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

SUPPLEMENTAL APPENDIX TO APPELLANTS' REPLY BRIEF

VOLUME 19

Submitted for all appellants by:

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NOTE REGARDING APPELLANTS' APPENDIX VOLUME 19

Respondents' answering brief relies on, and draws this court's attention to, a motion Willard filed under NRCP 60(b)(6) in the district court. RAB p.11, n.7. Respondents argue: "**This Court can take judicial notice of these [motion] filings, which are part of the District Court's docket.**" *Id.* (emphasis added). The answering brief provides a Washoe District Court website link for Willard's motion. *Id.*

Willard has no objection to Respondents' request for this court to take judicial notice of Willard's Rule 60(b)(6) motion. Willard hereby joins in Respondents' request. For the convenience of the court, and to eliminate a need for the court's staff to search the website and to download the motion for which Respondents are requesting judicial notice and review by this court, Willard is providing the motion and all of its exhibits in this supplemental appendix.

CHRONOLOGICAL INDEX TO APPELLANTS' APPENDIX

CERTIFICATE OF SERVICE

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

I further certify that on the 8th day of June, 2022, I electronically filed the foregoing **SUPPLEMENTAL APPENDIX TO APPELLANTS' REPLY BRIEF – VOLUME 19** with the Clerk of the Court by using the electronic filing system, which served the following parties electronically:

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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. AND ALL RELATED MATTERS.	Case No. CV14-01712 Dept. No. 6

WILLARD PLAINTIFFS' MOTION FOR RELIEF UNDER NRCP 60(b)(5)&(6)

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION[1]

If ever a case presented circumstances where setting aside orders was necessary, this is it. Plaintiffs Larry J. Willard, individually and as Trustee of the Larry James Willard Trust Fund ("Mr. Willard"), and Overland Development Corporation (collectively, the "Willard Plaintiffs") had their case dismissed after this Court granted the unopposed Motion for Sanctions filed by Defendants Berry-Hinckley Industries and Jerry Herbst (collectively, "Defendants"). The Willard Plaintiffs promptly filed their Rule 60(b) Motion for Relief ("Rule 60(b)(1) Motion"), requesting the Court set aside its order granting the Motion for Sanctions, its order granting Defendants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich, and its Findings of Fact, Conclusions of Law (collectively, the "Sanctions Orders"). Unfortunately, the Willard Plaintiffs' prior attorney refused to help them.

The Willard Plaintiffs' former attorney, Brian Moquin, caused the Sanctions Orders through his failure to follow rules, his failure to abide by deadlines, and his utter abandonment of the Willard Plaintiffs. Moquin missed a number of deadlines in this matter, leading to an unnecessary expenditure of resources by this Court both in entertaining requests for more time and, when no filing was submitted, in addressing additional motions from Defendants. Among these missed deadlines was the critical deadline to oppose the Motion for Sanctions. This Court granted the Motion for Sanctions as unopposed and dismissed the case with prejudice.

While the Willard Plaintiffs emphatically argued for relief under NRCP 60(b)(1), Moquin's unreasonable refusal to mitigate the damages he caused to the Willard Plaintiffs in this matter severely hampered their efforts. The Willard Plaintiffs offered declarations and numerous exhibits justifying their Rule 60(b)(1) Motion. Unfortunately, they were unable to provide any declaration from Moquin himself or any of the other evidence he had repeatedly promised,

[1] The Court should not consider this motion until after it has completed its reevaluation of the Willard Plaintiffs' Rule 60(b)(1) Motion under the factors announced in Yochum v. Davis, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982). That reevaluation should be limited to the record that existed prior to remand from the Nevada Supreme Court. If this Court finds that the Yochum factors justify relief, then this motion may be moot. Alternatively, if the Court somehow still denies relief under NRCP 60(b)(1), then this motion under NRCP 60(b)(5) and (6) provides additional grounds upon which the Court should set aside the Sanctions Orders.

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because he refused to cooperate in the Willard Plaintiffs' efforts to mitigate the damage he caused. Defendants seized upon this evidentiary gap and ultimately convinced this Court to deny the Willard Plaintiffs' Rule 60(b)(1) Motion. (See Order Denying Plaintiffs' Rule 60(b) Motion for Relief, filed November 30, 2018 at 11-20 (concluding that "Competent and substantial evidence has not been presented to establish *Rule 60(b) Relief*," after finding much of Mr. Willard's declaration and exhibits attached thereto inadmissible (emphasis in original)).)

In preparing the Rule 60(b)(1) Motion, the Willard Plaintiffs' new attorneys and Mr. Willard reached out to Moquin repeatedly to obtain (a) a declaration from Moquin providing the circumstances of his mental illness, his missteps in this case, his ultimate abandonment of the Willard Plaintiffs, and his official medical diagnosis; (b) an authenticated diagnosis from his doctor; and (c) Moquin's case file for this matter. Moquin made a series of promises that he would provide all of the requested information, only to then threaten Mr. Willard and subsequently refuse to provide any of the promised information (thereby cementing his total abandonment of the Willard Plaintiffs).

Now, additional evidence exists to support the Willard Plaintiffs' claims surrounding Moquin's mental illness. This evidence was not previously available. As a direct result of Moquin's acts and omissions in this matter, the Nevada State Bar prosecuted Moquin for violating a variety of Nevada's Rules of Professional Conduct. Moquin entered a Conditional Guilty Plea in Exchange for a Stated Form of Discipline on April 16, 2019 ("Conditional Guilty Plea"). The stipulated facts therein outline Moquin's brazen failures in representing the Willard Plaintiffs in this matter, including, but not limited to, failing to disclose damages, failing to comply with this Court's orders, failing to properly inform the Willard Plaintiffs of the matter's progression, failing to oppose the Motion for Sanctions, and failing to provide any assistance to the Willard Plaintiffs in seeking relief under NRCP 60(b). (See Ex. 1, Conditional Guilty Plea, filed April 16, 2019.) Notably, Moquin admits to informing the Willard Plaintiffs' current attorney that "he had been diagnosed with bipolar disorder and had recently been arrested in California on charges of domestic violence." (Id. at 5:3-4.)

The Northern Nevada Disciplinary Board then recommended that Moquin be enjoined from practicing law in Nevada for two years based on his violations of RPC 1.3, 1.4, and 1.16. (See Ex. 2, Findings of Fact, Conclusions of Law, and Recommendation After Formal Hearing, filed May 14, 2019, at 6:13-17.) The Supreme Court approved the recommendation and banned Moquin from practicing law in Nevada for two years based on his conduct in this matter. (See Ex. 3, Order Approving Conditional Guilty Plea Agreement and Enjoining Attorney From Practicing Law In Nevada, filed October 21, 2019.) Justice Hardesty and two other justices dissented, opining that a two-year suspension was not "sufficient discipline" in light of the severe harm Moquin caused the Willard Plaintiffs. (Id. at 3.)

This 2019 disciplinary action and the documents filed therein were not available at the time the Willard Plaintiffs filed their Rule 60(b)(1) Motion in 2018. Thus, the Willard Plaintiffs could not have presented this important information to the Court. Accordingly, the Court should now consider this additional evidence supporting the Willard Plaintiffs' requests for relief from the Sanctions Orders.

II. STATEMENT OF FACTS

A. The Underlying Matter

The underlying facts in this matter present "a legally clear breach of contract matter" against the Defendants. (Ex. 3 at 6.[2]) BHI and Herbst strategically defaulted on their agreements with the Willard Plaintiffs and are now trying to escape liability for millions of dollars based upon Moquin's mental breakdown and inability to adequately represent the Willard Plaintiffs. Such a windfall is inequitable and would result in a horrible injustice – particularly where there is no doubt that the problems which led to the Sanctions Orders were due to Moquin and that the Willard Plaintiffs have been forthright with the Court from the outset.

As the Court is already familiar with most of the underlying facts, and in the interests of judicial economy, the Willard Plaintiffs will simply highlight a few key facts. Yet, for reference,

[2] Exhibit 3 is the Nevada Supreme Court's dispositional order in Moquin's discipline case. The order is available at Matter of Moquin, No. 78946, 2019 WL 5390401 (Nev. Oct. 21, 2019), and on the Supreme Court's public portal website. For efficiency, the Willard Plaintiffs will herein cite to Exhibit 3 instead of the Westlaw citation.

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the Willard Plaintiffs hereby incorporate their briefing in support of the Rule 60(b)(1) Motion and all exhibits attached thereto, as though set out here in full.

B. Willard Plaintiffs Retain New Counsel and File Rule 60(b)(1) Motion

After the Court granted Defendants' motion for case-terminating sanctions, the Willard Plaintiffs terminated Moquin's representation and retained their current counsel. The Willard Plaintiffs promptly began gathering evidence to file their Rule 60(b)(1) Motion requesting the Court set aside its order granting case-terminating sanctions. The basis of this motion was excusable neglect, Moquin's mental illness, and his ultimate abandonment of the Willard Plaintiffs. Unfortunately, this meant that Moquin alone controlled the bulk of the evidence. While Moquin initially indicated that he would cooperate and made several promises that he would provide evidence to support excusable neglect and his mental illness, Moquin ultimately became belligerent during communications with the Willard Plaintiffs and steadfastly refused to provide the promised evidence.

The Willard Plaintiffs were left without any of the requested evidence from Moquin. Notably, the Willard Plaintiffs' new counsel was also left at a tremendous disadvantage, as Moquin never delivered his case files for this matter. Thus, the Willard Plaintiffs' Rule 60(b)(1) Motion was largely supported by a voluminous declaration of Mr. Willard and a variety of exhibits attached thereto evidencing Moquin's communications and misdeeds. (See generally exhibits attached to Rule 60(b)(1) Motion, filed on April 18, 2018, and the Rule 60(b)(1) Reply, filed on May 29, 2018.) Unfortunately, the Court disregarded much of the evidence presented, and denied the motion. (Rule 60(b)(1) Order, filed November 30, 2018, at 12:10-20:4.)

C. Moquin Is Formally Disciplined As a Result of His Actions in This Matter

The Willard Plaintiffs and their new attorneys reported Moquin to the Nevada State Bar for his egregious misconduct in this matter. Moquin entered a Conditional Guilty Plea on April 16, 2019 (which was after this Court had already denied the Rule 60(b)(1) motion, and while the appeal was still pending). In that Conditional Guilty Plea, he stipulated to facts surrounding his wholly deficient and clearly unethical representation. (See generally Ex. 1.) Therein, Moquin agreed to plead guilty to the ethical charges against him and admitted in pertinent part that:

11. [Moquin] filed a Motion for Summary Judgment on behalf of Plaintiffs.

12. However, [Moquin] never submitted the Motion for Summary judgment before the December 15, 2017 deadline to submit such motions passed.

. . .

15. On November 15, 2017, the defendants filed a Motion for Sanctions, which requested the case-ending sanction of dismissal with prejudice based on Plaintiffs' discovery violations.

16. On December 6, 2017, [Moquin] sought an extension of time to respond to the Motion for Sanctions, and the defendants' two other pending motions.

17. At the December 12, 2017 Pre-trial Status Conference, the Court granted [Moquin]'s request for an extension to respond to the motions, telling [Moquin] that it was "very seriously considering granting all of it." [Moquin]'s new deadline was December 18, 2017.

. . .

20. Between December 12, 2017 and December 18, 2017, [Moquin] evaded local counsel's attempts to ensure that responses were filed.

21. [Moquin] failed to file any response to any of the defendants' motions by the extended deadline.

. . .

24. After the January 4, 2018 Order was issued, Willard retained new counsel to attempt to undo the harm created by Respondent's failures in the representation.

25. That new counsel, Richard Williamson, Esq., contacted Respondent to gather information and documentation necessary to try to set aside the dismissal.

26. [Moquin] told Williamson [the Willard Plaintiffs' new counsel] that he had been diagnosed with bipolar disorder and had recently been arrested in California on charges of domestic violence.

27. [Moquin] represented to Williamson that he would provide any documentation necessary to support the NRCP 60(b)[(1)] Motion for Relief, including but not limited to, an affidavit in support of the Motion, medical records/documents explaining the mental, emotional and psychological health issues that affected the representation, and documents related to the arrest.

28. [Moquin] represented to Williamson that he would organize and provide his entire client file to Williamson.

29. Williamson asked for the promised documents and file multiple times between January, 2018 and April, 2018.

30. During this time, Willard paid for [Moquin's] psychiatric bills in an effort to help [Moquin] be able to support Williamson's preparation of the NRCP 60(b)[(1)] Motion.

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> 31. [Moquin] never provided Williamson with the promised documents that would support the NRCP 60(b)([(1)] Motion.
>
> 32. [Moquin] never provided Williamson with any of his file for the representation.
>
> 33. When Willard contacted [Moquin] in late March, 2018 to try to facilitate [Moquin] assisting in the NRCP 60(b)([(1)] Motion for Relief, [Moquin] responded by text with a rant and threatened Willard that he would not provide the promised documents.
>
> . . .
>
> 36. On May 14, 2018, Williamson sent [Moquin] a formal demand for the Plaintiffs' files.
>
> 37. [Moquin] did not respond to Williamson's May 14, 2018 request.
>
> 38. In late May, 2018, Willard directly requested the necessary documents to support the NRCP 60(b)[(1)] motion from [Moquin].
>
> 39. [Moquin] promised to provide the documentation on Memorial Day weekend.
>
> 40. In the afternoon on May 28, 2018 (Memorial Day), Willard against asked [Moquin] for the documents.
>
> 41. [Moquin] replied to Willard, referencing a prior statement [Moquin] had made that if Willard 'communicate[d] in ANY WAY with [him] again before [he has] sent [Willard] the declaration and supporting exhibits [Willard] will receive neither' and declaring 'So be it.' (Quote alterations in original.)
>
> 42. [Moquin] did not provide any documentation to Willard or Williamson after May 28, 2018.

(Ex. 1 at 3:12-6:18.) Based on those admissions, Moquin and the State Bar of Nevada agreed:

> 2. Respondent knowingly violated RPC 1.3 (Diligence) when he (i) failed comply with the requirements of NRCP, (ii) failed to timely comply with discovery deadlines, (iii) failed to submit the Motion for Summary Judgment prepared for Plaintiffs, and (iv) failed to oppose multiple, potentially case-ending, motions.
>
> . . .
>
> 5. Respondent knowingly violated RPC 1.4 (Communication) because, although he may have frequently communicated with Willard, he failed to adequately communicate to Willard the dire situation that had been created by Respondent's failures to comply with discovery obligations or respond to the defendants' motions.
>
> 6. Willard was injured by Respondent's violation of RPC 1.4 (Communication) because he was unable to properly evaluate his claims and the status of his lawsuit without the necessary information about Respondent's failures.
>
> . . .
>
> 8. Respondent knowingly violated RPC 1.16 (Declining or Terminating Representation) when he failed to provide documentation to Willard's new counsel which was crucial to the

> NRCP 60(b) Motion for Relief. Respondent promised to provide the necessary documentation, but never did it.

(Ex. 1 at 7:4-8:2.)

Moquin's professional discipline did not stop there. On March 25, 2021, the Office of Chief Trial Counsel for the State Bar of California indicated that it was moving forward with further action on the bar complaint against Mr. Moquin. (Ex. 4, Letter from the State Bar of California's Office of Chief Trial Counsel, dated March 25, 2021).) Separately, the State Bar of California has also suspended Moquin's license to practice law. (Ex. 5, State Bar of California website listing for Brian Moquin, retrieved June 30, 2021).) The State Bar of California suspended Moquin on September 10, 2019 after he failed to pay child and/or family support. (Id.) On October 1, 2020, Moquin was further suspended after failing to pay fees. (Id.) There are currently two "CONSUMER ALERT" notices on the webpage showing Moquin's license status. (Id.)

Moreover, on June 16, 2021, the State Bar of California filed a Transmittal of Records of Conviction of Attorney. (Ex. 6, Transmittal of Records of Conviction of Attorney, filed June 16, 2021.) This transmittal contains certified copies of Moquin's criminal court records. (Id.)

All of this evidence was clearly unavailable when the Willard Plaintiffs filed their Rule 60(b)(1) Motion in 2018, and thus could not have been presented in support thereof; however, it now exists and is being presented by the Willard Plaintiffs pursuant to NRCP 60(b)(5) and (6).

III. LEGAL STANDARD

The Court may relieve a party from a final judgment, order, or proceeding under NRCP 60(b)(5) and (6) if prospective application is no longer equitable or for any other reason that justifies relief. On December 31, 2018, the Nevada Supreme Court issued an order in ADKT 0522, amending NRCP 60(b)(5) and adding NRCP 60(b)(6), among other rules. The amendments became effective on March 1, 2019 "as to all pending cases and cases initiated after that date." ADKT 0522 (Order filed on December 31, 2018, at 3). Accordingly, the changes to Rule 60 now apply to the present case.

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IV. LEGAL ARGUMENT

A. Moquin's Disciplinary Record is Admissible Evidence and Should Be Considered

The Court can consider Moquin's disciplinary record, including the Conditional Guilty Plea, the Nevada Supreme Court's decision accepting the Conditional Guilty Plea and affirming Moquin's recommended two-year suspension, Moquin's disciplinary record posted on the State Bar of California's website, and the Transmittal of Records of Conviction of Attorney filed by the State Bar of California because (1) the Willard Plaintiffs have provided certified copies of most of those documents; (2) the Conditional Guilty Plea contains statements Moquin made against his own interest; (3) the Court can take judicial notice of all the documents; and (4) all of the documents can be independently authenticated.

i. The Willard Plaintiffs Have Provided Certified Copies

When a copy of an official record is authorized by law to be filed, and is actually filed in a public office, that copy is presumed to be authentic if it is certified as correct by the custodian or other person authorized to make the certification. NRS 52.125(1). Attached to this Motion for the Court's consideration is a certified copy of the Conditional Guilty Plea and the subsequent disciplinary board recommendation. (See Exs. 1 & 2.) Moreover, the State Bar of California's transmittal includes certified copies of the criminal records in California. (See Ex. 6.)

Although orders signed by a judge "need not be authenticated" because "officially signed judicial decrees are self-authenticating," Matter of Estate of Walker, 460 P.3d 31 (Nev. App. 2020) (J. Tao, dissenting), the Willard Plaintiffs have also obtained and now present to this Court a certified copy of the Nevada Supreme Court order accepting the Conditional Guilty Plea and affirming Moquin's two-year suspension. (See Ex. 3.)

ii. The Conditional Guilty Plea Contains Statements Against Interest

Moquin's numerous admissions to wrongdoings in the Conditional Guilty Plea he signed are not barred by the hearsay rule because they are statements made against Moquin's interest. NRS 51.345. A statement that, at the time of its making, (a) "[w]as so far contrary to the pecuniary or proprietary interest of the declarant [or] (b) [s]o far tended to subject to the

declarant to civil or criminal liability" that a reasonable person in the declarant's position would not make the statement unless it was true is not inadmissible under the hearsay rule if the declarant is unavailable as a witness. Id. "In general a plea of guilty is a statement against the penal interest of the pleader for the obvious reason that it exposes him to criminal liability." United States v. Scopo, 861 F.2d 339, 348 (2d Cir. 1988) (discussing the substantively comparable Federal Rule of Evidence 804(b)(3))).

In the Conditional Guilty Plea, Moquin "agree[d] to plead guilty and admit" to his array of misdeeds in handling this matter and to telling the Willard Plaintiffs' current attorney "that he had been diagnosed with bipolar disorder and had recently been arrested in California on charges of domestic violence." (Ex. 1 at 5:3-4.) These statements are certainly against Moquin's pecuniary and proprietary interest because Moquin has admitted to significantly mishandling this matter, thereby damaging his professional reputation and his ability to practice law. These statements are further against Moquin's interest because they subject him to criminal and civil liability. Indeed, the Nevada Supreme Court imposed such liability with a two-year suspension and an order to pay costs. (Ex. 3 at 3.)

Moquin has made abundantly clear that he is unavailable to testify as a witness. Neither the Willard Plaintiffs nor their attorneys have had any communication with Moquin since Moquin's final text message to Mr. Willard that he would not provide anything to assist with the Rule 60(b)(1) Motion. (See Ex. 1 at 6:13-18; Ex. 7, Declaration of Larry J. Willard, at ¶ 107.) The Willard Plaintiffs and their attorneys have attempted to contact Moquin numerous times, but have never received the requested documents. (Ex. 7 at ¶¶ 95-108; Ex. 8, Declaration of Richard D. Williamson, at ¶¶ 7-15.) Furthermore, Moquin's current business address is in Utah, which is outside this Court's subpoena power. Thus, Moquin is unavailable as a witness. NRS 51.055(1).

iii. The Court Can Take Judicial Notice of These Documents

The Court "shall take judicial notice if requested by a party and supplied with the necessary information." NRS 47.150. When a fact is capable of accurate and ready determination through sources "whose accuracy cannot reasonably be questioned" such that the fact is not subject to reasonable dispute, the fact can be judicially noticed. NRS 47.130(2)(b).

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In Cannon v. Taylor, 88 Nev. 89, 92, 493 P.2d 1313, 1314 (1972), the Nevada Supreme Court took judicial notice of a related matter that involved "an incontrovertible fact, verifiable from records in the building where we sit." Moreover, in the recent case of Kinder v. Legrand, 2019 WL 2450922 (D. Nev., June 12, 2019; unpublished decision), the federal court took judicial notice of the State Bar of Nevada's public records showing the attorney in question had been disbarred. Id. The court noted disciplinary records are accessible to the public, and a court may take judicial notice of the State Bar's records of disciplinary action. Id.

Here, Moquin's Nevada and California disciplinary records are publicly accessible and capable of accurate and ready determination through sources whose accuracy cannot be reasonably questioned. This Court, like the federal Court in Kinder, can find the disciplinary records online at publicly accessible websites (i.e., the Nevada Supreme Court website and the State Bar of California website). Kinder, 2019 WL 2450922, at *1 fn.2. The Court can thus take judicial notice of Moquin's Nevada and California disciplinary records.[3]

iv. Conclusion

Accordingly, the Court must consider Moquin's disciplinary records, because the Willard Plaintiffs have provided certified copies of the Conditional Guilty Plea and the Nevada Supreme Court's decision barring Moquin from practicing in Nevada for two years, the Conditional Guilty Plea is comprised of Moquin's statements against his own interest, and the entire Nevada and California disciplinary records are subject to judicial notice. These documents and the statements therein are thus admissible evidence and must be considered by this Court.

B. The Court's Sanctions Orders Must be Set Aside Because Moquin's Disciplinary Proceedings Provide Additional Evidence Justifying Relief

Under the recently-amended version of NRCP 60(b), the Court may relieve a party from a final judgment, order, or proceeding for *any* "reason that justifies relief." NRCP 60(b)(6). As

[3] Indeed, in its Order Denying Plaintiffs' Rule 60(b) Motion for Relief, filed on November 30, 2018, the Court noted that it had visited the California State Bar's website, took judicial notice of the fact that Moquin was listed as an active attorney at that time, and relied upon it in denying the Rule 60(b)(1) Motion. (Order Den. Pls.' Rule 60(b) Mot. for Relief at 2:9-19.) This was prior to the discipline imposed in California and Nevada, but underscores that the Court should remain consistent and take judicial notice of the attached records.

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the United States Supreme Court has explained, this rule "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." Klapprott v. United States, 335 U.S. 601, 614-15 (1949).

There was no subpart (6) in NRCP 60(b) before the March 2019 rule amendments. As such, there was no broad catchall provision in Rule 60(b) that the Willard Plaintiffs could have relied upon in their Rule 60(b)(1) Motion. The equivalent federal rule, FRCP 60(b), contains a very broad catchall provision, which allows a court to grant relief from a judgment for "any other reason that justifies relief." FRCP 60(b)(6). The 2019 amendments to the Nevada rule added the catchall provision from the federal rule. Now, NRCP 60(b)(6) allows a party to obtain relief from a final judgment or order "for any other reason that justifies relief."

There are not yet any Nevada appellate decisions applying the new rule. Consequently, federal cases provide persuasive guidance. Nelson v. Heer, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005). Rule 60(b)(6) is a broad catchall provision that permits relief from the operation of a judgment for ***any reason*** justifying such relief. Kile v. United States, 915 F.3d 682, 687 (10th Cir. 2019). The rule acts as a "grand reservoir of equitable power to do justice in a particular case." Id.

Moquin forced the Willard Plaintiffs to argue their 2018 Rule 60(b)(1) Motion without the benefit of having Moquin's own testimony about what happened. The Willard Plaintiffs were without recourse to obtain this evidence by any alternative means at the time of the Rule 60(b)(1) Motion. This was because the Rule 60(b)(1) Motion was filed on April 18, 2018, and the Court rendered its order denying the motion on November 30, 2018. During that time, Moquin had not yet been disciplined, but was non-responsive and outside the Court's subpoena power. Moquin entered into the Conditional Guilty Plea on April 16, 2019 – over six (6) months after the Court denied the Willard Plaintiffs' Rule 60(b)(1) Motion. The Nevada Supreme Court then entered its order approving the Conditional Guilty Plea on October 21, 2019.

Unfortunately, when the Willard Plaintiffs filed their 2018 Rule 60(b)(1) Motion, they remained at Moquin's mercy. Moquin's abject failure to follow through on numerous promises to provide evidence supporting the Rule 60(b)(1) Motion and his total abandonment of the

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Willard Plaintiffs – all as conclusively confirmed by the Conditional Guilty Plea and the Nevada Supreme Court's October 21, 2019 order – prevented the Willard Plaintiffs from offering the Court the evidence that this Court sought.

Luckily, the Willard Plaintiffs are no longer at Moquin's mercy. Where Moquin was the resistant gatekeeper for this evidence at the time of the Rule 60(b)(1) Motion, the sought-after evidence is now contained in the Conditional Guilty Plea and the final Supreme Court decision suspending Moquin from practicing law in Nevada. (See generally Exs. 1 & 3.)

This is certainly an exceptional circumstance where relief under Rule 60(b)(6) is warranted. The Willard Plaintiffs were deceived by Moquin throughout his representation of them in this matter – at least partially as a result of Moquin's mental illness.

Moquin ***has admitted*** that he suffers from a mental illness. (Ex. 1 at 5:3-4.) More importantly, the Willard Plaintiffs could not have anticipated Moquin's mental illness, which resulted in his failures, missed deadlines, and ultimate abandonment of his clients. Accordingly, the Court should find exceptional circumstances exist and grant the Willard Plaintiffs' relief from the Sanctions Orders.

At its core, this is a simple case about a breach of a lease with a personal guarantee. The Defendants cannot credibly deny the breach, or that the accelerated rent owed to Mr. Willard and Overland under the Virginia Lease exceeds $15,000,000.00. The Defendants also cannot deny that their breach of the Virginia Lease financially devastated the Willard Plaintiffs and caused them to lose the Virginia Property. If the Willard Plaintiffs' case is not reinstated, the Defendants will fully escape the consequences of their strategic breach. More importantly, Mr. Willard will face a continuation of his financial ruin – and at age 79, will effectively be deprived of any hope for a comfortable future.

In sum, justice demands the Court reinstate the Willard Plaintiffs' case in light of additional, admissible evidence of Moquin's mental illness leading to numerous wrongdoings and abandonment of the Willard Plaintiffs. The Court granted the Motion for Sanctions because Moquin failed to file an opposition (compounding the Court's understandable frustration with Moquin), and then denied the Willard Plaintiffs' 2018 Rule 60(b)(1) Motion because the Willard

Plaintiffs could not possibly produce additional evidence to support their claims regarding Moquin's mental illness at that time. Now, however, there is additional and compelling evidence proving that substantial justice requires this Court set aside its prior orders and allow this matter to be decided on its merits.

C. Alternatively, NRCP 60(b)(5) Provides Relief Because There Has Been A Significant Change in Factual Conditions Relating to This Matter

NRCP 60(b)(5) also provides the Court with the ability to "modify or vacate a judgment or order 'if a significant change in either factual conditions or law' renders continued enforcement 'detrimental to the public interest.'" Anoruo v. Valley Health Sys., LLC, 486 P.3d 729 (Nev. App. 2021) (quoting Horne v. Flores, 557 U.S. 433, 447 (2009) (internal citations omitted). Before March 1, 2019, Rule 60(b)(5) only allowed relief from *an injunction* if applying *the injunction* prospectively was no longer equitable. The March 2019 rule change significantly broadened the scope of this rule, removing the limitation to only injunctions.

By removing reference to injunctions, subpart (5) now allows a party to obtain relief from any judgment, not just an injunction, if "applying it prospectively is no longer equitable." Because neither the Nevada Supreme Court nor the Nevada Court of Appeals has "yet had occasion to discuss the standards governing the new NRCP 60(b)(5)," those standards "governing a materially identical provision in FRCP 60(b)(5)" are strong persuasive authority. Anoruo, 486 at 729 (citing Horne, 557 U.S. at 447; Exec. Mgmt., Ltd. v. Ticor Title Ins. Co., 118 Nev 46, 53, 38 P.3d 872, 876 (2002)).

This case presents a significant change in factual conditions – namely, that Moquin has admitted to (1) failing to adequately respond to requests to produce information related to damages; (2) causing trial in this matter to be continued at least three times, thus delaying the matter for many years; (3) failing to serve an updated expert disclosure as ordered by this Court; (4) failing to serve an updated damage disclosure pursuant to NRCP 16.1 and this Court's order; (5) failing to submit that Motion for Summary Judgment he filed on behalf of the Willard Plaintiffs before the deadline to submit such motions passed; (6) failing to take responsibility for the pace of the suit, largely blaming Defendants' counsel or "legal reasons"; (7) seeking an

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Reno. Nevada 89501

extension of time to oppose Defendants' Motion for Sanctions; (8) evading local counsel and the Willard Plaintiffs' attempts to ensure that responses were filed; (9) failing to file any opposition to the Motion for Sanctions or other pending matters; (10) making numerous representations to the Willard Plaintiffs' current counsel that he would provide any documentation necessary to support the Willard Plaintiffs' Rule 60(b)(1) Motion, including, but not limited to, an affidavit in support of the Motion, medical records/documents explaining the mental, emotional, and psychological health issues that affected the representation, and documents related to his arrest; (11) failing to provide the case file to the Willard Plaintiff's current counsel; (12) threatening the Willard Plaintiffs; (13) ultimately, failing to provide any information or documents to the Willard Plaintiffs or their current counsel; (14) knowingly violating numerous Nevada Rules of Professional Conduct; and (15) causing the Willard Plaintiffs severe harm. (Ex. 1 at 2:20-8:6.)

These facts show that it is neither just nor equitable to continue to maintain the Sanctions Orders and the order denying the Rule 60(b)(1) Motion against the Willard Plaintiffs. Moquin has now ***expressly admitted*** to his mental illness, his heap of wrongdoings, and his abandonment of the Willard Plaintiffs. (Ex. 1 at 2:20-8:6.) This is undeniably an incredible change in the circumstances and facts surrounding the Court's prior orders, including its order denying the Willard Plaintiffs' Rule 60(b)(1) Motion.

Now that Moquin has admitted to his wrongdoing and the harm he has caused the Willard Plaintiffs as a direct result of that wrongdoing, it would be unjust for the Court to continue enforcing its case-terminating sanctions and its order denying the Willard Plaintiffs' Rule 60(b)(1) Motion. Accordingly, the Willard Plaintiffs request the Court's Sanctions Orders be set aside based on this significant change in the facts and circumstances.

V. CONCLUSION

The circumstances here could not cry out for orders to be set aside more. The Willard Plaintiffs were at Moquin's mercy when filing their initial Rule 60(b)(1) Motion because direct evidence of Moquin's wrongdoings and mental illness were under Moquin's complete control, and he refused to provide such evidence to his clients and their new attorneys. Now, however, Moquin's formal disciplinary files provide this evidence in an objective and unimpeachable way.

The Court can now see that the Willard Plaintiffs are undeniably entitled to relief from the Sanctions orders based on Moquin's mental illness, his abandonment, the exceptional circumstances present in this case, and the total injustice that would result from continuing to impose the Sanctions Orders against the Willard Plaintiffs.

Accordingly, the Willard Plaintiffs respectfully request this Court grant this motion and set aside its Sanctions Orders and finally allow the Willard Plaintiffs to proceed to trial.

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 13th day of July, 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

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 13th day of July, 2021, I electronically filed the foregoing **WILLARD PLAINTIFFS' MOTION FOR RELIEF UNDER NRCP 60(b)(5)&(6)** 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

Index of Exhibits

Exhibit	Description	Pages
1	Conditional Guilty Plea, filed April 16, 2019	10
2	Findings of Fact, Conclusions of Law, and Recommendation After Formal Hearing, filed May 14, 2019	10
3	Order Approving Conditional Guilty Plea Agreement and Enjoining Attorney From Practicing Law In Nevada, filed October 21, 2019	8
4	Letter from the State Bar of California, dated March 25, 2021	1
5	State Bar of California listing for Brian Moquin, retrieved June 30, 2021	2
6	Transmittal of Records of Conviction of Attorney, filed June 16, 2021	13
7	Declaration of Larry J. Willard	11
8	Declaration of Richard D. Williamson	5

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Miller & Williamson
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Suite 600
Reno. Nevada 89501

F I L E D
Electronically
CV14-01712
2021-07-13 08:38:54 AM
Alicia L. Lerud
Clerk of the Court
Transaction # 8539625 : csulezic

EXHIBIT “1”

EXHIBIT “1”

EXHIBIT “1”

Case No. OBC18-0660

FILED
APR 16 2019
STATE BAR OF NEVADA
BY: _____
OFFICE OF BAR COUNSEL

STATE BAR OF NEVADA

NORTHERN NEVADA DISCIPLINARY BOARD

STATE BAR OF NEVADA, Complainant, vs. BRIAN P. MOQUIN, ESQ., California Bar No. 257583 Respondent.	**CONDITIONAL GUILTY PLEA IN EXCHANGE FOR A STATED FORM OF DISCIPLINE**

BRIAN P. MOQUIN, ESQ, ("Respondent") hereby tenders to Bar Counsel for the State Bar of Nevada ("State Bar") this Conditional Guilty Plea pursuant to Supreme Court Rule 113(1) in exchange for the imposition of a stated form of discipline as more fully set forth herein.

I. TENDER OF GUILTY PLEA

Respondent hereby agrees to plead guilty and admit that, as set forth in the Complaint filed on December 21, 2018, he violated Rule 1.3 (Diligence), Rule 1.4 (Communication), and RPC 1.16 (Declining or Terminating Representation) of the Rules of Professional Conduct ("RPC") during his representation of Larry Willard in Second

Judicial District Court Case No. CV14-01712 and after such representation was terminated and new counsel was attempting to protect the client's interest.

II. STIPULATION OF FACTS

Respondent understands that by pleading guilty he admits the facts that support all elements of the rules to which he tenders his plea of guilty as follows:

1. Attorney Brian P. Moquin, Esq. ("Respondent"), California Bar No. 257283, is currently an active member of the State Bar of California and was admitted *pro hac vice* on or about November 13, 2014 to appear in Case No. CV14-01712, pending in the Second Judicial District Court of the State of Nevada in and for the County of Washoe ("the Lawsuit").

2. Larry J. Willard ("Willard") retained Respondent to represent him in a contract dispute matter regarding commercial property located in Washoe County, Nevada, to wit Second Judicial District Court Case No. CV14-01712.

3. Respondent arranged with Nevada licensed attorney David O'Mara to have O'Mara file the Complaint to initiate the Lawsuit.

4. On or about August 8, 2014, the Complaint was filed on behalf of Willard and others (the "Plaintiffs") in the Second Judicial District Court.

5. On or about October 28, 2014, Respondent was associated in as counsel for the Lawsuit on a *pro hac vice* status.

6. Starting in early 2015 and continuing through December, 2016, the defendants in the Lawsuit requested specific information related to the Plaintiffs' allegations of damages. Respondent's failure to adequately respond to those requests resulted in the issuance of an order compelling responses.

7. Respondent's continuing failures to provide adequate disclosures resulted in a third Stipulation and Order to continue the trial, entered on February 9, 2017. In the

stipulation, Respondent agreed that (i) Plaintiffs' expert had never been properly disclosed, causing prejudice to the defendants and (ii) Plaintiffs' NRCP 16.1 damages disclosures had not been properly provided. The parties also stipulated, and the Court ordered, that Plaintiffs were required to serve the defendants with an updated initial expert disclosure within 30 days of the Court's Order.

