Court to 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).

Upon carefully considering the papers submitted, the arguments of counsel, and the entire court file, and complying with the Nevada Supreme Court's instructions, this Court hereby enters its order as follows:

FINDINGS OF FACT

The Court makes the following Findings of Fact:

Plaintiffs' Complaint

1. On August 8, 2014, Plaintiffs commenced this action by filing their *Complaint* against Defendants.[1] *Complaint*, generally.

2. By way of their *Complaint* and subsequently *First Amended Complaint*, Plaintiffs sought the following damages against Defendants for an alleged breach of the lease between Willard and BHI: (1) "rental income" for $19,443,836.94, discounted by 4% per the lease to $15,741,360.75 as of March 1, 2013; and (2) certain property-related damages, such as insurance and installation of a security fence. *First Amended Complaint* ("FAC").

3. Willard also sought several other categories of damages which have since been dismissed or withdrawn. May 30, 2017, *Order*.

---

[1]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 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.

Plaintiffs have failed to comply with the Nevada Rules of Civil Procedure and this Court's Orders.

4. Plaintiffs failed to provide a compliant damages disclosure in this action.

5. Plaintiffs failed to provide a damages computation in their initial disclosures, as required under NRCP 16.1(a)(1)(C). *Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions* ("*Sanctions Order*") ¶ 12, and failed to provide damages computations at any time despite numerous demands on both Brian Moquin and David O'Mara, of which Plaintiffs personally were aware. *Sanctions Order* ¶¶ 14-16, 25, 27-33, 39, 43-44 and 51-54; *January 10, 2017, Transcript*.

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.

8. 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* ¶¶ 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.

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.

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

14. Such 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.

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 that this Court should preclude Plaintiffs from offering Mr. Gluhaich's testimony on the grounds that: (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 attached to and 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 that 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 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*").[2]

Withdrawal of Local Counsel.

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

32. The *Notice* describes the terms of retention of Mr. O'Mara as being that "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

[2]The *Order Granting Sanctions* ordered 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 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.

Counsel was retained only to provide services as directed by Mr. Moquin, and would be relieved of services if Mr. Moquin was removed." *Id*.

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 *Rule 60(b) Motion*. Therein, Plaintiffs argued that this Court should set aside its *Order Granting the Motion to Strike*, *Order Granting Sanctions Motion*, and *Sanctions Order*, based upon Mr. Moquin's excusable neglect. Plaintiffs further argued that 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 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 *Sanctions Motion* 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).

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).[3]

37. The *Willard Declaration* included several statements about Mr. Moquin's alleged mental disorder. It stated that Mr. Willard is "**convinced**" Mr. Moquin 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. Moquin suffered a "total mental breakdown." WD ¶ 68. It stated that Mr. Moquin **explained** to Mr. Willard he had been diagnosed with bipolar disorder.

[3]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.

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. Moquin's alleged psychological issues affected Plaintiffs' case. WD ¶ 87 (emphasis added).

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. Moquin, some of which referenced Mr. Moquin'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 the 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).[4] The *Reply* exhibits included copies of text messages between Mr. Willard and Mr. Moquin, (*Reply* Exs. 3, 6, 8, and 10), a receipt detailing an alleged payment made by Mr. Willard to Mr. Moquin's

[4]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* ¶91 - 100; *RWD* ¶67.

doctor on March 13, 2018 (*Reply*, Ex. 5), and a letter from Mr. Williamson to Mr. Moquin dated May 14, 2018. (*Reply*, Ex. 9).

42. On June 6, 2018, Defendants filed their *Motion to Strike, or in the Alternative, Motion for Leave to File Sur-Reply*, arguing this Court should strike Exhibits 1-10 to the *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 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 the 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. Thereafter, 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.

<u>Plaintiffs' appeal</u>.

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 a published opinion on Plaintiffs' appeal (the "*Opinion*").

49. Therein, 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 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." (*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.

CONCLUSIONS OF LAW

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

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

Rule 60(b) Standard

54. NRCP 60(b)(1) operates as 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*.

<u>The Rule 60(b) Motion is not supported by competent, admissible, and substantial evidence</u>

58. Plaintiffs' ground asserted to set aside the *Order Granting Defendants' Motion to Strike, Order Granting the Motion for Sanctions, and Sanctions Order*[5] is that 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.

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[5]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.

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. 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. Indeed, 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. Thus, 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 has reversed a district court's order setting aside a judgment, and stated that "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 statements and documents that are inadmissible, and in some instances, 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* ¶ 76); and, Mr. Willard can now see how Mr. Moquin's alleged psychological issues affected his case (*WD* ¶ 87).[6]

[6]The *Willard Declaration and the Reply Willard Declaration* contain many nearly identical statements. They compare as follows:

Willard Declaration **Paragraph**	***Reply Willard Declaration***
53	7
54	8
59	9
63	11
64	12 (slightly differs)
65	13
67	15
68	16
69	35
70	38
71	39
82	10 Similar – not exact)
89	3
91	67

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

65. Mr. Willard's statements are not all based on his own perceptions.

66. It logically follows, based on the subject matter, that Mr. Willard could not have credibly obtained this information by observing it.

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.

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

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 it is construed that Mr. Moquin's report of Dr. Mar's diagnosis constituted Mr. Moquin's statement of then-existing mental condition, Mr. Willard's statements are not admissible as contemporaneous statements that Mr. Moquin made 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 contains hearsay within hearsay, which is inadmissible under NRS 51.067.

74. Mr. Willard also 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 what 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 that 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. However, *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 Court concludes that 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. The Nevada Revised Statutes (Evidence Code) provides that 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 their "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 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.").

Id.

80. While the Nevada Supreme Court and Nevada Court of Appeals have not addressed lay witness testimony, such as that contained in the *Willard Declaration* and *Reply Willard Declaration*, regarding bipolar disorder, this 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 that "[l]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*, 733 A.2d 1286 (Pa. 1999). This Court therefore concludes such testimony is inadmissible to support the *Rule 60(b) Motion*.

81. The documents attached as 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 which also contain statements about Mr. Moquin's alleged bipolar condition, are inadmissible as discussed, *supra*, with regard to 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 of the California court records, contained in the exhibits to the *Rule 60(b) Motion* and the *Reply* based on certified copies. 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 be inadmissible hearsay, as they were apparently authored by Mr. Moquin's wife, and Plaintiffs are offering them to prove that Mr. Moquin suffers from bipolar disorder and his life was in "shambles."

86. A number of *Reply* Exhibits discussed in the *Reply Willard Declaration* also contain inadmissible hearsay.

87. All of 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.

Plaintiffs failed to establish excusable neglect under the factors announced in *Yochum v. Davis*.

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 that, to determine whether such 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, this Court determines that Plaintiffs failed to establish excusable neglect under the factors announced in *Yochum*. This Court will issue detailed and explicit findings with respect to each such factor, as well as Nevada's policy to decide cases on the merits when feasible, in turn herein:

(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. Indeed, "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 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 both 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 had knowledge 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. Therein, this Court 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.

108. Therefore, this Court found that "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 *Bianco v. Bianco*, 129 Nev. Adv. Op. 77, 311 P.3d 1170." *Id*. at 3-4. This Order was served upon both Mr. Moquin and Mr. O'Mara. *Id*.

109. This Court directed Defendants to submit a Proposed Order granting the *Sanctions Motion*, including factual and legal analysis and discussion, to the Court within 20 days of the *Initial Sanctions Order* in accordance with WDCR 9.

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 claimed that "[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. It would have required very little action by Plaintiffs, or by Plaintiffs through Mr. O'Mara, who remained Plaintiffs' counsel of record until March 15, 2018, to promptly inform this Court—on even a cursory basis—of Plaintiffs' alleged circumstances.

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

114. 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.

115. This failure to promptly notify the Court of anything is a continuation of Plaintiffs' repeated delay throughout this case with respect to each of Plaintiffs' obligations, which will be discussed further *infra*.

116. While Plaintiffs should and could have attempted to notify the Court of any alleged issues in a timelier 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.[7]

117. However, even if Plaintiffs satisfy this factor, the remaining three *Yochum* factors, each of which will be discussed in turn *infra*, 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.").

(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

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[7] 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.

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.

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. Here, even though a Plaintiff presumably would not usually have incentive to delay resolution of its own case, this Court concludes that Plaintiffs have not demonstrated an absence of intent to delay the proceedings for multiple, independent reasons.

124. First, Plaintiffs' sole asserted basis for allegedly 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 this Court has 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 effort by Plaintiffs to delay the proceedings.

128. Although Plaintiffs satisfied the first *Yochum* factor by promptly moving to remove the judgment, the complete record before this Court is otherwise replete with evidence of willful delay throughout the proceedings.

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

130. Indeed, as this Court has already found:

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 filed motions to compel, and necessitate that the trial and discovery deadlines be extended on three occasions to accommodate for Plaintiffs' continued non-compliance. (*Sanctions Order* ¶ 121).

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

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

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

131. Further, in addition to the fact that 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), this Court has also already found that 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 trial date being continually delayed. *See, e.g.*, *Stipulation and Order to Continue Trial (Third Request)* ¶ 7, 10 (stipulating that Plaintiffs had not yet provided a compliant NRCP 16.1 damages disclosure as discussed at the January 10, 2017, hearing, that "[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 that "[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 had knowledge 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).

136. Yet, **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 claimed that "[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. Yet, Plaintiffs did nothing to apprise this Court of any issues until they filed the *Rule 60(b) Motion* in April of 2018.[8] *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 that 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.").

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[8]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).

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

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

144. Plaintiffs voluntarily chose to stop seeking 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. Indeed, as discussed *supra*, all of Plaintiffs' proffered evidence regarding Mr. Moquin's alleged mental condition is inadmissible, and does not establish that Mr. Moquin had any mental illness or that any alleged mental illness affected Plaintiffs' case.

147. Further, Mr. Willard's claim that 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 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 that "[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 that 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 that 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) that 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, on the record before this Court, Plaintiffs have unequivocally failed to establish a lack of knowledge of procedural requirements.

156. As a threshold matter, Plaintiffs themselves have admitted as much, conceding that "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 that Plaintiffs had knowledge of the pertinent procedural requirements.

158. This Court has already found that 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 has 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 personally had knowledge of procedural requirements leading to the Sanctions Order. *See also Prior 60(b) Order* 26 ¶65.

161. For example, Mr. Willard was personally in attendance at the hearing in which Defendants' counsel informed this Court that "[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, that "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 personally had knowledge of this procedural requirement, their failure to comply therewith, and this Court's Order that 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* ¶119, 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. Both Mr. Moquin and Mr. O'Mara unequivocally had ample knowledge 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 of correspondence 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. *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 also indicated (albeit by unpublished order) that "[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 in that case, this factor disfavored NRCP 60(b)(1) relief).

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

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

173. Specifically, Plaintiffs' sole asserted basis for allegedly satisfying this factor is that "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, that they acted in good faith. *See Kahn v. Orme*, 108 Nev. 510, 513–14, 835 P.2d 790, 793.

176. Further, even beyond this complete lack of admissible evidentiary support by Plaintiffs, the record clearly demonstrates that Plaintiffs have failed to demonstrate that 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 that Plaintiffs did not act in good faith.

178. And, this Court has also already found that "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 that 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 has already 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 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 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 that the timing of the *Motion for Summary Judgment* was such that 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 that "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 that 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 that "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 that "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 that "[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, common sense dictates that Willard, who authored a 15-page affidavit in support of his *Motion for Summary Judgment*, averred that "[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 that the damages he sought in that Motion were significantly different than those ostensibly sought in his 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 that Plaintiffs personally 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 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 that Plaintiffs' failure to disclose their NRCP 16.1 damages was 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 were in attendance at the January 10, 2017 hearing wherein Plaintiffs admitted that they had failed to provide compliant NRCP 16.1 damages disclosures and this Court ordered 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 that "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 that "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*, and the following conclusions from the *Sanctions Order* are reincorporated herein:

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

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

> 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, this Court concludes that the application of the *Yochum* factors disfavors NRCP 60(b)(1) relief.

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 that:

> 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….

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

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 Passarrelli*, 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 ignored.

210. Plaintiffs attempt to excuse this conduct in their *Rule 60(b) Motion* by claiming Mr. Moquin had 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 are vague in asserting when any of the alleged events took place. Plaintiffs do attach additional exhibits to their *Reply* that offer some information on timing but are inadequate for the Court's determination.

211. However, 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.

Plaintiffs knew of Mr. Moquin's alleged condition and alleged non-responsiveness prior to the *Sanctions Order* and did nothing, and therefore 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 far more diligently than he did so here.

216. In the *Willard Declaration* and the *Reply Willard Declaration*, Mr. Willard admits that he knew that Mr. Moquin was having personal financial difficulties and that he borrowed money from friends and family to fund Mr. Moquin'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. 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.

217. 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*, 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 that "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….").

220. Mr. Willard's claim that 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 and medical treatment. It logically follows he had resources to retain new attorneys at the time.

221. 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.

Plaintiffs are not entitled to 60(b) relief because two attorneys represented Plaintiffs who had an obligation to ensure compliance with the Nevada Rules of Civil Procedure and this Court's Orders.

222. Plaintiffs' *Rule 60(b) Motion* ignores the fact that David O'Mara served as local counsel. In Nevada, the responsibilities of local counsel are clearly defined, and encompass active responsibility to represent the client and manage the case:

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

Supreme Court Rule ("SCR") 42(14).

223. Mr. O'Mara's representation, even if contractually limited, was governed by this rule.

224. Mr. O'Mara expressly "consent[ed] as Nevada Counsel of Record to the designation of Petitioner to associate in this cause pursuant to SCR 42" as part of his *Motion to Associate Counsel*.

225. Mr. O'Mara attended every hearing and court conference in this case. And, among other things, Mr. O'Mara signed the Verified Complaint and the First Amended Verified Complaint. *Complaint*; *FAC*.

226. WDCR 23(1) provides:

> Counsel who has appeared for any party shall represent that party in the case and shall be recognized by the court and by all parties as having control of the client's case, until counsel withdraws, another attorney is substituted, or until counsel is discharged by the client in writing, filed with the filing office, in accordance with SCR 46 and this rule.

WDCR 23.

227. Mr. O'Mara was the sole signatory on Plaintiffs' deficient initial disclosure, (*Opposition to Rule 60(b) Motion*, Ex. 6), the uncured deficiencies of which were a basis for sanction of dismissal. *Sanctions Order*.

228. Mr. O'Mara also signed and filed the *Brief Extension Request* with this Court, representing that:

> Counsel has been diligently working for weeks to respond to Defendant's serial motions, which include seeking dismissal of Plaintiffs' case. With the full intention of submitting said responses, Counsel for Plaintiffs encountered unforeseen computer issues…. Counsel for Plaintiffs is confident that with a one-day extension they will be able to recreate and submit the oppositions to Defendants' three motions.

229. In their *Rule 60(b) Motion*, Plaintiffs do not provide any declaration by Mr. O'Mara.

230. Mr. O'Mara's involvement precludes a conclusion of excusable neglect here.

The *Sanctions Order* was sufficient under Nevada law.

231. Plaintiffs assert 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 609b) Motion* at 12. However, consideration of this factor is 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).

232. The Court concludes 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 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*.

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 so as 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.

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ORDER

Based on the foregoing, Plaintiffs' *Rule 60(b) Motion* is **DENIED** in its entirety.

DATED this _____ day of _____, 2021.

_____
DISTRICT COURT JUDGE

Respectfully submitted by:

DICKINSON WRIGHT, PLLC

/s/ Brian R. Irvine

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation, Plaintiffs, vs. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual, Defendants.	Case No. CV14-01712 Dept. No. 6
AND ALL RELATED MATTERS.	

MOTION TO STRIKE DEFENDANTS' PROPOSED ORDER OR, IN THE ALTERNATIVE, OBJECTION TO DEFENDANTS' PROPOSED ORDER

Plaintiffs Larry J. Willard, individually and as Trustee of the Larry James Willard Trust Fund ("Mr. Willard") and Overland Development Corporation ("Overland") (collectively, the "Willard Plaintiffs") hereby move to strike the Defendants' [Proposed] Order Denying Plaintiffs' Rule 60(b) Motion for Relief on Remand (the "Defendants' Proposed Order") or, in the

alternative, object to Defendants' Proposed Order for violating the Nevada Supreme Court's Order Denying En Banc Reconsideration, entered on February 23, 2021. This motion is supported by the following Memorandum of Points and Authorities, all papers and pleadings on file herein, and any oral argument that this Court may choose to hear.

DATED this 9th day of June, 2021.

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MILLER & WILLIAMSON
50 West Liberty Street, Suite 600
Reno, Nevada 89501

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and

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

As the Court is aware, on April 18, 2018, the Willard Plaintiffs filed the Willard Plaintiffs' Rule 60(b) Motion for Relief ("Rule 60(b)(1) Motion") pursuant to NRCP 60(b)(1). On May 18, 2018, Defendants Berry-Hinckley Industries and Jerry Herbst (collectively, "Defendants") filed their Opposition to Rule 60(b) Motion for Relief ("Rule 60(b)(1) Opposition"). The Willard Plaintiffs filed their Reply in Support of the Willard Plaintiffs' Rule 60(b) Motion for Relief ("Rule 60(b)(1) Reply") on May 29, 2018, and the matter was submitted for decision on May 30, 2018. On June 6, 2018, however, Defendants filed a Sur-Reply in Support of Opposition to the Willard Plaintiffs' Rule 60(b) Motion for Relief ("Rule 60(b)(1) Sur-Reply"). The Court heard the matter on Tuesday, September 4, 2018, and then entered an Order Denying Plaintiffs' Rule 60(b) Motion ("Rule 60(b)(1) Order") on November 30, 2018.

Throughout that briefing, the Defendants primarily ignored the factors announced in *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982) (the "*Yochum* factors"). Likewise, in the proposed order they submitted to the Court and again on appeal, the Defendants steadfastly took the position that the *Yochum* factors did not apply to the Rule 60(b)(1) Motion. The Defendants were wrong.

On August 6, 2020, the Nevada Supreme Court filed a published opinion in this matter, which expressly found that district courts must issue express factual findings pursuant to each *Yochum* factor. *Willard v. Berry-Hinckley Indus.*, 136 Nev. ____, Adv. Op. 53 at 2-3, 469 P.3d 176, 178 (2020).

Defendants sought rehearing of that opinion, which was denied on November 3, 2020. Defendants then sought en banc reconsideration of the published opinion. In Respondents' Petition for En Banc Reconsideration, filed on December 1, 2020, Defendants sought "clarification from [the Nevada Supreme] Court that Willard may not present new arguments or evidence on remand—rather, the remand must be solely for the District Court to modify its order to make express findings on each of the *Yochum* factors on the record before it." (Pet. En Banc Recon. at 17 n.4.)

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On February 23, 2021, the Nevada Supreme Court entered an Order Denying En Banc Reconsideration. In that order, the Nevada Supreme Court expressly stated 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."

Despite this plain limitation – which the Defendants themselves requested – the Defendants have now submitted Defendants' Proposed Order, which includes approximately 17 pages of entirely new arguments and analysis. Thus, the Defendants have violated the Nevada Supreme Court's Order Denying En Banc Reconsideration. Therefore, the Court should strike and disregard Defendants' Proposed Order. Moreover, as the Willard Plaintiffs are the only parties who both (1) provided analysis regarding the *Yochum* factors in their original briefing, and (2) complied with the Nevada Supreme Court's Order Denying En Banc Reconsideration in submitting their proposed order, the Court should grant the Willard Plaintiffs' proposed order and allow this case to finally proceed to a trial on the merits.

II. LEGAL AUTHORITY

Generally, a motion to strike is used to strike "an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter" from a pleading. NRCP 12(f). Yet, motions to strike are not so limited. Courts regularly allow motions to strike in other contexts. *See, e.g., Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1003 (9th Cir. 2002) (noting that "[i]n order to preserve a hearsay objection, a party must either move to strike the affidavit or otherwise lodge an objection with the district court."). Indeed, even the local rules allow the Court or the court clerk to strike non-conforming documents. WDCR 10(10). Accordingly, the appropriate procedure to challenge Defendants' Proposed Order is through a motion to strike.

Yet, parties can also object to proposed orders. *See, e.g., State Eng'r v. Eureka Cty.*, 133 Nev. 557, 559, 402 P.3d 1249, 1251 (2017) (noting that the district court sustained objections to proposed orders and ultimately affirming the district court). Therefore, either a motion to strike or an objection is an appropriate response to a proposed order that violates a court order.

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III. ARGUMENT

A. The Court Should Strike the Defendants' Proposed Order

As explained above, the Defendants are now violating the very Nevada Supreme Court order that they obtained. Importantly, the Defendants are following what they *requested* the Nevada Supreme Court to order, rather than what it did order.

Respondents' Petition for En Banc Reconsideration sought clarification "that *Willard may not present new arguments or evidence on remand . . . .*" (Pet. En Banc Recon. at 17 n.4 (emphasis added).) Yet, the Nevada Supreme Court did not grant that unilateral request. Instead, it expressly ruled 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*." (Order Denying En Banc Recon. at 1 (emphasis added).)

The Willard Plaintiffs' proposed order submitted on May 21, 2021, honored that limitation. The Defendants' Proposed Order, however, disregarded it and added a swath of new arguments. The Supreme Court ruled that "neither party may present any new arguments," and this Court's consideration is "limited to the record currently before the court." The only defense documents contained in the "record currently before the court" regarding *Yochum* would consist of Defendants' opposition to the Rule 60(b) motion and Defendants' sur-reply.

Defendants' Rule 60(b)(1) Opposition only mentioned *Yochum* once:

> The presence of the following factors indicates that the requirements of this rule have been satisfied: (1) a prompt application to remove the judgment; (2) an absence of an intent to delay the proceedings; (3) a lack of knowledge of the procedural requirements on the part of the moving party; and (4) good faith. *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982).

(Rule 60(b)(1) Opp'n at 7:25-8:1.) After this passing inclusion in the standard of review, the Defendants never analyzed any of the *Yochum* factors. Indeed, the critical phrases "prompt application," "intent to delay," "procedural requirements," and "good faith" do not appear anywhere else in the Defendants' Rule 60(b)(1) Opposition.

Likewise, even though the Defendants filed a Rule 60(b)(1) Sur-Reply, that sur-reply does not even contain the word "*Yochum*" and likewise does not contain any analysis of the

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Yochum factors. Thus, "the record currently before the court" is devoid of any arguments by Defendants that are contrary to the Willard Plaintiffs' analysis of the *Yochum* factors (an analysis that **is** contained in "the record currently before the court").

When winning is on the line, however, not even an order from the Nevada Supreme Court can stop these Defendants.

The Defendants' Proposed Order contained at least one hundred seven (107) paragraphs of entirely new arguments and analysis. Indeed, paragraphs 95 to 201, covering seventeen (17) pages, are all essentially brand new arguments that were never made in Defendants' Rule 60(b)(1) Opposition, or in Defendants' sur-reply, and are therefore "new arguments" that are not in the "record currently before the court." In light of the Nevada Supreme Court's clear prohibition against new arguments and new matters that are not already before this Court, Defendants are surreptitiously attempting to supplement their opposition by adding their new arguments to their proposed order. This is a blatant violation of the clear limitations in the Nevada Supreme Court's Order Denying En Banc Reconsideration.

"It is well established that a party cannot for the first time in a reply memorandum (***or in a post-hearing proposed order***) assert new factual arguments to support a summary judgment motion." *Procaps S.A. v. Patheon Inc.*, 141 F. Supp. 3d 1246, 1293 (S.D. Fla. 2015), aff'd, 845 F.3d 1072 (11th Cir. 2016) (emphasis added). When a party violates this principle, "the argument will not be considered." *Foley v. Wells Fargo Bank, N.A.*, 849 F.Supp.2d 1345, 1349 (S.D. Fla. 2012) (citing *Herring v. Sec. Dep't of Corr.*, 397 F.3d 1338, 1342 (11th Cir. 2005)).

Therefore, the Court must disregard Defendants' Proposed Order. Moreover, to remediate the prejudice created by Defendants inserting new arguments for the Court's consideration, the Court should simply enter the Willard Plaintiffs' proposed order.

B. <u>Objection to Proposed Order</u>

As explained above, the Court should accept the Willard Plaintiffs' motion to strike and affirmatively strike Defendants' Proposed Order. Yet, in the event that the Court disagrees that a motion to strike is the appropriate procedure, then the Willard Plaintiffs alternatively lodge an objection to Defendants' Proposed Order.

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Again, Defendants' Proposed Order improperly added one hundred seven (107) paragraphs of new arguments and analysis, covering seventeen (17) pages. This brazen maneuver violates the Nevada Supreme Court's Order Denying En Banc Reconsideration and invites this Court to do the same. As the Court knows, a "district court commits error if its subsequent order contradicts the appellate court's directions." *Eureka Cty.*, 133 Nev. at 559, 402 P.3d at 1251 (citing Stacy v. Colvin, 825 F.3d 563, 568 (9th Cir. 2016)).

The Willard Plaintiffs object to Defendants' Proposed Order and urge the Court to follow the Nevada Supreme Court's mandate by reviewing the only *Yochum* analysis that was in the record at the time of the Rule 60(b)(1) Order: the Willard Plaintiffs' analysis of the *Yochum* factors, which are set forth in the Willard Plaintiffs' proposed order.

IV. CONCLUSION

Defendants' Proposed Order included approximately 17 pages of new arguments. It brashly violated the Nevada Supreme Court's Order Denying En Banc Reconsideration. Therefore, the Court must strike and disregard Defendants' Proposed Order. The Court should enter the Willard Plaintiffs' proposed order and allow this case to proceed to a trial on the merits.

Affirmation

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

DATED this 9th day of June, 2021.

ROBERTSON, JOHNSON,
MILLER & WILLIAMSON

By: */s/ Richard D. Williamson*
Richard D. Williamson, Esq.
Jonathan Joel Tew, Esq.

and

LEMONS, GRUNDY & EISENBERG

By: */s/ Robert L. Eisenberg*
Robert L. Eisenberg, Esq.

Attorneys for Plaintiffs Overland Development Corporation and Larry J. Willard, individually and as Trustee of the Larry James Willard Trust Fund

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Robertson, Johnson, Miller & Williamson, 50 West Liberty Street, Suite 600, Reno, Nevada 89501, over the age of 18, and not a party within this action. I further certify that on the 9th day of June, 2021, I electronically filed the foregoing **MOTION TO STRIKE DEFENDANTS' PROPOSED ORDER OR, IN THE ALTERNATIVE, OBJECTION TO DEFENDANTS' PROPOSED ORDER** with the Clerk of the Court by using the ECF 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 for Defendants/Counterclaimants

/s/ *Stefanie E. Smith*
An Employee of Robertson, Johnson, Miller & Williamson

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

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

Plaintiffs,

vs.

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

Defendants.

CASE NO. CV14-01712

DEPT. 6

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

Counterclaimants,

vs

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

Counter-defendants.

_____/

DEFENDANTS BERRY-HINCKLEY INDUSTRIES AND JERRY HERBST'S OPPOSITION TO PLAINTIFF LARRY J. WILLARD'S MOTION TO STRIKE DEFENDANTS' PROPOSED ORDER OR, IN THE ALTERNATIVE, OBJECTION TO DEFENDANTS' PROPOSED ORDER

Defendants Berry-Hinckley Industries and Jerry Herbst (collectively, "Defendants"), hereby respectfully submit their Opposition to Plaintiff Larry Willard's Motion To Strike Defendants' Proposed Order or, in The Alternative, Objection To Defendants' Proposed Order. This Opposition is supported by the following Memorandum of Points and Authorities and exhibits thereto, the pleadings and papers on file herein, the Declaration of Brian R. Irvine (**Exhibit 1**), and any other material this Court may wish to consider.

MEMORANDUM OF POINTS AND AUTHORITIES

Willard's Motion to Strike Defendants' Proposed Order or, in the Alternative, Objection to Defendants' Proposed Order ("Motion to Strike") is patently frivolous, both with respect to the arguments it makes and the relief it seeks. Accordingly, the Motion to Strike should be denied in its entirety.

PERTINENT FACTS

As this Court is intimately familiar with the details of this case, this Opposition will only state the limited facts needed to resolve Willard's Motion to Strike.

On August 6, 2020, the Nevada Supreme Court entered an Opinion (the "Opinion") in which it reversed this Court's Order Denying the NRCP 60(b)(1) Motion (the "NRCP 60(b) Order") and remanded to this Court for further consideration. (Opinion at 3, on file herein). In so doing, the Nevada Supreme Court stated that "a district court **must** address the *Yochum* factors 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." *Id*. at 7 (emphasis added), 8. The Nevada Supreme Court concluded that this Court abused its discretion by failing to address the *Yochum* factors, and therefore "reverse[d] the district court's order denying Willard's NRCP 60(b)(1) motion and remand[ed] for further proceedings consistent with this opinion." *Id*. at 8-9.

BHI subsequently filed a Petition for Rehearing (on file herein), which the Court denied. BHI then filed a Petition for En Banc Reconsideration (on file herein). Due to the fact that Willard had been continually attempting to improperly introduce inadmissible evidence of a disciplinary hearing that occurred subsequent to the entry of the NRCP 60(b) Order, BHI requested that "[i]f nothing else, BHI seeks clarification from this Court that Willard may not present new arguments or evidence on remand—rather, the remand must be solely for the District Court to modify its order to make express findings on each of the *Yochum* factors on the record before it." (Petition for En Banc Reconsideration at 17 n.4, on file herein). Willard objected to this request, instead attempting to argue that Moquin's guilty plea should be admitted and considered. (Answer to Petition for En Banc Reconsideration at 14-15). Indeed, at the time the Petition for En Banc Reconsideration was filed, Willard had already been attempting to improperly introduce untimely purported evidence to this Court more than two years after filing his NRCP 60(b)(1) Motion, and well outside of NRCP 60(b)'s time limits. *See, e.g.*, (August 19, 2020, Notice of Related Action, on file herein).

Even though the Court denied BHI's Petition for En Banc Reconsideration, the Court agreed with BHI's request, stating that "we clarify 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 <u>record currently before the court</u>." (En Banc Reconsideration Order, on file herein) (emphasis added). Remittitur issued, (Remittitur, on file herein), and the case was remanded back to this Court for consideration of the *Yochum* factors on the record currently before the court.

At Willard's request (March 30, 2021, Request for Status Conference, on file herein), this Court held a status conference on April 8, 2021. (Declaration of B. Irvine, **Exhibit 1**). During the Conference, this Court directed each of the parties to submit a Proposed Order by May 21, 2021. *Id*.

In accordance therewith, BHI timely submitted a Proposed Order. (BHI's Notice of Submission of Proposed Order ("BHI Proposed Order"), on file herein). Therein, BHI acted

precisely within the confines of the Nevada Supreme Court's directions. It submitted a proposed order, as directed by this Court, which contained "explicit and detailed findings…in writing [on each of the] four *Yochum* factors," as the Nevada Supreme Court ordered this Court to do. *See* (Opinion). And, the *Yochum* analysis in BHI's Proposed Order was clearly limited to the record that was available to this Court at the time it entered the NRCP 60(b) Order. For each such finding, upon stating the applicable law, the BHI Proposed Order reiterated the applicable arguments and findings already on the record. (BHI Proposed Order pp. 25-42). Indeed, even a cursory reading of BHI's Proposed Order unequivocally demonstrates that BHI's Proposed Order did not draw from any purported evidence or facts beyond the record that was before this Court when it entered the NRCP 60(b) Order.

On June 9, 2021, 19 days after the parties submitted their respective Proposed Orders, Willard filed the present Motion to Strike Defendants' Proposed Order Or, in the Alternative, Objection to Defendants' Proposed Order. ("Motion to Strike," on file herein). Therein, Willard argued that because BHI addressed the *Yochum* factors as directed by the Nevada Supreme Court, its proposed order must be "stricken" and this Court must enter Willard's Proposed Order instead—notwithstanding that Willard's Proposed Order has this Court reverse itself on numerous findings of fact and evidentiary determinations, which are not even at issue on remand. As will be discussed herein, Willard's Motion to Strike is wholly devoid of merit, and should be denied.

ARGUMENT

Willard has no legal basis to file the present Motion, which was filed 19 days after the parties submitted their proposed orders, and which does not seek to strike any portion of a pleading. *Cf. generally, e.g., JIPC Mgmt., Inc. v. Incredible Pizza Co.*, 2009 WL 10674384, at *1 (C.D. Cal. Oct. 8, 2009) (a proposed pretrial order submitted by the parties is not considered a pleading as that term is used in Rule 12(f)); WDCR 9 ("In a non-jury case, where a judge directs an attorney to prepare findings of fact, conclusions of law, and judgment, the attorney shall serve a copy of the proposed document upon counsel for all parties who have appeared at

the trial and are affected by the judgment. Seven days after service counsel shall submit the same to the court for signature together with proof of such service.”).

But assuming *arguendo* that Willard even has a legal basis to file this Motion, the Motion is facially frivolous. Willard claims that “[t]he only defense documents contained in the ‘record currently appearing before the court’ regarding *Yochum* would consist of Defendants’ opposition to the Rule 60(b) motion and Defendants’ sur-reply.” (Motion at 5). According to Willard, even though BHI’s opposition and sur-reply each addressed *Yochum*, because those briefs primarily focused on the fact that Willard had no admissible evidence or meritorious arguments, BHI is now prohibited from submitting findings on the *Yochum* factors in its Proposed Order. *Id*. at 5-7. Therefore—outrageously—Willard accuses BHI of “blatant[ly] and “brazen[ly]” violating the Nevada Supreme Court’s directives, and claims that “to remediate the prejudice created by Defendants inserting new arguments for the Court’s consideration, the Court should simply enter the Willard Plaintiffs’ proposed order,” *id*. at 6, without mention of the fact that Willard’s proposed order seeks to have this Court reverse itself on numerous evidentiary findings that it made in its prior 60(b) order.

However, Willard and this Court should take a closer look at the pertinent documents. It is unequivocally beyond dispute that the Nevada Supreme Court remanded the matter to this Court specifically to “issue explicit and detailed findings, preferably in writing, with respect to the four *Yochum* factors…” (Opinion at 8, on file herein). This is exactly what BHI’s Proposed Order did, and those findings were limited to the record before this Court when it entered the NRCP 60(b) Order. (BHI Proposed Order, on file herein). To the extent that Willard is advocating that BHI was not permitted to reference *Yochum*, Willard’s argument is absurd on its face and ignores the entire purpose of the remand.

Further, Willard’s vague argument that BHI’s Proposed Order “contained at least one hundred seven (107) paragraphs of entirely new arguments and analysis” in “blatant” violation of the En Banc Reconsideration Order is wholly meritless. (Motion at 6). In denying En Banc Reconsideration, the Nevada Supreme Court stated that “we clarify 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."[1] (En Banc Reconsideration Order, on file herein). BHI's Proposed Order fully complies with the Supreme Court's directive: it identifies each *Yochum* factor and Willard's argument in support thereof, and states findings on the *Yochum* factor based upon this Court's prior findings on the existing record. (BHI Proposed Order, on file herein). Tellingly, Willard does not identify what "new" argument or evidence was presented beyond the arguments, findings, and evidence already in the record, beyond claiming generally that BHI may not reference *Yochum* in the context of submitting a proposed order that is required to make findings on each of the *Yochum* factors.

Willard's Motion is not only frivolous, it is also the height of hypocrisy. Despite the fact that the stated purpose of the remand was for this Court to enter detailed findings regarding each *Yochum* factor, Willard's Proposed Order goes well beyond this scope and would have this Court reverse numerous evidentiary findings it made in its prior NRCP 60(b) Order, without any rationale for doing so and despite the express direction from the Supreme Court. *See, e.g.*, (Willard's Proposed Order at 6-10). And in addition to proposing evidentiary findings which are irreconcilably inconsistent with the findings already made by this Court and well beyond the scope of the remand, Willard proposes evidentiary findings which rely upon a statute that Willard never cited in the briefing this Court. *See, e.g.*, (Willard's Proposed Order at 7 (proposing a finding that Moquin's statement falls within the general exception of NRS 51.315(1)). Thus, it is Willard, not BHI, that has violated the directives of the Supreme Court by

[1]As discussed at length in the pertinent facts section herein, it is abundantly clear that the purpose of the En Banc Reconsideration Order language was to prohibit Willard from improperly attempting to introduce alleged evidence and argument regarding Moquin's disciplinary proceedings. *See, e.g.*, (August 19, 2020, Notice of Related Action, on file herein). Willard's argument that the Supreme Court instead intended to state that any proposed order submitted by BHI could not reference *Yochum*, or that this Court's Order is effectively limited to stating that Willard must prevail on all of the *Yochum* factors, despite Willard's failure to produce any admissible evidence and in irreconcilable contrast with this Court's prior findings as they pertain to the factors, is meritless—to say the least. But even taking Willard's absurd interpretations at face value, Willard's arguments are still unavailing.

including new legal arguments. Further, Willard's discussion of the *Yochum* factors relies on evidence which this Court has already ruled is inadmissible. *Compare, e.g.*, (Willard's Proposed Order at 10-12, relying on statements allegedly made by Moquin, and citing exhibits 2, 4, and 10 to Willard's Reply) *with* (November 30, 2018, NRCP 60(b) Order 15 ¶ 17, 19 ¶ 32). Thus, Willard's argument that *BHI* is the party violating the parameters of the remand, and that "to remediate the prejudice created by Defendants inserting new arguments for the Court's consideration, the Court should simply enter the Willard Plaintiffs' proposed order," should be offensive to this Court. If any proposed order, or portion thereof should be summarily stricken or disregarded, it is Willard's.

Finally, Willard appears to misunderstand the purpose of a proposed order. Both parties submitted proposed orders at this Court's request. As this Court is abundantly aware, this Court may choose to adopt findings and/or conclusions from either party's proposed order, both parties' proposed orders, and/or neither party's proposed order. Even if this Court were to grant Willard's baseless request and strike BHI's Proposed Order, this would have no effect whatsoever on this Court's existing discretion to enter any findings and conclusions of its choosing. Indeed, the only findings that the order *must* contain are detailed written findings on each *Yochum* factor. Thus, Willard's arguments are not only meritless, they are nonsensical.

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CONCLUSION

Based on the foregoing, BHI respectfully requests that this Court deny Willard's Motion.

AFFIRMATION

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

DATED this 23rd day of June, 2021.

DICKINSON WRIGHT, PLLC

/s/ Brian R. Irvine

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CERTIFICATE OF SERVICE

I certify that I am an employee of DICKINSON WRIGHT PLLC, and that on this date, pursuant to NRCP 5(b); I am serving a true and correct copy of the attached **Defendants Berry-Hinckley Industries and Jerry Herbst's Opposition to Plaintiff Larry J. Willard's Motion to Strike Defendants' Proposed Order or, In The Alternative, Objection To Defendants' Proposed Order** on the parties through the Second Judicial District Court's E-Flex filing system to the following:

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Attorneys for Plaintiffs/Counterdefendants

DATED this 23rd day of June, 2021.

