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. 84848 (consolidated with No. 83640) Electronically Filed Jul 01/2022 04:42 p.m. Elizabeth A. Brown Clerk of Supreme Court

DOCKETING STATEMENT CIVIL APPEALS

GENERAL INFORMATION

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

WARNING

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

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

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

County: Washoe	Judge Hon. Lynne K. Simons
District Ct. Case NoCV14-03	1712
2. Attorney filing this docketing sta	ntement:
Attorney Richard D. Williamson	Telephone (775) 329-5600
Firm Robertson, Johnson, Miller & Wil	liamson
Address 50 West Liberty Street, Suite 60	00, Reno, Nevada 89501
Clients Larry J. Willard, individually a Trust Fund, and Overland Deve	and as Trustee of the Larry James Willard elopment Corporation
3. Attorney(s) representing respon	dents(s):
Attorney Brian R. Irvine	Telephone (775) 343-7507
Firm <u>Dickinson Wright PLLC</u>	
Address 100 West Liberty Street, Su	ite 940, Reno NV 89501
Clients Berry-Hinckley Industries, Je Special Administrator of the Es	rry Herbst, and Timothy P. Herbst, as state of Jerry Herbst, deceased
4. Nature of disposition below (che	ck all that apply):
☐ Judgment after bench trial	■ Dismissal:
☐ Judgment after jury verdict	☐ Lack of jurisdiction
☐ Summary judgment	☐ Failure to state a claim
☐ Default judgment	☐ Failure to prosecute
■ Grant/Denial of NRCP 60(b) relief	■ Other (specify): <u>Sanction</u>
☐ Grant/Denial of injunction	☐ Divorce Decree:

☐ Grant/Denial of declaratory relief	☐ Original	☐ Modification
☐ Review of agency determination	☐ Other disposition (specify):	
5. Does this appeal raise issues con- No.	cerning any of the	following?
☐ Child Custody		
□ Venue		
☐ Termination of parental rights		

6. **Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

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

Willard v. Berry-Hinckley Industries, et al., docket number 83640.

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

N/A.

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

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

While that case was on appeal, this Court enacted a new subsection to Rule 60, NRCP 60(b)(6), effective March 1, 2019. In addition, new events transpired during that appeal.

On August 6, 2020, this Court found that the district court abused its discretion and failed to apply the required factors set forth in *Yochum v. Davis*, 98 Nev. 484,

486, 653 P.2d 1215, 1216 (1982), and this Court remanded for further proceedings. On February 23, 2021, this Court entered an Order Denying En Banc Reconsideration. In that order, the Court clarified that "neither party may present any new arguments or evidence on remand; the district court's consideration of the factors set forth in *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982), is limited to the record currently before the court."

Following remand to the district court, new evidence came to light establishing additional grounds to grant Appellants relief. In light of this Court's prior order, however, Appellants were required to wait until the proceedings on remand were submitted to the district court. Promptly thereafter, on July 13, 2021, Appellants filed a motion seeking relief under NRCP 60(b)(5&6). That motion was fully briefed by August 17, 2021. On May 10, 2022, the district court entered an order denying that motion. This appeal timely followed. In the meantime, the district court again denied the original Rule 60(b)(1) motion. Appellants appealed from that denial, and the appeal is pending as No. 83640, which this court consolidated with the present appeal, No. 84848.

- 9. **Issues on appeal.** State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):
- A. Did the district court err in failing to grant relief under NRCP 60(b)(5)?
- B. Did the district court err in failing to grant relief under NRCP 60(b)(6)?
- 10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

Appellants are not aware of any such proceedings.

11. Constitutional issues. If this appeal challenges the constitutionality of
statute, and the state, any state agency, or any officer or employee thereof i
not a party to this appeal, have you notified the clerk of this court and the
attorney general in accordance with NRAP 44 and NRS 30.130?
■ N/A

— 1 1/1 L
□ Yes
■ No
If not, explain:

12. Other issues. Does this appear involve any of the following issues?
☐ Reversal of well-settled Nevada precedent (identify the case(s))
☐ An issue arising under the United States and/or Nevada Constitutions
☐ A substantial issue of first impression
■ An issue of public policy
☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions
☐ A ballot question
If so, explain:

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

In addition, NRCP 60(b)(6) is a relatively new provision, which would benefit from further development through published case law. The problems in this case arose from Appellants' former attorney's misconduct and ultimate abandonment. The disciplinary proceedings against that attorney provide evidence justifying relief under NRCP 60(b)(5&6).

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

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

Wa	s it a bench or jury trial	?N/A
hav	-	. Do you intend to file a motion to disqualify or h/herself from participation in this appeal? If so,
10.		
	TIMELINES	SS OF NOTICE OF APPEAL
	· ·	udgment or order appealed from:
If	y 10, 2022. no written judgment or its for seeking appellate	order was filed in the district court, explain the review:
<u>202</u>		try of judgment or order was served: May 13,
	Delivery	
	Mail/electronic/fax	
	the time for filing the ration (NRCP 50(b), 52(notice of appeal was tolled by a post-judgment b), or 59)
	(a) Specify the ty	ype of motion, the date and method of service of date of filing.
	□ NRCP 50(b)	Date of filing
	□ NRCP 52(b)	Date of filing
	□ NRCP 59	Date of filing

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

(b) I	Date of entry of written or	der resolving tolling motion	N/A
(c) I N/A	Date written notice of entr	ry of order resolving tolling mot	tion was served ₋
	Was service by:		
	☐ Delivery		
	□ Mail		
If m each		June 6, 2022. Spealed from the judgment or or or iled and identify by name the	
_	-	rning the time limit for filing to other NRAP 4(
	SUBSTANT	IVE APPEALABILITY	
_	cify the statute or other lew the judgment or ord	authority granting this court er appealed from:	jurisdiction to
(a)			
	\square NRAP 3A(b)(1)	□ NRS 38.205	
	\square NRAP 3A(b)(2)	□ NRS 233B.150	
	\square NRAP 3A(b)(3)	□ NRS 703.376	
	■ Other (specify): NR	AP 3A(b)(8)	
(b) judgment	-	hority provides a basis for a	appeal from the

In this case, the district court judge denied Appellants' motion for relief under NRCP 60(b)(5&6). An order denying Rule 60(b) relief is appealable as a special

order after final judgment under NRAP 3A(b)(8). *Milton v. Gesler*, 107 Nev. 767, 769 n. 2, 819 P.2d 245, 246 n. 2 (1991).

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

(a) Parties:

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

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

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

Additional Defendant: JH, Inc.

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

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

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

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

All of the Plaintiffs jointly filed a Verified Complaint on August 8, 2014, and then a Verified Complaint on January 21, 2015. The operative complaint included claims for breaches of the Plaintiffs' respective lease agreements with Defendant/Respondent Berry-Hinckley Industries, breaches of the personal guarantees that the Plaintiffs received from with Defendant/Respondent Jerry

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

On April 21, 2015, Defendants/Respondents filed a counterclaim against Plaintiffs/Appellants for breach of contract and declaratory relief. On March 8, 2018, Defendants/Respondents filed a motion to dismiss their own counterclaims. On April 13, 2018, the district court entered an order granting that motion and dismissing the counterclaims. The district court entered final judgment on December 11, 2018.

The district court also entered an order denying NRCP 60(b) relief on September 13, 2021, after a prior appeal and a remand from this Court.

24 Did the judgment or order appealed from adjudicate ALL the claims

action or consolidated actions below? ■ Yes	
□ No	
25. If you answered "No" to question 24, complete the following: (a) Specify the claims remaining pending below: (b) Specify the parties remaining below: (c) Did the district court certify the judgment or order appealed from final judgment pursuant to NRCP 54(b)? 	as a
□ Yes □ No	
(d) Did the district court make an express determination, pursuan NRCP 54(b), that there is no just reason for delay and an express direction for entry of judgment?	
□ Yes	
□ No	

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

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

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

VERIFICATION

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

Larry J. Willard, individually and as Trustee	
of the Larry James Willard Trust Fund, and	
Overland Development Corporation	Richard D. Williamson
Names of Appellants	Name of counsel of record
July 1, 2022	/s/ Richard D. Williamson
Date	Signature of counsel of record
State of Nevada, County of Washoe State and county where signed	

CERTIFICATE OF SERVICE

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

I further certify that on the 1st day of July, 2022, I electronically filed the foregoing **DOCKETING STATEMENT CIVIL APPEALS** with the Clerk of the Court by using the electronic filing system, which served the following parties electronically:

John P. Desmond, Esq. Brian R. Irvine, Esq. Anjali D. Webster, Esq. Dickinson Wright 100 West Liberty Street, Suite 940 Reno, NV 89501 Attorneys Respondents Robert L. Eisenberg, Esq. Lemons, Grundy & Eisenberg 6005 Plumas Street Third Floor Reno NV 89519 775-786-6868 Attorneys for Appellants

/s/ Teresa Stovak

An Employee of Robertson, Johnson, Miller & Williamson

Index of Exhibits

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

Notices of entry for each attached order

11	Notice of Entry of Order regarding the Order Granting	10
	Defendants'/Counterclaimants' Motion for Sanctions, filed on	
	01/05/18	
12	Notice of Entry of Order regarding the Order Granting	10
	Defendants'/Counterclaimants' Motion to Strike and/or Motion	
	in Limine to Exclude the Expert Testimony of Daniel Gluhaich,	
	filed on 01/05/18	
13	Notice of Entry of Order regarding the Order Granting	10
	Defendants'/Counterclaimants' Motion for Partial Summary	
	Judgment [Oral Argument Requested], filed on 01/05/18	
14	Notice of Entry of Findings of Facts, Conclusions of Law and	39
	Order, filed on 03/06/18	
15	Notice of Entry of Order regarding the Order Granting	8
	Defendants'/Counterclaimants' Motion to Dismiss	
	Counterclaims, filed on 04/16/18	
16	Notice of Entry of Order regarding the Order of Dismissal of	7
	Claims of Wooley Plaintiffs with Prejudice, filed on 04/16/18	
17	Notice of Entry of Judgment, filed on 12/11/18	8
18	Notice of Entry of Order Denying Willard Plaintiffs' Motion	13
	for Relief Under NRCP 60(b)(5)&(6), filed on 05/13/22	

EXHIBIT "1"

EXHIBIT "1"

EXHIBIT "1"

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

I THE O'MARA LAW FIRM, P.C. DAVID C. O'MARA, ESO. 2 NEVADA BAR NO. 8599 311 East Liberty Street 3 Reno, Nevada 89501 Telephone: 775/323-1321 4 Fax: 775/323-4082 5 LAW OFFICES OF BRIAN P. MOQUIN 6 BRIAN P. MOQUIN, ESQ. Admitted Pro Hac Vice 7 CALIFORNIA BAR NO. 247583 3506 La Castellet Court 8 San Jose, CA 95148 Telephone: 408.300.0022 9 Fax: 408.843.1678 bmoquin@lawprism.com 10 11 Attorneys for Plaintiffs LARRY J. WILLARD. 12 OVERLAND DEVELOPMENT CORPORATION. EDWARD C. WOOLEY, and JUDITH A. WOOLEY 13 14 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA 15 IN AND FOR THE COUNTY OF WASHOE 16 LARRY J. WILLARD, individually and as Case No. CV14-01712 trustee of the Larry James Willard Trust Fund; 17 OVERLAND DEVELOPMENT Dept. No. 6 CORPORATION, a California corporation; 18 EDWARD C. WOOLEY AND JUDITH A. 19 WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley 2.0 Intervivos Revocable Trust 2000. 21 Plaintiffs, 22 v. 23 BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an 24 individual. 25 Defendants. 26 27 28

VERIFIED FIRST AMENDED COMPLAINT

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

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

JURISDICTION

- 1. This Court has jurisdiction over Defendants because Defendants are either citizens or residents of the State of Nevada or do business in the State of Nevada, County of Washoe.
- 2. Venue is proper in this Court because the properties at issue are located in this judicial district and because the leases at issue expressly provide for venue in this Court.

PARTIES

- 3. Plaintiff Larry J. Willard ("Willard") is, and at all times relevant herein was, a citizen of the United States and a resident of the State of California. At all times relevant herein Willard was trustee of the Larry James Willard Trust Fund ("the Willard Trust").
- 4. Plaintiff Overland Development Corporation ("Overland") is, and at all times relevant herein was, a corporation organized and existing under the laws of the State of California. Willard is the President of Overland. Willard, the Willard Trust, and Overland are referred to hereinafter as "the Willard Plaintiffs."
- 5. Plaintiffs Edward C. Wooley and Judith A Wooley (collectively, "the Wooleys") are, and at all times relevant herein were, citizens of the United States of America and are trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000 ("the Wooley Trust") (collectively, "the Wooley Plaintiffs").
 - 6. Defendant Berry-Hinckley Industries ("BHI") is, and at all times relevant herein

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

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

FIRST CAUSE OF ACTION

(Breach of Lease Agreement)

By the Willard Plaintiffs Against Berry-Hinckley Industries

- 8. Paragraphs 1 through 7 above are hereby incorporated by reference as if fully set forth at this point.
- 9. On November 18, 2005, BHI entered into a lease agreement (the "Willard Lease") on the property owned by the Willard Plaintiffs located at 7695-7699 S. Virginia Street, Reno, Nevada (the "Willard Property"). Under the Willard Lease, BHI agreed to lease the Virginia Street Property from January 2006 through January 2026 at a monthly rental rate of \$122,031.25, said rental rate increasing by 2% per month through the lease term. A true and correct copy of the Willard Lease is attached hereto as Exhibit 1.
- 10. On February 17, 2007, BHI sent the Willard Plaintiffs a letter indicating Herbst's intent to acquire BHI's convenience store assets. Attached to that letter was a letter from Herbst requesting that the Willard Plaintiffs agree to a modifications of the Willard Lease in return for Herbst personally guaranteeing lease payments by BHI through the duration of the revised lease term. Also attached was a letter from Johnson Jacobson Wilcox dated January 31, 2007 attesting to the fact that Herbst's net worth was in excess of \$200 million. A true and correct copy of the February 17, 2007 letter and accompanying attachments is attached hereto as Exhibit 2.
- 11. On March 9, 2007, the Willard Plaintiffs agreed to amend the Willard Lease, thereby forgoing \$5,250,045.20 in rent through the shortening of the lease term by 30 months, in return for Herbst's personally guaranteeing that BHI would make all lease payments through the term of the lease (the "Herbst-Willard Guaranty Agreement"). A true and correct copy of the Herbst-Willard Guaranty Agreement is attached hereto as Exhibit 3. A true and correct copy of the amendment to the Willard Lease is attached hereto as Exhibit 4.
- 12. In March 2013, BHI defaulted on the Willard Lease. BHI and Herbst negotiated an agreement (the "Operating Agreement") with the Willard Plaintiffs under which BHI would

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

- 13. BHI failed to tender any payments to the Willard Plaintiffs as required under the Interim Operating Agreement, instead occupying the Willard Property through May 2013 without paying any rent. At the end of May 2013, BHI abandoned the Willard Property leaving it in such a state of dishevelment and disrepair that Willard was fined and continues to be fined by the City of Reno, said fines currently totaling \$3,265.00.
- 14. As a direct and proximate result of BHI breaching the Willard Lease, the Willard Plaintiffs were deprived of rental income in the amount of \$19,443,836.94 that they otherwise would have received. The net present value of the remaining lease payments using a discount rate of 4% as specified in the Willard Lease was \$15,741.360.75 as of March 1, 2013.
- 15. As a further direct and proximate result of BHI breaching the Willard Lease, the Willard Plaintiffs were forced to sell the Willard Property in March 2014 in a short sale, thereby losing \$4,437,500.00 of earnest money invested in the Willard Property and incurring at least \$3,000,000.00 in tax consequences and \$549,852.00 in closing costs.
- 16. As a further direct and proximate result of BHI breaching the Willard Lease, the Willard Plaintiffs were forced to purchase insurance on the Willard Property at a cost of \$4,554.53, were forced to pay for installation of a security fence for the Willard Property at a cost of \$2,668.62, and were charged \$10,393.35 by Nevada Energy for utility fees rightly owed by BHI.
- 17. As a further direct and proximate result of BHI breaching the Willard Lease, Willard filed for bankruptcy protection, incurring \$22,623.00 in legal fees and \$15,000.00 in accounting fees in the process. Six months later, upon the advice of counsel, Willard withdrew his bankruptcy petition but has been rendered insolvent by virtue of the breaches by BHI and Herbst.
- 18. As a further direct and proximate result of BHI breaching the Willard Lease, the Willard Plaintiffs hired an attorney to file suit against BHI and Herbst in Santa Clara County,

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

SECOND CAUSE OF ACTION

(Breach of Personal Guaranty)

By the Willard Plaintiffs Against Jerry Herbst

- 19. Paragraphs 1 through 18 above are hereby incorporated by reference as if fully set forth at this point.
- 20. Upon receiving notice from the Willard Plaintiffs that BHI was in default of the Willard Lease, Herbst breached his duties under the Herbst-Willard Guaranty in failing to tender payment of rent due by BHI to the Willard Plaintiffs.
- Under the terms of the Herbst-Willard Guaranty, Herbst guaranteed 21. "unconditionally, absolutely and irrevocably" the timely payment and performance of each of BHI's obligations arising out of and under the Willard Lease. This guaranty was "a guaranty of timely payment and performance of the Guaranteed Obligations and not merely of collectability or enforceability of such obligations." Herbst agreed to be "directly responsible for the full extent of any unsatisfied Guarantee Obligations." Herbst further agreed that his guaranty "is an unconditional, absolute, present and continuing guaranty of payment and performance, and will remain in full force and effect without regard to, and the obligations of [Herbst] hereunder shall not be impaired, affected or released by, any of the following: (i) any modification, supplement, extension or amendment of any of the Guaranteed Obligations or the Lease; (ii) any extension, indulgence or other action in respect thereto or therefor; (iii) any failure or delay by the Lessor or BHI in exercising any right or power under the Lease; (iv) any invalidity or unenforceability in any respect of, or any irregularity or other defect in any of, the Lease or Guaranteed Obligations; (v) any exercise or non-exercise of any right, remedy, power or privilege in respect of this Agreement or any of the Guaranteed obligations; (vi) any transfer of the assets of Lessor to, or any consolidation or merger of the Lessor with or into, any other entity; (vii) any voluntary or involuntary liquidation, dissolution, sale or other disposition of all or substantially all of the assets, receivership, insolvency, bankruptcy, reorganization or similar proceeding affecting BHI or any of its assets; (viii) any allegation or contest of the validity of the Lease or this Agreement."

- 22. In the Herbst-Willard Guaranty, Herbst expressly waived "any defense to its obligations . . . that might arise as a result of any of the" contingencies articulated in Paragraph 20, and further waived "the effect of any fact, circumstance or event of any nature whatsoever that would exonerate, or would constitute or give rise to a defense to, the obligation of a surety or guarantor."
- Agreement, the Willard Plaintiffs were forced to sell the Willard Property in March 2014 in a short sale, thereby losing \$4,437,500.00 of earnest money invested in the Willard Property and incurring at least \$3,000,000.00 in tax consequences and \$549,852.00 in closing costs.
- As a direct and proximate result of Herbst breaching the Herbst-Willard Guaranty Agreement, the Willard Plaintiffs were forced to purchase insurance on the Willard Property at a cost of \$4,554.53, were forced to pay for installation of a security fence for the Willard Property at a cost of \$2,668.62, and were charged \$10,393.35 by Nevada Energy for utility fees rightly owed by BHI.
- As a direct and proximate result of Herbst breaching the Herbst-Willard Guaranty Agreement, Willard filed for bankruptcy protection, incurring \$22,623.00 in legal fees and \$15,000.00 in accounting fees in the process. Six months later, upon the advice of counsel, Willard withdrew his bankruptcy petition but has been rendered insolvent by virtue of the breaches by BHI and Herbst.
- 26. As a direct and proximate result of Herbst breaching the Herbst-Willard Guaranty Agreement, the Willard Plaintiffs hired an attorney to file suit against BHI and Herbst in Santa Clara County, California, thereby incurring \$35,000.00 in attorney's fees.

THIRD CAUSE OF ACTION

(Breach of Lease Agreement)

By the Wooley Plaintiffs Against Berry-Hinckley Industries

- 27. Paragraphs 1 through 7 above are hereby incorporated by reference as if fully set forth at this point.
- 28. On December 2, 2005, BHI entered into a lease agreement ("Wooley Lease #1") on the property owned by the Wooley Plaintiffs located at 1820 Highway 50 East, Carson City,

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

- 29. On June 6, 2006, BHI entered into a lease agreement ("Wooley Lease #2") on the property owned by the Wooley Plaintiffs located at 1365 Baring Boulevard, Sparks, Nevada (the "Sparks Property"). Under Wooley Lease #2, BHI agreed to lease the Sparks Property from June 6, 2006 through September 30, 2025 at a monthly rental rate of \$19,856.25, said rental rate increasing by 2% per month through the lease term. A true and correct copy of Wooley Lease #2 is attached hereto as Exhibit 7.
- 30. On February 17, 2007, BHI sent the Wooley Plaintiffs a letter indicating Herbst's intent to acquire BHI's convenience store assets. Attached to that letter was a letter from Herbst requesting that the Wooley Plaintiffs agree to a modifications of Wooley Lease #1 and Wooley Lease #2 in return for Herbst personally guaranteeing lease payments by BHI through the duration of the revised lease terms. Also attached was a letter from Johnson Jacobson Wilcox dated January 31, 2007 attesting to the fact that Herbst's net worth was in excess of \$200 million. A true and correct copy of the February 17, 2007 letter and accompanying attachments is attached hereto as Exhibit 2.
- On March 12, 2007, the Wooley Plaintiffs agreed to amend Wooley Lease #1 and Wooley Lease #2, thereby forgoing \$1,834,663.77 in rent through the shortening of the lease terms by 30 months, in return for Herbst's personally guaranteeing that BHI would make all lease payments through the term of the lease (the "Herbst-Wooley Guaranty Agreement"). A true and correct copy of the Herbst-Wooley Guaranty Agreement regarding the Highway 50 Property is attached hereto as Exhibit 8. A true and correct copy of the Herbst-Wooley Guarantee is attached hereto as Exhibit 9. A true and correct copy of the amendment to Wooley Lease #1 is attached hereto as Exhibit 10. A true and correct copy of the amendment to Wooley Lease #2 is attached hereto as Exhibit 11.
 - 32. In March 2013, BHI defaulted on Wooley Lease #1.