8. Respondent failed to comply with the Court's February 9, 2017 Order.

9. On May 30, 2017, the Court granted the Defendants' motion for partial summary judgment and included in the Order that Plaintiffs shall serve an updated NRCP 16.1 damage disclosure within 15 days of the order.

10. Respondent, on behalf of Plaintiffs, failed to comply with the Court's May 30, 2017 Order.

11. Respondent filed a Motion for Summary Judgment of behalf of Plaintiffs.

12. However, Respondent never submitted the Motion for Summary Judgment before the December 15, 2017 deadline to submit such motions passed.

13. If there was a contested Formal Hearing in this matter, the State Bar would present testimony that, during the pendency of the suit, Willard would express concern about the pace of the suit and the lack of resolution to Respondent and Respondent would blame the defendants' counsel or refer to "legal reasons" for the delays. Willard did not understand that Respondent's failure to comply with discovery requirements was delaying the trial in the matter.

14. If there was a contested Formal Hearing in this matter, Respondent would testify that he kept Willard adequately informed of the progress and status of the lawsuit.

15. On November 15, 2017, the defendants filed a Motion for Sanctions, which requested the case-ending sanction of dismissal with prejudice based on Plaintiffs' discovery violations.

16. On December 6, 2017, Respondent sought an extension of time to respond to the Motion for Sanctions, and the defendants' two other pending motions.

17. At the December 12, 2017 Pre-trial Status Conference, the Court granted Respondent's request for an extension to respond to the motions, telling Respondent that it was "very seriously considering granting all of it." Respondent's new deadline was December 18, 2017.

18. Willard would testify that he had been unaware, prior to the December 12, 2017 hearing, that Respondent had failed to respond to any of the defendants' motions.

19. Willard would also testify that, after December 12, 2017, he relied on Respondent's representations to him and did not expect the motions to be granted.

20. Between December 12, 2017 and December 18, 2017, Respondent evaded local counsel's attempts to ensure that responses were filed.

21. Respondent failed to file any response to any of the defendants' motions by the extended deadline.

22. On January 4, 2018, the Court granted the Defendant's request for case-ending sanctions. The Court based its decision on Respondent's failure to oppose the Motion for Sanctions, "the egregious discovery violations throughout the pendency of the litigation and repeated failure to comply with [the] Court's orders."

23. On March 6, 2018, the Court entered a Findings of Fact, Conclusion of Law and Order which extensively detailed the Plaintiffs' (Respondent's) failings in the litigation and officially dismissing Respondent's client's claims with prejudice. The Court also noted that it had not heard from Respondent since the December 12, 2017 Pre-Trial Status Conference.

24. After the January 4, 2018 Order was issued, Willard retained new counsel to attempt to undo the harm created by Respondent's failures in the representation.

25. That new counsel, Richard Williamson, Esq., contacted Respondent to gather information and documentation necessary to try to set aside the dismissal.

26. Respondent told Williamson that he had been diagnosed with bipolar disorder and had recently been arrested in California on charges of domestic violence.

27. Respondent represented to Williamson that he would provide any documentation necessary to support the NRCP 60(b) Motion for Relief, including but not limited to, an affidavit in support of the Motion, medical records/documents explaining the mental, emotional and psychological health issues that affected the representation, and documents related to the arrest.

28. Respondent represented to Williamson that he would organize and provide his entire client file to Williamson.

29. Williamson asked for the promised documents and file multiple times between January, 2018 and April, 2018.

30. During this time period, Willard paid for Respondent's psychiatric bills in an effort to help Respondent be able to support Williamson's preparation of the NRCP 60(b) Motion for Relief.

31. Respondent never provided Williamson with the promised documents that would support the NRCP 60(b) Motion.

32. Respondent never provided Williamson with any of his file for the representation.

33. When Willard contacted Respondent in late March, 2018 to try to facilitate Respondent assisting in the NRCP 60(b) Motion for Relief, Respondent responded by text with a rant and threatened Willard that he would not provide the promised documents.

34. On April 18, 2018, Williamson filed a Rule 60(b) Motion for Relief, requesting that the dismissal, and other case determinative sanctions, be set aside.

35. The NRCP 60(b) Motion for Relief relied on Willard's statements about Respondent's communication with him to support the requested relief because Respondent had never provided the necessary documentation that he had promised.

36. On May 14, 2018, Williamson sent Respondent a formal demand for the Plaintiffs' files.

37. Respondent did not respond to Williamson's May 14, 2018 request.

38. In late May, 2018, Willard directly requested the necessary documents to support the NRCP 60(b) motion from Respondent.

39. Respondent promised to provide the documentation on Memorial Day weekend.

40. In the afternoon on May 28, 2018 (Memorial Day), Willard again asked Respondent for the documents.

41. Respondent replied to Willard, referencing a prior statement Respondent had made that if Willard "communicate[d] in ANY WAY with [him] again before [he has] sent [Willard] the declaration and supporting exhibits [Willard] will receive neither" and declaring "So be it."

42. Respondent did not provide any documentation to Willard or Williamson after May 28, 2018.

43. On November 30, 2018, the Court denied Willard's Rule 60(b) Motion for Relief. The Court specifically noted in the Order that the Motion lacked sufficient evidentiary proof of Respondent's alleged mental health and personal issues to support the request.

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III. Violations of the Rules of Professional Conduct

1. Respondent had a duty to "act with reasonable diligence and promptness in representing a client," pursuant to RPC 1.3 (Diligence).

2. Respondent knowingly violated RPC 1.3 (Diligence) when he (i) failed comply with the requirements of NRCP, (ii) failed to timely comply with discovery deadlines, (iii) failed to submit the Motion for Summary Judgment prepared for Plaintiffs, and (iv) failed to oppose multiple, potentially case-ending, motions.

3. Respondent's clients were injured by Respondent's violations of RPC 1.3 (Diligence) because the lawsuit dragged on for over four years and the clients' claims were ultimately dismissed with prejudice based on a sanction motion that Respondent failed to oppose.

4. RPC 1.4 (Communication) provides that Respondent had a duty to "keep the client reasonably informed about the status of the matter."

5. Respondent knowingly violated RPC 1.4 (Communication) because, although he may have frequently communicated with Willard, he failed to adequately communicate to Willard the dire situation that had been created by Respondent's failures to comply with discovery obligations or respond to the defendants' motions.

6. Willard was injured by Respondent's violation of RPC 1.4 (Communication) because he was unable to properly evaluate his claims and the status of his lawsuit without the necessary information about Respondent's failures.

7. RPC 1.16 (Declining or Terminating Representation) requires Respondent to "take steps to the extent reasonably practicable to protect a client's interest" once a representation is terminated.

8. Respondent knowingly violated RPC 1.16 (Declining or Terminating Representation) when he failed to provide documentation to Willard's new counsel which

was crucial to the NRCP 60(b) Motion for Relief. Respondent promised to provide the necessary documentation, but never did it.

9. Respondent's client, Willard, was injured by Respondent's violation of RPC 1.16 (Declining or Terminating Representation) because the Court denied the request to set the dismissal aside based on a lack of evidence to support the assertions made by Respondent to excuse his failures in the case.

10. Standard 4.42 of the ABA Standards for Imposing Lawyer Sanctions applies in this matter. That Standard provides that "suspension is generally appropriate when (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or (b) a lawyer engages in a pattern of neglect causes injury or potential injury to a client."

11. Suspension is the appropriate baseline sanction for the aforementioned violations of the Rules of Professional Conduct.

IV. AGGRAVATING AND MITIGATING FACTORS

The aggravating factor that, pursuant to SCR 102.5, the parties find relevant to the guilty plea and agreed upon stated form of discipline is Respondent's substantial experience in the practice of law (SCR 102.5(1)(i)). The mitigating factor that, pursuant to SCR 102.5, the parties find relevant to the guilty plea and agreed upon stated form of discipline is an absence of prior disciplinary record (SCR 102.5(2)(a)).

V. STATED FORM OF DISCIPLINE

Pursuant to the Conditional Guilty Plea and Stipulation of Facts as set forth above, Respondent agrees to the following:

1. Respondent shall be enjoined from practicing law in Nevada for two years for violations of RPC 1.3 (Diligence), Rule 1.4 (Communication), and RPC 1.16 (Declining or Terminating Representation) during his representation of Larry Willard in Second Judicial

District Court Case No. CV14-01712 and after such representation was terminated and new counsel was attempting to protect the client's interest. The injunction shall begin to run upon the issuance of the Nevada Supreme Court's Order approving and accepting Respondent's Plea.

2. Respondent shall pay costs, provided for in SCR 120, in the amount of $2,500 plus the hard costs of these proceedings. Such payment shall be made no later than the 90th day after the issuance of the Nevada Supreme Court's Order approving and accepting Respondent's Plea.

V. CONDITIONAL APPROVAL AND AGREEMENT BY STATE BAR

Conditional to Respondent's execution of the instant plea and final ratification of the agreement at the hearing in this matter, the State Bar accepts the Plea and recommends approval of the stated form of discipline by the Formal Hearing Panel, and further agrees to dismiss charges regarding violations of RPC 1.1 (Competence), RPC 3.2 (Expediting Litigation), RPC 3.4 (Fairness to Opposing Party or Counsel), RPC 8.1 (Bar Admissions and Disciplinary Matters) and RPC 8.4 (Misconduct).

VI. APPROVAL OF RESPONDENT

Respondent certifies and acknowledges the following:

He has read the Conditional Guilty Plea in Exchange for a Stated Form of Discipline and understands that by pleading guilty he admits the facts that support all elements of the offenses.

He has discussed the plea with counsel, or has had the opportunity to discuss the plea with counsel and has chosen to not do so.

He fully understands the terms and conditions set forth herein and the consequences of this plea, including that this plea resolves only OBC18-0660 and not any other matters pending with, or grievances in investigation by, the State Bar of Nevada.

He is signing this agreement voluntarily and is not acting under duress or coercion or by virtue of any promises except as set forth herein.

He further understands a failure to fully adhere to any of the subject terms and conditions of the instant plea shall constitute grounds upon which the State Bar may directly seek relief from the Nevada Supreme Court or the Northern Nevada Disciplinary Board for said noncompliance.

DATED this 16th day of April, 2019.

Brian P. Moquin, Esq.
California Bar No. 257583
Respondent

STATE BAR OF NEVADA
Daniel M. Hooge, Bar Counsel

By: Kait Flocchini
R. Kait Flocchini, Assistant Bar Counsel
Nevada Bar No. 9861
9456 Double R Blvd, Suite B
Reno, Nevada 89521
Attorney for State Bar of Nevada

EXHIBIT “2”

EXHIBIT “2”

EXHIBIT “2”

Case No. OBC18-0660

FILED
MAY 14 2019
STATE BAR OF NEVADA
BY: _____
OFFICE OF BAR COUNSEL

STATE BAR OF NEVADA

NORTHERN NEVADA DISCIPLINARY BOARD

STATE BAR OF NEVADA, Complainant, vs. BRIAN P. MOQUIN, CALIFORNIA BAR NO. 257583 Respondent.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION AFTER FORMAL HEARING**

This matter involving attorney Brian Moquin, Esq. ("Respondent"), California Bar No. 257583, initially came before a designated Formal Hearing Panel of the Northern Nevada Disciplinary Board ("Panel") at 9:00 a.m. on April 17, 2019, at the offices of the State Bar of Nevada in Reno, Nevada. The Panel consisted of Chair Stephen S. Kent, Esq.; Caren Jenkins, Esq.; and Tim Meade, Laymember. Assistant Bar Counsel R. Kait Flocchini, Esq., represented the State Bar of Nevada ("State Bar"). Respondent was present telephonically and represented himself.

The State Bar's Exhibits 1- 16 were previously admitted into evidence in the Order After Pre-Hearing Conference. At the hearing, the State Bar offered the executed Conditional Guilty Plea in Exchange for a Stated Form of Discipline as Exhibit 17, which was admitted. Respondent did not offer any documents to be marked as Exhibits for the hearing.

The Panel also heard a summary statement from the State Bar and testimony from Respondent.

Based upon the evidence presented and testimony received, the Panel unanimously issues the following Findings of Fact, Conclusions of Law, and Recommendation:

FINDINGS OF FACT

1. Respondent is an attorney licensed to practice law in the State of California. Respondent was admitted *pro hac vice* to practice law in the State of Nevada on or about November 13, 2014 for Second Judicial District Case No. CV14-01712.

2. During the period in question, Respondent was primary counsel for the Plaintiffs in Second Judicial District Case No. CV14-01712, pending in Washoe County, Nevada.

3. The Stipulation of Facts, as set forth in paragraphs 1 through 43 of the Conditional Guilty Plea in Exchange for a Stated Form of Discipline, accurately reflects this Panel's findings regarding facts and circumstances pertinent to these proceedings. *See* Transcript of the Proceedings, dated April 17, 2019 ("Transcript), page 40, lines 19-23 and Exhibit 17.)

4. On December 21, 2018, the Office of Bar Counsel filed a disciplinary Complaint which charged Respondent with violations of Rule of Professional Conduct ("RPC") 1.1 (Competence), RPC 1.3 (Diligence), RPC 1.4 (Communication), RPC 1.16

(Declining or Terminating Representation), RPC 3.2 (Expediting Litigation), RPC 3.4 (Fairness to Opposing Party and Counsel), RPC 8.1 (Bar Admissions and Disciplinary Matters) and RPC 8.4 (Misconduct).*See* Transcript, Exhibit 1.

5. Respondent filed an Answer on February 21, 2019. *See* Transcript, Exhibit 1.

6. The Notice of Hearing, a Summary of Evidence and Designation of Witnesses and Documents, and the Order Appointing Formal Hearing Panel were filed and served by the State Bar on March 11, 2019. *See* Transcript, Exhibit 1.

7. Respondent knowingly and voluntarily pled guilty to knowing violations of RPC 1.3 (Diligence), RPC 1.4 (Communication), and RPC 1.16 (Declining or Terminating Representation.) *See* Transcript, page 37, line 18 to page 40, line 2.

8. The Panel considered Respondent's testimony regarding personal issues that coincided with his failures in the prosecution of Second Judicial District Court Case No. CV14-01712. *See* Transcript, page 41, lines 21-24.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Panel hereby issues the following Conclusions of Law:

1. The Northern Nevada Disciplinary Board has jurisdiction over Respondent and the subject matter of these proceedings pursuant to SCR 99.

2. Venue is proper in Washoe County.

3. The State Bar must prove by clear and convincing evidence that Respondent violated any Rules of Professional Conduct. *See* Nev. Sup. Ct. R. 105(2)(f); *In re Stuhff*, 108 Nev. 629, 633-634, 837 P.2d 853, 856; *Gentile v. State Bar*, 106 Nev. 60, 62, 787 P.2d 386, 387 (1990).

///

4. The Panel unanimously finds that the foregoing findings of fact prove by clear and convincing evidence that:

a. Respondent knowingly violated RPC 1.3 (Diligence) when he (i) failed comply with the requirements of NRCP, (ii) failed to timely comply with discovery deadlines, (iii) failed to submit the Motion for Summary Judgment prepared for Plaintiffs, and (iv) failed to oppose multiple, potentially case-ending, motions.

b. Respondent's clients were injured by Respondent's violations of RPC 1.3 (Diligence) because the lawsuit dragged on for over four years and the clients' claims were ultimately dismissed with prejudice based on a sanction motion that Respondent failed to oppose.

c. Respondent knowingly violated RPC 1.4 (Communication) because, although he may have frequently communicated with Willard, he failed to adequately communicate to Willard the dire situation that had been created by Respondent's failures to comply with discovery obligations or respond to the defendants' motions.

d. Willard was injured by Respondent's violation of RPC 1.4 (Communication) because he was unable to properly evaluate his claims and the status of his lawsuit without the necessary information about Respondent's failures.

e. Respondent knowingly violated RPC 1.16 (Declining or Terminating Representation) when he failed to provide documentation to Willard's new counsel which was crucial to the NRCP 60(b) Motion for Relief. Respondent promised to provide the necessary documentation, but never did it.

f. Respondent's client, Willard, was injured by Respondent's violation of RPC 1.16 (Declining or Terminating Representation) because the Court denied the request

to set the dismissal aside based on a lack of evidence to support the assertions made by Respondent to excuse his failures in the case.

See Transcript, page 41, lines 8-17.

5. The appropriate level of discipline must be determined considering "all relevant factors and mitigating circumstances on a case-by-case basis." *State Bar of Nevada v. Claiborne*, 104 Nev. 11, 219, 756 P.2d 464, 531 (1988). We evaluate The American Bar Association Standards for Imposing Lawyer Sanctions' four factors to be considered in determining the appropriate disciplinary sanction: "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." *See In re Discipline of Lerner*, 124 Nev. 1232, 1246, 197 P.3d 1067, 1078 (2008).

6. Pursuant to Standard 4.42 of the ABA Standard for Imposing Lawyer Sanctions, the appropriate baseline sanction for Respondent's violation of RPC 1.3 (Diligence), RPC 1.4 (Communication) and RPC 1.16 (Declining or Terminating Representation) is suspension. *See* Transcript, page 42, lines 5-7. It appropriate to enjoin Respondent from practicing law in the state of Nevada because, for an attorney that was practicing on a *pro hac vice* admission, injunction is the most similar consequence to a suspension.

7. Pursuant to SCR 102.5, the Panel unanimously found the following aggravating factor exists:

a. Substantial experience in the practice of law (SCR 102.5(1)(i). *See* Transcript, page 41, lines 18-24.

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8. Pursuant to SCR 102.5, the Panel unanimously found the following mitigating factor exists:

a. an absence of prior disciplinary record (SCR 102.5(2)(a)). *See id.*

9. The Panel unanimously found that the aggravating factor and mitigating factor were not sufficient reason to deviate from the application of Standard 4.42 and they did not impact the discipline to be recommended.

10. The Panel did not consider Respondent's unsupported presentation of personal issues as a reason to deviate from the application of Standard 4.42 and or impose alternative discipline. *See* Transcript, page 42, line 21 to page 42, line 4.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Panel hereby recommends that:

1 Respondent shall be enjoined from practicing law in Nevada for two years for violations of RPC 1.3 (Diligence), Rule 1.4 (Communication), and RPC 1.16 (Declining or Terminating Representation) during his representation of Larry Willard in Second Judicial District Court Case No. CV14-01712 and after such representation was terminated and new counsel was attempting to protect the client's interest. The injunction shall begin to run upon the issuance of the Nevada Supreme Court's Order approving and accepting Respondent's Plea.

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2. Respondent shall pay costs, provided for in SCR 120, in the amount of $2,500 plus the hard costs of these proceedings. Such payment shall be made no later than the 90th day after the issuance of the Nevada Supreme Court's Order approving and accepting Respondent's Plea.

DATED this 13th day of May, 2019.

STEPHEN S. KENT, ESQ., Chair
Northern Nevada Disciplinary Panel

CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that a true and correct copy of the foregoing **Findings of Fact, Conclusions of Law and Recommendation after Formal Hearing** was placed in the US mail, postage prepaid, via first class mail, addressed to Brian Moquin, Esq., Law Office of Brian P. Moquin, 50 W. Broadway, Ste. 300, Salt Lake City, UT 84101 and 1476 E. Westminster, Salt Lake City, UT 84105

In addition, the same was e-mailed to bmoquin@lawprism.com, brianmoquin@yahoo.com, skent@skentlaw.com and kaitf@nvbar.org.

Dated this 14th day of May, 2019.

Laura Peters, an employee of
the State Bar of Nevada

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
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

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

EXHIBIT “4”

EXHIBIT “4”

EXHIBIT “4”

The State Bar
of California

OFFICE OF CHIEF TRIAL COUNSEL

180 Howard Street, San Francisco, CA 94105

March 25, 2021

PERSONAL AND CONFIDENTIAL

Richard Williamson
500 Liberty Street, Suite 600
Reno, NV 89501

Re: Respondent: Brian Moquin
Case Number: 18-O-14177

Dear Richard Williamson:

We have completed the investigation of the above-referenced matter and have forwarded the case to Senior Trial Counsel Christina M. Lauridsen for further action. You will be contacted after the attorney has had an opportunity to review the file.

If you have any additional information to report, including any change of address or telephone number, please call Senior Trial Counsel Christina M. Lauridsen directly at 415-538-2271. You can also contact Senior Trial Counsel Christina M. Lauridsen at christina.lauridsen@calbar.ca.gov

Please remember, **all** documents that you send to the State Bar, whether **copies or originals**, become State Bar property and are subject to destruction.

Thank you for your continued cooperation in this matter.

Sincerely,

OFFICE OF CHIEF TRIAL COUNSEL

EXHIBIT “5”

EXHIBIT “5”

EXHIBIT “5”

The State Bar of California

Brian P Moquin #257583

License Status: Not Eligible to Practice Law

CONSUMER ALERT
This attorney is suspended from the practice of law. As a result, the attorney is ineligible to practice law in California. The State Bar posts consumer alerts online when attorneys are suspended from practice. Anyone who believes they have been the victim of attorney misconduct is urged to file a complaint with the State Bar.

CONSUMER ALERT
This attorney is suspended from the practice of law. As a result, the attorney is ineligible to practice law in California. The State Bar posts consumer alerts online when attorneys are suspended from practice. Anyone who believes they have been the victim of attorney misconduct is urged to file a complaint with the State Bar.

Address: Law Offices of Brian P. Moquin, 346 E Fenton Ave, Salt Lake City, UT 84115-4641
Phone: Not Available | Fax: Not Available
Email: bmoquin@lawprism.com | Website: Not Available

More about This Attorney

All changes of license status due to nondisciplinary administrative matters and disciplinary actions.

Date	License Status	Discipline	Administrative Action
Present	Not eligible to practice law in CA		
6/16/2021		Conviction record transmitted to State Bar Court 21-C-30456	
10/1/2020	Not eligible to practice law in CA		Suspended, failed to pay fees
9/10/2019	Not eligible to practice law in CA		Suspended/Child & Fam Supp noncompliance
11/3/2008	Admitted to the State Bar of California		

Here is what you need to know to access discipline documents:

If a case was open or filed on or after Feb. 7, 2019, documents are being added in the State Bar Court's online docket as events occur.

Search for a Case

To search for a case filed on or after Feb. 7, 2019, please copy the case number displayed above and click Search for a Case. **In the search box, you must add the prefix SBC to the case number, e.g., SBC [CASE NUMBER]. If an active case number begins with 18 or lower, there's no need to add SBC.**

Older case records are available on request. The State Bar Court began posting public discipline documents online in 2005.

NOTE: Only Published Opinions may be cited or relied on as precedent in State Bar Court proceedings. For further

information about a case displayed here, please refer to the State Bar Court's online docket.

DISCLAIMER: Any posted Notice of Disciplinary Charges, Conviction Transmittal or other initiating document, contains only allegations of professional misconduct. The licensee is presumed to be innocent of any misconduct warranting discipline until the charges have been proven.

Additional Information:

- About the disciplinary system

EXHIBIT “6”

EXHIBIT “6”

EXHIBIT “6”

FILED
JG
6/16/2021
STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES

THE STATE BAR OF CALIFORNIA
OFFICE OF CHIEF TRIAL COUNSEL
BRANDON KEITH TADY, No. 83045
845 South Figueroa Street
Los Angeles, California 90017-2515
Telephone: (213) 765-1000

Public Matter

IN THE STATE BAR COURT OF THE STATE BAR OF CALIFORNIA

IN THE MATTER OF THE CONVICTION OF: **BRIAN P. MOQUIN,** **No. 257583** Attorney	Case No. SBC-21-C-30456 Transmittal of Records of Conviction of Attorney (Bus. & Prof. Code §§ 6101-6102; Cal. Rules of Court, rule 9.5 et seq.) (OCTC Case No. 21-C-04811) [ ] Felony; [X] Misdemeanor; [ ] Crime(s) involves moral turpitude per se; [ ] Probable cause to believe the crime(s) involves moral turpitude; [ ] Request for summary disbarment per Bus. & Prof. Code §6102(c)-(1); [ ] Hearing required to determine whether summary disbarment per Bus. & Prof. Code § 6102(c)-(2) is warranted; [X] Hearing required to determine whether crime(s) involves moral turpitude or other misconduct warranting discipline; [ ] Evidence of sentence to incarceration of 90 days or more re involuntary enrollment per Bus. & Prof. Code § 6007(c)(5); [ ] Evidence that conviction is final.

To the CLERK OF THE STATE BAR COURT:

1. Transmittal of records.

[X] A. Pursuant to the provisions of Business and Professions Code, section 6101-6102 and California Rules of Court, rule 9.5 et seq., the Office of Chief Trial Counsel transmits a certified copy of the record of convictions of the following attorney of the State Bar and for such consideration and action as the Court deems appropriate:

[ ] B. Notice of Appeal

[ ] C. Evidence of Finality of Conviction (Notice of Lack of Appeal)

[ ] D. Other

Name of Licensee: Brian P. Moquin

Date licensee admitted to practice law or registered in California: 11/3/2008

Licensee's Address of Record: Law Offices of Brian P. Moquin
346 E Fenton Ave
Salt Lake City, UT 84115-4641

2. Date and court of conviction; offense(s).

The record of conviction reflects that the above-named attorney of the State Bar was convicted as follows:

Date of entry of conviction: January 23, 2018
Convicting court: Superior Court of California, County of Santa Clara
Case number(s): C1886692

Crime(s) of which convicted and classification(s):

Violation of Penal Code section 415(1), unlawful fighting in a public place, one count, a misdemeanor that may or may not involve moral turpitude, or other misconduct warranting discipline; see *In re Babero* (Review Department 1993) 2 Cal. State Bar Ct. Rptr. 322. Respondent's conviction arose out of an altercation with his spouse where she claimed he caused her bodily injuries.

[ ] 3. Compliance with Rule 9.20. (Applicable only if checked.)

We bring to the Court's attention that, should the Court enter an order of interim suspension herein, the Court may wish to require the above-named attorney to comply with the provisions of rule 9.20, California Rules of Court, paragraph (a), within 30 days of the effective date of any such order; and to file the affidavit with the Clerk of the State Bar Court provided for in paragraph (c) of rule 9.20 within 40 days of the effective date of said order, showing the attorney's compliance with the provisions of rule 9.20.

[ ] 4. Other information to assist the State Bar Court

DOCUMENTS TRANSMITTED:

Certified Record of Conviction
Misdemeanor Complaint

THE STATE BAR OF CALIFORNIA
OFFICE OF CHIEF TRIAL COUNSEL

DATED: June 16, 2021

BY: Brandon K. Tady
Brandon Keith Tady
Senior Trial Counsel

The Office of Chief Trial Counsel received the full set of Certified Record of Conviction on this matter on June 1, 2021.

A copy of this transmittal and its
Attachments have been sent to:

Brian P. Moquin
Law Offices of Brian P. Moquin
346 E Fenton Ave
Salt Lake City, UT 84115-4641

DOMESTIC VIOLENCE

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA
HALL OF JUSTICE

C1986692

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

BRIAN PHILIP MOQUIN (11/18/1967),
3287 RUFFINO LN SAN JOSE CA 95148

Defendant(s).

MISDEMEANOR COMPLAINT

DA NO: 180308384
CEN
18003023 BPM BAIL 03/26/2018

FILED
MAR 21 2018
Clerk of the Court
Superior Court of CA County of Santa Clara
BY _____ DEPUTY

The undersigned is informed and believes that:

COUNT 1

On or about January 23, 2018, in the County of Santa Clara, State of California, the crime of BATTERY ON SPOUSE, COHABITANT, PARENT OF CHILD, FORMER SPOUSE, FIANCE, FIANCEE OR DATING RELATIONSHIP, in violation of PENAL CODE SECTION 242-243(e), a Misdemeanor, was committed by BRIAN PHILIP MOQUIN who did willfully and unlawfully use force and violence against a the mother or father of his or her child, Natasha Doe.

COUNT 2

On or about January 23, 2018, in the County of Santa Clara, State of California, the crime of MISDEMEANOR FALSE IMPRISONMENT, in violation of PENAL CODE SECTION 236-237, a Misdemeanor, was committed by BRIAN PHILIP MOQUIN who did unlawfully violate the personal liberty of Natasha Doe.

COUNT 3

On or about and between January 25, 2018 and January 26, 2018, in the County of Santa Clara, State of California, the crime of CONTEMPT OF COURT - VIOLATION OF PROTECTIVE ORDER OR STAY-AWAY ORDER, in violation of PENAL CODE SECTION 166(c)(1), a Misdemeanor, was committed by BRIAN PHILIP MOQUIN who did willfully and knowingly violate a protective court order or stay-away court order, an order issued pursuant to Penal Code section 136.2.

2018 MAR 12 PM 2:24

EVIDENCE CODE SECTION 1109 NOTICE

Notice is given that the People will offer evidence of other acts of domestic violence within the meaning of Evidence Code section 1109 contained within the affidavit of probable cause and the attached reports. In compliance with Penal Code section 1054.7, the People will disclose any additional evidence that may become known or acquired during the pendency of this action.

DISCOVERY REQUEST

Pursuant to Penal Code sections 1054 through 1054.7, the People request that, within 15 days, the defendant and/or his/her attorney disclose: (A) The names and addresses of persons, other than the defendant, he/she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial; (B) Any real evidence which the defendant intends to offer in evidence at the trial. This request is a continuing request, to cover not only all such material currently in existence, but all material which comes into existence to the conclusion of this case.

Further, attached and incorporated by reference are official reports and documents of a law enforcement agency which the complainant believes establish probable cause for the pretrial restraint of defendant BRIAN PHILIP MOQUIN, for the above-listed crimes.

Complainant therefore requests that the defendant(s) be dealt with according to law.
I certify under penalty of perjury that the above is true and correct.
Executed on March 15, 2018, in SANTA CLARA County, California.

Ramos 3919
(Luu 2780)
SJPD (408) 277-3700 180230650 FV
DEMERTZIS/ D468/ MISDEMEANOR/ BC

THE FOREGOING INSTRUMENT IS
A CORRECT COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE

MAY 20 2021

Clerk of the Court
SUPERIOR COURT OF CA COUNTY OF SANTA CLARA
BY E. Kremerskotter DEPUTY
E. KREMERSKOTTER

HALL OF JUSTICE
190 W. HEDDING STREET
SAN JOSE, CA 95110

CASE NO. C1886692
CEN 18003023

PEOPLE VS. BRIAN PHILIP MOQUIN
A.K.A. 3287 RUFFINO LA
SAN JOSE, CA 95148

DATE 05/31/2018 9:00 AM DEPT 45
11/18/1967 CAF1569667 CDY BK#:Y
CLERK L. CERACLO EEW212 M
HEARING JURY TRIAL
AGENCY SJ-04313-3919 -RAMOS
STATUS O-BB -25000/002055 TW Y

JUDGE HON. RONALD TOFF DV:Y
REPORTER NEBOLON CHILD:
DEF. ATTY VERANIEC, MARK (G) D.A. O. Mendoza APO
CHARGES M(001)PC242/243(E) M(002)PC236/237
M(003)PC166(C)(1)

VIOLATION DATE 01/23/2018

NEXT APPEARANCE 6-20-18 900 D45

☑ Defendant Present ☐ Not Present ☑ Atty Present MK ☐ AD / PD / IDO / Special App
☐ Arr'd ☐ Adv ☑ Arr Wav ☑ Amend Comp/Info ☐ Arr ☐ Plea ☐ IDC ☐ PTC ☑ Prob / Sent ☐ Interpreter ☐ Swo
☐ PC977 ☐ Filed ☐ On File ☐ Reptr. Adv / Wav ☐ Bail/ OR/ SORP ☐ Rect Dr Rpt ☐ FAR/ ERC ☐ Bail Apply ☐ Balance Exonerated
☐ NG ☐ Entered by CRT ☐ NGBRI / Adv ☐ PSet ☐ Prelim ☐ Readiness ☐ S / B MTC ☐ Bail Exonerated ☐ Forfeited Bond #
☐ Denies Priors/ Allegations/ Enhancements/Refusal ☐ Further ☐ Jury ☐ CT ☐ Peo / Def Wav Jury ☐ Reassumption Filed ☐ Forfeiture Set Aside ☐ Bail Rei
☐ TW ☐ TNW ☐ TW / WD ☑ TW Sentence ☐ Ref'd ☐ $ Costs Within 30 Days to Court
☐ Ref / Appt PD / ADO / IDO ☐ Con Decl ☐ Adm A / F ☐ APO / DADS/ Prop 36 ☐ P36 Re-Assm't SORP / OR ☐ Revoked ☐ Reinstated ☐ May Post & For
☐ Relieved Appt'd ☐ Crim Proc Susp ☐ Rein ☐ Status Hrg ☐ BW Ordered $ ☐ Stayed ☐ To Issu
☐ Hrg on Motion ☐ Doubt Decl Pursuant PC 1368 ☐ No Cite Release/SCIT ☐ No Request ☐ Cash Only
☐ Granted ☐ Denied ☐ Submitted ☐ Off Cal ☐ Subm on Report ☐ Found ☐ BW Set Aside ☐ Recalled ☐ Filed ☐ Remain Out ☐
☐ Stip to Comm ☐ Drs. Appointed ☐ Max Term ☐ Committed ☑ Proof of Hawk DVAP Enrollment
☐ Prelim Wav ☐ Certified to General Jurisdiction ☑ MDA / ~~COM~~ Amended to Add ct 4 pc 415(1) misd
☐ Amended to ☐ (M) VC12500(a) / VC23103(a) ☐ Pur VC23103.5 ☐ DA Stmt Filed ☐ PROP.