/s/ Mina Reel
An employee of DICKINSON WRIGHT PLLC

EXHIBIT TABLE

Exhibit	Description	Pages[2]
1	Declaration of Brian R. Irvine	2

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

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EXHIBIT 1

EXHIBIT 1

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

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

Plaintiffs,

vs.

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

Defendants.

CASE NO. CV14-01712

DEPT. 6

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

Counterclaimants,

vs

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

Counter-defendants.

_____/

DECLARATION OF BRIAN R. IRVINE IN SUPPORT OF DEFENDANTS BERRY-HINCKLEY INDUSTRIES AND JERRY HERBST'S OPPOSITION TO PLAINTIFF LARRY J. WILLARD'S MOTION TO STRIKE DEFENDANTS' PROPOSED ORDER OR, IN THE ALTERNATIVE, OBJECTION TO DEFENDANTS' PROPOSED ORDER

I, BRIAN R. IRVINE, do hereby declare as follows:

1. I am an attorney with the law firm of DICKINSON WRIGHT, PLLC, attorneys for Defendants, Berry Hinckley Industries and Jerry Herbst (collectively, "Defendants"), in the above captioned action. I submit this Declaration in support of Defendants Berry-Hinckley Industries and Jerry Herbst's Opposition to Plaintiff Larry J. Willard's Motion to Strike Defendants' Proposed Order or, on The Alternative, Objection to Defendants' Proposed Order. I have personal knowledge of the matters set forth in this Declaration and, if called as a witness could and would competently testify thereto.

2. This Court held a status conference on April 8, 2021.

3. During the status conference, this Court directed both parties to submit proposed orders by May 21, 2021.

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

DATED this 23rd day of June, 2021.

/s/ Brian R. Irvine
BRIAN R. IRVINE

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation, Plaintiffs, vs. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual, Defendants.	Case No. CV14-01712 Dept. No. 6
AND ALL RELATED MATTERS.	

REPLY IN SUPPORT OF MOTION TO STRIKE DEFENDANTS' PROPOSED ORDER OR, IN THE ALTERNATIVE, OBJECTION TO DEFENDANTS' PROPOSED ORDER

The Willard Plaintiffs hereby file this reply in support of their Motion to Strike Defendants' Proposed Order or, in the Alternative, Objection to Defendants' Proposed Order ("Motion").[1]

[1] For purposes of consistency, the Willard Plaintiffs have maintained the same defined terms that they established in their underlying Motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

At Defendants' request, the Nevada Supreme Court ordered 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." (Order Den. En Banc Recons., filed 2/26/21, at 1 (bold emphasis added).) Unfortunately, the Defendants' Proposed Order completely violated and disregarded the Nevada Supreme Court's mandate.

In opposition to the present Motion, Defendants claim that *they* could not analyze the required *Yochum* factors without inserting new arguments. Yet, that is no excuse for violating a Nevada Supreme Court order. While this Court is free to conduct its own analysis of the *Yochum* factors, the Defendants were not allowed to offer **any** new arguments – regarding *Yochum* or otherwise. Regrettably, that is precisely what they did. Therefore, to honor the Nevada Supreme Court's order and to protect the integrity of this case, the Court must disregard the Defendants' Proposed Order and adopt the only analysis of the *Yochum* factors that existed before the remand: the Willard Plaintiff's briefing and proposed orders.

II. ARGUMENT

Defendants' opposition is essentially comprised of four arguments. First, Defendants claim that they did not include any new evidence, and so that is apparently good enough despite the fact that they disregarded the express prohibition on offering "new arguments" on remand. Second, even though the Nevada Supreme Court's order expressly stated that "***neither*** **party** may present any new arguments" on remand, that order apparently didn't apply to them. Third, since Defendants made the strategic decision to omit any discussion of the *Yochum* factors in their original briefing, they should now be allowed to take advantage of the remand and offer entirely new arguments on those factors. Fourth, the Willard Plaintiffs included one statute that had not been expressly cited before, so that should justify the 12 new citations and 17 pages of new argument that Defendants presented for the first time in their proposed order. As discussed below, all four of these arguments are without merit and strain the bounds of credibility.

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A. Defendants Added New Argument, Violating a Nevada Supreme Court Order

The Defendants' first argument is that they did not offer any new "evidence or facts beyond the record that was before this Court when it entered the NRCP 60(b) Order." (Opp'n at 3:9-10.) That may be true, but it has absolutely no bearing on the Motion. Whether Defendants raised new facts has nothing to do with whether they raised new arguments.

The Nevada Supreme Court plainly stated 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**." (Order Den. En Banc Recons., filed 2/26/21, at 1 (bold emphasis added).) None of the arguments regarding *Yochum* that the Defendants raised for the very first time in their proposed order were in the Court's record prior to the remand. (*Compare* Defendants' Proposed Order at ¶¶ 95-201, including seventeen (17) pages of new argument, *with* Defendants' Rule 60(b)(1) Opposition at 7:25-8:1, which constitutes the only time that Defendants even mentioned any of the *Yochum* factors prior to remand.)

The Defendants' Proposed Order contained at least one hundred seven (107) paragraphs of entirely new arguments. In light of the Nevada Supreme Court's clear prohibition against new arguments, the Defendants improperly attempted to supplement their opposition briefs by adding new arguments to a proposed order. *See First Fed. Sav. Bank of Hegewisch v. United States*, 52 Fed. Cl. 774, 783 n.13 (2002) (noting that it is not proper to "basically file another brief, under the guise of statements of fact, setting forth alternative arguments against plaintiff's claim.").

The Court must confine itself to the evidence and the arguments that were in the record at the time of the hearing on the Rule 60(b)(1) Motion. (Order Den. En Banc Recons. at 1.) As explained in the Motion, a party cannot use a post-hearing proposed order to raise new arguments. *Procaps S.A. v. Patheon Inc.*, 141 F. Supp. 3d 1246, 1293 (S.D. Fla. 2015), aff'd, 845 F.3d 1072 (11th Cir. 2016); *see also Rivera-Cruz v. Hewitt Assocs. Caribe, Inc.*, CV 15-1454 (PAD), 2018 WL 1704473, at *10 (D.P.R. Apr. 6, 2018) (after a matter is briefed, a party "cannot later add new arguments at subsequent stages of the proceeding"). When a party violates this principle, "the argument will not be considered." *Foley v. Wells Fargo Bank, N.A.*,

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849 F. Supp. 2d 1345, 1349 (S.D. Fla. 2012) (citing *Herring v. Sec. Dep't of Corr.*, 397 F.3d 1338, 1342 (11th Cir. 2005)). Therefore, the Court must disregard Defendants' Proposed Order.

B. <u>The Nevada Supreme Court Precluded *All* Parties from Offering New Argument</u>

Amazingly, the Defendants also argue that "the purpose of the En Banc Reconsideration Order language was to prohibit Willard from improperly attempting to introduce alleged evidence and argument regarding Moquin's disciplinary proceedings." (Opp'n at 5:22-24.) Yet, that is manifestly untrue. If it were true, the Nevada Supreme Court would have limited its prohibition on new argument to just the Willard Plaintiffs – which is exactly what the Defendants requested. Instead, however, the Nevada Supreme Court entered a bilateral prohibition on new arguments that applied to **all of the parties**, including the Defendants.

Respondents' Petition for En Banc Reconsideration requested an order "that *<u>Willard</u>* may not present new arguments or evidence on remand . . . ." (Pet. En Banc Recon. at 17 n.4 (emphasis added).) But, the Nevada Supreme Court did not grant that unilateral request. Instead, it expressly ruled that "*<u>neither party</u> may present any new arguments or evidence on remand* . . . ." (Order Den. En Banc Recons. at 1 (emphasis added).)

Thus, the Defendants' argument that the prohibition against new arguments was only directed at the Willard Plaintiffs is demonstrably false. The Nevada Supreme Court precluded *<u>all</u>* parties from offering new arguments. Therefore, the Defendants' willful violation of a Nevada Supreme Court order can only be remedied by striking the offending submission.

C. <u>The Fact that Defendants Chose to Avoid the *Yochum* Factors Before Does Not Mean They Can Now Offer New Arguments</u>

Next, the Defendants argue that it would be "absurd" and "nonsensical" to prevent them from offering argument on the *Yochum* factors when the purpose of the remand was to allow this Court to enter findings on each of the *Yochum* factors. What the Defendants fail to acknowledge, however, is that they had every opportunity to offer argument on the *Yochum* factors in their original briefing before the appeal. They filed a Rule 60(b)(1) Opposition, then filed a Rule 60(b)(1) Sur-Reply, and had full oral argument. For whatever reason, the Defendants made the strategic decision to ignore the *Yochum* factors. Therefore, they cannot now supplement their

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prior briefing by including brand new arguments in their proposed order. To do so is tantamount to yet another sur-reply.

It is true that the Court is required to enter detailed findings regarding each of the *Yochum* factors. Thankfully, it already has everything it needs to do that. The Willard Plaintiffs' Rule 60(b)(1) Motion, their Rule 60(b)(1) Reply, and their oral argument all carefully discussed and analyzed all of the *Yochum* factors. As this information was all in the record, the Willard Plaintiffs' proposed order likewise tracks the *Yochum* factors.[2]

The Defendants are sophisticated parties represented by very talented lawyers. They did not omit a discussion of the *Yochum* factors from their prior briefing by accident. They did it for strategic reasons – likely because the *Yochum* factors heavily favor the Willard Plaintiffs. Therefore, the Court should not condone the Defendants' attempt to now offer new argument just because their prior attempt to disregard the *Yochum* factors was unsuccessful.

D. <u>The Nevada Supreme Court Prohibited New "Arguments" Not Citations</u>

Finally, the Defendants flippantly attempt to assert that the Willard Plaintiffs' proposed order included one statute that had not been previously cited, and so that should somehow open the door to 17 pages of entirely new arguments that Defendants offered for the first time in their proposed order.

This argument has two problems. First, it is based upon a false premise that the Willard Plaintiffs cited to some "new" evidentiary proposition. Defendants are correct that the Willard Plaintiffs mistakenly cited to NRS 51.315(1). That is the general hearsay exception that applies when the declarant is unavailable. In their prior briefing, however, the Willard Plaintiffs had cited to NRS 51.075(1), which is the general hearsay exception that applies where the availability of the declarant is immaterial. (*See* Opposition to Defendants' Motion to Strike, or in the Alternative, Motion for Leave to File Sur-Reply, filed on June 22, 2018, at 11:18.) Thus, the Willard Plaintiffs absolutely raised the corollary – and more flexible – version of NRS

[2] Strangely, Defendants complain that the Willard Plaintiffs' proposed order would set aside the Court's previous orders. But, that is the entire purpose of the Rule 60(b)(1) Motion: to receive relief from prior orders. If the Court implements the *Yochum* factors, it will necessarily need to provide the Willard Plaintiffs with the relief they sought in the Rule 60(b)(1) Motion, by setting aside the prior sanctions orders and replacing the Rule 60(b)(1) Order.

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51.315(1). Thus, the insignificant reference to NRS 51.315(1) did not constitute a "new argument" whatsoever. The Willard Plaintiffs have always asserted that the "catch-all" general hearsay exception applies to any claimed hearsay evidence.

Second, the Nevada Supreme Court did not preclude new statutory references or even new case citations. Indeed, the Motion did not complain about the fact that Defendants' Proposed Order included citations to 11 cases and a procedural rule that the Defendants had never cited before. Rather, the Motion is based upon the fact that the Defendants crammed 17 pages of entirely new argument into their proposed order. (Mot. at 6:6-14.)

That is the core problem here. The Nevada Supreme Court very clearly stated that "neither party may present any new arguments" on remand, as the Court's consideration of the *Yochum* factors "is limited to the record currently before the court." The Defendants then disregarded that plain limitation and shoved 17 pages of new argument into Defendants' Proposed Order that had never been in the record.

III. CONCLUSION

Defendants' Proposed Order included approximately 17 pages of new arguments. That was an improper violation of the Nevada Supreme Court's order. The only rational consequence is to strike Defendants' Proposed Order.

Affirmation

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

Dated this 29th day of June, 2021.

ROBERTSON, JOHNSON,
MILLER & WILLIAMSON

By: */s/ Richard D. Williamson*
Richard D. Williamson, Esq.
Jonathan Joel Tew, Esq.

and

LEMONS, GRUNDY & EISENBERG

By: */s/ Robert L. Eisenberg*
Robert L. Eisenberg, Esq.

Attorneys for the Willard Plaintiffs

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Robertson, Johnson, Miller & Williamson, 50 West Liberty Street, Suite 600, Reno, Nevada 89501, over the age of 18, and not a party within this action. I further certify that on the 29th day of June, 2021, I electronically filed the foregoing **REPLY IN SUPPORT OF MOTION TO STRIKE DEFENDANTS' PROPOSED ORDER OR, IN THE ALTERNATIVE, OBJECTION TO DEFENDANTS' PROPOSED ORDER** with the Clerk of the Court by using the ECF 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 for Defendants/Counterclaimants

/s/ *Stefanie E. Smith*
An Employee of Robertson, Johnson, Miller & Williamson

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Clerk of the Court
Transaction # 8640059

CODE NO. 2842

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

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

Plaintiffs,

vs.

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

Defendants.
_____/

Case No. CV14-01712

Dept. No. 6

ORDER DENYING MOTION TO STRIKE DEFENDANTS' PROPOSED ORDER OR, IN THE ALTERNATIVE, OBJECTION TO DEFENDANTS' PROPOSED ORDER

Before this Court is the *Motion to Strike Defendants' Proposed Order or, in the alternative, Objection to Defendants' Proposed Order* ("*Motion*") filed by Plaintiffs LARRY J. WILLARD ("Mr. Willard"), individually and as Trustee of the Larry James Willard Trust Fund and OVERLAND DEVELOPMENT CORPORATION ("Overland") (collectively, "Plaintiffs" unless named individually), by and through its counsel of record, Robertson, Johnson, Miller & Williamson, and Lemons, Grundy & Eisenberg.

/ /

Defendants BERRY-HINCKLEY INDUSTRIES ("BHI"), a Nevada corporation, and JERRY HERBST ("Mr. Herbst") (collectively, "Defendants" unless named individually) filed *Defendants Berry-Hinckley Industries and Jerry Herbst's Opposition to Plaintiff Larry J. Willard's Motion to Strike Defendants' Proposed Order or, in the Alternative, Objection to Defendants' Proposed Order* ("*Opposition*"), by and through its counsel of record, Dickson Wright, PLLC.

Plaintiff filed their *Reply in Support of Motion to Strike Defendants' Proposed Order or, in the alternative, Objection to Defendants' Proposed Order* ("Reply") and the matter was thereafter submitted for the Court's consideration.

I. FACTS AND PROCEDURAL HISTORY.

This case arises from a dispute concerning a commercial lease rental agreement between Plaintiffs and Defendants. *Amended Complaint*, ¶ 9.

Initially, Plaintiffs were represented by Brian Moquin, Esq., appearing *pro hac vice* with David O'Mara, Esq. ("Mr. O'Mara"). See *Order Admitting Brian P. Moquin, Esq. to Practice*. Defendants were represented by Gordon Silver, Esq. See *Defendants' Answer to Plaintiffs' Complaint*. On June 23, 2015, Dickson Wright PLLC filed a *Notice of Appearance of Anjali D. Webster* as attorney of record for Defendants.

On March 15, 2018, Mr. O'Mara filed a *Notice of Withdrawal of Local Counsel*, alleging Mr. Moquin's unresponsiveness to case matters. On March 26, 2018, Plaintiffs filed a *Notice of Appearance* and retained Robertson, Johnson, Miller & Williamson as counsel.

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On April 18, 2018, Plaintiffs filed *Willard Plaintiffs' Rule 60(b) Motion for Relief*. Defendants filed *Defendants/Counterclaimants' Opposition to Rule 60(b) Motion for Relief* on May 18, 2018. Plaintiffs filed their *Reply in Support of the Willard Plaintiffs' Rule 60(b) Motion for Relief* on May 29, 2018.

On November 30, 2018, the Court entered *Order Denying Plaintiffs' Rule 60(b) Motion for Relief*. Thereafter, the Court entered *Judgment* in favor of Defendants and dismissed Plaintiffs claims with prejudice on December 11, 2018. On December 28, 2018, Plaintiffs filed a *Notice of Appeal*, appealing the Court's *Order Denying Plaintiffs' Rule 60(b) Motion for Relief*. On March 25, 2021, the Nevada Supreme Court reversed and remanded the matter for the Court to address the factors set forth in Yochum v. Davis, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982), *overruled in part by* Epstein v. Epstein, 113 Nev. 1401, 1405, 950 P.2d 771, 773 (1997). See Willard v. Berry-Hinckley Industries, 136 Nev. 467, 468, 469 P.3d 176, 178 (2020).

Thereafter, Plaintiffs filed a *Notice of Submission of Proposed Order* on May 21, 2021. Defendants filed a *Notice of Submission of Proposed Order* on May 21, 2021. The instant briefing followed.

In their *Motion*, Plaintiffs assert that courts regularly allow motions to strike in circumstances otherwise not provided for in NRCP 12(f). *Motion*, p. 4; citing Pfingston v. Ronan Eng'g Co., 284 F.3d 999, 1003 (9th Cir. 2002). WDCR 10(1) provides the court or clerk can strike non-conforming documents and parties can object to proposed orders. *Motion*, p 4; citing State Eng'r v. Eureka Cty., 113 Nev. 557, 559, 402 P.3d 1249, 1251 (2017).

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Plaintiffs argue Defendants' proposed order introduces new arguments and disregards the Nevada Supreme Court's ruling that "neither party may present new arguments or evidence on remand" with respect to the factors set forth in Yochum v. Davis, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982). *Motion*, p. 5; See also *Order Denying En Banc Reconsideration*.

Plaintiffs contend that before appeal, Defendants only cited Yochum as a standard of review and there are no documents by Defendants that analyze the Yochum factors which are contrary to the Plaintiffs' analysis of the same factors. *Motion*, p. 6. Plaintiffs assert Defendants cannot raise new arguments under the Yochum factors in their proposed order and the Court should disregard any new arguments. Id.; citing Procaps S.A. v. Patheon Inc., 141 F. Supp. 3d 1246, 1293 (S.D. Fla. 2015); Foley v. Wells Fargo Bank, N.A., 849 F.Supp.2d 1345, 1349 (S.D. Fla. 2012).

In the alternative, Plaintiffs object to Defendants' proposed order. *Motion*, p. 6. Plaintiffs maintain Defendants' proposed order contains one hundred and seven (107) paragraphs of new arguments and analysis, covering seventeen (17) pages. Id. Defendants' proposed order violates the Nevada Supreme Court's directive and "a district court commits error if its subsequent order contradicts the appellate court's directions." *Motion*, p. 7; citing Eureka Cty., 133 Nev. at 559, 402 P.3d at 1251.

In their *Opposition*, Defendants contend that Plaintiffs have no legal basis to file their *Motion*, which was filed nineteen (19) days after the parties submitted their proposed orders and does not seek to strike any portion of a pleading. *Opposition*, p. 3. Defendants agree the Nevada Supreme Court remanded the matter for the Court to address the four (4) Yochum factors, but Defendants contests Plaintiffs' assertion the record is devoid of

defense documents discussing the Yochum factors. *Opposition*, p. 4. Additionally, Plaintiffs have not identified what new arguments or evidence Defendants have presented. *Opposition*, p. 5.

In their *Reply*, Plaintiffs reiterate that none of the arguments regarding Yochum in the Defendants' proposed order were in the Court's record prior to appeal. *Reply*, p. 2. A party cannot use a post-hearing proposed order to raise new arguments. *Reply*, p. 2; citing Rivera-Cruz v. Hewitt Assocs. Caribe, Inc., CV 15-1454 (PAD), 2018 WL 1704473, at *10 (D.P.R. Apr. 6, 2018).

Plaintiffs argue Defendants had every opportunity to offer argument on the Yochum factors before appeal, but failed to do so. *Reply*, p. 3. Defendants cannot supplement their prior briefings with brand new arguments in their proposed order, which would in effect serve as a sur-reply. *Reply*, pp. 3-4.

II. LAW AND ANALYSIS.

Rule 12(f) of the Nevada Rules of Civil Procedure allows the Court to eliminate "an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter" from a pleadings or papers. The motion to strike must be "made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading." NRCP 12(f)(2).

The Nevada Supreme Court has noted the practice of moving to strike a motion is not favored. Afriat v. Afriat, 61 Nev. 321, 321, 117 P.2d 83, 84 (1941); Lamb v. Lamb, 55 Nev. 437, 437, 38 P.2d 659, 659 (1934).

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Here, the Court finds no adequate grounds to justify striking Defendants' proposed order. Accordingly, the Court considers Plaintiffs' *Motion* as an objection to the proposed order provided by Defendants. As directed by the Supreme Court, the 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" and this Court will issue its order appropriately. See Nevada Supreme Court *Order Denying En Banc Reconsideration*.

III. ORDER.

Accordingly, and good cause appearing therefor,

IT IS HEREBY ORDERED the *Motion to Strike Defendants' Proposed Order or, in the alternative, Objection to Defendants' Proposed Order* is DENIED.

DATED this 10th day of September, 2021.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 10th day of September, 2021, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

ROBERT EISENBERG, ESQ.
BRIAN IRVINE, ESQ.
ANJALI WEBSTER, ESQ.
RICHARD WILLIAMSON, ESQ.
JONATHAN TEW, ESQ.
JOHN DESMOND, ESQ.

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

Holly Longe

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Alicia L. Lerud
Clerk of the Court
Transaction # 8643933

CODE NO. 2842

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

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

Plaintiffs,

vs.

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

Defendants.
_____/

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

Counterclaimants,

vs

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

Counter-defendants.
_____/

Case No. CV14-01712

Dept. No. 6

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

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

Court makes the following findings of fact, conclusions of law and orders as follows:

I. FINDINGS OF FACT.

The Court makes the following Findings of Fact:

A. PLAINTIFFS' COMPLAINT.

1. On August 8, 2014, Plaintiffs commenced this action by filing their *Complaint* against Defendants.[1] *Complaint*, generally.

2. By the *Complaint* and the *First Amended Complaint* ("*FAC*"), Plaintiffs sought the following damages against Defendants for an alleged breach of the lease between Willard and BHI: (1) "rental income" for $19,443,836.94, discounted by 4% per the lease to $15,741,360.75 as of March 1, 2013; and (2) certain property-related damages, such as insurance and installation of a security fence. *FAC.*

3. Willard also sought several other categories of damages which have since been dismissed or withdrawn. May 30, 2017, *Order*.

B. PLAINTIFFS FAILED TO COMPLY WITH THE NEVADA RULES OF CIVIL PROCEDURE AND THIS COURT'S ORDERS.

4. Plaintiffs failed to provide a compliant damages disclosure in this action[2].

5. Plaintiffs failed to provide a damages computation in their initial disclosures, as required under NRCP 16.1(a)(1)(C). *Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions* ("*Sanctions Order*") ¶ 12. Plaintiffs also failed to provide damages computations at any time despite numerous demands on both Brian Moquin and David O'Mara, of which Plaintiffs personally were aware. *Sanctions Order* ¶¶ 14-16, 25, 27-33, 39, 43-44 and 51-54; *January 10, 2017, Transcript*.

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[1] 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 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] 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.

8. 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* ¶¶ 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.

13. The damages asserted in Plaintiffs' *Motion for Summary Judgment* were not previously disclosed. The motion was also supported by previously undisclosed expert 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.

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*").[3]

E. 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. Moquin for many months with a total failure just prior to the Court's first decisions being filed in this case," and "Mr. Moquin was unresponsive during the time in which this Court was deciding the pending motions, even after counsel begged him for a response to be filed with the Court and was told he would provide such 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*

[3]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 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. Moquin'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).[4]

37. The *Willard Declaration* included several statements about Mr. Moquin's alleged mental disorder. It stated that Mr. Willard is "**convinced**" Mr. Moquin 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. Moquin 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. Moquin's alleged psychological issues affected Plaintiffs' case. WD ¶ 87. (Bolded emphasis supplied on all paragraphs cited).

[4]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. Moquin, some of which referenced Mr. Moquin'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).[5] The *Reply* exhibits included copies of text messages between Mr. Willard and Mr. Moquin, (*Reply,* Exs. 3, 6, 8, and 10), a receipt detailing an alleged payment made by Mr. Willard to Mr. Moquin's doctor on March 13, 2018 (*Reply*, Ex. 5), and a letter from Mr. Williamson to Mr. Moquin dated May 14, 2018. (*Reply*, Ex. 9).

42. On June 6, 2018, Defendants filed their *Motion to Strike, or in the Alternative, Motion for Leave to File Sur-Reply*, arguing this Court should strike Exhibits 1-10 to the *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

[5]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* ¶91 - 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.

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

A. 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*[6] 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.*

[6]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* ¶

76); and, Mr. Willard can now see how Mr. Moquin's alleged psychological issues affected his case (*WD* ¶ 87).[7]

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.

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[7]The *Willard Declaration and the Reply Willard Declaration* contain many nearly identical statements. They compare as follows:

Willard Declaration **Paragraph**	***Reply Willard Declaration***
53	7
54	8
59	9
63	11
64	12 (slightly differs)
65	13
67	15
68	16
69	35
70	38
71	39
82	10 Similar – not exact)
89	3
91	67

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. However,

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

> 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.").

Id.

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 "[l]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*, 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.

108. Therefore, this Court found, "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 *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. Moquin 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.

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.[8]

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.").

(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.

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[8] 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.

129. This Court has previously ruled on Plaintiffs' numerous egregious and 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.

130. The Court's prior findings include:

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.

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

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

e. Before the present case, Plaintiffs filed a case against Defendants in 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.[9] *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* ¶ 36. Plaintiffs instead provided personal financial assistance to Mr. Moquin and did not terminate his services. *Prior 60(b) Order* 24 ¶55; *WD* ¶ 71; *RWD* ¶ 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.

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[9]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* ¶119, 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

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:

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

> 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….

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

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. Moquin'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. 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.

217. 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*, 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….").

220. Mr. Willard's claim that 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 and medical treatment. It logically follows he had resources to retain new attorneys at the time.

221. 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.

G. PLAINTIFFS ARE NOT ENTITLED TO 60(B) RELIEF BECAUSE TWO ATTORNEYS REPRESENTED PLAINTIFFS WHO BOTH HAD AN OBLIGATION TO ENSURE COMPLIANCE WITH THE NEVADA RULES OF CIVIL PROCEDURE AND THIS COURT'S ORDERS.

222. Plaintiffs' *Rule 60(b) Motion* ignores the fact David O'Mara served as local counsel. In Nevada, the responsibilities of local counsel are clearly defined, and encompass active responsibility to represent the client and manage the case:

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

Supreme Court Rule ("SCR") 42(14).

223. Mr. O'Mara's representation, even if contractually limited, was governed by this rule.

224. Mr. O'Mara expressly "consent[ed] as Nevada Counsel of Record to the designation of Petitioner to associate in this cause pursuant to SCR 42" as part of his *Motion to Associate Counsel*.

225. Mr. O'Mara attended every hearing and court conference in this case. And, among other things, Mr. O'Mara signed the Verified Complaint and the First Amended Verified Complaint. *Complaint*; *FAC*.

226. WDCR 23(1) provides:

> Counsel who has appeared for any party shall represent that party in the case and shall be recognized by the court and by all parties as having control of the client's case, until counsel withdraws, another attorney is substituted, or until counsel is discharged by the client in writing, filed with the filing office, in accordance with SCR 46 and this rule.

WDCR 23.

227. Mr. O'Mara was the sole signatory on Plaintiffs' deficient initial disclosure, (*Opposition to Rule 60(b) Motion*, Ex. 6), the uncured deficiencies of which were a basis for sanction of dismissal. *Sanctions Order*.

228. Mr. O'Mara also signed and filed the *Brief Extension Request* with this Court, representing that:

> Counsel has been diligently working for weeks to respond to Defendant's serial motions, which include seeking dismissal of Plaintiffs' case. With the full intention of submitting said responses, Counsel for Plaintiffs encountered unforeseen computer issues…. Counsel for Plaintiffs is confident that with a one-day extension they will be able to recreate and submit the oppositions to Defendants' three motions.

229. Plaintiffs do not provide any declaration by Mr. O'Mara in support of their *Rule 60(b) Motion*.

230. Mr. O'Mara's involvement precludes a conclusion of excusable neglect here.

H. THE *SANCTIONS ORDER* WAS SUFFICIENT UNDER NEVADA LAW.

231. Plaintiffs assert 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 609b) Motion* at 12. However, consideration of this factor is 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).

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.

/ /

/ /

III. <u>ORDER</u>.

Based upon the foregoing, and good cause appearing therefor,

IT IS HEREBY ORDERED Plaintiffs' Rule 60(b) Motion is DENIED in its entirety.

DATED this 13th day of September, 2021.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 13th day of September, 2021, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

ROBERT EISENBERG, ESQ.
BRIAN IRVINE, ESQ.
ANJALI WEBSTER, ESQ.
RICHARD WILLIAMSON, ESQ.
JONATHAN TEW, ESQ.
JOHN DESMOND, ESQ.

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

Holly Longe

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Electronically
CV14-01712
2021-10-11 05:04:23 PM
Alicia L. Lerud
Clerk of the Court
Transaction # 8691728 : yviloria

CODE: 2610
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Attorneys for Plaintiffs/Counterdefendants/Appellants

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; et al., Plaintiffs, vs. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; et al., Defendants.	Case No. CV14-01712 Dept. No. 6

NOTICE OF FILING COST BOND

Please take notice that Plaintiff Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund, and Plaintiff Overland Development Corporation, have posted cash in the amount of $500 for the costs on appeal, pursuant to NRAP 7.

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

DATED this 11th day of October, 2021.

ROBERTSON, JOHNSON,
MILLER & WILLIAMSON

By: */s/ Richard D. Williamson*
Richard D. Williamson, Esq.
Jonathan Joel Tew, Esq.

and

LEMONS, GRUNDY & EISENBERG

By: */s/ Robert L. Eisenberg*
Robert L. Eisenberg, Esq.

Attorneys for the Plaintiffs/Counterdefendants/Appellants

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

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Robertson, Johnson, Miller & Williamson, 50 West Liberty Street, Suite 600, Reno, Nevada 89501, over the age of 18, and not a party within this action. I further certify that on the 11th day of October, 2021, I electronically filed the foregoing **NOTICE OF FILING COST BOND** with the Clerk of the Court by using the ECF system which served the following parties electronically:

John P. Desmond, Esq.
Brian R. Irvine, Esq.
Anjali D. Webster, Esq.
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Attorneys for Defendants/Counterclaimants

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Attorneys for Plaintiffs/ Counterdefendants/Appellants

/s/ Stefanie E. Smith
An Employee of Robertson, Johnson,Miller & Williamson

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; et al., Plaintiffs, vs. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; et al., Defendants.	Case No. CV14-01712 Dept. No. 6

NOTICE OF APPEAL

Notice is hereby given that Plaintiff Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund, and Plaintiff Overland Development Corporation, hereby appeal to the Nevada Supreme Court from the Order After Remand Denying Plaintiffs' Rule 60(b) Motion for Relief, entered on September 13, 2021 (attached as Exhibit 1). These Plaintiffs also appeal from all other rulings and orders made final and appealable by the foregoing.[1]

[1] These Plaintiffs previously appealed from (1) the Findings of Fact, Conclusions of Law, and Order on Defendant's Motions for Sanctions, entered on March 6, 2018; (2) the Order Denying Plaintiffs' Rule 60(b) Motion for Relief, entered on November 30, 2018; and (3) the Judgment entered on December 11, 2018. (Nevada Supreme

AFFIRMATION

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

DATED this 11th day of October, 2021.

ROBERTSON, JOHNSON,
MILLER & WILLIAMSON

By: */s/ Richard D. Williamson*
Richard D. Williamson, Esq.
Jonathan Joel Tew, Esq.

and

LEMONS, GRUNDY & EISENBERG

By: */s/ Robert L. Eisenberg*
Robert L. Eisenberg, Esq.

Attorneys for the Plaintiffs/Counterdefendants/Appellants

Court docket number 77780). The appeal from these orders and judgments resulted in a remand to the district court for further proceedings, and the remand resulted in the September 13, 2021 Order from which the present appeal is taken. To the extent necessary to preserve challenges relating to the prior orders and judgments described in this footnote, this notice of appeal includes the prior orders and judgments.

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

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Robertson, Johnson, Miller & Williamson, 50 West Liberty Street, Suite 600, Reno, Nevada 89501, over the age of 18, and not a party within this action. I further certify that on the 11th day of October, 2021, I electronically filed the foregoing **NOTICE OF APPEAL** with the Clerk of the Court by using the ECF system which served the following parties electronically:

John P. Desmond, Esq.
Brian R. Irvine, Esq.
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Attorneys for Plaintiffs/ Counterdefendants/Appellants

/s/ Stefanie E. Smith
An Employee of Robertson, Johnson,Miller & Williamson

Index of Exhibits

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Reno. Nevada 89501

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Alicia L. Lerud
Clerk of the Court
Transaction # 8691728 : vwiloria

EXHIBIT "1"

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EXHIBIT "1"

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Clerk of the Court
Transaction # 8643933

CODE NO. 2842

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

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

Plaintiffs,

vs.

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

Defendants.
_____/

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

Counterclaimants,

vs

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

Counter-defendants.
_____/

Case No. CV14-01712

Dept. No. 6

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

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

Court makes the following findings of fact, conclusions of law and orders as follows:

I. FINDINGS OF FACT.

The Court makes the following Findings of Fact:

A. PLAINTIFFS' COMPLAINT.

1. On August 8, 2014, Plaintiffs commenced this action by filing their *Complaint* against Defendants.[1] *Complaint*, generally.

2. By the *Complaint* and the *First Amended Complaint* ("*FAC*"), Plaintiffs sought the following damages against Defendants for an alleged breach of the lease between Willard and BHI: (1) "rental income" for $19,443,836.94, discounted by 4% per the lease to $15,741,360.75 as of March 1, 2013; and (2) certain property-related damages, such as insurance and installation of a security fence. *FAC.*

3. Willard also sought several other categories of damages which have since been dismissed or withdrawn. May 30, 2017, *Order*.

B. PLAINTIFFS FAILED TO COMPLY WITH THE NEVADA RULES OF CIVIL PROCEDURE AND THIS COURT'S ORDERS.

4. Plaintiffs failed to provide a compliant damages disclosure in this action[2].

5. Plaintiffs failed to provide a damages computation in their initial disclosures, as required under NRCP 16.1(a)(1)(C). *Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions* ("*Sanctions Order*") ¶ 12. Plaintiffs also failed to provide damages computations at any time despite numerous demands on both Brian Moquin and David O'Mara, of which Plaintiffs personally were aware. *Sanctions Order* ¶¶ 14-16, 25, 27-33, 39, 43-44 and 51-54; *January 10, 2017, Transcript*.

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[1] 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 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] 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.

8. 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* ¶¶ 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.

13. The damages asserted in Plaintiffs' *Motion for Summary Judgment* were not previously disclosed. The motion was also supported by previously undisclosed expert 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.

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*").[3]

E. 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. Moquin for many months with a total failure just prior to the Court's first decisions being filed in this case," and "Mr. Moquin was unresponsive during the time in which this Court was deciding the pending motions, even after counsel begged him for a response to be filed with the Court and was told he would provide such 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*

[3]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 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. Moquin'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).[4]

37. The *Willard Declaration* included several statements about Mr. Moquin's alleged mental disorder. It stated that Mr. Willard is "**convinced**" Mr. Moquin 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. Moquin 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. Moquin's alleged psychological issues affected Plaintiffs' case. WD ¶ 87. (Bolded emphasis supplied on all paragraphs cited).

[4]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. Moquin, some of which referenced Mr. Moquin'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).[5] The *Reply* exhibits included copies of text messages between Mr. Willard and Mr. Moquin, (*Reply,* Exs. 3, 6, 8, and 10), a receipt detailing an alleged payment made by Mr. Willard to Mr. Moquin's doctor on March 13, 2018 (*Reply*, Ex. 5), and a letter from Mr. Williamson to Mr. Moquin dated May 14, 2018. (*Reply*, Ex. 9).

42. On June 6, 2018, Defendants filed their *Motion to Strike, or in the Alternative, Motion for Leave to File Sur-Reply*, arguing this Court should strike Exhibits 1-10 to the *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

[5]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* ¶91 - 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.

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

A. 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*[6] 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.*

[6]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* ¶

76); and, Mr. Willard can now see how Mr. Moquin's alleged psychological issues affected his case (*WD* ¶ 87).[7]

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.

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[7]The *Willard Declaration and the Reply Willard Declaration* contain many nearly identical statements. They compare as follows:

Willard Declaration **Paragraph**	***Reply Willard Declaration***
53	7
54	8
59	9
63	11
64	12 (slightly differs)
65	13
67	15
68	16
69	35
70	38
71	39
82	10 Similar – not exact)
89	3
91	67

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. However,

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

> 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.").

Id.

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 "[l]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*, 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.

108. Therefore, this Court found, "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 *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. Moquin 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.

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.[8]

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.").

(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.

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[8] 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.

129. This Court has previously ruled on Plaintiffs' numerous egregious and 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.

130. The Court's prior findings include:

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.

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

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

e. Before the present case, Plaintiffs filed a case against Defendants in 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.[9] *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* ¶ 36. Plaintiffs instead provided personal financial assistance to Mr. Moquin and did not terminate his services. *Prior 60(b) Order* 24 ¶55; *WD* ¶ 71; *RWD* ¶ 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.

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[9]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* ¶119, 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

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:

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

> 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….

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

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. Moquin'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. 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.

217. 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*, 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….").

220. Mr. Willard's claim that 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 and medical treatment. It logically follows he had resources to retain new attorneys at the time.

221. 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.

G. PLAINTIFFS ARE NOT ENTITLED TO 60(B) RELIEF BECAUSE TWO ATTORNEYS REPRESENTED PLAINTIFFS WHO BOTH HAD AN OBLIGATION TO ENSURE COMPLIANCE WITH THE NEVADA RULES OF CIVIL PROCEDURE AND THIS COURT'S ORDERS.

222. Plaintiffs' *Rule 60(b) Motion* ignores the fact David O'Mara served as local counsel. In Nevada, the responsibilities of local counsel are clearly defined, and encompass active responsibility to represent the client and manage the case:

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

Supreme Court Rule ("SCR") 42(14).