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- 33. As a direct and proximate result of BHI breaching Wooley Lease #1, the Wooley Plaintiffs were deprived of rental income in the amount of \$4,420,244.00 that they otherwise would have received. The net present value of the remaining lease payments using a discount rate of 4% as specified in Wooley Lease #1 was \$3,323,543.49 as of March 1, 2013.
- 34. As a further direct and proximate result of BHI breaching Wooley Lease #1, the Highway 50 Property suffered a diminution in value in an amount to be proven at trial but which is at least \$2,000,000.00.
- 35. As a further direct and proximate result of BHI breaching Wooley Lease #1, the Wooley Plaintiffs incurred property taxes in the amount of \$1,500.00.
- 36. As a further direct and proximate result of BHI breaching Wooley Lease #1, the Wooley Plaintiffs were forced to purchase insurance on the Highway 50 Property at a cost of \$3,840.00.
- 37. As a further direct and proximate result of BHI breaching Wooley Lease #1, the Wooley Plaintiffs incurred maintenance costs on the Highway 50 Property of \$4,000.00.
- 38. As a further direct and proximate result of BHI breaching Wooley Lease #1, the Wooley Plaintiffs incurred management fee costs on the Highway 50 Property of \$2,500.00.
- 39. As a further direct and proximate result of BHI breaching Wooley Lease #1, the Wooley Plaintiffs were deprived of the security deposit from the subtenant at the Highway 50 Property in the amount of \$2,485.00.
- 40. As a further direct and proximate result of BHI breaching Wooley Lease #1, because the Sparks Property was cross-collateralized with the Highway 50 Property, the Wooley Plaintiffs were forced to sell the Sparks Property at a loss of \$147,847.30.
- 41. As a further direct and proximate result of BHI breaching Wooley Lease #1, because the Sparks Property was cross-collateralized with the Highway 50 Property and the Wooley Plaintiffs were forced to sell the Sparks Property, the Wooley Plaintiffs incurred tax liabilities in an amount to be proven at trial but which is at least \$600,000.00.
- 42. As a further direct and proximate result of BHI breaching Wooley Lease #1, the Wooley Plaintiffs hired an attorney to file suit against BHI and Herbst in Santa Clara County,

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

FOURTH CAUSE OF ACTION

(Breach of Personal Guaranty)

By the Wooley Plaintiffs Against Jerry Herbst

- 43. Paragraphs 27 through 42 above are hereby incorporated by reference as if fully set forth at this point.
- 44. Upon receiving notice from the Wooley Plaintiffs that BHI was in default of the Wooley Leases, Herbst breached his duties under the Herbst-Wooley Guaranty in failing to tender payment of rent due by BHI to the Wooley Plaintiffs.
- 45. Under the terms of the Herbst-Wooley Guaranty, Herbst guaranteed "unconditionally, absolutely and irrevocably" the timely payment and performance of each of BHI's obligations arising out of and under the Wooley Leases. This guaranty was "a guaranty of timely payment and performance of the Guaranteed Obligations and not merely of collectability or enforceability of such obligations." Herbst agreed to be "directly responsible for the full extent of any unsatisfied Guarantee Obligations." Herbst further agreed that his guaranty "is an unconditional, absolute, present and continuing guaranty of payment and performance, and will remain in full force and effect without regard to, and the obligations of [Herbst] hereunder shall not be impaired, affected or released by, any of the following: (i) any modification, supplement. extension or amendment of any of the Guaranteed Obligations or the Lease: (ii) any extension. indulgence or other action in respect thereto or therefor; (iii) any failure or delay by the Lessor or BHI in exercising any right or power under the Lease; (iv) any invalidity or unenforceability in any respect of, or any irregularity or other defect in any of, the Lease or Guaranteed Obligations; (v) any exercise or non-exercise of any right, remedy, power or privilege in respect of this Agreement or any of the Guaranteed obligations; (vi) any transfer of the assets of Lessor to, or any consolidation or merger of the Lessor with or into, any other entity; (vii) any voluntary or involuntary liquidation, dissolution, sale or other disposition of all or substantially all of the assets, receivership, insolvency, bankruptcy, reorganization or similar proceeding affecting BHI or any of its assets; (viii) any allegation or contest of the validity of the Lease or this Agreement."

- 46. In the Herbst-Wooley Guaranty, Herbst expressly waived "any defense to its obligations . . . that might arise as a result of any of the" contingencies articulated in Paragraph 44, and further waived "the effect of any fact, circumstance or event of any nature whatsoever that would exonerate, or would constitute or give rise to a defense to, the obligation of a surety or guarantor."
- 47. As a direct and proximate result of Herbst breaching the Herbst-Wooley Guaranty, the Wooley Plaintiffs were deprived of rental income in the amount of \$4,420,244.00 that they otherwise would have received. The net present value of the remaining lease payments using a discount rate of 4% as specified in the Wooley Leases was \$3,323,543.49 as of March 1, 2013.
- 48. As a further direct and proximate result of Herbst breaching the Herbst-Wooley Guaranty, the Highway 50 Property suffered a diminution in value in an amount to be proven at trial but which is at least \$2,000,000.00.
- 49. As a further direct and proximate result of Herbst breaching the Herbst-Wooley Guaranty, the Wooley Plaintiffs incurred property taxes in the amount of \$1,500.00.
- 50. As a further direct and proximate result of Herbst breaching the Herbst-Wooley Guaranty, the Wooley Plaintiffs were forced to purchase insurance on the Highway 50 Property at a cost of \$3,840.00.
- 51. As a further direct and proximate result of Herbst breaching the Herbst-Wooley Guaranty, the Wooley Plaintiffs incurred maintenance costs on the Highway 50 Property of \$4,000.00.
- 52. As a further direct and proximate result of Herbst breaching the Herbst-Wooley Guaranty, the Wooley Plaintiffs incurred management fee costs on the Highway 50 Property of \$2,500.00.
- 53. As a further direct and proximate result of Herbst breaching the Herbst-Wooley Guaranty, the Wooley Plaintiffs were deprived of the security deposit from the subtenant at the Highway 50 Property in the amount of \$2,485.00.
 - 54. As a further direct and proximate result of Herbst breaching the Herbst-Wooley

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

- As a further direct and proximate result of Herbst breaching the Herbst-Wooley Guaranty, because the Sparks Property was cross-collateralized with the Highway 50 Property and the Wooley Plaintiffs were forced to sell the Sparks Property due to the breach of the Herbst-Wooley Guaranty, the Wooley Plaintiffs incurred tax liabilities in an amount to be proven at trial but which is at least \$600,000.00.
- 56. As a further direct and proximate result of Herbst breaching the Herbst-Wooley Guaranty, the Wooley Plaintiffs hired an attorney to file suit against BHI and Herbst in Santa Clara County, California, thereby incurring \$45,088.00 in attorney's fees.

FIFTH CAUSE OF ACTION

(Attachment)

By All Plaintiffs Against All Defendants

- 57. Paragraphs 1 through 56 above are hereby incorporated by reference as if fully set forth at this point.
- 58. Plaintiffs are informed and believe and on that basis allege that as a result of this action, Defendants will attempt to transfer or otherwise conceal assets in an effort to make it impossible for Plaintiffs to reach the property by execution after judgment is entered.
- 59. Plaintiffs are informed and believe and on that basis allege that Defendants will move, transfer or otherwise conceal these assets in order to defeat or otherwise hinder Plaintiff's ability to collect after judgment is entered.
- 60. These allegations are based in part on the fact that on March 18, 2013, Defendants attorney, Gerald M. Gordon of Gordon Silver, sent a letter to Plaintiffs' attorney in which Defendants threatened to declare bankruptcy rather than honor their obligations arising under the leases. A true and correct copy of this letter is attached hereto as Exhibit 12.
- These allegations are further based on the fact that on March 28, 2013,

 Defendants attorney, Gerald M. Gordon of Gordon Silver, sent a letter to Plaintiffs' attorney reiterating Defendants' threat of seeking bankruptcy protection and offering to pay a small fraction of the amount due under the leases and Herbst's personal guaranty, an offer which

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Plaintiffs rejected.

- These allegations are further based on the fact that on July 1, 2013, while 62. Plaintiffs had the instant claim pending against Defendants in Santa Clara County, California, Herbst and his wife transferred 100% of their interest in the estate located at 1701 Enclave Court, Las Vegas, Nevada 89134 to their sons, Timothy Paul Herbst and Troy Dederick Herbst, as trustees of the Jerry E. Herbst Residence Trust and the Maryanna Herbst Residence Trust. Plaintiffs are informed and believe and on that basis allege that such transfer was for the purpose of attempting to shelter the estate, which is estimated to be worth at least \$18 million, from being attached by Plaintiffs.
- In this action, Plaintiffs seek an attachment pursuant to NRS 31.013 because 63. extraordinary circumstances exist which will make it improbable for Plaintiffs to reach the property of Defendants by execution after judgment has been entered. Specifically, Plaintiffs seek an attachment of the following property:
- the estate located at 1701 Enclave Court, Las Vegas, Nevada 89134, Parcel No. 138-20-416-003;
- the property located at 1001 South California Avenue, Parker, Arizona 85334, Parcel No. 311-23-031;
- the property located at 1005 South California Avenue, Parker, Arizona 85344, Parcel No. 311-23-030;
- the property located at 1009 South California Avenue, Parker, Arizona 85334, Parcel No. 311-23-028A:
- the property located at 515 Saddle View Way 23, Park City, Utah 84060, Parcel No. 01-923-06; and
- such other and further assets and properties owned by Defendants sufficient to secure payment of Plaintiffs' claims against Defendants.
- Pursuant to NRS Chapter 31, Plaintiffs seek issuance of a prejudgment writ of attachment upon the assets of Defendant Berry-Hinckley Industries and Defendant Jerry Herbst, to secure payment of Plaintiffs' claims against Defendants.

SIXTH CAUSE OF ACTION

(Temporary Restraining Order)
By All Plaintiffs Against All Defendants

- 65. Paragraphs 1 through 65 above are hereby incorporated by reference as if fully set forth at this point.
- 66. If Defendants are permitted the ability to transfer, sell, or otherwise conceal assets during the pendency of this action, Plaintiffs will suffer irreparable harm.
- 67. If Defendants are permitted to have the ability to transfer, sell, or otherwise conceal assets before this Court can issue a writ of attachment on the assets of Defendants, and each of them, Plaintiffs will be denied the extraordinary relief provided in NRS Chapter 31 to protect their rights.
- 68. An interlocutory injunction preventing Defendants or any person with actual knowledge of the injunction is necessary to maintain the status quo until this Court can determine whether a writ of attachment should issue and/or until the conclusion of this action after trial.
- 69. Plaintiffs are entitled to a temporary restraining order and preliminary injunction enjoining Defendants, and each of them, and any other person with notice of the injunction from transferring, selling, or otherwise encumbering any assets or property of Defendants.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:

ON THE FIRST CAUSE OF ACTION:

- 1. For direct damages in the discounted amount of \$15,766,991.73;
- 2. For consequential damages in the amount of \$8,080,856.50;
- 3. For late payment penalties of \$25,630.98 for the period of March 2013 through May 2013;
- 4. For interest at a rate of 18% per annum as provided for under the Willard Lease from March 1, 2013 through entry of judgment; and
 - 5. For reasonable attorney's fees as provided for under the Willard Lease.

///

1	138-20-416-003;	
2	 the property located at 1001 South California Avenue, Parker, Arizona 85334, 	
3	Parcel No. 311-23-031;	
4	• the property located at 1005 South California Avenue, Parker, Arizona 85344,	
5	Parcel No. 311-23-030;	
6	• the property located at 1009 South California Avenue, Parker, Arizona 85334,	
7	Parcel No. 311-23-028A;	
8	• the property located at 515 Saddle View Way 23, Park City, Utah 84060, Parcel	
9	No. 01-923-06; and	
10	• such other and further assets and properties owned by Defendants sufficient to	
11	secure payment of Plaintiffs' claims against Defendants.	
12	ON THE SIXTH CAUSE OF ACTION:	
13	1. For a temporary restraining order and preliminary injunction preventing	
14	Defendants, and each of them, and any person with knowledge of the injunction from	
15	transferring, selling, or otherwise encumbering the assets of Defendants.	
16	ON ALL CAUSES OF ACTION:	
17	1. For pre-judgment interest upon such damages through entry of judgment at the	
18	rate of 18 percent per annum as provided for under the Lease Agreements;	
19	2. For costs of suit;	
20	3. For such other orders and further relief as the Court deems just and proper.	
21	Respectfully submitted,	
22	THE O'MARA LAW FIRM, P.C.	
23		
24	DATED: January 20, 2015 By: WARA PA	
25	DAVID C. O'MARA Nevada Bar No. 8599	
26	311 East Liberty Street Reno, Nevada 89501	
27	(775) 323-1321 (775) 323-4082 (facsimile)	
28	(113) 323-4082 (lacsimile)	
	1	

LAW OFFICES OF BRIAN P. MOQUIN

DATED: January 20, 2015

By:

BRIAN P. MOQUIN

Pro Hac Vice Application Pending
California Bar No. 257583
3506 La Castellet Court
San Jose, CA 95148
(408) 300-0022
(408) 843-1678 (facsimile)

Attorneys for Plaintiffs

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the attorney for Larry J. Willard, Overland Development Corporation, Edward C. Wooley, and Judith A. Wooley, Plaintiffs in the foregoing First Amended Complaint and knows the contents thereof, that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and that as to such matters he believes them to be true.

Pursuant to NRS 15.010, the undersigned attorney verifies this First Amended Complaint for Plaintiffs Larry J. Willard, Overland Development Corporation, Edward C. Wooley, and Judith A. Wooley because Plaintiffs reside outside this County.

DATED: January 20, 2015

BRIAN P. MOQUIN, ESQ.

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

EXHIBIT "2"

EXHIBIT "2"

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

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

vs.

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

Counter-defendants

DEFENDANTS' AMENDED ANSWER TO PLAINTIFFS' AMENDED COMPLAINT AND COUNTERCLAIM

DEFENDANTS BERRY HINCKLEY INDUSTRIES and JERRY HERBST (collectively, "Defendants"), by and through their attorneys of record, GORDON SILVER, answer Plaintiffs' Amended Complaint as follows:

JURISDICTION

- 1. Defendants admit the allegations contained in Paragraph 1 of Plaintiffs' Complaint.
- 2. To the extent Plaintiffs purport to quote or paraphrase from a document, the document speaks for itself. Defendants deny any statements inconsistent with the document. Defendants admit the remaining allegations contained in Paragraph 2 of Plaintiffs' Complaint.

PARTIES

- 3. Defendants are without knowledge or information sufficient to form a belief as to the truthfulness of the allegations contained in Paragraph 3 of Plaintiffs' Complaint, and thus deny the same.
- 4. Defendants are without knowledge or information sufficient to form a belief as to the truthfulness of the allegations contained in Paragraph 4 of Plaintiffs' Complaint, and thus deny the same.
- 5. Defendants are without knowledge or information sufficient to form a belief as to the truthfulness of the allegations contained in Paragraph 5 of Plaintiffs' Complaint, and thus deny the same.
- 6. Defendants admit the allegations contained in Paragraph 6 of Plaintiffs' Complaint.

7. Defendants admit the allegations contained in Paragraph 7 of Plaintiffs' Complaint.

FIRST CAUSE OF ACTION (Breach of Lease Agreement)

- 8. Paragraphs 1 through 7 above are hereby incorporated by reference as if fully set forth at this point.
- 9. To the extent Plaintiffs purport to quote or paraphrase from a document, the document speaks for itself. Defendants deny any statements inconsistent with the document. Additionally, Defendants are without knowledge or information sufficient to form a belief as to the truthfulness of the remaining allegations contained in Paragraph 9 of Plaintiffs' Complaint, and thus deny the same.
- 10. To the extent Plaintiffs purport to quote or paraphrase from a document, the document speaks for itself. Defendants deny any statements inconsistent with the document and deny any remaining allegations contained in Paragraph 10 of the Complaint.
- 11. To the extent Plaintiffs purport to quote or paraphrase from a document, the document speaks for itself. Defendants deny any statements inconsistent with the document. Additionally, Defendants are without knowledge or information sufficient to form a belief as to the truthfulness of the remaining allegations contained in Paragraph 11 of Plaintiffs' Complaint, and thus deny the same.
 - 12. Defendants deny the allegations contained in Paragraph 12 of the Complaint.
- 13. To the extent Plaintiffs purport to quote or paraphrase from a document, the document speaks for itself. Defendants deny any statements inconsistent with the document. Additionally, Defendants are without knowledge or information sufficient to form a belief as to the truthfulness of the remaining allegations contained in Paragraph 13 of Plaintiffs' Complaint, and thus deny the same.
 - 14. Defendants deny the allegations contained in Paragraph 14 of the Complaint.
 - 15. Defendants deny the allegations contained in Paragraph 15 of the Complaint.
 - 16. Defendants deny the allegations contained in Paragraph 16 of the Complaint.

- 17. Defendants deny the allegations contained in Paragraph 17 of the Complaint.
- 18. Defendants deny the allegations contained in Paragraph 18 of the Complaint.

SECOND CAUSE OF ACTION (Breach of Personal Guaranty)

- 19. Paragraphs 1 through 18 above are hereby incorporated by reference as if fully set forth at this point.
 - 20. Defendants deny the allegations contained in Paragraph 20 of the Complaint.
- 21. To the extent Plaintiffs purport to quote or paraphrase from a document, the document speaks for itself. Defendants deny any statements inconsistent with the document and deny any remaining allegations contained in Paragraph 21 of the Complaint.
- 22. To the extent Plaintiffs purport to quote or paraphrase from a document, the document speaks for itself. Defendants deny any statements inconsistent with the document and deny any remaining allegations contained in Paragraph 22 of the Complaint.
 - 23. Defendants deny the allegations contained in Paragraph 23 of the Complaint.
 - 24. Defendants deny the allegations contained in Paragraph 24 of the Complaint.
 - 25. Defendants deny the allegations contained in Paragraph 25 of the Complaint.
 - 26. Defendants deny the allegations contained in Paragraph 26 of the Complaint.

THIRD CAUSE OF ACTION (Breach of Lease Agreement)

- 27. Paragraphs 1 through 26 above are hereby incorporated by reference as if fully set forth at this point.
- 28. To the extent Plaintiffs purport to quote or paraphrase from a document, the document speaks for itself. Defendants deny any statements inconsistent with the document. Additionally, Defendants are without knowledge or information sufficient to form a belief as to the truthfulness of the remaining allegations contained in Paragraph 28 of Plaintiffs' Complaint, and thus deny the same.
- 29. To the extent Plaintiffs purport to quote or paraphrase from a document, the document speaks for itself. Defendants deny any statements inconsistent with the document. Additionally, Defendants are without knowledge or information sufficient to form a belief as to

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

- 30. To the extent Plaintiffs purport to quote or paraphrase from a document, the document speaks for itself. Defendants deny any statements inconsistent with the document. Additionally, Defendants are without knowledge or information sufficient to form a belief as to the truthfulness of the remaining allegations contained in Paragraph 30 of Plaintiffs' Complaint, and thus deny the same.
- 31. To the extent Plaintiffs purport to quote or paraphrase from a document, the document speaks for itself. Defendants deny any statements inconsistent with the document. Additionally, Defendants are without knowledge or information sufficient to form a belief as to the truthfulness of the remaining allegations contained in Paragraph 31 of Plaintiffs' Complaint, and thus deny the same.
 - 32. Defendants deny the allegations contained in Paragraph 32 of the Complaint.
 - 33. Defendants deny the allegations contained in Paragraph 33 of the Complaint.
 - 34. Defendants deny the allegations contained in Paragraph 34 of the Complaint.
 - 35. Defendants deny the allegations contained in Paragraph 35 of the Complaint.
 - 36. Defendants deny the allegations contained in Paragraph 36 of the Complaint.
 - 37. Defendants deny the allegations contained in Paragraph 37 of the Complaint.
 - 38. Defendants deny the allegations contained in Paragraph 38 of the Complaint.
 - 39. Defendants deny the allegations contained in Paragraph 39 of the Complaint.
 - 40. Defendants deny the allegations contained in Paragraph 40 of the Complaint.
 - 41. Defendants deny the allegations contained in Paragraph 41 of the Complaint.
 - 42. Defendants deny the allegations contained in Paragraph 42 of the Complaint.

FOURTH CAUSE OF ACTION (Breach of Personal Guaranty)

- 43. Paragraphs 1 through 42 above are hereby incorporated by reference as if fully set forth at this point.
 - 44. Defendants deny the allegations contained in Paragraph 44 of the Complaint.

- 45. To the extent Plaintiffs purport to quote or paraphrase from a document, the document speaks for itself. Defendants deny any statements inconsistent with the document and deny any remaining allegations contained in Paragraph 45 of the Complaint.
- 46. To the extent Plaintiffs purport to quote or paraphrase from a document, the document speaks for itself. Defendants deny any statements inconsistent with the document and deny any remaining allegations contained in Paragraph 46 of the Complaint.
 - 47. Defendants deny the allegations contained in Paragraph 47 of the Complaint.
 - 48. Defendants deny the allegations contained in Paragraph 48 of the Complaint.
 - 49. Defendants deny the allegations contained in Paragraph 49 of the Complaint.
 - 50. Defendants deny the allegations contained in Paragraph 50 of the Complaint.
 - 51. Defendants deny the allegations contained in Paragraph 51 of the Complaint.
 - 52. Defendants deny the allegations contained in Paragraph 52 of the Complaint.
 - 53. Defendants deny the allegations contained in Paragraph 53 of the Complaint.
 - 54. Defendants deny the allegations contained in Paragraph 54 of the Complaint.
 - 55. Defendants deny the allegations contained in Paragraph 55 of the Complaint.
 - 56. Defendants deny the allegations contained in Paragraph 56 of the Complaint.

FIFTH CAUSE OF ACTION (Attachment)

- 57. Paragraphs 1 through 56 above are hereby incorporated by reference as if fully set forth at this point.
 - 58. Defendants deny the allegations contained in Paragraph 58 of the Complaint.
 - 59. Defendants deny the allegations contained in Paragraph 59 of the Complaint.
- 60. To the extent Plaintiffs purport to quote or paraphrase from a document, the document speaks for itself. Defendants deny any statements inconsistent with the document. Additionally, Defendants are without knowledge or information sufficient to form a belief as to the truthfulness of the remaining allegations contained in Paragraph 60 of Plaintiffs' Complaint, and thus deny the same.