PLEA Conditions: ☐ None ☐ No State Prison ☐ PC17 after 1 Yr Prob ☐ Includes VOP
☐ Jail / Prison Term of ☐ Add to Cal ☐ Vacate pending d
☑ Dismissal / ~~Striking~~ MDA - cts 1, 2 & 3 VOP ☐ Subm time of Sent ☐ Harvey Stip
☑ Adv Max Pen / Parole / Prob / Immig / Appeal ☐ Reg HS11590/PC290/PC457.1/PC186.30 ☐ FSF ☐ Fines/Fees ☐ PC29800/29805/30305/666/VC14607.8
☑ Wav Right to ☐ Counsel ☑ Court / Jury Trial ☑ Subpoena / Confront / Examine Witnesses ☑ Self-incrimination ☐ Written Waiver filed ☐ Plea / Absentia f
☐ COP ☑ **GUILTY** ☐ **NOLO CONTENDERE** to charges & admits enhancements / allegations / priors ☐ **PC1Z** ☑ Arbuckle ☑ Factual Basis found ☑ Findings sta
☐ Prop 36 Granted / Unamenable / Refused / Term ☐ DEJ Eligibility Filed ☐ DEJ Granted / Rein / Term Fee $ ☐ Guilty Plea Rend
☐ Waives Referral ☐ APO Full Rpt ☐ CR110 issued **Fines/Fees Pay to:** ☐ DOR ☐ Traffic ☐ Court ☐ Today ☐ Audit #
☐ Sent Suspended ☐ **PROBATION DENIED**

PROBATION ☐ Execution ☐ Imposition of sentence suspended for probation period
☐ COURT ☐ FORMAL PROBATION GRANTED for Days / Mos / Yrs
☐ Report to APO within Days ☐ Terminated ☐ Upon Release
☐ Perform Hrs Volunteer Work as directed PO / SAP ☐ in lieu of fine/Jail
☐ Not drive w/o valid DL & Ins ☐ Adv VC23600 ☐ HTO ☐ Re-refer
☐ MOP ☐ FOP ☐ 12 hrs ☐ 3 mos ☐ 9 mos Enroll within days
☐ DL Susp/ Restr'd/ Rvk'd for ☐ IID Not/Ordered/ Rmv'd Term Yrs
☐ No contact with victim or family / co-defts unless appr by APO ☐ PC1202.05
☐ DVPO issued / mod /term'd Exp ☐ Victim Present
☐ No Contact ☐ Peaceful Contact ☐ DSA thru APO / DOR / CRT ☐ Filed
☐ Not own/possess deadly weapons ☐ Destroy/return weapon
☐ Stay away from
☐ Submit Search/Testing ☐ Educ/Voc Trng/Empl ☐ No alcohol / drugs or where sold
☐ Substance Abuse, Psych, Theft, Anger Mgmt, DV, Parenting cnsl / prgm
☐ PC296 (DNA) ☐ PC1202.1 HIV Test / Education
VOP: ☐ Wav ☐ Arr'd ☐ Admits/Denies Viol ☐ Court Finds VOP / No VOP
Prob Rein / Mod / Term'd / Revoked / Remains Revoked / Ext to
☐ Original Terms & Conditions Except as Amended herein
☐ Co-terminous with ☐ No Further Penalties / Reviews
Other:

COUNT $ + PA $ ☐ Purs HS11350d
COUNT $ + PA $ ☐ PC290.3
AIDS / CPP $ + PA $ SORP
DPF $ + PA $ EMAT $
LAB $ + PA $
DRF /RF $ Add'l RF $ Susp'd PC1202.
AEF $ Original Fine $
SECA/COPA $ **CTS PC2900.5** $
ICMF $ **TOTAL DUE** $
ICIN $ Payments Granted / Modified
AR $ $ / Mo beginning
SHELTER $ FINE STAYED
DV $ Committed @ $ /day ☐ May Pay (
ATTY $ Consec/Conc to
ASF$25/CPF$10 $ Fine / Fees ☐ Deemed Satisfied ☐ Commu
P/INVEST $ ☐ P/SUP $ /Mo ☐ Waiv
CJAF $129.75/$259.50 $ ☐ Addt'l Fees Waived
☐ SECA, ICMF, ICIN, CJAF, PINVEST, PSUP FEES NOT COND. OF PR
☐ Restit ☐ Gen $ to
☐ As determined by APO/Court ☐ Referred to VWAC ☐ Collect Civ

JAIL/PRISON ☐ See Attachm't Pg ☐ CDCR/Parole collect restit from Def's earnings ☐ Blended Sentence

Count	F/M	Violation	Prison Term / Yrs	Enhancement / Priors	Yrs / Styd / Strkn	County Jail HRS / DAYS / MO
4	M	PC415(1)				Hawk DV Prob Denied 4.15

Enhancement	Yrs/S	Enhancement	Yrs/S	Enhancement	Yrs/S	Enhancement	Yrs/S	Enhancement	Yrs/S	Total

CTS = ACT + ☐ 4019 ☐ ½ ☐ ⅓ ☐ PC2933.1 Total Total term CDCR / PC 1170h
☐ Straight time ☐ In Camp ☐ WWP ☐ PC1209 Fees ☐ Waived ☐ Court Rec All / Except ☐ EMP/PSP/ERP/DRP/Co Parole/NP
☐ Sent Deemed Srv'd ☐ Rpt to Parole/Prob w/in ☐ Adv/ORD Yrs/Mos Parole/MS/PRCS/Appeal ☐ Consec ☐ Conc to
☐ Bal CJ Susp ☐ All but Hrs/Days/Mos ☐ On Cond Complete Residential Treatment Prgm ☐ Serve Consec MO/TU/WE/TH/FR/SA/SU
☐ Pre-process AM/PM ☐ **Stay / Surrender / Transport to** @ AM/PM or Sooner

☐ REMANDED-BAIL $ ☐ REMAIN AS SET ☐ NO BAIL ☐ COMMITTED ☐ RELEASED ☐ OR ☐ SORP ☐ JAC PHONE ASSM'T ☐ P3
☐ AS COND OF SORP ☐ BAIL INCREASED / REDUCED ☐ TO PRGM AS REC BY JAC DOC TO ARRANGE TRANSPORT UPON AVAIL BED

THE FOREGOING INSTRUMENT IS
A CORRECT COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE

MAY 20 2021

Clerk of the Court
SUPERIOR COURT OF CA COUNTY OF SANTA CLARA
BY E. Kremerkotter DEPUTY
E. KREMERSKOTTER

17 HALL OF JUSTICE
190 W. HEDDING STR
SAN JOSE, CA 95110

CASE NO. C188669
CEN 1800302
TC:_
DATE 11/07/2018 9:00 AM DEPT. 45

PEOPLE VS. BRIAN PHILIP MOQUIN
A.K.A. 3287 RUFFINO LA
SAN JOSE, CA 95148
11/18/1967 CAF1569667 CDY BH

CLERK VERNA/PARKER/SIENNA EEW212
HEARING PROBATION AND SENTENCING
JUDGE HON. NAHAL IRAVANI-SANI DV: Y AGENCY SJ-04313-3919 -RAMOS
REPORTER T GANDSEY CHILD: STATUS 0-88 -25000/002055 TW
DEF. ATTY. YERANIEC, MARK (G) D.A. Rothbach APO
CHARGES M(004)PC415(1)

VIOLATION DAT
01/23/2018

NEXT APPEARANCE

☑ Defendant Present ☐ Not Present ☑ Atty Present A/R Pro Per ☐ AD / PD / IDO / Special App
☐ Arr'd ☐ Adv ☐ Arr Wav ☐ Amend Comp/Info ☐ Arr ☐ Plea ☐ IDC ☐ PTC ☐ Prob / Sent ☐ Interpreter ☐ Swor
☐ PC977 ☐ Filed ☐ On File ☐ Reptr. Adv / Wav ☐ Bail/ OR/ SORP ☐ Rect Dr Rpt ☐ FAR/ ERC ☐ Bail Apply ☐ Balance Exonerated
☐ NG ☐ Entered by CRT ☐ NGBRI / Adv ☐ PSet ☐ Prelim ☐ Readiness ☐ S / B MTC ☑ Bail Exonerated ☐ Forfeited Bond #
☐ Denies Priors/ Allegations/ Enhancements/Refusal ☐ Further ☐ Jury ☐ CT ☐ Peo / Def Wav Jury ☐ Reassumption Filed ☐ Forfeiture Set Aside ☐ Bail Rein
☐ TW ☐ TNW ☐ TW / WD ☐ TW Sentence ☐ Ref'd ☐ $ Costs Within 30 Days to Court
☐ Ref / Appt PD / ADO / IDO ☐ Con Decl ☐ Adm A / F ☐ APO / DADS/ Prop 36 ☐ P36 Re-Assm't SORP / OR ☐ Revoked ☐ Reinstated ☐ May Post & For
☐ Relieved Appt'd ☐ Crim Proc Susp ☐ Rein ☐ Status Hrg ☐ BW Ordered $ ☐ Stayed ☐ To Issue
☐ Hrg on Motion ☐ Doubt Decl Pursuant PC 1368 ☐ No Cite Release/SCIT ☐ No Request ☐ Cash Only
☐ Granted ☐ Denied ☐ Submitted ☐ Off Cal ☐ Subm on Report ☐ Found ☐ BW Set Aside ☐ Recalled ☐ Filed ☐ Remain Out
☐ Stip to Comm ☐ Drs. Appointed ☐ Max Term ☐ Committed ☑ Proof of PCC 16WK DVAP Sho
☐ Prelim Wav ☐ Certified to General Jurisdiction ☐ MDA / COM Amended to
☐ Amended to ☐ (M) VC12500(a) / VC23103(a) ☐ Pur VC23103.5 ☐ DA Stmt Filed ☐ PROP.

PLEA Conditions: ☐ None ☐ No State Prison ☐ PC17 after 1 Yr Prob ☐ Includes VOP
☐ Jail / Prison Term of ☐ Add to Cal ☐ Vacate pending da
☐ Dismissal / Striking ☐ Subm time of Sent ☐ Harvey Stip
☐ Adv Max Pen / Parole / Prob / Immig / Appeal ☐ Reg HS11590/PC290/PC457.1/PC186.30 ☐ FSF ☐ Fines/Fees ☐ PC29800/29805/30305/666/VC14607.8
☐ Wav Right to ☐ Counsel ☐ Court / Jury Trial ☐ Subpoena / Confront / Examine Witnesses ☐ Self-incrimination ☐ Written Waiver filed ☐ Plea / Absentia fi
☐ COP ☐ **GUILTY** ☐ **NOLO CONTENDERE** to charges & admits enhancements / allegations / priors ☐ **PC17** ☐ Arbuckle ☐ Factual Basis found ☐ Findings sta
☐ Prop 36 Granted / Unamenable / Refused / Term ☐ DEJ Eligibility Filed ☐ DEJ Granted / Rein / Term Fee $ ☐ Guilty Plea Rendi
☐ Waives Referral ☐ APO Full Rpt ☐ CR110 issued **Fines/Fees Pay to:** ☐ DOR ☐ Traffic ☑ Court ☑ Today ☑ Audit # 124573
☐ Sent Suspended ☑ **PROBATION DENIED**

PROBATION ☐ Execution ☐ Imposition of sentence suspended for probation period
☐ COURT ☐ FORMAL PROBATION GRANTED for Days / Mos / Yrs
☐ Report to APO within Days ☐ Terminated ☐ Upon Release
☐ Perform Hrs Volunteer Work as directed PO / SAP ☐ in lieu of fine/Jail
☐ Not drive w/o valid DL & Ins ☐ Adv VC23600 ☐ HTO ☐ Re-refer
☐ MOP ☐ FOP ☐ 12 hrs ☐ 3 mos ☐ 9 mos Enroll within days
☐ DL Susp/ Restr'd/ Rvk'd for ☐ IID Not/Ordered/ Rmv'd Term Yrs
☐ No contact with victim or family / co-defts unless appr by APO ☐ PC1202.05
☑ DVPO ~~issued / mod /term'd Exp~~ Remains ☐ Victim Present
☐ No Contact ☐ Peaceful Contact ☐ DSA thru APO / DOR / CRT ☐ Filed
☐ Not own/possess deadly weapons ☐ Destroy/return weapon
☐ Stay away from
☐ Submit Search/Testing ☐ Educ/Voc Trng/Empl ☐ No alcohol / drugs or where sold
☐ Substance Abuse, Psych, Theft, Anger Mgmt, DV, Parenting cnsl / prgm
☐ PC296 (DNA) ☐ PC1202.1 HIV Test / Education
VOP: ☐ Wav ☐ Arr'd ☐ Admits/Denies Viol ☐ Court Finds VOP / No VOP
Prob Rein / Mod / Term'd / Revoked / Remains Revoked / Ext to
☐ Original Terms & Conditions Except as Amended herein
☐ Co-terminous with ☐ No Further Penalties / Reviews
Other:

COUNT	$	+ PA $	☐ Purs HS11350d
COUNT	$	+ PA $	☐ PC290.3
AIDS / CPP	$	+ PA $	SORP
DPF	$	+ PA $	EMAT $
LAB	$	+ PA $	
DRF /RF	$ 165	Add'l RF $	Susp'd PC1202.
AEF	$	Original Fine $	
SECA/~~COPA~~	$ 40	**CTS PC2900.5**	$
ICMF	$ 30	**TOTAL DUE**	$ 364.75
ICIN	$	Payments Granted / Modified	
AR	$	$ / Mo beginning	
SHELTER	$	FINE STAYED	
DV	$	Committed @ $ /day	☐ May Pay C
ATTY	$	Consec/Conc to	
ASF$25/CPF$10	$	Fine / Fees	☐ Deemed Satisfied ☐ Commu
P/INVEST	$	☐ P/SUP $ /Mo	☐ Waiv
CJAF $129.75/$259.50	$	☐ Addt'l Fees Waived	
☐ SECA, ICMF, ICIN, CJAF, PINVEST, PSUP FEES NOT COND. OF PR			
☐ Restit ☐ Gen $		to	
☐ As determined by APO/Court	☐ Referred to VWAC	☐ Collect Civ	

JAIL/PRISON ☐ See Attachm't Pg ☐ CDCR/Parole collect restit from Def's earnings ☐ Blended Sentence

Count	F/M	Violation	Prison Term / Yrs	Enhancement / Priors	Yrs / Styd / Strkn	County Jail HRS / DAYS / MO
						16WK DV
						$364.75
						=Prob Den

Enhancement	Yrs/S	Enhancement	Yrs/S	Enhancement	Yrs/S	Enhancement	Yrs/S	Enhancement	Yrs/S	Total

CTS = **ACT +** ☐ 4019 ☐ ½ ☐ ⅓ ☐ PC2933.1 Total Total term CDCR / PC 1170h
☐ Straight time ☐ In Camp ☐ WWP ☐ PC1209 Fees ☐ Waived ☐ Court Rec All / Except ☐ EMP/PSP/ERP/DRP/Co Parole/NP
☐ Sent Deemed Srv'd ☐ Rpt to Parole/Prob w/in ☐ Adv/ORD Yrs/Mos Parole/MS/PRCS/Appeal ☐ Consec ☐ Conc to
☐ Bal CJ Susp ☐ All but Hrs/Days/Mos ☐ On Cond Complete Residential Treatment Prgm ☐ Serve Consec MO/TU/WE/TH/FR/SA/SU
☐ Pre-process AM/PM ☐ **Stay / Surrender / Transport to** @ AM/PM or Sooner

☐ REMANDED-BAIL $ ☐ REMAIN AS SET ☐ NO BAIL ☐ COMMITTED ☐ RELEASED ☐ OR ☐ SORP ☐ JAC PHONE ASSM'T ☐ P3
☐ AS COND OF SORP ☐ BAIL INCREASED / REDUCED ☐ TO PRGM AS REC BY JAC DOC TO ARRANGE TRANSPORT UPON AVAIL BED

THE FOREGOING INSTRUMENT IS
A CORRECT COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE

MAY 20 2021

Clerk of the Court
SUPERIOR COURT OF CA COUNTY OF SANTA CLARA
BY E. Kremenkotter DEPUTY

E. KREMENKOTTER

L23 HALL OF JUSTICE
190 W. HEDDING ST. [redacted] ET
SAN JOSE, CA 95110

OPLE VS. BRIAN PHILIP MOQUIN
.A. 3287 RUFFINO LA
SAN JOSE, CA 95148

DGE HON. RONALD TOFF
PORTER P. CROWLEY
F. ATTY. YERANIEC, MARK (G)
IARGES M(004)PC415(1)

[redacted] TC:_

CASE NO. C1886692
CEN 18003023
DATE 07/12/2018 1:30 PM DEPT. 45
11/18/1967 CAF1569667 CDY BK:Y
CLERK B. CHIENG/L. CERAOLO EEW212 M
HEARING SENTENCING
DV:Y AGENCY SJ-04313-3919 -RAMOS
CHILD: STATUS 0-BB -25000/002055 TW Y
D.A. Hawkins APO

VIOLATION DATE 01/23/2018

11-7-18 900 D45

NEXT APPEARANCE

☒ Defendant Present ☐ Not Present Prc per Not ☒ Atty Present AIR ☐ AD / PD / IDO / Special App
☐ Arr'd ☐ Adv ☐ Arr Wav ☐ Amend Comp/Info ☐ Arr ☐ Plea ☐ IDC ☐ PTC ☒ Prob / Sent ☐ Interpreter ☐ Sworn
☐ PC977 ☐ Filed ☐ On File ☐ Reptr. Adv / Wav ☐ Bail/ OR/ SORP ☐ Rect Dr Rpt ☐ FAR/ ERC ☐ Bail Apply ☐ Balance Exonerated
☐ NG ☐ Entered by CRT ☐ NGBRI / Adv ☐ PSet ☐ Prelim ☐ Readiness ☐ S / B MTC ☐ Bail Exonerated ☐ Forfeited Bond #
☐ Denies Priors/ Allegations/ Enhancements/Refusal ☐ Further ☐ Jury ☐ CT ☐ Peo / Def Wav Jury ☐ Reassumption Filed ☐ Forfeiture Set Aside ☐ Bail Rein
☐ TW ☐ TNW ☐ TW / WD ☐ TW Sentence ☒ Ref'd Poc Vera 10 Week ☐ $ Costs Within 30 Days to Court
☐ Ref / Appt PD / ADO / IDO ☐ Con Decl ☐ Adm A / F ☐ APO / DADS/ Prop 36 ☐ P36 Re-Assm't ☒ SORP / OR ☐ Revoked ☐ Reinstated ☐ May Post & Forfeit
☐ Relieved Appt'd ☐ Crim Proc Susp ☐ Rein ☐ Status Hrg ☐ BW Ordered $ ☐ Stayed ☐ To Issue
☐ Hrg on Motion ☐ Doubt Decl Pursuant PC 1368 ☐ No Cite Release/SCIT ☐ No Request ☐ Cash Only
☐ Granted ☐ Denied ☐ Submitted ☐ Off Cal ☐ Subm on Report ☐ Found ☐ BW Set Aside ☐ Recalled ☐ Filed ☐ Remain Out ☐ NWF
☐ Stip to Comm ☐ Drs. Appointed ☐ Max Term ☐ Committed ☒ Proof of Poc DVAP Waiver to Crt
☐ Prelim Wav ☐ Certified to General Jurisdiction ☐ MDA / COM Amended to
☐ Amended to ☐ (M) VC12500(a) / VC23103(a) ☐ Pur VC23103.5 ☐ DA Stmt Filed ☐ PROP. 47

PLEA Conditions: ☐ None ☐ No State Prison ☐ PC17 after 1 Yr Prob ☐ Includes VOP
☐ Jail / Prison Term of ☐ Add to Cal ☐ Vacate pending date
☐ Dismissal / Striking ☐ Subm time of Sent ☐ Harvey Stip
☐ Adv Max Pen / Parole / Prob / Immig / Appeal ☐ Reg HS11590/PC290/PC457.1/PC186.30 ☐ FSF ☐ Fines/Fees ☐ PC29800/29805/30305/666/VC14607.8
☐ Wav Right to ☐ Counsel ☐ Court / Jury Trial ☐ Subpoena / Confront / Examine Witnesses ☐ Self-incrimination ☐ Written Waiver filed ☐ Plea / Absentia filed
☐ COP ☐ **GUILTY** ☐ **NOLO CONTENDERE** to charges & admits enhancements / allegations / priors ☐ **PC17** ☐ Arbuckle ☐ Factual Basis found ☐ Findings stated
☐ Prop 36 Granted / Unamenable / Refused / Term ☐ DEJ Eligibility Filed ☐ DEJ Granted / Rein / Term Fee $ ☐ Guilty Plea Rendered
☐ Waives Referral ☐ APO Full Rpt ☐ CR110 issued **Fines/Fees Pay to:** ☐ DOR ☐ Traffic ☐ Court ☐ Today ☐ Audit #
☐ Sent Suspended ☐ **PROBATION DENIED**

PROBATION ☐ Execution ☐ Imposition of sentence suspended for probation period
☐ COURT ☐ FORMAL PROBATION GRANTED for ____ Days / Mos / Yrs
☐ Report to APO within ____ Days ☐ Terminated ☐ Upon Release
☐ Perform ____ Hrs Volunteer Work as directed PO / SAP ☐ in lieu of fine/Jail
☐ Not drive w/o valid DL & Ins ☐ Adv VC23600 ☐ HTO ☐ Re-refer
☐ MOP ☐ FOP ☐ 12 hrs ☐ 3 mos ☐ 9 mos Enroll within ____ days
☐ DL Susp/ Restr'd/ Rvk'd for ____ ☐ IID Not/Ordered/ Rmv'd Term ____ Yrs
☐ No contact with victim or family / co-defts unless appr by APO ☐ PC1202.05
☐ DVPO issued / mod /term'd Exp ☐ Victim Present
☐ No Contact ☐ Peaceful Contact ☐ DSA thru APO / DOR / CRT ☐ Filed
☐ Not own/possess deadly weapons ☐ Destroy/return weapon
☐ Stay away from
☐ Submit Search/Testing ☐ Educ/Voc Trng/Empl ☐ No alcohol / drugs or where sold
☐ Substance Abuse, Psych, Theft, Anger Mgmt, DV, Parenting cnsl / prgm
☐ PC296 (DNA) ☐ PC1202.1 HIV Test / Education
VOP: ☐ Wav ☐ Arr'd ____ ☐ Admits/Denies Viol ☐ Court Finds VOP / No VOP
Prob Rein / Mod / Term'd / Revoked / Remains Revoked / Ext to
☐ Original Terms & Conditions Except as Amended herein
☐ Co-terminous with ☐ No Further Penalties / Reviews
Other:

COUNT ____	$ ____	+ PA $ ____	☐ Purs HS11350d
COUNT ____	$ ____	+ PA $ ____	☐ PC290.3
AIDS / CPP	$ ____	+ PA $ ____	SORP ____
DPF	$ ____	+ PA $ ____	EMAT $ ____
LAB	$ ____	+ PA $ ____	
DRF /RF	$ ____	Add'l RF $ ____	Susp'd PC1202.44/4
AEF	$ ____	Original Fine $	____
SECA/COPA	$ ____	**CTS PC2900.5**	$ ____
ICMF	$ ____	**TOTAL DUE**	$ ____
ICIN	$ ____	Payments Granted / Modified	
AR	$ ____	$ ____ / Mo beginning	____
SHELTER	$ ____	FINE STAYED	____
DV	$ ____	Committed @ $ ____ /day	☐ May Pay Out
ATTY	$ ____	Consec/Conc to	____
ASF$25/CPF$10	$ ____	Fine / Fees ☐ Deemed Satisfied	☐ Commuted
P/INVEST	$ ____	☐ P/SUP $ ____	/Mo ☐ Waived
CJAF $129.75/$259.50	$ ____	☐ Addt'l Fees Waived	

☐ SECA, ICMF, ICIN, CJAF, PINVEST, PSUP FEES NOT COND. OF PROB
☐ Restit ☐ Gen $ ____ to ____
☐ As determined by APO/Court ☐ Referred to VWAC ☐ Collect Civilly

JAIL/PRISON ☐ See Attachm't Pg ☐ CDCR/Parole collect restit from Def's earnings ☐ Blended Sentence

Count	F/M	Violation	Prison Term / Yrs	Enhancement / Priors	Yrs / Styd / Strkn	County Jail HRS / DAYS / MOS
						16w DVAP
						Prob Dens
						364.25

Enhancement	Yrs/S	Enhancement	Yrs/S	Enhancement	Yrs/S	Enhancement	Yrs/S	Enhancement	Yrs/S	Total

CTS = ____ **ACT +** ____ ☐ 4019 ☐ ½ ☐ ⅓ ☐ PC2933.1 ____ Total Total term ____ CDCR / PC 1170h
☐ Straight time ☐ In Camp ☐ WWP ☐ PC1209 Fees ☐ Waived ☐ Court Rec ____ All / Except ☐ EMP/PSP/ERP/DRP/Co Parole/NP ____
☐ Sent Deemed Srv'd ☐ Rpt to Parole/Prob w/in ____ ☐ Adv/ORD ____ Yrs/Mos Parole/MS/PRCS/Appeal ☐ Consec ☐ Conc to ____
☐ Bal CJ Susp ☐ All but ____ Hrs/Days/Mos ☐ On Cond Complete Residential Treatment Prgm ☐ Serve Consec MO/TU/WE/TH/FR/SA/SU ____
☐ Pre-process ____ AM/PM ☐ **Stay / Surrender / Transport to** ____ @ ____ AM/PM or Sooner

☐ REMANDED-BAIL $ ____ ☐ REMAIN AS SET ☐ NO BAIL ☐ COMMITTED ☐ RELEASED ☐ OR ☐ SORP ☐ JAC PHONE ASSM'T ☐ P36
☐ AS COND OF SORP ☐ BAIL INCREASED / REDUCED ☐ TO PRGM AS REC BY JAC DOC TO ARRANGE TRANSPORT UPON AVAIL BED

THE FOREGOING INSTRUMENT IS
A CORRECT COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE

MAY 20 2021

Clerk of the Court
SUPERIOR COURT OF CA COUNTY OF SANTA CLARA
BY E. Kremenkotter DEPUTY

E. KREMENKOTTER

DECLARATION OF SERVICE BY CERTIFIED MAIL

CASE NUMBER: 21-C-04811

I, the undersigned, over the age of eighteen (18) years and not a party to the within action, whose business address and place of employment is the State Bar of California, 180 Howard Street, San Francisco, California 94105, declare that I am not a party to the within action; that I am readily familiar with the State Bar of California's practice for collection and processing of correspondence for mailing with the United States Postal Service; that in the ordinary course of the State Bar of California's practice, correspondence collected and processed by the State Bar of California would be deposited with the United States Postal Service that same day; that I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date on the envelope or package is more than one day after date of deposit for mailing contained in the affidavit; and that in accordance with the practice of the State Bar of California for collection and processing of mail, I deposited or placed for collection and mailing in the City and County of San Francisco, on the date shown below, a true copy of the within

TRANSMITTAL OF RECORD OF CONVICTION OF ATTORNEY, including

Certified Record of Conviction
Misdemeanor Complaint

in a sealed envelope placed for collection and mailing as certified mail, return receipt requested, Article No.: 9590 9266 9904 2176 2677 28, at San Francisco, on the date shown below, addressed to:

Brian P. Moquin
Law Offices of Brian P. Moquin
346 E Fenton Ave
Salt Lake City, UT 84115-4641

in an inter-office mail facility regularly maintained by the State Bar of California addressed to:

N/A

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California, on the date shown below.

DATED: June 16, 2021

Signed: Carole I. Huygen
Carole I. Huygen
Declarant

EXHIBIT “7”

EXHIBIT “7”

EXHIBIT “7”

CODE: 1520

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

DECLARATION OF LARRY J. WILLARD IN SUPPORT OF WILLARD PLAINTIFFS' MOTION FOR RELIEF UNDER NRCP 60(b)(5)&(6)

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

1. I am the President, Chief Executive Officer, and sole Director of Overland Development Corporation, a California corporation ("Overland").

2. I am also the trustee of the Larry James Willard Trust Fund.

3. On November 18, 2005, I entered into a Purchase and Sale Agreement with P.A. Morabito and Co. Limited to purchase a commercial property located at 7695 and 7699 South Virginia Avenue, Reno, Nevada (the "Virginia Property") for a total purchase price of $17,750,000.00.

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

4. I paid a total of $4,668,738.49 in earnest money for the Virginia Property, and borrowed $13,250,000.00 from South Valley National Bank ("South Valley") to pay the balance of the purchase price.

5. I assigned the Purchase and Sale Agreement to Overland and my trust.

6. The Purchase and Sale Agreement contained a lease-back provision under which the seller would lease back the Virginia Property for a long-term lease at a base annual rental rate of $1,464,375.00 with the annual rent increasing by two percent per year compounded annually.

7. On December 2, 2005, Berry-Hinckley Industries ("BHI"), Overland, and my trust signed a lease agreement (the "Virginia Lease") to accomplish this lease-back, which was made effective as of November 18, 2005.

8. On February 21, 2006, we entered into a Lease Subordination, Non-Disturbance and Attornment Agreement (the "Subordination Agreement"), which informed BHI that we were purchasing the Virginia Property with financing from South Valley.

9. In the Subordination Agreement, BHI: (1) expressly agreed not to terminate the Virginia Lease without obtaining the consent of South Valley; and (2) acknowledged that South Valley would not make the loan without the Subordination Agreement being in place.

10. BHI and its owners also knew that breaching the Virginia Lease would have devastating consequences on Overland, my trust, and me.

11. On March 16, 2006, we refinanced the South Valley loan with Telesis Community Credit Union ("Telesis") for a total loan amount of $13,312,500.00.

12. Under this loan, we were required to pay $87,077.52 per month to Telesis's loan servicing agent, Business Partners, LLC.

13. On February 17, 2007, BHI sent an offer letter to me and other landlords indicating that Jerry Herbst ("Mr. Herbst") intended to acquire BHI's convenience store assets, which included the Virginia Property.

14. As part of the offer, Mr. Herbst offered to personally guarantee BHI's payments and performance under the Virginia Lease.

15. As a material inducement for this offer, Mr. Herbst represented that his net worth exceed $200,000,000.00.

16. In reliance upon Mr. Herbst's and BHI's representations and Mr. Herbst's personal guarantee, I accepted Herbst's offer.

17. BHI stayed current on its rent until 2013.

18. On March 1, 2013, without any notice, violated the Virginia Lease by not sending the monthly rent payment.

19. On March 10, 2013, BHI's finance department informed me that it would no longer pay any rent.

20. On April 12, 2013, BHI and Herbst's lawyers sent a letter indicating that BHI did not intend to cure the breach of the Virginia Lease and instead planned to vacate the Virginia Property on April 30, 2013.

21. Under the Virginia Lease, upon BHI's breach, the rent due rent was accelerated.

22. The amount owed now exceeds $15,000,000.00.

23. Mr. Herbst fully guaranteed the Virginia Lease, so he is also liable for that sum.

24. Unfortunately, we could not wait for BHI and Mr. Herbst to honor their contracts as their breach placed us under tremendous financial stress.

25. Under our loan for the Virginia Property, Overland, my trust, and I had an obligation to pay $87,077.52 per month and we relied on the monthly rent of approximately $140,000 from BHI and Mr. Herbst to pay the loan.

26. Therefore, I coordinated with BHI and Mr. Herbst to remain on the Virginia Property until we could find a replacement tenant.

27. To do this, we entered into an interim "Operation and Management Agreement" effective May 1, 2013, under which BHI promised to continue active operations of the Virginia Property.

28. This agreement did not excuse BHI's rent obligations, but provided an incentive for BHI to reduce its liability for damages to us while they looked for a replacement tenant.

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

29. Unfortunately, in late May 2013, I discovered that the Virginia Property was not fully operational.

30. BHI had removed signs and boarded entry doors to the convenience store; it had broken down equipment in the car wash; there were torn awnings; and there was insufficient inventory in oil and lube shop. The Defendants had left the Virginia Property in disarray.

31. When I reviewed property in late May it appeared to me that the Virginia Property may have been only partially operational for weeks.

32. On June 1, 2013, BHI vacated the Virginia Property having paid no rent whatsoever since its sudden breach of the Virginia Lease on March 1, 2013.

33. On or about June 14, 2013, I received a Notice of Intent to Foreclose from the lender's loan servicing agent, Business Partners, LLC.

34. Following the breach, despite our diligent efforts, Overland, my trust, and I were unable to find a replacement tenant to lease the property.

35. By February 2014, we had no way to keep the property.

36. On February 14, 2014, we agreed to enter into an agreement to sell the Virginia Property to Longley Partners, LLC through a short sale.

37. Due to the Defendants' breach, Overland, my trust, and I lost our investment, our substantial monthly rental income of approximately $140,000, and the Virginia Property.

38. I was already a senior citizen at the time of the Defendants' breach.

39. That income also provided for my ex-wife and my blind father, who was 92 years old at the time of the breach and was in an assisted living facility.

40. I understand that Edward Wooley also had agreements that Mr. Herbst and BHI breached.

41. After BHI violated our respective leases, Mr. Wooley and I both faced losing our substantial income and retirement. We were forced to contemplate insolvency and financial ruin.

42. This was devastating to me in that I had invested approximately $5,000,000 in the Virginia Property, and depended on that property for my monthly income.

43. Presently, I have only a social security income of $1,630.00 per month.

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44. Therefore, in an effort to avoid financial ruin, Ed Wooley and I joined in pursuing a lawsuit against BHI and Mr. Herbst.

45. Mr. Wooley and I were living in the San Francisco Bay Area and originally retained an attorney there named Steven Goldblatt.

46. Mr. Goldblatt filed the case in California, which we later learned was not appropriate. Mr. Goldblatt then had to withdraw because of a serious car accident.

47. Therefore, Mr. Wooley and I were forced to find another attorney to take our case and file it in the correct jurisdiction.

48. We were directed to another California attorney, Brian Moquin.

49. At the time that we retained Mr. Moquin, he seemed to be a stable, accomplished lawyer with no known record of any bar complaints, misconduct, or other causes for concern.

50. Upon reviewing Mr. Moquin's professional status and speaking to other people, I believed that Mr. Moquin was qualified and would take this case very seriously.

51. Because of my lack of income, Mr. Moquin agreed to take the case on a contingency fee.

52. At the onset Mr. Moquin was busy cleaning up and assimilating the original lawsuit that the previous attorney had incorrectly filed in California, filing this current case in Reno, and subsequently amending the complaint in this case.

53. Mr. Moquin always assured me that this case was a fairly simple one that not only had a very good lease in place but also a guarantee from a person with very substantial wealth.

54. Throughout 2015 and 2016, I believed Mr. Moquin was quite busy dealing with discovery demands, interrogatories, vetting, research, and culminating in a hearing regarding defendants' partial motion for summary judgment on certain matters of the lawsuit.

55. Periodically I did get concerned with the slow pace of the litigation and the lack of a resolution, but Mr. Moquin always had an explanation or "legal reasons" for any issues and delays. He also frequently explained that the defendants' attorneys were the cause of the delay.

56. When the defendants abandoned their lease, I was financially devastated and had no resources to pay for a lawyer.

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57. Initially, I could only hire a lawyer on a contingency fee basis.

58. After some time, it became apparent to me that Mr. Moquin was having some financial difficulties. However, he continued moving forward with this case and I did not know how badly his personal life was affecting his work.

59. Mr. Moquin continued to assure me that he would be able to secure a large judgment or settlement. Mr. Moquin also repeatedly assured me that he had everything under control and that we would receive a favorable result in the case. Therefore, expecting that favorable result, I borrowed money from friends and family and also secured loans from friends and family for Mr. Moquin's personal expenses in mid-to-late 2017.

60. As it turned out, Mr. Moquin was dealing with more than just financial problems.

61. I am now convinced that as much as Mr. Moquin wanted to respond timely and appropriately, he was dealing with issues and "demons" beyond his control.

62. Based on Mr. Moquin's admissions to me and my experiences with Mr. Moquin and his wife, it is now clear that Mr. Moquin was engaged in marital conflicts and struggling with mental illness that greatly interfered with his work.

63. Mr. Moquin's problems culminated in Mr. Moquin suffering what I can only describe as a total mental breakdown in December 2017.

64. Around that time, I had learned that there were documents we needed to file with the court.

65. I sent Mr. Moquin a text message on Saturday, December 2, 2017, to confirm that everything was moving forward okay.

66. When Mr. Moquin did not respond, I wrote to him the next day asking if I needed to review anything. Mr. Moquin did not respond again.

67. During the first week in December, I texted and/or called Mr. Moquin daily, often without receiving any response.

68. I grew increasingly alarmed, but when I did speak with Mr. Moquin, he would always assure me that everything was fine and he would offer some plausible explanation for why things were not due yet or could be filed at a later date.

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69. Based on Mr. Moquin's assurances, I expected that he would come through.

70. The following week, I was copied on an email exchange between Mr. Moquin and the local attorney we were using, David O'Mara. In that exchange, Mr. O'Mara had expressed concerns about whether we would be able to file three oppositions and some other briefs that were apparently due. Yet, on Monday, December 11, 2017, Mr. Moquin assured us that "all three oppositions will be filed today."

71. I later learned that Mr. Moquin had not filed the required oppositions, but that he apparently received more time to do so.

72. The next week I followed up with Mr. Moquin to ensure that he had filed the required documents, but Mr. Moquin explained that he was not yet finished.

73. I sent Mr. Moquin a text message on Tuesday, December 19, 2017, asking if the documents were almost finished. Mr. Moquin said that they were almost finished and that he should be able to finalize them that night.

74. The next day, however, Mr. Moquin failed to respond. I kept texting the next day and he still failed to respond. Finally, on Thursday, December 21, Mr. Moquin assured me that he was "still on it."

75. After that, however, Mr. Moquin stopped responding again. I kept texting him until December 25 asking for an update and pleading with him to get the documents filed, but did not receive a response.

76. As I have learned and as Mr. Moquin has admitted to me, he suffered a total mental breakdown and also had some terrible conflicts with his wife, Natasha.

77. After having worked with him for years, and having met his wife and his family, I had terrible sympathy for all of them.

78. After Mr. Moquin suffered this mental breakdown, I recommended that he visit Dr. Douglas Mar, who is well-respected psychiatrist in Campbell, California.

79. At this time, I also started looking for other attorneys who might be able to help.

80. In January 2018, Mr. Moquin was also arrested related to charges of domestic violence.

81. In early 2018, Mr. Moquin later explained to me that Dr. Mar had diagnosed him with bipolar disorder and that he needed money to pay Dr. Mar for treatment.