223. Mr. O'Mara's representation, even if contractually limited, was governed by this rule.

224. Mr. O'Mara expressly "consent[ed] as Nevada Counsel of Record to the designation of Petitioner to associate in this cause pursuant to SCR 42" as part of his *Motion to Associate Counsel*.

225. Mr. O'Mara attended every hearing and court conference in this case. And, among other things, Mr. O'Mara signed the Verified Complaint and the First Amended Verified Complaint. *Complaint*; *FAC*.

226. WDCR 23(1) provides:

> Counsel who has appeared for any party shall represent that party in the case and shall be recognized by the court and by all parties as having control of the client's case, until counsel withdraws, another attorney is substituted, or until counsel is discharged by the client in writing, filed with the filing office, in accordance with SCR 46 and this rule.

WDCR 23.

227. Mr. O'Mara was the sole signatory on Plaintiffs' deficient initial disclosure, (*Opposition to Rule 60(b) Motion*, Ex. 6), the uncured deficiencies of which were a basis for sanction of dismissal. *Sanctions Order*.

228. Mr. O'Mara also signed and filed the *Brief Extension Request* with this Court, representing that:

> Counsel has been diligently working for weeks to respond to Defendant's serial motions, which include seeking dismissal of Plaintiffs' case. With the full intention of submitting said responses, Counsel for Plaintiffs encountered unforeseen computer issues…. Counsel for Plaintiffs is confident that with a one-day extension they will be able to recreate and submit the oppositions to Defendants' three motions.

229. Plaintiffs do not provide any declaration by Mr. O'Mara in support of their *Rule 60(b) Motion*.

230. Mr. O'Mara's involvement precludes a conclusion of excusable neglect here.

H. THE *SANCTIONS ORDER* WAS SUFFICIENT UNDER NEVADA LAW.

231. Plaintiffs assert 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 609b) Motion* at 12. However, consideration of this factor is 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).

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.

/ /

/ /

III. <u>ORDER</u>.

Based upon the foregoing, and good cause appearing therefor,

IT IS HEREBY ORDERED Plaintiffs' Rule 60(b) Motion is DENIED in its entirety.

DATED this 13th day of September, 2021.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 13th day of September, 2021, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

ROBERT EISENBERG, ESQ.
BRIAN IRVINE, ESQ.
ANJALI WEBSTER, ESQ.
RICHARD WILLIAMSON, ESQ.
JONATHAN TEW, ESQ.
JOHN DESMOND, ESQ.

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

Holly Longe

F I L E D
Electronically
CV14-01712
2021-10-11 05:04:23 PM
Alicia L. Lerud
Clerk of the Court
Transaction # 8691728 : yviloria

CODE: 1310
Richard D. Williamson, Esq., SBN 9932
Jonathan Joel Tew, Esq., SBN 11874
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6005 Plumas Street, Third Floor
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(775) 786-6868
rle@lge.net

Attorneys for Plaintiffs/Counterdefendants/Appellants

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, Plaintiffs, vs. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, Defendants.	Case No. CV14-01712 Dept. No. 6
BERRY-HINCKLEY INDUSTRIES a Nevada corporation; and JERRY HERBST, Counterclaimants, vs. LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation, Counterdefendants.	

CASE APPEAL STATEMENT

Pursuant to NRAP 3(f), Plaintiff Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund, and Plaintiff Overland Development Corporation (collectively, the "Willard Plaintiffs") hereby submit the following case appeal statement:

A. District court case number and caption, showing names of all parties to the proceedings (without using *et al.*):

LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, Plaintiffs, vs. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual, Defendants.	Case No. CV14-01712 Dept. No. 6
BERRY-HINCKLEY INDUSTRIES a Nevada corporation; and JERRY HERBST, an individual, Counterclaimants, vs. LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation, Counterdefendants.	

On February 22, 2019, Defendant Berry-Hinckley Industries and Timothy P. Herbst, Special Administrator of the Estate of Jerry Herbst, filed a Suggestion of Death explaining that Defendant Jerry Herbst passed away on November 27, 2018. That same day, Defendant Berry-Hinckley Industries filed a Motion to Substitute Proper Party to substitute Timothy P. Herbst, as Special Administrator of the Estate of Jerry Herbst, deceased, for Defendant Jerry Herbst. That

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motion included a proposed order. On February 26, 2019, Defendant Berry-Hinckley Industries filed an Addendum to Motion to Substitute Proper Party, which attached a revised proposed order. On March 29, 2019, Willard Plaintiffs filed a Notice of Non-Opposition to Substitution confirming that they did not oppose either the Motion to Substitute Proper Party or the Addendum to Motion to Substitute Proper Party. To date however, the Court has not ruled on that motion. Therefore, the caption has not yet officially changed.

B. Name of judge who entered order or judgment being appealed:

Hon. Lynne K. Simons

C. Name of each appellant, and name and address of counsel for each appellant:

Appellants are Plaintiff Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund, and Plaintiff Overland Development Corporation

Counsel for Appellants are:

Robert L. Eisenberg (SBN 950)
Lemons, Grundy & Eisenberg
6005 Plumas Street, Third Floor
Reno NV 89519

Richard D. Williamson (SBN 9932)
Jonathan Joel Tew (SBN 11874)
Robertson, Johnson, Miller, & Williamson
50 W. Liberty St. Suite 600
Reno, NV 89501

D. Name of each respondent, and name and address of each respondent's appellate counsel, if known:

Respondents are Defendant Berry-Hinckley Industries and Defendant Jerry Herbst (and/or Timothy P. Herbst, as Special Administrator of the Estate of Jerry Herbst, deceased, for Defendant Jerry Herbst).

Counsel for Respondents are:

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

E. Whether attorneys identified in subparagraph D are not licensed to practice law in Nevada; and if so, whether the district court granted permission to appear under SCR 42 (include copy of district court order granting permission):

All of the attorneys that are currently representing the parties are licensed to practice law in Nevada.

F. Whether appellant was represented by appointed counsel in the district court or on appeal: No appointed counsel; retained counsel only.

G. Whether any appellant was granted leave to proceed *in forma pauperis*: No.

H. Date proceedings were commenced in district court: August 8, 2014.

I. Brief description of nature of the action and result in district court, including type of judgment or order being appealed and relief granted by district court:

This litigation involves the lease, strategic breach, and ultimate abandonment of commercial property in Reno. After plaintiffs' former counsel failed to oppose several pending motions, the district court issued a sanction consisting of dismissal of plaintiffs' claims. The district court also denied a motion for relief under NRCP 60(b)(1) and entered judgment.

After a first appeal, the Nevada Supreme Court entered an opinion, which stated in part that "district courts must issue express factual findings, preferably in writing, pursuant to each *Yochum* factor to facilitate our appellate review. Accordingly, we reverse the district court's order denying the NRCP 60(b)(1) motion and remand to the district court for further consideration." *Willard v. Berry-Hinckley Indus.*, 136 Nev. 467, 468, 469 P.3d 176, 178 (2020).

Defendants sought rehearing of that opinion, which was denied. Defendants then sought en banc reconsideration of that opinion. On February 23, 2021, the Nevada Supreme Court entered an Order Denying En Banc Reconsideration, in which it ordered 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."

Despite that limitation, the Defendants submitted a proposed order that included 107 paragraphs of new analysis on the *Yochum* factors that had never before existed in the record.

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Over the Willard Plaintiffs' objection, the district court adopted that proposed order and again denied the Willard Plaintiffs any relief under NRCP 60(b)(1).

J. Whether case was previously subject of appeal or writ proceeding in Nevada Supreme Court or Court of Appeals, and if so, caption and docket number of prior proceeding: Yes, this case has been the subject on one prior appeal. The caption and docket number for that appeal are set forth below:

LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; and OVERLAND DEVELOPMENT CORPORATION, a California corporation, Appellants, vs. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual, Respondents.	**Docket No. 77780**

K. Whether appeal involves child custody or visitation: No

L. Whether appeal involves possibility of settlement: Yes

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

DATED this 11th day of October, 2021.

ROBERTSON, JOHNSON,
MILLER & WILLIAMSON

By: */s/ Richard D. Williamson*
Richard D. Williamson, Esq.
Jonathan Joel Tew, Esq.

and

LEMONS, GRUNDY & EISENBERG

By: */s/ Robert L. Eisenberg*
Robert L. Eisenberg, Esq.

Attorneys for the Plaintiffs/Counterdefendants/Appellants

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Robertson, Johnson, Miller & Williamson, 50 West Liberty Street, Suite 600, Reno, Nevada 89501, over the age of 18, and not a party within this action. I further certify that on the 11th day of October, 2021, I electronically filed the foregoing **CASE APPEAL STATEMENT** with the Clerk of the Court by using the ECF system which served the following parties electronically:

John P. Desmond, Esq.
Brian R. Irvine, Esq.
Anjali D. Webster, Esq.
Dickinson Wright
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Attorneys for Defendants/Counterclaimants

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775-786-6868
Attorneys for Plaintiffs/ Counterdefendants/Appellants

/s/ Stefanie E. Smith
An Employee of Robertson, Johnson,Miller & Williamson

IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; and OVERLAND DEVELOPMENT CORPORATION, a California corporation, Appellants, vs. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; JERRY HERBST, an individual; and TIMOTHY P. HERBST, as Special Administrator of the ESTATE OF JERRY HERBST, deceased, Respondents.	**No. 83640** District Court Case No. CV14-01712

APPENDIX TO APPELLANTS' OPENING BRIEF

VOLUME 18 OF 18

Submitted for all appellants by:

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ATTORNEYS FOR APPELLANTS LARRY J. WILLARD, et al.

CHRONOLOGICAL INDEX TO APPELLANTS' APPENDIX

4185

IN THE SECOND JUDICIAL DISTRICT COURT

STATE OF NEVADA, COUNTY OF WASHOE

THE HONORABLE LYNNE K. SIMONS, DISTRICT JUDGE

LARRY J. WILLARD, et al., Department No. 6

Plaintiffs, Case CV14-01712

vs.

BERRY-HINCKLEY INDUSTRIES, et al.,

Defendants.

_____/

Pages 1 to 18, inclusive.

TRANSCRIPT OF PROCEEDINGS

STATUS HEARING

August 17, 2015

REPORTED BY: Christina Amundson, CCR #641
Sunshine Reporting, 323.3211

A P P E A R A N C E S:

FOR PLAINTIFFS: David O'Mara, Esq.
O'Mara Law Firm
311 E. Liberty Street
Reno, NV 89501

FOR PLAINTIFFS: Brian Moquin, Esq.
3507 La Castellet Court
(Via phone) San Jose, CA 95148

FOR DEFENDANTS: Brian Irvine, Esq.
Dickinson Wright
100 W. Liberty, Ste. 940
Reno, NV 89501

-o0o-

1 RENO, NEVADA -- 8/17/15 -- 11:09 A.M.
2 -o0o-
3 THE COURT: Good morning. Please be
4 seated. This is the time set for a status hearing
5 for 11:00 a.m. on August 17th, 2015, in Case No.
6 CV14-01712, Larry J. Willard, et al v.
7 Berry-Hinckley Industries and Jerry Herbst, et al.
8 And in addition to the underlying claims, there are
9 also counterclaims asserted in this matter.
10 Would you go ahead and state your
11 appearances for me, please.
12 MR. IRVINE: Yes. Good morning, your
13 Honor. Brian Irvine from Dickinson, Wright on
14 behalf of Defendants and Counter Plaintiffs.
15 MR. O'MARA: Good morning, your Honor.
16 David O'Mara with the O'Mara Law Firm on behalf of
17 Plaintiffs, acting as local counsel for Brian Moquin
18 on the telephone.
19 THE COURT: Right.
20 Mr. Moquin, would you like to state your
21 appearance.
22 MR. MOQUIN: Yes. Good morning, your
23 Honor. Brian Moquin appearing for Plaintiffs.
24 THE COURT: All right. So, I want to

1 clarify a couple things for the record first. And I
2 wanted to tell you that I have requested that
3 Commissioner Wes Ayres be present in court today and
4 be totally apprised of this matter going forward as
5 well as today.
6 Now, I set this status hearing because we
7 were -- several motions have been coming before the
8 Court. I had a concern regarding the lack of
9 oppositions but -- and I'm going to ask you, Mr.
10 Irvine, to feel free to correct me on anything that
11 I am misstating.
12 But we're here on Defendant's Second Motion
13 to Compel Discovery Responses as well as the motion
14 -- there's an error in the title, but Motion for
15 Contempt Pursuant to NRCP 45(e) and Motion for
16 Sanctions Against Plaintiff's Counsel pursuant to
17 NRCP 37, correct?
18 MR. IRVINE: Yes, your Honor. And I would
19 say that the second motion to compel that we have on
20 file actually relates back to the first motion.
21 THE COURT: Right.
22 MR. IRVINE: Same set of written discovery,
23 but otherwise you stated that perfectly.
24 THE COURT: Okay.

1 MR. O'MARA: The one for contempt is also
2 in regards to a subpoena to a third party, not to
3 the parties in this case.
4 THE COURT: Correct.
5 MR. IRVINE: And, your Honor, just to
6 clarify, on the motion for contempt and for
7 sanctions, we addressed this in a footnote in our
8 request for this status conference. But we did not
9 submit that motion for decision after you signed the
10 order shortening time because we did get a response
11 from that third party --
12 THE COURT: Okay.
13 MR. IRVINE: -- so that motion is moot.
14 THE COURT: The motion for the settlement
15 has not been submitted.
16 MR. IRVINE: Yes, and it's now moot.
17 THE COURT: Okay. That's what I wanted to
18 clarify for the record because it was pending and I
19 was greatly concerned that such a motion had not
20 been opposed.
21 And let me tell you what we're going to do
22 today. My tentative decision on the motion to
23 compel, second motion, is to grant it. There is no
24 opposition in the file. I've read everything

1 thoroughly. I'm not closing the door, if you want
2 to present any argument but, obviously, you're
3 somewhat behind the eight ball because there's no
4 response to the Court, although there was a
5 deadline.
6 That being said, in addition, I believe --
7 now, with regard to -- I moved my outline. Hold on.
8 With regard to the motion to compel, here's where I
9 have some concerns from my point of view, that this
10 action is more than a year old. And here we are, a
11 jury trial is approaching quickly in January and
12 you're getting into some very key discovery that
13 you're going to want to conduct including your
14 experts' depositions.
15 And there's just not a lot of room to
16 monkey around with production. I mean, it needs to
17 be done and it needs to be -- the plaintiff
18 certainly decided to file the action and so
19 certainly should be in a position to provide all
20 documents and full answers.
21 Now, going forward there's a couple things
22 that we are going to do. I understand that you've
23 requested fees and costs and they may be warranted.
24 But on the other hand, it seems to me that when

1 we're under this type of time crunch that I also
2 want to ensure that there's available judicial
3 oversight to try to preclude -- to enhance getting
4 the information produced without the necessity of
5 these types of motions, which I am sure everybody's
6 preference is.
7 And, therefore, from here on out
8 Commissioner Ayres is going to handle the discovery.
9 He will be setting incremental status hearings so
10 that you're checking in as these critical dates come
11 up. He will -- any motions filed regarding
12 discovery will be via recommendation and then to me.
13 But one of the things that I want to make
14 sure I'm wholeheartedly understanding from my own
15 practice is that as you get into the nuances of
16 responses to interrogatories and whether or not they
17 were complete answers or whether or not there's full
18 production, I think it's very helpful to have the
19 discovery commissioner there on a moment's notice to
20 say -- and to really go through and sift out yes,
21 this is complete, no, that isn't.
22 So, that's my intent going forward. He and
23 I have discussed that he will have -- it's a
24 proactive management that we're going to undertake

1 now and that is that he will have hearings that on
2 an incremental basis as he decides. You know, I
3 thought, perhaps, every two weeks, maybe every
4 month. But that does not preclude anyone from
5 making their objections timely, as I anticipate
6 there's going to be more discovery or filing
7 appropriate motions. But I'm hoping that having him
8 available on an incremental basis here on out will
9 allow you to resolve some things before you have to
10 get to the motion stage.
11 Everyone understand that?
12 MR. O'MARA: Yes, your Honor.
13 MR. IRVINE: Yes, your Honor.
14 THE COURT: Now, I'm assuming that Mr.
15 Moquin is responsible for the discovery responses
16 primarily, not your offices, correct?
17 MR. O'MARA: That's correct, your Honor.
18 Mr. Moquin -- we're here in the local counsel aspect
19 of this so he's been doing all the discovery.
20 THE COURT: All right. So, Mr. Moquin, did
21 you hear all of that, what I just stated.
22 MR. MOQUIN: Yes, I did.
23 THE COURT: I was talking away to Mr.
24 O'Mara, not meaning to not look at the phone. I was

1 making eye contact with Mr. O'Mara.
2 MR. MOQUIN: No. I heard perfectly.
3 THE COURT: Okay. So, I'm correct that you
4 have not filed an opposition to the defendant's
5 Second Motion to Compel Discovery Responses,
6 correct?
7 MR. MOQUIN: That is correct, for two
8 reasons. One, I take full responsibility for the
9 fact that they were overdue. I never charge my
10 clients or pass on this kind of thing when it's my
11 -- you know, it's actually my fault.
12 There are things in that motion which I
13 disagree with but, you know, on the whole,
14 unfortunately, this has been two and a half, almost
15 three months of back-to-back trials plus
16 unexpectedly having to move and it's just been an
17 overwhelmingly, you know -- I've been sleeping every
18 other day, quite literally.
19 And, you know, so I have -- I'm a solo
20 practitioner. I have no assistants. I'm looking to
21 hire assistants. I've been interviewing, in fact,
22 other counsel to come onboard to assist here. But,
23 you know, occasionally tsunamis like this hit me
24 and, unfortunately, it's happened in this case with

1 respect to discovery.
2 However, I just got out of a trial just an
3 hour ago, which I was tied up with for the past
4 week. And from here on out my schedule is fairly
5 open until November. So, I don't anticipate there
6 being these kinds of issues moving forward but I do
7 appreciate the oversight and I defer to the wisdom
8 of the Court.
9 THE COURT: All right. Thank you. And I
10 understand that law firms have considerable
11 workloads but, nonetheless, you belabored it more
12 because you chose to file the lawsuit, so, in filing
13 that lawsuit there is, obviously, an obligation on
14 your part to diligently pursue it.
15 And it's unfortunate that we are at a time
16 when there's a motion to compel. I am granting it.
17 It provides -- and a proposed order was provided to
18 me. That order states, "The Court" -- since you're
19 on the phone I'll read it to you. "The Court having
20 reviewed Defendant's Second Motion to Compel
21 Discovery Response for the defendant's second set of
22 requests for discovery filed on August 13th, good
23 cause appearing it is hereby ordered Plaintiff shall
24 have to and including" -- now, this said "Tuesday

1 August 18th," and I am going to change that to
2 "Wednesday, August 19th," since we are having this
3 hearing today. I'm going to give you two days to
4 produce the supplemental responses.
5 I do want to make clear to you that the
6 Court will entertain awards of fees and costs in
7 this case because, unfortunately, due to the history
8 it appears to me that many good-faith attempts were
9 made to get responses and including -- I'm not sure
10 that I've ever read in a motion that "we regret to
11 file this motion," and so I don't think it was the
12 defendant's first choice to go down this road, but,
13 nonetheless, it does appear that it was a course of
14 last resort.
15 So, I'm telling you in the -- I believe
16 they requested fees and costs with regard to the
17 Second Motion to Compel Discovery Responses. They
18 did not provide an affidavit that included fees and
19 costs and I will leave it up to the defendants as to
20 whether or not they want to make a motion on fees
21 and costs. I think, certainly, my interpretation
22 was simply you want the discovery and that that was
23 at the forefront, and if you supplement, the Court
24 will consider that and, actually, Mr. Ayres will

1 consider it first. So I have signed this order.
2 I do want to indicate to all parties going
3 forward it's a preference of this Court that when
4 you do provide -- and I welcome proposed orders from
5 both sides at any and all times. But that you have
6 a cover sheet that says "Proposed order" but then
7 you have the actual sheet that says "Order" behind
8 it.
9 So, I think we've completed -- I know this
10 is somewhat short and my reading and preparation and
11 your preparation was longer, so I don't want to
12 foreclose any other matters you'd like to discuss
13 with the Court today.
14 MR. IRVINE: Well, your Honor, on the order
15 that you just referred to, we have several important
16 depositions coming up kind of back to back to back.
17 We have one Thursday of Mr. Wooley, Friday of Mr.
18 Willard and then we go down to San Jose for another
19 deposition Tuesday of next week.
20 So, would it be possible for us, in order
21 for us to more adequately prepare for the
22 depositions, to have that be at least Wednesday by
23 noon or so so that we could have the --
24 THE COURT: That's what it is.

1 MR. IRVINE: Okay. Wonderful. And then I
2 understand your Honor's ruling that things will flow
3 through Mr. Ayres now. I'm comfortable with that.
4 I appreciate that.
5 But while we're here, I have another motion
6 to compel unfiled sitting in front of me and I don't
7 want to file it. I just want, again, to get the
8 discovery. We have a second set of written
9 discovery that's out. The responses -- and that was
10 a full request for admissions, interrogatories,
11 requests for production to each of the plaintiffs,
12 so there's six documents.
13 THE COURT: When did you serve it?
14 MR. IRVINE: I'm not sure when the service
15 date was. I know that it was due on August 6th,
16 the responses were, and no responses were filed on
17 -- served on us August 6th.
18 We talked to Mr. Moquin several times about
19 that and he promised responses. We did get one
20 response to a request for admission on Friday and
21 one response to an interrogatory on Friday, but the
22 other four documents are outstanding.
23 I really don't want to file another motion
24 or trouble you with another motion. I just want the

1 discovery. We really -- this is carefully crafted
2 stuff. You know, they're asking for damages related
3 to tax liabilities. We don't have the tax returns
4 that we can ask the witnesses about. This is pretty
5 basic stuff that we really feel should have been
6 produced pursuant to 16.1, but we're trying to get
7 it now so we don't have to take depositions twice or
8 hold them open, all that stuff that we like to
9 avoid.
10 So, I'm not trying to short-circuit any
11 argument on a motion to compel. But it's not like
12 we're fighting about whether this will be produced,
13 but it just hasn't come our way. We haven't got it
14 yet.
15 THE COURT: I can't rule on something
16 that's not been submitted --
17 MR. IRVINE: I understand.
18 THE COURT: -- without the other side
19 having adequate notice. However, I will issue a
20 general admonishment that the delays have to stop
21 and that sanctions will be considered going forward.
22 And Commissioner Ayres is aware that this is -- the
23 delays in this case have been extraordinary and they
24 are reaching potentially prejudicial.

1 And I would hope that the -- I'm
2 admonishing the plaintiff that there are no more
3 excuses for delays, that full and complete discovery
4 needs to be responded to and provided. And it has
5 been with my predecessor and also it is my position
6 that, if you do not produce it, you can't use it.
7 So, the risk is that, if you have a claim
8 on which you may be basing information, for example,
9 tax returns, you don't produce it, you're not going
10 to be able to use it at trial to support your
11 claims.
12 So, I am providing the plaintiff with an
13 admonishment that any recommendations regarding --
14 that Commissioner Ayres may make regarding
15 sanctions, the Court will consider. Just produce
16 the documents and produce adequate responses or
17 there will be consequences.
18 I just don't feel comfortable entering
19 anything on something that hasn't been filed with
20 the court. And I do want to indicate that to you as
21 well, Mr. Moquin, and I do want to -- that reminded
22 me of something I wanted to address.
23 Mr. Moquin did contact my assistant and we
24 were following up on whether there was any

1 oppositions filed. And he wanted to file --
2 basically, send me an email addressing the points in
3 the motion and my assistant indicated that was just
4 not proper and that I would not consider it. But I
5 thought it was a channel for ex parte and it was
6 unfair, so I want to tell everyone on the record
7 that.
8 MR. IRVINE: Thank you, your Honor.
9 MR. O'MARA: Your Honor, just as a
10 suggestion, we're here and we have Mr. Moquin on the
11 phone and we have Commissioner Ayres that will be
12 able to help us. I understand you're busy and
13 you're going to pass this off to Commissioner Ayres,
14 who we all know is highly capable of helping us in
15 all avenues of this discovery -- and maybe we should
16 have even tried to contact him a little bit before
17 today, so we're happy that's going to happen.
18 But why don't we just keep this hearing
19 going with Mr. Ayres and we can kind of hash out
20 this issue that Mr. Irvine has brought in as to when
21 these -- I know they're frustrated and I know that
22 there's been some problems upon Mr. Moquin with
23 having to move and things of that nature and,
24 hopefully, we can get back on track.

1 If we can maybe have ten minutes of
2 Commissioner Ayres' time, we may be able to
3 alleviate our concerns on a formal or informal basis
4 with everybody here.
5 THE COURT: So, I think that's a very great
6 proposal. Thank you.
7 So, what I will do is I'm going to close
8 the hearing that's before the court. And I do know
9 that -- because I contacted Mr. Ayres last week --
10 that he has reviewed a lot of materials so he's
11 prepared. I don't want to put him on the spot, but
12 I'm sure we can print off anything else that he
13 needs. This portion has been reported, so if you
14 don't need the other portion, we can terminate the
15 court reporting.
16 From my perspective I will be in recess and
17 you can commence. I'll go ahead and leave these
18 documents up here, Commissioner, in case you want
19 them. You're welcome to sit at the table or at the
20 bench, whatever you prefer. And the order is here
21 and I will hand it to my clerk to file.
22 (Whereupon, proceedings were
23 concluded at 11:27 a.m.)
24 -o0o-

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

I, CHRISTINA MARIE AMUNDSON, a Certified Court Reporter in and for the states of Nevada and California, do hereby certify:

That I was personally present for the purpose of acting as Certified Court Reporter in the matter entitled herein;

That said transcript which appears hereinbefore was taken in verbatim stenotype notes by me and thereafter transcribed into typewriting as herein appears to the best of my knowledge, skill, and ability and is a true record thereof.

DATED: At Reno, Nevada, this 28th day of May 2019.

/S/Christina Marie Amundson, CCR #641

Christina Marie Amundson, CCR #641

-o0o-

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7 IN AND FOR THE COUNTY OF WASHOE

8 HONORABLE LYNNE K. SIMONS, DISTRICT JUDGE

9 -oOo-

10
LARRY J. WILLARD, et al., Case No. CV14-01712
11
Plaintiffs, Dept. 6
12
vs.
13
BERRY-HINCKLEY, et al.,
14
Defendants.
15
_____/
16

17 TRANSCRIPT OF PROCEEDINGS

18 HEARING ON MOTION FOR PARTIAL SUMMARY JUDGMENT

19 January 10, 2017

20 Reno, Nevada

21

22

23

24 REPORTED BY: CONSTANCE S. EISENBERG, CCR #142, RMR, CRR

25 Job No. 364978

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1 TUESDAY, JANUARY 10, 2017, RENO, NEVADA, 9:41 A.M.
2 -oOo-
3 THE COURT: This is the time set for oral arguments on
4 Defendants' motion for partial summary judgment in case number
5 CV14-01712, Willard, et al., versus Berry-Hinckley Industries,
6 et al.
7 Please state your appearances.
8 MR. IRVINE: Brian Irvine on behalf of defendants, and
9 with me is Anjali Webster.
10 MR. MOQUIN: Good morning, Your Honor. Brian Moquin.
11 We have the plaintiffs with cocounsel, David O'Mara. And
12 plaintiffs Larry Willard and Ed Wooley are also present.
13 THE COURT: Good morning.
14 Counsel, I have read everything, and I'm going to allow
15 you to go ahead and make your arguments.
16 I do have some specific points that I want to address,
17 but I don't want to foreclose whatever you would like to argue
18 because we have the time set aside.
19 So you may proceed.
20 MR. IRVINE: Thank you, Your Honor. We appreciate you
21 scheduling time for us to hear this motion today. And, obviously,
22 jump in and ask me whatever questions you want. I'm very flexible
23 in how I can present this, so it won't bother me.
24 Your Honor, we filed this motion for partial summary
25 judgment for a couple of purposes.

1 The most important reason is, we want to focus the
2 remaining issues in this case to allow us to streamline our
3 presentation to Your Honor in what we anticipate will be future
4 motions for summary judgment and trial in this case.
5 We want to make sure also -- second reason is that the
6 plaintiffs, if they prevail in this case, get what they contracted
7 for and nothing else, because a reading of the operative pleading,
8 the first amended complaint in this case, shows that the
9 plaintiffs are seeking unforeseeable, remote and overreaching
10 damages that they are not entitled to as a matter of settled
11 Nevada law, specifically, well beyond the more than $20 million in
12 cumulative damages for future rent sought by the plaintiffs.
13 The plaintiffs are also seeking multimillions of dollars
14 in damages for purported losses that don't result directly from
15 any breach by the defendants and which are not foreseeable to the
16 parties at the time the leases were executed.
17 Specifically, looking at the first verified amended
18 complaint -- and, Your Honor, I'll be referring to two sets of
19 plaintiffs here today.
20 We've got the Willard plaintiffs, which are Mr. Willard
21 and his company, Overland, and the Wooley plaintiffs, which are
22 Mr. Wooley and his wife and an entity there as well.
23 So with respect to the Willard plaintiffs, if you look
24 at the first amended complaint, we've got the rent damages they
25 are seeking in paragraph 14.

1 And then at paragraph 15, we've got what I'll refer to
2 as the short sale damages, which Mr. Willard is claiming as a
3 result of being forced to sell the property located at Longley and
4 South Virginia Streets following a threatened foreclosure by the
5 lender.
6 Specifically, they are seeking about 4.4, $4 million in
7 earnest money that the Willard plaintiffs claim they invested in
8 that property.
9 They are also claiming at least $3 million in tax
10 consequences and $550,000, roughly, in closing costs. And those
11 are all in paragraph 15 of the first amended complaint.
12 THE COURT: But the amounts really don't matter,
13 correct? I mean, it's the principal that matters.
14 MR. IRVINE: That's correct, Your Honor. I'm just
15 trying to be specific as to what we're going to ask for. But you
16 are right, the amounts don't matter.
17 So I'll call those the closing -- excuse me, the short
18 sale damages for the Willard plaintiffs.
19 The other category of damages that the Willard
20 plaintiffs are seeking are what I'll call the attorney's fees
21 damages.
22 And these are damages that the Willard plaintiffs are
23 seeking for two purposes.
24 Firstly, as a result of the threatened foreclosure
25 proceedings by their lender, Mr. Willard voluntarily filed for

1 Chapter 11 protection down in Northern California.
2 He later dismissed that bankruptcy voluntarily after he
3 was unable to, apparently, renegotiate with the bank. But they
4 are seeking all their fees and costs associated with that
5 bankruptcy filing, which was voluntarily dismissed.
6 They are also seeking fees as damages here, not as
7 attorney's fees as a prevailing party in this case, but as
8 damages, the fees and costs that they incurred filing their
9 original complaint in state court in Northern California.
10 That case was also dismissed by the Court. And we've
11 got some exhibits in there that show that the case was pretty
12 wildly overreaching with respect to not the only damages that were
13 sought, but the parties that were named as defendants.
14 So I'll call those the attorney's fees damages.
15 Those are actually common to both the Willard and Wooley
16 plaintiffs with respect to the California state court action. The
17 bankruptcy court piece is unique to Mr. Willard.
18 Then with respect to Mr. Wooley, the other category of
19 damages I'll be discussing today are the damages that they claim
20 they incurred as a result of having to sell the Baring Boulevard
21 property in Sparks, because, allegedly, the Baring Boulevard
22 property and the Highway 50 property, which is actually at issue
23 in this case, were cross-collateralized on the loan, meaning that
24 if they defaulted under one, both were security for the note.
25 And so Mr. Wooley has indicated that he was forced to

1 sell the Baring Boulevard property in order to cure his default on
2 the Highway 50 loan and lose -- and avoid losing that property.
3 He's claiming that as a damage in this case, even though
4 the Baring Boulevard property was not operated by my client at the
5 time he sold it.
6 We -- as we set forth in our motion, we believe that all
7 of these damages are precluded under Nevada law on consequential
8 damages.
9 You have to look to when the contracts were formed to
10 determine whether the damages were foreseeable as a matter of law.
11 And you also have to look as to whether plaintiffs actually
12 incurred some of these damages.
13 As we briefed this, some of the short sale damages that
14 the Willard plaintiffs are claiming, they have never paid those.
15 They have never written a check, never actually been financially
16 harmed.
17 And we can get to that, but that's another reason for
18 this Court deciding that those damages are inappropriate.
19 THE COURT: Is there dispute as to whether they were
20 paid or not?
21 MR. IRVINE: I think there may be as to the closing
22 costs. I think the plaintiffs have certainly conceded that they
23 never paid any taxes as a result of forgiven debt income from the
24 short sale.
25 They never paid those taxes. They are claiming an

1 additional type of damage out of that now.
2 But it's very clear under Nevada law -- and I'm citing
3 to the Hilton Hotels case, and I'll quote. "The damages are not
4 recoverable for loss that the party in breach did not have reason
5 to foresee as a probable result of the breach when the contract
6 was made."
7 And the Hilton case cites with approval, the restatement
8 second of contracts at Section 351, which further defines
9 "foreseeability."
10 It says "Damages are not recoverable for loss that the
11 party in breach did not have reason to foresee as a probable
12 result of the breach when the contract was made."
13 It says, number two, "Loss may be foreseeable as a
14 probable result of a breach because it follows from the breach, A,
15 in the ordinary course of events; or B, as a result of special
16 circumstances beyond the ordinary course of events that the party
17 in breach had reason to know."
18 THE COURT: But doesn't the Hilton case really cut both
19 ways for you, because the Court there found that the trial court
20 erred by not submitting a third claim -- that was the loss of
21 profits claim -- to the jury?
22 MR. IRVINE: Well, there is -- foreseeability, to be
23 sure, Your Honor, is usually a question of fact. But here, we
24 think that all the discovery that's necessary has been completed
25 for this Court to determine these as a matter of law.

1 THE COURT: So you would distinguish that portion of
2 that case?
3 MR. IRVINE: And that's the reason, Your Honor, because
4 that usually is a question of fact.
5 We did all the discovery we wanted to do on this. We
6 filed our motion. Plaintiffs opposed the motion. They didn't do
7 so under Rule 56(f). They haven't taken a position that they need
8 additional facts for this Court to decide.
9 So we would submit that it's appropriate for this Court
10 to decide these issues on foreseeability as a matter of law at
11 this point in the case.
12 THE COURT: And wasn't the supplement unopposed?
13 Essentially, the additional information that you provided the
14 Court, there was no opposition or any additional information
15 provided by plaintiffs?
16 MR. IRVINE: That's correct, Your Honor. There was no
17 response to that.
18 And by way of background, if it wasn't clear, we did
19 that supplement because of some information that came later in the
20 case after the briefing. And so we felt it would be appropriate
21 for Your Honor to see what our expert had to say on the tax
22 damages.
23 And there's been no rebuttal report disclosed to
24 Ms. Salazar either, Your Honor. And the deadline for that has
25 run, just so you know that.

1 THE COURT: Okay.
2 MR. IRVINE: So, getting back to where -- I left off
3 with the restatement.
4 So there are two ways that something can be foreseeable.
5 It can be a damage that flows in the ordinary course of events,
6 something you would expect for this type of breach in all cases,
7 or the breaching party had some special knowledge about the
8 consequences of a possible breach.
9 And neither of those are met for any of the categories
10 of damages we've identified. And the burden of proving
11 foreseeability is on the plaintiff, as it is in all cases for
12 damages.
13 So I would like to start with Mr. Willard's damages and
14 the Willard plaintiffs' damages.
15 Specifically, I'll start with the short sale damages.
16 And we've cited a number of cases about this, which all say the
17 same thing.
18 We've got the Margolese case from the Ninth Circuit. We
19 have the Enak Realty case from the Supreme Court of New York. And
20 we have -- sorry. And we have the Boise joint venture case from
21 the Court of Appeals of Oregon, all which say the same thing,
22 which says, in the case of a lease -- and I'm quoting from
23 Margolese.
24 "In the case of a lessee, the lessee generally does not
25 expect that the lessor will lose his property if the lease is

1 breached. Rather, a lessee would expect to be liable for lost
2 rent and any physical damage to the premises."
3 All three of those cases hold the same thing and we
4 would submit that that's the case here.
5 Otherwise, if the Court were to hold that a commercial
6 lessee assumes, essentially, the debt of the landlord, then he
7 might as well set the lease aside and call the lessee a guarantor,
8 because, really, they are signing up to pay the rent.
9 And in this case, the Willard plaintiffs are asking them
10 not only to be responsible for rent, which is a very high amount,
11 $15 million plus, they are also asking them to, essentially, be
12 responsible for the debt service that the landlord is obligated
13 to.
14 So we would submit that under the first prong of the
15 restatement with respect to the short sale damages, the
16 foreclosure on the property and the following short sale are not
17 something that's foreseeable in the ordinary course when you
18 breach a lease.
19 We would also submit that there was no actual special
20 knowledge that defendants had at the time the parties entered into
21 the contracts that it was probable that Willard would have the
22 property foreclosed upon if the tenants stopped paying rent.
23 And this really goes to the summary judgment standard,
24 Your Honor.
25 We provided an affidavit from Tim Herbst that

1 demonstrated that BHI had no reason to believe at the time the
2 Willard lease was executed that a breach of that lease by BHI
3 could force Willard to sell the property, incur tax consequences,
4 closing costs, or lost earnest money.
5 We shifted the burden to the plaintiffs with the
6 evidence that we produced as part of our motion. And the Willard
7 plaintiffs didn't offer any evidence to contradict what Mr. Herbst
8 said. So summary judgment should be granted under Rule 56(e).
9 In fact, not only did they not contradict it, they
10 agreed with Mr. Herbst.
11 If you look at Mr. Willard's deposition testimony, which
12 we attached as Exhibit 6 to our motion, pages 117 to 119, he
13 testified that he only spoke to Tim Herbst several years after the
14 execution of the Willard lease. The Willard lease was executed in
15 2005.
16 Mr. Willard testified that he had discussions with the
17 Herbst family in 2008 and, again, in 2012 about the problems that
18 it would cause if the Herbst family breached the lease.
19 But those discussions don't impose any special knowledge
20 upon the defendants here, because you have to look at the time the
21 lease was formed.
22 And there's no question, it's undisputed that all of
23 these conversations about the consequences of a breach took place
24 three years, maybe even as much as six or seven years after the
25 lease was executed.