- 61. To the extent Plaintiffs purport to quote or paraphrase from a document, the document speaks for itself. Defendants deny any statements inconsistent with the document.
 - 62. Defendants deny the allegations contained in Paragraph 62 of the Complaint.
 - 63. Defendants deny the allegations contained in Paragraph 63 of the Complaint.
 - 64. Defendants deny the allegations contained in Paragraph 64 of the Complaint.

EIGHTH CAUSE OF ACTION (Temporary Restraining Order)

- 65. Paragraphs 1 through 64 above are hereby incorporated by reference as if fully set forth at this point.
 - 66. Defendants deny the allegations contained in Paragraph 66 of the Complaint.
 - 67. Defendants deny the allegations contained in Paragraph 67 of the Complaint.
 - 68. Defendants deny the allegations contained in Paragraph 68 of the Complaint.
 - 69. Defendants deny the allegations contained in Paragraph 69 of the Complaint.

AFFIRMATIVE DEFENSES

In accordance with Nevada Rule of Civil Procedure 11, all possible affirmative defenses may or may not have been asserted herein insofar as sufficient facts were not available to Defendants after reasonable inquiry upon the filing of this pleading and therefore Defendants assert the following defenses based in fact or upon reasonable belief and hereby reserve the right to amend this Answer to allege appropriate or additional defenses, if subsequent investigation or discovery so warrants:

FIRST AFFIRMATIVE DEFENSE

Defendants hereby incorporate by reference those affirmative defenses enumerated in Rule 8 of the Nevada Rules of Civil Procedure as if fully set forth herein. In the event further investigation or discovery reveals the applicability of any such defenses, Defendants reserve the right to seek leave of the court to amend this Answer to specifically assert any such defense. Such defenses are herein incorporated by reference for the specific purpose of not waiving any such defense.

SECOND AFFIRMATIVE DEFENSE

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

against Defendants.

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FOURTEENTH AFFIRMATIVE DEFENSE

It has been necessary for Defendants to employ the services of an attorney to defend this action and a reasonable sum should be allowed Defendants as and for attorney's fees, together with their costs expended in this action.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' Complaint fails to allege facts, or a cause of action, sufficient to support a claim for attorney's fees, costs, or interest.

PRAYER FOR RELIEF

WHEREFORE, Defendants BERRY HINCKLEY INDUSTRIES and JERRY HERBST hereby pray for judgment against Plaintiffs as follows:

- 1. That Plaintiffs take nothing by way of their Complaint and that the same be dismissed with prejudice.
 - 2. For costs of suit and reasonable attorneys' fees; and
- 3. For such other and further relief as the Court deems just and proper in the circumstances.

COUNTERCLAIM

Counterclaimants Berry-Hinckley Industries and Jerry Herbst, by and through their counsel of record, Gordon Silver, allege as follows:

PARTIES

- 1. Berry-Hinckley Industries ("BHI") is a Nevada corporation.
- 2. Jerry Herbst ("Herbst," and collectively with BHI, "Counterclaimants") is an individual and a resident of the State of Nevada.
- 3. Counter-defendant Larry J. Willard ("Willard") is, on information and belief, a resident of California, and at all relevant times herein was trustee of the Larry James Willard Trust Fund (the "Willard Trust").
- 4. Counter-defendant Overland Development Corporation, Inc., dba LJW Enterprises, Inc. ("Overland"), is, on information and belief, a California corporation.

1 5. On informa 2 Willard Trust, and Overlar 3 6. On May 1,

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5. On information and belief, Willard is the president of Overland. Willard, the Willard Trust, and Overland are collectively referred to hereinafter as "Counter-defendants."

GENERAL ALLEGATIONS

- 6. On May 1, 2013, BHI entered into an Operation and Management Agreement (the "Operation Agreement") with Counter-defendants related to the real property located at 7695 S. Virginia Street in Reno, Nevada, which BHI had occupied pursuant to a Lease Agreement by and between BHI and Counter-defendants (the "Willard Lease"). A true and correct copy of the Operation Agreement is attached hereto as **Exhibit 1**.
- 7. Pertinent to this Counterclaim, Section 4 of the Operation Agreement provided the following with respect to compensation to BHI, who is defined in the Operation Agreement as the "Operator":

In consideration of Operator performing the Services and other mutual covenants set forth herein, Owner shall pay to Operator the sum of Ten Thousand and No/100ths Dollars (\$10,000.00) per month (the "Fee"), and Owner then shall be entitled to all Net Profits (below defined) generated at the Location during each month of the term of this Agreement. The Fee and Net Profits payment shall be payable as set forth below.

Operator shall have fifty (50) days from the end of each month to tender the Net Profits to Owner and provide Owner with an accounting of the subject month's Net Profits. Based thereon, commencing on July 20, 2013, and continuing no later than the twentieth (20th) day of each month thereafter as necessary depending on the length of the term of this Agreement, Operator shall tender to Owner the subject month's Net Profits attributable to the Location, minus the Fee, which such Fee shall be retained by Operator. In the event that the Net Profits for any given month are negative or otherwise not sufficient to pay the Fee, Owner shall not be entitled to any payment and shall instead pay to Operator the amount of the negative Net Profits (if applicable) plus the balance of the Fee within three (3) days of receipt of written demand therefore. As used herein, the term Net Profits shall mean the gross receipts collected by Operator in operating the Location in any given month, minus any and all expenses incurred by Operator in operating the Location during such month including, but not limited to, the cost of all insurance required to be carried by Operator as well as the actual cost to Operator of all inventory sold during such month (regardless of whether Operator purchased such inventory during the subject month, or any previous month). Each payment of Net Profits to Owner hereunder (or alternatively, demand by Operator for payment of the Fee and/or negative Net Profits) shall be accompanied by documentation, certified by an officer of Operator to be accurate, supporting Operator's calculation of Net Profits for the subject month.

-10-

8. Section 5 of the Operation Agreement also provided that BHI had no obligation to make the rent payments set forth in the Willard Lease. Specifically:

During the term of this Agreement, Operator shall have no obligation to make the rent payments set forth in the Lease. Owner hereby acknowledges and agrees that the continuous operation of the Location by Operator and the payment of the Net Profits to Owner (if any) constitutes sufficient consideration of Operator's occupation of the Location and shall be in lieu of any obligation to pay rent under the Lease during the term of this Agreement.

9. Further, Section 9 of the Operation Agreement provides that Counter-defendants must indemnify BHI as follows:

Owner shall indemnify and defend Operator, and its officers, directors, owners, employees, affiliates and agents against, and hold them harmless from, any and all costs, expenses, claims, suits, liabilities, loss and damages, including attorneys' fees arising out of or relating to this Agreement and/or the services provided by Operator under this Agreement, excepting therefrom costs, expenses, claims, suits, liabilities, loss and damages arising as a result of Operator's gross negligence. The indemnification obligations set forth herein shall survive the expiration or earlier termination of this Agreement.

- 10. BHI incurred a negative Net Profit during the term of the Operation Agreement, which was also insufficient to pay the Fee contemplated in Section 4 of the Operation Agreement.
- 11. However, Counter-defendants have failed to pay to BHI the amount of negative Net Profits plus the balance of the Fee as was required by Section 4 of the Operation Agreement.
- 12. Further, Counter-defendants have brought suit against BHI, seeking, *inter alia*, rental payments under the Willard Lease that Counter-defendants claim were incurred during the term of the Operation Agreement.
- 13. Counter-defendants have also brought suit against Herbst, claiming, *inter alia*, that Herbst is liable for rental payments under the Willard Lease that Counter-defendants claim were incurred during the term of the Operation Agreement by virtue of a guaranty between Herbst and Counter-defendants (the "Willard Guaranty").

FIRST CLAIM FOR RELIEF (BREACH OF CONTRACT)

14. Counterclaimants incorporate by reference all allegations previously stated in this

Counterclaim as though set forth fully herein.

- 15. The Operation Agreement constitutes a binding legal contract.
- 16. BHI performed under the terms of the Operation Agreement.
- 17. Counter-defendants' failure to pay to BHI the amount of negative Net Profits plus the balance of the Fee as was required by Section 4 of the Operation Agreement constitutes a breach of the Operation Agreement.
- 18. As a result of Counter-defendants' breach of the Operation Agreement, BHI has suffered damages in excess of \$10,000, plus interest, attorneys' fees, and costs.

SECOND CLAIM FOR RELIEF (DECLARATORY RELIEF)

- 19. Counterclaimants incorporate by reference all allegations previously stated in this Counterclaim as though set forth fully herein.
- 20. Pursuant to NRS 30.040(1) and NRS 30.050, any person interested under a written contract, or whose rights, status, or other legal relations are affected by a contract, may have determined any question of construction or validity arising under the contract and obtain a declaration of rights, status, or other legal relations thereunder, regardless of whether or not a breach has occurred.
- 21. Here, a controversy exists because Counter-defendants have brought suit against BHI seeking, *inter alia*, rental payments under the Willard Lease that Counter-defendants claim were incurred during the term of the Operation Agreement.
- 22. Similarly, Counter-defendants have brought suit against Herbst, claiming, *inter alia*, that Herbst is liable for rental payments under the Willard Lease that Counter-defendants claim were incurred during the term of the Operation Agreement by virtue of the Willard Guaranty.
- 23. While BHI and Herbst deny any liability under the Willard Lease and Willard Guaranty, BHI and Herbst request a declaration that BHI and Herbst are not responsible for any of the rental payments that Counter-defendants claim were incurred during the term of the Operation Agreement, as Section 5 of the Operation Agreement expressly provides that "[d]uring

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

CERTIFICATE OF SERVICE 1 2 I certify that I am an employee of GORDON SILVER, and that on this date, pursuant to 3 NRCP 5(b), I am serving a true and correct copy of the attached **DEFENDANTS' ANSWER** 4 TO PLAINTIFFS' AMENDED COMPLAINT AND COUNTERCLAIM on the parties as 5 set forth below: 6 XXX Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, Reno, Nevada, postage prepaid, following 7 ordinary business practices 8 Certified Mail, Return Receipt Requested 9 Via Facsimile (Fax) 10 Via E-Mail 11 Placing an original or true copy thereof in a sealed envelope and causing the same 12 to be personally Hand Delivered 13 Federal Express (or other overnight delivery) 14 **Electronic Notification** 15 addressed as follows: 16 17 David C. O'Mara THE O'MARA LAW FIRM, P.C. 18 311 E. Liberty Street Reno, Nevada 89501 19 DATED this 21st day of April, 2015. 20 21 22 /s/ Stephanie J. Glantz An Employee of GORDON SILVER 23

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EXHIBIT "3"

EXHIBIT "3"

EXHIBIT "3"

FILED Electronically CV14-01712 2018-04-13 11:09:14 AM Jacqueline Bryant Clerk of the Court Transaction # 6628496

1 3105 DICKINSON WRIGHT, PLLC 2 JOHN P. DESMOND Nevada Bar No. 5618 3 BRIAN R. IRVINE Nevada Bar No. 7758 4 ANJALI D. WEBSTER Nevada Bar No. 12515 5 100 West Liberty Street, Suite 940 Reno, NV 89501 6 Tel: (775) 343-7500 Fax: (775) 786-0131 Email: <u>Jdesmond@dickinsonwright.com</u> Email: Birvine@dickinsonwright.com 8 Email: Awebster@dickinsonwright.com Attorney for Defendants Berry Hinckley Industries and 10 Jerry Herbst IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA 11 12 IN AND FOR THE COUNTY OF WASHOE 13 CASE NO. CV14-01712 LARRY J. WILLARD, individually 14 and as trustee of the Larry James Willard Trust Fund; OVERLANĎ DEVELOPMENT DEPT. 6 15 CORPORATION, a California corporation; EDWARD C. WOOLEY AND JUDITH A. 16 WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley 17 Intervivos Revocable Trust 2000, 18 Plaintiff, vs. 19 BERRY-HINCKLEY INDUSTRIES, a 20 Nevada corporation; and JERRY HERBST, an individual 21 Defendants. 22 23 BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, 24 an individual; 25 Counterclaimants, 26 vs 27 28

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

Counter-defendants.

[PROPOSED] ORDER GRANTING DEFENDANTS/COUNTERCLAIMANTS' MOTION TO DISMISS COUNTERCLAIMS

Before this Court is Defendants/Counterclaimants' Motion to Dismiss Counterclaims, filed on March 8, 2018. No opposition was ever filed.

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

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1	Accordingly, and good cause appearing therefor,
2	IT IS HEREBY ORDERED that Defendants' Motion to Dismiss Counterclaims is
3	granted. DATED this 12th day of March, 2018.
4	DATED HIS 17 day of Haron, 2010.
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6	DISTRICT COURT JUDGE
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8	Respectfully submitted by:
10	DICKINSON WRIGHT, PLLC
11	
12	/s/ Brian R. Irvine
13	JOHN P. DESMOND Nevada Bar No. 5618
14	BRIAN R. IRVINE Nevada Bar No. 7758
15	ANJALI D. WEBSTER Nevada Bar No. 11525 100 West Liberty Street, Suite 940
16	Reno, NV 89501 Tel: (775) 343-7500
17	Fax: (775) 786-0131 Fmail: Idesmond@dickinsonwright.com
18	Email: Birvine@dickinsonwright.com Email: Awebster@dickinsonwright.com
19	Attorneys for Defendants
20	Berry Hinckley Industries, and Jerry Herbst
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EXHIBIT "4"

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EXHIBIT "4"

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

3105 1 DICKINSON WRIGHT, PLLC 2 JOHN P. DESMOND Nevada Bar No. 5618 3 BRIAN R. IRVINE Nevada Bar No. 7758 4 ANJALI D. WEBSTER Nevada Bar No. 12515 5 100 West Liberty Street, Suite 940 Reno, NV 89501 Tel: (775) 343-7500 6 Fax: (775) 786-0131 7 Email: Jdesmond@dickinsonwright.com Email: Birvine@dickinsonwright.com 8 Email: Awebster@dickinsonwright.com 9 Attorney for Defendants Berry Hinckley Industries and 10 Jerry Herbst IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA 11 IN AND FOR THE COUNTY OF WASHOE 12 13 CASE NO. CV14-01712 LARRY J. WILLARD, individually 14 and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT DEPT. 6 15 CORPORATION, a California corporation; EDWARD C. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the 16 Edward C. Wooley and Judith A. Wooley 17 Intervivos Revocable Trust 2000, 18 Plaintiff, VS. 19 BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an 20 individual 21 Defendants. 22 23 BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, 24 an individual; 25 Counterclaimants, 26 27 28

1 2	LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;
3	Counter-defendants.
5	OF CLAIMS OF WOOLEY PLA
6 7 8	Pursuant to the Stipulation for Dismissal with Prejudice of the parties and other good cause appearing therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that all
9	of the claims of Plaintiffs EDWARD C. WOOLEY AND JUDITH A. WOOLEY, individually
10	and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000
11	asserted in the above-entitled action are dismissed with prejudice, the parties to bear their own
12	costs and attorney's fees. IT IS SO ORDERED this day of, 2018.
13	
14	DISTRICT COURT JUDGE
1516	Respectfully submitted by:
17	DICKINSON WRIGHT, PLLC
18	
19	JOHN P. DESMOND Nevada Bar No. 5618
20	BRIAN R. IRVINE Nevada Bar No. 7758
21	ANJALI D. WEBSTER Nevada Bar No. 11525
22	100 West Liberty Street, Suite 940 Reno, NV 89501
23	Tel: (775) 343-7500 Fax: (775) 786-0131
2425	Email: <u>Jdesmond@dickinsonwright.com</u> Email: <u>Birvine@dickinsonwright.com</u> Email: <u>Awebster@dickinsonwright.com</u>
26	Attorneys for Defendants Berry Hinckley Industries, and
27	Jerry Herbst

EXHIBIT "5"

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Clerk of the Court
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CODE NO. 3370

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

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

Plaintiffs,

VS.

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

Defendants.

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

Counterclaimants,

vs

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

Counter-defendants.

Case No. CV14-01712

Dept. No. 6

ORDER GRANTING
DEFENDANTS'/
COUNTERCLAIMANTS' MOTION
FOR SANCTIONS [ORAL
ARGUMENT REQUESTED]

ORDER GRANTING DEFENDANTS'/ COUNTERCLAIMANTS' MOTION FOR SANCTIONS

Before this Court is *Defendants'/Counterclaimants' Motion for Sanctions [Oral Argument Requested]* ("Motion"), filed November 15, 2017 by Defendants/Counterclaimants BERRY-HINCKLEY INDUSTRIES ("Berry-Hinckley") and JERRY HERBST ("Mr. Herbst") (collectively, "Defendants") by and through their counsel Brian Irvine, Esq. Also on November 14, 2017, Defendants filed *Defendants/Counterclaimants' Motion to Exceed Page Limit on Defendants/Counterclaimants' Motion for Sanctions* ("Motion to Exceed Page Limit"). Plaintiffs LARRY J. WILLARD, OVERLAND DEVELOPMENT CORPORATION, EDWARD C. WOOLEY and JUDITH WOOLEY (collectively, "Plaintiffs" unless individually referenced) failed to file an opposition to the *Motion to Strike*. As a result, Defendants filed a *Notice of Non-Opposition to Defendants'/Counterclaimants' Motion for Sanctions* ("Notice of Non-Opposition") on December 7, 2017 and submitted the matter for decision thereafter.

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

//

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26 1/

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

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

Plaintiffs once again failed to respond to the *Motion* or request an extension.

Defendants then filed a second *Notice* of *Non-Opposition* to *Defendants'/Counterclaimants' Motion for Sanctions* ("Second Notice of Non-Opposition") and subsequent request for submission on December 18, 2017.

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

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

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

Accordingly, and good cause appearing therefor,

IT IS HEREBY ORDERED AND DECREED:

- Defendants'/Counterclaimants' Motion for Sanctions [Oral Argument Requested] is GRANTED.
- Defendants/Counterclaimants' Motion to Exceed Page Limit on Defendants/Counterclaimants' Motion for Sanctions is GRANTED.
- Defendants shall submit a Proposed Order granting Defendants'/Counterclaimants' Motion for Sanctions, including factual and legal analysis and discussion, to Department 6 within twenty (20) days of the date of this Order in accordance with WDCR 9.

Dated this ____ day of January, 2018.



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

EXHIBIT "6"

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Jacqueline Bryant
Clerk of the Court
Transaction # 6466778

CODE NO. 3370

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

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

Plaintiffs,

VS.

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

Defendants.

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

Counterclaimants,

VS

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

Counter-defendants.

Case No. CV14-01712

Dept. No. 6

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

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

Before this Court is *Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* ("Motion to Strike"), filed

November 14, 2017 by Defendants/Counterclaimants BERRY-HINCKLEY INDUSTRIES

("Berry-Hinckley") and JERRY HERBST ("Mr. Herbst") (collectively, "Defendants") by and through their counsel Brian Irvine, Esq. Also on November 14, 2017, Defendants filed a *Motion to Exceed Page Limit* in conjunction with their *Motion to Strike*. Plaintiffs LARRY J.

WILLARD, OVERLAND DEVELOPMENT CORPORATION, EDWARD C. WOOLEY and JUDITH WOOLEY (collectively, "Plaintiffs" unless individually referenced) failed to file an opposition to the *Motion to Strike*. As a result, Defendants filed a *Notice of Non-Opposition to Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* ("Notice of Non-Opposition") on December 7, 2017 and submitted the matter for decision thereafter.

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

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

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

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

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

Accordingly, and good cause appearing therefor,

IT IS HEREBY ORDERED AND DECREED:

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

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

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

DISTRICT JUDGE

1	<u>CERTIFICATE OF SERVICE</u>
2	I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT
3	that on the 40 day of January, 2018, I electronically filed the foregoing with the Clerk
4	of the Court system which will send a notice of electronic filing to the following:
5	
6	BRIAN IRVINE, ESQ.
7	JOHN P. DESMOND, ESQ.
8	ANJALI D. WEBSTER, ESQ.
9	BRIAN MOQUIN, ESQ.
10	DAVID O'MARA, ESQ.
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16	And, I deposited in the County mailing system for postage and mailing with the
17	United States Postal Service in Reno, Nevada, a true and correct copy of the attached
18	document addressed as follows:
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EXHIBIT "7"

EXHIBIT "7"

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Jacqueline Bryant
Clerk of the Court
Transaction # 6466867

CODE NO. 3370

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

Plaintiffs,

VS.

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

Defendants.

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

Counterclaimants,

VS

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

Counter-defendants.

Case No. CV14-01712

Dept. No. 6

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

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

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

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

I. FACTUAL AND PROCEDURAL HISTORY

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

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

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

Plaintiffs once again failed to respond to the *Motion* or request an extension.

Defendants then filed a second *Notice of Non-Opposition to Defendants'/Counterclaimants' Motion for Partial Summary Judgment* ("Second Notice of Non-Opposition") and subsequent request for submission on December 18, 2017.

II. LAW AND ANALYSIS

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

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

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

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

juncture.

Accordingly, and good cause appearing therefor,

IT IS HEREBY ORDERED Defendants' Motion for Partial Summary Judgment is

DENIED as moot.

Dated this _____day of January, 2018.

DISTRICT JUDGE

1	<u>CERTIFICATE OF SERVICE</u>
2	I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT;
3	that on the day of January, 2018, I electronically filed the foregoing with the Clerk
4	of the Court system which will send a notice of electronic filing to the following:
5	
6	BRIAN IRVINE, ESQ.
7	JOHN P. DESMOND, ESQ.
8	ANJALI D. WEBSTER, ESQ.
9	BRIAN MOQUIN, ESQ.
10	DAVID O'MARA, ESQ.
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16	And, I deposited in the County mailing system for postage and mailing with the
17	United States Postal Service in Reno, Nevada, a true and correct copy of the attached
18	document addressed as follows:
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20	hidi Pore
21	- mar row
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EXHIBIT "8"

EXHIBIT "8"

EXHIBIT "8"

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

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

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

Counter-defendants.

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON DEFENDANTS' MOTION FOR SANCTIONS

- 1. Plaintiffs in this matter are Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund; Overland Development Corporation, a California corporation (collectively, "Willard" or the "Willard Plaintiffs"); Edward E. Wooley and Judith A. Wooley, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000 (collectively, "Wooley"). The Willard Plaintiffs are also counter-defendants in this matter.
- 2. Plaintiffs' counsel are Brian Moquin, a California attorney who has been admitted to practice in Nevada *pro hac vice*, and David O'Mara of the O'Mara Law Firm, P.C., who is serving as local counsel.
- 3. Defendants/counter-claimants in this matter are Berry-Hinckley Industries ("BHI") and Jerry Herbst (collectively, "Defendants").
- 4. The Motion before this Court is Defendants' Motion for Sanctions, wherein Defendants sought, in pertinent part, dismissal with prejudice of this action pursuant to NRCP 16.1(e)(3), NRCP 37(b)(2), NRCP 41(b), and *Blanco v. Blanco*, 129 Nev. ____, 311 P.3d 1170. (Defendants' Motion).
- 5. Defendants' Motion was filed on November 15, 2017. Plaintiffs did not file an Opposition, despite Defendants and this Court granting several extensions. Defendants' Motion was submitted to this Court on December 18, 2017.