82. After obtaining a loan from a friend, I arranged to pay Dr. Mar for his services, but I do not know if Mr. Moquin has continued with any course of treatment.

83. On March 13, 2018, I paid Dr. Mar's office $470 to pay for Mr. Moquin's treatment so that Mr. Moquin could get well and help us fix the case.

84. Mr. Moquin would often stay up late working on our case through the night. I assumed that he was just a very hard worker and that our case was in good hands. I did not realize that his behavior may have been a symptom of his severe and debilitating mental illness.

85. I now see that Mr. Moquin was suffering from many of these symptoms throughout his work on my case.

86. Only now do I realize that while Mr. Moquin was assuring me that he was working on this case, he was missing deadlines and failing to properly pursue the case. At the time that they were occurring, I did not realize the extent of these circumstances, and they were completely out of our control.

87. Before the case was dismissed, local attorney David O'Mara had raised concerns about Mr. Moquin's responsiveness. After having my total income dissipated after the Defendants' breach, and having only a social security income to rely on, I felt I only had this one option of continuing to rely on Mr. Moquin.

88. In addition, Mr. Moquin repeatedly assured me that we would prevail and that the case was proceeding fine.

89. For my part, I was making ongoing efforts on an almost daily basis to push the case forward, provide Mr. Moquin with what he needed, and to pursue our case against the Defendants for breach of lease agreements that were backed up with a personal guarantee.

90. It was devastating and agonizing to realize that Mr. Moquin had not been able to file an opposition refuting the Defendants' unmerited claims.

91. Having now received Mr. Moquin's diagnosis and learning more about his personal problems, I can now see how Moquin's issues affected our case.

92. I can now see some of Mr. Moquin's symptoms manifested in our interactions with him, including continually giving us anticipated dates by which he would finish projects and later having to change them, and alternating between cycles of irrepressible optimism and ideas (mania) and then going days when he would not respond at all (depression).

93. It is unfair that my case should be dismissed because of Mr. Moquin's personal struggles, family strife, and mental collapse.

94. Moreover, even after the court entered sanctions and dismissed the case, I continued to try and rectify the situation and get the case back on track.

95. My new attorneys and I repeatedly asked Mr. Moquin to provide a summary of the case, documentation of his mental illness, a declaration explaining what had happened, and his case files.

96. From January through March, 2018, Mr. Moquin repeatedly assured me that he would provide me with all of the information that my new attorneys needed to reinstate the case.

97. On March 30, Mr. Moquin assured me that he will "get everything out the door before I leave today." In response, I asked if he had obtained the requested documentation from Dr. Mar, and Mr. Moquin told me that he was playing phone tag with a person in Dr. Mar's office. I then followed up to ask if he had advised my new attorney, Richard Williamson, of the status, and he assured me that he would.

98. I then sent text messages on March 31, April 1, and April 2 urging Mr. Moquin to provide Mr. Williamson with everything he needed to try and reinstate this case.

99. Mr. Moquin then responded with an alarming rant, which included the following: "I'm not sure what part of '[F**k] off' you don't understand, but it is in your best interest to stop communicating with me at this point until I contact you."

100. Mr. Moquin's abusive and threatening language in his text dated April 2, 2018, is just one example of the abusive treatment I received from Mr. Moquin in late 2017 and 2018.

101. In early April, Mr. Williamson and his partner, Jonathan Tew, both repeatedly asked Mr. Moquin for the various documents that he had still not provided.

102. Finally, exasperated with Mr. Moquin and his failure to provide the documents that he promised he would provide to fix the problems that he created, we finally felt that we had no choice but to move forward without the documents that Mr. Moquin had promised.

103. Mr. Moquin never even provided me or my new attorneys his complete file.

104. On Wednesday, May 23, 2018, I again wrote to Mr. Moquin begging him to provide a diagnosis letter from Dr. Mar letter, along with evidence that Mr. Moquin claims to possess that he timely disclosed our damage calculations and an affidavit from Mr. Moquin explaining his personal situation and how it impacted his performance in this case.

105. Mr. Moquin responded by claiming that he always intended to provide us all of the information we needed, but that he could not get to it until that weekend because he had a hearing in his criminal case on Thursday, May 24. He assured me that he should be able to provide an affidavit and supporting exhibits that weekend.

106. When I tried to follow-up later that week, however, he told me that if I communicated with him until he had provided the documents that I would never receive them. Although I felt that this was an unreasonable demand, particularly when he had put me in this position and had promised all of this documentation months ago, I tried to respect his request.

107. By the afternoon of Monday, May 28, 2018, however, Mr. Moquin still had not provided the documents. Therefore, I wrote to him again asking for the required documents. Mr. Moquin responded by quoting his previous warning not to contact him: **"'**Communicate in ANY WAY with me again before I have sent you the declaration and supporting exhibits and you will receive neither.**'** So be it.**"**

108. Mr. Moquin never provided the promised affidavit, letter from Dr. Mar, other supporting exhibits, or damages disclosure information. Instead, I have had to endure Mr. Moquin**'**s threats and claims. Accordingly, I authorized Mr. Williamson to file a bar complaint against Mr. Moquin.

109. I have also been cooperating with the California State Bar**'**s ongoing investigation into Mr. Moquin**'**s representation of me. Our first complaint against Mr. Moquin was in 2018. As far as I know, the California State Bar is still investigating and processing the case.

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110. Mr. Moquin's admitted personal problems disrupted and severely harmed our ability to move this case forward.

111. I am an innocent victim of Mr. Moquin's instability, mental illness, and erratic behavior. I deserve an opportunity to prove my case against the defendants.

112. It is unfair for me and my family to not only go through but now possibly be put in a position where I lose everything I worked for over the last fifty years.

113. I am now 79 years old.

114. It has been over eight years since the defendants breached their agreements.

115. I had invested approximately $5,000,000 in the property that is the subject of this case, which supposedly had a strong lease and an "iron clad" guarantee behind it.

116. Jerry Herbst had assured us that he had a net worth of over $200,000,000 and that his guarantee was reliable.

117. I just want to recover from my losses and move on with my life.

118. I was 71 years old at the time of the breach and will not recapture the almost ten years that have elapsed since the defendants' breaches.

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

Dated this 12 day of July, 2021.

Larry J. Willard

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EXHIBIT “8”

EXHIBIT “8”

EXHIBIT “8”

CODE: 1520

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

DECLARATION OF RICHARD D. WILLIAMSON IN SUPPORT OF WILLARD PLAINTIFFS' MOTION FOR RELIEF UNDER NRCP 60(b)(5)&(6)

I, Richard D. Williamson, state as follows:

1. I am over the age of eighteen years and have personal knowledge regarding the facts contained herein.

2. I am an attorney licensed to practice law by the State Bar of Nevada.

3. I am a shareholder with the law firm of Robertson, Johnson, Miller & Williamson, presently counsel of record for Plaintiffs Larry J. Willard, individually and as Trustee of the Larry James Willard Trust Fund, and Overland Development Corporation (collectively, the "Willard Plaintiffs").

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4. The Willard Plaintiffs retained my firm in 2018, and we immediately began trying to gather evidence from Brian Moquin about the case and the reasons why it had been dismissed.

5. Mr. Moquin admitted to me that he had recently been diagnosed with bipolar disorder and that he was having problems with his marriage, all of which culminated in a mental breakdown. As a result, he had failed to meet court deadlines and failed to work on the case.

6. Mr. Moquin explained that he intended to seek treatment for his bipolar disorder. Initially, Mr. Moquin also seemed genuinely willing to provide us with whatever documentation we needed to provide to the court.

7. Mr. Moquin promised me that he would organize and provide his entire client file.

8. He also agreed to provide documents in response to a specific list of items that we requested, which included:

a. A detailed case summary and a supporting affidavit from Mr. Moquin.

b. Letters, diagnoses, medical records, and other documents explaining his mental, emotional, and psychological health, including an explanation of how Mr. Moquin's problems affected his ability to work, respond to deadlines, and manage the case.

c. Letters, arrest records, orders, and other documents regarding Mr. Moquin's arrest for domestic violence and related domestic disputes.

d. Mr. Moquin's entire file, including all pleadings, briefs, discovery responses, evidence, disclosures, notes, spreadsheets, draft documents, agreements, transcripts, recordings, legal research, expert witness reports, and other items that could in any way pertain to the case.

9. Although we did refine the list over time, we repeatedly asked Mr. Moquin to provide those four categories of documents.

10. We first summarized that list for Mr. Moquin in late January or early February, and he promised to provide all of the necessary information within a matter of days.

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11. When he did not provide the requested information, we followed up with Mr. Moquin. This went on for months after Mr. Moquin had promised to deliver the information. Mr. Moquin continually failed to meet agreed deadlines to provide the promised information.

12. In addition to telephone conferences with Mr. Moquin, I wrote to him numerous times to ask for the documents listed above. This included emails on February 5, February 20, March 21, April 2, April 16, and April 17.

13. In addition to the fact that Mr. Moquin had failed to provide documents needed for the Rule 60(b)(1) motion, we also just needed Mr. Moquin's files to get up to speed on the case and try to piece together what Mr. Moquin had done and not done.

14. On May 14, 2018, I sent Mr. Moquin a formal demand for the clients' file.

15. Again, however, Mr. Moquin failed to respond or provide his file.

16. Despite Mr. Moquin's promises to help the clients whose case he allowed to get dismissed, and despite Mr. Moquin's very clear ethical duties to act diligently, communicate, and provide clients with their files, Mr. Moquin instead badgered, threatened, berated, and withheld critical files from the Willard Plaintiffs.

17. Accordingly, I felt that I had no choice but to report Mr. Moquin to both the State Bar of Nevada and the State Bar of California.

18. The Willard Plaintiffs agreed and authorized me to do so.

19. From mid-2018 through April 2019, I cooperated with the State Bar of Nevada's investigation into Mr. Moquin.

20. As I was only a witness, however, I did not have access to the disciplinary file against Mr. Moquin.

21. I received an update from the State Bar of Nevada in October 2019 providing a copy of the Nevada Supreme Court's order against Mr. Moquin.

22. At that point, the parties were in the middle of briefing the appeal of the court's order denying our Rule 60(b)(1) motion.

23. In 2020, however, I sought and obtained certified copies of the Conditional Guilty Plea, filed April 16, 2019, the Findings of Fact, Conclusions of Law, and Recommendation After

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Formal Hearing, filed May 14, 2019, and the Order Approving Conditional Guilty Plea Agreement and Enjoining Attorney From Practicing Law In Nevada, filed October 21, 2019.

24. Those certified copies are attached to the Willard Plaintiffs' Motion for Relief Under NRCP 60(b)(5)&(6) (the "Motion") as Exhibits 1, 2, and 3, respectively.

25. The State Bar of Nevada provided the certified copies of the Conditional Guilty Plea and the Findings of Fact, Conclusions of Law, and Recommendation After Formal Hearing to me electronically, and I have attached those certified copies to the Motion.

26. I am also happy to provide the Court with the original certified copy of the Order Approving Conditional Guilty Plea Agreement and Enjoining Attorney From Practicing Law In Nevada, which I received from the Nevada Supreme Court in paper format with an inked and embossed certification stamp.

27. Since 2018, I have I have also been cooperating with the State Bar of California's ongoing investigation into Mr. Moquin's representation of the Willard Plaintiffs.

28. On March 25, 2021, the State Bar of California's Office of Chief Trial Counsel wrote to me and confirmed that the State Bar of California has completed its investigation of our complaint against Mr. Moquin "and have forwarded the case to Senior Trial Counsel Christina M. Lauridsen for further action."

29. A true and correct copy of the letter I received from the State Bar of California's Office of Chief Trial Counsel is attached to the Motion as Exhibit 4.

30. As far as I know, the State Bar of California is still proceeding with the case.

31. In an effort to check on the status, I visited the State Bar of California's website on June 30, 2021.

32. According to the State Bar of California's website, there is a "Consumer Alert" against Mr. Moquin, which confirms that he is "suspended from the practice of law. As a result, the attorney is ineligible to practice law in California."

33. A true and correct copy of the website page is attached to the Motion as Exhibit 5.

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34. That website also reveals that Mr. Moquin's current mailing address is listed as "Law Offices of Brian P. Moquin, 346 E Fenton Ave. Salt Lake City, UT 84115-4641." Yet, I checked the Utah state bar website, and there is no listing for a Brian Moquin.

35. The State Bar of California's website also listed a "Conviction record transmitted to the State Bar Court" that was filed on June 16, 2021.

36. That conviction document is publicly available.

37. A true and correct copy is attached to the Motion as Exhibit 6, and it includes certified copies of criminal records against Mr. Moquin.

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

Dated this 13th day of July, 2021.

/s/ Richard D. Williamson
Richard D. 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' OPPOSITION TO THE WILLARD PLAINTIFFS' MOTION FOR RELIEF UNDER NRCP 60(b)(5) &(6)

Defendants Berry-Hinckley Industries and Jerry Herbst (collectively, "Defendants"), hereby respectfully submit their Opposition to Plaintiff Larry Willard's MOTION FOR RELIEF UNDER NRCP 60(b)(5) &(6). 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

INTRODUCTION

Presently before this Court is a motion in which Willard asks this Court to set aside a more than three-year-old order which dismissed Willard's case as a sanction for Willard's egregious litigation conduct (the "Motion"). Willard seeks relief pursuant to NRCP 60(b)(5) and NRCP 60(b)(6), claiming that he now has "additional evidence" to corroborate the NRCP 60(b)(1) Motion Willard filed in 2018, which was denied by this Court. Willard's purported "additional evidence" consists primarily of a Conditional Guilty Plea entered into by Moquin in April of 2019, more than two years ago.

Willard does not even attempt to justify his reasoning for waiting more than two years from the entry of the Conditional Guilty Plea to file this Motion; nor does Willard acknowledge the fact that this Motion, which seeks to untimely supplement Willard's prior NRCP 60(b)(1) Motion, is a categorically-prohibited use of NRCP 60(b)(6). Further, Willard seems content to ignore the fact that his Motion is fundamentally and irreconcilably inconsistent with multiple binding rulings that this Court has already made, and that even taking the Motion at face value, it is *still* facially insufficient to support the arguments Willard makes. Perhaps most concerning, Willard's Motion is filed in open and blatant violation of the Nevada Supreme Court's Order denying En Banc Reconsideration, which unambiguously and directly prohibits *this exact type*

of filing. In sum, Willard's Motion is not only meritless, it is patently frivolous, serves no purpose other than to harass, and warrants the imposition of sanctions.[1]

Willard's Motion does make one highly persuasive argument, but likely not an argument Willard intended—the Motion confirms that Willard will stop at nothing to continually hold Defendants hostage to this litigation, with no basis whatsoever to do so. Indeed, this egregiously untimely Motion, which flies in the face of the law, the facts, and the Supreme Court's directive, fits squarely within the pattern of conduct that Willard has exhibited throughout this entire case. Willard continues to believe that he can blithely hold Defendants captive to this litigation indefinitely and make frivolous and strategic filings on his own timeline—the very conduct that led this Court to conclude, in March of 2018, that "[i]f [Willard is] permitted to continue prosecuting this case without severe consequences, then this type of abusive litigation practice will continue to the prejudice of [Defendants] and will make a mockery of the Nevada Rules of Civil Procedure and court orders." (Sanctions Order at 31).

As will be discussed herein, the Motion should be denied (and sanctions should be imposed) for multiple, independent reasons: (1) this Motion is in blatant violation of the Nevada Supreme Court's Order Denying En Banc Reconsideration; (2) the Motion improperly attempts to use NRCP 60(b)(6) to untimely corroborate Willard's NRCP 60(b)(1) motion filed in 2018, which is a categorically-prohibited use of NRCP 60(b)(6); (3) the Motion was indisputably not made within a reasonable time; (4) the arguments in the Motion are facially meritless, as they are fundamentally irreconcilable with the binding holdings the Court has already made and *per se* fail to demonstrate "extraordinary circumstances"; and (5) Willard's reliance upon NRCP 60(b)(5) is unavailing because NRCP 60(b)(5) is facially inapplicable to this case. Accordingly, as each of these reasons independently constitutes a basis for denial, Defendants respectfully requests that this Court deny Willard's Motion.

///

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[1]Defendants will also be filing a Motion for Sanctions.

STATEMENT OF FACTS

While this Court is intimately familiar with the facts and procedural history of this case, for ease of reference, Defendants provide a brief timeline of events that are germane to Willard's Motion:

August 2014: Willard commenced the present lawsuit against Defendants (which was his second lawsuit against Defendants on this set of facts; his first was in California and dismissed for lack of personal jurisdiction). (FAC; Sanctions Order at 28).

January 2018: This Court entered an initial Order dismissing Willard's claims with prejudice based upon Willard's failure to oppose Defendants' Motion for Sanctions and, independently, because "Defendants' Motion ha[d] merit due to Plaintiffs' egregious discovery violations throughout the pendency of this litigation and repeated failure to comply with this Court's Orders." (January 2018 Order, on file herein).

March 2018: This Court entered is Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions, wherein it dismissed Willard's claims with prejudice based upon Willard's strategic and bad faith conduct and failure to comply with multiple Orders from this Court and obligations pursuant to the Nevada Rules of Civil Procedure, all to the prejudice of Defendants. (Sanctions Order, on file herein). Willard did not file an appeal from this order. *See generally* docket.

April 2018: Willard filed a Motion to Set Aside the Judgment pursuant to NRCP 60(b)(1) (the "NRCP 60(b)(1) Motion") on the grounds that Moquin "failed to properly prosecute this case due to a serious mental illness and a personal life that was apparently in shambles." (NRCP 60(b)(1) Motion at 1, on file herein). Therein, Willard claimed that "under Nevada law, where an attorney's mental illness causes procedural harm to his or her client, NRCP 60(b)(1) justifies granting relief to the client," and here, the Court should find excusable neglect because "Moquin was suffering from a psychological disorder that caused him to constructively abandon the case." *Id*. at 10-11.

November 2018: This Court entered its Order Denying Willard's NRCP 60(b)(1) Motion based upon, *inter alia*: the fact that Willard failed to support his NRCP 60(b)(1) Motion with any admissible evidence; the fact that Moquin, who made multiple filings throughout the case and attended every hearing, did not abandon Willard; the fact that Willard's personal conduct, knowledge, and lack of client diligence precluded Willard's requested relief; and the fact that O'Mara's representation of Willard throughout this case precluded Willard's requested relief. (NRCP 60(b)(1) Order, on file herein).

December 2018: Willard filed a Notice of Appeal from the NRCP 60(b)(1) Order. (Notice of Appeal, on file herein).

April 2019: according to Willard, Moquin entered into a Conditional Guilty Plea in April of 2019, (Exhibit 1 to Willard's Motion), which constitutes the primary basis for Willard's present Motion. Despite his inexplicable two-year delay in bringing this Motion, Willard attempted to use this Plea in his NRCP 60(b)(1) appeal, and claimed that "the Moquin disciplinary file and guilty pleas…simply validated and corroborated the admissible evidence Willard advanced in support of the Rule 60(b)[(1)] Motion." (Opening Brief 23-26, **Exhibit 2**; Answer to Petition for Rehearing at 3, **Exhibit 3**; Answer to Petition for En Banc Reconsideration at 13-14, **Exhibit 4**).

August 6, 2020: The Nevada Supreme Court reversed this Court's NRCP 60(b)(1) Order and remanded to this Court to consider the factors set forth in *Yochum v. Davis*. (Supreme Court Opinion, on file herein).

August 19, 2020: Less than two weeks after the Nevada Supreme Court's Opinion, Willard filed a "Notice of Related Action" in which Willard asked this Court, for the first time, to take notice of Moquin's Conditional Guilty Plea and the Nevada Supreme Court Order affirming the same. (Notice of Related Action, on file herein).

December 2020: Defendants filed a Petition for En Banc Reconsideration. Out of concern for Willard's continued improper attempts to untimely introduce alleged evidence from Moquin's disciplinary hearing, Defendants noted 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, **Exhibit 5**); *see also* (Respondents' Answering Brief at 24-28 (arguing that introduction of such alleged evidence was an improper attempt to subvert the NRCP 60(b) time requirements, **Exhibit 6**).

February 2021: The Supreme Court entered its Order Denying En Banc Reconsideration. Although it denied the Petition for En Banc Reconsideration, it clarified that "neither party may present any new arguments or evidence on remand; the district court's consideration of the [*Yochum* factors]…is limited to the record currently before the court." (Order Denying En Banc Reconsideration, **Exhibit 7**).

July 2021: While this case is still on remand for this Court's consideration of the *Yochum* factors, Willard filed the present Motion. Therein, he seeks to corroborate his 2018 NRCP 60(b)(1) Motion with "additional evidence" of Moquin's Conditional Guilty Plea, and with no explanation whatsoever as to why he waited more than two years from the entry of the alleged Plea to file this Motion. (Motion, on file herein). The Motion seeks to set aside the March 2018 Order dismissing Willard's case as a sanction for Willard's egregious litigation conduct, and to reopen this case based upon alleged evidence that Willard has had in his possession for over two years, and which, even upon taking such evidence into consideration, does not entitle Willard to the relief he seeks. *Id*.

ARGUMENT

The Motion should be denied (and sanctions should be imposed) for multiple reasons, each of which is an independent basis for denial: (1) this Motion is in blatant violation of the Order Denying En Banc Reconsideration; (2) the Motion improperly attempts to use NRCP 60(b)(6) to corroborate Willard's NRCP 60(b)(1) Motion, which is a categorically-prohibited use of NRCP 60(b)(6); (3) the Motion was indisputably not made within a reasonable time; (4) the arguments in the Motion are facially meritless, as they are fundamentally irreconcilable with

the binding holdings the Court has already made and *per se* fail to demonstrate "extraordinary circumstances"; and (5) Willard's reliance upon NRCP 60(b)(5) is unavailing because NRCP 60(b)(5) is facially inapplicable to this case.

1. **Willard's Motion is in blatant, sanctionable violation of the Nevada Supreme Court's express order.**

As a threshold matter, and as will be addressed in Defendants' forthcoming Motion for Sanctions, Willard's Motion is in open, brazen violation of the Nevada Supreme Court's express order denying en banc reconsideration, which *explicitly prohibited* Willard from making *this exact type of filing*. (Order Denying En Banc Reconsideration, **Exhibit 7**). Specifically, the Nevada Supreme Court clarified that "neither party may present any new arguments or evidence on remand; the district court's consideration of the [*Yochum* factors]…is limited to the record currently before the court." *Id*.

Clearly aware of this obvious violation of the Nevada Supreme Court Order, Willard claims, in a footnote, that:

> The Court should not consider this motion until after it has completed its reevaluation of the Willard Plaintiffs' Rule 60(b)(1) Motion under the factors announced in *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982). That reevaluation should be limited to the record that existed prior to remand from the Nevada Supreme Court. If this Court finds that the *Yochum* factors justify relief, then this motion may be moot. Alternatively, if the Court somehow still denies relief under NRCP 60(b)(1), then this motion under NRCP 60(b)(5) and (6) provides additional grounds upon which the Court should set aside the Sanctions Orders.

(Motion at n.1, on file herein).

This footnote is simply a poorly-disguised attempt to provide Willard with cover in anticipation of an inevitable sanctions request for the filing of Willard's Motion. Specifically, as will be discussed herein, Willard has been aware of Moquin's Conditional Guilty Plea, upon which his Motion is premised, for well over two years. He has provided no excuse whatsoever in his Motion as to why he waited more than two years to file the present Motion. Thus, there is no cogent reason whatsoever (and Willard does not even attempt to craft one), as to why Willard needed to file this already egregiously-untimely Motion *now*. The only possible reason

is yet another desperate, unfounded attempt to put Moquin's guilty plea before this Court, in complete and open violation of the Nevada Supreme Court's Order.[2]

Further, as is discussed at length *infra*, Willard himself argues at length that the **entire purpose** of the present Motion is to provide additional evidence to support his 2018 NRCP 60(b)(1) Motion. (Motion, on file herein). Indeed, in no uncertain terms, Willard states that "[Moquin's] 2019 disciplinary action and the documents filed therein were not available at the time the Willard Plaintiffs filed their Rule 60(b)(1) Motion in 2018. Thus, the Willard Plaintiffs could not have presented this important information to the Court. Accordingly, the Court should now consider this additional evidence supporting the Willard Plaintiffs' requests for relief from the Sanctions Orders." *Id*. at 3. Willard's Motion also "incorporate[s] [Willard's] briefing in support of the Rule 60(b)(1) Motion and all exhibits thereto, as though set forth in full." *Id*. at 4. Thus, Willard's attempt to corroborate his NRCP 60(b)(1) Motion with "additional evidence" is **exactly** what the Nevada Supreme Court prohibited.

2. <u>Willard's NRCP 60(b)(6) Motion is facially meritless and warrants sanctions</u>.

Even looking past the violation of the Supreme Court's Order, Willard's NRCP 60(b)(6) request is facially meritless. When interpreting FRCP 60(b)(6), the federal analogue to NRCP 60(b)(6), courts hold that "[a] party seeking relief under Rule 60(b)(6) must satisfy three requirements." *Bynoe v. Baca*, 966 F.3d 972, 979–80 (9th Cir. 2020). First, "[t]he motion cannot be premised on another ground in delineated in the Rule." *Id*. Second, "it must be filed within a reasonable time." *Id*. And third, "it must demonstrate extraordinary circumstances justifying reopening the judgment." *Id*. In this case, assuming *arguendo* that Willard can even invoke

[2]Certainly, Willard is aware of the Nevada Supreme Court's Order—in his most recent frivolous filing, Willard quoted the Order repeatedly to baselessly claim that Defendants' proposed order somehow violated the Nevada Supreme Court's order because the proposed order analyzed the *Yochum* factors, which was the entire purpose of the remand. Therein, Willard claimed that the limitations in the Order were "clear." (Motion to Strike, on file herein).

NRCP 60(b)(6),[3] Willard's Motion indisputably fails to satisfy all three requirements, thereby providing multiple independent reasons to deny the Motion.

a. <u>Willard's Motion blatantly misuses NRCP 60(b)(6) to improperly seek untimely relief under NRCP 60(b)(1) and 60(b)(2)</u>.

First, Willard's Motion misuses NRCP 60(b)(6) as a backdoor means to improperly re-seek untimely relief under NRCP 60(b)(1) and NRCP 60(b)(2), a strategy which the law categorically prohibits.

Specifically, case law interpreting FRCP 60(b)(6) unambiguously explains that "[b]ecause Rule 60(b)'s six categories of relief are mutually exclusive from one another,…an action cannot be brought through the catch-all provision of Rule 60(b)(6) if it could have been brought through one of the Rule's first five subsections." *Su v. Wilmington Tr., Nat'l Ass'n*, 839 F. App'x 884, 887 (5th Cir. 2021). "[A] Rule 60(b)(6) motion is not simply an opportunity to reargue facts and theories upon which a court has already ruled. And it cannot be premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5), thus rendering Rule 60(b)(6)'s scope "mutually exclusive" and separate from Rule 60(b)'s five other subsections." *Avila v. Dailey*, 404 F. Supp. 3d 15, 27 (D.D.C. 2019). Thus, "if the reason offered for relief falls under on[e] of the more specific subsections of Rule 60(b)(1)-(5), the reason will not

[3]This provision was not added to the Nevada Rules of Civil Procedure until March of 2019, **one year** after this Court entered the Sanctions Order which Willard seeks to set aside. All March 1, 2019, amendments were ruled to "be effective prospectively on March 1, 2019, as to all pending cases and cases initiated after that date." (December 31, 2018, ADKT 0522 at 3). Here, the Sanctions Order which dismissed all of Willard's claims with prejudice was entered on March 6, 2018. Willard did not appeal from that Order, but instead chose to file a Motion to Set Aside the Order pursuant to NRCP 60(b)(1). His Motion was denied, and he appealed from the Order denying his NRCP 60(b)(1) Motion. Thus, the only reason that this case was still "pending litigation" is that Willard pursued an NRCP 60(b)(1) Motion on the very same grounds which constitute the alleged basis for his current NRCP 60(b)(6) Motion which was pending appellate resolution at the time of NRCP 60(b)(6)'s enactment. It seems a far, and prejudicial, stretch, to claim that this case constituted "pending litigation" at the time of NRCP 60(b)(6)'s enactment where the judgment was entered one year prior. Indeed, such an interpretation would create an absurd distinction in which litigants who moved to set aside a judgment prior to March 1, 2019, on some other NRCP 60(b) grounds could benefit from the newly-added NRCP 60(b)(6), whereas litigants who did not move to set aside a judgment prior to March 1, 2019, could not.

justify relief under the catch-all provision of 60(b)(6)." *Clayborne v. Franks*, 326 F.R.D. 532, 534 (D. Neb. 2018), *aff'd sub nom. Clayborne v. Franks*, 2018 WL 7286712 (8th Cir. Nov. 15, 2018). In *Su*, for example, the Fifth Circuit held that even where the movant's attorney "effectively abandoned him by failing to appear at the May 2019 hearing despite not having been permitted by the district court to withdraw," 60(b)(6) relief was inapplicable because "an attorney's failure to appear at a hearing is covered by Rule 60(b)(1)'s 'mistake, inadvertence, surprise, or excusable neglect' category of relief.… Because Rule 60(b)'s categories of relief are mutually exclusive, [the attorney's] failure to appear on [the movant's] behalf at that May 2019 hearing cannot serve as the basis for relief under Rule 60(b)(6)." 839 F. App'x at 888. And in *Bouazizi v. Hillsborough Cty. Civ. Serv. Bd.*, where a movant "allege[d] negligence of her attorneys in connection with Rule 60(b)(6)," the Eleventh Circuit opined that "[t]hat claim was already addressed under Rule 60(b)(1); having found it unsuccessful there, [the movant] cannot resuscitate it under Rule 60(b)(6)." 844 F. App'x 135, 140–41 (11th Cir. 2021).

Indeed, "[i]f clause (6) were not mutually exclusive of the other clauses, a party's artful motion practice could render meaningless the one-year time limitation on clauses (1), (2), (3). [A] party cannot circumvent the one year limitation applicable to clauses (1), (2), and (3) by invoking the residual clause (6) of Rule 60(b)." *Freedom, N.Y., Inc. v. United States*, 438 F. Supp. 2d 457, 464 (S.D.N.Y. 2006). In fact, where a movant has brought a Rule 60(b)(6) Motion under such circumstances, courts have found that sanctions are appropriate. For example, in *Bautista v. Star Cruises*, the Court found that the Plaintiffs' Rule 60(b)(6) Motion was frivolous given that "Eleventh Circuit precedent clearly bars a party from seeking relief under Rule 60(b)(6) when the relief should have been sought pursuant to Rule 60(b)(2) and (b)(3) and if properly brought under those subsections the relief would be time-barred." 696 F. Supp. 2d 1274, 1279 (S.D. Fla. 2010). The court therefore issued sanctions. *Id.*

Here, the record—and in fact, Willard's own arguments—clearly demonstrate that Willard is bringing this Motion as an attempt to improperly and untimely bolster the arguments in his NRCP 60(b)(1) Motion (or to bring a clearly time-barred NRCP 60(b)(2) Motion) related

to Moquin's alleged mental illness and abandonment of Willard. Specifically, Willard himself states that the purpose of the present Motion is to provide alleged corroborating evidence for his Motion filed under NRCP 60(b)(1), claiming that:

> While the Willard Plaintiffs emphatically argued for relief under NRCP 60(b)(1), Moquin's unreasonable refusal to mitigate the damages he caused to the Willard Plaintiffs in this matter severely hampered their efforts. The Willard Plaintiffs offered declarations and numerous exhibits justifying their Rule 60(b)(1) Motion. Unfortunately, they were unable to provide any declaration from Moquin himself or any of the other evidence he had repeatedly promised, because [Moquin] refused to cooperate in the Willard Plaintiffs' efforts to mitigate the damage he caused.…
>
> Now, additional evidence exists to support the Willard Plaintiffs' claims surrounding Moquin's mental illness. This evidence was not previously available…
>
> **[Moquin's] 2019 disciplinary action and the documents filed therein were not available at the time the Willard Plaintiffs filed their Rule 60(b)(1) Motion in 2018. Thus, the Willard Plaintiffs could not have presented this important information to the Court. Accordingly, the Court should now consider this additional evidence supporting the Willard Plaintiffs' requests for relief from the Sanctions Orders.**

(Motion at 1-3, on file herein (emphasis added)). Indeed, "**the Willard Plaintiffs hereby incorporate their briefing in support of the Rule 60(b)(1) Motion and all exhibits thereto, as though set forth in full.**" *Id*. at 4 (emphasis added). Willard also states that his currently proffered evidence "was clearly unavailable when the Willard Plaintiffs filed their Rule 60(b)(1) Motion in 2018, and thus could not have been presented in support thereof; however, it now exists and is being presented by the Willard Plaintiffs pursuant to NRCP 60(b)(5) and (6)." *Id*. at 7. Similarly, Willard claims that "[w]here Moquin was the resistant gatekeeper for [the alleged] evidence at the time of the Rule 60(b)(1) Motion, the sought-after evidence is now contained in the Conditional Guilty Plea and the final Supreme Court decision suspending Moquin from practicing law in Nevada." *Id*. at 11-12. Indeed, unsurprisingly, the arguments in Willard's present Motion simply echo those made in Willard's NRCP 60(b)(1) Motion, wherein Willard argued that NRCP 60(b)(1) relief was warranted because "Moquin failed to prosecute

this case due to a serious mental illness and a personal life that was apparently in shambles."[4] (NRCP 60(b)(1) Motion, on file herein). Thus, by Willard's plain admission, Willard's NRCP 60(b)(6) Motion is indisputably being brought to provide alleged additional evidence to support Willard's prior NRCP 60(b)(1) Motion.

Willard also took a similar position in his briefing before the Nevada Supreme Court, repeatedly claiming that "the Moquin disciplinary file and guilty pleas…simply validated and corroborated the admissible evidence Willard advanced in support of the Rule 60(b) Motion" that Willard filed in April of 2018 pursuant to NRCP 60(b)(1). (Answer to Petition for Rehearing at 3, **Exhibit 3**; Answer to Petition for En Banc Reconsideration at 13-14, **Exhibit 4**). Indeed, Willard argued at length that the alleged evidence which forms the basis for his current NRCP 60(b)(6) Motion supported Willard's arguments with respect to NRCP 60(b)(1) and the *Yochum* factors. (Answer to Petition for Rehearing at 11, 15, 16, 17, 19, **Exhibit 3**; Answer to Petition for En Banc Reconsideration at 8, 12, 13, 15, **Exhibit 4**).

Thus, this Court need look no further than Willard's **own arguments** to conclude that Willard is bringing this NRCP 60(b)(6) Motion as a blatantly improper means to have this Court reconsider Willard's NRCP 60(b)(1) Motion along with Willard's newly-proffered alleged evidence, well outside of the time-limit plainly imposed by NRCP 60(c)(1).[5] Willard's conduct

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[4]In fact, Willard claimed in his NRCP 60(b)(1) Motion that "[u]nder Nevada law, where an attorney's mental illness causes procedural harm to his or her client, **NRCP 60(b)(1)** justifies granting relief to the client." (NRCP 60(b)(1) Motion at 10). Thus, in his NRCP 60(b)(1) Motion, Willard argued that "Moquin was suffering from a psychological disorder that caused him to constructively abandon the case. Accordingly, the Court should find **excusable neglect** and grant the Willard Plaintiffs relief from the orders disposing their claims." *Id*. at 11.

[5]Willard argues that "[t]here was no subpart (6) in NRCP 60(b) before the March 2019 rule amendments. As such, there was no broad catchall provision in Rule 60(b) that the Willard Plaintiffs could have relied upon in their Rule 60(b)(1) Motion." Motion at 11. If Willard is somehow arguing that he would have brought a Rule 60(b)(6) Motion in 2018 if he could have done so, then he is conceding that his NRCP 60(b)(1) Motion was frivolous, because as discussed herein, NRCP 60(b)(1) and 60(b)(6) are mutually exclusive. If that is the case, then Willard has been frivolously wasting this Court's, and Defendants', time and resources for more than three years in the proceedings before this Court and the Nevada Supreme Court.

is plainly and unambiguously prohibited by law. Thus, Willard's position is not only unavailing, it is frivolous and serves no purpose other than to harass this Court and Defendants, and to likely remind this Court of why it dismissed Willard's action with prejudice as a sanction in the first instance (more than three years ago). Willard has held Defendants hostage to the litigation before this Court for **seven years**, and shows no signs of relenting. The latest Motion, which is nothing more than an improper attempt to re-litigate Willard's unsuccessful NRCP 60(b)(1) motion, should be categorically denied.

b. <u>The Motion was not filed within a reasonable time; rather, the timing of the filing only further demonstrates the sanctionable nature of this Motion</u>.