1 And you can't do that. You have to look at
2 foreseeability at the time the lease was signed, because that's
3 the time when the -- when the tenant has the opportunity to say
4 wait a minute, what kind of liability am I going to assume here.
5 That's the chance they have to not assume that
6 liability. After the lease is signed, it's a done deal. So
7 that's when you have to look at foreseeability.
8 The only evidence that plaintiffs provided that the
9 short sale damages might have been foreseeable to the tenants is
10 the subordination agreement that they attached to their opposition
11 as Exhibit 32, which they claim put the tenant on notice that a
12 breach could result in a foreclosure, short sale, default, all
13 that kind of stuff.
14 But if we look at the subordination agreement, that
15 argument really doesn't hold water. The subordination agreement
16 in Exhibit 32 was executed on February 21st, 2006. Again, we're
17 looking at about three months after the lease was executed.
18 And it was recorded on February 24th, 2006.
19 So, again, this was signed by the tenant several months
20 after the lease was executed and has no bearing on foreseeability.
21 In addition, it's important to note that this really
22 would only put the tenant, at best, on notice that there was
23 financing in place. It doesn't say anywhere in here that there
24 would be a foreclosure if the lease was breached.
25 And thirdly, this subordination agreement shows that the

1 lender is an entity known as South Valley National Bank.
2 Well, that's not the loan that the Willard plaintiffs
3 defaulted under, and that's not the loan that was eventually
4 foreclosed upon or was satisfied by a short sale.
5 That's a different loan. That's the loan with a bank
6 called Telesis.
7 And if you look at Exhibit 33, you'll see that that's
8 the case, that a deed of trust was executed in favor of Telesis
9 Community Credit Union in March of 2006.
10 And there's no evidence that this was given to the
11 Herbsts, and it doesn't matter because it's several months after
12 the lease was executed.
13 So the plaintiffs didn't even breach the loan that they
14 provided to the tenants as part of the subordination agreement.
15 The next argument that the plaintiffs used in their
16 opposition was to cite to a number of lease provisions to try to
17 get around the requirement that all damages under Nevada law have
18 to be foreseeable.
19 And this is at the opposition at page 14 where they run
20 through a number of lease provisions and try to say that these
21 lease provisions somehow eliminate the foreseeability requirement
22 or help them meet it.
23 I'm sorry, Your Honor, bear with me one moment.
24 But, Your Honor, I would submit that all the provisions
25 that the plaintiffs cite in this section, which starts at page 14,

1 don't do anything to obviate the foreseeability requirement.
2 The first provision that the plaintiffs cite there is
3 Section 4-D of the lease, which talks about rent.
4 This is a provision that details the tenants' obligation
5 to pay rent. It's entitled "Rental and Monetary Obligations."
6 And sure, it says that the landlord is entitled to rent and the
7 tenant has to pay it.
8 It doesn't say anything about foreclosure. It doesn't
9 say anything about short sales.
10 THE COURT: What about the term "monetary obligations"?
11 MR. IRVINE: Well, sure, yeah. The plaintiffs have
12 monetary -- excuse me. The tenant has monetary obligations to pay
13 rent certainly, and it's a triple net lease. They have the
14 obligations to pay taxes, they have the obligations to pay
15 utilities and everything else that goes with that.
16 But in order for this to get around the foreseeability
17 requirement, it would certainly have to say more than, hey,
18 tenant, you owe money under this lease.
19 It doesn't say anything about damages that were caused
20 by the breach of the loan that the plaintiffs had.
21 Same thing holds true for Section 8 of the lease, which
22 is addressed later there. This is the section on taxes and
23 assessments and also goes with the triple net nature of the lease.
24 And we won't dispute that it certainly says that the
25 tenant has the obligation to pay 100 percent of the taxes on the

1 property during the lease term. We're not disputing that.
2 And if they had a claim that we hadn't paid some kind of
3 tax damage, we wouldn't be here.
4 This provision doesn't say anything, again, about
5 financing. It doesn't say anything about foreclosures. It
6 doesn't say anything at all about the damages that the Willard
7 plaintiffs are seeking here.
8 THE COURT: So your position is although they claim tax
9 consequences, it's simply something different than what is
10 intended by Section 8?
11 MR. IRVINE: Absolutely. Absolutely.
12 This says -- this says that the lessee shall pay -- and
13 I'm paraphrasing a bit here --
14 THE COURT: I have it right here in front of me.
15 MR. IRVINE: -- "all taxes and assessments of every type
16 and nature assessed against or imposed upon the property or the
17 lessee."
18 The taxes that the Willard plaintiffs are seeking are
19 personal income taxes to both Mr. Willard and to Overland. This
20 doesn't address anything or impose any obligation upon the tenant
21 to pay the personal income taxes of any of the plaintiffs.
22 Willard plaintiffs also cite to Section 15 of the lease,
23 which is the indemnification provision. And I wanted to spend a
24 minute on this because I think this is an interesting area.
25 The plaintiffs are claiming that the indemnification

1 provision somehow gives them rights for direct damages from my
2 clients for the breach of the lease.
3 But that's not what indemnity is. Indemnity is there to
4 serve against -- to serve to defend plaintiffs for claims that are
5 brought against -- brought by third parties for actions that my
6 client took or failed to take.
7 The best example might be taxes. For instance, if we
8 didn't pay the property taxes on the property for the first
9 quarter of 2012, and the County came after the plaintiffs, they
10 would have indemnity from us from that claim against
11 Washoe County.
12 That doesn't give them any additional rights against us
13 for direct liability.
14 And that's what both the Boise joint venture case, which
15 we cite on page 11 of our reply, the Pacificorp v. SimplexGrinnell
16 case from Oregon, and the May Department Store case from the
17 Colorado Court of Appeals all say.
18 "Indemnity clauses are intended to protect parties
19 against claims made by third parties and do not apply to actions
20 between the contracting parties directly."
21 Same thing with the May case. I'll quote, "Generally
22 indemnity language is construed to apply only to claims asserted
23 by third parties against the indemnitee, not to claims based upon
24 injuries or damages suffered directly by that party."
25 So, again, this indemnification provision doesn't give

1 them any additional rights under this contract. This would give
2 them the right to a defense from us against claims made by third
3 parties.
4 And I would submit that they are simply misconstruing
5 the effect of the indemnity provision.
6 Moving on, Your Honor, to the tax consequence damages
7 specifically, we -- damages in this case, frankly, have been a bit
8 of a moving target.
9 I read to you from the first amended complaint. We've
10 never received a specific damages computation from any of the
11 plaintiffs in this case under 16.1, as they are required to do,
12 despite multiple demands from us.
13 We've done some written discovery and deposition
14 discovery from them on their damages, specifically about the tax
15 damages. And we were always told that it was income from debt
16 forgiveness.
17 But then in the opposition, we learn for the first time
18 that they never actually paid the debt forgiveness income. We
19 raised that in the brief, and we said, hey, we don't have any
20 evidence you paid this.
21 On page 10 of their opposition, the Willard plaintiffs
22 conceded that they didn't claim any tax damages.
23 They say, since the Willard plaintiffs' respective total
24 debt was greater than their respective total assets, these tax
25 liabilities were not reported as income and are consequently no

1 longer being claimed as damages.
2 But then they change their position for the first time
3 in this opposition and say that the damages they are now seeking
4 are what they call capital loss carryovers that they have been
5 carrying as an asset.
6 Well, we would submit that capital loss carryovers are
7 even more remote and more attenuated than debt forgiveness income.
8 And we certainly, the plaintiffs -- excuse me. The
9 tenant certainly had no reason to know what the accounting
10 circumstances were for the Willard plaintiffs and that they were
11 carrying these capital loss carryovers.
12 And in addition, as we put forth in our supplement,
13 these aren't a dollar-for-dollar damage anyway. These would have
14 to be multiplied by the applicable tax rate to arrive at
15 plaintiffs' actual loss benefit.
16 But it doesn't matter because these are completely
17 unforeseeable, and there's no chance that any of the tenants had
18 special knowledge that would put them on notice that plaintiffs
19 were carrying these on their books and would lose them as the
20 result of a breach of the lease as result of the foreclosure.
21 I mean, there's multiple steps in between that cancel
22 out the foreseeability here.
23 With respect to the earnest money component of the short
24 sale damages, again, none of the lease provisions we've looked at
25 remotely contemplate the tenants having to pay the landlords back

1 for their initial investment in the property. It's categorically
2 unreasonable to require a tenant to be responsible for that.
3 I mean, Your Honor, I would submit that you could look
4 at the hypothetical residential lease where a family rents a
5 property and that's where they are going to live. Someone loses
6 their job and they can't pay the rent on the property they are
7 renting anymore.
8 Then all of a sudden, they are responsible for all the
9 landlord's financing damages? It just doesn't make sense. It's a
10 slippery slope that we can't go down.
11 It's also directly contradicted by the Margolese case.
12 In that case, the plaintiffs were seeking to recover -- and I'm at
13 page 1 here.
14 Plaintiffs/appellants brought the action for lost
15 rentals, cost of tenant improvements and their lost equity in the
16 property, which I submit is the same as lost earnest money.
17 And the Court held that because they are just a general
18 lessee, there's no expectation that the lessor would lose his
19 property if the lease were breached and the lessee's liability is
20 limited to the lost rent and physical damages to the premises.
21 And I would say there's no reason to depart from that
22 here based upon the evidence before the Court.
23 Finally, with respect to the closing costs component of
24 the short sale damages, I won't repeat the foreseeability part of
25 this. Again, it's not anywhere contemplated in the lease.

1 There's no special knowledge about that.
2 This one is interesting because there's no evidence that
3 Willard actually paid any closing costs with respect to that short
4 sale.
5 The closing statement, which the Willard plaintiffs
6 disclosed in discovery and which is attached to our motion as
7 Exhibit 9, simply shows that all of the proceeds from the short
8 sale went to the lender and that the closing costs that were
9 incurred simply went to reduce the amount of money that the lender
10 received, which increased the amount of debt forgiveness that the
11 Willard plaintiffs received.
12 And they are not claiming damages for that debt
13 forgiveness income anymore.
14 So it's not as if Willard wrote a check here. He's not
15 out of pocket for any of these closing costs. Certainly, no
16 evidence to the contrary has been produced. The closing costs
17 only impacted how much Willard lenders would receive in the payoff
18 from that purchase price.
19 I think that's what I have with respect to the short
20 sale damages, Your Honor, if you have any questions on any of
21 that.
22 THE COURT: No. I addressed it with regard to Hilton.
23 I wanted to ask that very question. You can move on to attorney's
24 fees.
25 MR. IRVINE: I'm going to actually do attorney's fees

1 last because that's common to both of the plaintiffs. So I'll
2 skip over to Mr. Wooley's claim for damages on the
3 Baring Boulevard cross-collateralization now.
4 That's a tough word.
5 Again, we're looking at the same law on foreseeability.
6 And the leases in play here, Your Honor, are, if not identical,
7 then 99 percent identical.
8 So the provisions that the plaintiffs have cited in
9 their opposition brief about indemnity and the taxes and the
10 monetary obligations and all of that, I won't repeat those
11 arguments with respect to Baring because they apply to both.
12 But it's clear that the Wooley lease was executed in
13 December of 2005. That's Exhibit 10 to our brief. And it's also
14 clear that when that lease was executed, the Wooley plaintiffs did
15 not own the Baring Boulevard property.
16 The Baring purchase was executed about six months later.
17 That was in, I believe, May of 2006. And I think that's
18 Exhibits 13 and 14 to the opposition brief.
19 Yes, that's -- let's see here. Yes, that's the lease
20 and the guarantee for the Baring Boulevard property, which are
21 both dated later in time.
22 And the deed of trust on that property and the note and
23 the purchase and sale agreement are all attached to the opposition
24 as well.
25 But it's undisputed that the Baring property was not

1 owned at the time of the Highway 50 lease, which is subject to
2 this case, was executed.
3 And it's undisputed that there's no way that the tenants
4 could have known about any cross-collateralization provisions
5 between the two parties when they signed the lease because they
6 didn't own Baring yet, didn't have financing on Baring yet. So
7 there couldn't have been any cross-collateralization for them to
8 be aware of.
9 There's certainly nothing in the lease that references
10 cross-collateralization with another property, certainly nothing
11 in there that says that if you breach the Highway 50 lease, that
12 the Wooley plaintiffs are going to be forced to sell an unrelated
13 property at a loss, which would cause them to incur liabilities.
14 Because foreseeability is measured at the time of
15 entering into the contract, this precludes Wooley from claiming
16 foreseeability as a matter of law.
17 And, Your Honor, I think a little background here would
18 be helpful as well.
19 The first complaint in this case, the Wooley plaintiffs
20 actually sought direct damages for breach of the lease on Baring.
21 And we had to point out to them that we were no longer operating
22 Baring and that it had been sold to Jackson's food stores and that
23 Jackson's was fully performing.
24 It took a few months, but they eventually conceded that
25 position and came up with this new damages model to try to get

1 another $600,000 for the loss on Baring, plus some tax damages.
2 And, again, we submitted the affidavit of Tim Herbst,
3 saying that BHI had no knowledge of any of this
4 cross-collateralization or financing consequences with respect to
5 Highway 50 breach having an effect on Baring. His affidavit is
6 pretty clear.
7 And, again, under Rule 56, the burden shifted to the
8 plaintiff to come up with affirmative evidence, including
9 affidavits contradicting Mr. Herbst. They weren't able to do
10 that.
11 In fact, Mr. Wooley in his deposition admits -- I'm at
12 pages 119 and 120 of his deposition. He admits that he didn't
13 discuss any of that with any of the Herbst family and that they
14 had no reason to know about it.
15 So I would submit for all of those reasons the Baring
16 property damages from the cross-collateralization and the forced
17 sale of that property, none of that was foreseeable as a matter of
18 law.
19 Nothing -- it's not discussed in the lease. It's not a
20 natural consequence of a breach of a lease, and there was no
21 special knowledge that the Herbst parties had that would impose
22 liability on them.
23 With respect to the attorney's fees damages, I'll start
24 with the California action because it's common to both the Willard
25 and Wooley plaintiffs.

1 They are claiming that they had to hire an attorney to
2 file suit against BHI and Herbst in Santa Clara County and
3 incurred $35,000 roughly in attorney's fees.
4 Well, Your Honor, the lease -- both leases, in fact,
5 have a pretty clear venue and choice of law provision that
6 requires lawsuits to be filed here in Nevada, not in California.
7 The California case, as I said before, included a number
8 of parties that were in no way related to this case.
9 We attached a docket sheet, Your Honor, and a motion to
10 dismiss at Exhibits 4 and 5 to our motion respectively. And
11 you'll see, if you look at those, that in that case, they named
12 Jerry Herbst's wife Mary Ann, who had nothing to do with the
13 transaction between these parties; named Timothy Herbst, who,
14 again, had no -- didn't sign a guarantee or anything else.
15 They named Terrible Herbst's, Inc. They named some
16 financial consultants, Mark Berger, Crossroad Solutions Group.
17 They named Union Bank, who is the successor in interest to
18 Santa Barbara Bank.
19 There was significant motion practice over in the
20 California court having to do not only with jurisdiction and
21 venue, but also just that there were no viable claims against any
22 of these parties.
23 The California court eventually dismissed that case and
24 it was brought here.
25 Well, we think that these fees are not recoverable by

1 the plaintiffs in this action as damages for a number of reasons.
2 Firstly, they are not -- they are not special damages.
3 The Christopher Homes case is the most comprehensive case the
4 Nevada Supreme Court has on this issue. That's from 2014.
5 And it clarifies what was, I guess, kind of a mess that
6 we had with the other previous cases, the Horgan case and the
7 Sandy Valley Associates case.
8 But after the Christopher Homes v. Liu case, it's pretty
9 clear that special damages -- attorney's fees can only be
10 recovered as special damages in limited circumstances.
11 The first one is cases concerning title to real
12 property, slander of title actions. You can get attorney's fees
13 as special damages if you are suing to remove a cloud on title.
14 That, obviously, doesn't apply here.
15 Or a party to a contract can seek to recover from a
16 breaching party the fees that arise from the breach that caused
17 the nonbreaching party to accrue attorney's fees in defending
18 against a third party's legal action.
19 This was pretty similar to what I was arguing on the
20 indemnity provision earlier. You can only get attorney's fees as
21 special damages if somebody else sues you and you have to defend
22 that. You can go back to the party you have a contract with and
23 try to get your attorney's fees back from them.
24 And that would be, you know, fairly similar to an
25 indemnification case. The example I used with Washoe County is

1 probably somewhat still good, although they probably wouldn't sue,
2 but it's very similar to an indemnity.
3 And it's simply not one of the circumstances here that
4 the Court contemplated in the Christopher Homes case.
5 Here, we've got plaintiffs making a deliberate choice to
6 go sue in the wrong forum. They sued the wrong defendants, and
7 their case was dismissed. And under the law, those aren't special
8 damages that we have to pay for here.
9 We don't think that they would be recoverable --
10 assuming the plaintiffs someday prevail in this case, we don't
11 think they would be recoverable as a prevailing party under the
12 contract either.
13 We think, frankly, that the California court would be
14 the proper forum to award those damages in the first place, not
15 this court.
16 But because they don't meet the test in
17 Christopher Homes, you don't really have to get there. They are
18 simply not special damages and both plaintiffs should be precluded
19 from seeking them in this case.
20 And then, finally, Your Honor, my last piece is the
21 bankruptcy damages that are unique to the Willard plaintiffs.
22 Again, Mr. Willard filed for personal bankruptcy over in
23 California. He testified specifically that he did that to try to
24 stop the foreclosure and to renegotiate with the bank.
25 That was unsuccessful. The bankruptcy was voluntarily

1 dismissed by Mr. Willard.
2 There's certainly, again, no way that that bankruptcy
3 was somehow foreseeable under the provisions of the Willard lease.
4 My client certainly had no special knowledge of that.
5 Mr. Willard expressly admits that the defendants had no
6 special knowledge of that. At his deposition, Exhibit 6 to the
7 motion at page 115, he says that he never had discussions with BHI
8 or Jerry Herbst about the possibility of filing bankruptcy, should
9 rent on the property stop being paid.
10 So with that, Your Honor, we would submit that these
11 categories of damages, the short sale damages for the Willard
12 plaintiffs, the attorney's fees for the California action for both
13 plaintiffs, the cross-collateralization damages for the Baring
14 property for the Wooley plaintiffs, and the bankruptcy damages for
15 the Willard plaintiffs are all precluded as a matter of law under
16 Nevada law on consequential damages and the requirement that such
17 damages be foreseeable at the time of the execution of the
18 contracts.
19 THE COURT: Counsel, is it sufficient where the lease is
20 signed by one principal, Berry-Hinckley, but your affidavit is
21 signed by the treasurer --
22 MR. IRVINE: Uh-huh.
23 THE COURT: Is that sufficient to establish -- because
24 you shift the burden to the plaintiffs, is that sufficient to
25 establish those facts? They are all based on information and

1 belief?
2 MR. IRVINE: They are, Your Honor. And frankly, that's
3 probably the best we could do. We would submit that we shifted
4 the burden and they didn't come back.
5 Mr. Herbst talked to his father. He investigated it.
6 And as a corporate representative of Berry-Hinckley, who is the
7 lessee under the lease, he said that there was nothing that they
8 knew as a corporation when the lease was executed that would lead
9 them to believe that any of these damages would be a consequence
10 of a breach.
11 THE COURT: And going back to the Margolese case --
12 MR. IRVINE: Yes.
13 THE COURT: -- now, you are arguing that that's
14 factually persuasive, correct, that -- or binding?
15 MR. IRVINE: Well, I don't think it's binding on this
16 Court, no, Your Honor. This is -- it's an unpublished
17 Ninth Circuit disposition for a judge I used to clerk for, which I
18 didn't realize until I read it last night, but Judge Brunetti.
19 But, no, it's not binding on this Court. We certainly
20 aren't taking that position. Frankly, there's not that much
21 law --
22 THE COURT: Right.
23 MR. IRVINE: -- on this type of factual scenario. So we
24 found what we could for you.
25 I did note in that case, it is factually persuasive

1 because that plaintiff -- actually, it's not a plaintiff, it's a
2 defendant and third-party plaintiff, was seeking as part of their
3 damages their lost equity in the property, which is what
4 Mr. Willard and Overland are seeking by way of their lost earnest
5 money claim here.
6 And that was precluded by the Margolese court, so I
7 thought it was factually similar. That's why we cited it.
8 THE COURT: At the end of the day, I mean, you are
9 really taking the position that the damages that are allowable
10 under 20-B, correct, Section 20-B of the lease?
11 MR. IRVINE: 20-B of the lease is the remedies
12 provision, yes.
13 THE COURT: And that they should be restricted to that?
14 MR. IRVINE: Yes, yes. The lease, as they have noted in
15 their opposition papers -- these leases, I should say, because
16 they both have 20-B in common, have broad remedies for the
17 landlord in the case of a breach.
18 THE COURT: But not as broad as they have asserted?
19 MR. IRVINE: No, you still have -- no matter what the
20 contract says, you still have to determine whether the damages
21 that are being sought are foreseeable. That's a fundamental
22 premise.
23 And, you know, we cited law going back to the 1800s in
24 our reply brief on this because that's how far it goes back.
25 And really, unless the lease specifically provides for

1 these type of damages, then you have to do the normal Hilton
2 restatement foreseeability test to see if these damages flow in
3 the ordinary course, number one, or if the tenant had some kind of
4 special knowledge that would put them on notice that the
5 consequences are foreseeable.
6 And neither of those are in play here.
7 In fact, the plaintiffs cited in their opposition, the
8 Gilman case, which is the family law divorce case, which I thought
9 was interesting. I hadn't found that case in my research.
10 But it says at -- I'll give you the Nevada cite -- at
11 page 426, that when parties to a contract foresee a condition
12 which may develop and provide in their contract a remedy for the
13 happening of that condition, the presumption is that the parties
14 intended the prescribed remedy as the sole remedy for that
15 condition.
16 And, Your Honor, I would submit that the parties here
17 did just that with paragraph 20-B. It's a comprehensive remedies
18 provision that allows the plaintiffs a lot of different options to
19 seek recovery against their tenant in the event of a breach.
20 And we would ask that they be held to the four corners
21 of the agreement on that and not the unforeseeable damages that
22 we're addressing here today.
23 THE COURT: All right. Thank you, Counsel.
24 MR. IRVINE: Thank you, Your Honor.
25 THE COURT: Who will be arguing?

1 MR. MOQUIN: Brian Moquin, Your Honor. I apologize, I'm
2 getting over the flu, so I'll try to keep my --
3 THE COURT: Many people have had it recently. If you
4 need water, it's there.
5 MR. MOQUIN: Thank you, Your Honor.
6 I appreciate the opportunity to present argument.
7 First -- and, I guess, going in reverse order might be
8 the simplest.
9 With respect to the last point that was just raised,
10 20-B is not the sole source of remedy provision in the lease.
11 If you look at page 18 of the lease, which in our
12 opposition is Exhibit 2, 2-18, at the bottom, it says "All powers
13 and remedies given by this section to lessor subject to applicable
14 law shall be cumulative and not exclusive of one another or if any
15 other right or remedy or any other powers of remedy is available
16 to lessor under this lease." Okay?
17 So our argument is that although it is true that
18 Section 20-B is quite broad, it is not the exclusive section with
19 respect to remedies. It is the liquidated damages section for
20 sure, but Section 15 also applies.
21 And I think it's a moot point whether or not
22 indemnification, which is Section 15, would apply to first-party
23 claims, because the vast majority in effect now, all of the claims
24 that are flowing under that provision are third party. They are
25 not direct first-party claims.

1 All the other claims, for example, attorney's fees, fall
2 out of 20-B not under indemnification.
3 But the indemnification clause is quite broad. And what
4 it does, and the way that I've structured our opposition, was not
5 to say that Section 4-B and Section 8 provide any kind of
6 remedies, it was to establish definitions of terms that were used
7 later on.
8 But it gives rise to reimbursement for any and all
9 losses caused by, incurred or resulting from, among other things,
10 breach of, default under, or failure to perform any term or
11 provision of this lease by lessee, which is clearly the case here.
12 If we look at the definition of "losses," it, too, is
13 quite comprehensive. That is found on page 32 of Exhibit 2.
14 "Losses" means "any and all claims, suits, liabilities, actions,
15 proceedings, obligations, debts, damages, losses, costs,
16 diminutions in value, fines, penalties, interest, charges, fees,
17 judgments, awards, amounts paid in settlement, and damages of
18 whatever kind or nature that are incurred."
19 I can hardly imagine a more comprehensive list of
20 damages.
21 So just broadly speaking, with respect to this
22 foreseeability issue, our argument is that, in fact, the parties
23 did contract, and the types of damages that we're discussing here
24 were contemplated because they are expressly provided for in terms
25 of the damages that are recoverable.

1 THE COURT: So your position is that this definition of
2 "losses" is so broad that it encompasses these additional damages,
3 and that, actually, because it does, you do not have to apply a
4 foreseeability test?
5 MR. MOQUIN: Well, that's not 100 percent accurate, but
6 it's close.
7 The term "any and all" has been held to apply to
8 virtually everything except for negligence of the person that's
9 being indemnified. And the Nevada law is pretty clear that that
10 is not the case.
11 But with respect to everything else, the Court is
12 obliged to -- there's no ambiguity in terms of the language of the
13 indemnification clause to read the plain language of the
14 indemnification clause entry as it is, as it is written.
15 THE COURT: So if you look at these damages as a whole,
16 and when I was analyzing the moving papers and the opposition and
17 reply, and if you go one by one, does the fact that there really
18 was a volitional act on the part of the plaintiff, in any way --
19 for instance, tax consequences resulting from cancelled mortgage
20 debt.
21 For instance, the fact that there's -- this language
22 doesn't exactly apply in a contract, but the concept does, and
23 that is this, that if the plaintiff took an act, for instance,
24 declaring bankruptcy --
25 MR. MOQUIN: Uh-huh.

1 THE COURT: -- does that obviate any kind of obligation
2 for those damages, because, in other words, they are kind of
3 creating their damages.
4 MR. MOQUIN: The only thing I can think that would fit
5 into that would be attorney's fees and bankruptcy filing fees. Is
6 that what you are referring to?
7 THE COURT: Well, the point is that they didn't have to
8 declare bankruptcy necessarily.
9 MR. MOQUIN: Okay. Well, this --
10 THE COURT: So if he took an act, isn't he really
11 creating damages?
12 MR. MOQUIN: No, he was trying to mitigate.
13 THE COURT: Okay.
14 MR. MOQUIN: And if you look at 20-B page 2, Exhibit 2,
15 page 18, the numbers here are strange, but 20-B Section 5, lower
16 case B in the middle of page 18 states, under the liquidated
17 damages provision that the lessors would be able to recover from
18 lessee "all costs paid or incurred by lessor as a result of such
19 breach, regardless of whether or not legal proceedings are
20 actually commenced."
21 Now, the definition of "costs" is important. And that,
22 again, is in the appendix to the lease, which is on page 30 --
23 THE COURT: -6.
24 MR. MOQUIN: 36.
25 Well, actually, "Cost" is defined on page 29.

1 THE COURT: Great.
2 MR. MOQUIN: Means "All reasonable costs and expenses
3 incurred by a person, including without limitation" -- "without
4 limitation, reasonable attorney's fees and expenses, court costs,
5 expert witness fees," and so forth.
6 THE COURT: And you don't think that that's restricted
7 to the relationship -- the contracting parties' relationship, but
8 that it encompasses any and all fees and expenses that could be
9 paid to any lawyer for --
10 MR. MOQUIN: Arising out of the breach.
11 And I don't think there's any disputing that the sole
12 reason that my predecessor, Mr. Goldblatt, was engaged was because
13 of this breach.
14 And he chose to file in Santa Clara County, California.
15 That was a year before I came on board.
16 With respect to the disposition of that matter, what had
17 happened is Mr. Goldblatt was in a serious auto accident, was in
18 ICU at Stanford for several weeks, and I was approached and I took
19 on the case.
20 It was too late for me to file any kind of opposition or
21 reply to their motion to dismiss in the discovery matter.
22 So I reached out to Mr. Desmond, who was the lead
23 counsel for defendants, and, basically, said that I thought that I
24 could dramatically simplify the matter, getting rid of a number of
25 parties, and simplifying the claims, if I was given some time to

1 come up to speed and file the amended complaint.
2 We entered into a stipulation, which was filed with the
3 Court prior to the hearing, in which they agreed to withdraw their
4 motion to dismiss. And that never happened.
5 So nobody showed up for this hearing. The Court granted
6 the motion, right? But that was not the way it was supposed to
7 happen.
8 Subsequent to that, Mr. Desmond and I entered into
9 conversations, and his argument was that the venue was improper.
10 Whether -- I mean, that's a debatable issue. That was
11 never decided by the Court on the merits, but I agreed to transfer
12 the case to Nevada.
13 So with respect to the damages incurred by the
14 plaintiffs with respect to, you know, the attorney fees for the
15 California case, it is not -- simply not the case that this
16 dismissal was proper.
17 It was in direct violation of the stipulated filing,
18 stipulated agreement between the parties.
19 THE COURT: And you said that stipulation was filed?
20 MR. MOQUIN: Yes. In fact, it's stamped. The copy that
21 I have attached is file stamped.
22 And I received -- I mean, I reached out -- just to make
23 sure everything had happened as requested, I reached out to
24 Mr. Desmond's secretary the Friday before the Tuesday of the
25 hearing. And she confirmed that the hearings had been taken off

1 calendar, which was not the case.
2 So I don't have any idea why that happened, but it --
3 the declaration of Mr. Desmond is not accurate, to put it mildly.
4 So I think that the question here -- and I appreciate
5 the point that you are making. I think that the question is
6 whether or not the fees that were incurred were reasonable, that
7 is, is there a natural relationship, a reasonable relationship
8 between the fees that were incurred and the breach; that is, are
9 they -- are they a proximate result of the breach.
10 With respect to Mr. Willard having to declare
11 bankruptcy, in fact, this is another point that is easily refuted.
12 In their reply, defendants claim that they had no
13 knowledge of the terms of the note that Mr. Willard had taken out
14 for approximately $13 million when he purchased the Virginia
15 property.
16 If you look at Exhibit 32, page 2, Section 2.2,
17 Defendants expressly consent to and approve all provisions of the
18 note and deed of trust that was entered into.
19 Now, that was not attached to this particular filing or
20 recorded document, but they have averred here that they looked at
21 and saw the terms.
22 So in terms of foreseeability, when you have an
23 87,000 -- when you have an $18 million property with a $13 million
24 mortgage in place, $87,000 a month in mortgage costs, and without
25 warning, without notice, your income suddenly goes to zero, I

1 think it is a natural result that you are going to potentially
2 have to seek bankruptcy protection.
3 I think that naturally flows. And that is a third-party
4 cost. It's a third-party cost, which is, in fact, also
5 recoverable under Section 20-B Subsection 5.
6 And that, of course, also holds with respect to the
7 attorney's fees incurred by the Wooley plaintiffs.
8 THE COURT: So with regard to this and the assertion
9 that there's no evidence that some of the claimed damages have
10 been paid, did they -- you keep using the term "incurred." Did
11 they actually pay the attorney's fees?
12 MR. MOQUIN: Yes.
13 THE COURT: And with regard to the closing costs?
14 MR. MOQUIN: We -- upon further scrutiny of the
15 settlement agreement with the receiver for Telesis, it turns out
16 that Mr. Willard would not have been entitled to any additional
17 fees.
18 And so we are, basically, withdrawing.
19 THE COURT: On the closing costs?
20 MR. MOQUIN: That's correct.
21 THE COURT: Okay.
22 MR. MOQUIN: On the closing costs and the costs -- all
23 costs associated with the short sale.
24 The only thing that remains with respect to the short
25 sale, basically, the diminution in value, which is only tacitly

1 related to that because the diminution of value is not as great as
2 if you were to use the value of the short sale. Okay?
3 But that was not a point that was brought up in the
4 motion for summary judgment, so I don't think that's appropriate
5 to argue it here.
6 But with respect to earnest money, we're not seeking
7 that. With respect to --
8 THE COURT: That was the 4.4 million?
9 MR. MOQUIN: Yes.
10 With respect to the tax consequences, again, upon
11 further research, I do not believe that -- because it is, in fact,
12 the case that Mr. Willard did not have to pay them, they are not
13 recoverable.
14 However, the loss of the net operating loss
15 carryforward --
16 THE COURT: So this is a different damage model than is
17 actually the subject of the motion?
18 So the motion with regard to Mr. Willard, or the Willard
19 plaintiffs, more accurately, the short sale damages, one, you are
20 withdrawing any claim for earnest money invested in the property;
21 two, withdrawing any claim for tax consequences resulting from the
22 cancelled mortgage debt --
23 MR. MOQUIN: Well --
24 THE COURT: -- and three, withdrawing any closing costs.
25 And instead, you may be making a claim for some sort of diminution

1 in value.
2 And the next point is?
3 MR. MOQUIN: Diminution of value is actually part of the
4 original amended complaint claim.
5 However, with respect to tax consequences -- and this is
6 where it gets a little bit convoluted because it's not direct
7 consequence -- it's not the direct tax liabilities that we're
8 seeking.
9 It is the loss of the tax benefit in terms of the net
10 operating loss and the loss carryforward.
11 THE COURT: I understand.
12 MR. MOQUIN: Okay. Now, with respect to that, I do
13 agree that that needs to be -- there is not a dollar-for-dollar
14 correspondence in terms of damages, but --
15 THE COURT: And one of the questions that I was going to
16 pose to Mr. Irvine was that very thing.
17 You can assert that simply because -- if it's a
18 dollar-to-dollar type of damage, do all damages have to be dollar
19 for dollar, because it seems to me that there are damages that are
20 collectible in some cases that are not dollar for dollar. Do you
21 agree?
22 MR. MOQUIN: I do. I do.
23 And I think that, although it is not the case that --
24 well, let me first explain that the reason that these damages were
25 not part of the complaint is because this all happened subsequent

1 to the complaint being filed, the amended complaint being filed.
2 Mr. Irvine made a statement claiming that we had never
3 submitted a statement of damages --
4 THE COURT: Under 16.1.
5 MR. MOQUIN: -- per 16.1, that is -- I dispute that.
6 Now, we will be supplementing, but --
7 THE COURT: Do you have evidence of that? Have you --
8 do you have a copy of the 16.1 information that you provided, or
9 are you saying you are going to amend it?
10 MR. MOQUIN: No, I'm saying that we provided, and in
11 discovery responses, went to great lengths to explain the basis.
12 Now, whether or not -- I'll have to search. Whether or
13 not that was in the form of a formal 16.1 response, I can't answer
14 without looking at my data entries here, but they were provided
15 with a calculation of damages.
16 THE COURT: And that calculation of damages, did it
17 include the amounts that you are advising the Court today that are
18 withdrawn?
19 MR. MOQUIN: Part. In part. In part, it did.
20 THE COURT: So as we sit here today, have you provided
21 an up-to-date and clear picture of plaintiffs' damage claims?
22 MR. MOQUIN: I was intending to before I came down with
23 the flu and that knocked me out, but --
24 THE COURT: So no?
25 MR. MOQUIN: Not 100 percent.

1 With respect to the Wooleys, they do have --
2 THE COURT: Okay.
3 MR. MOQUIN: They do. But with respect to Willard, they
4 do not.
5 THE COURT: Okay. All right.
6 So it's a work in process?
7 MR. MOQUIN: I thought that it best to wait for the
8 decision with respect to the issues at hand here.
9 THE COURT: Okay. But as to the Wooley plaintiffs, this
10 has been provided to them previously?
11 MR. MOQUIN: Yes.
12 THE COURT: Now, do you want to -- are you -- was there
13 anything with regard to the Willard plaintiffs that -- I
14 interrupted your flow.
15 And is there anything else you want to apprise the Court
16 of?
17 MR. MOQUIN: Yes. With respect to this loss
18 carryforward, I was saying that that is, you know, a tax issue,
19 but it is not actual taxes.
20 And the way it works is that under the IRS code, if --
21 if you have debt forgiveness, that is considered taxable income.
22 And to minimize that, what you need to do is go through and apply
23 what are called tax attributes, one of which is any loss
24 carryforward that you have.
25 So in order for him to avoid having to pay approximately

1 $6 million in taxes, pretty much the only way that he can minimize
2 or get rid of that was by applying these loss carryforwards.
3 So the debt forgiveness was a direct result of the need
4 for -- I mean, of the foreclosure, which was a direct result of
5 the breach.
6 In terms of the loss carryforward damages, there was a
7 statement made at the very end of the report that was submitted
8 that because Mr. Willard didn't have to pay any taxes, he incurred
9 no damages, which doesn't --
10 THE COURT: And the report you are referring to is their
11 expert?
12 MR. MOQUIN: The supplement, yes. It was tendered after
13 their response a couple of weeks ago.
14 THE COURT: Okay.
15 MR. MOQUIN: And the best analogy I can come up with to
16 show that that just doesn't make any sense is if I -- let's say
17 that somebody runs into my car and does $10,000 worth of damage.
18 And I take my car to my friend at a garage, who happens to owe me
19 $10,000, and he says, in return for you waiving what I owe, I'll
20 fix your car, and he does.
21 For the person that hit my car, then, to say that I
22 incurred no expenses, it's just not -- it's not correct because
23 the amount of money that my mechanic friend owed to me is no
24 longer there.
25 The same is true of this loss carryforward, which is no

1 longer available with respect, actually, to both of the plaintiffs
2 because they had to be used to minimize the tax liabilities
3 imposed by virtue of the breach.
4 So to that extent, although we're not seeking -- well,
5 in terms of Willard plaintiffs, they are not seeking reimbursement
6 for direct tax consequences.
7 THE COURT: I understand, but it's because they lost the
8 use of this, essentially.
9 MR. MOQUIN: Exactly. And at law, that is considered an
10 asset.
11 THE COURT: Uh-huh. Okay. All right. So with regard
12 to -- you've talked about the attorney's fees. Did you want to
13 add anything else to that with regard to the Willard claims?
14 Because then I would like you to address the Wooley plaintiffs,
15 Baring Boulevard property issues -- or, not "issues," claims.
16 MR. MOQUIN: Yeah, I would just point the Court to the
17 section in my opposition in which -- in which I went through and
18 talked about indemnification. Okay?
19 But other than that, I think we're done with respect to
20 Mr. Willard.
21 THE COURT: Okay.
22 MR. MOQUIN: In terms of the Wooleys, again, the
23 indemnification clause comes into play here because the bank
24 foreclosing on both of these properties, were it not the case that
25 both the Baring and the Highway 50 property happened to have loans

1 issued by the same bank, we wouldn't have this
2 cross-collateralization issue.
3 But, in fact, they were, both loans. And that's the
4 issue here.
5 So because of the breach, Mr. Wooley was no longer able
6 to support the mortgages on both. And because the Highway 50
7 property was not income producing, he really had no choice but to
8 sell one of the properties, and the only property that was viable
9 to sell was the Baring property.
10 And he sold that, again, out of necessity, at a loss.
11 The statement that was made in reply that Mr. Wooley somehow
12 pocketed $870,000 in closing ignores the fact that he put up over
13 a million in earnest money.
14 So there was actually a loss there.
15 THE COURT: But doesn't that actually -- didn't he
16 sustain some benefit from that loss --
17 MR. MOQUIN: Not at all.
18 THE COURT: -- tax wise?
19 MR. MOQUIN: No. I mean -- what do you mean? In what
20 sense?
21 THE COURT: Well, obviously, there are situations where
22 a loss, not dollar for dollar -- that is a contrary argument to
23 the Willards -- but there's some benefit to the fact that they
24 sustained a loss?
25 MR. MOQUIN: No, I don't believe there was any. And in

1 fact, there was detriment because what that did was terminate his
2 1031 exchange, which made him liable for capital gains.
3 THE COURT: Right.
4 MR. MOQUIN: Right?
5 THE COURT: Okay.
6 MR. MOQUIN: So I do not believe there's any benefit in
7 any way to him having -- have to sell this at loss.
8 THE COURT: Okay. Thank you for answering that.
9 MR. MOQUIN: Sure.
10 THE COURT: Go ahead.
11 MR. MOQUIN: So, again, in terms of this
12 cross-collateralization, I think that the issue for the Court to
13 really decide here is one of proximate cause.
14 That is, given the fact that we are somewhat removed
15 from the actual breach -- property that was breached, are the
16 damages that were incurred -- and I don't think there's any
17 disputing that there were damages incurred by virtue of the sale
18 of the Baring property. Are they recoverable?
19 And I think if we look to the indemnification clause and
20 the definition of "losses," I think the answer is that this was,
21 in fact, foreseeable. It was foreseen and it was bargained for.
22 Plaintiffs, to my understanding, did not write this
23 lease. And, in fact, this lease and minor variations of it were
24 used by -- I believe it was upwards of 30 different landlords that
25 Berry-Hinckley had leased properties from.