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6. This Court, having considered the briefing, and being otherwise fully advised, and GOOD CAUSE APPEARING, hereby finds the following facts and makes the following conclusions of law:

FINDINGS OF FACT

Plaintiffs' Complaint

- 7. On August 8, 2014, Plaintiffs commenced this action against Defendants, filing a joint complaint against them. (Complaint).¹
- 8. Willard sought the following damages against Defendants for an alleged breach of the lease between Willard and BHI: (1) "rental income" for \$19,443,836.94, discounted by 4% per the lease to \$15,741,360.75 as of March 1, 2013; and (2) certain property-related damages, such as insurance and installation of a security fence. (First Amended Complaint ("FAC")).
- 9. Willard had also sought several other categories of damages which have since been dismissed or withdrawn. (May 30, 2017, Order).
- 10. Wooley sought the following damages against Defendants for an alleged breach of the lease between Wooley and BHI: (1) "rental income in the amount of \$4,420,244.00 that [Wooley] otherwise would have received," discounted by a rate of 4% as specified in the Wooley Lease to \$3,323,543.90 as of March 1, 2013; (2) a "diminution in value in an amount to be proven at trial but which is at least \$2,000,000"; (3) property taxes in the amount of \$1,500; (4) insurance for \$3,840; (5) maintenance costs of \$4,000; (6) management costs of \$2,500; and (7) security deposit from subtenant for \$2,485.00. (FAC).
- 11. Wooley had also sought several other categories of damages which have since been dismissed or withdrawn. (May 30, 2017, Order).

¹All of the referenced documents have been filed with this Court in this case, either as pleadings/ briefings/ motions or as exhibits to the same. References to "Defendants' Motion" are to Defendants' Motion for Sanctions. References to "Willard Motion" or "Wooley Motion" are to the Plaintiffs' respective Motions for Summary Judgment.

Plaintiffs' Initial Disclosures

- 12. On December 12, 2014, Plaintiffs provided their initial disclosures. (Exhibit 1 to Defendants' Motion for Sanctions).
- 13. However, while Plaintiffs disclosed anticipated witnesses and documents, they did not provide any computation of their claimed damages, notwithstanding the express requirement to do so set forth in NRCP 16.1(a)(1)(C).

Defendants' February 12, 2015, Letter

- 14. On February 12, 2015, Defendants wrote to Plaintiffs regarding the deficiencies in their initial disclosures, and informing them that the disclosures did not include the damages computations required by the Nevada Rules of Civil Procedure. (Exhibit 4 to Defendants' Motion for Sanctions).
- 15. Defendants advised Plaintiffs that their failure to timely comply would result in Defendants seeking sanctions. *Id*.
- 16. However, Plaintiffs did not comply with their NRCP 16.1 obligations upon receipt of this letter or any time thereafter.

Plaintiffs' Interrogatory Responses

- 17. In April of 2015, Defendants served Plaintiffs with written discovery. (June 23, 2015, Motion to Compel).
- 18. Defendants had not received any NRCP 16.1 damages disclosures from Plaintiffs, and asked Plaintiffs in separate interrogatories to "[p]lease explain in detail how the damages...alleged in your Amended Complaint were calculated." (Plaintiffs' Interrogatory Responses, Exhibits 5 and 6 to Defendants' Motion for Sanctions).
- 19. Plaintiffs did not respond, even after Defendants granted them multiple extensions, requiring Defendants to file a motion to compel. (June 23, 2015, Motion to Compel).

- 20. This Court granted the Motion to Compel, which Plaintiffs failed to oppose. Therein, this Court ordered, in pertinent part, that Plaintiffs shall pay Defendants' reasonable expenses incurred in making the motion, including attorneys' fees. (July 1, 2015, Order).
- 21. Only then did Plaintiffs respond, and, in pertinent part, simply repeated the allegations in their Complaint when discussing their damages. (Plaintiffs' Interrogatory Responses, Exhibits 5 and 6 to Defendants' Motion for Sanctions).
- 22. Notably, these Court-ordered responses were the last time Plaintiffs provided anything that even came close to a damages disclosure until October of 2017, and even these did not comply with the requirements of NRCP 16.1.
- 23. Plaintiffs did not pay Defendants' reasonable expenses, despite the direct order from this Court to do so.
- 24. Further, the fact that the Court imposed monetary sanctions on Plaintiffs in 2015 clearly did not deter any of their subsequent conduct in continuing to fail to comply with their discovery obligations and Court orders.

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

- 25. On August 28, 2015, Defendants wrote to Plaintiffs, referencing Plaintiffs' continued failure to comply with discovery obligations and resulting prejudice to Defendants, and noting that Plaintiffs had also yet to comply with the promise they made during a status conference before this Court to provide Defendants with discovery responses to Defendants' outstanding discovery requests in advance of the parties' depositions scheduled to begin on August 20, 2015. (Exhibit 7 to Defendants' Motion for Sanctions).
- 26. Plaintiffs' failure to comply with discovery obligations necessitated a continuance of the trial date and an extension of all discovery deadlines. (September 3, 2015, Stipulation and Order).

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

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

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

- 28. On April 20, 2016, Defendants continued to request the information that they sought in their March 2016 letters, noting that Plaintiffs had promised to provide the documents but they had not done so. (Exhibit 10 to Defendants' Motion).
- 29. Defendants again requested Plaintiffs' NRCP 16.1 damages calculations, noting that "this is an issue which we have raised on multiple occasions." *Id*.
 - 30. Yet again, Plaintiffs did not provide their NRCP 16.1 calculations.
- 31. Defendants also stated that "[y]our clients' failure to provide us with the discovery documents ha[s] prejudiced our ability to prepare a defense on behalf of our clients. Without such documents, we cannot depose several witnesses, and our experts are unable to complete their opinions. This also jeopardizes our ability to submit dispositive motions with complete information in time for the Court to fully consider those motions." *Id*.
- 32. Due to Plaintiffs continued failure to meet discovery obligations, the parties agreed to continue the trial date for a second time. The agreed-upon basis for a continuance was that Plaintiffs needed to provide Defendants with documents and information, and also needed to provide "Plaintiffs' NRCP 16.1 damages calculations." (May 2, 2016, Stipulation and Order). This Court signed the Order, adding that "no further continuances will be granted." *Id*.
- 33. Following the second continuance, trial was scheduled for May 2, 2017, and discovery was set to close on March 2, 2017.

<u>Plaintiffs' Unsuccessful Purported Disclosure of Daniel Gluhaich as a Non-Retained Expert Witness</u>

- 34. On December 2, 2016, Plaintiffs purported to disclose Daniel Gluhaich as a non-retained expert. (Exhibit 11 to Defendants' Motion).
- 35. However, while Plaintiffs' disclosure generally referenced the categories as to which Mr. Gluhaich was expected to testify, Plaintiffs did not provide "a summary of the facts

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

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

The Parties' December 2016 Correspondence

- 38. On December 9, 2016, Defendants' counsel wrote that Defendants did not receive the amended disclosure, or dates pursuant to which Defendants could depose Mr. Gluhaich. (Exhibit 13 to Defendants' Motion). Defendants advised Plaintiffs' counsel that "[o]bviously, we will be prejudiced by further delay in learning all of the expert opinion testimony that plaintiffs intent to present at trial. Please provide that information immediately." *Id*.
- 39. Defendants also addressed Plaintiffs' continued failure to provide their NRCP 16.1 damages. *Id.* On December 5, 2016, Wooley had provided a spreadsheet of damages expressly "for use in the ongoing informal settlement negotiations between Tim Herbst and Ed Wooley," and asked Defendants' counsel to "forward...to Tim Herbst as [Defendants' counsel saw] fit." (Exhibit 12 to Defendants' Motion). Plaintiffs' counsel also stated that he would "be

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

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

- 40. On December 23, 2016, Defendants' counsel discussed with Plaintiffs' counsel Plaintiffs' continued failure to properly disclose Mr. Gluhaich or even work with Defendants on expert deposition dates, even though Defendants had provided Plaintiffs an extension. (Exhibit 14 to Defendants' Motion).
- 41. Defendants also stated that this conduct was prejudicing Defendants and making it impossible for Defendants to comply with discovery deadlines for rebuttal experts. *Id*.
- 42. Next, Defendants expressed their concerns to Wooley that the damages spreadsheet recently provided for settlement purposes only, which Defendants could not share with their expert or use to prepare any defenses, contained a "new damages model that Plaintiffs had never before utilized in the case," and prejudiced Defendants in that they were unable to conduct discovery about this new computation of damages or the methodology used to arrive at the purported numbers in the Wooley settlement-only spreadsheet. *Id.*
- 43. Defendants concluded that "[w]e still have never received an NRCP 16.1 damages computation from either set of Plaintiffs, despite numerous demands. Please ensure that Plaintiffs meet their obligations to provide such computations immediately, or we will seek to preclude Plaintiffs from seeking any non-disclosed damages at trial, including those contained in the Wooley spreadsheet you sent me on December 5." *Id.* Defendants also added that they reserved the right to provide Plaintiffs' damages disclosure to their expert so that she could provide new opinions about any new damages model. *Id.*
- 44. On December 27, 2016, Plaintiffs' counsel responded. (Exhibit 15 to Defendants' Motion). Plaintiffs did not address their failure to provide their damages disclosures in any way, nor did they provide an expert disclosure of Mr. Gluhaich compliant

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

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

This Court's January 10, 2017, Hearing

- 46. On January 10, 2017, this Court held a hearing on Defendants' motion for partial summary judgment on Plaintiffs' overreaching consequential damages, which Messrs. Willard and Wooley personally attended. (January 10, 2017, transcript).
- 47. At the hearing, in pertinent part, Defendants' counsel informed this Court that Defendants had never received a damages computation from the Plaintiffs pursuant to NRCP 16.1, despite Defendants' many demands. *Id.* at 18. Plaintiffs' counsel attempted to claim that Plaintiffs' interrogatory responses satisfied Plaintiffs' requirements. *Id.* at 42-43. But Plaintiffs' counsel admitted, in open court, that "with respect to Willard, they do not" have an up-to-date, clear picture of Plaintiffs' damages claims. *Id.*
- 48. Plaintiffs' counsel also represented to this Court that Wooley's damages disclosures to Defendants were complete and up-to-date. *Id.* This was a misrepresentation, as Wooley had never provided Defendants with any NRCP 16.1 damages disclosures, and certainly had not provided any updated disclosures since the court-ordered discovery response in July of 2015. Further, the December 2016 damages spreadsheet was for use in settlement negotiations only per Wooley's counsel's own words, and therefore was not a disclosure in this litigation that could be utilized as contemplated by the Nevada Rules of Civil Procedure. (Exhibit 12 to Defendants' Motion). Defendants' counsel apprised this Court of this fact during the hearing. (January 10, 2017, transcript).

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

The February 9, 2017, Stipulation and Order

- 50. In spite of the rapidly impending trial date (at the time, May 2, 2017) and close of discovery (at the time, March 2, 2017), Plaintiffs did not provide Defendants with any damages disclosures or otherwise supplement or update their discovery responses in any way. Nor did Plaintiffs supplement their improper disclosure of Mr. Gluhaich or properly disclose any expert.
- 51. On February 3, 2017, Defendants wrote Plaintiffs, prefacing their letter by stating that "as of the date of this letter, we have less than thirty (30) days to complete discovery, less than sixty (60) days to fully-brief and submit dispositive motions to the Court for decision and less than three months until the current trial date." (Exhibit 16 to Defendants' Motion). Defendants wrote this letter to inform Plaintiffs that because of their failure to comply with their obligations, Defendants would not be able to timely complete discovery or submit dispositive motions, all to Defendants' prejudice, and to inform Plaintiffs that their conduct necessitated yet another continuance of the trial date. *Id*.
- 52. In the letter, Defendants first addressed Plaintiffs' obstinate refusal to comply with expert disclosure requirements. *Id.* Defendants reminded Plaintiffs that Plaintiffs "were indisputably aware of the fact that Plaintiffs' disclosures did not comply with the Nevada Rules of Civil Procedure at the time [they] served the deficient disclosure or immediately thereafter, as demonstrated by [the parties'] December 5, 2016, telephonic conversation." *Id.* However, despite Defendants having granted Plaintiffs an extension, Plaintiffs had not even attempted to comply with the Nevada Rules of Civil Procedure more than two months after the deadline, "without any justification whatsoever." *Id.*
- 53. Defendants further informed Plaintiffs that their "failure to comply with the Nevada Rules of Civil Procedure in the first instance, or to rectify their failure by providing an

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

- 54. Defendants also addressed Plaintiffs' continued failure to provide Defendants with an NRCP 16.1 damages computation. *Id.* Defendants stated that it would be "patently prejudicial to Defendants to receive Plaintiffs' damages model within mere days of the close of discovery," and it would be impossible for Defendants' expert to opine on any new damages theories under the current discovery deadlines if Plaintiffs were to seek any additional or different types of damages. *Id.*
- 55. Finally, Defendants requested that Plaintiffs also provide other outstanding discovery, stating that Plaintiffs "have been promising to disclose these documents for more than 10 months, but have yet to do so." *Id*.
- 56. Based on these issues, Defendants asked for a continuance of the trial date so that Plaintiffs could comply with their obligations such that Defendants could receive time to prepare their defenses in the timeline entitled to them by the Nevada Rules of Civil Procedure and the parties' agreements. *Id.*
- 57. Plaintiffs agreed to a third trial continuance, and on February 9, 2017, the parties signed a stipulation which contained several express recitals and stipulations regarding Plaintiffs' ongoing failure to comply with discovery obligations.
- 58. First, Plaintiffs agreed that they never properly disclosed Mr. Gluhaich and that this conduct had been prejudicial to Defendants:
 - 4. On December 2, 2016, Plaintiffs disclosed Dan Gluhaich as a non-retained expert. Plaintiffs' disclosure of Mr. Gluhaich indicated that Mr. Gluhaich would offer testimony regarding twelve separate subject matters and included Mr. Gluhaich's resume, but did not include "a summary of the facts and opinions to which the witness is expected to testify" as required by NRCP 16.1(a)(2)(B).

- 5. Because Plaintiffs' disclosure of Mr. Gluhaich did not include a summary of the facts and opinions to which the witness is expected to testify as required by NRCP 16.1(a)(2)(B), Defendants have been unable to conduct a meaningful deposition of Mr. Gluhaich or to retain experts to rebut Mr. Gluhaich's opinions, because those opinions remain unknown to Defendants.
- 6. Following receipt of Plaintiffs' supplemental disclosure of Mr. Gluhaich, if any, which includes a summary of the facts and opinions to which the witness is expected to testify as required by NRCP 16.1(a)(2)(B), Defendants intend to depose Mr. Gluhaich and retain experts to rebut his opinions.
- 10. ...[B]ecause Plaintiffs have not yet provided an expert disclosure of Mr. Gluhaich that includes a summary of the facts and opinions to which the witness is expected to testify as required by NRCP 16.1(a)(2)(B), Defendants will be unable to complete the deposition of Mr. Gluhaich or to retain and disclose experts to rebut Mr. Gluhaich's opinions within the time currently allowed for discovery.

(February 9, 2017, Stipulation and Order).

- 59. Second, Plaintiffs stipulated that they had not properly provided their NRCP 16.1 damages disclosures:
 - On January 10, 2017, the parties appeared in this Court for a hearing on Defendants' Motion for Partial Summary Judgment. At the hearing, the parties discussed with the Court Plaintiffs' obligation to provide, pursuant to NRCP 16.1(a)(1)(C), "[a] computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary matter, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered." (January 10, 2017 Hearing Transcript at 18, 42-43 and 61-62). Plaintiffs conceded at the hearing that they have not yet provided Defendants with a complete damages disclosure pursuant to NRCP 16.1(a)(1)(C), and the Court ordered Plaintiffs "to serve, within 15 days after the entry of the summary judgment, an updated 16.1 damage disclosure." Id. at 68.
 - 8. Upon receipt of Plaintiffs' NRCP 16.1 damages disclosure, Defendants intend to have Michelle Salazar supplement her initial expert report to include any opinions about any new or revised damages claims or calculations submitted by Plaintiffs, and Defendants may also need to conduct additional fact discovery on any new or revised damages claims or calculations submitted by Plaintiffs.

This Court's May 30, 2017, Order

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partial summary judgment. (Order).

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

66. On May 30, 2017, this Court entered an Order granting Defendants' motion for

- 67. In pertinent part, this Court stated that "[i]t is further ordered Plaintiffs shall serve, within fifteen (15) days of entry of this order, an updated NRCP 16.1 damage disclosure." Id.
- 68. Again, Plaintiffs completely ignored the requirements and obligations imposed by this order. They have failed to both properly disclose Mr. Gluhaich or to provide damages computations, despite the express requirements of the NRCP and this Court's Orders.

Plaintiffs' Motions for Summary Judgment

- 69. After three years of obstinate refusal to provide Defendants with an NRCP 16.1 damages calculation or to supplement any damages calculations, and after nearly one year of refusing to comply with the requirements to properly disclose an expert, Plaintiffs filed motions for summary judgment in which they requested brand new, never-disclosed types, categories, and amounts of damages with only four weeks remaining in discovery. (Motions for Summary Judgment).
- Further, their calculations were based upon opinions of Mr. Gluhaich, an expert 70. witness who was never properly disclosed, and who primarily based his opinions on appraisals that were also never disclosed. Id.
- These Motions were filed with only four weeks remaining in discovery—putting 71. Defendants in the exact same predicament that they were placed in February of 2017— Defendants could not engage in the discovery (fact and expert) necessary to adequately respond to Plaintiffs' brand new information, untimely disclosures, and new requests for relief. (Exhibit 16 to Defendants' Motion; February 9, 2017, Stipulation and Order).

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

Willard's Motion

- 73. In Willard's Motion, Willard sought more than triple the amount of damages (nearly \$40 million more) than he sought in the complaint and ostensibly throughout this case.
- 74. Willard also had a brand new, different basis for his claimed "rent" damages: the liquidated damages provision in the Lease. Unlike the damages sought in his Complaint, the liquidated damages clause contains a variable—reasonable rental value—that would necessarily require Willard to provide expert opinion to support his request and meet his burden of proof. (Willard Lease; Willard Motion).
- 75. Willard also had a brand new claim for diminution in value damages that would also require Willard to offer expert opinions to meet his burden of proof. (Willard's Motion for Summary Judgment).
 - 76. Default interest was a brand new component of Willard's claimed damages. *Id.*
- 77. The property-related damages now had a different purported value and amount. *Id.*
- 78. Willard's damages were based upon the opinions of Mr. Gluhaich, an undisclosed expert witness, and therefore Defendants did not have the chance to explore Mr. Gluhaich's opinions or rebut them as they are expressly entitled to do under Nevada law. *Id*.
- 79. Willard and his purported expert witness relied upon appraisals from 2008 and 2014 which were never disclosed in this litigation, despite Willard's NRCP 16.1 and NRCP 26(e) obligations and affirmative discovery requests served by Defendants. *See also* (Exhibit 17 to Defendants' Motion ("Please produce any and all appraisals for the Property from January 1, 2012 through present.")).

Wooley's Motion

- 80. Wooley sought nearly double the amount of damages that he sought in his complaint and ostensibly throughout this case. (Wooley Motion).
- 81. Wooley used different bases for his claimed "rent" damages. Unlike the damages sought in his Complaint, the liquidated damages clause contains a variable—reasonable rental value—that would necessarily require Wooley to introduce an expert opinion to meet his burden of proof, which Defendants would be entitled to rebut under Nevada law. (*Id.*; Exhibit 19 to Defendants' Motion). Wooley's basis for these damages was also different because Mr. Wooley had testified at his deposition that he had not yet terminated the lease and that it was ongoing, yet termination is a prerequisite to utilizing the liquidated damages formula per the parties' lease. (Exhibit 18 to Defendants' Motion; Exhibit 19 to Defendants' Motion). Thus, Wooley was proceeding on an entirely new theory.
- 82. Default interest was also a brand new component of Wooley's claimed damages. (Wooley Motion).
- 83. The property-related damages were based in part upon new damages and documents that were not disclosed to Defendants. *Id.*
- 84. Wooley's damages were based upon the opinions of Mr. Gluhaich, an undisclosed expert, and therefore Defendants did not have the chance to explore Mr. Gluhaich's opinions or rebut them as they were entitled to do. *Id.*; (February 9, 2017, Stipulation and Order).
- 85. Wooley and his purported expert relied upon an appraisal to establish "value" that was not previously disclosed in this litigation, despite Wooley's NRCP 16.1 and NRCP 26(e) obligations. (Exhibit 18 to Defendants' Motion (wherein Wooley stated that he had an appraisal performed when he bought the property, but had not produced that to his lawyer)).

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

- 87. This timing of these Motions undeniably deprived Defendants of the process that the parties expressly agreed was necessary to rebut any properly-disclosed expert opinions or properly-disclosed NRCP 16.1 damages calculations, as ordered by this Court. (February 9, 2017, Stipulation and Order).
- 88. Indeed, the conduct discussed herein is part of a larger pattern of Plaintiffs to ignore their discovery obligations. Defendants have been forced to file two motions to compel and a motion for contempt and sanctions, simply to have Plaintiffs comply with their discovery obligations.
- 89. Defendants have been required repeatedly to go to extraordinary lengths to attempt to force Plaintiffs to comply with basic obligations and deadlines imposed by the NRCP. (Exhibits 20-23 to Defendants' Motion).
- 90. This Court has also issued several Orders requiring Plaintiffs to meet their discovery obligations, but Plaintiffs have blatantly ignored those Orders.
- Plaintiffs never submitted their Motions for Summary Judgment by the 91. December 15, 2017 deadline to submit dispositive motions, or any time thereafter.

This Court's December 12, 2017, Hearing

- On November 15, 2017, Defendants filed, inter alia, Defendants' Motion for 92. Sanctions.³
- Therein, Defendants requested that this Court dismiss Plaintiffs' case with 93. prejudice as a sanction for Plaintiffs' discovery violations.