As an independent basis for denying Willard's Motion (and for imposing sanctions), the Motion is also indisputably well beyond any measure of "reasonable time." In fact, the timing of the Motion only further demonstrates the blatantly sanctionable nature of the Motion: despite knowing of the events constituting the alleged basis for this Motion for **two years**, and even attempting to rely upon such events in all of his briefing before the Supreme Court, Willard is just now filing this Motion after being admonished by the Supreme Court that he may not present evidence of Moquin's disciplinary hearing on remand.

Specifically, a motion filed pursuant to NRCP 60(b)(5) or NRCP 60(b)(6) must be filed "within a reasonable time." NRCP 60(c); *Bynoe,* 966 F.3d at 979–80. Further, "the movant bears the burden of showing timeliness." *Wells Fargo Bank, N.A. v. AMH Roman Two NC, LLC*, 859 F.3d 295, 300 (4th Cir. 2017).

"The definition of a reasonable time varies with the circumstances, and a court must balance the interests of justice and the sanctity of final judgments in determining whether a delay is reasonable." *Carvajal v. Drug Enf't Admin.*, 286 F.R.D. 23, 26 (D.D.C. 2012). "To evaluate whether a party's delay in filing a Rule 60(b) motion was reasonable, [courts] consider the party's ability to learn earlier of the grounds relied upon, the reason for the delay, the parties' interests in the finality of the judgment, and any prejudice caused to parties by the delay." *Bynoe*, 966 F.3d at 980. However, "Rule 60(b)(6) relief normally will not be granted unless the moving party is able to show circumstances beyond its control prevented taking

'earlier, more timely' action to protect its interests." *Carvajal*, 286 F.R.D. at 26 (quoting *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1983) (collecting cases)); *see also id.* (in the D.C. Circuit, "courts almost uniformly deny Rule 60(b)(6) motions as untimely when they are filed more than three months after the judgment"); *McLawhorn v. John W. Daniel & Co., Inc.*, 924 F.2d 535, 538 (4th Cir. 1991) ("We have held on several occasions that a Rule 60(b) motion is not timely brought when it is made three to four months after the original judgment and no valid reason is given for the delay.").

In this case, there is absolutely no dispute that Willard has failed to satisfy his burden to demonstrate that this Motion was filed within a reasonable time. Willard's Motion is premised upon Moquin's Conditional Guilty Plea, entered in April of 2019, and the Nevada Supreme Court's October 21, 2019, Order affirming the same. (Motion at 2, 3, 11, 12, 13-14, on file herein). However, even assuming *arguendo* that these events justified NRCP 60(b) relief (they unequivocally do not—see *infra*), Willard cannot—and does not even attempt to—provide any reason as to why Willard failed to file this Motion until approximately two years after these alleged events occurred.

Indeed, while Willard claims that he was unable to acquire the alleged evidence in *early 2018* (Motion at 3 (claiming that the "2019 disciplinary action and the documents filed therein were not available at the time the Willard Plaintiffs filed their Rule 60(b)(1) Motion in 2018. Thus, the Willard Plaintiffs could not have presented this information to the Court"; 11-12), the Motion is completely silent as to why Willard waited from April of 2019 until *now*, **more than two years** to file the present Motion.[6] *See generally id*. Certainly, Willard was aware of

[6]Perhaps in an attempt to somehow excuse his inexcusable delay in filing this Motion (although Willard does not even acknowledge his delay, so this may be providing him with too much credit), Willard references certain other events that occurred after April of 2019. But these alleged events certainly do not form the basis for Willard's present Motion, and in fact, are largely irrelevant to it. Willard claims that the bar suspended Willard on September 10, 2019, after he failed to pay child and/or family support, and further suspended him on October 1, 2020, after he failed to pay fees. (Motion at 8). These assertions, even if true, have nothing to do with Willard's Motion, and certainly provide no justification whatsoever for Willard's delay. Similarly, Willard is plainly not seeking to set aside this Court's Sanctions Order on the basis that "[o]n March 25, 2021, the Office of Chief Trial Counsel for the State Bar of California

Moquin's disciplinary proceeding from its inception, as "[t]he Willard Plaintiffs and their new attorneys reported Moquin to the Nevada State Bar…" *Id*. at 4. Further, Willard has attempted to rely extensively upon Moquin's conditional guilty plea in every one of his filings since August of 2019. *See, e.g.*, (Appellants' Opening Brief, **Exhibit 2**; Answer to Petition for Rehearing, **Exhibit 3**; Answer to Petition for En Banc Reconsideration, **Exhibit 4**). In fact, Willard filed Moquin's Conditional Guilty Plea in this Court one year ago, in August of 2020. (Notice of Related Action, on file herein). But bizarrely, Willard provides no explanation whatsoever as to why Willard has waited **more than two years** from the availability of such alleged evidence until now to file the present Motion, nor does he even acknowledge this delay. Thus, Willard cannot possibly satisfy his burden to demonstrate that the present Motion was filed within a reasonable time, nor does he attempt to do so.

Additionally, Willard's appeal of this Court's Order Denying Willard's NRCP 60(b)(1) Motion unequivocally did not provide Willard with any additional time to file the present Motion. Nevada law is clear in this regard, and has addressed this precise scenario. In *Foster v. Dingwall*, the appellants timely appealed from a judgment. 126 Nev. 49, 228 P.3d 453 (2010). Two years later, while the appeal was still pending, the appellants filed a motion with the district court pursuant to NRCP 60(b)(2). *Id*. The district court certified its intent to grant the appellants' motion, and the appellants moved to remand with the Nevada Supreme Court. *Id*. The Nevada Supreme Court denied the motion to remand on the basis that the appellants' NRCP 60(b)(2) motion was untimely. *Id*. In so doing, the Nevada Supreme Court first confirmed that movants can file an NRCP 60(b) Motion with a district court during a pending appeal, so long as they follow the procedure outlined in *Honeycutt*:

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indicated that it was moving forward with further action on the bar complaint against Mr. Moquin" (an event which in itself occurred nearly three months before Willard filed this Motion). (Motion at 7, on file herein). Thus, the reference to these later events, which themselves were months before Willard filed his Motion, plainly do not constitute the primary basis for the Motion, and rather have only been referenced as a surreptitious way to attempt to justify Willard's delay.

> As outlined in *Huneycutt*, prior to filing a motion for remand in this court, a party seeking to alter, vacate, or otherwise change or modify an order or judgment challenged on appeal should file a motion for relief from the order or judgment in the district court. As demonstrated by our *Huneycutt* decision, despite our general rule that the perfection of an appeal divests the district court of jurisdiction to act except with regard to matters collateral to or independent from the appealed order, the district court nevertheless retains a limited jurisdiction to review motions made in accordance with this procedure. In considering such motions, the district court has jurisdiction to direct briefing on the motion, hold a hearing regarding the motion, and enter an order denying the motion, but lacks jurisdiction to enter an order granting such a motion….
>
> [But] if the district court is inclined to grant the relief requested, then it may certify its intent to do so. At that point, it would be appropriate for the moving party to file a motion (to which the district court's certification of its intent to grant relief is attached) with this court seeking a remand to the district court for entry of an order granting the requested relief. This court will then consider the request for a remand and determine whether it should be granted or denied.

Id. at 52–53, 228 P.3d at 455. Second, the Court next held that the pendency of the appeal did **not** toll the time for the appellants to file their NRCP 60(b) Motion. In so holding, the Nevada Supreme Court noted the "overwhelming[]" federal authority concluding that the one-year period for seeking relief under FRCP 60(b) was not tolled by the filing of a notice of appeal, and cited law concluding "that a contrary rule could impair the finality of judgments and prolong appellate proceedings that may take months or years to complete." *Id*. Thus, the Court denied the appellants' request for a remand on the basis that the appellants' NRCP 60(b)(2) Motion was untimely. *Id*. Applied here, *Foster* clearly demonstrates that the pendency of Willard's appeal from NRCP 60(b)(1) Motion: (1) did not preclude Willard from seeking NRCP 60(b)(5) or NRCP 60(b)(6) relief with this Court at an earlier date; and (2) did not toll the time for Willard to file an NRCP 60(b) motion.

Further, upon consideration of other factors that courts consider to determine the timeliness of a Rule 60(b)(6) motion, the untimeliness of Willard's Motion is even more striking. For example, courts consider whether the movant's delay has prejudiced the non-moving party. Here, resoundingly, it has: Willard is once again seeking to commence a case which would now otherwise be long-since barred by the statute of limitations and NRCP 41(e).

And, despite Willard's reference to his age in every single one of his filings before this Court and the Supreme Court, it should also be mentioned that the sole individual defendant, Jerry Herbst, passed away on November 27, 2018. (Notice of Death, on file herein). Herbst was also the President and owner of BHI, the only other Defendant. Yet, Defendants (in the unlikely event that the case were resuscitated for trial) will never have the benefit of Herbst's testimony. This is because even though Willard initiated the underlying action against Defendants in August 2014, and therefore had **multiple years** to depose Herbst or propound written discovery requests upon Herbst before his passing, Willard never even attempted to do so. (Sanctions Order, on file herein). The fact that Willard "languidly [held] Defendants in litigation while simultaneously failing to meet [his obligations] under the NRCP to provide threshold information necessary to defend his case and to comply with the other obligations imposed by the NRCP" now prejudices Defendants significantly more than even when the District Court found prejudice in its Sanctions Order in 2018. *Id*. And certainly, the delay of this Motion is not an uncharacteristic occurrence: rather, it fits precisely within Willard's nearly decade-long pattern of holding Defendants hostage to this litigation that necessitated the dismissal of this case in the first instance.

In fact, Willard's Motion is not only egregiously untimely, it is strategically so, and warrants the imposition of sanctions. As discussed *supra*, Willard has waited two years to file this Motion at a time when the Supreme Court prohibited him from introducing new evidence to this Court during its consideration of the *Yochum* factors. In sum, the indisputable untimeliness of Willard's Motion mandates its denial.

c. <u>Even beyond the patent threshold defects precluding consideration of the Motion, the Motion is wholly frivolous and does nothing more than harass this Court and Defendants with arguments that have already been expressly made and rejected</u>.

Finally, even assuming *arguendo* that Willard's Motion was not categorically barred on the grounds discussed *supra*, Willard's Motion is also wholly frivolous. As discussed, a Rule 60(b)(6) Motion "must demonstrate extraordinary circumstances justifying reopening the

judgment." Here, Willard's only claimed basis to reopen the judgment is that Willard allegedly now has additional evidence to purportedly corroborate his prior argument under NRCP 60(b)(1) that Moquin suffered from mental illness and abandoned Willard. *See generally* (Motion, on file herein). This does not entitle Willard to NRCP 60(b)(6) relief for multiple, independent reasons.

First, in filing this Motion, Willard completely ignores this Court's Order denying Willard's NRCP 60(b)(1) Motion. In fact, Willard's declaration in support of the present Motion should offend this Court: it is replete with statements from Willard that this Court has already expressly held that Willard lacks the personal knowledge or foundation to make. For example, Willard continues to opine that "Mr. Moquin's problems culminated in Mr. Moquin suffering what I can only describe as a total mental breakdown in December 2017," or that "Mr. Moquin later explained to me that Dr. Mar had diagnosed him with bipolar disorder and that he needed money to pay Dr. Mar for treatment," or that "[h]aving now received Mr. Moquin's diagnosis and learning more about his personal problems, I can see how Moquin's issues affected our case," despite this Court's prior findings expressly rejecting Willard's ability to make such assertions. *Compare, e.g.*, (Exhibit 7 to Motion at 6, 8, on file herein) *with* (NRCP 60(b)(1) Order at 12-16, on file herein).

More alarmingly, Willard's Motion completely ignores the fact that this Court has already made multiple findings which categorically preclude Willard's present Motion, even assuming *arguendo* the truth of the Motion's contents. Indeed, this Court has already found that "notwithstanding Plaintiff's lack of admissible evidence, Plaintiffs fail to meet their burden under Rule 60(b)…." (NRCP 60(b)(1) Order at 20, on file herein). Specifically, among other things, this Court found that Willard was represented by **two** attorneys throughout the case, thereby categorically precluding NRCP 60(b) relief with respect to Moquin's alleged conduct. *Id*. at 27-28. Further, this Court found that "Moquin did not abandon Plaintiffs. He appeared at status hearings, participated in depositions, filed motions and other papers, including a lengthy opposition to Defendants' motion for partial summary judgment. Mr. Moquin participated in

oral arguments and filed two summary judgment motions with substantial supporting exhibits and detailed declarations."[7] *Id*. at 25; 23-24. Additionally, this Court found that "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." *Id*. at 25-27. Indeed, using Willard's own proffered evidence, this Court found that "Mr. Willard was aware of Mr. Moquin's alleged problems prior to this Court's [Sanction Order], yet continued to allow Mr. Moquin to represent Plaintiffs," that "Mr. Willard was aware of Mr. Moquin's inaction," and that "Mr. Willard admits 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." *Id*. at 25-26.

This Court has also attributed much of the sanctionable conduct to Willard personally, noting, for example, that a critical basis for dismissal was Willard's failure to ever provide a NRCP 16.1 damages disclosure, a fact of which Willard was personally aware. *Id*.; (Sanctions Order). And, this Court has already expressly found that Willard's conduct throughout this case was willful—indeed, Willard personally averred to "collaborat[ing]" with Moquin to prepare his damages calculation in his October 2017 Motion for Summary Judgment, which was substantially different than those damages sought in Willard's signed interrogatory responses. (Sanctions Order (finding that "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 detailing the many new and different bases for damages, and concluding that Willard exhibited

[7]Indeed, Moquin answered Defendants' counterclaim and asserted 20 affirmative defenses, defended Willard's deposition, opposed Defendants' Motion for Partial Summary Judgment with a 22-page opposition accompanied by three affidavits and 51 exhibits, filed a lengthy objection to Defendants' proposed order on their Motion for Partial Summary Judgment, and filed two Motions for Summary Judgment in October of 2017 which were each accompanied by three detailed affidavits and collectively more than 70 exhibits. Further, if O'Mara's signed representations to this Court are to be believed, "[Moquin was] diligently working for weeks to respond to Defendants' serial motions, which include seeking dismissal with prejudice of Plaintiffs' case." Moquin also participated in every hearing prior to Willard obtaining new counsel. In sum, the record amply supports this Court's express finding that Willard was not abandoned by Moquin.

"bad faith motives in waiting to ambush Defendants"). Willard's present Motion does nothing whatsoever to overcome these express findings,[8] *see, e.g.,* (Motion at 5-7), and Willard's complete disregard of binding holdings warrants sanctions for wasting Court and party resources to address Willard's Motion.

Second, even looking past Willard's total disregard of the governing findings in this case (as well as the numerous other deficiencies discussed herein), Willard's Motion is still unable to seek NRCP 60(b)(6) relief. Willard states that "Moquin **has admitted** that he suffers from a mental illness," and that "the Willard Plaintiffs could not have anticipated Moquin's mental illness, which resulted in his failures, missed deadlines, and ultimate abandonment of his clients." (Motion at 12 (emphasis in original)). Thus, Willard claims that "the Court should find exceptional circumstances exist and grant the Willard Plaintiffs' relief from the Sanctions Orders." *Id*.

But Willard's sweeping assertions of allegedly having "additional evidence" of some of the arguments made in his NRCP 60(b)(1) Motion, which even if true do not contradict the binding holdings by this Court, simply do not come within the purview of NRCP 60(b)(6). Indeed, "[r]elief under "Rule 60(b)(6) has been used sparingly as an equitable remedy to prevent manifest injustice. The rule is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." *Fed. Trade Comm'n v. EMP Media, Inc.*, 334 F.R.D. 611, 613 (D. Nev. 2020), *aff'd sub nom. Fed. Trade Comm'n v. Cottelli*, No. 20-15717, 2021 WL 1202463 (9th Cir. Mar. 30, 2021); *Avila*, 404 F.

[8]Willard also continues to claim that Moquin suffered "a total mental breakdown in December 2017," (Exhibit 7 to Motion at 6, on file herein), and the alleged Conditional Guilty Plea findings that Willard highlights in his present Motion have nothing to do with any conduct prior to December of 2017. (Motion 5-7, on file herein). Yet, as this Court already expressly found, Willard's sanctionable conduct throughout the case—for which Willard was personally culpable—is what warranted the dismissal, in addition to, but separate from, the failure to oppose the Sanctions Motions. *See, e.g.*, (NRCP 60(b)(1) Order at 24-25, on file herein ("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.").

Supp. 3d at 27 ("A movant must clear a very high bar to obtain relief under Rule 60(b)(6), which is even more rare than relief under Rule 60(b)(1), and requires a more compelling showing of inequity or hardship than is necessary under Rule 60(b)'s other subsections…"); *Clayborne*, 326 F.R.D. at 535 ("It is well-established that Rule 60(b)(6) authorizes relief only in the most exceptional of cases. Relief under the catch-all provision of the rule is exceedingly rare as relief requires an intrusion into the sanctity of a final judgment."). "Examples of the extraordinary circumstances under which relief has been granted pursuant to Rule 60(b)(6) include an adversary's failure to comply with a settlement agreement that was incorporated into a court's order, fraud by the "party's own counsel, by a codefendant, or by a third-party witness[,]" or "when the losing party fails to receive notice of the entry of judgment in time to file an appeal."" *More v. Lew*, 34 F. Supp. 3d 23, 28 (D.D.C. 2014) (quoting 11 Federal Practice and Procedure § 2864 (2d ed. 1995).

Here, even if Moquin allegedly admitted that he suffered from a mental illness, this is insufficient evidence to seek NRCP 60(b)(6) relief. In considering whether similar testimony from a movant's attorney entitled the movant to Rule 60(b)(6) relief, one court explained that "[t]his Court gives no weight to [the attorney's] opinion testimony that she was mentally incapacitated to the extent it impaired her ability to practice law. Houlette is a duly licensed attorney at law—not a medical doctor—and she is not competent as a matter of law to give opinion testimony that she was mentally incapacitated." *In re FM Forrest, Inc.*, 587 B.R. 891, 922 (Bankr. S.D. Tex. 2018) (collecting supporting cases from across the country). The Court further explained:

> In making this conclusion, the Court emphasizes the Fifth Circuit's pronouncement that [m]otions under Rule 60(b)(6)...require, truly 'extraordinary circumstances' precisely because there is no specification of the basis for relief. Were it otherwise, Rule 60(b)(6) could supersede the companion provisions [i.e., Rule 60(b)(1)-(5)]. To meet the very high threshold of "truly extraordinary circumstances," this Court finds that, at a minimum, Morgan needed to introduce evidence from a medical doctor about Houlette's alleged mental incapacity during her representation of Morgan and, additionally, exactly when she suffered from such incapacity and to what extent it impaired her ability to practice law. To grant Morgan the relief he requests under Rule 60(b)(6) by simply allowing

> Houlette herself to testify that she was "mentally incapacitated" and therefore incapable of practicing law would make a mockery of the "truly extraordinary circumstances" standard articulated by the Fifth Circuit.

Id. at 923. Further, similar to the question Willard's arguments raise as to how Moquin was able to abandon Willard, yet simultaneously attend every hearing, defend every deposition taken, and file multiple oppositions and two lengthy motions for summary judgment, the Court explained that this dichotomy further militated against 60(b)(6) relief:

> Here, Houlette, despite her alleged mental incapacity, timely filed the Answer on November 28, 2016, [Finding of Fact No. 7], timely and articulately communicated on January 24, 2017, with Plaintiff's counsel (Wade) about a continuance of the scheduled MSJ hearing *926 set for February 1, 2017, [Finding of Fact Nos. 9, 10, 12], timely filed the Motion for Continuance on January 25, 2017, with an attached affidavit, [Finding of Fact Nos. 13, 14], and carried on legitimate settlement negotiations with Wade in April and May of 2017, [Finding of Fact Nos. 23–26]. Thus, Houlette… did in fact take several concerted, well-thought-out actions on behalf of her client (i.e., Morgan); and…has provided no explanation as to why her alleged psychological impairment caused her failure to oppose the MSJ, the Motion to Compel, and the Receivership Application but did not prevent her from taking the above referenced actions.

Id. at 925–26. Thus, even if Willard's alleged evidence and legal arguments are considered, they are inadequate to provide NRCP 60(b)(6) relief..

3. <u>Willard's NRCP 60(b)(5) request is similarly meritless</u>.

Willard's NRCP 60(b)(5) request is similarly unavailing. NRCP 60(b)(5) permit this Court to modify or vacate a judgment or order if a significant change in either factual conditions or law renders continued enforcement detrimental to the public interest. According to Willard, "[b]efore March 1, 2019, Rule 60(b)(5) only allowed relief from *an injunction* if applying the *injunction* prospectively was no longer available." (Motion at 13, on file herein). Willard claims that by removing the reference to injunctions in the March 2019 amendments, the scope of the rule was "significantly broadened" and no allows a party to obtain relief from "any judgment, not just an injunction, if applying it prospectively is no longer equitable." *Id*.

However, as with Rule 60(b)(6), Willard does not and cannot demonstrate that he is bringing this request within a reasonable time. NRCP 60(c)(1). Further, it is wholly unclear how

this judgment is being applied prospectively. Even if NRCP 60(b)(5) applies to prospective judgments beyond injunctions, courts have explained that "[j]udgments that have a prospective effect for purposes of Rule 60(b)(5) include declaratory judgments, injunctions of a continuing nature, and paternity judgments that give rise to a duty to pay future child support. They do not include final judgments…which simply resolve present claims related to an alleged past wrong." *Powell v. State*, 460 P.3d 787, 794 (Alaska Ct. App. 2020); *see also Thompson v. Thompson*, 407 P.3d 232, 237 (Idaho Ct. App. 2017) ("[T]he judgment is not prospective, but instead a declarative judgment. Because the judgment is not prospective in application, Patricia is not entitled to equitable relief from the judgment pursuant to I.R.C.P. 60(b)(5)."). Thus, Willard's request for NRCP 60(b)(5) relief should also be denied.

CONCLUSION

Courts across the country recognize that there is salutary and sound public policy that litigation should come to an end. It would strain the imagination to envision a case that is better-suited for this policy. For the reasons discussed herein, Defendants respectfully request that this Court deny Willard's Motion in its entirety.

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 10th day of August, 2021.

DICKINSON WRIGHT, PLLC

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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' OPPOSITION TO THE WILLARD PLAINTIFFS' MOTION FOR RELIEF UNDER NRCP 60(b)(5) &(6)** on the parties through the Second Judicial District Court's E-Flex filing system to the following:

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DATED this 10th day of August, 2021.

/s/ Mina Reel
An employee of DICKINSON WRIGHT PLLC

EXHIBIT TABLE

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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 THE WILLARD PLAINTIFFS' MOTION FOR RELIEF UNDER NRCP 60(b)(5) &(6)

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 the Willard Plaintiffs' Motion for Relief Under NRCP 60(B)(5) &(6) (the "Opposition"). 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. Attached to the Opposition as **Exhibit 2** is a true and correct copy of the Appellant's Opening Brief filed in Nevada Supreme Court, Case No. 77780.

3. Attached to the Opposition as **Exhibit 3** is a true and correct copy of the Answer to Petition for Rehearing filed in Nevada Supreme Court, Case No. 77780.

4. Attached to the Opposition as **Exhibit 4** is a true and correct copy of the Answer to Petition for En Banc Reconsideration filed in Nevada Supreme Court, Case No. 77780.

5. Attached to the Opposition as **Exhibit 5** is a true and correct copy of the Petition for En Banc Reconsideration filed in Nevada Supreme Court, Case No. 77780.

6. Attached to the Opposition as **Exhibit 6** is a true and correct copy of the Respondent's Answering Brief filed in Nevada Supreme Court, Case No. 77780.

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7. Attached to the Opposition as **Exhibit 7** is a true and correct copy of the Order Denying En Banc Reconsideration filed in Nevada Supreme Court, Case No. 77780.

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

DATED this 10th day of August, 2021.

/s/ Brian R. Irvine
BRIAN R. IRVINE

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Clerk of the Court
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EXHIBIT 2

EXHIBIT 2

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
District Court Case No. CV14-01712

APPEAL FROM ORDER DENYING NRCP 60(B) MOTION
SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE
HONORABLE LYNNE K. SIMONS

APPELLANTS' OPENING BRIEF

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A.App. 4127

NRAP 26.1 DISCLOSURE

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

There are no parent corporations or publicly-held companies that own 10% or more of any of the Appellants.

The law firm of Lemons, Grundy & Eisenberg has represented the Appellants throughout this appeal.

The law firm of Robertson, Johnson, Miller & Williamson has been counsel of record in this case since March 26, 2018.

Prior to that date, Brian P. Moquin represented the Appellants as lead counsel and David C. O'Mara represented the Appellants as local counsel.

No Appellant is using a pseudonym.

DATED: August 26, 2019

/s/ Robert L. Eisenberg
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Lemons, Grundy & Eisenberg

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ATTORNEYS FOR APPELLANTS

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INTRODUCTION

This is an extremely unfortunate case, where the Plaintiffs/Appellants – primarily a 77-year-old individual named Larry Willard – lost a $15,000,000 cut-and-dry breach of lease case because the Plaintiffs' attorney, Brian Moquin, suffered from bipolar disorder and abandoned his clients by failing to oppose dispositive motions. Even after Plaintiffs retained new counsel in an attempt to undo the devastation by filing a Rule 60(b) motion for relief, Moquin repeatedly made promises that he would help fix the problems he had caused, provide his case files, and continue to see the doctor who diagnosed him as bipolar. Consistent with his illness, Moquin never followed through. Instead, he became increasingly vulgar, hurling expletives at both Willard and present counsel, and viciously blaming his wife for his woes. He was also arrested for domestic violence in January of 2018.

The Defendants claim to have been harmed by Moquin's inaction as well – both in terms of time and attorneys' fees. But what they lost pales in comparison to what Larry Willard, a 77-year-old man, has lost.

Due to Moquin's abandonment of the Plaintiffs, the district court entered case-terminating sanctions. As this court will see, however, the district court erred for several, independently reversible reasons.

First, the district court should have issued a sanction more proportionate to Moquin's discovery failures and inability to oppose motions. The Defendants claimed prejudice because of Moquin's failure to produce discovery on various categories of damages, the amount of which Moquin could not keep consistent. Yet, this is a simple case involving the Defendants' strategic decision to breach a commercial lease and personal guarantee. A much more appropriate sanction would have been to prohibit Plaintiffs from utilizing an expert at trial, and limit Plaintiffs to establishing basic, breach of lease damages which an expert is not needed to establish. It is just simple math. Moreover, those basic damages were repeatedly disclosed to the Defendants. In fact, they were calculated and disclosed in the original Verified Complaint and again in the Verified First Amended Complaint.

Second, the district court erred in its application of the pertinent case-terminating sanctions factors, and failed to consider the most appropriate factor applicable to this case: whether sanctions unfairly operate to penalize a party for the misconduct of his attorney. The Defendants' Motion for Sanctions conveniently ignored this extremely relevant factor, and the district court's sanctions order ignored it as well. In the Rule 60(b) Order, which the Defendants drafted, the district court simply stated that the court was not required to consider

that factor. However, that factor should have been addressed by the district court, and the failure to do so constituted an error of law.

Third, the district court committed clear error in finding that Moquin did not abandon the Plaintiffs. Abandonment alone constitutes excusable neglect, and the evidence in this case demonstrates clear abandonment. Moquin failed to oppose dispositive motions despite repeatedly assuring Willard that he would, and, after the Plaintiffs retained new counsel, Moquin refused to provide any assistance to Willard or new counsel – including the fundamental, ethical obligation to provide his files.[1] Instead, he elected to profanely insult and disparage Willard and new counsel. Simply because an attorney is capable of performing *some* tasks in a case does not preclude a finding of constructive abandonment and excusable neglect, as the district court seems to have believed.

Fourth, the district court erred in excluding admissible evidence. While some of the evidence the Plaintiffs submitted was hearsay, each item of evidence met the requirements of various exceptions to the hearsay rule, and should have been considered. Relatedly, the district court was able to directly observe Moquin, and the procedural history of this case on its own established that Moquin was suffering from mental illness. This is not the typical sanctions case where a party

[1] See In re: Discipline of Brian Moquin, Esq. (Nev. Sup. Ct. Case No. 78946).

hides or destroys evidence; this is a case where *the attorney* simply could not function. This also justifies reversal.

Fifth, the district court committed clear error by not addressing any of the Rule 60(b) "excusable neglect" standards. Under established Nevada law, a district court must consider whether a party promptly applied for Rule 60(b) relief, lacked intent to delay the proceedings, lacked knowledge of the procedural requirements, and demonstrated good faith. Plaintiffs' Rule 60(b) Motion argued these factors at length, the Defendants' opposition brief simply ignored those required factors, and the district court's order failed to address them as well. This was clear error.

The Plaintiffs themselves did nothing wrong. They only ask for their day in court. Accordingly, Plaintiffs seek a reversal of the district court's orders dismissing the Plaintiffs' case and refusing to provide Rule 60 relief. *The Plaintiffs have stated their willingness to rectify any harm caused to the Defendants*, and reversal is appropriate so that the case can proceed on the merits.

JURISDICTIONAL STATEMENT

Pursuant to NRAP 3(b)(8) (special order after final judgment) and this court's Order Partially Dismissing Appeal and Reinstating Briefing filed on August 23, 2019, the only order being appealed is the district court's Order Denying Plaintiffs' Rule 60(b) Motion for Relief. The other orders mentioned in the notice of appeal were dismissed in the August 23, 2019 order. As stated in its

Order to Show Cause entered on August 8, 2019, this court has already determined that this appeal is timely and that it may proceed. (Order to Show Cause at 2, n.1.)

ROUTING STATEMENT

This appeal is presumptively retained by the Supreme Court under NRAP 17(a)(12) because the case presents issues of statewide public importance involving clarification of the law dealing with sanctions imposed on clients due solely to the derelictions of counsel with a mental health disorder. Clients rely on their attorneys to guide them through the legal system. When those attorneys utterly fail to do so despite repeated assurances that they would do so, innocent clients are harmed, guilty defendants are absolved of liability, and public trust in the judicial system weakens. In addition, district courts do struggle to reconcile the extent of the recognized exceptions to the attorney-agency rule. A published case applying the effect and extent of the abandonment exclusion to the rule of attorney agency would provide district courts with important guidance.

STATEMENT OF ISSUES

1. Did the district court err in choosing to enforce case-terminating sanctions rather than awarding a lesser sanction that would address the actual degree of prejudice that Defendants suffered?

2. Did the district court err in failing to assess all of the pertinent factors set forth in Young v. Johnny Ribeiro Bld., 106 Nev. 88, 92-93, 787 P.2d 777

(1990), such as whether sanctions unfairly operate to penalize a party for the misconduct of his attorney?

3. Did the district court err in failing to find that Plaintiffs' prior counsel abandoned them?

4. Did the district court err in excluding admissible evidence supporting relief under NRCP 60(b)?

5. Did the district court err in otherwise denying Appellants' motion for relief under NRCP 60(b)?

STATEMENT OF THE CASE

All of the Plaintiffs jointly filed a Verified Complaint on August 8, 2014, and then a Verified First Amended Complaint on January 21, 2015. (1 A.App. 1; 2 A.App. 232.) The operative complaint included claims for breaches of the Plaintiffs' respective lease agreements with Defendant/Respondent Berry-Hinckley Industries ("BHI"), breaches of the personal guarantees that the Plaintiffs received from Defendant/Respondent Jerry Herbst, a claim for attachment, and a claim for injunctive relief. (2 A.App. 234-244.) Due to attorney Moquin's failures in the case, the district court entered an order granting Respondents' motion for sanctions on January 4, 2018. (16 A.App. 3585.) The district court then entered findings of fact and conclusions of law on March 6, 2018, ordering that Plaintiffs' claims

against the Defendants/Respondents are dismissed with prejudice. (16 A.App. 3607, 3639.)

The Plaintiffs, after obtaining new counsel, promptly filed for Rule 60(b) relief on the basis of "excusable neglect." (16 A.App. 3675-3798.) The matter was fully briefed and oral argument was held on September 4, 2018. (17 A.App. 3799; 17 A.App. 3942; 19 A.App. 4332.) The district court denied Plaintiffs' Rule 60(b) Motion on November 30, 2018. (18 A.App. 4061.) This appeal now follows.

STATEMENT OF FACTS

Background Regarding the Lease and the Defendants' Breach[2]

On November 18, 2005, Plaintiffs/Appellants Larry J. Willard, individually and as Trustee of the Larry James Willard Trust Fund (collectively, "Willard") and Overland Development Corporation entered into a Purchase and Sale Agreement with P.A. Morabito and Co. Limited to purchase a commercial property (gas station, car wash, car service center, and retail store) located at 7695 and 7699 South Virginia Avenue, Reno, Nevada (the "Virginia Property") for a total purchase price of $17,750,000. (16 A.App. 3695.) Out of their own funds,

[2] To receive Rule 60(b) relief, the moving party is no longer required to demonstrate a meritorious claim or defense. Rodriguez v. Fiesta Palms, LLC, 134 Nev. Adv. Op. 78, 428 P.3d 255, 257 n.2 (2018) (citing Epstein v. Epstein, 113 Nev. 1401, 1405, 950 P.2d 771, 773 (1997)). Nonetheless, the merits of this case further underscore the need for relief. Therefore, Plaintiffs will briefly describe the merits of the case and then provide facts surrounding their experience with prior counsel and the resulting excusable neglect.

Plaintiffs paid a total of $4,668,738.49 in earnest money for the Virginia Property. (Id.) Plaintiffs then borrowed $13,250,000 from South Valley National Bank ("South Valley") to pay the balance of the purchase price. (Id.) The Purchase and Sale Agreement contained a lease-back provision under which the seller or its assignee would lease the Virginia Property for a period of twenty years (20) years at a base annual rental rate of $1,464,375 with the annual rent increasing by two percent per year. (Id.)

The seller's affiliate, Defendant/Respondent BHI, became interested in leasing the business property from Willard, and on December 2, 2005, BHI, Overland, and Willard entered into a lease agreement (the "Virginia Lease") containing the lease-back provision mentioned above. (Id.) On February 21, 2006, BHI, Overland, and Willard entered into a Lease Subordination, Non-Disturbance and Attornment Agreement (the "Subordination Agreement"), which informed BHI that Willard was purchasing the Virginia Property with financing from South Valley. (Id.) In the Subordination Agreement, BHI: (1) expressly agreed not to terminate the Virginia Lease without obtaining the consent of South Valley; and (2) acknowledged that South Valley would not make the loan without the Subordination Agreement in place. (Id.) Accordingly, the Defendants would have been fully aware that breaching the Virginia Lease would have devastating consequences on Overland and Willard.

On March 16, 2006, Willard refinanced the South Valley loan with Telesis Community Credit Union for a total loan amount of $13,312,500. (16 A.App. 3696.) Under this loan, Overland and Willard were required to pay $87,077.52 per month to Telesis Community Credit Union's loan servicing agent, Business Partners, LLC. (Id.) On February 17, 2007, BHI sent an offer letter to Willard and other landlords indicating that Herbst intended to acquire BHI's convenience store assets, which included the Virginia Property. (Id.) In the offer letter, Herbst offered to personally guarantee BHI's payments and performance under the Virginia Lease. (Id.) Herbst materially supported the offer letter through representations that his net worth exceeded $200,000,000. (Id.) In reliance upon the Defendants' representations and Herbst's personal guarantee, Willard accepted Herbst's offer. (Id.)