1 So, you know, the lease terms are there because
2 Berry-Hinckley put them in, and they should be held to them.
3 I think that it's clear -- you know, it's certainly the
4 case that you do not have to explicitly spell out every
5 conceivable type of damage in order for it to be recoverable. And
6 the phrase "any and all damages," coupled with this list, I think,
7 is dispositive of the issue.
8 THE COURT: All right. Thank you.
9 With regard to the Wooley plaintiffs now, you have
10 already discussed the attorney's fees. So are there -- I'm
11 assuming it's the same -- similar to the Willard claims?
12 MR. MOQUIN: Yes, it's identical.
13 THE COURT: Right. Is there anything else you would
14 like to address in opposition to the motion?
15 I think your client may want to talk with you for a
16 moment. So why don't we take a brief break.
17 MR. MOQUIN: Yeah, I would appreciate if I could go --
18 THE COURT: And I'll be back on the bench at 11:05.
19 (A recess was taken.)
20 THE COURT: You may continue, Counsel.
21 MR. MOQUIN: Your Honor, I just have three small points,
22 and then I'm done.
23 The first is that, in fact, the Wooleys did pay all the
24 taxes that were alleged.
25 THE COURT: Okay. The Wooleys or the Willards?

1 MR. MOQUIN: The Wooleys, yes. And those are damages
2 that are being sought.
3 THE COURT: And that is due to the 600,000 in damages
4 incurred when the Wooleys had to sell the Baring property?
5 MR. MOQUIN: That's correct.
6 And I think it's important -- there are two aspects to
7 these leases which, I think, are important to note.
8 The partial nature of these leases, the fact that this
9 was, as Mr. Irvine pointed out, a triple net lease, the landlords
10 expected these things to, basically, cause them no problems; that
11 is, they had triple net. They were not responsible for
12 maintenance, taxes, property taxes, anything.
13 And in entering into these leases, there was an
14 expectation, I think, on both sides that this was going to be a
15 pretty turnkey situation, that the landlords own the properties,
16 they lease them to the defendants, and wouldn't have to worry
17 about them.
18 In fact, in March 2007 -- oh, there's another point.
19 The subrogation agreement predates by over a year the amended
20 lease. So the claim that it -- that this knowledge of the Willard
21 lease -- I mean, the Willard loan was not prior to the lease
22 being --
23 THE COURT: So it postdated the original lease, but
24 predated the amended lease?
25 MR. MOQUIN: Correct. Correct. And that is when

1 Mr. Herbst came into the picture as guarantor.
2 He came into it -- bought Berry-Hinckley in 2007,
3 renegotiated all the contracts, all the leases with all the
4 landlords that Berry-Hinckley had been renting from, and demanded
5 that -- well, actually, what he did was, he agreed to personally
6 guarantee these leases in return for certain changes being made to
7 the leases.
8 The most important one, I think, was that the
9 modification of the first amended leases gave him the right to
10 subrogate his leasehold without first obtaining the permission of
11 the landlords, which he did in obtaining a $74 million line of
12 credit from First National Bank of Nevada, which was secured by
13 his leasehold interest in all of these properties, including the
14 plaintiffs' properties.
15 And the only reason he was able to do that without
16 seeking the permission both of the plaintiffs and the plaintiffs'
17 lenders is because of this amendment.
18 So this amendment was, you know, material and, in fact,
19 he was at that point apprised of the fact that there was this
20 enormous loan in place.
21 THE COURT: But just because -- let's assume that that
22 is correct, that this amended lease came after and that he knew
23 that this other loan was in place.
24 Is it still foreseeable on his part that the payments
25 wouldn't be met?

1 MR. MOQUIN: That the loan payments --
2 THE COURT: The loan -- I may have said "lease." I
3 meant to say "loan payments."
4 MR. MOQUIN: I think, given the enormity of the loan,
5 it's very easy to amortize out what the monthly payment would be.
6 I mean, this is not your normal -- in fact, I could not
7 find a case anywhere close to this value in all of Nevada case law
8 dealing with an $18 million property where the monthly rent at the
9 time of the breach was $142,000 a month.
10 Now, to go from that, with $87,000 being due for a
11 mortgage, to zero, I think it's reasonable to -- you know, I think
12 that it's reasonable for somebody to suspect that there's going to
13 be some serious fallout from that. There's going to be --
14 THE COURT: And that this was the plaintiffs' only
15 source of income?
16 MR. MOQUIN: At the time of the breach, yes.
17 THE COURT: And that Mr. Herbst or Berry-Hinckley had
18 reason to know that?
19 MR. MOQUIN: I don't think it's relevant.
20 In fact, whether or not -- see, we're getting into an
21 area here where whether or not there was a mortgage on the
22 property, okay, is not really important in terms of the damages.
23 Now, it does come into play now, given the fact that
24 there was, okay, but given the language in the lease, the "any and
25 all damages" provision under Nevada law, which I've cited in my

1 opposition, is binding and not subject to reinterpretation.
2 There's nothing ambiguous about it.
3 And so the claim that this was not foreseeable and was
4 not contemplated at the time of contract formation is simply
5 untrue because they put those provisions in, into the lease.
6 It wasn't necessary for them to put the indemnification
7 clause in. In fact, I think in Section 12 or 13, there's an
8 environmental indemnification clause. So this additional
9 Section 15, they put in as an added protection for the lessor.
10 But the "any and all" language is -- you know, under
11 Nevada law and under California and everywhere that I have looked,
12 it's not -- I mean, it would be infeasible to have to list all the
13 different particular damages that could potentially arise.
14 The "any and all" language itself is interpreted, as far
15 as I can tell, across the board to mean "reasonably proximate
16 damages."
17 THE COURT: All right. Thank you.
18 Is there anything else?
19 MR. MOQUIN: No, Your Honor. Thank you.
20 THE COURT: Thank you.
21 Counsel.
22 MR. IRVINE: Thank you, Your Honor.
23 It struck me in briefing our reply that plaintiffs
24 didn't address or didn't do much to address a couple of things
25 that we argued in the motion. And we're still there today.

1 They haven't addressed the concept of foreseeability,
2 number one.
3 And they haven't addressed the requirement under the
4 Christopher Homes case for attorney's fees. Their arguments
5 simply fly by those.
6 With respect to foreseeability, Mr. Moquin keeps coming
7 back to the indemnity provision. And he says you don't need to
8 look at foreseeability because of this broad boilerplate language
9 that says "any and all."
10 Well, firstly, I would, again, talk about what an
11 indemnity provision is. He didn't address any of the case law
12 that I cited in the reply, the Boise case, the Pacificorp case,
13 the May Department Store case, or the KMart case from the federal
14 court -- federal bankruptcy court in Illinois, that says that
15 indemnity provisions are designed to protect against claims
16 brought by third parties, not for direct claims between the
17 contracting parties.
18 The best example is a slip-and-fall. Someone falls
19 while they are in a Terrible Herbst gas station and breaks their
20 arm, and then they sue the owner, because they find out who the
21 owner of the property is, and it's Mr. Willard.
22 Then Mr. Willard would certainly have a right to
23 indemnity from the tenant for that act, because it's a triple net
24 lease and they are responsible for the entire premises.
25 But that doesn't extend to cases like this with

1 Mr. Willard's personal income taxes that are remote from the
2 breach we're talking about here. That's not what an
3 indemnification provision is.
4 And with respect to the "any and all" language that he's
5 relied on throughout his argument, I would direct the Court to the
6 Boise case from the Oregon Court of Appeals where they are
7 addressing a very similar argument where the party was seeking to
8 recover its $600,000 investment in the property and was attempting
9 to rely on the indemnity provision to do it.
10 And this is at -- I'll use the Pacific cite. This is at
11 page 709.
12 In there, the Court analyzes the indemnity provision,
13 which says "Tenant's Covenants of Indemnity," which reads that
14 "Tenant further covenants and agrees to protect, indemnify and
15 forever save harmless the Landlord and the Demised Premises of and
16 from any and all judgments, loss, costs, charges," et cetera.
17 Again, a very broad indemnity provision.
18 But the trial court here says this doesn't apply. It's
19 redundant to other paragraphs, remedies paragraphs, and it doesn't
20 apply to direct claims between the contracting parties.
21 The Court goes on to say on page 710 of that decision,
22 that "under the indemnity paragraph, defendant would be required
23 to indemnify BJV for claims that might arise out of defendant's
24 failure to perform his obligations under the lease, such as a
25 failure to pay assessments or taxes.

1 "But we agree with the trial court's interpretation that
2 the indemnity paragraph does not apply to claims between the
3 parties and does not provide a contractual basis on which BJV may
4 recover its lost equity."
5 So it's the same type of language we're faced with here,
6 and that Court said it didn't apply to direct claims between the
7 parties.
8 I apologize for getting on my phone, Your Honor, but I
9 didn't print the May Department Store cases, but that case is
10 similar.
11 It analyzes an indemnity provision, which says that the
12 tenant shall indemnify and hold harmless against -- it doesn't say
13 "any and all," it says "all claims, damages, costs, expenses," on
14 and on and on.
15 And, again, in that case, the May Department Store case,
16 the Court said no. It said that indemnity language is construed
17 to apply only to claims asserted by third parties against the
18 indemnitee, not to claims based upon injuries or damages suffered
19 directly by that party.
20 So, again, we're talking about a slip-and-fall. We're
21 talking about a scenario where my tenant might have done a tenant
22 improvement at one of these stores and not paid the contractor,
23 and the contractor goes after the owner. This is not for the
24 damages they are seeking here.
25 And frankly, Your Honor, if you buy their argument that

1 this sort of broad, "any and all" type indemnity language somehow
2 obviates the requirement under Nevada law that damages be
3 foreseeable, you can throw out the restatement, you can throw out
4 Hilton, you can throw out Hadley v. Baxendale, because these go
5 back that far.
6 Damages have to be reasonably foreseeable under a
7 contract case, and the inclusion of boilerplate language like that
8 doesn't eliminate that requirement.
9 With respect to the attorney's fees argument, we simply
10 shouldn't have to pay for their decision to file in the wrong
11 venue.
12 I would direct Your Honor to Section 38-H of the lease.
13 And I'm at the Willard lease, which is Exhibit 2 to our motion.
14 This is at page 25 of that lease.
15 Section 38-H clearly says that the parties hereto
16 expressly submit to the jurisdiction of all federal and state
17 courts located in the state of Nevada. Nevada law applies.
18 And it says also that the lessor can commence proceeding
19 in the federal or state courts located in the state where each
20 property is located.
21 Again, these properties are located in the state of
22 Nevada. They chose to go file these over in California. Frankly,
23 we shouldn't have to pay for that, even if these damages were
24 available under Christopher Homes, which they are not, which
25 Mr. Moquin didn't address.

1 I'll touch on his improper dismissal argument briefly.
2 I won't get into the details on that. I'll rely on Mr. Desmond's
3 declaration attached to the reply.
4 I think our position is very clear there, but it doesn't
5 matter because none of the fees that plaintiffs incurred in
6 California were in any way caused by an improper dismissal, even
7 if that were true.
8 These fees were all incurred in filing the motion --
9 filing the complaint and dealing with motions to quash and motions
10 to dismiss over there.
11 All the work was done. The case was dismissed at the
12 end, and that in no way changes the fact that they didn't have to
13 bring either that or, in fact, the bankruptcy over in California.
14 As Your Honor noted, these were their choices. These
15 were their voluntary choices, and we shouldn't have to pay for
16 them.
17 And under Christopher Homes, these are not -- these are
18 not special damages that are available for attorney's fees. This
19 is not an action to remove a cloud on title, which is one of the
20 prongs. And it's not an indemnity type case where they were
21 forced to litigate against a third party due to our breach.
22 So under the clear authority of Christopher Homes, these
23 types of damages aren't available anyway.
24 I'm sorry, Your Honor, I'm bouncing around a little bit,
25 trying to keep this short.

1 The argument that Mr. Moquin made with respect to
2 Exhibit 32 to the opposition, which is the subrogation
3 agreement -- I'm sorry, I'll get there.
4 Again, this was entered into after the original lease
5 was executed. And Mr. Moquin is correct, that this subrogation
6 agreement happened between the execution of the original lease and
7 the amendment of the lease and the guarantee by Mr. Herbst.
8 But that doesn't matter. You have to go back to the
9 original lease because that is when Berry-Hinckley signed on the
10 dotted line and agreed to be liable for all the obligations under
11 the lease.
12 You have to go back to that date, because if
13 Berry-Hinckley knew at that time that it would be responsible for
14 all of these financing type damages that plaintiffs are going to
15 assert, that was its chance to not enter into the lease.
16 After that, it's bound. And so anything that happens
17 after that doesn't have any bearing on foreseeability.
18 Not only that, Mr. Herbst's guarantee under Nevada law
19 is clearly limited to BHI's obligation under the four corners of
20 the lease. He doesn't assume anything outside the four corners of
21 the lease, and he doesn't assume anything that Berry-Hinckley
22 wasn't responsible for.
23 And the language of the guarantee is consistent with
24 that paragraph 1, which I won't read. It's a short paragraph.
25 But it says that he's responsible for what BHI is responsible for.

1 In addition, I would note that the subordination
2 agreement at Exhibit 32 -- I touched on this in my direct
3 argument. This refers Berry-Hinckley and Mr. Herbst at best to
4 the fact that a loan existed with the South Valley National Bank
5 at that time.
6 They were never put on notice of the loan with Telesis,
7 which is the loan they are seeking damages for. So I think that's
8 significant.
9 And as Your Honor pointed out, BHI and Mr. Herbst had no
10 way of knowing if Mr. Willard or his company could satisfy the
11 debt service on this property without the loan. They had no way
12 of knowing whether this was his only source of income or whether
13 he could pay this on his own without the lease payments.
14 There has been no evidence of any special knowledge from
15 the Herbsts on that fact.
16 Your Honor, I want to touch briefly on some of the
17 damages that they had withdrawn. They said they withdrew their
18 claim for the closing costs for the Willard short sale and for the
19 earnest money and for the tax consequences, but that they wanted
20 to continue with their claim for the capital loss carryover.
21 Again, Your Honor, these damages are even less
22 foreseeable than the tax consequences damages they were seeking
23 before.
24 If you play this out, it's not a probable result of a
25 breach of the lease. You would have to have a breach of the lease

1 followed by a threatened foreclosure, followed by a threatened
2 short sale, which was, then, completed.
3 And you would have to know about Mr. Willard's
4 accounting and tax treatment over the years. There's no evidence
5 in the record that the Herbsts had any way of knowing that they
6 were carrying these capital loss carryovers as assets.
7 We don't have access to their bank records. We don't
8 have access to their tax returns. We don't have access to their
9 accountants at any point in time prior to the breach.
10 This is all brand-new arguments. And, frankly, it's not
11 in the complaint. It's not in anything that they did in
12 discovery.
13 The first time we found out about this new theory was in
14 the opposition. But I still think it's appropriate for the Court
15 to decide it and deny their ability to seek it, because it's
16 simply not foreseeable.
17 In addition, they talk about trying to keep their claim
18 for diminution in value on the Willard property. Your Honor, that
19 is a new damage as well. There is nothing in the complaint about
20 any diminution in value claim for Willard.
21 I will concede that they have a claim for Mr. Wooley.
22 At paragraph 34 of the first amended complaint, they claim a
23 $2 million diminution in value damage on the Highway 50 property,
24 which is not subject to the motion that we're arguing here today.
25 But there's absolutely no claim in here about a

1 diminution in value claim for the Willard plaintiffs.
2 And, in fact, the only time we heard about that was,
3 again, for the first time in the opposition at page 10, I believe,
4 the very last sentence on page 10 where they say "Due to BHI's
5 abandonment of the Virginia property and subsequent breach of the
6 interim operation and management agreement, the Virginia property
7 suffered a dramatic diminution in value, the amount of which is
8 not relevant to the instant motion."
9 That sentence, Your Honor, is the first time we ever
10 heard of that damage. We've never been put on notice of anything
11 like that before.
12 Which takes me to the 16.1 damages disclosure issue.
13 Now, Mr. Moquin doesn't practice here. I don't know if he
14 understands this rule.
15 But as you know, Your Honor, 16.1 imposes upon
16 plaintiffs an affirmative obligation to disclose their calculation
17 of damages, along with any supporting documentation of those
18 calculations.
19 We have never in this case received a 16.1 disclosure
20 with any damages computation. We've had to pull damages from them
21 through interrogatories and depositions, but that shouldn't,
22 frankly, be our job.
23 It's their affirmative obligation to do that and to
24 continue to do that as their damages claims change, which it
25 continues to do in this case.

1 I'm not going to say we don't have some information
2 about damages, but we certainly have never received a 16.1 damages
3 disclosure.
4 And the Wooley damages computation that Mr. Moquin was
5 referring to, we received after the deadline for disclosing
6 initial expert witness reports. And the spreadsheet that I got
7 from him, he gave me to use for settlement purposes only.
8 I'm, obviously, not going to discuss the contents with
9 the Court because of that, but as of right now, I don't have even
10 have authority to disclose that to my experts to do anything with.
11 So they have not done their job of getting us what their
12 damages are. And it's starting to become fairly critical with the
13 deadlines that are approaching in this case.
14 I know that's not entirely relevant to your decision
15 here today, but because it was raised, I wanted to address it.
16 And then finally, with respect to the Wooley damages for
17 Baring, Mr. Moquin went back to the indemnification provision.
18 I've already addressed that.
19 I would take issue with his argument that all you have
20 to do is have a reasonable proximate cause to get these damages.
21 I mean, the Hadley v. Baxendale case, the Hilton case, the
22 restatements, they are all there for a reason.
23 They are there for policy reasons, to limit damages for
24 contracting parties to what they contracted to do.
25 And that's what we're asking for here. We're asking the

1 liability on the defendants to be limited to what's in the four
2 corners of the contract, not some proximate cause where you could
3 see a lot of slippery slopes, including being, essentially, held
4 as a guarantor for debt service and the like.
5 If you have any questions, I'm happy to answer them.
6 Otherwise, I think I've covered everything he had.
7 THE COURT: No. I think I have asked all of my
8 questions of both parties.
9 MR. IRVINE: Thank you, Your Honor.
10 THE COURT: I want to thank everyone for their
11 substantial papers and opposition and the time that went into
12 compiling these. I know that it takes a great amount of skill and
13 time.
14 In reviewing this, and going back to the standards of
15 Rule 56, where there is a partial adjudication, where it does not
16 actually adjudicate the entire case, it appears that the Court,
17 after the hearing the motion, by examining the pleadings and the
18 evidence before it, and by interrogating counsel, shall, if
19 practicable, ascertain what material facts exist without
20 substantial controversy and what material facts are actually, in
21 good faith, controverted, and thereafter, the Court must enter an
22 order.
23 I have, as an overview, concern with regard to the
24 affidavit that was submitted by Mr. Tim Herbst. Under 56(e), they
25 must be made on personal knowledge. And the format of that

1 affidavit is very clearly on information and belief. And it begs
2 the question of where Jerry Herbst is.
3 However, in reviewing this -- and the Court and my law
4 clerk, Ms. Booher, spent a substantial amount of time carefully
5 going through it -- and I'm prepared to rule, even with
6 disregarding that affidavit, and I'm going to do so with an
7 abundance of caution.
8 The depositions that are attached provide the Court what
9 is sufficient information, and where both parties have submitted
10 documents, that this Court can deem them as admissible evidence.
11 And the Court finds that the motion for summary judgment should be
12 granted.
13 In considering this, for the record, I am considering
14 the following damage categories.
15 One, as to the Willard plaintiffs, the short sale
16 damages incurred as a result of having to sell the property,
17 including earnest money invested in the property; tax consequences
18 resulting from the cancelled mortgage debt, and closing costs;
19 attorney's fees with regard to the voluntary bankruptcy,
20 attorney's fees for the California action.
21 With regard to the Wooley plaintiffs, the Court is
22 considering summary judgment as it relates to the $600,000 in
23 damages incurred with regard to selling the Baring property due to
24 the fact it was cross-collateralized, and the attorney's fees the
25 Wooley plaintiffs incurred from the California action that was

1 dismissed.
2 In doing so, I understand that you've indicated, and the
3 record is clear, with regard to which damages the plaintiff has
4 withdrawn.
5 Any damages that are not in these categories and the
6 subject of the motions will have to be the subject of future
7 motion practice, if the parties wish to narrow down the action.
8 In accordance with this, the Court finds as follows:
9 The Court concurs with -- as an overview, with the
10 plaintiff that you cannot identify in every single contract each
11 and every type of damage claim. However, the Court disagrees that
12 foreseeability does not apply. And the Court finds that as a
13 matter of law, that it does apply in the analysis.
14 In addition, the Court finds that the Christopher Homes
15 versus Liu case applies with regard to the special damages
16 requested in the form of attorney's fees.
17 Therefore, that being said, based on the motion,
18 opposition, the reply and supplement, the Court finds as follows:
19 With regard to the Willard lease, in 2005, Willard and
20 Berry-Hinckley Industries entered into a commercial lease,
21 called -- which I will designate the Willard lease, for the lease
22 of property in Reno, Nevada.
23 In 2013, Mr. Willard filed for bankruptcy. The
24 bankruptcy was voluntarily dismissed shortly after filing it.
25 In March 2014, Mr. Willard sold the Willard property in

1 a short sale.
2 While under the Hilton case it can be construed that the
3 type of foreseeability and the type of damages that are claimed in
4 this case must be submitted to the jury, the Court finds, based on
5 the deposition transcripts that were attached, specifically, that
6 the plaintiffs admit that the defendant had no reason to foresee
7 the items of damage which I have itemized, and that is sufficient
8 without the submitted affidavit from Mr. Tim Herbst.
9 In addition, the Court finds that with regard to the
10 Wooley leases, in 2005, Berry-Hinckley Industries and Wooley
11 entered into a commercial lease for the lease of property on
12 Highway 50 in Nevada, known as the Highway 50 lease.
13 In 2006, Wooley bought property on Baring Boulevard,
14 which I'll designate the Baring property. And Berry-Hinckley,
15 BHI, and Wooley entered into a separate lease for that property.
16 Wooley entered into a mortgage loan for the Baring
17 property, which purportedly contained a clause which
18 cross-collateralized the Baring property and the Highway 50
19 property.
20 Neither Berry-Hinckley Industries nor Mr. Jerry Herbst
21 were parties to the mortgage loan.
22 The Wooley plaintiffs have not set forth any evidence to
23 establish that BHI or Mr. Jerry Herbst knew about the
24 cross-collateralization provisions.
25 Wooley entered into this loan after the parties had

1 entered into the Highway 50 lease.
2 Wooley sold the Baring property while Jackson's Food
3 Stores, Inc., was a tenant and not Berry-Hinckley Industries.
4 Berry-Hinckley Industries was not in default of the Baring lease
5 when Wooley sold the Baring property.
6 The Court has applied all of the standards that are set
7 forth in Rule 56 with regard to whether or not -- as I indicated
8 earlier, the amounts are not -- for the Court's analysis, are not
9 important, it is the type of damages that are sought.
10 And the Court finds, based on the facts before us, that
11 the plaintiffs are not entitled to the damages that I itemized
12 earlier based on the fact either they are not foreseeable, or with
13 regard to the special damages, they are precluded by
14 Christopher Homes versus Liu.
15 Accordingly, this Court orders the plaintiff to provide
16 the Court with a proposed order. That proposed order will state
17 the following:
18 Each and every finding of fact supported by a citation
19 to the exhibits and not to the affidavit.
20 Secondly, that the plaintiff -- excuse me, I said
21 "plaintiff."
22 The defendant will provide conclusions of law supported
23 by the applicable authority. And specifically, it will include
24 Hilton Hotels, Margolese, Christopher Homes, the Boise case, all
25 of which the Court finds persuasive in ruling upon this motion.

1 Please, in addition, and separate and apart, the Court
2 enters a case management order that directs the plaintiff to
3 serve, within 15 days after the entry of the summary judgment, an
4 updated 16.1 damage disclosure.
5 That's the ruling of the Court. I would like the
6 proposed order within 15 days.
7 We'll be in recess.
8 MR. MOQUIN: Thank you, Your Honor.
9 (The proceedings concluded at 11:59 a.m.)
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STATE OF NEVADA)
) ss.
WASHOE COUNTY)

I, CONSTANCE S. EISENBERG, an Official Reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, DO HEREBY CERTIFY:

That I was present in Department 6 of the above-entitled Court on January 10, 2017, and took verbatim stenotype notes of the proceedings had upon the matter captioned within, and thereafter transcribed them into typewriting as herein appears;

That I am not a relative nor an employee of any of the parties, nor am I financially or otherwise interested in this action;

That the foregoing transcript, consisting of pages 1 through 69, is a full, true and correct transcription of my stenotype notes of said proceedings.

DATED: At Reno, Nevada, this 16th day of January, 2017.

/s/Constance S. Eisenberg

CONSTANCE S. EISENBERG
CCR #142, RMR, CRR

1 Code No. 4185
SUNSHINE LITIGATION SERVICES
2 151 Country Estates Circle
Reno, Nevada 89511

3

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5 SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

6 IN AND FOR THE COUNTY OF WASHOE

7 HONORABLE LYNNE K. SIMONS, DISTRICT JUDGE

8 LARRY J. WILLARD, et al.,

9 Plaintiffs,

Case No. CV14-01712

10 vs.

Department No. 6

11 BERRY-HINCKLEY, et al.,

12 Defendants.

_____/

13

14 TRANSCRIPT OF PROCEEDINGS

15 PRE-TRIAL CONFERENCE

16 December 12, 2017

17 Reno, Nevada

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23 REPORTED BY: DEBORA L. CECERE, NV CCR #324, RPR

24 JOB # 437679

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1 DECEMBER 12, 2017, TUESDAY, 10:11 A.M., RENO, NEVADA
2 -oOo-
3
4 THE COURT: This is the time set for pretrial
5 conference in Case No. CV14-01712, Larry Willard, et al.
6 versus Berry-Hinckley, et al.
7 Would you please state your appearances?
8 MR. O'MARA: Good morning, your Honor. David
9 O'Mara on behalf of the plaintiffs.
10 MR. MOQUIN: Brian Moquin on behalf of the
11 plaintiffs.
12 MR. IRVINE: Good morning, your Honor. Brian
13 Irvine on behalf of the defendants.
14 MS. WEBSTER: Good morning, your Honor. Anjali
15 Webster on behalf of defendants.
16 THE COURT: Good morning.
17 All right. As this is a pretrial conference, I
18 want to go over a couple of items.
19 And my intention is to go over the file motions
20 and where there's a nonopposition ask the party to submit
21 an order.
22 I want to set an oral arguments date for that
23 big stack of paper that's sitting there on my desk. And
24 then we're just going to go over some dates so everyone is

1 on the same page.
2 If there is anything that you would like to
3 bring up, please feel free to do so.
4 We are set for trial. My new trial date is not
5 on here. It is January 29th, correct?
6 MS. WEBSTER: Yes.
7 MR. IRVINE: Correct, your Honor.
8 THE COURT: And do you still believe that it
9 will be eight days, or do you think it will be longer or
10 shorter?
11 MR. O'MARA: Your Honor, I think that we're
12 going to have to -- Mr. Moquin is going to have to ask the
13 court today for an extension of time.
14 We notice that you want to do an order
15 submitting nonoppositions. Mr. Moquin has been trying to
16 finish those oppositions, and I told him he needs to
17 discuss that with the Court today. And we would hope that
18 the Court would have leniency on us to allow him to file
19 such oppositions because they would be so devastating to
20 our client if the Court just submitted orders on the
21 nonoppositions.
22 THE COURT: Okay. Well --
23 MR. O'MARA: The defendants are aware that we
24 have been trying to do the oppositions. And they have

1 provided us with extensions. We have filed an extension.
2 So it would be up to the Court as well as Mr. Moquin. I
3 just wanted the Court to be aware of that.
4 THE COURT: Okay.
5 MR. O'MARA: I'm sure Mr. Irvine will have his
6 response and go from there.
7 THE COURT: Let's just go about it this way. A
8 little bit different then.
9 We'll start with -- is anyone expecting to ask
10 for a continuance of the trial date?
11 MR. IRVINE: We are not, your Honor. We think
12 what would be a fourth continuance at this point, given the
13 plaintiffs' lack of compliance with the rules, or a
14 disregard of this Court's orders, and their failure to
15 provide basic damages information or expert disclosures
16 necessitate a dismissal. We've been clear in our moving
17 papers.
18 The motion for case ending sanctions that we
19 filed along with the two other motions, where the
20 oppositions were due last Monday, we did give them a couple
21 of brief extensions. We couldn't give them more than very
22 brief extensions because all motions must be submitted to
23 the Court for a decision by this Friday pursuant to the
24 stipulation and order that was entered last February.

1 And they've just simply failed to oppose the
2 motions. They filed with this Court a motion to extend the
3 time for them to respond to the motions, where they asked
4 until 4:30 on last Thursday.
5 I was assured by counsel that I'd receive
6 hand-delivery or email service of the oppositions to all
7 three motions by 4:30 last Thursday, and then nothing. I
8 didn't get a phone call. I didn't get an email. We still
9 don't have oppositions.
10 Your Honor, at this point, I mean my client
11 spent a lot of time and money trying to prepare a defense
12 to this case, and they've been thwarted in their ability to
13 prepare a defense because we just don't have the
14 information that the rules and this Court's orders would
15 require.
16 So we are happy to provide you with proposed
17 orders on all three motions. We're happy to set an oral
18 argument on all three of those motions. But we don't think
19 a fourth continuance of the trial is fair to our client
20 given what's been going on.
21 They're entitled to put this behind them and
22 move forward. And plaintiffs haven't played by the rules
23 or followed this Court's orders.
24 THE COURT: All right. Thank you.

1 Here's how we're going to do this. One, I have
2 the October 6th, 2014 Motion to Partially Dismiss
3 Plaintiffs' Complaint. No opposition filed. No reply.
4 That's one of them that you're adjusting,
5 correct?
6 Then I have a 10/28/2014 Motion to Associate
7 Counsel. And no opposition was filed. Defendants' Notice
8 of Nonopposition was filed on the plaintiffs at 10/29/2014.
9 So there's not an order entered on that,
10 correct? I mean, I realize this has gone up and back and
11 around. But I don't see an order on it.
12 MR. MOQUIN: I don't believe there is.
13 THE COURT: All right. So I want you to submit
14 an order.
15 Okay? Is this yours?
16 MR. IRVINE: The Motion to Associate Counsel I'm
17 assuming was --
18 THE COURT: It's yours. Filed by plaintiffs
19 Larry J. Willard.
20 MR. MOQUIN: We'll do that.
21 MR. O'MARA: We'll file an order, your Honor.
22 THE COURT: Just submit one, please.
23 MR. MOQUIN: Yes, your Honor.
24 MR. O'MARA: It was my understanding, I think,

1 that there was no objection, and the Court granted an order
2 at the previous hearing. But I'll, I'll get an order to
3 you --
4 THE COURT: Right. I just want to make sure we
5 have written orders on this.
6 MR. O'MARA: That's fine, your Honor.
7 THE COURT: And certainly we've been acting as
8 though it was granted.
9 Okay. Next we had Defendants' Motion to Compel
10 Discovery Responses filed by defendants with an Ex Parte
11 Order Shortening Time, Notice of Nonopposition to
12 Defendants' Motion to Compel Discovery Responses.
13 And, and later there was an Order Shortening
14 Time Filed. And then Order Granting Defendants' Motion to
15 Compel Discovery Responses was filed July 1st, 2015.
16 Has -- have you received those discovery
17 responses?
18 MR. IRVINE: Your Honor, I didn't review that
19 motion this morning. I think we certainly got substantial
20 compliance to it. I don't remember the scope of that. I
21 believe it was our first set of interrogatories, and I
22 think we did get answers to all of those.
23 THE COURT: Okay. 7/24/2015, Motion for
24 Contempt Pursuant to NRCP 45(e). And Motions for Sanctions

1 Against Plaintiffs' Counsel pursuant to NRCP 37.
2 Defendant filed an Ex Parte Motion for Order
3 Shortening Time, and Order Shortening Time was filed on
4 July 28th, 2015.
5 On this case there was no opposition, correct?
6 MR. IRVINE: That's correct, your Honor. But I
7 don't believe we ever submitted that motion.
8 THE COURT: Right, that was the next thing I was
9 going to say.
10 MR. IRVINE: I think that had to do with a
11 subpoena to a third-party witness, who is actually also the
12 expert that's the subject of our motion to strike. And I
13 believe we got the documents in time for the deposition so
14 we never submitted that.
15 THE COURT: Okay.
16 MR. IRVINE: So we would, we would withdraw that
17 motion.
18 THE COURT: Okay.
19 Next, Defendants -- 8/7/15, Defendants' Second
20 Motion to Compel Discovery Responses filed by Defendants
21 Barry Hinkley and Jerry Herbst; a Defendants' Ex Parte
22 Motion for Order Shortening Time was filed 8/7/15,
23 Emergency Request for Status Conference was filed. Order
24 Shortening Time was entered 8/11/2015, as well as an order

1 setting status conference of 8/12/2015.
2 Then we went to a status conference on August
3 17th. This Court granted the Defendant's Second Motion to
4 Compel Discovery Responses. It was filed on 8/17/2015. So
5 that's not at issue.
6 8/1/2016, Defendant/Counterclaimants Motion for
7 Partial Summary Judgment with a Request, Motion to Exceed
8 the Page Limit and a Supplement to
9 Defendants/Counterclaimants Motion for Partial Summary
10 Judgment filed 12/20. This was opposed and replied.
11 Defendants asked for page limit, to exceed the
12 page limit. The Court granted. Filed an order granting
13 Motion to Exceed Page Limit for both the motion and the
14 reply. And we set a hearing at the 12/9/2016 -- that's the
15 date the order was setting the hearing.
16 And then we had the hearing on January 10th,
17 2017, where the Court granted partial summary judgment and
18 ordered the defense counsel to prepare an order, which then
19 this Court entered on May 30th, 2017.
20 All right. The next one, it looks like, was
21 completed. It appears that you did object, but then I
22 filed the order.
23 Let's go to the next Motion for Summary Judgment
24 dated October 17th, 2017. Motion for Summary Judgment of

1 Plaintiffs Edward Wooley and Judith A. Wooley. Defendants
2 filed their opposition on November 13th, along with a
3 Motion to Exceed Page Limit on the same date.
4 Now as to this one there's no reply, correct?
5 MR. O'MARA: That's correct, your Honor.
6 THE COURT: Okay. And was this the subject of
7 an extension where you wanted to file a reply?
8 MR. MOQUIN: Yes, defendants gave an open
9 extension until the end of -- until this Friday.
10 THE COURT: Okay. So then you have an open
11 extension until Friday.
12 Okay. October 18th, Motion for Summary Judgment
13 by Plaintiffs Larry J. Willard and Overland Development.
14 Opposition was filed on November 13th along with a motion
15 to exceed page limit.
16 This one is in the same circumstance, correct?
17 MR. MOQUIN: Correct.
18 THE COURT: Okay. All right.
19 11/14, Defendants/Counterclaimants Motion to
20 Strike and/or Motion in Limine to Exclude the Expert
21 Witness, Expert Testimony of Daniel Gluhaich, along with a
22 Motion to Exceed Page Limit.
23 This one you have not filed an opposition,
24 correct?

1 MR. MOQUIN: Correct.
2 THE COURT: And is this -- a Request for
3 Submission After Notice of Nonopposition was filed by the
4 Defendants' Request for Submission 12/7.
5 And Mr. O'Mara, is this one of the motions that
6 you're wanting to file an opposition?
7 MR. O'MARA: Yes, your Honor.
8 THE COURT: Okay. And then 11/15, Defendants'
9 Motion for Partial Summary Judgment filed by Defendants
10 Berry-Hinckley and Jerry Herbst. No opposition was filed.
11 A Notice of Nonopposition was filed by defendants on 12/7.
12 And it was submitted.
13 This is in the same category?
14 MR. O'MARA: Yes, your Honor.
15 THE COURT: Okay. 11/15,
16 Defendant/Counterclaimants Motion for Sanctions Requesting
17 Oral Argument filed by Defendants Berry-Hinckley and Jerry
18 Herbst. Motion to Exceed Page Limit was filed on the same
19 date. No opposition was filed to this. And a Notice of
20 Nonopposition was filed by the defendants on 12/7, and it
21 was submitted on 12/7.
22 So this is the third one in that category,
23 correct?
24 MR. O'MARA: Correct.