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

- 94. On December 6, 2017, 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.
- 95. At the Pre-Trial Status Conference on December 12, 2017, this Court granted Plaintiffs' Request for Extension and directed Plaintiffs to respond no later than Monday, December 18, 2017, at 10 AM.⁴ This Court further directed Defendants to reply no later than January 8, 2018, and set the parties' Motions for oral argument on January 12, 2018.
- 96. This Court also admonished Plaintiffs that "you need to know going into these oppositions, that I'm very seriously considering granting all of it." (December 12, 2017, transcript).
- 97. This Court also admonished Plaintiffs that "you know going into this motion for sanctions that you're—I haven't decided it, but I need to see compelling opposition not to grant it." *Id*.
- 98. However, Plaintiffs did not file any opposition to Defendants' Motions by December 18 or any time thereafter, nor did Plaintiffs request any further extension. In fact, this Court and Defendants' counsel have not heard anything from Plaintiffs or their counsel since the December 12, 2017, hearing.
- 99. Defendants filed a notice of non-opposition to their Motions and request for submission of their Motions on December 18.

CONCLUSIONS OF LAW

Legal standard

100. NRCP 16.1(a)(1)(A)(C) provides that "a party must, without awaiting a discovery request, provide to other parties...[a] computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34

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⁴This Court inquired as to why Plaintiffs failed to oppose Defendants' Motions. Mr. Moquin informed this Court that his computer had malfunctioned, and his drafts of Plaintiffs' oppositions could not be recovered. Mr. Moquin further explained that he is a sole practitioner without access to an IT department.

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

101. Further, "the rule requires a computation supported by documents.... A plaintiff is required to provide its assessment of damages in its initial disclosure in light of the information currently available to it in sufficient detail so as to enable each defendant to understand the contours of its potential exposure and make informed decisions as to settlement and discovery." 10 Fed. Proc., L. Ed. § 26:44 (discussing FRCP 26); see generally Vanguard Piping, 129 Nev. at ____, 309 P.3d at 1020 ("Because of the similarity in the language, federal cases interpreting [the FRCP corollary to NRCP 16.1(A)(1)(D)] are strong persuasive authority."). Indeed, it is the plaintiff's burden to prove damages, see generally Gibellini v. Klindt, 110 Nev. 1201, 1206, 885 P.2d 540, 543-44 (1994) ("The party seeking damages has the burden of proving the fact that he was damaged and the amount thereof."), and "the plaintiff's damages." 10 Fed. Proc., L. Ed. § 26:44.

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

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

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

(1) A party is under a duty to supplement at appropriate intervals its disclosures under Rule 16.1(a) or 16.2(a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under Rule 16.1(a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 16.1(a)(3) are due.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production or request for admission, if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

104. Failure to comply with NRCP 16.1's requirements shall result in sanctions. Pursuant to NRCP 16.1(e)(3):

If an attorney fails to reasonably comply with **any** provision in [NRCP 16.1], or if an attorney or a party fails to comply with an **order** entered pursuant to [NRCP 16.1(d)], the court, upon motion or upon its own initiative, **shall** impose upon a party or a party's attorney, or both, appropriate sanctions in regard to the failure(s) as are just, including the following:

- (A) Any of the sanctions available pursuant to Rule 37(b)(2) and Rule 37(f);
- (B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).

(Emphases added).

105. In turn, NRCP 37(b)(2) provides that a court may make: "(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence", or "(C) striking out pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."

- 106. Further, NRCP 37(c)(1) provides that "[a] party that without substantial justification fails to disclose information required by Rule 16.1, 16.2, or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial...any witness or information not so disclosed." NRCP 37(c)(1) also provides that "[i]n addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C)."
- 107. Similarly, pursuant to NRCP 41(b), "[f]or failure of the plaintiff to comply with [the Nevada Rules of Civil Procedure] or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant."
- 108. In addition to the rule-based authority discussed herein, the Nevada Supreme Court has also recognized that "the court has inherent power to enter defaults and dismiss actions for abusive litigation practices." *Blanco v. Blanco*, 129 Nev. ____, ____, 311 P.3d 1170, 1174 (2013).
- 109. The Nevada Supreme Court has also expressly held that "the factual nature of the underlying case is not an appropriate measure to evaluate whether a [case] should be dismissed for violations of court rules and/or orders." *Huckabay Props. v. NC Auto Parts*, 130 Nev. ____, ____, 322 P.3d 429, 433 (2014) (discussing this in the context of dismissing an appeal, and also disapproving of prior case law "to the extent it indicates that a fact-based assessment of the underlying civil action should be made before determining whether to dismiss an appeal on procedural grounds.").
- 110. Finally, pursuant to DCR 13(3), the failure of an opposing party to serve and file a written opposition may be construed as an admission that the motion is meritorious and consent to granting the same.

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

- 112. Further, the Court must consider pertinent factors, including the extent of the offending party's willfulness, whether the non-offending party would be prejudiced by imposition of a lesser sanction, whether dismissal is too severe for the particular discovery abuse, the feasibility and fairness of less severe sanctions, the policy favoring adjudication of cases on their merits, and the need for deterring similar abusive conduct. *Id.* Dismissal should only occur in the most extreme of cases. *Id.*
- 113. However, district courts are not required to consider every factor, so long as the district court's analysis is thoughtfully performed. *See generally Young v. Johnny Ribeiro Bldg.*, *Inc.*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990).
- 114. Here, the factors readily demonstrate that dismissal with prejudice is warranted, and that there is no due process violation in so doing.

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

- 115. It must be emphasized as a threshold matter that Plaintiffs never opposed Defendants' Motion.
- 116. Under DCR 13(3), the failure of an opposing party to serve and file a written opposition may be construed as an admission that the motion is meritorious and consent to granting the same.
- 117. Thus, this Court finds that Plaintiffs' failure to file an opposition constitutes both an admission that the Motion is meritorious and Plaintiffs' consent to granting Defendants' Motion.
- 118. However, separate from this consideration, good cause exists to dismiss this case.

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

- 119. Plaintiffs' failure to provide damages disclosures are so central to this litigation, and to Defendants' rights and ability to defend this case, that dismissal of the entire case is necessary.
- 120. Plaintiffs have also completely failed to properly disclose an expert witness, waiting instead until the virtual end of discovery to attempt to utilize an undisclosed expert witness to support their Motions for Summary Judgment without complying with the requirements of the Nevada Rules of Civil Procedure, when it was too late for Defendants to disclose rebuttal expert testimony or otherwise defend against Plaintiffs' claims for damages.
- 121. Plaintiffs have also ignored or failed to comply with multiple separate discovery obligations throughout this case, forcing Defendants to repeatedly file motions to compel, and necessitating that the trial and discovery deadlines be extended on three occasions to accommodate for Plaintiffs' continued noncompliance.
- 122. Further, Plaintiffs have ignored this Court's express admonition to Plaintiffs that this Court was "seriously considering" dismissal and that Plaintiff's Oppositions would need to be "compelling." Plaintiffs did not even attempt to file oppositions, even after this warning.
- 123. Indeed, Plaintiffs have exhibited complete disregard for this Court's Orders, deadlines imposed by this Court, and the judicial process in general.

Plaintiffs' violations are willful

- 124. Plaintiffs' violations are willful. In addition to the plain language of NRCP 16.1, Plaintiffs have been on direct notice for three years that they have not complied with NRCP 16.1(a)(1)(C), yet have not attempted to rectify their wrongdoing. *Supra*.
- 125. This Court has ordered Plaintiffs to provide their damages disclosures, but Plaintiffs blatantly disregarded these orders. (January 10, 2017, Transcript at 68; May 30, 2017, Order); see also Perez v. Siragusa, 2008 WL 2704402, at *4 (E.D.N.Y. July 3, 2008) (dismissal under FRCP 37 and 41, noting that "[n]on-compliance with discovery orders will be deemed

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

- 126. Plaintiffs acknowledged in two stipulations that they have not complied with NRCP 16.1, yet have not even attempted to do so, despite promising and being ordered to comply. *See*, *e.g.*, (January 10, 2017, Transcript (for Willard); February 9, 2017, Stipulation and Order; May 2, 2016, Stipulation and Order).
- 127. Further, Wooley misrepresented to this Court that he had provided complete and up-to-date disclosures to Defendants when he had not. (January 10, 2017, Transcript). If anything, Wooley had only provided a spreadsheet that was, per Wooley's own words, for use in "settlement negotiations." *See* NRS 48.105(1). Defendants have informed Wooley repeatedly, including in open court, that this document provided for settlement negotiations does not equate to a disclosure, and Plaintiffs have never authorized Defendants to use that spreadsheet for litigation purposes in any manner. *See, e.g.*, (January 10, 2017, Transcript 62).
- 128. Plaintiffs' bad faith motives in waiting to ambush Defendants are also plainly evidenced by their eleventh-hour Motions requesting brand-new, different, categories and amounts of damages for double and triple what was originally sought, while such alleged damages were based upon information that has been in Plaintiffs' possession for the entire pendency of this case. Plaintiffs' strategic decision to only disclose their damages in their Motions for Summary Judgment prejudiced Defendants by depriving them of the opportunity to defend against damages that had never been previously disclosed.
- 129. Plaintiffs' failure to properly disclose an expert witness is similarly willful. Plaintiffs acknowledged immediately after the initial purported "disclosure" that the disclosure did not comply with Nevada law. *See* (December 5, 2016, email (three days after disclosures due) (wherein Plaintiffs' counsel stated that "[Defendants] agreed to allow Plaintiffs to provide an amended witness disclosure by mid-afternoon Thursday, December 8, 2016 to include the facts and conclusions to which Mr. Gluhaich will be testifying...."), Exhibit 12 to Defendants' Motion; Exhibits 14 and to Defendants' Motion).

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

- 131. Yet, Plaintiffs did not even attempt to provide a proper disclosure of Mr. Gluhaich at any time in 2017.
- 132. Then, on October 17 and 18, 2017, less than four weeks prior to the close of discovery, Plaintiffs filed Motions for Summary Judgment, referring to Mr. Gluhaich as their "designated expert," (Willard Motion at 19-20; Wooley Motion at 12-13), without even acknowledging their noncompliance, much less providing justification for it.
- 133. Further, even a cursory review of Mr. Gluhaich's Affidavits in support of the Motions demonstrates that the purported facts and opinions that he provided could have been timely disclosed in December of 2016, further demonstrating that there was no justification other than willful noncompliance. (Gluhaich Affidavit re: Willard (relying exclusively on events that occurred in 2014 or earlier); Gluhaich Affidavit re: Wooley (relying exclusively on events that occurred in 2015 or earlier)).
- 134. These Motions and Mr. Gluhaich's Affidavits were filed at a point in the case where it was too late for Defendants to properly explore or rebut Mr. Gluhaich's conclusions and the bases therefor, a fact that Plaintiffs acknowledged in February with approximately four weeks left in discovery. (February 9, 2017, Stipulation and Order).
- 135. In addition, it is clear that Plaintiffs' failure to disclose the appraisals upon which many of their calculations were based was also willful.
- 136. With respect to Willard, Willard relies upon an appraisal from 2008 to determine the purported "original" fair market value of the property. (Willard Motion at 19). According to Willard, this appraisal was "commissioned in 2008 by the Willard Plaintiffs." *Id.* Indeed, Mr. Gluhaich avers that "in September 2008 Willard commissioned an appraisal of the Virginia Property...from CB Richard Ellis..., a copy of which was sent directly to me by Jason Buckholz of CBRE on October 17, 2008." (Gluhaich Aff. re: Willard ¶5). Willard also relies

upon, inter alia, an appraisal from 2014 to establish the purported "fair rental value" of the property in 2014 for purposes of his newly-sought liquidated damages relief, and the purported "post-breach" value of the property in 2014. Id. at 19-20. Mr. Gluhaich averred that "The 2014 Appraisal was issued on February 11, 2014," and he "received [this appraisal] directly from Rob Cashell." (Gluhaich Aff. re: Willard ¶15). Mr. Gluhaich's purported opinions were heavily based on these appraisals. Id. ¶9 ("In my opinion, the 2008 Appraisal presents a thorough, detailed, professional, and highly compelling analysis of the market value of the Virginia Property as leased."); ¶16 (relying on the appraisal to opine on the purported "as-is" fair market value); ¶17 (relying upon the appraisal to establish the purported fair market rental value). However, these appraisals were never disclosed to Defendants at any time before the present motion. (Decl. of B. Irvine, Exhibit 1 to Willard Opposition). This is despite the fact that Defendants requested Willard to "produce any and all appraisals for the Property from January 1, 2012, through present," (Exhibit 17 to Defendants' Motion), and that Willard had an obligation to disclose this material pursuant to NRCP 16.1(a)(1)(C) and NRCP 26. Given that Willard freely admits that these appraisals were commissioned prior to the commencement of the case, and were in his possession, this is clearly willful omission. 137.

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

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

- 139. Finally, as noted, this is part of a larger pattern and practice by Plaintiffs to disregard their discovery obligations at every point in this litigation. (Motions to Compel).
- 140. Indeed, Plaintiffs completely failed to even respond to Defendants' Motion for Sanctions, even when this Court gave them an additional extension and expressly warned them, in open court, that "you need to know going into these oppositions, that I'm very seriously considering granting all of it," and "you know going into this motion for sanctions that you're—I haven't decided it, but I need to see compelling opposition not to grant it." (December 12, 2017, transcript).

<u>Defendants have been prejudiced by Plaintiffs' conduct and would be prejudiced by the imposition of a lesser sanction</u>

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

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

- 142. In fact, this is Plaintiffs' second case against Defendants based on the same set of facts.
- 143. Plaintiffs attempted to prosecute this case against Defendants in California, which was dismissed for a lack of personal jurisdiction.
- 144. Defendants are entitled to resolution, not to Plaintiffs languidly holding Defendants in litigation while simultaneously failing to meet their obligations under the NRCP to provide threshold information necessary to defend this case and to comply with the other obligations imposed by the NRCP.
- 145. Further, Plaintiffs' collective new requests and bases are not harmless additions: they would require Defendants to engage in additional fact discovery, retain direct and rebuttal experts, take depositions, re-open the briefing schedule, and again delay the trial for tasks that could, and should, have been accomplished during a discovery period that was already extended three times to account for Plaintiffs' continued noncompliance.

<u>Dismissal is not too severe for these discovery abuses, and lesser sanctions are not feasible or fair</u>

- 146. Plaintiffs' damages disclosures are central to this case, and dismissal is not too severe for Plaintiffs' repeated and willful noncompliance with Court orders and with Nevada law.
- 147. The Plaintiffs have been sanctioned for other discovery violations, (Order Granting Motion to Compel), yet remain undeterred, demonstrating that less severe sanctions have had no effect on Plaintiffs' recalcitrant conduct.
- 148. For example, in the context of granting Defendants' Motion to Compel Discovery Responses, this Court ordered Plaintiffs to pay Defendants' reasonable expenses incurred in making the motion, including attorneys' fees. (July 1, 2015, Order).

- 149. Not only have Plaintiffs not ever paid these expenses, but it is incontrovertible that this Court's imposition of monetary sanctions on Plaintiffs in 2015 had absolutely no deterrent effect on Plaintiffs' conduct, as Plaintiffs continued to commit discovery violations and continued to violate and ignore this Court's orders well after the issuance of the July 1, 2015, Order, completely undeterred by the imposition of monetary sanctions.
- 150. Further, Plaintiffs' conduct has already caused three continuances of the trial date, all to accommodate for Plaintiffs' continued disregard for Nevada discovery procedure. (Stipulations and Orders).
- 151. Given that this Court has already issued lesser sanctions, ordered continuances, and given Plaintiffs repeated admonitions about complying with deadlines and their NRCP obligations, all to no avail, it is clear that lesser sanctions have had no effect on Plaintiffs' conduct, and the issuance of lesser sanctions would only serve to encourage Plaintiffs' misconduct.
- 152. The fact that this Court granted Plaintiffs an additional extension to oppose Defendants' Motions, including their Motion for Sanctions, and Plaintiffs failed to do so without any excuse whatsoever further demonstrates that this Court's orders, and any lesser sanctions, have no effect on Plaintiffs' conduct. Given Plaintiffs' repeated failure to heed the court's warnings in the past, issuing additional warnings would be futile.
- 153. Nor would a less severe sanction be fair to Defendants, who have been continually prejudiced by Plaintiffs' willful disregard of their obligations despite their continued efforts to work with Plaintiffs and provide extensions to Plaintiffs.
- party cannot seek to avoid a dismissal based on arguments that his or her attorney's acts or omissions led to the dismissal." *Huckabay Props v. NC Auto Parts*, 130 Nev. ____, 322 P.3d 429, 432 (2014) (also discussing that "[t]he United States Supreme Court has recognized that when an action is dismissed for failure to comply with court rules, the litigant cannot seek a do-over of their dismissed action based on arguments that dismissal is too harsh a penalty for

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

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

- 155. Although there is a policy favoring adjudication on the merits, Plaintiffs themselves have frustrated this policy by refusing to provide Defendants with their damages calculations or proper expert disclosures. Defendants have not frustrated this policy; instead, the record is clear that Defendants, and this Court, have repeatedly attempted to force Plaintiffs to comply with basic discovery obligations, to no avail.
- 156. Indeed, Defendants have served multiple rounds of written discovery upon Plaintiffs, in an attempt to obtain basic information on Plaintiffs' damages; have taken multiple depositions, and have been requesting compliant disclosures throughout this case so that they can address the merits. (Exhibits 24-35 of Defendants' Motion).
- 157. Plaintiffs should not be permitted to hide behind the policy of adjudicating cases on the merits when it is they who have frustrated this policy throughout the litigation. Defendants cannot reach the merits when they must spend the entire case asking Plaintiffs for threshold information and receiving no meaningful responses.
- 158. As the Nevada Supreme Court has held, the policy favoring adjudication on the merits "is not boundless and must be weighed against other policy considerations, including the public's interest in expeditious...resolution, which coincides with the parties' interests in bringing litigation to a final and stable judgment, prejudice to the opposing party; and

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

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

Dismissal is required to deter similar abusive conduct

- 160. The need to deter similar abusive conduct also weighs heavily in favor of dismissal.
 - 161. The discovery rules are in place for a reason, and are mandatory.
 - 162. Compliance with this Court's Orders is also mandatory.
- 163. Yet, Plaintiffs have completely ignored multiple Orders from this Court, deadlines imposed by this Court, and their obligations pursuant to the Nevada Rules of Civil Procedure.
- 164. Plaintiffs have received multiple opportunities and extensions to rectify their noncompliance, but have not even attempted to do so.
- 165. If Plaintiffs are permitted to continue prosecuting this case without severe consequences, then this type of abusive litigation practice will continue to the prejudice of defending parties and will make a mockery of the Nevada Rules of Civil Procedure and court orders. *Cf. generally Foster*, 126 Nev. at 66, 227 P.3d at 1049 (noting that "[i]n light of appellants' repeated and continued abuses, the policy of adjudicating cases on the merits would not have been furthered in this case, and the ultimate sanctions were necessary to demonstrate to future litigants that they are not free to act with wayward disregard of a court's orders."); *see also Langermann v. Prop. & Cas. Ins. Co.*, 2015 WL 4714512 at *5 (D. Nev. 2015) (failing "to

comply with a scheduling order is not harmless, and re-opening discovery after the expiration of the deadlines only encourages cavalier treatment of deadlines").

166. Plaintiffs' disregard for this Court's orders and docket, Nevada law, and Defendants' rights to prepare a defense necessitates dismissal.

Dismissal would not violate Plaintiffs' due process rights

- 167. There is also no issue of due process deprivation upon dismissal.
- 168. Plaintiffs' response to Defendants' Motions, including Defendants' Motion for Sanctions, was originally due on December 4, 2017.
- 169. There is no dispute that Plaintiffs were served with the Motions. (December 12, 2017, transcript).
- 170. Through extensions granted by Defendants, and ultimately this Court, Plaintiffs were given until December 18, 2017, to file Oppositions. *Id*.
- 171. Defendants were expressly warned that this Court was seriously considering dismissal, and that Plaintiffs' oppositions needed to be "compelling." *Id*.
- 172. However, Plaintiffs did not file any Opposition by that time or any time thereafter; nor did Plaintiffs request another extension.
- 173. Thus, Plaintiffs, in voluntarily choosing to not respond to Defendants' Motions, are not being deprived of any due process. *See* DCR 13(3); *Huckabay*, 130 Nev. at ____, 322 P.3d at 436. No evidentiary hearing was needed. *See Nevada Power Co. v. Fluor Illinois*, 108 Nev. 638 (1992) ("If a party against whom dismissal may be imposed raises a question of fact as to any of [the] factors [for dismissal], the court must allow the parties to address the relevant factors in an evidentiary hearing.").
- 174. Indeed, this Court held a hearing on December 12, 2017, which was attended by both of Plaintiffs' counsel. As Plaintiffs have not filed anything with this Court since that hearing, or otherwise provided any new information, there would be nothing new to discuss at another hearing. *See* DCR 13(3).

1	ORDER
2	Defendants' Motion for Sanctions is GRANTED.
3	Plaintiffs' claims against Defendants are DISMISSED WITH PREJUDICE.
4	DATED this Ut day of March, 2018.
5	DATED this $\underline{\varphi}$ day of March, 2018.
6	
7	DISTRICT COURT JUDGE
8	
9	Respectfully submitted by:
10	DICKINSON WRIGHT, PLLC
11	
12	/s/ Brian R. Irvine
13	JOHN P. DESMOND Nevada Bar No. 5618
14	BRIAN R. IRVINE Nevada Bar No. 7758
15	ANJALI D. WEBSTER Nevada Bar No. 11525
16	100 West Liberty Street, Suite 940 Reno, NV 89501
17	Tel: (775) 343-7500 Fax: (775) 786-0131
18	Email: <u>Jdesmond@dickinsonwright.com</u> Email: <u>Birvine@dickinsonwright.com</u>
19	Email: Awebster@dickinsonwright.com
20	Attorneys for Defendants Berry Hinckley Industries, and
21	Jerry Herbst
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24	
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1	CERTIFICATE OF SERVICE
2	I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT;
3	that on the $\frac{\dot{u}^{1/2}}{\dot{u}^{1/2}}$ day of March, 2018, I electronically filed the foregoing with the Clerk of
4	the Court system which will send a notice of electronic filing to the following:
5	BRIAN IRVINE, ESQ.
6	DAVID O'MARA, ESQ.
7	BRIAN MOQUIN, ESQ.
8	JOHN DESMOND, ESQ.
9	ANJALI WEBSTER, ESQ.
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15	And, I deposited in the County mailing system for postage and mailing with the
16	United States Postal Service in Reno, Nevada, a true and correct copy of the attached
17	document addressed as follows:
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1	1880 DICKINSON WRIGHT, PLLC	Transaction # 701
2	JOHN P. DESMOND	
3	Nevada Bar No. 5618 BRIAN R. IRVINE	
4	Nevada Bar No. 7758 ANJALI D. WEBSTER	
5	Nevada Bar No. 12515 100 West Liberty Street, Suite 940	
6	Reno, NV 89501 Tel: (775) 343-7500	
7	Fax: (844) 670-6009 Email: <u>Jdesmond@dickinsonwright.com</u>	
8	Email: Birvine@dickinsonwright.com Email: Awebster@dickinsonwright.com	
9	Attorney for Defendants Berry Hinckley Industries and	
10	Jerry Herbst	
11	IN THE SECOND JUDICIAL DISTRICT	COURT OF THE STATE OF NEVADA
12	IN AND FOR THE CO	DUNTY OF WASHOE
13	TARRY TARREST AND SOLUTION	CASE NO. CV14-01712
14	LARRY J. WILLARD, individually and as trustee of the Larry James Willard	
15	Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;	DEPT. 6
16	EDWARD C. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the	
17	Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,	
18	Plaintiff,	
19	vs.	
20	BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an	
21	individual	
22	Defendants.	
23	BERRY-HINCKLEY INDUSTRIES, a	
24	Nevada corporation; and JERRY HERBST, an individual;	
25	Counterclaimants,	
26		
27	VS	
28	Page	1 of 3

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

Counter-defendants.