The Defendants operated the Terrible Herbst automotive service business and stayed current on their rent obligations under the Virginia Lease until 2013. (Id.) On March 1, 2013, without any notice whatsoever, and without giving any reason, BHI defaulted on the Virginia Lease by not sending the monthly rental payment for March 2013. (Id.) On March 10, 2013, BHI's finance department disclosed to Willard that it would no longer pay any rent. (Id.) On April 12, 2013, Defendants' lawyers sent a letter indicating that BHI did not intend to cure the breach of the Virginia Lease and instead planned to vacate the Virginia Property on

April 30, 2013. (9 A.App. 1879.) They gave no reason for their decision to abandon the Virginia Lease, other than the fact that BHI was losing money. (Id.) In other words, this was an intentional strategic breach meant only to save the Defendants' money.

Under the Virginia Lease, the rent was accelerated upon BHI's breach. (16 A.App. 3696.) The amount owed, to date, exceeds $15,000,000. (Id.) Herbst personally guaranteed BHI's entire obligation under the Virginia Lease. (Id.) Due to BHI's breach, Herbst is also liable for an amount in excess of $15,000,000. (Id.)

Despite the Defendants' liability, Willard and the other Plaintiffs recognized they would have to mitigate their damages immediately. The Plaintiffs knew that because of their obligation to pay $87,077.52 per month to the Loan Servicing Agency, they could lose the Virginia Property due to BHI's sudden decision to breach the Lease and no longer pay the approximately $140,000 in rent that the Plaintiffs had been using to make payments on the loan. (16 A.App. 3697.) Willard coordinated with BHI to remain on the Virginia Property until he could find a replacement tenant. (Id.) Willard entered into an interim "Operation and Management Agreement" with BHI effective May 1, 2013, under which BHI agreed to continue active operations of the Virginia Property. (Id.) This Operation and Management Agreement did not excuse BHI's rent obligations, but provided

incentive for BHI to reduce its liability for damages to Willard and Overland while they attempted to locate a replacement tenant. (Id.)

Unfortunately, in late May 2013, Willard discovered that the Virginia Property was not fully operational and was actually in total disarray. (Id.) On June 1, 2013, BHI vacated the Virginia Property having paid no rent whatsoever since its sudden breach of the Virginia Lease on March 1, 2013. (Id.) In other words, they simply walked away from the lease and the Plaintiffs' property, without any legitimate reason. BHI never explained why it abandoned its obligations to the Plaintiffs and their property.

On June 14, 2013, Willard received a Notice of Intent to Foreclose from the loan servicing agent. (Id.) Following the breach, despite Willard's diligent efforts, he was unable to find a replacement tenant to lease the Virginia Property. (Id.) On February 14, 2014, Overland and Willard agreed to enter into an agreement with Longley Partners, LLC to purchase the Virginia Property via short sale. (Id.)

Due to the Defendants' breach, Willard lost his investment, the stream of rental income of approximately $140,000 a month, and the Virginia Property. (16 A.App. 3698.)

Willard's History with Prior Counsel

When BHI breached the Virginia Lease, Willard faced losing his substantial income and his personal retirement funds. (16 A.App. 3698.) Willard is a senior

citizen and was very much dependent on the income derived from the Virginia Property. (Id.) Willard's income not only provided for him, but also for his ex-wife and his blind father, who was 92 years old at the time of the breach and was in an assisted living facility. (Id.) Willard now has only a social security income of $1,630 per month. (Id.)

To try to avoid financial ruin, Willard pursued a lawsuit against BHI and its guarantor, Jerry Herbst. (Id.) Willard was living in the San Francisco Bay Area and originally retained an attorney there named Steven Goldblatt. (Id.) Goldblatt filed the case in California, and then had to withdraw because of a serious car accident. (Id.) Willard was thus forced to find another attorney to take his case and file it in the correct jurisdiction. (Id.) The Plaintiffs were directed to another California attorney, Brian Moquin. (Id.)

Upon reviewing Moquin's professional status and speaking to other people, Willard had every reason to believe that Moquin was qualified and would take this case very seriously. (Id.) Because of Willard's lack of income, Moquin agreed to take the case on a contingency fee. (16 A.App. 3699.)

On August 8, 2014, Willard and Overland, along with co-plaintiffs Edward E. Wooley and Judith A. Wooley, commenced the Nevada action against Herbst and BHI.[3] (1 A.App. 1.) At the onset, Moquin was busy cleaning up and

[3] The Wooley plaintiffs did not participate in the Rule 60 motion or this appeal.

assimilating the original lawsuit that the previous attorney had incorrectly filed in California, filing this current case in Reno, and subsequently amending the complaint in this case. (16 A.App. 3699.) Throughout 2015 and 2016, Willard believed Moquin was quite busy dealing with discovery demands, interrogatories, vetting, research, and culminating in a hearing regarding defendants' partial motion for summary judgment on certain issues. (Id.)

After some time, Willard realized that Moquin was having financial difficulties. (Id.) However, Moquin continued moving forward with this case, until some point in mid-to-late 2017. (Id.) As it turned out, Moquin was dealing with more than just financial problems. (Id.) Willard discovered that as much as Moquin wanted to respond to deadlines in a timely fashion, Moquin was dealing with mental health issues beyond his control. (Id.) Willard also discovered that Moquin was struggling with a constant marital conflict that greatly interfered with his work. (Id.) In addition, Moquin was suffering from bipolar disorder. (16 A.App. 3700; see also 16 A.App. 3761.)

Moquin's disorder is both severe and debilitating. (16 A.App. 3700.) Symptoms of Moquin's disorder manifest as apathy, an inability to concentrate, difficulty making decisions, an inability to accomplish tasks, missed work, lack of energy, and depressed mood. (Id.; see also 16 A.App. 3748.)

Willard now realizes that while Moquin was assuring him that he was working on the case, he was missing deadlines and failing to properly pursue the case.[4] (16 A.App. 3700.)

Moquin was not always responsive, but after having his total income dissipated after the Defendants' breach, Willard felt that his only option was to rely on Moquin. (16 A.App. 3701.) In addition, Moquin repeatedly assured Willard that he would prevail and that the case was proceeding fine. (Id.; see also 17 A.App. 3953.)

For his part, Willard made ongoing efforts on an almost daily basis to push the case forward, provide Moquin with what he needed, and to pursue the case against the Defendants for breach of the Virginia Lease and the personal guarantee. (16 A.App. 3701.) Willard was devastated to realize that Moquin had not been able to file timely oppositions and had failed to comply with various discovery

[4] In fact, Moquin's inability to meet deadlines and to comply with litigation obligations had become well known to defense counsel as early as May 2015. This was established in defense counsel's motion seeking a contempt finding and sanctions based upon attorney Moquin's litigation failures. (2 A.App. 308-382.) Defense counsel's motion asserted "Moquin's dilatory conduct" (2 A.App. 309) and Moquin's failure to provide documents by dates he had promised. (2 A.App. 311.) The motion asserted that one witness's failure to comply with a subpoena was "attributable to Mr. Moquin" (2 A.App. 312); that Moquin's false assurances regarding the litigation "have become a pattern" (id.); and that Moquin had made numerous somewhat far-fetched excuses for his failures to comply with discovery requirements. (2 A.App. 312-313.) Defense counsel's 2015 contempt motion placed the blame entirely on Moquin, without even a whisper that Larry Willard may have somehow been responsible for Moquin's litigation failures.

rules. (Id.) Moquin would continually provide anticipated completion dates of various documents, but then change those anticipated dates. (Id.) Moquin would alternate between cycles of optimism (mania) and then going days when he would not respond at all (depression). (Id.)

Moquin's court records reveal disastrous personal problems that clearly affected his ability to practice and also corroborate that his failures in this case were not isolated. In her Request for Domestic Violence Restraining Order, which is signed under penalty of perjury, Moquin's wife, Natasha Moquin, confirms that Moquin "was recently diagnosed with Bipolar disorder, has been paranoid and violent," and that Mrs. Moquin is concerned about triggering a psychotic reaction. (16 A.App. 3761.) Natasha Moquin also confirms that the worst abuse she suffered from Moquin was around September 2016 – showing that his personal problems have been in the background of all of the critical events in this case. (16 A.App. 3766.)

Natasha Moquin further reveals that for years she has been concerned that Moquin was failing to meet filing responsibilities in his cases. (16 A.App. 3767.)

Prior to filing for divorce, Natasha Moquin had already received an Emergency Protective Order against Moquin. (16 A.App. 3761; see also 16 A.App. 3751.) Moquin was even arrested pursuant to that Emergency Protective Order on January 23, 2018. (16 A.App. 3754; see also 17 A.App. 3956.)

The Plaintiffs did not discover Moquin's mental illness until January 2018, when it was too late. (16 A.App. 3701.) In retrospect, the history of Moquin's failures began much earlier than the Plaintiffs initially realized. (Id.)

Moquin's Failures and the Sanctions Orders

On December 2, 2016, Plaintiffs had disclosed Daniel Gluhaich as an un-retained expert witness. (12 A.App. 2813-2816.) On February 9, 2017, the parties signed and 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." (7 A.App. 1490.) On February 9, 2017, the district court approved and filed the *Stipulation and Order to Continue Trial (Third Request)*. (7 A.App. 1493.)

On May 30, 2017, this district 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. (7 A.App. 1517.)

On October 18, 2017, the 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. (7 A.App.

1601-1605.) These damages included previously-disclosed rent damages and also damages for diminution in value and other categories of damages. (Id.) Some of these claimed damages were based upon the opinions of Gluhaich. (7 A.App. 1604-1605.)

On November 13, 2017, Defendants filed *Defendants'/Counterclaimants' Opposition to Larry Willard and Overland Development Corporation's Motion for Summary Judgment*. (10 A.App. 2284.) 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 district court's page limits. (12 A.App. 2781-2803; 16 A.App. 3593.) 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*. (See 13 A.App. 2880; 16 A.App. 3588; 13 A.App. 3021.)

On December 6, Plaintiffs 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*. (15 A.App. 3568.)

On December 12, 2017, the attorneys appeared for a Pre-Trial Conference. In that conference, they discussed the pending motions and Moquin's failure to file

oppositions. Moquin represented to the district court that on the day the oppositions were due he had computer problems and lost all of his work. (19 A.App. 4317.) Moquin requested additional time to respond in light of these circumstances. (Id.) Ultimately, the district court granted Moquin until December 18, 2017, in which to file oppositions to the Defendants' pending motions. (19 A.App. 4322.) Each party was represented by counsel, but Larry Willard and the other parties were not actually present at this conference. (19 A.App. 4305.)

Moquin never filed the oppositions in the time allowed. In fact, Moquin never filed another document in this case.

During this month of December, Willard attempted to communicate with Moquin on a daily basis, yet Moquin was highly unresponsive, and when he did respond, he would falsely assure Willard that everything was going fine. (17 A.App. 3954.) On January 4, 2018, the district 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). (16 A.App. 3590-3593.) A separate order granted *Defendants'/ Counterclaimants' Motion for Sanctions* pursuant to DCR 13(3). (16 A.App. 3585-3588.) A third order noted Plaintiffs' failure to respond, but found that *Defendants'/Counterclaimants' Motion for Summary Judgment* is moot. (19 A.App. 4355-4356.)

Defendants prepared and proposed Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions. (16 A.App. 3607.) Moquin did not object to those proposed findings. On March 6, 2018, pursuant to WDCR 9 and DCR 13(3), the district court entered the proposed *Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions*. (16 A.App. 3607.)

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.

(16 A.App. 3654.)

Moquin's Refusal to Cooperate with Willard and New Counsel

In January 2018, Moquin was arrested related to charges of domestic violence. (16 A.App. 3754; see also 17 A.App. 3956.) Plaintiffs began looking for a new lawyer. (17 A.App. 3956.)

Around that same time, Moquin explained to Willard that a Dr. Mar had diagnosed him with bipolar disorder and that he needed money to pay Dr. Mar for treatment. (17 A.App. 3956.) After obtaining a loan from a friend, Willard arranged to pay Dr. Mar for his services. (Id.)

On March 13, 2018, Willard paid Dr. Mar's office $470 for Moquin's treatment so that Moquin could get well and help new counsel fix the case. (17 A.App. 3956; see also 17 A.App. 3977.)

Moquin was, in part, supposed to obtain a letter from Dr. Mar evidencing his diagnosis and treatment. (17 A.App. 3956.) Despite paying for Moquin's treatment, and despite numerous requests from Willard and the new attorneys, Moquin refused to provide Plaintiffs with the promised letter from Dr. Mar. (Id.)

In fact, new counsel repeatedly requested Moquin to comply with ethical obligations by providing his files and other important information. (17 A.App. 3956; see also 17 A.App. 3979-3982.)

Willard and his new lawyers repeatedly asked Moquin to provide a summary of the case, documents regarding his mental illness, and his case files. (17 A.App. 3956.) From January through March, 2018, Moquin repeatedly assured Willard that he would provide him with all of the information that his new attorneys needed to reinstate the case. (Id.)

On March 30, 2018, Moquin specifically assured Willard that Moquin will "get everything out the door before I leave today." (Id.) In response, Willard asked if he had obtained the requested documentation from Dr. Mar, and Moquin told Willard that he was playing phone tag with a person in Dr. Mar's office. (Id.) Willard then sent text messages on March 31, April 1, and April 2 desperately

urging Moquin to provide the new attorneys with everything they needed to try reinstate this case. (Id.)

Moquin then responded with an alarming rant, which included the following: "I'm not sure what part of '[expletive] off' you don't understand, but it is in your best interest to stop communicating with me at this point until I contact you." (17 A.App. 3957; see also 17 A.App. 3987-3988.)

Moquin's abusive and threatening language in his text dated April 2, 2018, is *just one* example of the abusive treatment Willard received from Moquin. (17 A.App. 3957.)

In early April 2018, Plaintiffs' new lawyers repeatedly asked Moquin for the various documents that he had still not provided. (17 A.App. 3957; see also 17 A.App. 3991-3994.)

Finally, exasperated with Moquin and his failure to cooperate and to provide the documents that he promised he would provide to fix the problems that he created, Willard and new counsel finally felt that they had no choice but to move forward without the documents that Moquin had promised. (17 A.App. 3957.) Moquin never gave new counsel his complete files. (Id.)

In addition to the numerous emails requesting the files, on May 14, 2018, new attorney Williamson sent Moquin a formal demand for the Plaintiffs' client files. (17 A.App. 3957; see also 17 A.App. 3996-3997.)

On Wednesday, May 23, 2018, Willard again wrote to Moquin, literally begging him to provide: (1) a diagnosis letter from Dr. Mar; (2) evidence Moquin claimed to possess to prove that he timely disclosed the damage calculations; and (3) an affidavit from Moquin explaining his personal situation and how it impacted his performance in this case. (17 A.App. 3957.) Moquin responded by claiming that he intended to provide all of the information Plaintiffs needed, but that he could not get to it until that weekend because he had a hearing in his criminal case on Thursday, May 24, 2018. (Id.) Moquin assured Willard that he should be able to provide an affidavit and supporting exhibits that weekend. (Id.)

When Willard tried to follow-up later that week, however, Moquin threatened Willard by stating that if Willard tried to communicate again before Moquin had provided the documents, that *Willard would never receive them*. (17 A.App. 3958.) By the afternoon of Monday, May 28, 2018, however, Moquin still had not provided the documents. (Id.; 17 A.App. 3999.) Therefore, Willard wrote to him again asking for the required documents. (17 A.App. 3958; 17 A.App. 3999.) Moquin quoted his previous threat and responded as follows: "'Communicate in ANY WAY with me again before I have sent you the declaration and supporting exhibits and you will receive neither.' ***So be it.***" (17 A.App. 3958; 17 A.App. 3999 (emphasis added).)

Moquin never provided the promised affidavit, the letter from Dr. Mar, other supporting exhibits, and damages disclosure information. Moquin never even provided the Plaintiffs' client files. (17 A.App. 3958.)

On April 18, 2018, new counsel filed the Rule 60(b) Motion and the matter was fully briefed. (16 A.App. 3675; 17 A.App. 3799; 17 A.App. 3942.) On Tuesday, September 4, 2018, the parties appeared and offered oral argument to the district court. (19 A.App. 4332.) On November 30, 2018, the district court entered its Order Denying Plaintiffs' Rule 60(b) Motion. (18 A.App. 4061.)

REQUEST FOR JUDICIAL NOTICE

Plaintiffs hereby request the court to take judicial notice of this court's docket No. 78946, which consists of disciplinary proceedings against attorney Moquin arising out of his representation of Plaintiffs in this case. Under NRS 47.130 and NRS 47.150, this court may take judicial notice of facts that are capable of verification from a reliable source, or where the facts are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

This court will invoke judicial notice to take cognizance of the record in another case, particularly where there is a close relationship between the two cases. See Mack v. Estate of Mack, 125 Nev. 80, 91-92, 206 P.3d 98, 106 (2009) (finding close relationship between murder case and deceased victim's estate case, and

therefore taking judicial notice of outcome of murder trial). In Cannon v. Taylor, 88 Nev. 89, 92, 493 P.2d 1313, 1314 (1972), this court took judicial notice of a related matter that involved "an incontrovertible fact, verifiable from records in the building where we sit." In the present case, we are requesting judicial notice of Moquin's disciplinary docket in the supreme court.

A court may take judicial notice of an attorney discipline case that is related to the pending case. For example, in the recent case of Kinder v. Legrand, 2019 WL 2450922 (U.S. Dist. Nev., June 12, 2019; unpublished decision), a criminal defendant's appeal was decided by the Nevada Supreme Court, but his attorney never advised him of the decision. In a subsequent federal habeas corpus petition, the federal court held that the statute of limitations was equitably tolled because of the attorney's abandonment of the defendant. *Id*. In so holding, the federal court took judicial notice of public records of the State Bar of Nevada, showing that the attorney had been disbarred. *Id*. The court noted that disciplinary records are accessible to the public, and that a court may take judicial notice of the State Bar's records of disciplinary action. *Id.*

In the present case, the proceedings on Plaintiffs' Rule 60 motion were conducted during April through November of 2018. At that time Moquin's disciplinary proceedings were incomplete and unavailable. Moquin's automatic disciplinary appeal was docketed as No. 78946 in this court on June 10, 2019.

That docket shows that on April 16, 2019, Moquin entered a conditional guilty plea arising out of his representation of Larry Willard in the present case. He pleaded guilty to violations involving diligence, communications, and obligations involving terminating representation. The guilty plea recites that for more than two years he failed to comply with discovery requirements and court orders; he evaded local counsel's efforts to obtain compliance; and Willard did not understand the consequences of Moquin's derelictions.

The guilty plea in the disciplinary docket also shows that Moquin stated that he had been diagnosed with bipolar disorder, and he had been arrested in California on charges of domestic violence. He also falsely told Willard's new counsel, multiple times, that he would cooperate and provide necessary information for new counsel's effort to obtain relief under NRCP 60, but he never provided the information. The guilty plea establishes that Larry Willard was injured by Moquin's violations of ethical requirements, because "the lawsuit dragged on for over four years and the client's claims were ultimately dismissed with prejudice based upon a sanction motion that Respondent [Moquin] failed to oppose."

The disciplinary docket also contains a separate document containing the State Bar's findings and conclusions, which recite clear and convincing evidence of Moquin's multiple and repeated violations of ethical requirements that lead to

dismissal of Willard's case. Among other sanctions, the State Bar has recommended a two-year injunction against Moquin practicing law in Nevada. Moquin failed to file an opening brief in the automatic appeal of his bar discipline case, and, as of the time of filing of the present opening brief in Plaintiffs' appeal, Moquin's disciplinary docket is under submission.

Attorney Moquin's disciplinary file is closely and entirely related to this appeal. Accordingly, this court should take judicial notice of the contents of docket No. 78946.

SUMMARY OF ARGUMENTS

There are several compelling reasons for reversal of the district court's Rule 60(b) denial. First, the district court applied a sanction that was not proportional to Moquin's failures due to mental illness and abandonment of the clients. Second, the district court, in assessing case-terminating sanctions, did not consider the factor most relevant and applicable to this case: whether sanctions unfairly operate to penalize a party for the misconduct of his attorney. Third, as the above facts clearly demonstrate, the district court erred by finding that Moquin did not abandon the Plaintiffs. Fourth, the district court erred by excluding admissible evidence demonstrating Moquin's undeniable mental illness and personal problems. Finally, the district court erred by not considering any of the mandatory "excusable neglect" factors.

STANDARD OF REVIEW

This appeal involves the district court's denial of Plaintiffs' Rule 60(b) Motion. As such, it is usually subject to review for abuse of discretion. Bonnell v. Lawrence, 128 Nev. 394, 400, 282 P.3d 712, 716 (2012). However, when the sanction imposed is dismissal with prejudice, *a heightened standard of review applies*. Young, 106 Nev. at 92, 787 P.2d at 779 ("Where the sanction is one of dismissal with prejudice, however, we believe that a somewhat heightened standard of review should apply."). Additionally, this court reviews *de novo* a district court's legal conclusions, including the interpretation of court rules. Casey v. Wells Fargo Bank, N.A., 128 Nev. 713, 715, 290 P.3d 265, 267 (2012). *De novo* review is appropriate for issues involving interpretation of NRCP 60(b). Ford v. Branch Banking & Tr. Co., 131 Nev. 526, 528, 353 P.3d 1200, 1202 (2015).

ARGUMENT

A. Plaintiffs Were Entitled to Rule 60(b) Relief Because the District Court Erred in Choosing to Impose Case-Terminating Sanctions Rather than Awarding a Lesser Sanction More Proportional to Any Harm Caused to the Defendants

On March 6, 2018, the district court entered its Sanctions Order, the substance of which Plaintiffs challenged in their motion for Rule 60(b) relief. The Sanctions Order dismissed Plaintiffs' claims with prejudice, and it was therefore a

case-terminating sanction. "'Because dismissal with prejudice is the most severe sanction that a court may apply . . . its use must be tempered by a *careful* exercise of judicial discretion.'" Hunter v. Gang, 123 Nev. 249, 260, 377 P.3d 448, 455-56 (Nev. Ct. App. 2016) (internal citations omitted) (emphasis in original). Further, a heightened standard of review applies to case-terminating sanctions. Young, 106 Nev. at 92-93, 787 P.2d at 780.

The district court entered a case-terminating sanction because of attorney Moquin's repeated failure to comply with discovery rules and the district court's orders. Moquin's failure to respond deprived the Plaintiffs of any opportunity to explain their position. Moreover, at the time, neither the parties nor the district court knew that these failures were caused by Moquin's psychological condition. When these facts are applied to the sanctions analysis required under Young, it becomes clear that Willard and Overland should receive relief from the Sanctions Order.

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

> The factors a court may properly consider include, but are not limited to, the degree of willfulness of the offending party, the extent to which the non-offending party would be prejudiced by a lesser sanction, the severity of the sanction of dismissal relative to the severity of the discovery abuse, whether any evidence has been irreparably lost, the feasibility and fairness of alternative, less severe sanctions, such as an order deeming facts relating to improperly withheld or destroyed evidence to be admitted by the offending party, the policy favoring

> adjudication on the merits, **whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney**, and the need to deter both the parties and future litigants from similar abuses.

Young, 106 Nev. at 92-93, 787 P.2d at 780 (emphasis added).

i. Moquin's Inability to Comply with the Discovery Rules and District Court Orders Was Not Willful – and Plaintiffs Certainly Did Not Act Willfully in Any Way

"Sanctions may only be imposed where there has been willful noncompliance with a court order . . . ." GNLV Corp. v. Serv. Control Corp., 111 Nev. 866, 869, 900 P.2d 323 (1995). The Defendants assumed the Plaintiffs were engaged in willful misconduct, and even argued that Plaintiffs engaged in a bad faith attempt to sabotage them. (See 13 A.App. 3040, 3042, 3046.)

As this court can see, these allegations turned out to be 100% untrue. The Plaintiffs did not engage in any willful misconduct. Instead, Plaintiffs' failures are solely the result of Moquin's mental illness and other serious personal problems. Any other conclusion is belied by the factual evidence submitted in support of the Rule 60(b) Motion and Reply, and by plain reason. In light of what happened in this case, it strains credulity to conclude that Moquin was acting to strategically ambush the Defendants when he could not even oppose motions or timely file a request for submission of his own motions. There was no evidence to establish that Moquin or the Plaintiffs acted willfully or strategically.

Because there were no willful violations of orders or rules in this case, the district court should have granted Willard and Overland relief under Rule 60(b).

ii. Defendants' Prejudice, if Any, Was Much More Limited Than the Defendants Contended

Moquin's failures caused some delay and minor prejudice. However, delay alone is not generally considered substantial prejudice. Lemoge v. United States, 587 F.3d 1188, 1196 (9th Cir. 2009) ("[p]rejudice requires greater harm than simply that relief would delay resolution of the case."). Further, while the Defendants contended that the parties did not make any progress with discovery or move closer to trial readiness, that claim was inaccurate and overblown. The Defendants prevailed on one motion for partial summary judgment, and, more importantly, acknowledged that they had been able to prepare defenses to Plaintiffs' accelerated-rent damages, which exceed $15,000,000. (Compare 13 A.App. 3037 with 13 A.App. 3039.) Thus, if the district court had granted the Rule 60(b) Motion, trial could have been scheduled quickly.

Indeed, the crux of the Defendants' purported prejudice relates to Moquin's claim for "diminution in value" damages and reliance upon an inadequately-disclosed expert. Thus, a more proportional sanction due to Moquin's mental illness should focus on the "diminution of value" claim. See, e.g., Young, 106 Nev. at 92, 787 P.2d at 779-80 ("fundamental notions of due process require that the

discovery sanctions for discovery abuses be just and that the sanctions relate to the claims which were at issue in the discovery order which is violated.").

iii. Dismissal Was Too Severe of a Sanction

Dismissal of Plaintiff's case with prejudice was too severe of a sanction. As the record demonstrates, the Defendants' deliberate breach of the Virginia Lease financially destroyed Willard. This case unfortunately presents the only chance he has at age 77 to recover any financial compensation and live out his remaining years with some financial stability. If the Defendants face no responsibility for their intentional and unexcused breaches, and are absolved from liability, they will ultimately receive a windfall in excess of $15,000,000, all resulting from an attorney's personal and mental problems. Conversely, Willard – through no fault of his own – will be left in financial ruin.

The Defendants' Motion for Sanctions argued that dismissal with prejudice was not too severe of a sanction because of the willfulness of the violations and the need to deter future recalcitrant conduct. (13 A.App. 3050.) Yet, as was noted above, Plaintiffs' failures were not willful. Indeed, under Nevada law, they constituted excusable neglect. Thus, the dismissal sanction was clearly too severe.

Finally, there is no question that sanctions serve no deterrent purpose when the cause of a litigant's failures was the mental illness of his attorney.[5]

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

The Nevada Supreme Court has repeatedly declared Nevada's policy that cases be adjudicated on the merits. Because of the clear excusable neglect, and the Defendants' acknowledgment of being prepared to assert defenses to Plaintiff's rent-based damages, the district court should have followed Nevada's policy and allowed the case to proceed to trial.

Without relief, the Plaintiffs will undoubtedly be unfairly penalized by Moquin's conduct caused by his mental condition. Moquin repeatedly assured Willard that the case was proceeding fine. It was only in late 2017 / early 2018 that it became clear to Willard that something was terribly wrong, and that Moquin was suffering from mental illness. Critically, Nevada Supreme Court precedent makes clear that it would be improper to impute Moquin's conduct to the Plaintiffs because of Moquin's mental illness. Passarelli v. J. Mar Dev., 102 Nev. 283, 286,

[5] For this reason, the Defendants' argument that dismissal with prejudice is necessary to deter similar abusive conduct does not apply. (See 13 A.App. 3051.)

720 P.2d 1221, 1224 (1986) (noting that it would be unfair to impute the attorney's conduct to the client and deprive the client of a "full trial on the merits.").

B. The District Court Erred By Not Considering Whether the Sanctions Unfairly Operated to Penalize the Plaintiffs for the Misconduct of Their Attorney

Under Young, 106 Nev. at 93, 787 P.2d at 780, a district court must consider "whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney." In its Rule 60(b) Order, the district court contended that the consideration of the Young factors are discretionary and simply concluded that "the Court addressed the factors it deemed appropriate." (18 A.App. 4090.) Respectfully, the district court erred for a very simple reason. The Nevada Supreme Court clearly included a list of the pertinent factors that it felt were appropriate to be considered when evaluating case-terminating sanctions. In many instances, a party's attorney may not be responsible for conduct resulting in the case-terminating sanctions. In such a case, the attorney's conduct would be irrelevant to the question of whether to assess case-terminating sanctions.

But this is not that case. Indeed, *no factor* could be more important, relevant, and applicable in the instant case regarding whether to assess case-terminating sanctions than Moquin's extreme behavior and abandonment of the

Plaintiffs. For this simple reason, the district court committed legal error. Plaintiffs are entitled to relief under Rule 60(b).

C. The District Court Erred in Failing to Find that the Plaintiffs' Prior Counsel Abandoned Them

Moquin's mental illness and abandonment of the Plaintiffs demonstrates clear excusable neglect.

Under Nevada law, where an attorney's mental illness causes procedural harm to his or her client, NRCP 60(b)(1) justifies granting relief to the client. See Passarelli, 102 Nev. at 286, 720 P.2d at 1224. Other courts are in accord. See United States v. Cirami, 563 F.2d 26, 34 (2d Cir. 1977) (where a psychological disorder led a party's attorney to neglect almost completely his clients' business while at the same time assuring them that he was attending to it, Rule 60(b) relief is appropriate); Boehner v. Heise, No. 03 CIV. 05453 (THK), 2009 WL 1360975, at *9 (S.D.N.Y. May 14, 2009) (counsel's psychological disorder justified relief under) (counsel's psychological disorder justified relief under Rule 60(b)); Cobos v. Adelphi Univ., 179 F.R.D. 381, 388 (E.D.N.Y. 1998) (where an attorney's mishandling of a movant's case stems from the attorney's mental illness, extraordinary circumstances may justify relief).

As the facts and evidence demonstrate, Moquin was suffering from a psychological disorder that caused him to abandon the case. Accordingly, the court

should find excusable neglect and grant the Plaintiffs relief from the district court's orders disposing of their claims.

The district court's Rule 60(b) Order claims that the facts of the case do not demonstrate "excusable neglect" because under Huckabay Props. v. NC Auto Parts, 130 Nev. 196, 322 P.3d 429 (2014), the only exceptions that matter are a lawyer's addictive disorder, abandonment of legal practice, or criminal conduct victimizing the client. (18 A.App. 4082.) The district court concluded that these factors did not apply to this case. This is inaccurate for several reasons. First, it is beyond argument that an "addictive disorder" constitutes a form of mental illness. Accordingly, to say that Moquin's bipolar disorder should not fall within the existing exceptions is inequitable and illogical.

Second, the record demonstrates that Moquin *unequivocally* abandoned the Plaintiffs. Quite remarkably, the district court took an extremely narrow view of abandonment, concluding that there is "no evidence of missed meetings or absences from the office" or that "he closed his legal practice." (18 A.App. 4083.) Yet, the evidence demonstrates that Moquin could not function and oppose dispositive motions, which is significantly worse than missing meetings or being absent from the office. The record also reflects that Moquin was often unresponsive to his clients' calls, texts, and emails, and when Moquin did respond, he simply made assurances that he would get work done that he never did. In

addition, Moquin's behavior from January through April shows that the abandonment continued *since he refused* to help Willard or new counsel by providing any affidavit, health report, or even the Plaintiffs' client files – again despite promising to do so. Ultimately, he told Willard he would get nothing from him. Certainly, abandonment is not limited to closing one's law practice.

Moreover, Moquin constructively closed his law practice to the Plaintiffs by taking these actions. A distinction should not be made between formally closing the doors of one's office and closing one's practice with respect to a particular client.

The district court also states that Moquin was still on active status with the California Bar. (18 A.App. 4083.) Yet, voluntarily closing one's practice and *being forced to close one's law practice* are two separate issues. As the evidence demonstrates, Moquin was recalcitrant. He destroyed Willard's life and has shown no sympathy about it whatsoever. Willard should not be punished again simply because Moquin has not voluntarily gone on disability inactive status.

The district court also relied on Passarelli to hold that the Plaintiffs cannot demonstrate excusable neglect because the record included evidence the attorney suffered from a substance abuse disorder, closed his law practice, and the attorney was placed on disability inactive status. (18 A.App. 4082-4083.) Yet, these are meaningless distinctions. In fact, Moquin's refusal to cooperate after admitting he

is bipolar, not trying to mitigate his harm, not placing himself on disability status, and not properly closing his practice shows that the facts of this case ***are egregiously worse*** than what happened in Passarelli. And, again, as a practical matter, he closed his office to the Plaintiffs and became inactive in this case.

The district court further argues that there was no abandonment because the Plaintiffs: (1) knew about the December filing deadlines; (2) communicated with Moquin about those deadlines; (3) continued to retain Moquin after learning he failed to meet those deadlines; (4) were given notice of the seriousness of the situation. (18 A.App. 4084-4086.)

The district court's analysis here misses the point. The Plaintiffs' knowledge of the December filing deadlines and communication about those deadlines simply shows the Plaintiffs' diligence in trying to prosecute the case. If anything, it demonstrates abandonment since Moquin failed to file the oppositions.

With respect to the Plaintiffs continuing to retain Moquin for a few weeks after he failed to oppose the motions, this is a hollow point. Even through Christmas, Willard was desperately trying to get Moquin to file oppositions – and Moquin was the only attorney with deep knowledge of the case. Again, Moquin failed to follow through, which also shows clear abandonment. Finally, the Defendants' claim – that the Plaintiffs were given notice by the district court of

how serious the situation was – is absolutely false. The Plaintiffs were not at the December 12, 2017 hearing where that warning was issued.

Next, the district court states that Moquin did not abandon the Plaintiffs because he: (1) appeared at status hearings; (2) participated in depositions; (3) filed motions and other papers; (4) participated in oral arguments; and (5) filed two summary judgment motions. (18 A.App. 4086.)

The district court's findings here are truly irrelevant to the abandonment issue. Abandonment can happen at any time, and simply because Moquin attended depositions, filed motions years before December 2017, and managed to file motions for summary judgment in October 2017, is not relevant to what happened from December 2017 afterwards. Indeed, Moquin did not even file replies to his summary judgment motions and never submitted them for decision, which is consistent with his failure to oppose the dispositive motions. This is abandonment. See, e.g., Maples v. Thomas, 565 U.S. 266, 282 (2012) ("'Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word.'" (internal citations omitted)); see also Boehner, 2009 WL 1360975, at *3-6 (attorney's ability to take a separate case to trial immediately prior to failing to respond to court orders - which resulted in dismissal of the case - did not preclude Rule 60(b) relief and a finding that attorney "constructively" abandoned his client).

The district court also made the inaccurate finding that the Plaintiffs knew of Moquin's psychiatric problems before the district court's January 4, 2018 Order Granting Motion to Strike and Sanctions Order and yet still allowed Moquin to represent them. (18 A.App. 4087.) This is also inaccurate. The Plaintiffs learned of Moquin's diagnosis after he was arrested on January 23, 2018. (17 A.App. 3956.)

The findings the Defendants prepared claimed that the Plaintiffs have to show diligence to inquire about their case, were aware of Moquin's non-responsiveness, and yet failed to rectify representation. (18 A.App. 4087-4088.) But this is not what the record actually shows. The record shows that Willard texted and emailed daily on the progress of the oppositions, and through Christmas, was still assured by Moquin that he would file the oppositions. Further, the Plaintiffs did locate substitute counsel and retained them *just a few weeks later*. As such, the Plaintiffs were extremely diligent.

D. The District Court Erred in Excluding Admissible Evidence Supporting Relief under NRCP 60(b)

The district court entirely ignored the most glaring evidence of Moquin's abandonment: his repeated refusal to cooperate with Plaintiffs in their attempts to reinstate the case. In addition, in its Rule 60(b) Order, the district court incorrectly held that the Plaintiffs' Rule 60(b) Motion and Reply were not supported by admissible evidence.

i The Challenge to Dr. Mar's Diagnosis

The district court ruled that Moquin's statement to Willard that Dr. Mar diagnosed Moquin with bipolar disorder is admissible hearsay with no exception under NRS 51.105(1) because the statement does not qualify as a "declaration of 'then existing state of mind, emotion, sensation, or other physical condition, such as intent, plan, motive, design, mental feeling, pain and bodily health.'" (18 A.App. 4075-4076.) Yet, Moquin's admissions that he has bipolar disorder are statements about his present condition, and are admissible.