1 THE COURT: Okay. And lastly, the December 6th,
2 2017, Plaintiffs' Request for Brief Extension of Time to
3 Respond to Defendants' Three Pending Motions and to Extend
4 the Deadline for Submission of Dispositive Motions filed by
5 all plaintiffs.
6 No opposition was filed, right?
7 Isn't it your -- you still have until next week?
8 MR. IRVINE: Yes, your Honor. And I can
9 certainly file an opposition to that.
10 I think it had two requests for relief. One was
11 for an extension through 4:29 p.m. on December 7th, to file
12 the three oppositions that we just discussed.
13 And so I would submit that that portion of the
14 motion is moot because that deadline has already passed.
15 We would certainly oppose any extension at this
16 point, as I've already discussed.
17 The second relief that they sought in that
18 motion was a continuance of the date to submit dispositive
19 motions to this Court.
20 We stipulated that that would be done by this
21 Friday, December 15th. We did that very deliberately,
22 because we looked at the calendar and saw where these were
23 going to fall with the Christmas holiday. We knew that we
24 were filing some significant dispositive motions so we

1 built in 45 days before trial instead of 30.
2 We did that with much thought and intent to try
3 to give this Court adequate time to consider the motions.
4 We would oppose any extension to that submission deadline
5 which the parties stipulated to last February.
6 THE COURT: So I want to hear from you, Counsel.
7 Tell me why I don't have oppositions.
8 MR. MOQUIN: Your Honor, early morning of the
9 date that my oppositions to these two motions were due, the
10 application that I was writing them in, it just -- it just
11 hung.
12 And so I killed it and started it up again. It
13 would not let me save what I had done. So I killed it
14 again. And everything was gone. I lost three weeks' worth
15 of work.
16 So I contacted opposing counsel, and given the
17 fact that I had extended a seven-day extension for them to
18 respond to our motion for summary judgment, I was hoping
19 that they would reciprocate. And they only gave me one
20 day.
21 I did what I could, and the following day said,
22 you know, I just haven't been able to, to make this up.
23 And that continued through that Wednesday.
24 Wednesday morning I asked for another extension, and I was

1 granted, at 11:00 o'clock, until 5:00, I believe -- no,
2 3:00 o'clock. And so I filed this motion for, for an
3 extension of time.
4 Meanwhile, my computer system, my primary
5 computer system has been just a nightmare. And I've been
6 migrating all of my assets off of it with respect to this
7 case so that I can continue to work.
8 But that is the sole and, and just debilitating
9 cause of the --
10 THE COURT: So do you have IT people working on
11 it?
12 MR. MOQUIN: I'm solo.
13 THE COURT: Okay. All right.
14 So the -- I was just trying to pull up your
15 motion again, because I think I left it on my desk.
16 So the time frame you want at this juncture?
17 MR. MOQUIN: For oppositions?
18 THE COURT: Yes.
19 MR. MOQUIN: If I could have -- my, my replies
20 to plaintiffs' motion for summary judgment are due on
21 Friday. If I could have until this coming Monday, that
22 would be ideal. Otherwise, I would be grateful for Friday.
23 THE COURT: All right. And specifically that is
24 on the three motions that I mentioned.

1 MR. O'MARA: The oppositions, your Honor, right?
2 THE COURT: Right. On the three motions that I
3 mentioned that you wanted to file the opposition. That's
4 the motion to strike filed on 1/14. 11/15, motion for
5 partial summary judgment. And 11/15/2017, motion for
6 sanctions.
7 All right. If I were to grant an extension, and
8 I know this will make you unhappy, but if I were to, how
9 much time would you want to file a reply?
10 MR. IRVINE: Well, your Honor, that's where the
11 trouble comes in and why we did the 45 days.
12 If we get oppositions on Monday, then, you know,
13 the following week you're into the Christmas holiday and
14 everything else. I'm not even sure when -- you'd have four
15 days. I mean --
16 THE COURT: Monday would be the 18th.
17 MR. IRVINE: Right.
18 THE COURT: And the 22nd is right before the
19 holidays.
20 Now I took that following week off.
21 MR. IRVINE: I'm back East on a vacation that
22 week myself, your Honor. I won't be back until the 4th.
23 THE COURT: And it was purposeful because I saw
24 all the documents. So I'm hoping to get caught up with

1 reading all the documents.
2 MR. IRVINE: I think the effect of an extension
3 through Monday, we would need, you know, a decent amount of
4 time. We'd have to be looking at the week of the 8th to
5 file our replies. I don't see how we could get it done
6 before then.
7 THE COURT: Well, when are you departing?
8 MR. IRVINE: I'm leaving the 26th, and I'll be
9 back on the 4th. I'm leaving for the East Coast.
10 THE COURT: Okay.
11 MR. IRVINE: The other complicating factor is I
12 have a very significant set of Ninth Circuit briefing that
13 is due on the 28th, which is going to take all my time
14 basically between now and then, for the most part.
15 So I'm pretty jammed up, which is why we hoped
16 to have everything done by the 15th.
17 THE COURT: I understand.
18 MR. IRVINE: Again, respectfully, in response to
19 what Mr. Moquin is saying, I can buy what he's saying, but
20 if you look at the motion for sanctions, this is a part of
21 a very significant repeated behavior.
22 We've had to file multiple motions to compel in
23 this case, because they won't provide us with basic
24 discovery information.

1 When we file those motions to compel, they
2 simply don't oppose them. And then we have to get orders
3 from this Court and go and enforce those.
4 We were here almost 11 months ago to the day,
5 and I was standing in Court explaining to your Honor that
6 we hadn't received damages disclosures from them; that we
7 hadn't received an appropriate disclosure for Mr. Gluhaich.
8 They stipulated to that, but they haven't done their job on
9 those two issues.
10 We have a stip and order, it was entered by this
11 court. It set forth very specific deadlines and a very
12 specific approach to how we were going to handle the rest
13 of the case.
14 Lo and behold in October, we still don't have
15 damages disclosures. We still haven't seen anything from
16 Gluhaich. And we get summary judgment motions from
17 plaintiff where they seek three times the amount of damages
18 than we've ever seen before.
19 So I'm sensitive to any computer issues and
20 problems counsel has, but this is simply part of a very
21 consistent pattern of behavior. That's why we think the
22 case should be dismissed.
23 I just, these motions are very important to my
24 client, and I want your Honor to have the appropriate time

1 to look at them. We need to have time to do our replies.
2 I don't know what the solution is. I'm just
3 strongly opposed to any continuances from here on out.
4 THE COURT: I'm not inclined to continue the
5 trial, number one.
6 Two, it's the seriousness of the relief, which
7 is substantial, and my serious consideration of imposing
8 sanctions.
9 So I am going to allow you to file oppositions
10 and I will tell you why. We had the very same thing happen
11 this week on a document. My law clerk did. And we could
12 not recover it.
13 And so that's the only reason that -- but I
14 appreciate defendant's extreme frustration. And you need
15 to know going into these oppositions, that I'm very
16 seriously considering granting all of it. And they have
17 been beyond courteous to you.
18 So you will have until Monday, the 18th, to file
19 any papers, any oppositions, and they must be filed by
20 10:00 a.m.
21 MR. MOQUIN: Thank you, your Honor.
22 THE COURT: Now I want to accommodate, which is
23 just a hard schedule for all of us. You have your Ninth
24 Circuit argument on the 28th, did you say?

1 MR. IRVINE: I have two Ninth Circuit briefs due
2 on the 28th.
3 THE COURT: Wouldn't it be better for you to
4 have your replies due on the 22nd, or for me to extend it
5 out? I mean, my intention is to get the motion and the
6 opposition all read and outlined so that I only need to
7 look at your reply.
8 MR. IRVINE: Okay.
9 THE COURT: It would be easier if it was not
10 excessively long for the reply.
11 MR. IRVINE: We'll keep that in mind, your
12 Honor.
13 THE COURT: So I'll give you whatever time you
14 need. And what that means is I'll be a bit jammed up, but
15 we'll do it.
16 MR. O'MARA: Why don't you give them until the
17 8th, and they can file it, and that gives them plenty of
18 time. And if they get it done beforehand, they can file it
19 beforehand. That way if something happens with Brian and
20 his travels or whatever, I mean --
21 THE COURT: And what I would like you to do --
22 MR. IRVINE: I'm sorry to interrupt. Your
23 Honor, we'll certainly get at least one of our replies
24 filed by the 22nd, because it's the one that I'm going to

1 be primarily writing, and I'm going to do that before I
2 go --
3 THE COURT: Okay.
4 MR. IRVINE: -- on my trip.
5 THE COURT: Okay.
6 MR. IRVINE: And that will be the motion to
7 strike. That one will definitely be submitted --
8 resubmitted, I guess, by the 22nd.
9 Ms. Webster was primarily responsible for the
10 other two briefs. And she's got another appeal that I
11 didn't mention to you in the Sixth Circuit that she's got
12 working as well. So I think we're going to need to ask for
13 the Court's indulgence for the other two.
14 THE COURT: That's fine. These are very
15 significant motions. There's a lot to read. And I have
16 outlined a couple of areas of our own research I want to
17 do. So I will give you until the 8th.
18 Now let's set a date for oral arguments.
19 I had a three-week trial starting on the 8th,
20 but I'm somewhat remembering that they may be just now
21 talking about either it's going to shorten up or they're
22 going to ask for a continuance.
23 So do you have any hearing dates? I think we
24 need allow some significant argument time.

1 MR. O'MARA: Your Honor, if you're talking about
2 the 8th, 9th, we are trying to schedule settlement that
3 week.
4 THE COURT: On this case?
5 MR. O'MARA: And I don't know if it's been
6 revoked because they may do that.
7 MR. IRVINE: It hasn't been revoked. But I
8 don't think those dates are magic. We're trying to
9 schedule mediation with retired Judge Adams, and he was
10 generally available those first two weeks. So I'd rather
11 get an oral argument date that works for you, and we'll
12 figure out a settlement conference date.
13 THE COURT: And you want it while the motions
14 are pending, or decided, after oral arguments?
15 MR. IRVINE: The settlement conference?
16 THE COURT: Right. Right, there would be no
17 need for one --
18 MR. IRVINE: Right.
19 THE COURT: -- if I roll one way.
20 MR. IRVINE: Right.
21 MR. MOQUIN: Or there would be no need for oral
22 argument if we could settle.
23 THE COURT: Right.
24 MR. IRVINE: True.

1 THE COURT: So what do we have?
2 THE CLERK: We have the afternoon of the 18th.
3 THE COURT: That's close to trial.
4 What do we have on the 12th?
5 THE CLERK: That would just be the end of that
6 first week of a three-week trial. Nothing else is set that
7 day.
8 THE COURT: I have two trials behind that
9 three-week trial, though.
10 So going back to the, if we have a trial
11 starting on the 29th, you're still expecting it to be eight
12 days, correct?
13 MR. O'MARA: I think maximum.
14 THE COURT: Okay. Let's go backwards from
15 there.
16 THE CLERK: Okay. The week of the 8th you only
17 have the one.
18 THE COURT: So the other went off?
19 THE CLERK: (Nods head.)
20 THE COURT: Okay. So we could do it on the
21 12th, correct?
22 THE CLERK: Yes.
23 MR. O'MARA: That's just the day we were trying
24 to find, but I mean, I think defendants are really going to

1 be the ones that push the settlement date. So if they want
2 to do it after --
3 MR. IRVINE: The 12th is fine for us.
4 THE COURT: So then you would be -- okay.
5 So how much time do you think you need?
6 Generally, I mean, because I have extra time now
7 with this. I'm going to have my outline done, and I will
8 have very specific questions, and I will have the
9 opportunity to check all the case law. And then we'll do
10 our own independent research.
11 And so I expect to allow you to do your initial
12 presentations, but I'll probably interrupt you and go right
13 to questioning. Okay?
14 MR. O'MARA: Are you planning on having the
15 whole day, your Honor, and we just schedule it at 9:00
16 a.m., or do you want to start at 1:00 and go to 4:00?
17 THE COURT: What works better?
18 THE CLERK: We can start at 1:00.
19 THE COURT: Either one. Whatever you would
20 like.
21 Do you have a preference?
22 MR. IRVINE: I can't imagine that the argument
23 will take a whole day. I think three hours is probably
24 ample.

1 THE COURT: Okay.
2 MR. MOQUIN: Your Honor, the only issue I have
3 is I will be driving from San Jose, as I did this morning.
4 So it would be more convenient for me if it was this time
5 or later.
6 MR. O'MARA: So 1:00?
7 MR. MOQUIN: 1:00 would be great.
8 MR. O'MARA: Is that okay, Mr. Irvine?
9 MR. IRVINE: Sure. I'm free the whole day.
10 THE COURT: 1:00.
11 MR. MOQUIN: This would be on all five pending
12 motions?
13 THE COURT: Yes, it's going to be on everything
14 that is outstanding.
15 Now, in light of the fact that we set that on
16 the 12th, and you will have your oppositions, your replies
17 done by the 8th, that should give us enough time.
18 Does that give you enough time between filing
19 your replies and argument?
20 MR. IRVINE: Sure.
21 THE COURT: Okay. All right.
22 And will you be arguing all the motions, or will
23 you be splitting them?
24 MR. MOQUIN: I'll be doing them all.

1 MR. IRVINE: We'll being splitting them.
2 THE COURT: Okay.
3 MR. IRVINE: I know Ms. Webster will take at
4 least one of the briefs.
5 THE COURT: Okay. All right.
6 I will tell you this. This is it for
7 extensions. All right. And, and there will be no more.
8 And you know going into this motion for
9 sanctions that you're -- I haven't decided it, but I need
10 to see compelling opposition not to grant it. Okay.
11 MR. MOQUIN: I understand.
12 THE COURT: Anything else we need to do today?
13 MR. IRVINE: I don't think so, your Honor.
14 Thank you.
15 THE COURT: Okay. Thank you.
16 We'll be in recess.
17 MR. O'MARA: I'm sorry, your Honor.
18 Could you just restate when you want the trial
19 statements, or will you just --
20 THE COURT: Isn't it in our scheduling order?
21 MR. IRVINE: It is. Five judicial days from the
22 29th.
23 THE COURT: Yes. Where did I put my outline?
24 And you should be aware that I may ask for

1 follow-up briefing during the trial since it's a bench
2 trial, and there are specific areas that I want briefing
3 on.
4 But it is five days before trial. It's always
5 welcome if it comes a little early. But that is your
6 deadline.
7 And you do know that pursuant to local rules, or
8 the applicable rules, that you must submit proposed
9 findings with your trial statement on a bench trial.
10 MR. O'MARA: Okay.
11 THE COURT: Okay. All right.
12 We'll be in recess.
13 MR. MOQUIN: Thank you, your Honor.
14 THE COURT: Thank you, Counsel.
15 MR. IRVINE: Thank you, your Honor.
16 MS. WEBSTER: Thank you.
17 MR. O'MARA: Thank you, your Honor.
18
19 (Whereupon the proceedings were
20 concluded.)
21 -oOo-
22
23
24

STATE OF NEVADA)
) ss.
WASHOE COUNTY)

I, DEBORA L. CECERE, an Official Reporter of the State of Nevada, in and for Washoe County, DO HEREBY CERTIFY:

That I was present at the times, dates, and places herein set forth, and that I reported in shorthand notes the proceedings had upon the matter captioned within, and thereafter transcribed them into typewriting as herein appears;

That the foregoing transcript, consisting of pages 1 through 28, is a full, true and correct transcription of my stenotype notes of said proceedings.

DATED: At Reno, Nevada, this 14th day of December, 2017.

/s/ Debora Cecere

DEBORA L. CECERE, CCR #324

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5
THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
6 IN AND FOR THE COUNTY OF WASHOE
BEFORE THE HONORABLE LYNNE K. SIMONS, DISTRICT JUDGE
7
-o0o-
8
LARRY J. WILLARD, :
9 individually and as
Trustee of the Larry :
10 James Willard Trust
Fund; and OVERLAND :
11 DEVELOPMENT CORPORATION,
a California : Case No. CV14-01712
12 corporation,
Plaintiffs, : Dept. No. 6
13
vs :
14
BERRY-HINCKLEY :
15 INDUSTRIES, a Nevada
corporation; and JERRY :
16 HERBST, an individual,
Defendants. :
17 ==========

18

19 TRANSCRIPT OF PROCEEDINGS

20 ORAL ARGUMENTS - PLAINTIFFS' RULE 60(b) MOTION

21 WEDNESDAY, SEPTEMBER 4TH, 2018

22 Reno, Nevada

23

24 Reported By: ERIN T. FERRETTO, RPR, CCR #281

25 Job No.: 494048

A P P E A R A N C E S

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RENO, NEVADA, WEDNESDAY, SEPTEMBER 4TH, 2018, 1:30 P.M.

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THE COURT: Good afternoon. Please be seated.

This is Case No. CV14-01712, Larry J. Willard; et al, versus Berry-Hinckley Industries.

Please state your appearances.

MR. WILLIAMSON: Good afternoon, your Honor. Richard Williamson and Jon Tew on behalf of Larry Willard and the Willard plaintiffs, and we have Mr. Willard here in the courtroom with us.

THE COURT: Good afternoon.

MR. IRVINE: Good afternoon, your Honor. Brian Irvine on behalf of defendants, and with me today is Brooks Westergard, who just joined our firm and he came to observe.

THE COURT: Welcome. You're going to be doing all the argument?

MR. WESTERGARD: Of course.

THE COURT: All right. Before the court are several motions -- I guess two, essentially -- the Motion to Strike or, in the Alternative, Motion for Leave to

File Surreply, plaintiff's opposition to that motion and the defendant's reply. Would you like to present -- I've read everything, would you like to present any additional argument on those points?

Counsel, it's your motion.

MR. IRVINE: Briefly, your Honor.

As noted in our briefs, we think that the reply attached a number of exhibits that were not present in the Rule 60(b) motion, although those exhibits were characterized as rebuttal to what we put in our opposition brief. I think they were really mostly exhibits that could have been attached to the Rule 60 motion and they simply were not.

We filed a motion to strike under the Providence case because we didn't have a chance to respond to any of those exhibits in our opposition papers, so we're asking the court to either strike those -- those papers or to consider the surreply that is focused only on those exhibits that we filed as an attachment to the motion to strike.

THE COURT: Okay.

MR. IRVINE: I don't think I have anything besides that, your Honor. It's pretty simple.

THE COURT: Counsel?

MR. WILLIAMSON: Yes, your Honor. Thank you, if the court will allow argument on the Rule 60 motion ultimately but certainly on the motion to strike.

We do believe all those were properly rebuttal'd exhibits that were offered in response to what the defendants' filed in their opposition but, more importantly, the defendants now have had a chance to respond. They really had two chances to respond, they filed not only the motion to strike but also the proposed surreply. I don't think that was necessary because I do think they were rebuttal exhibits, but I have no objection to the filing of the surreply. We'll admit -- or we'll accept that.

THE COURT: So your Opposition to Defendants' Motion to Strike or, in the Alternative, Motion to File Surreply, at this time, even though you contend that what was attached was appropriate, you're stipulating that they can file a surreply?

MR. WILLIAMSON: We'll stipulate to the surreply that they have already placed in the court's record.

THE COURT: All right. So there's no need for that stipulation for me to rule on the motion to strike or the --

MR. IRVINE: I agree, your Honor.

1 THE COURT: Okay. Thank you.
2 MR. WILLIAMSON: Thank you, your Honor.
3 THE COURT: Let's move to your Rule 60(b) motion
4 for relief.
5 MR. WILLIAMSON: Yes, your Honor.
6 Would you mind if I use the lectern?
7 THE COURT: Oh, please.
8 MR. WILLIAMSON: Thank you, your Honor.
9 THE COURT: And I need to -- I want to have you
10 present your argument in the fashion that you would like
11 but I would like you to stick really, really, really
12 close to the NRCP 60(b) standards.
13 MR. WILLIAMSON: Thank you, your Honor. I would
14 do that, and obviously if I appear to be trailing or if
15 the court has any questions, please don't hesitate to
16 interrupt me.
17 That's right, we are here, your Honor, asking for
18 relief under Rule 60 from several of the sanction motions
19 that were entered earlier this year. They were entered
20 simple because Brian Moquin failed to respond to them.
21 He failed to respond to them because he is suffering from
22 mental illness, and he did effectively abandon Mr.
23 Willard and the other Willard plaintiffs.
24 Mr. Willard is anxious to help mitigate the

1 problems that Brian Moquin caused not only to him but
2 also to the court and to the defendants, and try to get
3 this case back on track. We also recognize that that
4 Rule 60 relief is not automatic. We understand that and
5 the decision is in the court's discretion. In this case,
6 however, due to the specific factual circumstances here,
7 the court should grant Rule 60 relief.
8 And I want to come back to the question of mental
9 illness, but as the court requested and I think is
10 appropriate, I do want to focus on the Rule 60 standards.
11 I think originally derived from Hotel Frontier and
12 then stated more succinctly in the Yochum case, there are
13 really four factors that the court needs to look at.
14 Number one, was there a prompt application for relief;
15 number two, is there any intent to delay the proceedings;
16 number three, a lack of procedural knowledge on behalf of
17 the moving party; and, number four, good faith on behalf
18 of the moving party.
19 As to the first question, whether or not we moved
20 promptly for relief, we did. We filed our motion in
21 mid-April, that was approximately three months after the
22 court entered the first sanctions order and I think a
23 little more than one month after the findings of fact and
24 conclusions of law were entered in March of 2018. So we

1 have -- obviously, under Rule 60, the outside time limit
2 is six months and so moving within one to three months, I
3 believe, demonstrates prompt relief, particularly when
4 here the Willard clients had to get replacement counsel,
5 get us as up to speed as we could with very difficult and
6 non-responsive former counsel and present quite a lot of
7 material to the court. So I do think we moved promptly
8 for relief.
9 The second factor, is there an intent to delay the
10 proceedings? There is not. Certainly, I think if you
11 look at Mr. -- actually what Mr. Willard did, everything
12 he could to try to push this case forward, to push his
13 counsel to file things on time, to be an active
14 participant in the case, the plaintiffs did not evidence
15 any intent to delay the proceedings.
16 I do recognize there's been several delays and
17 several stipulations to continue trial, but those were
18 stipulations, they were entered between both parties. I
19 realize there are stipulations within those agreements
20 that provided why it was done, but it was certainly not
21 to advance any intent to delay.
22 And as the facts before the court demonstrate,
23 Mr. Willard was financially devastated by the defendants'
24 strategic decision to breach their contract and vacate

1 the Longley and South Virginia property. He wants
2 nothing more than to get a quick, speedy determination on
3 the merits, and that's certainly what he was asking his
4 attorney, Mr. Moquin, to do. And, if allowed, that's
5 certainly what we will pursue. There's no intent to
6 delay the proceedings, your Honor, so, again, we've met
7 that factor.
8 The third factor is lack of a procedural
9 requirements, and this is, candidly, a little bit of a
10 difficult one. There isn't a situation where someone was
11 served, got a default judgment entered against them
12 because they thought they had 30 days to respond instead
13 of 20 days. It's a situation where the defendants filed
14 motions with the court, filed dispositive motions,
15 motions for sanctions, there was a straight deadline, and
16 Mr. Moquin, the plaintiffs' former counsel, failed to
17 meet that deadline.
18 THE COURT: Does it make a difference, really,
19 against Mr. Irvine's vehement opposition, that I gave him
20 additional time, I gave him my deadline?
21 MR. WILLIAMSON: Yeah. You know, I think, your
22 Honor, it certainly demonstrated extensive generosity on
23 behalf of the court. It doesn't change Mr. Willard's
24 lack of procedural knowledge. I think there is no doubt

1 Mr. Moquin knew better and should have acted better.
2 Again, we'll get to it in a minute why he didn't act
3 better, but the plaintiffs did have a lack of procedural
4 knowledge; and, two, more importantly, the Stoecklein
5 case, your Honor, that's 109 Nevada 268, actually does
6 say, quote:
7 "A lack of procedural knowledge on the
8 part of the moving party is not always
9 necessary to show excusable neglect under
10 Rule 60 -- under NRCP 60(b)(1)."
11 Close quote. And I do think we have a lack of
12 procedural knowledge here on the plaintiffs, not on
13 Mr. Willard -- excuse me -- not on Mr. Moquin but on
14 Mr. Willard and the other plaintiffs, but under
15 Stoecklein that's not a determining factor one way or the
16 other.
17 THE COURT: I was just trying to recall, at the
18 hearing that we held on January 10, 2017, my recollection
19 is Mr. Willard was not here.
20 MR. WILLIAMSON: That's correct, your Honor.
21 THE COURT: And so he chose not to be here.
22 MR. WILLIAMSON: I don't know that any -- again, I
23 wasn't there, I don't know that any of the parties were
24 there. I don't know that Mr. Willard was -- I don't know

1 that. I don't know whether anyone was invited -- any of
2 the parties were invited to appear, and I don't know
3 whether Mr. Willard declined. I believe he was relying
4 on his counsel to be here for him and expected Mr. Moquin
5 and was told Mr. Moquin would be here and would do his
6 job.
7 So but thank you for clarifying that, your Honor,
8 because I do think it's an important point. The
9 defendants, in their opposition, rightly pointed out it's
10 not like they've been absentee plaintiffs; they haven't
11 been. Mr. Willard has been here and he's been involved,
12 and he understood his appearance was appropriate he has
13 been was here. He was here, I think, in January -- I may
14 be messing up the dates -- January '16 or January '17
15 conference with the court, and he was here for that, but
16 he was not here most critically in December was 2017 so
17 he did not know that these procedural issues were
18 pending.
19 He did, candidly, know that things needed to be
20 filed, he knew that. He knew trial was coming up and he
21 knew that they were both motions that he wanted to see
22 filed and oppositions that he understood needed to be
23 filed because he was an active participant in this case
24 and he wants to continue to be.

1 THE COURT: Has Mr. Willard or the plaintiffs been
2 involved in litigation previously?
3 MR. WILLIAMSON: They have, your Honor, and this
4 is admitted. I'm going beyond our submissions but they
5 have both been involved in litigation previously and have
6 been represented by Mr. Moquin previously, and he
7 successfully went through a trial. And so they really
8 had every reason to believe and understand that
9 Mr. Moquin would do his job and I think his track record
10 up until late 2017 was that he did do his job, then
11 something terrible did happen.
12 That's really the issue here, is that Mr. Willard
13 certainly is not recalcitrant, and although I didn't know
14 him and we have no evidence in the record at this point,
15 all facts indicate that Mr. Moquin was not recalcitrant.
16 He doesn't have a history of bar disciplinary matters, he
17 doesn't have a history of getting sanctions against him
18 or any of that kind of thing. All indications were that
19 the plaintiffs could rely on him, that he was a
20 reasonable and responsible attorney that could be trusted
21 to do his job, and that's really what they expected.
22 And I think that then brings us to the fourth
23 factor, your Honor, that's whether the moving parties are
24 proceeding in good faith. Again, Stoecklein defines --

1 or rather it intentionally doesn't define, it says:
2 Good faith is not subject to a precise
3 technical definition but it encompasses,
4 quote, "an honest belief, the absence of
5 malice, and the absence of design to
6 defraud."
7 Close quote. I absolutely, having been on the
8 other side, I understand the court's frustrations and the
9 defendants' frustration. There is nothing more
10 aggravating than having non-responsive counsel on the
11 other side, so I don't -- I don't blame any anger or
12 frustration that has been exhibited towards this side of
13 the table, but I think, as our submission shows, that is
14 not Mr. Willard.
15 Mr. Willard has always acted in good faith and
16 wants nothing more than to proceed to a trial on the
17 merits of this case. And, frankly, I don't even think
18 Mr. Moquin was proceeding in bad faith, and, you know, a
19 design to defraud or with malice or with some dishonest
20 belief, because that would be the worst case strategy in
21 the world, your Honor, would be to allow summary judgment
22 and sanctions and motion to strike an expert witness be
23 leveled against you. That's no way case strategy or
24 design that I'm aware of. So there is no question that

1 Mr. Willard has been proceeding in good faith, and he
2 intends to do so and that's why he's here, your Honor.
3 So, again, I think we've satisfied all four of the
4 requirements under Yochum to get Rule 60 relief. There
5 is one other that is not delineated in Yochum but that
6 the Supreme Court has since pointed out needs to be
7 presented, and that is that the party seeking relief must
8 demonstrate a meritorious claim or defense; that is
9 unequivocally the case.
10 We went -- in fact, even in our motion, perhaps
11 too much so, we focused on the merits of this case, and
12 why he should be entitled to his day in court and why,
13 based on the facts that we're aware of, he's entitled to
14 a judgment in his favor. And the defense did not oppose
15 that prong, they certainly haven't conceded the case by
16 any means, but they don't oppose that we have
17 demonstrated a meritorious claim, and therefore, again,
18 Mr. Willard has satisfied all the requirements for Rule
19 60 relief, and we do think the court should grant it.
20 But I want to come back to what I think is the
21 core issue of why we're here. One of the factors that
22 the court was required to analyze before dismissing the
23 case as a sanction, was the extent to which what has gone
24 on in this case was attributable to the attorney, to

1 Mr. Moquin.
2 Under Young v. Johnny Ribeiro Bldg., 106 Nevada
3 88, the court analyzes I think eight factors that should
4 be evaluated before entering a dismissal, and one of
5 those factors is, quote, "whether sanctions unfairly
6 operate to penalize a party for the misconduct of his or
7 her attorney," close quote.
8 That factor was not included in the findings of
9 fact and conclusions of law that the court received that
10 were submitted to the court, but I do think that factor
11 should be the deciding factor here today. It is --
12 THE COURT: Doesn't misconduct imply some sort of
13 deliberate action and I thought that you were indicating
14 that it's really a mental illness that has resulted in
15 Mr. Moquin's decline?
16 MR. WILLIAMSON: Very good question, your Honor.
17 The reason why I raise it is this is a factor that
18 I think was not provided to the court for consideration
19 but what should be considered, is just does the blame
20 reside with the party or does the blame reside with the
21 attorney? And I'm not here saying that -- I'm absolutely
22 not saying that Mr. Moquin was acting out of any sort of
23 deliberate design, I don't think that he was. What am
24 saying is when I'm attributing blame with what I think

1 the Young court was trying to get the district courts to
2 do is decide in attributing blame between the party and
3 the party's attorney, who is at fault, where should that
4 blame reside. Here, it certainly should not reside with
5 Mr. Willard.
6 It is undisputed that Brian Moquin suffers from
7 mental illness and that he constructively abandoned the
8 plaintiffs when they needed him most. The defendants
9 have not presented any contrary facts, just presented
10 arguments on why the court should disregard some of the
11 evidence we submitted, and we can talk about -- we can
12 talk about the hearsay rule, we can talk about what is
13 in, what is out, but there are some crucial undisputed
14 facts in the record, based on Mr. Willard's personal
15 knowledge, that the court has before it.
16 First, in late 2017 Mr. Moquin was oscillating
17 between sort of periods of frantic activity and total
18 silence. He was swinging between irrepressible optimism
19 and days of unresponsiveness, while at the same time
20 Mr. Moquin was assuring Mr. Willard and the other
21 plaintiffs that he had everything under control, that
22 everything was fine.
23 Mr. Willard had contemporary observations that Mr.
24 Moquin suffered a mental breakdown in 2017. Mr. Willard

1 recommended in early 2018 a psychiatrist in the Bay Area
2 named Dr. Douglas Mar and Mr. Willard made payments to
3 Dr. Mar to treat Mr. Moquin. So the only truly disputed
4 issue is the technical diagnosis of bipolar disorder.
5 Mr. Moquin told Mr. Willard, "I was diagnosed with
6 bipolar disorder." Mr. Moquin is not here, that is an
7 out-of-court statement offered for the truth of the
8 matter asserted.
9 THE COURT: When was that?
10 MR. WILLIAMSON: That was in early 2018.
11 So that would be hearsay, but for I believe those
12 statements do fall within the state of mind exception
13 under NRS 51.105, so I do think that comes in as well.
14 But even without the name diagnosis, we still have
15 overwhelming and uncontradicted evidence of mental
16 illness, that Brian Moquin was mentally ill.
17 THE COURT: That was the first time he was
18 diagnosed?
19 MR. WILLIAMSON: To our knowledge -- to Mr.
20 Willard's knowledge, that's exactly right, your Honor.
21 THE COURT: During the period of time that this
22 was going on and Mr. Willard was recommending treatment
23 for him, was Mr. Moquin representing other clients?
24 MR. WILLIAMSON: I don't know that. As

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1 separately, you know, as we all have a duty, professional
2 responsibility, that is my concern. I do not think he
3 should be practicing. I don't think he should be
4 representing anyone. I do not know whether -- whether he
5 was representing anyone. I only know that he abandoned
6 Mr. Willard. I don't know if he abandoned others.
7 One of the cases we cited, your Honor, Boehner v.
8 Heise, it's a 2009 Southern District of New York case, it
9 quotes to another published New York case for the
10 proposition that, quote -- excuse me -- quote:
11 "When an able attorney which former
12 counsel appears to have been suddenly
13 ignores court orders and is unable to be
14 reached despite diligent attempts, it
15 does not require medical expertise to
16 know that something is obviously wrong
17 with counsel."
18 Close quote. That is the case here, your Honor.
19 I do believe the admission -- Mr. Moquin's admission of
20 being diagnosed with bipolar disorder does and should
21 come in. But his erratic behavior departs from the
22 normal bounds of how people act and that alone is
23 undisputed evidence of mental illness.
24 As the Nevada Supreme Court explained, and this is

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1 Passarelli v. J-Mar Development, 102 Nevada 283, quote:
2 Counsel's failure to meet his
3 professional obligations constitutes
4 excusable neglect. The disintegration of
5 this attorney in his law practice was the
6 result of a recognized psychiatric
7 disorder. Passarelli was effectively and
8 unknowingly deprived of legal
9 representation. It would be unfair to
10 impune such conduct to Passarelli and
11 thereby deprive him of a full trial on
12 the merits.
13 THE COURT: But in that case, where were they
14 procedurally?
15 MR. WILLIAMSON: You know, your Honor, that is an
16 extremely good question, and I cannot for the life of me
17 off the top of my head --
18 THE COURT: Because there would be a difference if
19 it was before warnings and judgment entered.
20 MR. WILLIAMSON: You know, that's a good point,
21 your Honor. I mean, I think -- there's a couple of
22 critical issues about where we were in this case. Number
23 one, what I think the court is alluding to is exactly
24 correct, that sanctions should be escalating in nature,

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1 and they are progressive and they get progressively worse
2 if you keep it up. And there were -- there was a prior
3 order to supplement NRCP 16.1, but this is -- some other
4 cases that I'm sure the court has seen recently and I
5 know I've dealt with, deal with truly repetitive and
6 recalcitrant conduct, destruction of evidence,
7 withholding of evidence, on and on and on.
8 THE COURT: Really as a design to -- many times by
9 a defendant, though, to hog tie the case.
10 MR. WILLIAMSON: Exactly right, your Honor.
11 Exactly right, and that's our concern is that was not the
12 case here.
13 And the other thing I think is all of these
14 sanctions, as the courts are very clear, sanctions should
15 be designed to address the wrong that was committed. The
16 16.1 complaints, the issues with Mr. Gluhaich's
17 testimony, all of those surround the question of
18 diminution in value damages.
19 The calculation is set forth in the lease and
20 there wasn't any allegations of destruction of evidence
21 or anything else, and so it was, number one, a very
22 compartmentalized issue; and, number two, it was not part
23 of some grand scheme or design.
24 Again, I think it was Mr. Moquin, which none of

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1 us -- no one in this room, certainly I wasn't around, and
2 certainly Mr. Willard, and I doubt counsel or the court
3 recognized what was happening in Mr. Moquin's life
4 because it does seem that progressively things -- you
5 know, maybe there was difference of opinions but there
6 were no major red flags until everything reached a
7 crescendo in December of 2017, and to the point of where
8 we are in the case, to me, that's all the worse.
9 This isn't a situation where, oh, you know, maybe
10 it was shortly after a -- shortly after a case got
11 started and counsel can just -- you can dismiss it
12 without prejudice and counsel can start over, there
13 wasn't a lot invested. The case was on the eve of trial,
14 and rightfully should be on the eve of trial. The
15 defendants, I'm sure, have put in a whole lot of work, I
16 know Mr. Willard has put in a whole lot of work, we've
17 done a whole lot to get up to speed, obviously the court
18 has had to deal with this case for years right now on the
19 precipice of what should be a trial on the merits. Let's
20 get this case back on track and allow it to go.
21 Unequivocally, the State of Nevada prefers cases to be
22 tried on the merits, let's do that. That can still be
23 done.
24 As I mentioned, Mr. Willard is here ready to try.

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1 If there is information that the defendants need, you can
2 trust me, they can have it. Let's get this case back on
3 track, let's do it right. But because one attorney went
4 completely off the rails, and not just off the rails in
5 terms of misconduct and what I think Passarelli, what the
6 other cases cited, Cirami, which is a Second Circuit
7 case, and also that Boehner case I mentioned earlier,
8 what they're all showing there and why this -- why this
9 exception exists for mental illness is it's not -- it's
10 not the case that there was a recalcitrant bad attorney
11 that -- that the plaintiff should have known was
12 representing them. It was mental illness is so
13 unanticipated and can strike so suddenly and completely,
14 that it shatters what is normally the expectations and
15 understandings between an attorney and his client, and it
16 leaves that client flat foot, surprised and vulnerable,
17 and had no way of knowing that that was coming.
18 By all means, if Mr. Willard could have known or
19 anticipated that Brian Moquin was going to have a mental
20 breakdown, he would have done something, but he didn't.
21 I don't think he knew, I don't think the court knew, I
22 doubt Mr. Moquin even knew. I mean, that's the whole
23 point, it's not something that is subject to rational
24 forethought. It is irrational, unanticipated, and under

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1 those circumstances courts have said, this is too outside
2 the bounds of what anyone can reasonably understand,
3 we're going to give the moving party another chance.
4 THE COURT: Wasn't he -- you mentioned in your
5 papers, I want to say late 2016, his wife reported --
6 Mr. Moquin's wife reported a change in his behavior, your
7 statement had to do with significant abuse.
8 MR. WILLIAMSON: That's right, your Honor. That
9 is right. That is something obviously we weren't in
10 possession of, that's what we found in preparing for the
11 Rule 60 motion. Mr. Willard did not know that and was
12 not aware of that. We got that -- we actually got that
13 from Mr. Moquin. The few files we were able to gather
14 from him, that was in there.
15 THE COURT: So when between -- when was your firm
16 actually retained?
17 MR. WILLIAMSON: I believe we were first contacted
18 in January, your Honor, and I think we were officially
19 retained either late January or early December.
20 THE COURT: Or early February?
21 MR. WILLIAMSON: Sorry. Yeah, late January or
22 early February, and only retained to get up to speed,
23 figure out what was going on, try to get documents from
24 Mr. Willard -- from Mr. Moquin.