TPROPOSED| JUDGMENT

This action, having come before this Court, the Honorable Lynne K. Simons presiding, and all of the claims of Plaintiffs Larry J. Willard, individually and as trustee of the Larry James Willard Trust (the "Willard Plaintiffs"), having been dismissed by this Court with prejudice in its Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions filed herein on March 6, 2018, this Court having denied the Willard Plaintiffs' NRCP 60(b) Motion for Relief on November 30, 2018, and all of the counterclaims of Defendants Berry-Hinckley Industries ("BHI") and Jerry Herbst having been dismissed by this Court in its Order granting Defendants' Motion for voluntary dismissal filed herein on April 13, 2018,

IT IS ORDERED AND ADJUDGED that Judgment is entered in favor of Defendants and against the Willard Plaintiffs on all of the Willard Plaintiffs' claims and that such claims are dismissed with prejudice.

21 | /// 22 | /// 23 | /// 24 | /// 25 | /// 26 | ///

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

EXHIBIT "10"

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

Case No. CV14-01712

ORDER DENYING WILLARD

PLAINTIFFS' MOTION FOR

RELIEF UNDER NRCP 60(B)(5)&(6)

Dept. No. 6

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

Plaintiffs,

VS.

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

Defendants.

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

Counterclaimants,

VS

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

Counter-defendants.

1

ORDER DENYING WILLARD PLAINTIFFS' MOTION FOR RELIEF UNDER NRCP 60(B)(5)&(6)

Before this Court is *Willard Plaintiffs' Motion for Relief Under NRCP 60(b)(5)&(6)*("*Motion*") filed by Plaintiffs LARRY J. WILLARD, individually, and as Trustee of the Larry

James Willard Trust Fund, and OVERLAND DEVELOPMENT CORPORATION (collectively,

"Plaintiffs" unless named individually), by and through its counsel of record, Robertson,

Johnson, Miller & Williamson, and Lemons, Grundy & Eisenberg.

Defendants BERRY-HINCKLEY INDUSTRIES, a Nevada corporation, and JERRY HERBST (collectively, "Defendants" unless named individually) filed *Defendants' Opposition* to the Willard Plaintiffs' Motion for Relief Under NRCP 60(b)(5)&(6) ("Opposition"), by and through their counsel of record, Dickinson Wright, PLLC.

Plaintiffs filed their *Reply in Support of Willard Plaintiffs' Motion for Relief Under NRCP 60(b)(5)&(6)* ("*Reply*") and the matter was thereafter submitted for the Court's consideration.

I. RELEVANT FACTUAL AND PROCEDURAL HISTORY.

On April 18, 2018, Plaintiffs filed *Willard Plaintiffs' Rule 60(b) Motion for Relief* ("*NRCP 60(b) Motion*") on the grounds Brian Moquin's ("Mr. Moquin") mental illness constituted excusable neglect.

On December 11, 2018, the Court entered *Judgment* in favor of Defendants and dismissed Plaintiffs' claims with prejudice.

On September 13, 2021, the Court entered its *Order After Remand Denying*Plaintiffs' Rule 60(b) Motion for Relief, which Plaintiffs appealed on October 11, 2021, and is presently pending appeal.

In their *Motion*, Plaintiffs argue there are exceptional circumstances to warrant NRCP 60(b)(6) relief because the Court has been presented with newly available evidence of Mr. Moquin's disciplinary records, which were previously unavailable to Plaintiffs because Mr. Moquin purportedly deceived Plaintiffs by failing to provide such evidence and Mr. Moquin was disciplined after Plaintiffs filed their request for relief under NRCP 60(b)(1). See generally *Motion*, pp. 7, 11-12. Furthermore, Plaintiffs identify fifteen (15) purported significant changes in the factual conditions of this case to warrant relief under NRCP 60(b)(5). *Motion*, pp. 13-14.

In their *Opposition*, Defendants assert each of the six (6) categories of relief under Rule 60 of the Rules of Civil Procedure are mutually exclusive. *Opposition*, pp. 8-9 (citing various persuasive federal authority). Defendants argue Plaintiffs' arguments demonstrate their *Motion* is an attempt to improperly and untimely bolster their NRCP 60(b)(1) arguments. *Opposition*, pp. 9-11. Defendants contend Plaintiffs' *Motion* is untimely because Plaintiffs fail to explain why the *Motion* comes two (2) years after Mr. Moquin's conditional guilty plea entered in April 2019. *Opposition*, pp. 13-14. Likewise, Defendants contend Plaintiffs request for relief under NRCP 60(b)(5) is untimely and NRCP 60(b)(5) relief does not apply prospectively to final judgments. *Opposition*, pp. 21-22.

In their *Reply*, Plaintiffs assert they did not state the *Motion* is a supplement to their previously filed NRCP 60(b) motion. *Reply*, p. 2. Plaintiffs contend they filed their *Motion* within a reasonable time because disciplinary and conviction records were not publicly filed. Furthermore, Plaintiffs cite authority they urge is persuasive for the premise NRCP 60(b)(6) relief is available when personal problems of counsel cause counsel to grossly neglect a client's case and mislead the client. *Reply*, p. 3. Additionally, Plaintiffs argue their *Motion*

was filed within a reasonable time and Mr. Moquin's abandonment of Plaintiffs constitutes extraordinary circumstances to award relief under NRCP 60(b)(6). *Reply*, pp. 3-4.

II. <u>APPLICABLE LAW AND ANALYSIS</u>.

A. NRCP 60(b)(5)

Section 60(b)(5) of the Nevada Rules of Civil Procedure provides, in pertinent part, a court may relieve a party from a final judgment, order, or proceeding for the following reasons, including "the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable." NRCP 60(b)(5).

A motion for relief under NRCP 60(b)(5) requires the district court find "a significant change either in factual conditions or in law." S.E.C. v. Coldicutt, 258 F.3d 939, 942 (9th Cir. 2001) (citing Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384, 112 S. Ct. 748, 760 (1992)). A two-step process is required for relief under NRCP 60(b)(5): (1) the moving party must satisfy their burden of showing significant change either in factual conditions or in the law; and (2) "whether the proposed modification is suitably tailored to resolve the problems created by the changed factual or legal conditions." U.S. v. Asarco Inc., 430 F.3d 972, 979 (9th Cir. 2005) (citing Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384, 391, 112 S. Ct. 748 (1992)).

The Court finds the newly published disciplinary actions of Mr. Moquin do not constitute significant changes in factual conditions. The Court's prior finding that Plaintiffs were represented by Mr. Moquin and Mr. O'Mara has not changed. *Order*, pp. 42-43. Further, the newly published disciplinary actions are still based on the information the Court had before it previously. Therefore, the proposed modification is not suitably tailored to

resolve the problems created by claimed changed factual conditions argued to support Plaintiffs' position Moquin's mental illness constituted excusable neglect. The Court finds NRCP 60(b)(5) does not provide a basis for relief from the Court's prior ruling.

B. NRCP 60(b)(6)

ADKT 0522 amended Rule 60(b) of the Nevada Rules of Civil Procedure adding subsection six (6) to Rule 60(b) to conform with Rule 60(b)(6) of the Federal Rules of Civil Procedure. See ADKT 0522 and Advisory Committee Note-2019 Amendment ("[t]he amendments generally conform to Rule 60 to FRCP 60, including incorporating FRCP 60(b)(6) as Rule 60(b)(6)."). NRCP 60(b)(6) provides, in pertinent part, a court may relieve a party from a final judgment, order, or proceeding for the following reasons, including "any other reason that justified relief." NRCP 60(b)(6) (emphasis supplied). NRCP 60(b)(6) was specifically amended to conform with FRCP 60(b)(6). As such, it has long been held federal decisions interpreting the "Federal Rules of Civil Procedure are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts." Exec. Mgmt., Ltd. v. Ticor Title Ins. Co., 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (internal quotations omitted) (citing Las Vegas Novelty v. Fernandez, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990)); see also Nelson v. Heer, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005).

"The district court has broad discretion to grant or deny a motion to set aside a judgment under NRCP 60(b), and [i]ts determination will not be disturbed on appeal absent an abuse of discretion." Byrd v. Byrd, No. 80548-COA, 2021 WL 4494633, at *3, 137 Nev. Adv. Op. 60, (Nev. Ct. App. Sept. 30, 2021) (internal quotations omitted); see also Cook v. Cook, 112 Nev. 179, 181-82, 919 P.2d 264, 265 (1996). An abuse of discretion occurs if

the district court's discretion is arbitrary, capricious, or exceeds the bounds of law or reason. Byrd, 2021 WL 4494633, at *3.

Recently, the Nevada Court of Appeals held "NRCP 60(b)(6) provides an independent basis for relief that is mutually exclusive of clauses (1)-(5)." Byrd, 2021 WL 4494633, at *4. Federal courts have also concluded the same.¹ A party seeking relief under NRCP 60(b)(6) must satisfy three (3) elements: (1) the motion "cannot be premised on another ground delineated in" NRCP 60; (2) the motion was filed within a reasonable time; and (3) there are extraordinary circumstances justifying reopening the judgment. Bynoe v. Baca, 966 F.3d 972, 979 (9th Cir. 2020).

In this case, the Court concludes Plaintiffs' NRCP 60(b)(6) relief is precluded because the *Motion* is premised on another ground delineated in NRCP 60. Both the *NRCP 60(b) Motion* and the instant *Motion* request relief based on NRCP 60(b)(5) and specifically on the facts of Mr. Moquin's mental illness and the effect on his representation of Plaintiffs. In the instant *Motion*, Plaintiffs argue newly published disciplinary records of Mr. Moquin are additional evidence the Court can now, and should, consider which in effect supplements their previously filed *NRCP 60(b) Motion*.²

See Gonzalez v. Crosby, 545 U.S. 524, 528-29, 125 S. Ct. 2641, 2646 (2005) ("Rule 60(b)(6) . . . permits reopening [of a judgment] when the movant shows any . . . reason justifying relief from the operation of the judgment other than the more specific circumstances set out in Rules 60(b)(1)-(5).") (internal quotations omitted); Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 863, 108 S. Ct. 2194, 2204 (1988) (to prevail under Rule 60(b)(6) the motion must be "made within a reasonable time and is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5).").

² *Motion*, p. 2 ("Now, additional evidence exists to support the Willard Plaintiffs' claims surrounding Moquin's mental illness. This evidence was not previously available."); p. 3 (Plaintiffs state the Court should now consider Mr. Moquin's 2019 disciplinary action and documents filed therein as additional evidence.); pp. 12-13 ("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 decide on its merits.").

Notwithstanding this, the Court did consider whether the circumstances at hand are extraordinary and justify reopening the Court's decision. The Court finds, based on all of the circumstances that were before it then, and those that are argued now, do not warrant the relief requested.

II. <u>ORDER</u>.

Accordingly, and good cause appearing therefor,

IT IS HEREBY ORDERED the Willard Plaintiffs' Motion for Relief Under NRCP 60(b)(5)&(6) is DENIED.

DATED this 9th day of May, 2022.

DISTRICT JUDGE

CERTIFICATE OF SERVICE I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 10th day of May, 2022, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following: JOHN DESMOND, ESQ. ANJALI WEBSTER, ESQ. ROBERT EISENBERG, ESQ. RICHARD WILLIAMSON, ESQ. BRIAN IRVINE, ESQ. JONATHAN TEW, ESQ. And, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows: Holly W. Longe

EXHIBIT "11"

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

2540 1 **DICKINSON WRIGHT** JOHN P. DESMOND 2 Nevada Bar No. 5618 BRIAN R. IRVINE Nevada Bar No. 7758 ANJALI D. WEBSTER 4 Nevada Bar No. 12515 100 West Liberty Street, Suite 940 5 Reno, NV 89501 Tel: (775) 343-7500 6 Fax: (775) 786-0131 Email: <u>Jdesmond@dickinsonwright.com</u> Email: Birvine@dickinsonwright.com Email: Awebster@dickinsonwright.com 8 Attorney for Defendants 9 Berry Hinckley Industries, and Jerry Herbst 10 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA 11 IN AND FOR THE COUNTY OF WASHOE 12 13 LARRY J. WILLARD, individually and as CASE NO. CV14-01712 trustee of the Larry James Willard Trust Fund: 14 OVERLAND DEVELOPMENT DEPT. 6 CORPORATION, a California corporation; 15 EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the 16 Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, 17 18 Plaintiff, **NOTICE OF ENTRY OF ORDER** VS. 19 BERRY-HINCKLEY INDUSTRIES, a Nevada 20 corporation; and JERRY HERBST, an Individual: 21 Defendants. 22 23 BERRY-HINCKLEY INDUSTRIES, a 24 Nevada corporation; and JERRY HERBST, an individual; 25 Counterclaimants. 26 vs 27 28

1 2	LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;			
3	CORPORATION, a Camorina corporation,			
	Counter-defendants.			
4				
5	PLEASE TAKE NOTICE that on January 4, 2018, an Order Granting			
7	Defendants'/Counterclaimants' Motion for Sanctions [Oral Argument Requested]. A true and			
8	correct copy of the Order is attached hereto as Exhibit 1.			
9	<u>AFFIRMATION</u>			
10	Pursuant to NRS 239B.030			
11	The undersigned does hereby affirm that the preceding document does not contain the			
12	social security number of any person.			
13	DATED this 5th day of January, 2018.			
14	DICKINSON WRIGHT			
15				
16	/s/ Brian R. Irvine DICKINSON WRIGHT			
17	JOHN P, DESMOND			
18	Nevada Bar No. 5618 BRIAN R. IRVINE Nevada Bar No. 7758			
19	ANJALI D. WEBSTER			
20	Nevada Bar No. 12515 100 West Liberty Street, Suite 940			
21	Reno, NV 89501 Email: <u>Jdesmond@dickinsonwright.com</u>			
22	Email: <u>Birvine@dickinsonwright.com</u> Email: <u>Awebster@dickinsonwright.com</u>			
23	Attorney for Defendants Berry Hinckley			
24	Industries, and Jerry Herbst			
25				
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CERTIFICATE OF SERVICE I certify that I am an employee of DICKINSON WRIGHT, and that on this date, pursuant to NRCP 5(b); I am serving a true and correct copy of the attached NOTICE OF ENTRY OF ORDER on the parties through the Second Judicial District Court's EFlex filing system to the following: David C. O'Mara Brian P. Moquin LAW OFFICES OF BRIAN P. MOQUIN THE O'MARA LAW FIRM 3287 Ruffino Lane 311 E. Liberty Street Reno, Nevada 89501 San Jose, California 95148 DATED this 5th day of January, 2018. /s/ Cindy S. Grinstead An employee of DICKINSON WRIGHT

EXHIBIT LIST

Exhib	it Description	Pages 1
1	Order Granting Defendants'/Counterclaimants' Motion for Sanctions [Oral Argument Requested], January 4, 2018	5

¹ Exhibit page count is exclusive of exhibit slip sheet.

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27 28 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

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

Plaintiffs,

VS.

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

Defendants.

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

Counterclaimants,

VS

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

Counter-defendants.

Case No. CV14-01712

Dept. No. 6

ORDER GRANTING DEFENDANTS'/ COUNTERCLAIMANTS' MOTION FOR SANCTIONS [ORAL ARGUMENT REQUESTED]

ORDER GRANTING DEFENDANTS'/ COUNTERCLAIMANTS' MOTION FOR SANCTIONS

Before this Court is Defendants'/Counterclaimants' Motion for Sanctions [Oral Argument Requested] ("Motion"), filed November 15, 2017 by Defendants/Counterclaimants BERRY-HINCKLEY INDUSTRIES ("Berry-Hinckley") and JERRY HERBST ("Mr. Herbst") (collectively, "Defendants") by and through their counsel Brian Irvine, Esq. Also on November 14, 2017, Defendants filed Defendants/Counterclaimants' Motion to Exceed Page Limit on Defendants/Counterclaimants' Motion for Sanctions ("Motion to Exceed Page Limit"). Plaintiffs LARRY J. WILLARD, OVERLAND DEVELOPMENT CORPORATION, EDWARD C. WOOLEY and JUDITH WOOLEY (collectively, "Plaintiffs" unless individually referenced) failed to file an opposition to the Motion to Strike. As a result, Defendants filed a Notice of Non-Opposition to Defendants'/Counterclaimants' Motion for Sanctions ("Notice of Non-Opposition") on December 7, 2017 and submitted the matter for decision thereafter.

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

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

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

Plaintiffs once again failed to respond to the *Motion* or request an extension.

Defendants then filed a second *Notice of Non-Opposition to Defendants'/Counterclaimants' Motion for Sanctions* ("Second Notice of Non-Opposition") and subsequent request for submission on December 18, 2017.

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

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

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

Accordingly, and good cause appearing therefor,

IT IS HEREBY ORDERED AND DECREED:

- Defendants'/Counterclaimants' Motion for Sanctions [Oral Argument Requested] is GRANTED.
- Defendants/Counterclaimants' Motion to Exceed Page Limit on Defendants/Counterclaimants' Motion for Sanctions is GRANTED.
- Defendants shall submit a Proposed Order granting
 Defendants'/Counterclaiments' Motion for Sanctions, including factual and legal analysis and discussion, to Department 6 within twenty (20) days of the date of this Order in accordance with WDCR 9.

Dated this _____ day of January, 2018.



CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the Harday of January, 2018, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

BRIAN IRVINE, ESQ.

JOHN P. DESMOND, ESQ.

ANJALI D. WEBSTER, ESQ.

BRIAN MOQUIN, ESQ. DAVID O'MARA, ESQ.

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



EXHIBIT "12"

EXHIBIT "12"

EXHIBIT "12"

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

2540 1 **DICKINSON WRIGHT** JOHN P. DESMOND 2 Nevada Bar No. 5618 BRIAN R. IRVINE Nevada Bar No. 7758 ANJALI D. WEBSTER 4 Nevada Bar No. 12515 100 West Liberty Street, Suite 940 5 Reno, NV 89501 Tel: (775) 343-7500 6 Fax: (775) 786-0131 Email: Jdesmond@dickinsonwright.com Email: Birvine@dickinsonwright.com Email: Awebster@dickinsonwright.com 8 Attorney for Defendants Berry Hinckley Industries, and Jerry Herbst 10 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA 11 IN AND FOR THE COUNTY OF WASHOE 12 13 LARRY J. WILLARD, individually and as CASE NO. CV14-01712 trustee of the Larry James Willard Trust Fund; 14 DEPT. 6 OVERLAND DEVELOPMENT CORPORATION, a California corporation; 15 EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley 16 Intervivos Revocable Trust 2000, 17 18 Plaintiff, **NOTICE OF ENTRY OF ORDER** VS. 19 BERRY-HINCKLEY INDUSTRIES, a Nevada 20 corporation; and JERRY HERBST, an Individual; 21 Defendants. 22 23 BERRY-HINCKLEY INDUSTRIES, a 24 Nevada corporation; and JERRY HERBST, an individual; 25 Counterclaimants, 26 VS 27 28 Page 1 of 4

1 2	LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;			
3				
4	Counter-defendants.			
5				
6	PLEASE TAKE NOTICE that on January 4, 2018, an Order Granting			
7	Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Exper			
8	Testimony of Daniel Gluhaich was entered. A true and correct copy of the Order is attached			
9	hereto as Exhibit 1.			
10	AFFIRMATION			
11	Pursuant to NRS 239B.030			
12	The undersigned does hereby affirm that the preceding document does not contain the			
13	social security number of any person.			
14	DATED this 5th day of January, 2018.			
15	DICKINSON WRIGHT			
16				
17	/s/ Brian R. Irvine			
18	DICKINSON WRIGHT JOHN P. DESMOND Name of the Park of the Second S			
19	Nevada Bar No. 5618 BRIAN R. IRVINE			
20	Nevada Bar No. 7758 ANJALI D. WEBSTER			
21	Nevada Bar No. 12515 100 West Liberty Street, Suite 940			
22	Reno, NV 89501 Email: <u>Jdesmond@dickinsonwright.com</u>			
23	Email: <u>Birvine@dickinsonwright.com</u> Email: <u>Awebster@dickinsonwright.com</u>			
24	Attorney for Defendants Berry Hinckley			
25	Industries, and Jerry Herbst			
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CERTIFICATE OF SERVICE I certify that I am an employee of DICKINSON WRIGHT, and that on this date, pursuant to NRCP 5(b); I am serving a true and correct copy of the attached NOTICE OF ENTRY OF ORDER on the parties through the Second Judicial District Court's EFlex filing system to the following: David C. O'Mara Brian P. Moquin THE O'MARA LAW FIRM LAW OFFICES OF BRIAN P. MOQUIN 3287 Ruffino Lane 311 E. Liberty Street San Jose, California 95148 Reno, Nevada 89501 DATED this 5th day of January, 2018. /s/ Cindy S. Grinstead An employee of DICKINSON WRIGHT

EXHIBIT LIST

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

¹ Exhibit page count is exclusive of exhibit slip sheet.

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

EXHIBIT 1

EXHIBIT 1

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2018-01-04 04:53:56 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6466778

CODE NO. 3370

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

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

Plaintiffs,

VS.

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

Defendants.

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

Counterclaimants,

vs

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

Counter-defendants.