The district court found that the statements were not "spontaneous." (18 A.App. 4076.) Yet, the treatise the district court relied upon merely states that the spontaneous quality of the declarations provides special reliability. Spontaneity is not an absolute requirement to admissibility under the state of mind exception, but is a factor to assess in weighing admissibility. Sec. Alarm Fin. Enterprises, LP v. Alarm Prot. Tech., LLC, 743 F. App'x 786, 788 (9th Cir. 2018). Moreover, Moquin's statement to Willard is evidence of Moquin's state of mind at the time of the conversation. Wagner v. Cty. of Maricopa, 747 F.3d 1048, 1053 (9th Cir. 2013). When Moquin admitted to Willard that he was bipolar, that is a spontaneous statement about his present condition at the very time he made the statement to Willard. It is also a statement against Moquin's interest as it could

have subjected him to possible civil liability or bar discipline. The statement was therefore admissible under NRS 51.345.

Finally, the special circumstances under which this statement was made offer assurances of accuracy that would not likely to have been enhanced by calling Moquin as a witness (and Moquin was unavailable to be called as a witness). Therefore, the district court should have concluded that this statement fell within the general exceptions of NRS 51.075(1) and NRS 51.315(1).

As such, the district court erred in its finding.[6]

ii Willard Can Testify as to Moquin's Mental Condition as a Lay Witness

The district court concluded that Willard cannot testify as a lay witness regarding Moquin's mental condition. (18 A.App. 4076.) The district court is simply wrong here. As one court carefully explained:

> Lay witnesses may testify upon observed symptoms of mental disease, because mental illness is characterized by departures from normal conduct. Normal conduct and abnormal conduct are matters of common knowledge, and so lay persons may conclude from observation that certain observed conduct is abnormal. Such witnesses may testify only upon the basis of facts known to them. They may testify as to their own observations and may then express an opinion based upon those observations. *Of course the testimony of a lay*

[6] The district court also made the generalized statement that the Willard Declaration and Willard Reply Declaration contain hearsay within hearsay. (18 A.App. 4076.) However, it is unclear which specific statements the court is referring to. Moreover, hearsay within hearsay is admissible if each part of the combined statements fits within an exception to the hearsay rule. NRS 51.067.

> *witness with training in this or related fields may have more value than the testimony of a witness with no such training.*

Carter v. U.S., 252 F.2d 608, 618 (D.C. Cir. 1957) (emphasis supplied).

Thus, lay witness testimony is actually very admissible, and indeed helpful, when it concerns mental illness. Further, Willard has a degree in psychology, which provides even more value – as the Carter court concluded. (Ex. 4 to Opp. at 13:19-20.)

iii The District Court's Ruling on Exhibits 6, 7 and 8 to the Rule 60(b) Motion Was Erroneous

The district court concluded that Exhibits 6, 7, and 8 to the Rule 60(b) Motion are not authentic and constitute inadmissible hearsay. This was error.

Exhibit 6 is an Emergency Protective Order entered against Moquin. (16 A.App. 3751.) Exhibit 7 is a Pre Booking Information Sheet regarding Moquin and his arrest. (16 A.App. 3754.) Exhibit 8 is a Request for Domestic Violence Restraining Order that Moquin's wife filed against him. (16 A.App. 3757-3769.)

All three exhibits are authentic. That is apparent from Willard's declaration, the documents' appearance, and their surrounding characteristics. See, e.g., NRS 52.015(1); NRS 52.025; NRS 52.055. Moreover, if the Defendants truly doubted the documents' authenticity, then the Defendants should have provided some

rebuttal "evidence or other showing sufficient to support a contrary finding" in their opposition. NRS 52.015(3). They did not do so.

Further, Defendants did not challenge that critical fact in their Opposition, other than to provide their own uncertified document stating that Moquin's bar license is still active. But Moquin's bar license is not the issue. Moreover, the best evidence of Moquin's failure to properly prosecute this case is capable of judicial notice: Moquin failed to file critical documents with the court. Notably, the district court refused to take judicial notice of these documents. (18 A.App. 4079.) Yet, the district court was willing to take judicial notice of Moquin's California Bar status from the California Bar website. (18 A.App. 4083.) It is unclear why genuinely-uncontested court documents are inauthentic and not susceptible of judicial notice while an attorney's bar status from a website is. This is an unfair double-standard, and the district court erred in finding Exhibits 6, 7, and 8 inadmissible.

The exhibits also do not constitute hearsay. Exhibits 6 and 7 were not offered for the truth of the facts stated in them, but rather as examples of the personal turmoil that Moquin was facing. Therefore, Exhibits 6 and 7 do not fall within the hearsay rule.

Exhibit 8 to the Rule 60(b) Motion presents a more difficult question. However, even if Mrs. Moquin's statements about Moquin's mental health would

constitute hearsay, 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 Moquin, do not constitute hearsay. Therefore, the district court should have admitted Exhibit 8 – either in full or for limited non-hearsay purposes, such as showing that there was turmoil in Moquin's home life.

As the factually-uncontested evidence shows, Moquin was suffering from a psychological disorder that caused him to abandon his clients. Accordingly, the district court should have found excusable neglect.

iv The Texts and Emails offered by Plaintiffs and Authored by Moquin and O'Mara are Admissible and Relevant

The district court concluded that Exhibits 5, 6, 7, 8, 9, and 10 to the Reply were not relevant because they occurred after the district court issued its Order Granting Motion to Strike, Order Granting Sanctions, and Sanctions Order. (18 A.App. 4080.) This was clear error.

Exhibit 5 is a copy of the receipt for Willard's payment of Moquin's mental health treatment with Dr. Mar. (17 A.App. 3977.) Exhibit 6 is email correspondence that occurred from February 5 through March 21, 2018, between Moquin and Willard's new attorneys. 17 A.App. 3979-3982.) Exhibit 7 contains text messages between Willard and Moquin dated from March 30 through April 2, 201. (17 A.App. 3984-3989.) Exhibit 8 is email correspondence dated April 2

through April 13, 2018, between Willard's new attorneys and Moquin. (17 A.App. 3991-3994.) Exhibit 9 is a letter from one of Willard's new attorneys to Moquin demanding the clients' files. (17 A.App. 3996-3997.) Finally, Exhibit 10 is email correspondence dated May 23 through May 28, 2018, between Moquin and Willard. (17 A.App. 3999-4000.)

The events that took place from January 2018 afterwards support the Plaintiffs' position that Moquin abandoned them and that he was suffering from mental illness. The communications demonstrate that Plaintiffs' attorney was acting highly abnormally. Among other repulsive behavior, he began to spew vulgarities at his clients and new counsel, and failed to provide files, supportive declarations, and a mental health letter. These documents are indisputably relevant to the issue of abandonment and excusable neglect.

Finally, the district court concluded that any of the emails or text messages from O'Mara or Moquin contained in Exhibits 3, 4, 7, 8, and 10 are inadmissible hearsay. (18 A.App. 4080.) Yet, these exhibits do not actually constitute hearsay. For instance, statements that 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 Plaintiffs' diligence and the effect of Moquin's statements on O'Mara and the Plaintiffs. Similarly, Moquin's abusive and combative statements toward Willard are also not offered for the truth of the underlying statements, but

as evidence of Moquin's abnormal conduct and mental health. Therefore, they do not constitute hearsay under NRS 51.035.

Ideally, the Plaintiffs would have provided a formal diagnosis from a psychiatrist or an affidavit from Moquin confirming that he suffers from bipolar disorder. Yet, the Plaintiffs had no means to compel discovery from Moquin in the context of this case. Moreover, as other courts have recognized, an affidavit from a client can be used to confirm that mental health problems justify a motion for relief based upon excusable neglect. See, e.g., Schumacher v. Schroeder, 414 N.W.2d 319 (Wis. Ct. App. 1987) (awarding relief from a judgment based in part upon an affidavit confirming that although the plaintiff and his spouse were aware of the attorney's "mental health problems, they had no idea that his health problems were seriously interfering with his ability to handle this case").

Willard's declarations alone, which are based on his personal knowledge and his own experiences with Moquin, substantiate the Plaintiffs' inadvertence, surprise, and excusable neglect:

> 67. I have learned that Mr. Moquin was apparently struggling with a constant marital conflict that greatly interfered with his work.
> 68. This culminated in Mr. Moquin suffering what I can only describe as a total mental breakdown.
> 69. After Mr. Moquin suffered this mental breakdown, I recommended that he visit Dr. Douglas Mar, who is well-respected psychiatrist in Campbell, California.
> 70. Mr. Moquin later explained to me that Dr. Mar had diagnosed him with bipolar disorder and that he needed money to pay Dr. Mar for treatment.

71. After obtaining a loan from a friend, I arranged to pay Dr. Mar for his services, but I do not know if Mr. Moquin has continued with any course of treatment.

. . .

76. I now see that Mr. Moquin was suffering from many of these symptoms throughout his work on my case.

77. There have also been periods when Mr. Moquin was unavailable.

78. I have learned that Mr. Moquin has been going through a bitter divorce with his wife and that at one point he was even arrested in conjunction with those proceedings.

. . .

80. Only now do I realize that while Mr. Moquin was assuring me that he was working on this case, he was missing deadlines and failing to properly pursue the case. At the time that they were occurring, I did not realize the extent of these circumstances, and they were completely out of our control.

. . .

83. For my part, I was making ongoing efforts on an almost daily basis to push the case forward, provide Mr. Moquin with what he needed, and to pursue our case against the Defendants for breach of lease agreements that were backed up with a personal guarantee.

. . .

87. Having now received Mr. Moquin's diagnosis and learning more about his personal problems, I can now see how Moquin's issues affected our case.

88. I can now see some of the apparent symptoms manifested in our communications with Mr. Moquin, including continually giving us anticipated dates by which he would finish projects and later having to change them, and alternating between cycles of irrepressible optimism and ideas (mania) and then going days when he would not respond at all (depression).

(16 A.App. 3699-3701.)

14. I now know that he was struggling with mental health and dealing with other personal crises in his life.

15. I have learned that Mr. Moquin and his wife, Natasha, were in a state of nearly constant marital conflict that greatly interfered with his work.
16. This culminated in Mr. Moquin suffering what I can only describe as a total mental breakdown in December 2017.
. . .
34. After having worked with him for years, and having met his wife and his family, I had terrible sympathy for all of them and wanted to help if I could. At the same time, it was becoming clear to me that Mr. Moquin's personal problems had interfered with his duties to me and the other plaintiffs.
35. After Mr. Moquin suffered this mental breakdown, I recommended that he visit Dr. Douglas Mar, who is well-respected psychiatrist in Campbell, California.
36. At this time, I also started looking for other attorneys who might be able to help.
37. In January 2018, Mr. Moquin was also arrested related to charges of domestic violence.
38. Around that same time, Mr. Moquin explained to me that Dr. Mar had diagnosed him with bipolar disorder and that he needed money to pay Dr. Mar for treatment.
39. After obtaining a loan from a friend, I arranged to pay Dr. Mar for his services, but I do not know if Mr. Moquin has continued with any course of treatment.
40. On March 13, 2018, I paid Dr. Mar's office $470 to pay for Mr. Moquin's treatment so that Mr. Moquin could get well and help us fix the case.
. . .
42. Mr. Moquin was also supposed to obtain a letter from Dr. Mar evidencing his diagnosis and treatment.
43. Despite paying for Mr. Moquin's treatment, and despite numerous requests from me and my new attorneys, Mr. Moquin still failed to provide us with that letter from Dr. Mar.
. . .
46. Mr. Williamson and I both repeatedly asked Mr. Moquin to provide a summary of the case, documents regarding his mental illness, and his case files.
47. From January through March, 2018, Mr. Moquin repeatedly assured me that he would provide me with all of the information that my new attorneys needed to reinstate the case.

> 48. On March 30, Mr. Moquin assured me that he will "get everything out the door before I leave today." In response, I asked if he had obtained the requested documentation from Dr. Mar, and Mr. Moquin told me that he was playing phone tag with a person in Dr. Mar's office. I then followed up to ask if he had advised Mr. Williamson of the status, and he assured me that he would.
> 49. I then sent text messages on March 31, April 1, and April 2 urging Mr. Moquin to provide Mr. Williamson with everything he needed to try and reinstate this case.
> 50. Mr. Moquin then responded with an alarming rant, which included the following: "I'm not sure what part of '[expletive] off' you don't understand, but it is in your best interest to stop communicating with me at this point until I contact you."
> . . .
> 52. Mr. Moquin's abusive and threatening language in his text dated April 2, 2018, is just one example of the abusive treatment I received from Mr. Moquin.
> . . .
> 66. Throughout my experience with him, Mr. Moquin was always so positive about our case and confident that everything would work out. Over the last six months, however, Mr. Moquin's emotional swings have become terrifying and impossible to predict.

(17 A.App. 3954-3959.)

> 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); see also Boehner, 2009 WL 1360975, at *5 ("when an 'able attorney, which [f]ormer [c]ounsel appears to have been, suddenly ignores [c]ourt orders and is unable to be

reached despite diligent attempts, it does not require medical expertise to know that something is obviously wrong with counsel.'" (internal citations omitted)).

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. In this case, the Plaintiffs were effectively deprived of legal representation.

At oral argument, Defendants argued that the district court should not look at Moquin's conduct "in a vacuum," and should also consider the actions or inactions of Willard and his local counsel, David O'Mara. While this may be true, the record demonstrates that Willard was still effectually and unknowingly deprived of legal representation. First, Willard's declarations show that he diligently attempted to ensure that Moquin would oppose the critical motions that ultimately ended the Plaintiffs' case. And second, while O'Mara owed various duties of advocacy under the Supreme Court Rules, the record reflects that he too was led to believe that Moquin would respond to the Defendants' motions and was effectively unaware that Moquin had abandoned the case. Again, Moquin expressly promised that "all three oppositions will be filed today. (17 A.App. 3964.) O'Mara and Willard justifiably relied on that promise. Moquin's false promise and failure to file those very oppositions is what led to the dismissal that is the subject of this appeal. See,

e.g., Coburn Optical Indus., Inc. v. Cilco, Inc., 610 F. Supp. 656, 660 (M.D.N.C. 1985) (recognizing "that local counsel must be able to rely to some extent on the representations of reputable out of state attorneys, especially when local counsel has no independent knowledge concerning the representations."); see also Scott v. Dalkon Shield Claimants' Tr., No. CIV.A. 85-1718, 1994 WL 321212, at *2 (E.D. La. June 23, 1994) (entering sanctions only against out-of-state counsel who mislead plaintiffs and their local counsel).

Based on the evidence and the other materials in the record, it is clear that the Plaintiffs promptly moved for relief, had no intent to delay these proceedings, lacked full knowledge of the procedural requirements at issue, and have been trying to proceed in good faith. Thus, the district court should have reinstated the case, especially in light of "the state's sound basic policy of resolving cases on their merits whenever possible." Stoecklein v. Johnson Elec., 109 Nev. 268, 274, 849 P.2d 305, 309 (1993).

Rule 60(b) is a remedial provision that district courts must construe liberally. La-Tex Pshp. v. Deters, 111 Nev. 471, 475-76, 893 P.2d 361, 365 (1995). "The term 'discretion' contemplates a process of reasoning which depends on facts that are in the record or are reasonably derived by inference from the record, and yields a conclusion based on logic and founded on proper legal standards." January v.

Barnes, 621 So. 2d 915, 927 (Miss. 1992) (quoting Shuput v. Lauer, 325 N.W.2d 321, 328 (Wis. 1982)); Kelly v. State, 694 P.2d 126, 133 (Wyo. 1985).

E. The District Court Erred in Otherwise Denying Appellants' Motion for Relief under NRCP 60(b)

The district court failed to consider the excusable neglect factors. The Nevada Supreme Court established several factors to consider in determining whether relief should be granted based upon excusable neglect, including: (1) a prompt motion for relief, (2) absence of an intent to delay; (3) lack of knowledge of the procedural requirements, and (4) good faith. Yochum v. Davis, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982). Moreover, Rule 60(b) is guided by the state's "policy of resolving cases on their merits whenever possible." Stoecklein, 109 Nev. at 274, 849 P.2d at 309.

The Plaintiffs' Rule 60(b) Motion established all four Yochum factors, and also explained why their claims are meritorious. Thus, they met their burden to show excusable neglect. By contrast, the Defendants' opposition did not even mention the Yochum factors or dispute the Plaintiffs' meritorious claims. Since those elements were undisputed, the district court should have granted the Rule 60(b) Motion.

Finally, in the Rule 60(b) Order, the district court very briefly attempted to claim that Yochum does not apply because it involves relief from a default

judgment and not an order. (18 A.App. 4091.) This was erroneous. Rule 60(b) and excusable neglect apply to both judgments and orders. Simply because Yochum references "judgment" instead of "order" does not affect the excusable neglect factors. They remain the same. In addition, in the Rule 60(b) Order, the district court cites to Polivka v. Kuller, 128 Nev. 926, 381 P.3d 651 (2012), *which sets forth the very same standard for excusable neglect*. Thus, the district court committed clear error.

F. O'Mara's Role as Local Counsel Does Not Prohibit a Finding of Excusable Neglect

The district court concluded that because O'Mara was required to actively participate in the case, Willard cannot demonstrate excusable neglect. (18 A.App. 4088.) Yet, there is no statute or case that suggests that local counsel's reliance on lead counsel's promises to handle critical oppositions prohibits a finding of excusable neglect. Indeed, Defendants' opposition highlights the fact that O'Mara participated in the case and was similarly misled by Moquin. (See 17 A.App. 3816.) That fact presents a sharp contrast to the facts in Huckabay Props. v. NC Auto Parts, 130 Nev. 196, 322 P.3d 429 (2014), on which the Defendants relied. O'Mara's notice of withdrawal corroborates how Moquin's situation affected the case. (16 A.App. 3654 (O'Mara "begged" Moquin to oppose the dispositive motions and Moquin assured him he would).)

Further, Plaintiffs were still effectually and unknowingly deprived of legal representation. First, Willard's declarations show that he diligently attempted to ensure that Moquin would oppose the critical motions that ultimately ended the Plaintiffs' case. And second, while O'Mara owed various duties of advocacy under the Supreme Court Rules, the record reflects that he too was led to believe that Moquin would respond to the Defendants' motions and was effectively unaware that Moquin's had abandoned the case. See Maples, 565 U.S. at 287 (litigant could not be held constructively liable for misconduct of lead attorney, despite presence of local counsel, where local counsel had no substantive involvement in the case). Accordingly, the district court erred in denying Plaintiffs' Rule 60(b) Motion.

CONCLUSION

This is not a typical case-terminating sanctions case. The record reflects that the Plaintiffs were not at all culpable. Indeed, the record plainly demonstrates that Moquin's mental health was the source of the problems that occurred in this case, and that he fully abandoned the Plaintiffs at the eleventh hour. Then, after the unspeakable damage was done, he continued his abandonment by refusing to do anything to help the Plaintiffs salvage what was left of their case. This case cries out for reversal of the order denying Rule 60(b) relief.

DATED: August 26, 2019

/s/ Robert L. Eisenberg
Robert L. Eisenberg (0950)

/s/ Richard D. Williamson
Richard D. Williamson (9932)
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ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in 14-point, Times New Roman type style.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and contains 12,675 words.

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

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: August 26, 2019

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CERTIFICATE OF SERVICE

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

I further certify that on the 26th day of August, 2019, I electronically filed the foregoing **APPELLANTS' OPENING BRIEF** with the Clerk of the Court by using the electronic filing system, which served the following parties electronically:

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EXHIBIT 3

EXHIBIT 3

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

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

Respondents.

No. 77780
District Court Case No. CV14-01712

APPEAL FROM ORDER DENYING NRCP 60(B) MOTION
SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE
HONORABLE LYNNE K. SIMONS

APPELLANTS' ANSWER TO PETITION FOR REHEARING

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INTRODUCTION

The petition for rehearing essentially argues one point: the panel overlooked or misapprehended the district court's analysis of the factors in *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982). The petition is wrong. The panel's opinion correctly summarized the record, and rehearing should be denied.

The District Court Did Not Address the Yochum Factors

The petition argues that the district court's Rule 60(b) Order (the Order) specifically addressed each of the four factors set forth in *Yochum*, and that the panel therefore erred by overlooking and misapprehending the district court's findings. (Pet. at 5.) The argument is incorrect and should be rejected.

First, the Order, in the **one** paragraph that references *Yochum*, not only fails to address the *Yochum* factors, it **expressly disclaims that *Yochum* applies –** thus contradicting the petition's argument. This court's opinion correctly provided the following quotation from the district court Order:

> Plaintiffs assert this Court must address the additional factors set forth in *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982). *Yochum* involves relief from a default judgment **and not an order**, **as here**, where judgment has not been entered. *Yochum* does not preclude denial of the motion.

(Op. at 4 (bold emphasis supplied).) In light of the district court's clear rejection of any application of *Yochum*, it is impossible to conclude that the panel overlooked or misapprehended the district court's failure to apply the *Yochum* factors.

Moreover, the Order: (1) does not reference the *Yochum* factors in the Legal Standard section; or (2) set forth, describe, or even in a cursory fashion analyze **any** of the *Yochum* factors. Thus, the Order that respondents drafted, and that the district court adopted, simply did not apply (or even consider) the *Yochum* factors, and the panel did **not** misapprehend anything.

In fact, the Order focused only on the following issues: (1) the evidence the Willard appellants offered; (2) excusable neglect under *Huckabay Props. v. NC Auto Parts*, 130 Nev. 196, 322 P.3d 429 (2014) and *Passarelli v. J. Mar Dev.*, 102 Nev. 283, 286, 720 P.2d 1221, 1224 (1986); (3) excusable neglect based on the (objectively false) claim that Willard was aware of Moquin's bipolar condition **before** the sanctions order; (4) O'Mara's role as local counsel; and (5) whether the sanctions order needed to consider whether Moquin's misconduct unfairly operated to penalize Willard. Noticeably absent are any explicit, detailed findings on the four *Yochum* factors. Instead, the Order disavowed the applicability of *Yochum* and its factors.

Despite the district court's disavowal of the *Yochum* factors, the petition only now – after an adverse ruling on appeal – attempts to retroactively graft a *Yochum* factor analysis into the Order.

Yet, the Order shows that it contains no *Yochum* analysis. The petition's attempt to reconstruct the Order is belied by the context from which each statement

that respondents rely upon was pulled. Stated differently, and as discussed in more detail below, the respondents cite certain paragraphs to claim that the Order addressed each *Yochum* factor, but the paragraphs they rely upon do **not** address *Yochum*. They support entirely different legal propositions and conclusions.

In sum, because (a) the respondents failed to argue the *Yochum* factors in the district court, and (b) the district court did not address each *Yochum* factor in its Order, respondents' petition does not support rehearing and should be denied.[1]

The Order Was Not Supported by Substantial Evidence

Unfortunately, the petition is a continuation of a pattern of overreaching advocacy. Due to Moquin's bipolar disorder, the respondents were able to take advantage of unopposed motions and proposed orders to advance hyperbolic narratives and inaccurate conclusions. But the truth came to light through the Moquin disciplinary file and guilty pleas (which simply validated and corroborated the admissible evidence Willard advanced in support of the Rule 60(b) Motion).

In any event, the petition fails to show that each of the four *Yochum* factors was explicitly addressed (or even considered) by the district court, as required by

[1] This court's Opinion also emphasized that a district court abuses its discretion when it disregards established legal principles, and that Rule 60(b) operates as a remedial rule that gives due consideration to the state's preference to adjudicate cases on the merits. (Opinion at 5; *accord id.* at 6 (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.").) Respondents' petition makes no effort to address this important point.

the panel's opinion, and the petition should therefore be summarily denied. Due to Mr. Willard's age, a prompt remand is essential if he is to receive any redress for the respondents' strategic breach of the lease and refusal to honor the personal guaranty (which damages approximate $15,000,000).

THERE ARE REMAINING ARGUMENTS THAT WILL NEED TO BE ADDRESSED

Even if the panel were to conclude that it somehow misapprehended the facts, Willard raised additional arguments that would still need to be decided by the panel before this appeal can be resolved. The opinion noted:

> Because the district court's failure to address the *Yochum* factors requires remand for further proceedings, we decline to consider Willard's additional arguments challenging the merits of the district court's excusable neglect determination.

(Opinion at 9, n.7.)

Willard's arguments in Appellants' Opening Brief ("AOB"), that the panel would still need to consider on rehearing, include:

(1) Whether Moquin abandoned Willard, for the numerous reasons discussed at AOB 34-39.

(2) Whether Moquin abandoned Willard under *Passarelli* (AOB 34) in light of the State Bar's findings and conclusions, which recite clear and convincing evidence of Moquin's multiple and repeated violations of ethical requirements that led to dismissal of the case (and which

this court affirmed in the disciplinary appeal, No. 78946, with three justices even dissenting because the discipline imposed against Moquin by the State Bar was insufficient).

(3) Whether the district court erred in excluding admissible evidence supporting relief under Rule 60(b). (AOB 39-44.)

(4) Whether the district court erred in failing to assess all the pertinent factors set forth in *Young v. Johnny Ribeiro Bld.*, 106 Nev. 88, 92-93, 787 P.2d 777 (1990).

(5) Whether the district court erred by imposing case-terminating sanctions rather than lesser sanctions.

Because the panel found other reversible error, the panel did not determine these issues. Accordingly, resolution of the petition in favor of the respondents will not be dispositive, and these remaining contentions would still need to be resolved.

ARGUMENTS

A. The Panel Did Not Overlook or Misapprehend Material Facts

1. The *Yochum* Factors Were Never Addressed in the Order

In the Order the respondents prepared, *Yochum* is mentioned in one short paragraph, which determines *Yochum* is inapplicable. (18 A.App. 4091.) The Order does not expressly analyze each *Yochum* factor or explain how Willard failed to meet the burden under *Yochum* for Rule 60(b) relief.

The panel's opinion made abundantly clear that this is insufficient, where it stated: "[w]e recognize that our dispositions may have implied that the district court need only demonstrate that it considered the *Yochum* factors – **as opposed to issuing factual findings for each factor** . . . . However, we now clarify that we require district courts to issue **explicit factual findings** in the first instance **on all four *Yochum* factors.**" (Opinion at 7, n.6 (emphasis supplied); *accord id.* at 8 ("district courts must issue **explicit and detailed findings**, preferably in writing, **with respect to the four *Yochum* factors**" (emphasis supplied)).)

The Order does not make explicit factual findings as to each of the four *Yochum* factors. It does not even reference the *Yochum* factors. Instead, it summarily rejected application of *Yochum*. Indeed, respondents' opposition to Willard's Rule 60(b) Motion merely recited the *Yochum* factors, but utterly failed to address Willard's arguments regarding application of those factors. (17 A.App. 3805-06.) Thus, between respondents' opposition and the Order itself, it is clear that the Order did not explicitly address the four factors, as the law requires.

Accordingly, the panel did not misapprehend or overlook anything in the Order, and the panel's opinion must stand. Respondents have failed to demonstrate that rehearing is even remotely warranted.

Indeed, the mere structure of the Order further evidences that the *Yochum* factors were not addressed. As noted above, the Order focuses exclusively on

other legal issues such as evidentiary support, the sanctions factors under *Young*, and abandonment under *Huckabay* and *Passarelli*.

Further, the first time respondents attempted to argue that the *Yochum* factors were adequately addressed was in **a single, short footnote** on appeal. That conclusory footnote states:

> Accordingly, Willard's argument that the District Court erred in purportedly failing to consider the *Yochum v. Davis*, 653 P.2d 1215 (1982), factors is misplaced, as Willard could not even satisfy his threshold evidentiary burden. AOB 52-53; *see also, e.g.*, 16 AA 3686 (arguing that "Mr. Moquin's mental illness demonstrates that the Willard Plaintiffs have at all times acted in good faith and without the intent to delay the proceedings."). Further, the District Court did consider factors such as Willard's awareness of key procedural rules and deadlines, and his lack of diligence in promptly informing the Court of any issues. 18 AA 4085-88, 4064.

(RAB at 12, n.7.)

If the respondents truly believed the Order satisfied requirements for a thorough analysis of *Yochum* factors, respondents should have made their arguments in a non-conclusory argument in the answering brief – not for the first time on rehearing. *See* NRAP 40(c)(1) ("no point may be raised for the first time on rehearing").[2]

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[2] That the respondents failed to fully argue this point in their answering brief is not a basis for rehearing. "A petition for rehearing may not be utilized as a vehicle to reargue matters considered and decided in the court's initial opinion." *Matter of Estate of Herrmann*, 100 Nev. 149, 151, 679 P.2d 246, 247 (1984); *accord City of N. Las Vegas v. 5th & Centennial*, 130 Nev. 619, 622, 331 P.3d 896, 898 (2014).

Finally, respondents attempt to discredit Willard's AOB arguments with respect to the *Yochum* factors by claiming they were conclusory and "without analysis." (Pet. at 5.) This argument is ironic since the respondents failed to oppose Willard's Rule 60(b) Motion's arguments as to the *Yochum* factors. (*Compare* 16 A. App. 3684, 3686 *with* 17 A. App. 3799-3819.) Thus, in the AOB, Willard demonstrated that the Rule 60(b) Motion established all four of the *Yochum* factors; respondents' opposition simply ignored that argument in the district court proceedings.[3]

2. The District Court Did Not Consider Whether Willard Promptly Applied to Remove the Judgment

On page six of their petition, the respondents begin to reference for the first time the actual *Yochum* factors. (Pet. at 6 ("Under the first *Yochum* factor, the movant must establish is [sic] whether there was a 'prompt application to remove the judgment.'").) Respondents claim this factor was, despite never being mentioned in the Order, "expressly addressed." (*Id.*) For support, the petition cites six findings – **none of which deal with the promptness of Willard's Rule 60(b) Motion**. (*Id.* at 6-7.)

Respondents argued *Yochum* in one sentence of a footnote in their answering brief. Now they seek to reargue it expansively. Reargument is improper, as is raising new arguments for the first time on rehearing.

[3] It is also ironic that the petition attempts to make much of the fact that Willard did not address the *Yochum* factors in the ARB, when the RAB simply made a conclusory argument on the point in a short footnote.

Indeed, one finding states that neither Willard nor his counsel provided the district court with a status update regarding Moquin's failure to oppose the motion for sanctions. (*Id.*) Another finding repeats the same claim that Willard did not apprise the Court of any issues until they filed their Rule 60(b) Motion. (*Id.*) The third finding states that Willard knew timely oppositions were not filed. (*Id.*) The fourth states that Willard did not terminate Moquin after he failed to oppose the motion for sanctions. (*Id.*) The fifth notes that O'Mara did not report any issues until his notice of withdrawal from the case. (Pet. at 7.) And the sixth states that Willard never filed an opposition to the motion for sanctions by the due date. (*Id.*)

None of these findings have anything to do with the *Yochum* factor of "promptly applying to remove a judgment" – which had not even been entered at the time of the events alleged in these allegations. Instead, these allegations show respondents' after-the-fact attempts to insert a *Yochum* argument into the Order.

Problematically for the respondents, the facts show Willard's tremendous diligence. The district court entered the sanctions order in January. The record reflects Willard's remarkable efforts to get Moquin to oppose motions before the judgment was entered, as does O'Mara's Notice of Withdrawal of Local Counsel wherein he stated he "begged" Moquin to file timely oppositions. (16 A.App. 3654:23-26.) This diligence **preceded** entry of the judgment. **After the judgment**, the record reflects Willard and his new counsel's extraordinary efforts

– in the face of Moquin's false promises, obstruction, and expletive-laden threats – to promptly file a Rule 60(b) Motion. (16 A.App. 3675-92.) None of the supposed findings that respondents rely on set forth express findings on the first *Yochum* factor, as they do not have anything to do with Willard's promptness in seeking relief from the judgment.

Indeed, the findings respondents rely on do not deal with *Yochum*; they are part of the Order's attempt to show that there was no attorney abandonment under *Passarelli*. (*See* 18 A.App. 4081-86, ¶¶ 39-63.) As such, the court must deny respondents' petition.

3. The District Court Did Not Consider Whether There Was an Absence of Intent to Delay the Proceedings

The petition next argues that the panel misunderstood the Order's express consideration of the second *Yochum* factor: namely, that the movant must establish "the absence of an intent to delay the proceedings." (Pet. at 8.) Again, respondents' argument here cuts against them because they can cite to no portion in the Order that addresses "intent" to delay the proceedings – thus establishing that *Yochum* was never under consideration.

Respondents state that Willard was informed by O'Mara prior to the dismissal that Moquin was unresponsive. (Pet. at 8.) Yet, there are two problems here. First, this finding was made to dispute Willard's ability to rely upon Moquin's mental illness to establish excusable neglect. It has nothing to do with

an intent to delay proceedings. Second, during this time in December of 2017, the record reflects that: (1) both Willard and O'Mara relentlessly attempted to contact Moquin to ensure he filed oppositions to the dispositive motions by the requisite deadlines; and (2) that Moquin then **assured Willard and O'Mara that he would file the oppositions.** (17 A.App. 3959-65; 17 A.App. 3954:17-20; s*ee also In re Discipline of Brian Moquin, Esq.*, Docket No. 78946 (Conditional Guilty Plea in Exchange for a Stated Form of Discipline, Apr. 16, 2019, available at Moquin ROA 53)[4].) The problem, as demonstrated by the admissible evidence presented in the Rule 60(b) Motion and reply, as well as the disciplinary record, is that the psychologically-troubled Moquin misled both Willard and O'Mara into believing he was going to file timely oppositions. (17 A.App. 3963-3965; *see, e.g.*, Moquin ROA 53-57.) Thus, even if the Order addressed this second *Yochum* factor, which it did not, the evidence reflects that there **was no intent** to delay the proceedings. In fact, the evidence shows the opposite. Willard was doing everything in his power to <u>not</u> delay the proceedings.[5]

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[4] In its opinion, this court noted Moquin's disciplinary case. *See Willard v. Berry-Hinckley Indus.*, 136 Nev. Adv. Op. 53 at 3, 469 P.3d 176, 178 n.3 (2020).

[5] Larry Willard is nearly 80 years old. As an elderly plaintiff seeking millions of dollars in damages due to respondents' abandonment of the commercial lease on Willard's property, he had absolutely no reason or incentive to delay the case. It is absurd to suggest that he would have intentionally delayed filing his Rule 60(b) motion or anything else in this case, and the evidence certainly did not establish such an intent. Respondents' zealous arguments on this point are just not credible.

Respondents next argue that the Order's reference to extensions to oppose the various motions proves the Court made a finding that Willard intended to delay the proceedings. (Pet. at 8.) Yet, the request of an extension does not show an intention to delay – nor does the Order find that the extensions were requested with the intent to delay the proceedings for purposes of *Yochum*. The truth, again, quite clearly, was that Moquin had abandoned Willard due to Moquin's mental illness, was misleading Willard and O'Mara, and could not function as an attorney. His bipolar condition **necessitated requests for extensions**, and those desperate requests in no way evidence an intent to delay the proceedings; they evidence a troubled attorney who could not function normally. Accordingly, not only did the Order not address (or even try to address) the second *Yochum* factor, the petition's argument that the order did address it falls flat.

Accordingly, the panel did not overlook or misapprehend the Order, and the petition must be denied based on this second *Yochum* factor as well.

4. The District Court Did Not Consider Whether Willard Lacked Knowledge of Procedural Requirements

The respondents next contend that the Order made findings under *Yochum* that Willard, an elderly non-lawyer, had knowledge of the procedural requirements. (Pet. at 9-10.) A threshold problem with respondents' argument here, which is consistent with **all** of their attempts to import a *Yochum* factor analysis into the Order, is context.

Each of the findings in the Order that the respondents claim establish the third *Yochum* factor exist in that Order to try to establish that Willard could not rely on Moquin's bipolar disorder for purposes of Rule 60(b) – not to establish the third *Yochum* factor.

In addition, the findings are extensions of respondents' flawed argument that Willard could not establish abandonment or rely on *Passarelli*. (*See* 18 A. App. 4082-84.) Thus, respondents' argument that the Order addressed the third *Yochum* factor is specious.