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1 THE COURT: And were you the first attorney that
2 he visited with and requested representation?
3 MR. WILLIAMSON: As far as I know. Yeah, as far
4 as I know, your Honor.
5 THE COURT: And obviously I want to be delicate
6 and certainly respectful of any persons that have mental
7 illness, we see it in this court all the time, but he
8 had -- I heard you say it was the first-time diagnosis in
9 2018, was that diagnosis by Dr. Mar?
10 MR. WILLIAMSON: It was.
11 THE COURT: And as a result of the diagnosis, do
12 you have an understanding of whether or not Mr. Moquin
13 started taking medication?
14 MR. WILLIAMSON: I do think he continued -- it is
15 our understanding he did not continue that treatment;
16 that Mr. Willard paid for some. We were, again, hoping
17 to get some documentation that we could provide to the
18 court. It's our understanding Mr. Moquin then left town
19 and is either in Arizona or New Mexico somewhere. He has
20 cut off communication with us, cut off communication with
21 Mr. Willard.
22 And so the short answer is, I don't know, but my
23 guess -- my suspicion is he has not continued treatment.
24 And I think that's a -- I think that's a huge problem.

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1 I mean, I know it's a huge problem for us. I know
2 it's huge problem in the sense I would have liked to have
3 more documentation to provide to the court, I would have
4 liked to have had a letter from Dr. Mar, but also I think
5 it's a huge problem that here is Mr. Moquin, whether he
6 was representing other clients or not, he is still a
7 licensed attorney. I don't harbor any ill will towards
8 him, but I don't think he's safe for the public.
9 I mean, that is a huge issue and it's something
10 that concerns us, but also, as a result, has
11 significantly prejudiced us because we can't get
12 documents from him, we can't get evidence of his
13 diagnosis from Dr. Mar, he refused to sign an affidavit
14 for us, he refused -- he provided us kind of an
15 smattering of electronic documents and then fell off the
16 map, so it's really placed -- I mean, I understand the
17 concept of prejudice here is even if this case continues,
18 the plaintiffs will be prejudiced. I mean, we have to
19 basically start from scratch, and my guess is even if the
20 court is inclined to exercise its discretion and put this
21 case back on track, probably we're going to be under the
22 gun and that's going to be a challenge for our firm and
23 for Mr. Willard. But, given the alternative, I think
24 it's the best we can ask for.

1 THE COURT: But let's talk about prejudice for a
2 bit. There's not only the plaintiffs' claim against the
3 defendants but the defendants' counterclaim?
4 MR. WILLIAMSON: Correct.
5 THE COURT: And what is your proposal if the court
6 were to exercise its discretion and grant the relief
7 requested? The Berry-Hinckley and the related entity
8 persons and entities have spent a lot of money and -- and
9 frustration to finally get an answer in this lawsuit,
10 while there is a policy to make decisions based on the
11 merits, in some cases where a court has given the
12 opportunity to address the merits and that hasn't
13 happened, is it your position that the court should say,
14 No harm, no foul, we're back, I grant it? Or, it seems
15 to me, at a very least there would have to be some fees
16 and costs paid.
17 MR. WILLIAMSON: And that -- candidly, in
18 preparing this and preparing for today, it's -- this is a
19 difficult issue. It's an issue I've struggled with. I
20 want to come in here and say, Oh, your Honor, they're
21 fine, put us back, let's move on, but if I'm sitting in
22 your chair, I wouldn't -- I recognize that's something
23 you would be struggling with and I think that's fair.
24 I think here is -- I guess thinking out loud,

1 number one, I understand the defendants' move to dismiss
2 their counterclaim, again, just trying to get this case
3 to a judgment, of course that be rescinded. They should
4 be able to proceed on their counterclaim.
5 Number two, in terms of prejudice, I think, as the
6 court is aware, certainly we're all aware, just delaying
7 the case is not prejudice but this -- there is something
8 there and the court is right that some provision must be
9 made to the defendants, and I get that.
10 I think -- it does seem to me that if -- certainly
11 if I had the opportunity to oppose those motions, and I
12 think if Mr. Moquin had the opportunity to oppose those
13 motions --
14 THE COURT: Mr. Moquin had the opportunity.
15 MR. WILLIAMSON: Fair point, your Honor. If
16 Mr. Moquin had exercised that opportunity, as he was
17 ethically and morally required to do, I don't know that
18 the court would have entered dismissal. I think the
19 issues that were before the court, as I mentioned a
20 moment ago, dealt with this diminution in value damages
21 that took the plaintiffs' claimed damages from 15 million
22 to 50 million. I don't know that those were necessarily
23 in bad faith, but I do recognize that because of the lack
24 of disclosing calculations of those damages, because

1 discovery proceeded, because we were on the verge of a
2 trial on the merits, that the defendants had been
3 deprived their right of discovery into those damages.
4 And I think the punishment should fit the crime.
5 So if the court is trying to figure out how do we square
6 this up, there is no question that the defendants knew
7 they were going to have to answer for their breach of the
8 lease, but perhaps it is fair to concede maybe they
9 hadn't anticipated the diminution in value claims and
10 didn't get the opportunity to fully discover that.
11 I think they had some discovery. I believe they
12 deposed Mr. Gluhaich, I believe they disposed
13 Mr. Willard, but I can't with a straight face say, It's
14 fine, this didn't impact them at all. When you don't
15 have a 16.1 calculation of damages on this diminution in
16 value claim that is novel, you're stuck trying to figure
17 out, How do I defend against this? So that is a
18 difficult issue and I think, again, if there's going to
19 be a punishment, it should fit the crime.
20 The court asked about attorney's fees and costs,
21 and that's a fair question. I -- it's difficult for me
22 because, again, I don't think Mr. Moquin was acting out
23 of ill will but I think he was acting out of illness.
24 And, at the same time, as Young tells us, the court

1 should decide if blame is to fall where does it fall.
2 And Mr. Moquin did appear in front of this court.
3 The court does have ability to sanction not just parties
4 but attorneys that appear before it. So if there's a
5 question as to attorney's fees and costs, I really think
6 that should more appropriately borne by Mr. Moquin, not
7 by the plaintiffs.
8 But I do recognize the plaintiffs can't get out of
9 it scot-free, and that's why it seems to me that if there
10 is going to be some kind of sanction against the
11 plaintiffs, it should focus on the -- where Mr. Moquin
12 felt short, where the defendants truly prejudiced, and
13 that would be with those diminution in value damages.
14 THE COURT: All right. Thank you.
15 MR. WILLIAMSON: Thank you, your Honor.
16 THE COURT: Counsel?
17 MR. IRVINE: Thank you, your Honor.
18 I'm going to move the lectern so I can get to some
19 of the binders.
20 THE COURT: It has casters so it's very easy to
21 move.
22 MR. IRVINE: That's great.
23 Thank you, your Honor. Thank you for taking the
24 time to hear this today. It's been a long haul for the

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1 parties and the court.
2 Your Honor, essentially the plaintiffs are asking
3 this court for a do-over of this entire action after the
4 court rightfully dismissed plaintiffs' claims due to
5 years of systematic abuse of the Nevada Rules of Civil
6 Procedure and years of ignoring this court's express
7 written orders.
8 These abuses prejudiced my clients significantly
9 by requiring them to spend significant time and resources
10 attempting to force plaintiffs to meet very fundamental
11 discovery obligations. The obligation to disclose your
12 damages is in Rule 16.1. Those disclosures are supposed
13 to be made, as your Honor knows, shortly after the answer
14 and initial case conference and we just simply never,
15 ever got them in this case, despite probably ten letters,
16 despite multiple orders from this court, despite three
17 different continuances of the trial date, and despite
18 your Honor's warnings to counsel late last year.
19 We were also prejudiced in that we had to, again,
20 attempt to force plaintiffs to meet their obligations
21 under 16.1 to appropriate disclose an expert witness,
22 Mr. Gluhaich, who ended up being very critical to the
23 summary judgment motions which were filed late last year.
24 Despite all of their refusals to give us this

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1 fundamental information, my clients were then ambushed
2 with summary judgment motions in October of 2017 in which
3 plaintiffs sought four times the amount of damages that
4 they had sought in the complaint, which was the only
5 basis that we had to gauge their damages.
6 THE COURT: But a party isn't required to state
7 all of their damages in the complaint, isn't it just to
8 put notice that there is damages? The requirement really
9 comes when a party is obligated to supplement their 16.1.
10 MR. IRVINE: Correct, your Honor, that is exactly
11 the problem here. All they have to put in the complaint
12 is damages in excess of $10,000 to give the court
13 jurisdiction. Fortunately, I guess, or unfortunately
14 they put actual numbers in their complaint, about
15 $15 million, but when we got the summary judgment motions
16 they were then seeking $54 million, and it was --
17 respectfully to Mr. Williamson, who hasn't been in this
18 case that long, it wasn't just the diminution in value
19 claims, it was more than that, and I'll get to that in a
20 moment.
21 But, your Honor, getting to the Rule 60 piece of
22 this, plaintiffs are attempting to essentially use the
23 alleged psychological condition of Mr. Moquin as a magic
24 bullet to explain away all their bad conduct from the

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1 start of this case forward, and that goes to their
2 initial disclosures in this case which were signed by
3 Mr. O'Mara, who wasn't mentioned by Mr. Williamson but
4 who has been in this case from the very start. He signed
5 the initial disclosures, they didn't include a damages
6 calculation.
7 They failed to meet their burden of proof on the
8 issue of whether or not Mr. Moquin had the alleged
9 psychological condition. I'll certainly touch on the
10 evidentiary issues in a moment, but it's very clear under
11 the Stoecklein case that they've got an obligation to
12 provide this court with competent admissible evidence and
13 to meet a burden of substantial evidence before Rule 60
14 motions will be granted. I don't think they've done that
15 here.
16 Even if the court considers plaintiffs' evidence,
17 I think at best -- at best that evidence provides some
18 explanation for plaintiffs' failure to oppose the motion
19 for sanctions and the motion to strike Mr. Gluhaich as an
20 expert. It doesn't at all explain away their consistent
21 refusal over the entire course of this case to comply
22 with the Nevada Rules of Civil Procedure and this court's
23 orders, all to my client's prejudice.
24 Despite all this, they want to blame everything on

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1 Mr. Moquin and essentially start over with 16.1
2 disclosure and begin discovery, at least on damages,
3 anew, which is fundamentally unfair to both my clients
4 and this court.
5 That argument ignores the involvement of not one
6 but two attorneys. Mr. O'Mara, as I said, has been in
7 this case from the start, we briefed his obligations
8 under Supreme Court Rule 42 to ensure compliance with
9 local rules, to ensure compliance with court orders, and
10 to make sure cases are tried as they should be tried in
11 the local jurisdiction.
12 That also ignores -- their argument ignores Mr.
13 Willard's involvement. Mr. Willard was, in fact, present
14 at the hearing in January 2017. That's Exhibit 2 to our
15 opposition.
16 THE COURT: I saw that, and that's why I asked, I
17 could not remember --
18 MR. IRVINE: Yes, your Honor.
19 THE COURT: -- if he was present or not.
20 MR. IRVINE: It's at -- the appearance page, your
21 Honor, page three of the transcript, which I said
22 Exhibit 2 to our opposition, Mr. Moquin introduced --
23 THE COURT: Oh, I see it. And Mr. Wooley.
24 MR. IRVINE: Yeah, I was panicked for a second. I

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1 certainly remembered him sitting there, but I went back
2 and checked, so they were there.
3 And, as your Honor may recall and we've cited to
4 this transcript a number of times, the discovery
5 deficiencies with plaintiffs was brought to the court's
6 attention at that hearing. I raised it. I said, "Look,
7 we've never received a damages disclosure," Mr. Moquin
8 acknowledged that, your Honor, issued an oral order that
9 day saying that they had to do a damages disclosures
10 within 15 days of the order granting our motion for
11 partial summary judgment.
12 That was followed up after that hearing with a
13 stipulation and order that reset the trial date and
14 discovery deadlines in which Mr. Moquin represented that
15 he was apprising his clients of the continuance, as he
16 has to do it under the local rules, and they again
17 promised in that stip and order to provide us not only
18 with the damages disclosures but also a disclosure of
19 Mr. Gluhaich as an expert that complies with Rule 16.1,
20 and they just didn't do that.
21 So, your Honor, the plaintiffs have a remedy in
22 this case if this motion is denied, as we think it should
23 be, and that remedy is they have malpractice claims
24 against their attorneys. The Huckabay case that we've

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1 cited consistently in our briefing lays that out. It
2 says just that. It notes that a civil case, unlike a
3 criminal case, does not afford a constitutional right to
4 effective assistance of counsel, and if counsel fails to
5 do their job then there's a malpractice remedy against
6 the attorneys. And we would certainly submit that that
7 is the avenue that Mr. Willard should be pursuing, not
8 the relief sought in the Rule 60 motion.
9 THE COURT: But if we just step back and just
10 weigh if it was attributable completely to Mr. Moquin --
11 I understand that you're parsing it out that it isn't --
12 MR. IRVINE: Sure.
13 THE COURT: -- and what is the right thing to do?
14 Should a party be penalized for the act or inactions of
15 his attorney?
16 MR. IRVINE: Well, I think the answer is maybe. I
17 think the Supreme Court in the Huckabay case -- Huckabay
18 Properties v. NC Auto Parts, which is 130 Nevada Advisory
19 Opinion 23, the court shows, I think, a very distinct
20 trend -- I've read a number of cases in this arena
21 recently -- that essentially says, based upon general
22 agency principles, a civil litigant is bound by the acts
23 or omissions of a voluntarily chosen agent, and it says:
24 The dissatisfaction --

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1 I'm on page one here -- I guess I don't have the
2 cites for the Nevada Advisory Opinion page numbers, but
3 it's page 430 of the Pacific Reporter. It says:
4 Appellant's dissatisfaction with their
5 attorney's performance does not entitle
6 them to reinstatement of their appeals.
7 And then it goes on to cite the Link v. Wabash
8 case from the United States Supreme Court which
9 essentially sets forth these agency principles as a
10 reason for dismissing these claims when attorneys don't
11 comply with court rules and court orders, which is
12 exactly the case in Huckabay, that counsel ignored the
13 rule for his opening brief, sought several extensions,
14 the Supreme Court granted those extensions, conditionally
15 accepted a late brief, and then ultimately dismissed the
16 appeal.
17 So I think the question that you asked is whether
18 this should all fall on the client. I think sometimes it
19 should. I think in this case where there was not one but
20 two attorneys -- I mean, you have to consider
21 Mr. O'Mara's presence and his obligations under the
22 Supreme Court Rules, as well as Mr. Moquin, so I don't
23 think you can carve Mr. Moquin's acts out and put them in
24 a vacuum given the fact that they had two attorneys

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1 present.
2 And, as your Honor knows, Mr. O'Mara filed the
3 motion to extend time for them to oppose the motions for
4 sanctions and the motion to strike Mr. Gluhaich, he was
5 present here in December of last year, he was well aware
6 of these deadlines, and certainly never came over and
7 asked the court for help.
8 Mr. Willard, if you look at the text messages that
9 are attached to their reply brief, I think they're
10 Exhibit 2, the start of them, the brief was initially
11 due -- the oppositions were initially due on December 4th
12 after we gave them some extensions. We couldn't give
13 them as much extension as they were asking for because we
14 were running up against the deadline to submit motions to
15 your Honor for decision, so we gave them all the time we
16 could.
17 These text messages, Exhibit 2, seem to show that
18 Mr. Willard was aware that there was a deadline around
19 September 4th. If you look at page of that exhibit, he
20 says, "Aren't you supposed to file by noon," so he knew
21 that there were deadlines going, he knew those deadlines
22 weren't being met, and he didn't come over to the court
23 and ask for help, say, "I need more time to find a new
24 attorney," he didn't have Mr. O'Mara do that either. And

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1 in his declaration he admits that the reason he didn't do
2 that was financial. He said that, "I simply didn't have
3 the resources to pay another attorney at that point and I
4 thought I had to continue with Mr. Moquin," and I think
5 there has to be some responsibility for that decision.
6 He came up with the money to hire Mr. Williamson
7 to -- after the court dismissed the case, and he
8 certainly could have done that prior to that and he just
9 chose not to. So I think under these circumstance -- I
10 know it's a long answer -- some of the responsibility has
11 to fall on the client and dismissal is appropriate.
12 THE COURT: I also am reflecting on this. As I
13 indicated, we all have heard and I see it every day
14 persons that have mental illness that are evaluated but
15 there's differing kinds, and antidotally it seems that
16 there is many persons that -- in every profession that
17 may have an equivalent condition, and isn't it a slippery
18 slope for the court to put on a medical hat and start
19 saying, Well, this is sufficient to excuse those actions
20 and put the case back where it is, but this type of
21 mental illness is not -- I mean, should the court be put
22 in that position?
23 MR. IRVINE: I don't think so, your Honor. First
24 of all, I think you don't have the evidence in front of

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1 you that this an undisputed fact, as Mr. Williamson
2 characterized it. I can touch on that later. But I
3 wholeheartedly agree. I mean, there have to be quite a
4 few attorneys practicing in the state of Nevada right now
5 that have a bipolar condition. I mean, statistically
6 it's got to be the case. And I think they manage their
7 condition and they practice successfully.
8 So I think it's not only a slippery slope asking
9 the court to sort of parse out, you know, which omissions
10 or bad acts in this case were attributable to his alleged
11 conditions and which ones weren't. They don't really do
12 a good job of that in their briefing. Everything they
13 seem to point to is right at the end when he didn't
14 oppose our motions, but they don't explain if he had
15 opposed the motions what his opposition would have said,
16 why they didn't comply with the NRCP or something like
17 that.
18 So I think it's a difficult situation to put the
19 court in to try to say, Well, I'm going to excuse this
20 because of this condition and not this because of
21 another. And, you know, it's -- I guess it's somewhat
22 problematic for those attorneys who are out there
23 practicing successfully that have the same problems that
24 Mr. Moquin may have.

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1 THE COURT: And although that you're serving the
2 responsibility on the part of Mr. O'Mara, it seems to me
3 from the hearings it was clear who was intended to be the
4 lead counsel.
5 MR. IRVINE: No doubt, your Honor. I agree with
6 you that he was -- that he was local counsel and
7 Mr. Moquin was lead, but Supreme Court Rule 42, sub 14,
8 is abundantly clear as to what the responsibilities of
9 Nevada counsel are. 14(a), says they shall be
10 responsible for and actively participate in the
11 representation of a client in any proceeding that is
12 subject to this rule; sub (b) says they have to be
13 present at motions, pre-trials and other matters in open
14 court; and then sub (c) that they are responsible to make
15 sure that any proceedings subject to this rule for
16 compliance with all state and local rules of practice and
17 orders, and make sure that the case is tried and managed
18 with applicable Nevada procedural and ethical rules.
19 So regardless of what arrangement Mr. O'Mara may
20 have had with Mr. Willard or Mr. Moquin, his
21 responsibilities to the judiciary are the same. And his
22 responsibilities to the judiciary are essentially the
23 same as primary counsel, make sure that rules and orders
24 get followed.

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1 And, you know, I -- Mr. O'Mara didn't do that. He
2 signed the initial disclosures, didn't have a damages
3 disclosure. I called him on it in letters, and it never,
4 ever got fixed. And then at the end of the case, when
5 Mr. O'Mara certainly knew that things weren't getting
6 filed as they should be -- I'm trying to look for the
7 right exhibit in their reply, your Honor -- there's an
8 e-mail from Mr. O'Mara where he's asking, When are these
9 things going to get filed, he's not getting appropriate
10 responses, Mr. O'Mara did nothing. He had every
11 opportunity to call chambers, to ask for an emergency
12 status conference and say, "Your Honor, help. This guys
13 has gone dark, he's not opposing these motions, can you
14 please give us 30 days to find new counsel?"
15 We didn't hear anything from Mr. O'Mara until his
16 notice of withdrawal in March. Just silence from the
17 time we were in this courtroom, I think it was
18 December 10 or 11 of last year, until he withdrew, we
19 heard nothing, and neither did the court.
20 THE COURT: So really what the assertion then is
21 that I don't look at it in a vacuum but if I evaluate the
22 proof that they must establish, I really need to look at
23 the involvement of both attorneys, or lack thereof.
24 MR. IRVINE: And Mr. Willard, I think, your Honor.

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1 THE COURT: And Mr. Willard.
2 MR. IRVINE: That's the way we see it, your Honor.
3 THE COURT: If you were to identify the amount of
4 fees that you've incurred due to either Mr. O'Mara's --
5 which I haven't reached the conclusion that he hasn't met
6 his obligation because we don't know what correspondence
7 went back and forth internally, if there was any --
8 MR. IRVINE: Right.
9 THE COURT: -- attorney/client privileged
10 documents going back and forth, or his to Mr. Moquin, we
11 don't know that, but if you had to calculate the
12 attorney's fees and costs that have been incurred that
13 brings us to this situation as opposed to going to
14 trial --
15 MR. IRVINE: Uh-huh.
16 THE COURT: -- do you have a calculation or would
17 you have to undertake that?
18 MR. IRVINE: I'm sorry, your Honor, I would have
19 to go back and look at quite a few bills.
20 THE COURT: Because the papers filed in this are
21 substantial so I have to believe that that number is very
22 substantial.
23 MR. IRVINE: I'd be shock if it wasn't six
24 figures.

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1 THE COURT: Right. That's what I thought.
2 MR. IRVINE: And, your Honor, while we're on that
3 topic, I really think, you know, a sanction in the form
4 of attorney's fees to my client is a very, very hollow
5 remedy. Mr. Willard has testified in his affidavit -- I
6 guess, declarations provided in this case that he's not
7 financially sound, that he's essentially living off
8 Social Security, which I think it was about $1,600 a
9 month, so his ability to satisfy any attorney's fees
10 award, I think, is really not possible based on what he's
11 presented to the court. And, you know, an attorney's
12 fees awards in our favor against Mr. Moquin, given what
13 we've heard about his situation, kind of fleeing
14 California and residing now in Arizona or New Mexico, is
15 likewise going to be a hollow remedy.
16 I'll touch on the other piece, the diminution in
17 value a little bit later, but I don't think that works
18 well either.
19 Moving on, your Honor, to the Rule 60 standard, I
20 wanted to touch on the evidentiary stuff real quick.
21 First, I wanted to touch on what Mr. Williamson put in
22 his reply brief and that he just argued before your Honor
23 today that we failed to bring the Young v. Johnny Ribeiro
24 Building, Inc., case to your attention in our sanctions

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1 motion and that we didn't address some necessary factors
2 in that motion, and that your Honor's findings of fact
3 and conclusion of law also didn't. I don't think those
4 arguments are valid.
5 They argued in their reply that the factors listed
6 in Johnny Ribeiro, which include whether sanctions
7 unfairly operate to penalize a party for the misconduct
8 of his or her attorney, they characterize those as
9 required elements that the court has to look at, and if
10 you read the case that's not just true. And I'm at
11 page -- so this is 106 Nevada 88, I'm at page 93. They
12 say that:
13 We will require -- excuse me -- we will
14 further require that every order of
15 dismissal with prejudice as a discovery
16 sanction be supported by an express,
17 careful and peripherally written
18 explanation of the court's analysis of
19 the pertinent factors.
20 And then it says:
21 The factors a court may properly
22 consider include --
23 And then there's a list of about seven.
24 THE COURT: The court determines the pertinent

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1 factors.
2 MR. IRVINE: Exactly. So I just wanted to correct
3 that, that these are not required factors that had to be
4 addressed or had to be raised by us as a controlling
5 authority in our sanctions motion. I just don't think
6 that's true. It's a list of, you know, discretionary
7 factors that the court can look at, and I think that the
8 court's findings and conclusions entered earlier this
9 year are careful, detailed, and meet the standard there.
10 Moving on to the evidentiary issues, your Honor,
11 it's undisputed that it's plaintiffs' burden to prove
12 excusable neglect by a preponderance of the evidence, and
13 they meet this burden by producing competent evidence.
14 And that's the Stoecklein v. Johnson Electric case that
15 Mr. Williamson cited, 109 Nevada 268. And I'll quote the
16 Stoecklein court. It says.
17 The court has significant discretion
18 but this discretion is a legal discretion
19 and cannot be sustained where there was
20 no competent evidence to justify the
21 court's action.
22 So they have to have competent admissible evidence
23 to support excusable negligent. Here, their only
24 argument for excusable negligent is Mr. Moquin's alleged

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1 psychological condition, and I really wanted to focus on
2 Mr. Willard's declarations when arguing this. He
3 submitted two; he submitted the Declaration in Support of
4 Rule 60 Motion at Exhibit 1, and I think he did, I think,
5 nearly an identical Exhibit 1 to the reply brief, which I
6 think mostly served to authenticate the new exhibits that
7 were attached to that.
8 But if you look at what he actually says at
9 paragraph -- I think it starts about paragraph 66,
10 Mr. Willard states that he's convinced that Mr. Moquin
11 was dealing with issues and demons beyond his control;
12 that he learned that Mr. Moquin was struggling with a
13 constant marital conflict that greatly interfered with
14 his work, that's paragraph 67; that Mr. Moquin had
15 suffered a total mental breakdown, that's paragraph 68;
16 and that Mr. Moquin explained to Mr. Willard that his
17 doctor told him he had bipolar disorder, at Exhibit 70.
18 And then --
19 THE COURT: Paragraph 70?
20 MR. IRVINE: Sorry, paragraph 70. My apologies.
21 Then he goes on to sort of talk about what he
22 believes the disorder to be. He says it's severe and
23 debilitating, at paragraph 73; and that he now sees that
24 Mr. Moquin was suffering from symptoms of bipolar

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1 disorder through his work on the case, paragraph 76.
2 I really struggle with the statements here.
3 Mr. Williamson characterized this as based on his own
4 perception. I'm not sure how that could be the case.
5 You know, he had to hear it from Mr. Moquin at some point
6 and, I think, you know, frankly what happened was he
7 heard that he had bipolar disorder and kind of filled in
8 the rest of the declaration later.
9 Obviously, the statement from Dr. Mar through
10 Mr. Moquin to Mr. Willard is hearsay, Mr. Williamson has
11 acknowledged that, and I don't think that that statement
12 meets the standard under NRS 51.105, which is the
13 exception to the hearsay rule for the -- your own present
14 physical symptoms or feelings.
15 If you look at the McCormick on Evidence -- 2
16 McCormick on Evidence, Section 273, which the Supreme
17 Court has cited McCormick favorably in the past, it says
18 that these statements are a general exception to the
19 hearsay rule but that they get special reliability and
20 therefore an exception based on the spontaneous quality
21 of the declarations.
22 And the examples of those that they give in the
23 comments to that section of McCormick are, I feel pain, I
24 am light-headed, My leg hurts, stuff that is happening to

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1 that person right now, and that's not what Mr. Moquin is
2 saying. He's not saying, "I feel scattered" or "I feel
3 depressed" or anything like that. He's saying, "My
4 doctor told me I have X."
5 THE COURT: But wouldn't it go to his motive?
6 MR. IRVINE: Whose motive?
7 THE COURT: Couldn't it be used, or lack thereof,
8 in addressing the case? In other words, if it's used for
9 a different purpose -- I mean, I -- this isn't ideal
10 evidence, clearly --
11 MR. IRVINE: Right.
12 THE COURT: -- but there probably is an exception
13 that could be fashioned based on to determine whether
14 excusable or inexcusable, in essence, neglect or whether
15 it was intentional or not intentional, or what his motive
16 was for acting the way he was, whether it was mental
17 illness driven or something else? Nonetheless, I concur
18 that this is not ideal.
19 MR. IRVINE: I don't think it can be used for
20 motive. I think they're clearly offering it for it the
21 truth of the matter asserted, that he has bipolar. I
22 don't think there's any doubt that's why they want to use
23 it. I haven't certainty heard from them that they are
24 trying introduce it for something else. But that

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1 statement and the statement in I think at least one of
2 the court documents on the spousal abuse issue have the
3 same problems for hearsay and there's simply no
4 exceptions to those statements.
5 THE COURT: But your position is even if, one,
6 evidentiary-wise that it's not sufficient --
7 MR. IRVINE: Right.
8 THE COURT: -- but, number two, even if it was
9 sufficient, it's still not there?
10 MR. IRVINE: Yes, your Honor, absolutely.
11 Just let me make sure I'm not missing anything on
12 the evidence stuff. You know, I went through the
13 statements that Mr. Willard was making. I don't think he
14 has personal knowledge to testify to much of what he
15 said. I don't think he personally observed this. I
16 don't believe that Mr. Willard and Mr. Moquin lived in
17 the same state at the time this happened. I believe
18 Mr. Willard is in Texas. I could be wrong about that. I
19 know Mr. Moquin was in California.
20 I mean, he's testifying about Mr. Moquin's
21 personal mental status and the status of his marriage,
22 and I would -- it would be very difficult to perceive
23 those, to observe those on your own. It's really much
24 more likely that he obtained the information from

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1 Mr. Moquin himself or from Mr. Moquin's wife and,
2 therefore, I think the testimony that Mr. Willard is
3 offering constitutes inadmissible hearsay under NRS
4 51.035 and 51.065.
5 The documents that they've provided as well also
6 lack foundation. I went through those arguments, I don't
7 need to touch on those again, but 51.015 and 52.025 don't
8 apply to get the California TPO documents in.
9 Mr. Willard simply has no personal knowledge of these
10 documents, he's not the author, he wasn't involved with
11 those situations, he simply can't authenticate those or
12 lay foundation for any of those to come in.
13 Then, lastly, on evidence, Mr. Willard sort of
14 speculates about some of the -- the symptoms that
15 Mr. Moquin might be experiencing. He uses an internet
16 printout that they submitted as part of their moving
17 papers. We would certainly submit that that is
18 inappropriate lay witness testimony despite Mr. Willard's
19 degree in psychological years ago. He certainly didn't
20 practice as a psychologist, he was a real estate
21 developer, I believe.
22 And, your Honor, these evidentiary issues are very
23 important because of the standard set forth in the
24 Stoecklein case; you have to have competent evidence, it

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1 has to be substantial. And if you look at the cases that
2 the plaintiffs cited in support of their Rule 60 motion,
3 the United States v. Cirami case, 563 F.2nd 26, that case
4 had an attorney's affidavit where he talked about his
5 condition, had a letter from a psychologist; we don't
6 have that here. The same with the Boehner v. Heise case
7 that Mr. Williamson cited earlier, they had an attorney's
8 declaration and a psychologist's written evaluation.
9 As your Honor notes, the evidence we have here is
10 not ideal. I think it's further than that. I don't
11 think it's admissible. I don't think it can form the
12 basis to grant the Rule 60 motion, we just don't think
13 it's competent and can't be used.
14 THE COURT: Did you look at the Boehner v. Heise
15 case?
16 MR. IRVINE: Yes.
17 THE COURT: And you're distinguishing that as
18 well? Was that the one that you indicated that --
19 MR. IRVINE: Yes. Boehner v. Heise is
20 distinguishable because of the evidence that was given in
21 that case. If you look at that case, starting at page
22 three, it talks about the attorney submitted a
23 declaration in support of plaintiff's motion, talked
24 about exacerbation of his psychological problems, he

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1 testified about his own condition; we don't have that
2 here.
3 Going on down farther on that page, it talks about
4 Dr. Robbins, who was the lawyer's psychologist who
5 submitted a copy of his clinical neuropsychological
6 evaluation of the lawyer, including a brief letter and a
7 sworn declaration --
8 THE COURT: That's what I recalled, there was an
9 evaluation.
10 MR. IRVINE: We don't have that here either, so I
11 think the cases they relied on are very distinguishable
12 as far as the evidence that was presented to the court,
13 which we certainly don't have, but I'll move on, your
14 Honor.
15 I think we've addressed the evidence issues in the
16 briefing pretty well, unless you have any questions about
17 that.
18 THE COURT: No. Thank you.
19 MR. IRVINE: So even assuming the court accepts
20 and admits all the evidence that they've provided both
21 attached to the Rule 60 motion and the reply, I still
22 think they haven't met their burden of proving excusable
23 neglect, and I think the Huckabay case from 2014 is very
24 instructive.

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1 In that case, although it was not a Rule 60, it
2 was a case that was on appeal, the appellant was
3 represented by not one, but two attorneys, just like
4 here; the court granted two separate extensions to file
5 appellant's opening brief; they eventually filed the
6 brief late, along with the appendix. The court
7 conditionally accepted those but then later dismissed;
8 there was a motion for reconsideration, which was denied,
9 and then the opinion got to us through en banc
10 reconsideration because the court wanted to talk about
11 these issues.
12 And then the Nevada Supreme Court in the Huckabay
13 case addressed a lot of the policy reasons that Mr.
14 Williamson talked about, and I'm quoting from page 437,
15 the Pacific Reporter cite. It says:
16 While Nevada's jurisprudence expresses
17 a policy preference for a merit-based
18 resolution of appeals and our appellate
19 procedure rules embodied in this policy
20 among others, litigants should not read
21 the rules for any of this court's
22 decision as endorsing non-compliance with
23 court rules and directives, as to do so
24 risks forfeiting appellate relief. An

1 appeal may be dismissed for failure to
2 comply with court rules and orders and
3 still be consistent with the court's
4 preference for deciding cases on their
5 merits, as that policy must be balanced
6 against other policies including the
7 public's interest in an expeditious
8 appellate process. The parties'
9 interests in bringing litigation to a
10 final and stable judgment, prejudice to
11 opposing side, and judicial
12 administration consideration such as case
13 and docket management.
14 And then it says:
15 As for declining to dismiss the appeal
16 because the dilatory conduct was
17 occasioned by counsel and not the client,
18 that reasoning does not comport with
19 general agency principles under which a
20 client is bound by a civil attorney's
21 action or inactions.
22 And the court in Huckabay was really taking that
23 last bit of reasoning from the case that I had mentioned
24 earlier, which is the Link v. Wabash case from the United

1 States Supreme Court, which they went with that case
2 which was actually a Rule 41 dismissal for failure to
3 prosecute and sort of took that reasoning and brought it
4 up to the appellate level, so I think the court is
5 comfortable with that reasoning at the trial level as
6 well.
7 But the Link court was very interested in this
8 agency principle relationship and talking about how in
9 civil cases, unlike criminal cases, the civil litigant
10 has the right to choose their attorneys and they have to
11 bear the consequences of lawyers that don't do things
12 exactly right because of that.
13 And then they specifically note, citing the
14 Kushner case from the Third Circuit Court of Appeals,
15 that unlike a criminal case, an aggrieved party in a
16 civil case does not have a constitutional right to the
17 effective assistance of counsel. The remedy in a civil
18 case in which chosen counsel was negligent is an action
19 for malpractice, and I think that's what we've got here.
20 The court in Huckabay does note an exception to
21 this general rule citing to the Passarelli case that Mr.
22 Williamson cited earlier. The Passarelli opinion, which
23 I read again this morning, leaves a lot to be desired on
24 background facts that your Honor asked where that case

1 was when it was dismissed.
2 That case, the parties showed up for trial and
3 neither Passarelli nor his lawyer showed up, so that's
4 where that one was. I don't think there were any --
5 there's no statement in that opinion that there were any
6 warnings or prior incidents.
7 THE COURT: I thought it was unknowingly deprived
8 of legal representation; in other words, they didn't
9 really know.
10 MR. IRVINE: They didn't even know about the trial
11 date in Passarelli. Again, I don't think that's the case
12 here as we've seen from the text messages and e-mails
13 that they've sent. They knew about these deadlines and
14 Mr. Willard was certainly present in January of 2017 when
15 we discussed the lack of a damages disclosure, and where
16 his counsel promised to provide one.
17 The other distinguishing factors from Passarelli
18 that I think your Honor noticed -- noted there was
19 evidence in the record in Passarelli that the attorney
20 was suffering from substance abuse. There was direct
21 testimony from his legal assistant and from some of his
22 colleagues about what they had seen and what they had
23 done to try to help him. We don't have that here. All
24 we have, as we talked about, is hearsay and sort of

1 third-party evidence about that.
2 Second, the attorney in Passarelli had voluntarily
3 closed his law practice; that has not happened here. We
4 submitted to your Honor a printout from the California
5 Bar as one of our exhibits to the Rule 60 motion,
6 Mr. Moquin, when we filed the Rule 60 motion, was still
7 active with no discipline on his file in the state of
8 California, and I can represent to the court that I
9 checked that this morning and that remains the case, he's
10 still --
11 THE COURT: Well, he would be because it's
12 assessed annually, unless there was some action that had
13 been taken to suspend him.
14 MR. IRVINE: But he certainly hasn't voluntarily
15 turned over his license --
16 THE COURT: Right.
17 MR. IRVINE: -- as the lawyer did in Passarelli.
18 I think the third distinguishing factor in
19 Passarelli and then the reason that exception to Huckabay
20 doesn't apply is that Passarelli only had one attorney.
21 And here, we come back to Mr. O'Mara again, who was
22 certainly present, certainly was aware of court
23 deadlines, was aware that those deadlines weren't being
24 met, and simply we have no evidence that he did anything

about it. Certainly no filings, didn't approach us, didn't approach this court, and we don't have any kind of declaration or documents from Mr. O'Mara save one e-mail, I believe.

Your Honor, Huckabay is not a standalone. The Supreme Court has certainly expressed, I think, a more aggressive approach towards sanctioning, including case sanctions against parties for their attorney's inaction. It's definitely a different playing field than it was back in 1986 when Passarelli was decided, and I think that the court's analysis in Huckabay when applied to the fact here really compel the conclusion that the Rule 60 motion should be denied in its entirety.

The standard for excusable neglect requires that the attorney be completely unable to respond or appear in the proceedings; that was the holding in Passarelli, meaning he had to shut down his practice. Here, it's been a much different experience dealing with Mr. Moquin.

As your Honor will recall, he's been present at every status conference and hearing that the court has ordered and scheduled. We filed pretty significant motions for partial summary judgment. In 2016, he opposed those, the work was, you know, competent, and he came in and argued. He didn't win the motion but there

was certainly nothing to say that he's not been performing during the entirety of the case and, at the same time, he was refusing to give us the information we needed.

And then I think really most telling are the summary judgment motions that he filed last October. And those motions, I know there's a plaintiff that's no longer here, we've settled with Mr. Wooley and he's dismissed his claims, but between those two parties, Mr. Moquin was certainly able to file 40 pages of briefs and over 70 exhibits seeking summary judgment and seeking damages, as I said, four times what he ever asked for in the complaint or anywhere else.

And I know that Mr. Williamson has done his best to characterize that as sort of symptomatic of Mr. Moquin's alleged psychological condition. Having lived this case and having tried to pull teeth and get this information from Mr. Moquin, I have a different view. I think it was strategic. I think they intended to make it impossible for us to rebut their damages and try to sneak it by. I really do.

THE COURT: That's your belief?

MR. IRVINE: That's my belief.

THE COURT: You don't have any independent

evidence of that?