Case No. CV14-01712

Dept. No. 6

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

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

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

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

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

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

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

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

Accordingly, and good cause appearing therefor,

IT IS HEREBY ORDERED AND DECREED:

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

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

2. Defendants' Motion to Exceed Page Limit is GRANTED.

Dated this day of January, 2018.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the Hoday of January, 2018, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

BRIAN IRVINE, ESQ.

JOHN P. DESMOND, ESQ.

ANJALI D. WEBSTER, ESQ.

BRIAN MOQUIN, ESQ.

DAVID O'MARA, ESQ.

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

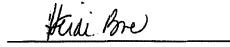


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Jacqueline Bryant
Clerk of the Court
Transaction # 6468348

l		Clerk of the Cour	
1	2540 DICKINSON WRIGHT	Transaction # 64683	
2	JOHN P. DESMOND		
l	Nevada Bar No. 5618		
3	BRIAN R. IRVINE Nevada Bar No. 7758		
4	ANJALI D. WEBSTER Nevada Bar No. 12515		
5	100 West Liberty Street, Suite 940 Reno, NV 89501		
6	Tel: (775) 343-7500 Fax: (775) 786-0131		
7	Email: <u>Jdesmond@dickinsonwright.com</u> Email: <u>Birvine@dickinsonwright.com</u>		
8	Email: Awebster@dickinsonwright.com		
9	Attorney for Defendants Berry Hinckley Industries, and		
10	Jerry Herbst		
11	IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA		
12	IN AND FOR THE CO	OUNTY OF WASHOE	
13	LARRY J. WILLARD, individually and as	— CASE NO. CV14-01712	
14	trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT	DEPT. 6	
15	CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A.		
16	WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley		
17	Intervivos Revocable Trust 2000,		
18	Plaintiff,	NOTICE OF ENTRY OF ORDER	
19	vs.		
20	BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an		
21	Individual;		
22	Defendants.		
23	BERRY-HINCKLEY INDUSTRIES, a		
24	Nevada corporation; and JERRY HERBST, an individual;		
25	Counterclaimants,		
26	vs		
27			
28	Page	1 of 4	

1 2	LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;		
3	Counter-defendants.		
4	Counter-defendants.		
5	DI EASE TAKE NOTICE that an Issuer A 2019 on Oak Good Defendants		
6	PLEASE TAKE NOTICE that on January 4, 2018, an Order Granting Defendants'		
7	Motion for Partial Summary Judgment [Oral Argument Requested]. A true and correct copy of		
8	the Order is attached hereto as Exhibit 1.		
9	AFFIRMATION		
10	Pursuant to NRS 239B.030		
11	The undersigned does hereby affirm that the preceding document does not contain the		
12	social security number of any person.		
13	DATED this 5th day of January, 2018.		
14	DICKINSON WRIGHT		
15			
16	/s/ Brian R. Irvine DICKINSON WRIGHT		
17	JOHN P. DESMOND		
18	Nevada Bar No. 5618 BRIAN R. IRVINE		
19	Nevada Bar No. 7758 ANJALI D. WEBSTER		
20	Nevada Bar No. 12515 100 West Liberty Street, Suite 940		
21	Reno, NV 89501 Email: Jdesmond@dickinsonwright.com		
22	Email: <u>Birvine@dickinsonwright.com</u> Email: <u>Awebster@dickinsonwright.com</u>		
23	Attorney for Defendants Berry Hinckley		
24	Industries, and Jerry Herbst		
25			
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27			
28	Page 2 of 4		

CERTIFICATE OF SERVICE I certify that I am an employee of DICKINSON WRIGHT, and that on this date, pursuant to NRCP 5(b); I am serving a true and correct copy of the attached NOTICE OF ENTRY OF ORDER on the parties through the Second Judicial District Court's EFlex filing system to the following: David C. O'Mara Brian P. Moquin LAW OFFICES OF BRIAN P. MOQUIN THE O'MARA LAW FIRM 3287 Ruffino Lane 311 E. Liberty Street Reno, Nevada 89501 San Jose, California 95148 DATED this 5th day of January, 2018. /s/ Cindy S. Grinstead An employee of DICKINSON WRIGHT

EXHIBIT LIST

-	Exhibit	Description	Pages 1
	1	Order Granting Defendants' Motion for Partial Summary Judgment [Oral Argument Requested], January 4, 2018	5
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¹ Exhibit page count is exclusive of exhibit slip sheet.

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Jacqueline Bryant
Clerk of the Court
Transaction # 6468348

EXHIBIT 1

EXHIBIT 1

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2018-01-04 05:32:39 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6466867

CODE NO. 3370

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

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

Plaintiffs,

VS.

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

Defendants.

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

Counterclaimants,

vs

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

Counter-defendants.

Case No. CV14-01712

Dept. No. 6

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

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

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

I. FACTUAL AND PROCEDURAL HISTORY

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

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

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

Plaintiffs once again failed to respond to the *Motion* or request an extension.

Defendants then filed a second *Notice of Non-Opposition to Defendants'/Counterclaimants' Motion for Partial Summary Judgment* ("Second Notice of Non-Opposition") and subsequent request for submission on December 18, 2017.

II. LAW AND ANALYSIS

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

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

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

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

 juncture.

Accordingly, and good cause appearing therefor,

IT IS HEREBY ORDERED Defendants' Motion for Partial Summary Judgment is

DENIED as moot.

Dated this _____ day of January, 2018.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the day of January, 2018, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

BRIAN IRVINE, ESQ.

JOHN P. DESMOND, ESQ.

ANJALI D. WEBSTER, ESQ.

BRIAN MOQUIN, ESQ.

DAVID O'MARA, ESQ.

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



EXHIBIT "14"

EXHIBIT "14"

EXHIBIT "14"

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Jacqueline Bryant
Clerk of the Court
Transaction # 6564488

2540 1 **DICKINSON WRIGHT** JOHN P. DESMOND 2 Nevada Bar No. 5618 BRIAN R. IRVINE 3 Nevada Bar No. 7758 ANJALI D. WEBSTER Nevada Bar No. 12515 100 West Liberty Street, Suite 940 Reno, NV 89501 Tel: (775) 343-7500 6 Fax: (775) 786-0131 Email: <u>Jdesmond@dickinsonwright.com</u> Email: Birvine@dickinsonwright.com Email: Awebster@dickinsonwright.com 8 Attorney for Defendants 9 Berry Hinckley Industries, and Jerry Herbst 10 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA 11 IN AND FOR THE COUNTY OF WASHOE 12 13 LARRY J. WILLARD, individually and as CASE NO. CV14-01712 trustee of the Larry James Willard Trust Fund; 14 OVERLAND DEVELOPMENT DEPT. 6 CORPORATION, a California corporation; 15 EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the 16 Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, 17 18 Plaintiff, **NOTICE OF ENTRY OF FINDINGS** OF FACTS, CONCLUSIONS OF LAW 19 AND ORDER BERRY-HINCKLEY INDUSTRIES, a Nevada 20 corporation; and JERRY HERBST, an Individual: 21 Defendants. 22 23 BERRY-HINCKLEY INDUSTRIES, a 24 Nevada corporation; and JERRY HERBST, an individual; 25 Counterclaimants, 26 vs 27 28

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

1	CERTIFICATE OF SERVICE I certify that I am an employee of DICKINSON WRIGHT, and that on this date, pursuant to NRCP 5(b); I am serving a true and correct copy of the attached NOTICE OF ENTRY O				
4	FINDINGS OF FACTS, CONCLUSIONS OF LAW AND ORDER on the parties through the				
5	Second Judicial District Court's EFlex filing system to the following:				
6	Brian P. Moquin	David C. O'Mara			
7	LAW OFFICES OF BRIAN P. MOQUIN 3287 Ruffino Lane	THE O'MARA LAW FIRM 311 E. Liberty Street			
8	San Jose, California 95148	Reno, Nevada 89501			
9	DATED this 6th day of March, 2018.				
10		/s/ Mina Reel			
11 12		An employee of DICKINSON WRIGHT			
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EXHIBIT LIST

Exhibit	Description	Pages ¹
1	Findings of Fact, Conclusions of Law and Order on Defendant's Motion for Sanctions	34

¹ Exhibit page count is exclusive of exhibit slip sheet.

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Clerk of the Court
Transaction # 6564488

EXHIBIT 1

EXHIBIT 1

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Jacqueline Bryant
Clerk of the Court
Transaction # 6564287

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

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

Counter-defendants.

PROPOSED | FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON DEFENDANTS' MOTION FOR SANCTIONS

- 1. Plaintiffs in this matter are Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund; Overland Development Corporation, a California corporation (collectively, "Willard" or the "Willard Plaintiffs"); Edward E. Wooley and Judith A. Wooley, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000 (collectively, "Wooley"). The Willard Plaintiffs are also counter-defendants in this matter.
- 2. Plaintiffs' counsel are Brian Moquin, a California attorney who has been admitted to practice in Nevada *pro hac vice*, and David O'Mara of the O'Mara Law Firm, P.C., who is serving as local counsel.
- 3. Defendants/counter-claimants in this matter are Berry-Hinckley Industries ("BHI") and Jerry Herbst (collectively, "Defendants").
- 4. The Motion before this Court is Defendants' Motion for Sanctions, wherein Defendants sought, in pertinent part, dismissal with prejudice of this action pursuant to NRCP 16.1(e)(3), NRCP 37(b)(2), NRCP 41(b), and *Blanco v. Blanco*, 129 Nev. ____, 311 P.3d 1170. (Defendants' Motion).
- 5. Defendants' Motion was filed on November 15, 2017. Plaintiffs did not file an Opposition, despite Defendants and this Court granting several extensions. Defendants' Motion was submitted to this Court on December 18, 2017.

6. This Court, having considered the briefing, and being otherwise fully advised, and GOOD CAUSE APPEARING, hereby finds the following facts and makes the following conclusions of law:

FINDINGS OF FACT

Plaintiffs' Complaint

- 7. On August 8, 2014, Plaintiffs commenced this action against Defendants, filing a joint complaint against them. (Complaint).
- 8. Willard sought the following damages against Defendants for an alleged breach of the lease between Willard and BHI: (1) "rental income" for \$19,443,836.94, discounted by 4% per the lease to \$15,741,360.75 as of March 1, 2013; and (2) certain property-related damages, such as insurance and installation of a security fence. (First Amended Complaint ("FAC")).
- 9. Willard had also sought several other categories of damages which have since been dismissed or withdrawn. (May 30, 2017, Order).
- 10. Wooley sought the following damages against Defendants for an alleged breach of the lease between Wooley and BHI: (1) "rental income in the amount of \$4,420,244.00 that [Wooley] otherwise would have received," discounted by a rate of 4% as specified in the Wooley Lease to \$3,323,543.90 as of March 1, 2013; (2) a "diminution in value in an amount to be proven at trial but which is at least \$2,000,000"; (3) property taxes in the amount of \$1,500; (4) insurance for \$3,840; (5) maintenance costs of \$4,000; (6) management costs of \$2,500; and (7) security deposit from subtenant for \$2,485.00. (FAC).
- 11. Wooley had also sought several other categories of damages which have since been dismissed or withdrawn. (May 30, 2017, Order).

¹All of the referenced documents have been filed with this Court in this case, either as pleadings/ briefings/ motions or as exhibits to the same. References to "Defendants' Motion" are to Defendants' Motion for Sanctions. References to "Willard Motion" or "Wooley Motion"

are to the Plaintiffs' respective Motions for Summary Judgment.

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Plaintiffs' Initial Disclosures

- On December 12, 2014, Plaintiffs provided their initial disclosures. (Exhibit 1 to Defendants' Motion for Sanctions).
- However, while Plaintiffs disclosed anticipated witnesses and documents, they did not provide any computation of their claimed damages, notwithstanding the express requirement to do so set forth in NRCP 16.1(a)(1)(C).

Defendants' February 12, 2015, Letter

- On February 12, 2015, Defendants wrote to Plaintiffs regarding the deficiencies in their initial disclosures, and informing them that the disclosures did not include the damages computations required by the Nevada Rules of Civil Procedure. (Exhibit 4 to Defendants' Motion for Sanctions).
- 15. Defendants advised Plaintiffs that their failure to timely comply would result in Defendants seeking sanctions. Id.
- 16. However, Plaintiffs did not comply with their NRCP 16.1 obligations upon receipt of this letter or any time thereafter.

Plaintiffs' Interrogatory Responses

- 17. In April of 2015, Defendants served Plaintiffs with written discovery. (June 23, 2015, Motion to Compel).
- 18. Defendants had not received any NRCP 16.1 damages disclosures from Plaintiffs, and asked Plaintiffs in separate interrogatories to "[p]lease explain in detail how the damages...alleged in your Amended Complaint were calculated." (Plaintiffs' Interrogatory Responses, Exhibits 5 and 6 to Defendants' Motion for Sanctions).
- 19. Plaintiffs did not respond, even after Defendants granted them multiple extensions, requiring Defendants to file a motion to compel. (June 23, 2015, Motion to Compel).

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- 20. This Court granted the Motion to Compel, which Plaintiffs failed to oppose. Therein, this Court ordered, in pertinent part, that Plaintiffs shall pay Defendants' reasonable expenses incurred in making the motion, including attorneys' fees. (July 1, 2015, Order).
- 21. Only then did Plaintiffs respond, and, in pertinent part, simply repeated the allegations in their Complaint when discussing their damages. (Plaintiffs' Interrogatory Responses, Exhibits 5 and 6 to Defendants' Motion for Sanctions).
- 22. Notably, these Court-ordered responses were the last time Plaintiffs provided anything that even came close to a damages disclosure until October of 2017, and even these did not comply with the requirements of NRCP 16.1.
- 23. Plaintiffs did not pay Defendants' reasonable expenses, despite the direct order from this Court to do so.
- 24. Further, the fact that the Court imposed monetary sanctions on Plaintiffs in 2015 clearly did not deter any of their subsequent conduct in continuing to fail to comply with their discovery obligations and Court orders.

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

- 25. On August 28, 2015, Defendants wrote to Plaintiffs, referencing Plaintiffs' continued failure to comply with discovery obligations and resulting prejudice to Defendants, and noting that Plaintiffs had also yet to comply with the promise they made during a status conference before this Court to provide Defendants with discovery responses to Defendants' outstanding discovery requests in advance of the parties' depositions scheduled to begin on August 20, 2015. (Exhibit 7 to Defendants' Motion for Sanctions).
- 26. Plaintiffs' failure to comply with discovery obligations necessitated a continuance of the trial date and an extension of all discovery deadlines. (September 3, 2015, Stipulation and Order).

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

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

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

- 28. On April 20, 2016, Defendants continued to request the information that they sought in their March 2016 letters, noting that Plaintiffs had promised to provide the documents but they had not done so. (Exhibit 10 to Defendants' Motion).
- 29. Defendants again requested Plaintiffs' NRCP 16.1 damages calculations, noting that "this is an issue which we have raised on multiple occasions." *Id*.
 - 30. Yet again, Plaintiffs did not provide their NRCP 16.1 calculations.
- 31. Defendants also stated that "[y]our clients' failure to provide us with the discovery documents ha[s] prejudiced our ability to prepare a defense on behalf of our clients. Without such documents, we cannot depose several witnesses, and our experts are unable to complete their opinions. This also jeopardizes our ability to submit dispositive motions with complete information in time for the Court to fully consider those motions." *Id*.
- 32. Due to Plaintiffs continued failure to meet discovery obligations, the parties agreed to continue the trial date for a second time. The agreed-upon basis for a continuance was that Plaintiffs needed to provide Defendants with documents and information, and also needed to provide "Plaintiffs' NRCP 16.1 damages calculations." (May 2, 2016, Stipulation and Order). This Court signed the Order, adding that "no further continuances will be granted." *Id*.
- 33. Following the second continuance, trial was scheduled for May 2, 2017, and discovery was set to close on March 2, 2017.

<u>Plaintiffs' Unsuccessful Purported Disclosure of Daniel Gluhaich as a Non-Retained Expert Witness</u>

- 34. On December 2, 2016, Plaintiffs purported to disclose Daniel Gluhaich as a non-retained expert. (Exhibit 11 to Defendants' Motion).
- 35. However, while Plaintiffs' disclosure generally referenced the categories as to which Mr. Gluhaich was expected to testify, Plaintiffs did not provide "a summary of the facts

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

The Parties' December 2016 Correspondence

- 38. On December 9, 2016, Defendants' counsel wrote that Defendants did not receive the amended disclosure, or dates pursuant to which Defendants could depose Mr. Gluhaich. (Exhibit 13 to Defendants' Motion). Defendants advised Plaintiffs' counsel that "[o]bviously, we will be prejudiced by further delay in learning all of the expert opinion testimony that plaintiffs intent to present at trial. Please provide that information immediately." *Id.*
- 39. Defendants also addressed Plaintiffs' continued failure to provide their NRCP 16.1 damages. *Id.* On December 5, 2016, Wooley had provided a spreadsheet of damages expressly "for use in the ongoing informal settlement negotiations between Tim Herbst and Ed Wooley," and asked Defendants' counsel to "forward...to Tim Herbst as [Defendants' counsel saw] fit." (Exhibit 12 to Defendants' Motion). Plaintiffs' counsel also stated that he would "be

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

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

- 40. On December 23, 2016, Defendants' counsel discussed with Plaintiffs' counsel Plaintiffs' continued failure to properly disclose Mr. Gluhaich or even work with Defendants on expert deposition dates, even though Defendants had provided Plaintiffs an extension. (Exhibit 14 to Defendants' Motion).
- 41. Defendants also stated that this conduct was prejudicing Defendants and making it impossible for Defendants to comply with discovery deadlines for rebuttal experts. *Id*.
- 42. Next, Defendants expressed their concerns to Wooley that the damages spreadsheet recently provided for settlement purposes only, which Defendants could not share with their expert or use to prepare any defenses, contained a "new damages model that Plaintiffs had never before utilized in the case," and prejudiced Defendants in that they were unable to conduct discovery about this new computation of damages or the methodology used to arrive at the purported numbers in the Wooley settlement-only spreadsheet. *Id*.
- 43. Defendants concluded that "[w]e still have never received an NRCP 16.1 damages computation from either set of Plaintiffs, despite numerous demands. Please ensure that Plaintiffs meet their obligations to provide such computations immediately, or we will seek to preclude Plaintiffs from seeking any non-disclosed damages at trial, including those contained in the Wooley spreadsheet you sent me on December 5." *Id.* Defendants also added that they reserved the right to provide Plaintiffs' damages disclosure to their expert so that she could provide new opinions about any new damages model. *Id.*
- 44. On December 27, 2016, Plaintiffs' counsel responded. (Exhibit 15 to Defendants' Motion). Plaintiffs did not address their failure to provide their damages disclosures in any way, nor did they provide an expert disclosure of Mr. Gluhaich compliant

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

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

This Court's January 10, 2017, Hearing

- 46. On January 10, 2017, this Court held a hearing on Defendants' motion for partial summary judgment on Plaintiffs' overreaching consequential damages, which Messrs. Willard and Wooley personally attended. (January 10, 2017, transcript).
- 47. At the hearing, in pertinent part, Defendants' counsel informed this Court that Defendants had never received a damages computation from the Plaintiffs pursuant to NRCP 16.1, despite Defendants' many demands. *Id.* at 18. Plaintiffs' counsel attempted to claim that Plaintiffs' interrogatory responses satisfied Plaintiffs' requirements. *Id.* at 42-43. But Plaintiffs' counsel admitted, in open court, that "with respect to Willard, they do not" have an up-to-date, clear picture of Plaintiffs' damages claims. *Id.*
- 48. Plaintiffs' counsel also represented to this Court that Wooley's damages disclosures to Defendants were complete and up-to-date. *Id.* This was a misrepresentation, as Wooley had never provided Defendants with any NRCP 16.1 damages disclosures, and certainly had not provided any updated disclosures since the court-ordered discovery response in July of 2015. Further, the December 2016 damages spreadsheet was for use in settlement negotiations only per Wooley's counsel's own words, and therefore was not a disclosure in this litigation that could be utilized as contemplated by the Nevada Rules of Civil Procedure. (Exhibit 12 to Defendants' Motion). Defendants' counsel apprised this Court of this fact during the hearing. (January 10, 2017, transcript).

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

The February 9, 2017, Stipulation and Order

- 50. In spite of the rapidly impending trial date (at the time, May 2, 2017) and close of discovery (at the time, March 2, 2017), Plaintiffs did not provide Defendants with any damages disclosures or otherwise supplement or update their discovery responses in any way. Nor did Plaintiffs supplement their improper disclosure of Mr. Gluhaich or properly disclose any expert.
- 51. On February 3, 2017, Defendants wrote Plaintiffs, prefacing their letter by stating that "as of the date of this letter, we have less than thirty (30) days to complete discovery, less than sixty (60) days to fully-brief and submit dispositive motions to the Court for decision and less than three months until the current trial date." (Exhibit 16 to Defendants' Motion). Defendants wrote this letter to inform Plaintiffs that because of their failure to comply with their obligations, Defendants would not be able to timely complete discovery or submit dispositive motions, all to Defendants' prejudice, and to inform Plaintiffs that their conduct necessitated yet another continuance of the trial date. *Id*.
- 52. In the letter, Defendants first addressed Plaintiffs' obstinate refusal to comply with expert disclosure requirements. *Id.* Defendants reminded Plaintiffs that Plaintiffs "were indisputably aware of the fact that Plaintiffs' disclosures did not comply with the Nevada Rules of Civil Procedure at the time [they] served the deficient disclosure or immediately thereafter, as demonstrated by [the parties'] December 5, 2016, telephonic conversation." *Id.* However, despite Defendants having granted Plaintiffs an extension, Plaintiffs had not even attempted to comply with the Nevada Rules of Civil Procedure more than two months after the deadline, "without any justification whatsoever." *Id.*
- 53. Defendants further informed Plaintiffs that their "failure to comply with the Nevada Rules of Civil Procedure in the first instance, or to rectify their failure by providing an

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

- 54. Defendants also addressed Plaintiffs' continued failure to provide Defendants with an NRCP 16.1 damages computation. *Id.* Defendants stated that it would be "patently prejudicial to Defendants to receive Plaintiffs' damages model within mere days of the close of discovery," and it would be impossible for Defendants' expert to opine on any new damages theories under the current discovery deadlines if Plaintiffs were to seek any additional or different types of damages. *Id.*
- 55. Finally, Defendants requested that Plaintiffs also provide other outstanding discovery, stating that Plaintiffs "have been promising to disclose these documents for more than 10 months, but have yet to do so." *Id*.
- 56. Based on these issues, Defendants asked for a continuance of the trial date so that Plaintiffs could comply with their obligations such that Defendants could receive time to prepare their defenses in the timeline entitled to them by the Nevada Rules of Civil Procedure and the parties' agreements. *Id*.
- 57. Plaintiffs agreed to a third trial continuance, and on February 9, 2017, the parties signed a stipulation which contained several express recitals and stipulations regarding Plaintiffs' ongoing failure to comply with discovery obligations.
- 58. First, Plaintiffs agreed that they never properly disclosed Mr. Gluhaich and that this conduct had been prejudicial to Defendants:
 - 4. On December 2, 2016, Plaintiffs disclosed Dan Gluhaich as a non-retained expert. Plaintiffs' disclosure of Mr. Gluhaich indicated that Mr. Gluhaich would offer testimony regarding twelve separate subject matters and included Mr. Gluhaich's resume, but did not include "a summary of the facts and opinions to which the witness is expected to testify" as required by NRCP 16.1(a)(2)(B).