In addition, respondents misguidedly focus their attention on the events that took place primarily in December 2017 and not the points in time prior where Moquin admitted in his guilty plea that Willard was unaware of the deadlines and other matters. (Moquin ROA 53.) As such, even if the Order was addressing the third *Yochum* factor, which it clearly was not, it would be deficient since Willard's purported knowledge of the procedural requirements and deadlines covers one month of the entire case.[6] Willard was certainly active in the case in December 2017 after he realized his life was about to be destroyed due to Moquin's failures.

Finally, respondents overzealously claim that the:

> "District Court expressly found in its order denying the Motion that it had previously ***admonished Willard***, "stating 'you need to know going into these

[6] Indeed, Moquin admitted that his communications to Willard in the years leading to December 2017 were deficient. (Moquin ROA 56.)

> oppositions, that I'm very seriously considering granting all of it . . .' Willard did not file an opposition or response to the Motion to Strike or the Motion for Sanctions, which sought dismissal of Willard's claims due to his repeated and willful violations of the NRCP and the District Court's Orders. This is precisely the type of conduct that this Court has found to militate against a finding that the movant lacked knowledge of procedural requirements."

(Pet. at 11 (emphasis added).)

Yet, the actual transcript of the proceedings – which is cited in the Order – shows that the district court **did not admonish Willard**, it admonished **Moquin**. (19 A.App. 4320-22.) The district court did not even address Willard at the hearing. (*Id.* at 4305-4330.) Despite this fact, the respondents – knowing that the almost 80-year old Willard was verbally abused, threatened, and taken advantage of by Moquin (and frequently berated with profanities) – claim that **Willard**, not Moquin, was admonished by the court, ignored deadlines, and repeatedly and willfully violated the NRCP and the district court's orders. The contention is false, meritless, and should be rejected.

5. The Court Did Not Address Good Faith in the Context of *Yochum*

The respondents again claim that the district court "expressly" addressed the fourth *Yochum* factor despite never mentioning it. (Pet. at 12.) To scrape together support for this "express" *Yochum* analysis, the respondents rely on the Order, paragraphs 68, 69, and 80. Yet, a review of paragraphs 68 and 69 in the context of

the Order, and in particular, in sequence with paragraph 67, simply demonstrates the failings of the petition.

Paragraph 67 states that:

> The *Rule 60(b) Motion* cites authority for the proposition that even "where an attorney's mishandling of a movant's case stems from the attorney's mental illness," which might justify relief under Rule 60(b). [sic] However, "client diligence must still be shown." 18 A.App. 4087-88 (italics in original; internal citations omitted).

Paragraphs 68 and 69 then state that Willard was not diligent or responsive in replacing Moquin despite "ample knowledge of his unresponsiveness." (18 A.App. 4088.) Noticeably absent from the Order here is any discussion of the actual *Yochum* factor of "good faith." Instead, the Order and its context make clear that it was addressing whether Willard could rely on Moquin's severe mental illness to support a finding of excusable neglect under Rule 60(b). As such, the petition should be denied because it fails to establish that the panel overlooked or misapprehended a non-existent *Yochum* factor analysis. Indeed, the panel was right to rely on the last substantive paragraph of the Order, paragraph 81, which expressly disavowed *Yochum*.

Further, the admissible evidence and the disciplinary record now establish that the conclusions respondents rely upon in the Order – which have nothing to do with *Yochum* – are now objectively false. Willard was the victim. After Willard became aware that Moquin failed to oppose respondents' dispositive motions in

December 2017 – despite Moquin's repeated promises and assurances to both Willard and O'Mara that he would file the oppositions – Willard diligently sought new counsel and only kept Moquin involved to assist new counsel in their attempt to right the ship. (*E.g.*, 17 A.App. 3954, 3959-65, 3963-65, 3979-82, 3991-94.) Of course, Moquin ultimately failed to assist new counsel, and new counsel did not delay in filing the Rule 60(b) Motion. (17 A.App. 3999-4000; *see also* Moquin ROA 54-55, 63; *see also 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).) The record amply shows that Willard and his new counsel unequivocally acted diligently by putting together and filing the Rule 60(b) Motion despite the fact that Moquin made that process extraordinarily difficult and repeatedly failed to follow through with providing case files and other information that would have helped Willard and his new counsel, as described above.

In addition, the record reflects that Willard did not know of Moquin's bipolar condition until **after the Sanctions Order**, despite respondents' attempt to claim that Willard knew of Moquin's condition **before** Moquin failed to oppose the dispositive motions in December 2017. (*See* AOB at 39; *compare* Order at ¶65 *with* Appellants' Reply Brief ("ARB") at 6 (showing sanctions order was entered

on January 4, 2018 and Willard's discovery of Moquin's bipolar disorder occurred in late January 2018.)

Finally, the respondents – again having no way to show that the Order addressed the "good faith" *Yochum* factor – turn their attention to the unopposed sanctions order to double down on their now debunked claim that the nearly 80-year-old Willard engaged in "willful" misconduct, exhibited "bad faith motives," and "strategically ambush[ed]" the respondents. (Pet. at 12-13.) Of course, the sanctions order is not the Rule 60(b) Order and therefore cannot be utilized to prove a lack of "good faith" analysis under *Yochum*. Moreover, the respondents' doubling down on the unsupported findings, in light of the admissible evidence Willard presented (and Moquin's disciplinary record), show just how inequitable the result is that the respondents now seek. As explained in the AOB, respondents strategically breached a lease and personal guaranty and destroyed Willard's life. He suffered $15,000,000 in just breach of lease / guaranty damages alone – which were fully disclosed and directly derived from a simple review of the lease.

In short, the petition's arguments on this point are baseless and do not support rehearing.

B. The Petition's Other Authorities Are Inapplicable

Respondents repeatedly rely on *Rodriguez v. Fiesta Palms, LLC,* 134 Nev. 654, 656, 428 P.3d 255, 257 (2018), *holding modified by Willard v. Berry-Hinckley*

Indus., 136 Nev. Adv. Op. 53, 469 P.3d 176 (2020), to support their specious argument that the *Yochum* factors were not met. (Pet. at 6-9, 11-12.) Yet, a simple review of that case demonstrates that it actually undercuts respondents' petition.

First, in *Rodriguez*, the district court ***expressly considered*** the *Yochum* factors in denying the Rule 60(b) Motion. *Id.* In the present case, the district court expressly did not. Thus, *Rodriguez* has no relevance to the petition.

Second, the court in *Rodriguez* concluded that Rodriguez failed to meet the first *Yochum* factor of filing a prompt application for relief because he filed his simple motion at the "extreme limit of reasonableness" – i.e., a week before the 6-month deadline. *Id.*, 134 Nev. at 657, 428 P.3d at 257.

In the present case, Willard filed his Rule 60(b) Motion only slightly more than one month after the March 6, 2018 order on the motion for sanctions. (*See* ARB "Timeline" at pp. 5-8.) Thus, it was promptly filed.

Moreover, unlike in *Rodriguez*, Willard and his new counsel were faced with Moquin's obstructive refusal to turn over case files and assist with submitting declarations to support the Rule 60(b) Motion – despite his repeated promises to do so. (*Id; see also* Moquin RAB at 54-55.) Accordingly, even though the Order in the present case fails to address the *Yochum* factors *in toto*, *Rodriguez* shows Willard promptly filed his Rule 60(b) Motion.

Third, respondents rely on *Rodriguez* to claim that Willard intended to delay the proceedings. In *Rodriguez*, the court found that there was an inference of delay because the appellant exhibited a pattern of repeatedly requesting continuances and filed his Rule 60(b) motion just a week before the six-month deadline. (Pet. at 9.) Yet here, Willard's Rule 60(b) Motion was promptly filed, and the December 2017 continuances **Moquin** requested were a result of his bipolar disorder. Thus, *Rodriguez* does not apply.

Finally, the respondents rely on *Rodriguez* to argue that the district court's December 2017 warnings to Moquin about deadlines prevent Willard from establishing the third *Yochum* factor. Yet, *Rodriguez* is distinguishable from the present case because the district court in *Rodriguez* directly warned Rodriguez, who was representing himself. Here, the evidence in the record (and the disciplinary record) show that: (a) the district court warned Moquin (not Willard); and (b) Moquin actively deceived Willard into believing that the deadlines would be met. (17 A.App. 3963-3965; *see, e.g.,* Moquin ROA at 53-57.) As such, *Rodriguez* is clearly distinguishable from the present case because, unlike in *Rodriguez*, Willard's purported knowledge of the December 2017 deadlines had no nexus to Moquin's failure to meet those deadlines. Moreover, the evidence submitted in support of the Rule 60(b) Motion, and Moquin's disciplinary admissions, establish that Willard was unaware of nearly all the other deadlines in

the case. Thus, *Rodriguez* does not support the third *Yochum* factor (or the fourth *Yochum* factor – good faith).[7]

The petition cites *Bryant v. Gibbs*, 69 Nev. 167, 243 P.2d 1050 (1952) for the proposition that Willard's conduct "evidences an intent to delay the proceedings." (Pet. at 9.) *Bryant* is inapplicable because it had nothing to do with intent to delay. The court simply held that, in the specific facts of that case, there was no legitimate excuse for the defendant's conduct. The petition also cites *Garrison v. Van Bueller Ent.*, 2020 WL 1531412 (Nev. 2020; No. 77051; unpublished) for the proposition that Willard's conduct shows a lack of good faith. (Pet. at 13.) *Garrison* had unique facts, including evidence of four other cases in which those defendants/appellants had knowingly allowed lawsuits to proceed to default judgments for financial reasons, and where this court determined that "appellants affidavits are untrue" regarding their knowledge of proceedings. *Id.* at *3. *Garrison* is inapplicable here.

Thus, the cases on which the petition is based are inapposite here.

CONCLUSION

The panel's decision was correct, and the petition fails to establish that the panel overlooked or misapprehended any facts that would support rehearing.

[7] The respondents do not attempt to argue that *Rodriguez* supports their arguments relating to good faith.

Simply put, the district court plainly did not consider and expressly discuss the *Youchum* factors. The petition's attempt to perform reconstructive surgery on the Order should be seen for what it is – an improper and late attempt to fix a now-discredited, respondent-prepared Order **that expressly disavowed *Yochum***. Because the panel correctly concluded that Plaintiffs' Rule 60(b) Motion should be reconsidered on remand, the petition should be denied.

DATED: October 26, 2020

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CERTIFICATE OF COMPLIANCE FOR ANSWER TO PETITION FOR REHEARING

I hereby certify that this answer to the petition for rehearing complies with the formatting requirements of NRAP 32(a)(4)-(6) and the size limitation in NRAP 40(b)(3), because this answer has been prepared in a proportionally spaced typeface using MS Word in 14 point Times New Roman type style, and the answer contains 4,527 words (not counting the cover page, the certificate of service, or the certificate of compliance.

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CERTIFICATE OF SERVICE

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

I further certify that on the 26th day of October, 2020, I electronically filed the foregoing **APPELLANTS' ANSWER TO PETITION FOR REHEARING** with the Clerk of the Court by using the electronic filing system, which served the following parties electronically:

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EXHIBIT 4

EXHIBIT 4

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
District Court Case No. CV14-01712

APPEAL FROM ORDER DENYING NRCP 60(B) MOTION
SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE
HONORABLE LYNNE K. SIMONS

APPELLANTS' ANSWER TO PETITION FOR EN BANC RECONSIDERATION

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INTRODUCTION

The petition for en banc reconsideration argues that: (1) the panel cannot **clarify** precedent to require a district court to make express findings of the factors in *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982); (2) the panel's decision is contrary to Nevada precedent holding that, as a "threshold issue," a movant must show excusable neglect by a preponderance of the evidence; (3) the panel's decision is contrary to Nevada precedent holding that a district court's findings may be implied from the record; and (4) the appeal involves a substantial precedential issue. Respondents misconstrue the panel's holding and fail to establish application of NRAP 40A(c).

First, the panel identified and addressed the precedential holdings of the court, **and** made clear that it was only **clarifying** precedent. Thus, Respondents' claim that the panel somehow subverted established precedent is misleading and erroneous.

Second, the panel's decision never held that a party moving for Rule 60(b) relief need not show excusable neglect. Instead, the panel found:

> Because the district court's failure to address the *Yochum* factors requires remand for further proceedings, **we decline to consider Willard's additional arguments challenging the merits of the district court's excusable neglect determination.**

(Opinion 9, n.7 (emphasis supplied).) Thus, Respondents' argument fails to demonstrate that the panel's decision is contrary to Nevada precedent, since the panel never reached that issue.

Third, the panel's decision **clarifying** that district courts must expressly address each *Yochum* factor is not contrary to Nevada precedent that an appellate court may in some instances imply findings from the record. The cases Respondents rely upon involve appeals addressing different standards and factors. Even more problematic for Respondents, the record demonstrates that the district court **expressly disavowed** the *Yochum* factors and **did not consider them.** (18 A.App. 4211 ¶81) Thus, the panel's **clarification** does not undo Nevada precedent on implied findings.

Finally, the panel's decision does not involve "a substantial precedential issue." (Petition 4.) The panel simply clarified that district courts must provide specific findings on each *Yochum* factor. Respondents fail to explain how this precedential issue is "substantial." While Respondents claim the panel's decision will affect future cases, they fail to identify any harm. Requiring district courts to make express findings on factors that the court must **already consider** is hardly burdensome. The panel's clarification of precedent: (1) will not overburden district courts; and (2) will assist appellate courts in Rule 60(b) appeals by providing a record that does not require speculation.

Accordingly, Respondents' Petition lacks merit and does not justify en banc reconsideration.

THERE ARE REMAINING ARGUMENTS THAT NEED TO BE ADDRESSED IF THE PETITION IS GRANTED

Even if the en banc court concludes that the panel erred, Willard raised additional arguments that would still need to be decided before this appeal can be resolved. The panel's opinion noted:

> Because the district court's failure to address the *Yochum* factors requires remand for further proceedings, we decline to consider Willard's additional arguments challenging the merits of the district court's excusable neglect determination.

(Opinion 9, n.7.)

Willard's arguments in the opening brief that would still need to be resolved on appeal include:

(1) Whether Willard's counsel, Moquin, abandoned Willard (see AOB 34-39).

(2) Whether Moquin abandoned Willard under *Passarelli* (AOB 34) in light of the State Bar's findings and conclusions, which recite clear and convincing evidence of Moquin's multiple and repeated violations of ethical requirements that led to dismissal of this case (and which this court affirmed in the disciplinary appeal, No. 78946, with three

justices dissenting because the discipline recommended against Moquin by the State Bar was insufficient).

(3) Whether the district court erred in excluding admissible evidence supporting relief under Rule 60(b). (AOB 39-44.)

(4) Whether the district court erred in failing to assess all the pertinent factors set forth in *Young v. Johnny Ribeiro Bld.*, 106 Nev. 88, 92-93, 787 P.2d 777 (1990). (AOB 32-34.)

(5) Whether the district court erred by imposing case-terminating sanctions. (AOB 27-34.)

Because the panel found other reversible error, the panel did not determine these issues. Accordingly, granting the petition would not be dispositive, and these remaining contentions would still need to be resolved.

ARGUMENT

A. Respondents' Petition Does Not Meet the Limited Purpose of En Banc Reconsideration

Petitions for reconsideration are appropriate only when "(1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals, or (2) the proceeding involves substantial precedential, constitutional or public policy issue." NRAP 40A(c). Respondents claim the panel overlooked precedential holdings of this court, and that the

decision would disrupt uniformity of those prior holdings. Yet, the panel was only **clarifying** precedent – not undoing it.

Panels have authority to clarify the court's precedent. A Westlaw search reveals that in 2020 alone, panels of this court have issued at least ten decisions clarifying legal principles, including clarification of the court's precedents. *E.g. Kaur v. Singh*, 136 Nev. Adv. Op. 77, __ P.3d __ (December 10, 2020) (panel clarified prior en banc opinion, and panel required district courts to consider five-factor test dealing with judicial estoppel). Thus, the panel did nothing wrong by clarifying precedent.

In fact, most of Respondents' petition simply rehashes their petition for rehearing – which the panel already rejected.

B. En Banc Reconsideration is Unwarranted

1. <u>The Panel's Clarification of *Yochum* is Not Contrary to Precedent</u>

In the district court's Rule 60(b) order, *Yochum* is mentioned in one short paragraph. (18 A.App. 4091.) The Order does not expressly analyze each *Yochum* factor or explain how Willard failed to satisfy *Yochum*.

The panel's opinion made clear that this is insufficient: "[w]e recognize that our dispositions may have implied that the district court need only demonstrate that it considered the *Yochum* factors – as opposed to issuing factual findings for each factor .... However, **we now clarify** that we require district courts to issue explicit

factual findings in the first instance on all four *Yochum* factors." (Opinion 7, n.6 (emphasis supplied).)

Respondents argue the panel's decision "clearly contradicts Nevada precedent establishing that a district court need not make express findings on all of the *Yochum* factors…" (Petition 8.) Yet Respondents concede that the panel addressed this very point: that prior court decisions **"implied** that the district court need only demonstrate that it considered the *Yochum* factors – as opposed to issuing factual findings for each factor." (Petition 8 (emphasis supplied).)

Thus, Respondents effectively concede their argument fails. In fact, Respondents – in relying on *Rodriguez* and *Stocklein* to claim that express findings on the *Yochum* factors are not required – fail to acknowledge that in neither case does the court hold that a district court **need not** make specific findings on *Yochum* factors. Moreover, the district court disavowed *Yochum* and did not consider the *Yochum* factors. Accordingly, the panel's clarification requiring express *Yochum* findings does not change any holdings of prior opinions.[1]

---

[1] Respondents cite *Garrison v. Van Bueller Enterprises, LLC*, 640 P.3d 25, Docket No. 77051 (Order of Affirmance, Mar. 27, 2020) (unpublished), to argue that the panel's decision in this case is contrary to one made five months earlier. The fact that the same panel decided to **clarify** precedent only five months after *Garrison* demonstrates that district courts too frequently fail to articulate express findings on the *Yochum* factors, and the need for express findings reached a tipping point of necessity. Also, the district court in this case **disavowed** applicability of *Yochum*, unlike in *Garrison*.

Separately fatal to Respondents' Petition is the fact that they concede the district court **did not even consider** the *Yochum* factors as required by binding case law. (Petition 10 ("the District Court incorrectly held that *Yochum* is inapplicable . . . .")) In so conceding, Respondents conclusively demonstrate that en banc reconsideration is inappropriate and that their Petition should be denied.

As they did in their Rehearing Petition, Respondents rehash their argument that the district court – despite disavowing *Yochum* – somehow *still* considered the *Yochum* factors: a contradiction if ever there was one. Yet, their arguments, which the panel correctly rejected in denying the Rehearing Petition, must fail.

a. Respondents' Arguments Regarding Willard's Knowledge of Procedural Requirements

Respondents contend that the Order made findings under *Yochum* that Willard had knowledge of procedural requirements. (Pet. 11-12.) A threshold problem with Respondents' argument here is context.

Each of the findings in the Order that Respondents claim establish this third *Yochum* factor exist in that Order to try to establish that Willard could not rely on Moquin's bipolar disorder for purposes of Rule 60(b) – not to establish the third *Yochum* factor.[2]

---

[2] Willard addresses Respondents' *Yochum* factor arguments in the order they are presented in the petition.

In addition, the findings are extensions of Respondents' flawed argument that Willard could not establish abandonment or rely on *Passarelli*. (*See* 18 A. App. 4082-84.) Thus, Respondents' argument that the Order already addressed the third *Yochum* factor is wrong.

Moreover, Respondents focus their attention on events primarily in December 2017 and not the time prior, when Moquin admitted in his guilty plea that Willard was unaware of the deadlines and other matters. (*In re Discipline of Brian Moquin, Esq.*, No. 78946 (Conditional Guilty Plea, Apr. 16, 2019, available at Moquin ROA 53.) As such, even if the Order was addressing the third *Yochum* factor, which it clearly was not, it would be deficient since Willard's purported knowledge of the procedural requirements and deadlines covers one month of the entire case.

b. Absence of Intent to Delay the Proceedings

Respondents argue that the district court "plainly considered whether there was an absence of intent to delay the proceedings, **even though improperly failing to characterize it as a *Yochum* analysis.**" (Pet. 13 (emphasis supplied).)

Respondents cite no portion in the Order that addresses "intent" to delay the proceedings; thus, *Yochum* was never considered.

Accordingly, Respondents cannot graft a *Yochum* analysis into the Order. This is fatal to Respondents' Petition because their case law – *Rodriguez,*

Stocklein, etc. – at least involved consideration of the pertinent factors. **No such consideration was performed by the district court in this case**.

Finally, the truth is that Willard had no intent to delay proceedings. During December 2017: (1) Willard relentlessly attempted to contact Moquin to ensure he filed oppositions to dispositive motions by requisite deadlines; and (2) Moquin then **assured Willard that he would file the oppositions.** (17 A.App. 3959-65; 17 A.App. 3954:17-20; s*ee also* Moquin ROA 53)[3].) The problem was that Moquin misled Willard into believing he would file timely oppositions. (17 A.App. 3963-3965; *see, e.g.,* Moquin ROA 53-57.) Thus, even if the Order addressed this second *Yochum* factor, which it did not, there **was no intent** to delay the proceedings. In fact, the evidence shows the opposite. Willard was doing everything in his power not to delay the proceedings.[4]

Respondents next argue that the Order's reference to extensions to oppose the various motions proves the Court made a finding that Willard intended to delay the proceedings. (Pet. 8.) Yet, the requests for extensions, which were stipulated, does not show an intention to delay – nor does the Order find that the extensions were requested with the intent to delay the proceedings, for purposes of *Yochum*.

[3] In its opinion, this court cited Moquin's disciplinary case. *See Willard v. Berry-Hinckley Indus.*, 136 Nev. Adv. Op. 53 n. 3, 469 P.3d 176, 178 n.3 (2020).

[4] Larry Willard is nearly 80 years old. As an elderly plaintiff seeking millions of dollars in damages, he had no reason to delay the case. It is absurd to suggest he would have intentionally delayed filing anything in this case.

Moquin had abandoned Willard due to Moquin's mental illness, was misleading Willard and O'Mara, and could not function as an attorney. His bipolar condition **necessitated requests for extensions**, and those requests in no way evidence an intent to delay proceedings. Accordingly, not only did the Order not address (or even try to address) the second *Yochum* factor, the petition's argument that the order did address it falls flat.

Accordingly, the panel did not overlook or misapprehend the Order, and the petition must be denied based on this second *Yochum* factor as well.

c. Prompt Application to Remove the Judgment

Again, despite the district court's disavowal of the applicability of *Yochum*, Respondents again argue that the "record . . . demonstrates that the Court considered the promptness of Willard's Rule 60(b) Motion." (Pet. 15.)

This issue was much more thoroughly briefed in the Rehearing Petition and Appellants' answer thereto. Not surprisingly, Respondents walked back their analysis considerably in the present Petition because their arguments are simply not credible.

As was explained in the answer to the Rehearing Petition, the facts show Willard's consistent diligence. Indeed, the record reflects Willard's remarkable efforts to get Moquin to oppose motions before the judgment was entered, as does attorney O'Mara's Notice of Withdrawal of Local Counsel wherein he stated he

"begged" Moquin to file timely oppositions. (16 A.App. 3654:23-26.) This diligence **preceded** entry of the judgment. **After the judgment**, the record reflects Willard and his new counsel's extraordinary efforts – in the face of Moquin's bipolar disorder, false promises, obstruction, and expletive-laden threats – to promptly file a Rule 60(b) Motion. (16 A.App. 3675-92.)

Further, none of the supposed findings that Respondents relied on in the Rehearing Petition – which they have abandoned in this Petition – set forth express findings on the first *Yochum* factor, as they do not have anything to do with Willard's promptness in seeking relief from the judgment.

Indeed, the findings Respondents rely on do not deal with *Yochum*; they are part of the Order's attempt to show that there was no attorney abandonment under *Passarelli*. (*See* 18 A.App. 4081-86, ¶¶ 39-63.) As such, Respondents present yet another baseless argument unworthy of consideration under NRAP 40A(c).

d. Good Faith

Respondents again claim that the district court "expressly" addressed the fourth *Yochum* factor **despite never mentioning it** (Pet. 15-17) and despite the district court's finding that *Yochum* was inapplicable in the underlying case.

To perform reconstructive surgery on the Order and graft an "express" *Yochum* analysis, Respondents rely on the portions of the Order where there is **no reference to the *Yochum* factor of good faith**.

Instead, the Order and its context make clear that the district court, rather than focusing on *Yochum*, was addressing whether Willard could rely on Moquin's severe mental illness to support a finding of excusable neglect under Rule 60(b). As such, the panel's order requiring remand for consideration and specific findings of the *Yochum* factors must stand, and Respondents' Petition must be denied.

Further, the evidence and the disciplinary record establish that the conclusions Respondents rely upon in the Order – which have nothing to do with *Yochum* – are objectively false. Willard was Moquin's victim. After Willard became aware that Moquin failed to oppose Respondents' dispositive motions in December 2017 – despite Moquin's repeated promises and assurances that he would file the oppositions – Willard diligently sought new counsel and only kept Moquin involved to assist new counsel in their attempt to right the ship. (*E.g.*, 17 A.App. 3954, 3959-65, 3963-65, 3979-82, 3991-94.) Moquin ultimately failed to assist new counsel, and new counsel did not delay in filing the Rule 60(b) Motion. (17 A.App. 3999-4000; *see also* Moquin ROA 54-55, 63; *see also In re Discipline of Moquin*, No. 78946 (Order Approving Conditional Guilty Plea, Oct. 21, 2019).) The record amply shows that Willard and his new counsel acted diligently by preparing and filing the Rule 60(b) Motion despite the fact that Moquin made that process extraordinarily difficult and repeatedly failed to follow through with

providing case files and other information that would have helped Willard and his new counsel, as described above.

Finally, Respondents – again having no way to show that the Order addressed the "good faith" *Yochum* factor – turn their attention to the unopposed sanctions order to double down on their claim that Willard engaged in "willful" misconduct, exhibited "bad faith motives," and "strategically" sought to ambush Respondents (who were represented by competent and aggressive counsel in a large law firm). (Pet. 16.) Of course, the sanctions order is not the Rule 60(b) Order and therefore cannot be utilized to prove a lack of "good faith" analysis under *Yochum*. Moreover, Respondents' doubling down on the unsupported findings, in light of the evidence Willard presented (and Moquin's disciplinary record), show just how inequitable the result is that Respondents now seek. Respondents strategically breached a lease and personal guaranty and destroyed Willard's life. He suffered $15,000,000 in just breach of lease / guaranty damages alone – which were fully disclosed and directly derived from a simple review of the lease. Why would Willard "ambush" Respondents by failing to oppose case-dispositive motions and fully brief and submit other motions?

Due to Moquin's bipolar disorder, Respondents were able to take advantage of unopposed motions and proposed orders to advance hyperbolic narratives and inaccurate conclusions. But the truth came to light through the Moquin

disciplinary file and guilty pleas (which simply validated and corroborated the evidence Willard advanced in support of the Rule 60(b) Motion).

Indeed, Respondents are well aware that they secured favorable rulings against an 80-year-old victim of a bipolar attorney who misled his client and willfully abandoned his case. This is not an exaggeration. In footnote 5 of their Petition, Respondents request that: "if nothing else, BHI seeks clarification from this Court that Willard may not present new arguments or evidence on remand – rather, the remand must be based solely for the District Court to modify its order to make express findings on each of the Yochum factors before it." (Petition 17, n.4.) This is part of a continued pattern of Respondents making logically absurd claims of willful misconduct by Willard, and denying the obvious abandonment of Willard by his counsel Moquin, which resulted in Respondents securing an unopposed victory in a case where they intentionally and strategically breached a lease and personal guaranty.

What is particularly disturbing is that Respondents persuaded the district court to rely on the fact that at the time of the Rule 60(b) Motion – which Moquin actively thwarted – Moquin had not yet been disqualified from practicing law in California. (18 A.App. 4083, ¶ 44-46.) Now, as this Court has taken judicial notice, Moquin entered a conditional guilty plea admitting what was obvious even at the time of the proceedings below – that he had abandoned Willard, was

diagnosed as bipolar, and simply could not function. (Moquin ROA 119-32; 143-48.) By inserting this footnote, Respondents again want to avoid any responsibility for destroying Willard's life, ensure that justice will never see the light of day, and achieve a result that is antithetical to all norms of decency and fairness in order to avoid their client's willful breach and refusal to pay Willard what he owed him under the breach of the lease and personal guaranty.

Given the significance that the district court placed on Moquin's status with the California and Nevada State Bars to conclude that Moquin was capable of practicing law, there is simply no legal justification – nor do Respondents present any legal authority to support their request to this Court – for prohibiting the admission of evidence of Moquin's disciplinary record on remand.

In short, the petition's arguments on this point do not support en banc review.

This panel's Opinion also emphasized that a district court abuses its discretion when it disregards established legal principles, and that Rule 60(b) operates as a remedial rule that gives due consideration to the state's preference to adjudicate cases on the merits. (Opinion 5, 6.) Respondents' petition makes no effort to address this important point.

2. The Panel's Decision is Not Contrary to Nevada Precedent Holding that a Movant Must Show Excusable Neglect

Respondents allege that the Panel's decision is contrary to Nevada precedent because: (1) Respondents bore the burden of proof to show excusable neglect by a

preponderance of the evidence; and (2) Willard could not meet that burden through competent evidence. (Pet. 5-7.) However, Respondents miss the point of the panel's decision.

The panel held:

> Because the district court's failure to address the *Yochum* factors requires remand for further proceedings, **we decline to consider Willard's additional arguments challenging the merits of the district court's excusable neglect determination**.

(Opinion 9, n.7 (emphasis supplied).) Thus, Respondents' argument is not only premature; it fails to demonstrate that the panel's decision is contrary to Nevada precedent **since the panel never resolved that issue**.

Respondents argue that under *McClellan*, a party seeking to set aside a judgment under NRCP 60(b)(1) must show his neglect was excusable. More than a decade later, this Court set forth the definitive excusable neglect factors that must be met (i.e., the *Yochum* factors). Unfortunately, while the Appellants argued the *Yochum* factors, the district court held that *Yochum* did not apply and simply ignored the factors in the proceedings below. Thus, Respondents cannot claim that the panel's decision, clarifying that district courts must make express statements of the *Yochum* factors, runs afoul of *McClellan*, 84 Nev. at 287, 439 P.2d at 676, because the district court flatly rejected that those factors even applied.

Respondents cite *Kahn v. Orme*, 108 Nev. 510, 513–14, 835 P.2d 790, 792–93 (1992), to claim that Appellants had to establish the *Yochum* factors by a preponderance of the evidence. Again, the problem here is that the district court disavowed the *Yochum* factors and never addressed them. The panel's limited holding only stated that the district court was required to make express findings of the *Yochum* factors – which the district court did not do because the district court felt they did not apply – and remanded the case on such grounds. Thus, the panel's decision does not conflict with prior Nevada decisions.

Next, Respondents claim that the panel's decision is contrary to past decisions of this court because a district court cannot grant Rule 60(b) relief "where there is no competent evidence to justify the court's action." *Stoecklein v. Johnson Elec., Inc.*, 109 Nev. 268, 271, 849 P.2d 305, 307 (1993). Yet again, Respondents ignore the limited nature of the panel's holding, namely, that the district court is required to make express specific findings on each of the *Yochum* factors. Nothing in the panel's decision reverses or is contrary to *Stocklein*. As the panel stated, its decision did not reach the excusable neglect factors. For the same reason, Respondents' reliance on *Otak Nev. LLC v. Eighth Judicial Dist. Ct.*, 129 Nev. 799, 805, 312 P.3d 491, 496 (2013) misses the point of the panel's holding as well.

Finally, Respondents cite cases from outside of Nevada to suggest the Appellants first must show competent evidence of excusable neglect before an appellate court can reverse a district court's decision. (Pet. 6.) Yet, none of these cases apply, because the district court rejected *Yochum* and the excusable neglect factors' applicability. As such, there is no threshold evidentiary requirement that precluded the panel's decision.

In sum, Respondents' statement that "[b]y not addressing the effect of the District Court's threshold evidentiary decision, the Panel's decision is contrary to *Stocklein, McClellan,* and *Kahn*" (Petition 7), is wrong, because none of those cases stand for the proposition that there is a "threshold evidentiary decision" grafted into the *Yochum* factors that would preclude the panel from clarifying that the district court erred by not making express specific findings as to each *Yochum* factor. Indeed, the district court believed *Yochum* **did not even apply** to this case.

3. The Panel's Decision is Not Contrary to Nevada Precedent Holding that a District Court's Findings May Be Implied from the Record

Respondents cite cases to suggest that when a district court fails to provide a written explanation of the court's analysis of certain factors, this court may still look to the record to determine if there was an abuse of discretion. (Petition 17-19.) On this basis, Respondents aver that the panel's decision runs contrary to established Nevada precedent. Respondents are wrong.

First, none of the cases Respondents cite involve appellate review of Rule 60(b) decisions, and thus have no precedential authority that the panel ignored.

Second, Respondents continue with their incorrect position that the district court actually considered the *Yochum* factors. (Pet. 19.) Again, the district court **expressly disavowed** the *Yochum* factors and did not consider them at all. Thus, the panel's decision cannot run contrary to Nevada precedent that this court can consider the record when a district court considers certain factors, but does not make findings regarding those factors, **when in this case, the district court did neither.**

4. <u>The Appeal Does Not Involve a Substantial Precedential Issue</u>

Respondents argue that this appeal presents a "substantial precedential issue" and "has the potential to impact **innumerable** civil cases – it impacts the proceedings of every case in which a movant seeks to set aside a judgment . . . based upon excusable neglect." (Pet. 19; emphasis added.) Respondents fail to explain how the panel's clarification of *Yochum* would result in undesirable consequences. Requiring district courts to make specific findings of factors they are required by law to consider: (1) does not unduly burden district courts at all; and (2) will assist appellate courts in their review of appeals based on Rule 60(b) by providing a clearer record and eliminating speculation about the district court's decision. Indeed, appellate courts will no longer have to course through the record

on appeal to determine how a district court came to decide unaddressed *Yochum* factors. Thus, the clarification the panel made is a good one. In the present case, the district court expressly disavowed *Yochum* and did not even consider or discuss the *Yochum* factors in the first place. The panel's decision will prevent such situations from occurring in the future.

CONCLUSION

The panel's decision was correct, and the Petition fails to establish that the panel did anything more than simply clarify existing law. Further, despite Respondents' attempt to avoid the panel's decision by inserting "threshold" determinations to analysis of the *Yochum* factors (which their case law does not support), the simple truth is that the district court **did not consider,** and in fact **expressly disclaimed,** the *Yochum* factors. Because the panel correctly concluded that Plaintiffs' Rule 60(b) Motion should be reconsidered on remand, the Petition should be denied.

Finally, the court should consider an essential point raised by the panel – yet ignored by Respondents. Indeed, the panel emphasized that a district court abuses its discretion when it disregards established legal principles, and that Rule 60(b) operates as a remedial rule that gives due consideration to the state's preference to adjudicate cases on the merits.

What happened in the district court was a travesty of justice – the abandonment of an elderly plaintiff by a bipolar attorney who willfully obstructed his client's case in which liability and damages are clear. The panel's decision must stand.

DATED: January 15, 2021

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A.App. 4241

CERTIFICATE OF COMPLIANCE FOR ANSWER TO PETITION FOR EN BANC RECONSIDERATION

I hereby certify that this answer complies with the formatting requirements of NRAP 32(a)(4)-(6) and the size limitation in NRAP 40A(d), because this answer has been prepared in a proportionally spaced typeface using MS Word in 14 point Times New Roman type style, and the answer contains 4,505 words (not counting the cover page, the certificate of service, or the certificate of compliance).

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CERTIFICATE OF SERVICE

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

I further certify that on the 15th day of January, 2021, I electronically filed the foregoing **APPELLANTS' ANSWER TO RESPONDENTS' PETITION FOR EN BANC RECONSIDERATION** with the Clerk of the Court by using the electronic filing system, which served the following parties electronically:

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