MR. IRVINE: I don't, but he said all their actions are in good faith and it's just sort of just saying that. I don't have anything to support that other than circumstantial, we got this --

THE COURT: And that we --

MR. IRVINE: -- we got this three weeks before the close of discovery and we can't do anything about it now. And certainly Mr. Willard signed declarations as part of that summary judgment process last October so he was working with his attorney very closely at that point to come up with very significant filings. And then, you know, a couple of months later they oppose our motions. Again, I wonder, even if you accept their evidence and he has bipolar condition, how much does that excuse? Does it excuse Mr. O'Mara not providing a damages disclosure when he signed the 16.1? Does it excuse them from never providing one despite numerous, numerous letters from us, numerous orders from this court, motions to compel which they didn't oppose and they never paid the attorneys' fees that you ordered as part of it.

I mean, I just don't think that even if what they're saying is true that it can be used as an eraser to forget about everything that happened. At best, maybe

they get a chance to go back and oppose our sanctions motion and our motion to strike Mr. Gluhaich now, but we certainly don't have any explanation from them in their moving papers here as to how they would address those. They don't explain why it's now okay that they didn't comply with 16.1, that they didn't comply with the expert disclosure requirements in 16.1. We just haven't heard any of that. It's all been focused on the late part of last year and early part of 2017 when they didn't oppose the sanctions piece and motion to strike Gluhaich.

THE COURT: There is one more question I wanted to ask you, and that is regarding the meritorious defense -- or meritorious claim portion. My -- when counsel was talking about that, I was recalling that that is not an analysis that has to be made in every case, so isn't there a recent Supreme Court case that actually says that sometimes you don't even get to that piece of the analysis?

MR. IRVINE: I don't know.

THE COURT: Okay.

MR. IRVINE: Your Honor, I frankly --

THE COURT: I know I have it in chambers.

MR. IRVINE: I looked at the standard and the standard for meritorious defense is pretty low. I mean,

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1 there's some case law, I think that they cited in their
2 moving papers that basically filing an answer is enough
3 for a meritorious defense is present.
4 THE COURT: Whether it's not -- it's whether or
5 not a court is obligated to undertake that analysis or
6 whether the analysis stops before that --
7 MR. IRVINE: Right. Well --
8 THE COURT: -- and there is some case law -- I --
9 I have it from drafting something else and I am going to
10 review it but either way, I know what their position is
11 with regard to it.
12 MR. IRVINE: And with the standard that they have
13 to meet to show a meritorious defense, I simply didn't
14 brief it because they've got their claims. Do I think we
15 have defenses? Yes, but the meritorious defense standard
16 is not high so we didn't choose to spend time in the
17 briefing on that issue.
18 THE COURT: All right. I interrupted both of
19 you -- I interrupted your flow so, of course, if you want
20 to wind up your argument, then I'm going to allow you the
21 chance to respond.
22 MR. IRVINE: Your Honor, I apologize, I'm getting
23 close. I just want to make sure I didn't miss anything.
24 My outline is much longer as it needs to be, they always

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1 are. I wanted to just focus on a couple more things.
2 We talked about Mr. O'Mara's role, and I'll leave
3 that alone for now. I think that's spelled out in our
4 brief and Supreme Court Rule 42 and everything else.
5 But when you talk about looking at this not in a
6 vacuum but in its totality and everyone's involvement,
7 the last piece I wanted to bring up with Mr. Willard is
8 that hearing January 10, 2017, on our motion for partial
9 summary judgment. At that hearing, at pages 42 and 43 of
10 the transcript, which is Exhibit 2 to our opposition to
11 the Rule 60 motion --
12 THE COURT: I have it.
13 MR. IRVINE: Okay -- we raised it, we talked about
14 how we never received a damages computation from the
15 plaintiffs despite a bunch of demands. Mr. Moquin
16 admitted in open court that with respect to Willard they
17 do not -- I'm quoting here --
18 With respect to Willard, they do not
19 have an up-to-date, clear picture of
20 plaintiffs' damages claims. At that
21 hearing when Mr. Willard was present, the
22 court ordered -- entered an oral case
23 management conference directing them
24 within 15 days of the entry of summary

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1 judgment an updated 16.1 damages
2 disclosure.
3 So Mr. Willard was certainly aware of that issue
4 which was -- you know, the most primary reason for our
5 sanctions motion, and I think one of the key focuses in
6 the findings and conclusions dismissing the case,
7 Mr. Willard was aware of that, you know, nine or
8 ten months before we filed the sanctions motions and no
9 damages disclosures were ever made.
10 Bear with me, your Honor, I'm about done.
11 Oh. Mr. Williamson, when you sort of asked him
12 about what lesser sanctions might be there that would
13 work, he talked about the diminution in value being the
14 only real issue that was affected by the lack of a
15 damages disclosure and a lack of proper disclosure of
16 Mr. Gluhaich. That's not accurate.
17 And I know he hasn't been involved in this case
18 that long, but if you look at the First Amended Complaint
19 and plaintiffs' interrogatory response, which I think is
20 Exhibit 5 to our sanctions motion, you'll see the damages
21 that they disclosed that we were aware of when we got the
22 summary judgment motions.
23 They were seeking accelerated rent of $19 million
24 and change, discounted by four percent per the lease to

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1 about $17,700,000. They were also seeking property
2 related damages of about $21,000. And this is in a chart
3 in our sanctions motion. We laid it out in a pretty user
4 friendly chart. It's on page 17 of our sanctions motion.
5 So that's what we knew about before we got the summary
6 judgment motions.
7 When we got the summary judgment motions, we had a
8 new category of damages called liquidated damages. We
9 hadn't the heard them use that phrase before. We had
10 heard accelerated rent but not liquidated damages, so
11 that's a new damages model that they included in the
12 summary judgment motion. They were seeking about
13 $26 million there.
14 Then they have the diminution in value claim that
15 Mr. Williamson referred to, that was about $27,600,000.
16 Then they had a new amount for property related damage
17 that went from about 21,000 to about 48,000.
18 Then they had another new category of damage
19 called unpaid rents and late payment charges, which was
20 $786,000. So, I mean, all told, they sought three new
21 categories of damages and the one category that they
22 continued with was a new amount, so we would certainly
23 submit that any sanctions order that was less than
24 dismissal we need to preclude those categories of damages

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1 which were certainly brand new and never disclosed
2 before.
3 And both -- two of the new categories, the
4 liquidated damages category and the diminution in value
5 category of damages, both of those exclusively rely on
6 Dan Gluhaich as an expert to prove, so we would submit
7 that all of that is inappropriate and should be excluded
8 if the case were to go forward, which we don't think it
9 should.
10 Then, your Honor, I would just take -- take you
11 back to December of last year. We were in this court, I
12 think it was the last time I was in here for this case,
13 they were asking for more time. Your Honor was gracious
14 enough to give them more time, and you told them, you
15 said:
16 You need to know going into these
17 oppositions that I'm very seriously
18 considering granting all of it. You know
19 going into the motion for sanctions that
20 you're -- I haven't decided it, but I
21 need to see compelling opposition not to
22 grant it.
23 Your Honor, I would submit that we haven't seen
24 that. We've seen some explanation as to why they didn't

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1 file opposition to the sanctions motion but we haven't
2 seen the compelling opposition that your Honor was asking
3 for last December as to why the sanctions motions
4 themselves shouldn't be granted. They don't address any
5 of that in their moving papers here other than just
6 saying bipolar.
7 With that, your Honor, I think I'll sit down,
8 unless you have any questions for me.
9 THE COURT: No, you've answered them along the
10 way. Thank you.
11 MR. IRVINE: Thank you.
12 THE COURT: Counsel?
13 MR. WILLIAMSON: Yes, your Honor. Thank you.
14 Your Honor, I may jump around a little bit but I
15 wanted to make sure I addressed Mr. Irvine's points.
16 First off, as an initial matter, Mr. Irvine said,
17 I don't think that Mr. Willard really had a chance to
18 observe Mr. Moquin. I don't think he really had personal
19 knowledge of that. With all due respect, Mr. Willard
20 says he does and obviously he's here, he'd be available
21 for cross-examination. And, most importantly, he does --
22 he did experience what Mr. Moquin -- what he was going
23 through with Mr. Moquin.
24 In fact, I think tellingly and correctly,

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1 Mr. Irvine pointed out that, as you can see from what was
2 filed in October, Mr. Willard was working closely with
3 Mr. Moquin and that Mr. Moquin was doing his job and was
4 able to get a comprehensive motion for summary judgment
5 on file. We agree with that. I mean, that is the whole
6 issue.
7 Mr. Willard had the benefit of working with him,
8 seeing him, talking to him on the phone. In fact, he --
9 at various times in that previous trial I mentioned, he
10 stayed with Mr. Moquin so he had this opportunity to
11 personally see him and interact with him. And, as he
12 tells you, all signs pointed to, Hey, this guy has got it
13 under the control -- until he didn't.
14 And on that point, let's turn and talk to both --
15 talk about both Mr. O'Mara -- excuse me -- before we jump
16 to that, I do want to clarify one other point. I think
17 when the court asked me in my initial presentation about
18 Mr. Willard's appearance, I believe I answered that
19 correctly, he was here in January 2017.
20 THE COURT: He was.
21 MR. WILLIAMSON: He was not here in December of
22 2017.
23 THE COURT: Correct.
24 MR. WILLIAMSON: I wanted to make sure I didn't

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1 misspeak and make sure the court -- that, you know, we
2 were all on the same page. I think everyone agrees with
3 that, he was not here in December 2017 when the court
4 said, "I'm very seriously considering granting all of
5 this." Mr. Willard was not here for that.
6 But so now turning to Mr. O'Mara and Mr. Moquin.
7 Number one, unequivocally, Mr. O'Mara has duties under
8 SCR 42. We are not disputing that. But SCR 42 is very
9 different than NRCP 60(b), and what -- I'm certainly --
10 I'm not here to go after Mr. Moquin and point the finger
11 at him, but what his duties are to the bar and the bench
12 are different than what the requirements are for Rule 60
13 relief, and that's why we're here today.
14 So turning to those issues, Mr. Irvine pointed to
15 the Huckabay case. And as he correctly pointed out,
16 though, Huckabay talks about Passarelli and in footnote
17 4, it's a very large footnote note in the Huckabay case,
18 and the Nevada Supreme Court case there emphasizes that
19 Passarelli is still good law and is still an exception.
20 First they talk about the Supreme Court recognized
21 exceptions when there's been actual abandonment and then
22 also talks about abandonment in the circumstances in
23 Passarelli, lawyer's addictive disorder and otherwise
24 either criminal conduct or abandonment, and that is the

1 case. There was no evidence of abandonment and mental
2 illness in Huckabay, which is why they didn't get Rule 60
3 relief. There is evidence of that here and that's why
4 Passarelli comes in.
5 Mr. Irvine also pointed out that a lot of these
6 cases stem from the Link v. Wabash case and, again, yes,
7 it is absolutely the rule that a civil litigant is
8 normally stuck with what his attorney chooses, strategic
9 decisions, what he does, what he doesn't do. But as the
10 US v. Cirami case -- that's the Second Circuit case we've
11 been discussing, it's 563 F.2nd 26 -- there's a very
12 detailed analysis of that Link v. Wabash case and
13 explains that the United States Supreme Court in that
14 case noted that there was nothing to indicate that
15 counsel's failure to attend the pre-trial conference was
16 other than deliberate or the product of neglect, and then
17 after citing a series of cases they point out that the
18 lawyer's conduct in that case, in the Cirami case, was
19 engendered by a mental illness which manifested itself to
20 his clients only after they had relied on him for months.
21 That's the case here. That's why Link doesn't
22 apply, that's why Huckabay doesn't apply because in both
23 of those cases, the United States Supreme Court in Link
24 and the Nevada Supreme Court in Huckabay acknowledged

1 when there's mental illness or constructive abandonment,
2 it's different. We treat it differently because that
3 normal attorney/client relationship has been severed by
4 something unforeseeable and unanticipated, and that is
5 the case here in terms of the evidence of what we have.
6 I would point out that Mr. Willard was prejudiced
7 more than the parties in Cirami and in Boehner. As the
8 court pointed out, in those cases at least those
9 attorneys stayed engaged. Maybe they shut down their law
10 practice but they stayed engaged and helped gather
11 evidence, helped transition the file, helped submit
12 affidavits. Mr. Willard didn't have the benefit of that,
13 didn't have the benefit of Mr. Moquin staying engaged and
14 helping us with this motion. So, if anything, in those
15 cases, where you at least had a former attorney partly
16 engaged and trying to fix the situation, if those deserve
17 relief, then certainly Mr. Willard deserves relief here
18 where he didn't have that benefit. He was truly
19 abandoned by Mr. Moquin and --
20 THE COURT: When did he last speak with
21 Mr. Moquin? That wasn't clear to me when he went to
22 Arizona or wherever he is now.
23 MR. WILLIAMSON: I believe it was right around the
24 time that we filed our Rule 60 motion, I think it was in

1 April -- you know, essentially trying to get him to
2 provide the stuff, and it was I think one of the last
3 texts was that --
4 THE COURT: That's the last communication?
5 MR. WILLIAMSON: I believe so. It was in that
6 string and that, What part of F-off don't you understand.
7 I think that also points out a good situation on the
8 evidence. That is certainly not effort -- not offered to
9 prove the truth of the matter asserted, that Mr. Willard
10 doesn't understand the meaning of F-off. Why that is
11 offered is to show that Mr. Moquin went so far beyond the
12 bounds of what could be expected in a normal
13 attorney/client relationship, and it is so far beyond
14 what about he had demonstrated to Mr. O'Mara and to
15 Mr. Willard prior to that time that he was a reliable
16 attorney that could go through trials, that could put
17 together motions for summary judgment, and then suddenly,
18 poof, he stopped responding --
19 THE COURT: But don't we have to balance that with
20 the continued failure to comply with this court's order
21 along the whole way to ultimately where I indicate on the
22 record that I'm going to need to be convinced essentially
23 by your opposition that I shouldn't grant this?
24 MR. WILLIAMSON: I think that's -- and I know the

1 court is struggling with that and I think it's fair to
2 struggle with that. That's why I mentioned before -- and
3 as the Nevada Supreme Court's guidance has pointed out,
4 the punishment for sanctions really does need to fit the
5 crime. And regardless of motive, you're exactly right,
6 the defendants have been prejudiced to some extent so
7 we've got to mitigate that, but it doesn't mean that just
8 because he failed to oppose that motion due to his mental
9 illness and due to his abandonment of Mr. Willard that
10 then you grant every single piece of relief that the
11 defendants, as good advocates, asked for.
12 We should still say, "Okay, how do we make this
13 right," "How do mitigate this wrong that was there?"
14 Again, when I heard Mr. Irvine explain, well, it wasn't
15 just diminution of value, there was some other categories
16 of damages, but what I also heard was acknowledgement
17 that right from the complaint everyone understood that
18 $15 million of rental damages were at issue, and that it
19 was only in this motion for summary judgment where they
20 asked for four times that they felt caught unawares and
21 that they felt that they were prejudiced by that.
22 Well, I don't know that they were, I think there
23 were some indications in the discovery, but if that's the
24 case, if it's that four times, all right, let's put it

1 back where it was in the complaint, where it was from the
2 beginning where they knew it would be.
3 THE COURT: The 15 million?
4 MR. WILLIAMSON: The 15 million, your Honor. If
5 we can't come after 15 million -- I mean, the loss of
6 $35 million is a pretty severe sanction, the loss of a
7 $35 million claim.
8 THE COURT: It's a claim.
9 MR. WILLIAMSON: It's a claim, fair enough. It
10 was not -- it was not in the bag, by any stretch. I
11 think that's a fair characterization. But the loss of a
12 claim of that size is significant. I mean -- and it
13 hampers -- as Mr. Irvine pointed out, I haven't been in
14 the case that long. I'm getting the feeling like if I'm
15 lucky enough to see this case move forward, my hands are
16 going to be pretty constrained, and that's a sanction.
17 That's problematic for Mr. Willard and for whoever
18 represents him to not have the full array of claims and
19 damages that you thought you had and that you think,
20 rightly or wrongly, you're entitled to. That is a
21 punishment, that does set things right, and it cures any
22 claimed prejudice on behalf of the defendants because now
23 they're not defending against something they didn't
24 anticipate.

1 So I really do think when the question is asked,
2 what are we going to do about -- let's go back to
3 December -- and that is one other thing. Mr. Irvine said
4 we can't reopen all discovery. We're not advocating
5 that, by no means. What I am saying is if there is
6 something they need from us, we will give it to them.
7 But let's go back to December and say, okay, what
8 is the prejudice, what is the basis for the motion for
9 sanctions, and what's your response? And the response
10 is, we think there's a valid claim, we think through
11 discovery responses and deposition testimony you knew
12 these things were coming, but -- and in one of the few
13 conversations I had with him, Mr. Moquin did assure me
14 that he believes that the 16.1 was disclosed, but I
15 haven't seen a shred of it and I don't think the court or
16 the defendants have, so I am constrained to conclude that
17 there is no evidence that he did comply with that 16.1,
18 although he says he did and Mr. Willard thought he did.
19 But so if we're going to try to make that right,
20 if we assume that disclosure was never given despite the
21 fact that there may have been evidence of it, despite the
22 fact that there may have been deposition testimony of it,
23 despite the fact that there was motion, as he pointed
24 out, Mr. Gluhaich offered opinions in October and let him

1 know what their positions were, despite all of that, if
2 we want to make this right and have the punishment fit
3 the crime, then the punishment has got to focus on those
4 things. It's not dispose of this whole case.
5 I appreciate Mr. Irvine -- the court asked me that
6 question about where was Passarelli. Passarelli was even
7 further down the line and was entitled to restate that
8 case; somebody didn't show up for trial. Mr. Moquin
9 stopped showing up a month before trial and so the thing
10 to do is put this case back on track as best we can,
11 mitigate the inconvenience and the prejudice that the
12 defendants have faced, and move forward so we can at
13 least get some determination on the merits.
14 That's what Rule 60 is designed to do and that's
15 why we're here today, that's the relief we would ask for.
16 THE COURT: All right. Thank you.
17 MR. WILLIAMSON: Thank you, your Honor.
18 THE COURT: I asked both of you for proposed
19 orders and I did receive them. What I would like to do
20 is give you two days to add, if you wish, based on my
21 questions and the presentations that have been raised, or
22 you may simply notify Ms. Bo that you don't need to add
23 anything. I just -- I want to allow anything that may
24 have been raised today to keep people from thinking, I

1 wished I would have included that in my proposed order,
2 and then after -- today is Tuesday, so after Thursday at
3 5:00, then I'm going to undertake completing my decision
4 on that. All right?
5 Thank you very much.
6 MR. IRVINE: Thank you, your Honor.
7 MR. WILLIAMSON: Thank you, your Honor.
8 THE COURT: We'll be in recess.
9 (At 3:15 p.m., court adjourned.)
10 * * *
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24

1 STATE OF NEVADA)
) ss.
2 COUNTY OF WASHOE)
3
4 I, ERIN T. FERRETTO, an Official Reporter
5 of the Second Judicial District Court of the State of
6 Nevada, in and for the County of Washoe, DO HEREBY
7 CERTIFY:
8 That I was present in Department No. 6 of
9 the above-entitled Court on WEDNESDAY, SEPTEMBER 4TH,
10 2018, and took verbatim stenotype notes of the
11 proceedings had upon the matter captioned within, and
12 thereafter transcribed them into typewriting as herein
13 appears;
14 That the foregoing transcript is a full,
15 true and correct transcription of my stenotype notes of
16 said proceedings.
17 DATED: This 20th day of June, 2019.
18
19
20 /s/ Erin T. Ferretto
_____
21 ERIN T. FERRETTO, CCR #281
22
23
24

1 CODE: 4185
NICOLE J. HANSEN, CCR 446
2 Sunshine Litigation Services
151 Country Estates Circle
3 Reno, Nevada 89511
(775) 323-3411
4 Court Reporter

5
SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
6
IN AND FOR THE COUNTY OF WASHOE
7
THE HONORABLE LYNNE K. SIMONS, DISTRICT JUDGE
8 --o0o--

9
LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; and OVERLAND DEVELOPMENT CORPORATION, a California corporation,
10 11 Appellants,
12 vs.
13 BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an
14 individual; and TIMOTHY P. HERBST, as Special Administrator of the ESTATE OF
15 JERRY HERBST, deceased,
Respondents.

Case No. CV14-01712

Dept. No. 6

16 ---
TRANSCRIPT OF PROCEEDINGS
17 STATUS CONFERENCE
APRIL 21, 2021
18
APPEARANCES:
19 For Larry Willard/
Overland Dev. Corp: RICHARD WILLIAMSON, ESQ.
20 Robertson, Johnson, Miller & Williamson
21 50 W. Liberty Street, Suite 600
Reno, NV 89501
22
For Berry-Hinckley Industries/
23 Jerry Herbst: BRIAN IRVINE, ESQ.
Dickinson Wright, PLLC
24 100 W. Liberty St., Suite 940
Reno, NV 89501

1 -o0o-
RENO, NEVADA; APRIL 21, 2021, 11:00 A.M.
2 -o0o-
3
4 THE COURT: Good afternoon good morning
5 actually, everyone. This is the time set for a status
6 hearing -- and let me get to the case number -- in Case
7 Number CV14-01712: Willard versus Berry-Hinckley
8 Industries.
9 The record will reflect that this court
10 session is taking place on April 21st, 2021 and is held
11 remotely via audiovisual means due to the closure of the
12 courthouse to hearings at 75 Court Street in Reno, Washoe
13 County, Nevada as a result of the COVID-19 pandemic and
14 resulting administrative orders.
15 The Court and all of the participants are
16 appearing through simultaneous audiovisual transmission.
17 I am physically located in Reno, Washoe County, Nevada,
18 and that will be deemed the site of today's court
19 session.
20 As I call upon you, please state your name
21 and county and state from which you are appearing.
22 Good morning, Ms. Clerk.
23 THE CLERK: Good morning, Your Honor.
24 Maureen Conway, appearing from Washoe County, Nevada.

1 THE COURT: And good morning, Miss Reporter.
2 THE COURT REPORTER: Good morning. Nicole
3 Hansen, Washoe County, Nevada.
4 THE COURT: The record will also reflect that
5 this court session and hearing is open to the public for
6 viewing and listening through the link on the Washoe
7 County District Court Website online hearings by
8 department or by accessing Zoom.com and typing in the
9 webinar number.
10 If at any time you cannot see or hear the
11 other participants, please notify the Court in some
12 fashion.
13 As I call upon counsel, please state your
14 appearance and where you are appearing from. Please
15 advise if you do have the client appearing with you and
16 where your client is appearing from. Please acknowledge
17 that you've received notice this hearing is taking place
18 pursuant to the Nevada Rules Governing Appearance by
19 Audiovisual Transmission Equipment Part 9. Please advise
20 if you have any objection to proceeding in this manner
21 today.
22 And I'm just calling in no particular order
23 except for where you appear on my screen. Good morning,
24 Mr. Irvine.

1 MR. IRVINE: Good morning, Your Honor. Brian
2 Irvine, on behalf of Larry -- excuse me -- of
3 Berry-Hinckley Industries and Jerry Herbst.
4 I'm in Washoe County, Nevada. I also have
5 two client representatives on the Zoom, I believe, Chris
6 Kemper. Mr. Kemper is located in Las Vegas. I believe
7 Mark Berger is also on the line. I believe Mr. Berger is
8 located in Orange County, Southern California. I have no
9 objection to conducting the hearing through the
10 audiovisual technology set forth in this Court's order.
11 THE COURT: All right. Thank you.
12 And good morning, Mr. Williamson.
13 MR. WILLIAMSON: Good morning, Your Honor.
14 Thank you for having us. Richard Williamson, appearing
15 on behalf of Larry Willard and the Willard plaintiffs.
16 That's Larry J. Willard individually and as trustee of
17 the Larry James Willard Trust Fund and Overland
18 Development Corporation.
19 I have no objection to proceeding. I do have
20 Mr. Willard on the line. I believe he is appearing from
21 California, but I cannot guess, and I apologize, Your
22 Honor, which county specifically. And so hopefully, he
23 can provide that information for the Court. But
24 Mr. Willard is here. I don't know if you'll be calling

1 on him, but my partner John Tu is here, and Mr. Eisenberg
2 was not able to be here today. He did send his
3 apologies, but he had a family commitment arise. I
4 believe he's actually on an airplane right now.
5 THE COURT: All right. And good morning,
6 Mr. Tu.
7 MR. TU: Good morning Your Honor. I'm also
8 here, as an Attorney Williamson stated, on behalf of
9 Mr. Willard and the Willard plaintiffs. I'm in Washoe
10 County, Nevada, and I had also have no objection to this
11 hearing takes place via audiovisual means as set forth in
12 the papers.
13 THE COURT: And Mr. Good morning,
14 Mr. Willard. Tell us what county you're in.
15 MR. WILLARD: Good morning, Your Honor. I'm
16 in Humboldt County, Eureka.
17 THE COURT: Okay. And Mr. Kemper and
18 Mr. Berger, you can speak up if your counsel did not
19 identify where you're appearing from correctly?
20 MR. KEMPER: Las Vegas, Nevada. Clark
21 County.
22 THE COURT: All right. And Mr. Berger is in
23 Orange County; correct? He's on mute, so --
24 MR. BERGER: Hi, Your Honor. I'm in Orange

1 County, California. Laguna Beach.
2 THE COURT: Lucky you. Okay. I wanted to
3 have a status hearing on this based on my prior court
4 order that denied the NRCP 60B motion for leave from
5 final order, and then it went to the Nevada Supreme Court
6 in Case Number 77780, and the opinion was issued which
7 identifies that this court abused its discretion for not
8 analyzing each of the Yoakum factors.
9 So I thought that it would be best to have
10 counsel appear, identify what you perceive as the status
11 and your assertions regarding how we should go forward
12 from here. So I'll hear from you, Mr. Williamson, first.
13 MR. WILLIAMSON: Thank you, Your Honor.
14 Again, Richard Williamson, for the record. I appreciate
15 the Court having us for a status conference. I think it
16 is helpful for all of us. And it is an awkward and
17 difficult procedural posture.
18 As the Court correctly outlined, it has been
19 remanded from the Supreme Court to this court and with
20 the directive to analyze the Yoakum factors. And so I do
21 think that absolutely needs to happen just so we fulfill
22 the Supreme Court's mandate date.
23 Obviously, there is no directive on how the
24 Court analyzes the Yoakum factors. What I do want to

1 point out and what I think it's important to understand
2 is our motion, originally our reply and our oral
3 arguments were all tread back to the Yoakum factors and
4 carefully analyzed the Yoakum factors.
5 The defendants' opposition to our Rule 60
6 motion did have a citation to Yoakum, but there was no
7 analysis of the Yoakum factors, either in the opposition
8 or in the oral argument we had before the Court. And
9 therefore, when the Court goes to analyze the Yoakum
10 factors, it must -- the only analysis the Court has is
11 the analysis we provided and the most recent order from
12 the Supreme Court.
13 So the Supreme Court reversed and remanded in
14 the fall and then did have the defendant sought rehearing
15 which was denied and sought en banc reconsideration which
16 was also denied, but the Court, the Supreme Court
17 emphasized that neither party can submit any new
18 arguments or new evidence.
19 And so certainly while I appreciate the
20 difficulty that presents, again, I believe that if the
21 Court is going to analyze the Yoakum factors, the only
22 analysis the Court has on the record, the only evidence
23 and argument the Court has on the record regarding the
24 Yoakum factors comes from us.

1 And so again, I want to be careful as well.
2 I don't want to introduce any new arguments. But as we
3 stated in our opposition, in our reply, and in the oral
4 argument, all four of those Yoakum factors do require
5 granting the Rule 60 motion.
6 And then in terms of where we go from here,
7 after the Court provides that analysis, then we go
8 forward to a -- we would go forward to a trial on the
9 merits.
10 Unfortunately for me, discovery is closed. I
11 don't have the benefit of all of the proceedings that
12 came before as this case was somewhat on the eve of trial
13 when it was dismissed, and so I recognize that I am in a
14 very difficult and unenviable position as this proceeds
15 towards trial.
16 But in answer to the Court's question, I
17 think those are the steps that need to occur; analyzing
18 the Yoakum factors. Again, the Court has discretion to
19 do that, but the only evidence and argument on the record
20 comes from the plaintiffs, and then if the Court tracks
21 the analysis and the argument that's on the record, it
22 would grant the Rule 60 motion and then we would proceed
23 to a trial without any further discovery, and I'll just
24 be stuck with whatever.

1 THE COURT: So let me ask you a question.
2 Was the directive from the Supreme Court that you
3 couldn't add any evidence or submit any additional
4 argument to the Supreme Court or to this Court?
5 MR. WILLIAMS: I believe it is this court,
6 Your Honor. And that's again, it's sort of a difficult
7 thing. But when I'm looking at the order denying en banc
8 reconsideration, I believe that was entered February
9 23rd, 2021, it stated: We clarify that neither party may
10 present any new arguments or evidence on remand. So I do
11 think with regard to the Rule 60 factors, we are stuck
12 with the record that the Court was already provided.
13 THE COURT: And so, Counsel, is it required
14 that the Court adopt your analysis or isn't the Supreme
15 Court order telling the Court to do the analysis?
16 MR. WILLIAMS: Absolutely. It's telling the
17 Court to do the analysis, but of course the Court is
18 confined to the record.
19 And so my point is everything on the record,
20 we can't -- I can't supplement that. There may be some
21 things that I want obviously in the Court's order, it
22 referenced the disciplinary case against Brian Mochlin.
23 I would love to provide the Court with certified copies
24 of those records, but I think that would be a violation

1 of the Court's order.
2 Likewise, I can appreciate Mr. Irvine may
3 want to say well, your argument we made, Your Honor, we
4 made this argument, and that argument and that fits into
5 these Yoakum factors this way and that way. But again,
6 that would be new arguments. Since they didn't fit them
7 into those Yoakum factors the first time, it would be
8 inappropriate to do that now.
9 So by all means, I am not telling the Court
10 what to do or how to do its job, but in answer to your
11 question, I do think you need to analyze the Yoakum
12 factors. I am just pointing out that when you go to the
13 record, the only analysis on the Yoakum factors comes
14 from us.
15 THE COURT: Okay.
16 MR. WILLIAMSON: So hopefully, that answers
17 your question.
18 THE COURT: Yes. Thank you. Mr. Irvine?
19 You're on mute.
20 MR. IRVINE: Thank you, Your Honor. Good
21 morning. I agree with Mr. Williamson that as to the
22 procedural background. The Court did direct Your Honor
23 to expressly consider each of the Yoakum factors in the
24 subsequent proceedings and then the order denying en banc

1 reconsideration limited what the Court can -- what Your
2 Honor can look at pretty clearly.
3 It says that, "The District Court's
4 consideration of the Yoakum factors is limited to the
5 record currently before the Court." So I certainly agree
6 that there should be no new briefs. There should be no
7 new exhibits, no new oral arguments, anything like that.
8 The Court has an ample record before it. This was
9 briefed significantly with lots of legal arguments and
10 lots of exhibits.
11 We did touch on the Yoakum factors in our
12 briefing, and we're confident that Your Honor can look at
13 Yoakum based on the facts and evidence that are already
14 before the Court and apply those factors. And we
15 obviously think application of the facts and evidence
16 under Yoakum are going to lead to the motion being denied
17 again to the same general bases, you know, lack of
18 admissible evidence and all of that that we already
19 argued before Your Honor.
20 So I think the Court's review is limited and
21 shouldn't need any input from the parties at all to
22 happen. So I think it's a fairly straightforward process
23 from here on out.
24 THE COURT: Does any other counsel want to

1 add anything? I guess that, Mr. Tu, if you would like to
2 add anything.
3 MR. TU: No thanks, Your Honor.
4 THE COURT: All right. So what I was
5 contemplating is and my recollection is that the order
6 that was entered was based on a proposed order that was
7 submitted by Mr. Irvine; correct?
8 MR. IRVINE: That is correct, Your Honor.
9 THE COURT: So I understand your diverse
10 positions. What I am going to require both of you to do
11 is to provide a proposed order supporting your position
12 with citations to the record. And how long do you think
13 you'd need to do that?
14 MR. WILLIAMSON: Your Honor, Richard
15 Williamson speaking on that. I would certainly I think
16 we should provide that in two weeks. I do think again,
17 given the directive that there be no new evidence or
18 arguments, I think that those proposed orders if maybe
19 submitted simultaneously so that there's no
20 back-and-forth, but I do think that they need to be
21 copied to each other.
22 THE COURT: So I think you bring -- you
23 provide a good point, Mr. Williamson. I would like to
24 pick a date for simultaneous submission, and then you

1 will file a request for submission at that time, and it
2 will be served on the opposing party.
3 What you can do is entitle it, "Proposed
4 Order." Now there may be some portions of the prior
5 order that was entered that are appropriate for reuse and
6 that's final. But my contemplation of this was I agree
7 with you that we were -- I have to do this based on the
8 record. I don't necessarily agree it's only limited to
9 that. I think it's anything in the record not
10 necessarily just what arguments were made.
11 And I think that I'm going to utilize your
12 expertise in drafting your proposed orders. I'm sure as
13 you know, I rarely take them word-for-word, but so what I
14 would like you to do is file a request for submission
15 within your proposed order, make sure there's a cover
16 sheet that says proposed order so you don't have any
17 difficulties with the clerk's office, and then I will
18 review them and we'll go from there.
19 MR. WILLIAMS: Thank you.
20 THE COURT: And the matter --
21 MR. IRVINE: Brian Irvine, Your Honor. I
22 would request a little longer than two weeks given the
23 volume of the record and the need to cite. I would say
24 30 days at least would be more appropriate given the

1 amount of material we need to get through.
2 THE COURT: And that's fine. I'm going to
3 give you whatever the two of you need and agree from upon
4 and during the course of it. If you need to agree upon
5 an extension of time, please do.
6 Our hands are full right now starting jury
7 trials, and in particular, our new complex litigation
8 courtroom, which I was heavily involved in setting up,
9 and so we're all right now very focused on getting
10 everybody back to the court. And so I'm happy to give
11 you whatever time you need. So if it's 30 days, I think
12 at a minimum, it should be 30 days.
13 Even the briefing just related to this issue
14 was a lot of voluminous -- that was the word I was
15 looking for. Does 30 days work? Do you want 45? I want
16 it done well. I'm less concerned with it being done in a
17 short time as I'm more concerned with it being done well.
18 So what's your pleasure?
19 MR. WILLIAMSON: Your Honor, Richard
20 Williamson, for the record. It's difficult because
21 obviously, my client, as we pointed out in the briefing,
22 this is not new information. My client is getting on in
23 age and is concerned and does want to move this forward
24 as quickly as possible, but I also want to be mindful of

1 your time and Mr. Irvine's time.
2 And so while I would prefer the two weeks, if
3 we want to do 30 days, make it's -- that's a Friday,
4 actually, so that's sort of convenient. We can do
5 Friday, May 21st. I'm fine cooperating on that point.
6 THE COURT: And does that work for you,
7 Mr. Irvine?
8 MR. IRVINE: I believe it does, Your Honor.
9 Just checking my calendar. I don't think I have anything
10 super significant before that. Just trying to make sure
11 we get -- yeah, I think that's fine. I think we can get
12 it done by May 21st, Your Honor.
13 THE COURT: And then I'll spend Memorial Day
14 with you all or your papers at least.
15 MR. WILLIAMSON: I'm certainly not trying to
16 put you in a tight spot.
17 THE COURT: No, I'm just kidding you. It's
18 interesting during Zoom time all of your personal days
19 and workdays blend together. I don't know if you've
20 found that, so it all kind of just happens seven days a
21 week.
22 All right. It's nice to see everyone. I
23 hope you stay well as we get hopefully towards the end of
24 our restrictions from the court, and I believe going

1 forward, some things will be kept via Zoom, and this
2 hearing is a perfect example of how we have people
3 appearing from different states and different counties,
4 and I'm sure the clients like it as it's a significant
5 cost savings to them. We'll be in recess. Nice so see
6 you all.
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1 STATE OF NEVADA)
2 COUNTY OF WASHOE) ss.
3
4 I, NICOLE J. HANSEN, Certified Court
5 Reporter in and for the State of Nevada, do hereby
6 certify:
7 That the foregoing proceedings were taken by
8 me at the time and place therein set forth; that the
9 proceedings were recorded stenographically by me and
10 thereafter transcribed via computer under my supervision;
11 that the foregoing is a full, true and correct
12 transcription of the proceedings to the best of my
13 knowledge, skill and ability.
14 I further certify that I am not a relative
15 nor an employee of any attorney or any of the parties,
16 nor am I financially or otherwise interested in this
17 action.
18 I declare under penalty of perjury under the
19 laws of the State of Nevada that the foregoing statements
20 are true and correct.
21 Dated this December 8, 2021.
22
23 Nicole J. Hansen
---
24 Nicole J. Hansen, CCR #446, RPR
CRR, RMR

1 SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

2 IN AND FOR THE COUNTY OF WASHOE

3 THE HONORABLE LYNN K. SIMONS, DISTRICT JUDGE

4 --o0o--

5

LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; and OVERLAND DEVELOPMENT CORPORATION, a California corporation,
6 Appellants,
7 vs.
8
BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual; and TIMOTHY P. HERBST, as Special Administrator of the ESTATE OF JERRY HERBST, deceased,
9 Respondents.
10 ----------
11

Case No. CV14-01712

Dept. No. 6

12 NOTICE OF COMPLETION AND DELIVERY OF TRANSCRIPT

13

14 I, Nicole J. Hansen, Nevada Certified Court Reporter, do hereby certify that the following transcript was prepared in response to a transcript request form filed in this appeal:

15

16

17

18

19

20 1) TRANSCRIPT OF PROCEEDINGS, STATUS HEARING APRIL 21, 2021.

21

22

23

24

1 That on the 8th day of December, 2021, I
2 electronically filed the Original transcript dated
3 April 21, 2021, with the Washoe County District Court.
4
5 And on the 16th day of December, 2021, I delivered
6 copies of the transcript via e-mail, messenger or U.S.
7 Mail Service, to the following parties:
8
9 Two copies to:
10 ROBERT L. EISENBERG, ESQ.
Lemons, Grundy & Eisenberg
11 6005 Plumas Street
Third Floor
12 Reno, Nevada 89519
13
14 One copy to:
15 DICKINSON WRIGHT
JOHN P. DESMOND, ESQ.
16 BRIAN R. IRVINE, ESQ.
ANJALI D. WEBSTER, ESQ.
17 100 West Liberty Street, Suite 940
Reno, Nevada 89501
18
19 DATED: This 8th day of December, 2021
20
/s/ Nicole J. Hansen
21 ----------
Nicole J. Hansen, CCR #446, RPR,
22 CRR, RMR
23 SUNSHINE LITIGATION SERVICES
151 Country Estates Circle
24 Reno, Nevada 89511
(775) 323-3411