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- 5. Because Plaintiffs' disclosure of Mr. Gluhaich did not include a summary of the facts and opinions to which the witness is expected to testify as required by NRCP 16.1(a)(2)(B), Defendants have been unable to conduct a meaningful deposition of Mr. Gluhaich or to retain experts to rebut Mr. Gluhaich's opinions, because those opinions remain unknown to Defendants.
- 6. Following receipt of Plaintiffs' supplemental disclosure of Mr. Gluhaich, if any, which includes a summary of the facts and opinions to which the witness is expected to testify as required by NRCP 16.1(a)(2)(B), Defendants intend to depose Mr. Gluhaich and retain experts to rebut his opinions.
- 10. ...[B]ecause Plaintiffs have not yet provided an expert disclosure of Mr. Gluhaich that includes a summary of the facts and opinions to which the witness is expected to testify as required by NRCP 16.1(a)(2)(B), Defendants will be unable to complete the deposition of Mr. Gluhaich or to retain and disclose experts to rebut Mr. Gluhaich's opinions within the time currently allowed for discovery.

(February 9, 2017, Stipulation and Order).

- 59. Second, Plaintiffs stipulated that they had not properly provided their NRCP 16.1 damages disclosures:
 - 7. On January 10, 2017, the parties appeared in this Court for a hearing on Defendants' Motion for Partial Summary Judgment. At the hearing, the parties discussed with the Court Plaintiffs' obligation to provide, pursuant to NRCP 16.1(a)(1)(C), "[a] computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary matter, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered." (January 10, 2017 Hearing Transcript at 18, 42-43 and 61-62). Plaintiffs conceded at the hearing that they have not yet provided Defendants with a complete damages disclosure pursuant to NRCP 16.1(a)(1)(C), and the Court ordered Plaintiffs "to serve, within 15 days after the entry of the summary judgment, an updated 16.1 damage disclosure." Id. at 68.
 - 8. Upon receipt of Plaintiffs' NRCP 16.1 damages disclosure, Defendants intend to have Michelle Salazar supplement her initial expert report to include any opinions about any new or revised damages claims or calculations submitted by Plaintiffs, and Defendants may also need to conduct additional fact discovery on any new or revised damages claims or calculations submitted by Plaintiffs.

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

This Court's May 30, 2017, Order

- 66. On May 30, 2017, this Court entered an Order granting Defendants' motion for partial summary judgment. (Order).
- 67. In pertinent part, this Court stated that "[i]t is further ordered Plaintiffs shall serve, within fifteen (15) days of entry of this order, an updated NRCP 16.1 damage disclosure." *Id*.
- 68. Again, Plaintiffs completely ignored the requirements and obligations imposed by this order. They have failed to both properly disclose Mr. Gluhaich or to provide damages computations, despite the express requirements of the NRCP and this Court's Orders.

Plaintiffs' Motions for Summary Judgment

- 69. After three years of obstinate refusal to provide Defendants with an NRCP 16.1 damages calculation or to supplement any damages calculations, and after nearly one year of refusing to comply with the requirements to properly disclose an expert, Plaintiffs filed motions for summary judgment in which they requested brand new, never-disclosed types, categories, and amounts of damages with only four weeks remaining in discovery. (Motions for Summary Judgment).
- 70. Further, their calculations were based upon opinions of Mr. Gluhaich, an expert witness who was never properly disclosed, and who primarily based his opinions on appraisals that were also never disclosed. *Id*.
- 71. These Motions were filed with only four weeks remaining in discovery—putting Defendants in the exact same predicament that they were placed in February of 2017—Defendants could not engage in the discovery (fact and expert) necessary to adequately respond to Plaintiffs' brand new information, untimely disclosures, and new requests for relief. (Exhibit 16 to Defendants' Motion; February 9, 2017, Stipulation and Order).

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

Willard's Motion

- 73. In Willard's Motion, Willard sought more than triple the amount of damages (nearly \$40 million more) than he sought in the complaint and ostensibly throughout this case.
- 74. Willard also had a brand new, different basis for his claimed "rent" damages: the liquidated damages provision in the Lease. Unlike the damages sought in his Complaint, the liquidated damages clause contains a variable—reasonable rental value—that would necessarily require Willard to provide expert opinion to support his request and meet his burden of proof. (Willard Lease; Willard Motion).
- 75. Willard also had a brand new claim for diminution in value damages that would also require Willard to offer expert opinions to meet his burden of proof. (Willard's Motion for Summary Judgment).
 - 76. Default interest was a brand new component of Willard's claimed damages. *Id.*
- 77. The property-related damages now had a different purported value and amount. *Id.*
- 78. Willard's damages were based upon the opinions of Mr. Gluhaich, an undisclosed expert witness, and therefore Defendants did not have the chance to explore Mr. Gluhaich's opinions or rebut them as they are expressly entitled to do under Nevada law. *Id.*
- 79. Willard and his purported expert witness relied upon appraisals from 2008 and 2014 which were never disclosed in this litigation, despite Willard's NRCP 16.1 and NRCP 26(e) obligations and affirmative discovery requests served by Defendants. *See also* (Exhibit 17 to Defendants' Motion ("Please produce any and all appraisals for the Property from January 1, 2012 through present.")).

Wooley's Motion

- 80. Wooley sought nearly double the amount of damages that he sought in his complaint and ostensibly throughout this case. (Wooley Motion).
- 81. Wooley used different bases for his claimed "rent" damages. Unlike the damages sought in his Complaint, the liquidated damages clause contains a variable—reasonable rental value—that would necessarily require Wooley to introduce an expert opinion to meet his burden of proof, which Defendants would be entitled to rebut under Nevada law. (*Id.*; Exhibit 19 to Defendants' Motion). Wooley's basis for these damages was also different because Mr. Wooley had testified at his deposition that he had not yet terminated the lease and that it was ongoing, yet termination is a prerequisite to utilizing the liquidated damages formula per the parties' lease. (Exhibit 18 to Defendants' Motion; Exhibit 19 to Defendants' Motion). Thus, Wooley was proceeding on an entirely new theory.
- 82. Default interest was also a brand new component of Wooley's claimed damages. (Wooley Motion).
- 83. The property-related damages were based in part upon new damages and documents that were not disclosed to Defendants. *Id.*
- 84. Wooley's damages were based upon the opinions of Mr. Gluhaich, an undisclosed expert, and therefore Defendants did not have the chance to explore Mr. Gluhaich's opinions or rebut them as they were entitled to do. *Id.*; (February 9, 2017, Stipulation and Order).
- 85. Wooley and his purported expert relied upon an appraisal to establish "value" that was not previously disclosed in this litigation, despite Wooley's NRCP 16.1 and NRCP 26(e) obligations. (Exhibit 18 to Defendants' Motion (wherein Wooley stated that he had an appraisal performed when he bought the property, but had not produced that to his lawyer)).

Timing of the Motions

- 86. At this point in discovery, Defendants had obviously only been able to prepare defenses to the claimed bases for damages that Plaintiffs asserted in the Complaint and Interrogatory responses, not Plaintiffs' brand new, previously undisclosed, bases for damages.
- 87. This timing of these Motions undeniably deprived Defendants of the process that the parties expressly agreed was necessary to rebut any properly-disclosed expert opinions or properly-disclosed NRCP 16.1 damages calculations, as ordered by this Court. (February 9, 2017, Stipulation and Order).
- 88. Indeed, the conduct discussed herein is part of a larger pattern of Plaintiffs to ignore their discovery obligations. Defendants have been forced to file two motions to compel and a motion for contempt and sanctions, simply to have Plaintiffs comply with their discovery obligations.
- 89. Defendants have been required repeatedly to go to extraordinary lengths to attempt to force Plaintiffs to comply with basic obligations and deadlines imposed by the NRCP. (Exhibits 20-23 to Defendants' Motion).
- 90. This Court has also issued several Orders requiring Plaintiffs to meet their discovery obligations, but Plaintiffs have blatantly ignored those Orders.
- 91. Plaintiffs never submitted their Motions for Summary Judgment by the December 15, 2017 deadline to submit dispositive motions, or any time thereafter.

This Court's December 12, 2017, Hearing

- 92. On November 15, 2017, Defendants filed, *inter alia*, Defendants' Motion for Sanctions.³
- 93. Therein, Defendants requested that this Court dismiss Plaintiffs' case with prejudice as a sanction for Plaintiffs' discovery violations.

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

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⁴This Court inquired as to why Plaintiffs failed to oppose Defendants' Motions. Mr. Moquin informed this Court that his computer had malfunctioned, and his drafts of Plaintiffs' oppositions could not be recovered. Mr. Moquin further explained that he is a sole practitioner without access to an IT department.

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

101. Further, "the rule requires a computation supported by documents.... A plaintiff is required to provide its assessment of damages in its initial disclosure in light of the information currently available to it in sufficient detail so as to enable each defendant to understand the contours of its potential exposure and make informed decisions as to settlement and discovery." 10 Fed. Proc., L. Ed. § 26:44 (discussing FRCP 26); see generally Vanguard Piping, 129 Nev. at ____, 309 P.3d at 1020 ("Because of the similarity in the language, federal cases interpreting [the FRCP corollary to NRCP 16.1(A)(1)(D)] are strong persuasive authority."). Indeed, it is the plaintiff's burden to prove damages, see generally Gibellini v. Klindt, 110 Nev. 1201, 1206, 885 P.2d 540, 543-44 (1994) ("The party seeking damages has the burden of proving the fact that he was damaged and the amount thereof."), and "the plaintiff's damages." 10 Fed. Proc., L. Ed. § 26:44.

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

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

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

- (1) A party is under a duty to supplement at appropriate intervals its disclosures under Rule 16.1(a) or 16.2(a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under Rule 16.1(a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 16.1(a)(3) are due.
- (2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production or request for admission, if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.
- 104. Failure to comply with NRCP 16.1's requirements shall result in sanctions. Pursuant to NRCP 16.1(e)(3):

If an attorney fails to reasonably comply with any provision in [NRCP 16.1], or if an attorney or a party fails to comply with an **order** entered pursuant to [NRCP 16.1(d)], the court, upon motion or upon its own initiative, **shall** impose upon a party or a party's attorney, or both, appropriate sanctions in regard to the failure(s) as are just, including the following:

- (A) Any of the sanctions available pursuant to Rule 37(b)(2) and Rule 37(f);
- (B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).

(Emphases added).

105. In turn, NRCP 37(b)(2) provides that a court may make: "(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence", or "(C) striking out pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."

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

- 107. Similarly, pursuant to NRCP 41(b), "[f]or failure of the plaintiff to comply with [the Nevada Rules of Civil Procedure] or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant."
- 108. In addition to the rule-based authority discussed herein, the Nevada Supreme Court has also recognized that "the court has inherent power to enter defaults and dismiss actions for abusive litigation practices." *Blanco v. Blanco*, 129 Nev. ____, ___, 311 P.3d 1170, 1174 (2013).
- 109. The Nevada Supreme Court has also expressly held that "the factual nature of the underlying case is not an appropriate measure to evaluate whether a [case] should be dismissed for violations of court rules and/or orders." *Huckabay Props. v. NC Auto Parts*, 130 Nev. _____, 322 P.3d 429, 433 (2014) (discussing this in the context of dismissing an appeal, and also disapproving of prior case law "to the extent it indicates that a fact-based assessment of the underlying civil action should be made before determining whether to dismiss an appeal on procedural grounds.").
- 110. Finally, pursuant to DCR 13(3), the failure of an opposing party to serve and file a written opposition may be construed as an admission that the motion is meritorious and consent to granting the same.

Plaintiffs' Conduct Demands Dismissal with Prejudice

- 111. When considering the issuance of dismissal with prejudice as a sanction, the Nevada Supreme Court has held that "[p]rocedural due process considerations require that such case-concluding discovery sanctions be just and that they relate to the claims at issue in the violated discovery order." *Blanco*, 129 Nev. at , 311 P.3d at 1174.
- 112. Further, the Court must consider pertinent factors, including the extent of the offending party's willfulness, whether the non-offending party would be prejudiced by imposition of a lesser sanction, whether dismissal is too severe for the particular discovery abuse, the feasibility and fairness of less severe sanctions, the policy favoring adjudication of cases on their merits, and the need for deterring similar abusive conduct. *Id.* Dismissal should only occur in the most extreme of cases. *Id.*
- 113. However, district courts are not required to consider every factor, so long as the district court's analysis is thoughtfully performed. *See generally Young v. Johnny Ribeiro Bldg.*, *Inc.*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990).
- 114. Here, the factors readily demonstrate that dismissal with prejudice is warranted, and that there is no due process violation in so doing.

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

- 115. It must be emphasized as a threshold matter that Plaintiffs never opposed Defendants' Motion.
- 116. Under DCR 13(3), the failure of an opposing party to serve and file a written opposition may be construed as an admission that the motion is meritorious and consent to granting the same.
- 117. Thus, this Court finds that Plaintiffs' failure to file an opposition constitutes both an admission that the Motion is meritorious and Plaintiffs' consent to granting Defendants' Motion.
- 118. However, separate from this consideration, good cause exists to dismiss this case.

Plaintiffs' violations are willful

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

- 119. Plaintiffs' failure to provide damages disclosures are so central to this litigation, and to Defendants' rights and ability to defend this case, that dismissal of the entire case is necessary.
- 120. Plaintiffs have also completely failed to properly disclose an expert witness, waiting instead until the virtual end of discovery to attempt to utilize an undisclosed expert witness to support their Motions for Summary Judgment without complying with the requirements of the Nevada Rules of Civil Procedure, when it was too late for Defendants to disclose rebuttal expert testimony or otherwise defend against Plaintiffs' claims for damages.
- 121. Plaintiffs have also ignored or failed to comply with multiple separate discovery obligations throughout this case, forcing Defendants to repeatedly file motions to compel, and necessitating that the trial and discovery deadlines be extended on three occasions to accommodate for Plaintiffs' continued noncompliance.
- 122. Further, Plaintiffs have ignored this Court's express admonition to Plaintiffs that this Court was "seriously considering" dismissal and that Plaintiff's Oppositions would need to be "compelling." Plaintiffs did not even attempt to file oppositions, even after this warning.
- 123. Indeed, Plaintiffs have exhibited complete disregard for this Court's Orders, deadlines imposed by this Court, and the judicial process in general.
- 124. Plaintiffs' violations are willful. In addition to the plain language of NRCP 16.1, Plaintiffs have been on direct notice for three years that they have not complied with NRCP 16.1(a)(1)(C), yet have not attempted to rectify their wrongdoing. *Supra*.
- 125. This Court has ordered Plaintiffs to provide their damages disclosures, but Plaintiffs blatantly disregarded these orders. (January 10, 2017, Transcript at 68; May 30, 2017, Order); see also Perez v. Siragusa, 2008 WL 2704402, at *4 (E.D.N.Y. July 3, 2008) (dismissal under FRCP 37 and 41, noting that "[n]on-compliance with discovery orders will be deemed

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

- 126. Plaintiffs acknowledged in two stipulations that they have not complied with NRCP 16.1, yet have not even attempted to do so, despite promising and being ordered to comply. *See, e.g.*, (January 10, 2017, Transcript (for Willard); February 9, 2017, Stipulation and Order; May 2, 2016, Stipulation and Order).
- 127. Further, Wooley misrepresented to this Court that he had provided complete and up-to-date disclosures to Defendants when he had not. (January 10, 2017, Transcript). If anything, Wooley had only provided a spreadsheet that was, per Wooley's own words, for use in "settlement negotiations." See NRS 48.105(1). Defendants have informed Wooley repeatedly, including in open court, that this document provided for settlement negotiations does not equate to a disclosure, and Plaintiffs have never authorized Defendants to use that spreadsheet for litigation purposes in any manner. See, e.g., (January 10, 2017, Transcript 62).
- 128. Plaintiffs' bad faith motives in waiting to ambush Defendants are also plainly evidenced by their eleventh-hour Motions requesting brand-new, different, categories and amounts of damages for double and triple what was originally sought, while such alleged damages were based upon information that has been in Plaintiffs' possession for the entire pendency of this case. Plaintiffs' strategic decision to only disclose their damages in their Motions for Summary Judgment prejudiced Defendants by depriving them of the opportunity to defend against damages that had never been previously disclosed.
- 129. Plaintiffs' failure to properly disclose an expert witness is similarly willful. Plaintiffs acknowledged immediately after the initial purported "disclosure" that the disclosure did not comply with Nevada law. See (December 5, 2016, email (three days after disclosures due) (wherein Plaintiffs' counsel stated that "[Defendants] agreed to allow Plaintiffs to provide an amended witness disclosure by mid-afternoon Thursday, December 8, 2016 to include the facts and conclusions to which Mr. Gluhaich will be testifying...."), Exhibit 12 to Defendants' Motion; Exhibits 14 and to Defendants' Motion).

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

- 131. Yet, Plaintiffs did not even attempt to provide a proper disclosure of Mr. Gluhaich at any time in 2017.
- 132. Then, on October 17 and 18, 2017, less than four weeks prior to the close of discovery, Plaintiffs filed Motions for Summary Judgment, referring to Mr. Gluhaich as their "designated expert," (Willard Motion at 19-20; Wooley Motion at 12-13), without even acknowledging their noncompliance, much less providing justification for it.
- 133. Further, even a cursory review of Mr. Gluhaich's Affidavits in support of the Motions demonstrates that the purported facts and opinions that he provided could have been timely disclosed in December of 2016, further demonstrating that there was no justification other than willful noncompliance. (Gluhaich Affidavit re: Willard (relying exclusively on events that occurred in 2014 or earlier); Gluhaich Affidavit re: Wooley (relying exclusively on events that occurred in 2015 or earlier)).
- 134. These Motions and Mr. Gluhaich's Affidavits were filed at a point in the case where it was too late for Defendants to properly explore or rebut Mr. Gluhaich's conclusions and the bases therefor, a fact that Plaintiffs acknowledged in February with approximately four weeks left in discovery. (February 9, 2017, Stipulation and Order).
- 135. In addition, it is clear that Plaintiffs' failure to disclose the appraisals upon which many of their calculations were based was also willful.
- 136. With respect to Willard, Willard relies upon an appraisal from 2008 to determine the purported "original" fair market value of the property. (Willard Motion at 19). According to Willard, this appraisal was "commissioned in 2008 by the Willard Plaintiffs." *Id.* Indeed, Mr. Gluhaich avers that "in September 2008 Willard commissioned an appraisal of the Virginia Property...from CB Richard Ellis..., a copy of which was sent directly to me by Jason Buckholz of CBRE on October 17, 2008." (Gluhaich Aff. re: Willard ¶5). Willard also relies

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

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

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

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

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

<u>Defendants have been prejudiced by Plaintiffs' conduct and would be prejudiced</u> by the imposition of a lesser sanction

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

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

- 142. In fact, this is Plaintiffs' second case against Defendants based on the same set of facts.
- 143. Plaintiffs attempted to prosecute this case against Defendants in California, which was dismissed for a lack of personal jurisdiction.
- 144. Defendants are entitled to resolution, not to Plaintiffs languidly holding Defendants in litigation while simultaneously failing to meet their obligations under the NRCP to provide threshold information necessary to defend this case and to comply with the other obligations imposed by the NRCP.
- 145. Further, Plaintiffs' collective new requests and bases are not harmless additions: they would require Defendants to engage in additional fact discovery, retain direct and rebuttal experts, take depositions, re-open the briefing schedule, and again delay the trial for tasks that could, and should, have been accomplished during a discovery period that was already extended three times to account for Plaintiffs' continued noncompliance.

<u>Dismissal is not too severe for these discovery abuses, and lesser sanctions are not feasible or fair</u>

- 146. Plaintiffs' damages disclosures are central to this case, and dismissal is not too severe for Plaintiffs' repeated and willful noncompliance with Court orders and with Nevada law.
- 147. The Plaintiffs have been sanctioned for other discovery violations, (Order Granting Motion to Compel), yet remain undeterred, demonstrating that less severe sanctions have had no effect on Plaintiffs' recalcitrant conduct.
- 148. For example, in the context of granting Defendants' Motion to Compel Discovery Responses, this Court ordered Plaintiffs to pay Defendants' reasonable expenses incurred in making the motion, including attorneys' fees. (July 1, 2015, Order).

do-over of their dismissed action b

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

- 150. Further, Plaintiffs' conduct has already caused three continuances of the trial date, all to accommodate for Plaintiffs' continued disregard for Nevada discovery procedure. (Stipulations and Orders).
- 151. Given that this Court has already issued lesser sanctions, ordered continuances, and given Plaintiffs repeated admonitions about complying with deadlines and their NRCP obligations, all to no avail, it is clear that lesser sanctions have had no effect on Plaintiffs' conduct, and the issuance of lesser sanctions would only serve to encourage Plaintiffs' misconduct.
- 152. The fact that this Court granted Plaintiffs an additional extension to oppose Defendants' Motions, including their Motion for Sanctions, and Plaintiffs failed to do so without any excuse whatsoever further demonstrates that this Court's orders, and any lesser sanctions, have no effect on Plaintiffs' conduct. Given Plaintiffs' repeated failure to heed the court's warnings in the past, issuing additional warnings would be futile.
- 153. Nor would a less severe sanction be fair to Defendants, who have been continually prejudiced by Plaintiffs' willful disregard of their obligations despite their continued efforts to work with Plaintiffs and provide extensions to Plaintiffs.
- party cannot seek to avoid a dismissal based on arguments that his or her attorney's acts or omissions led to the dismissal." *Huckabay Props v. NC Auto Parts*, 130 Nev. ____, ___, 322 P.3d 429, 432 (2014) (also discussing that "[t]he United States Supreme Court has recognized that when an action is dismissed for failure to comply with court rules, the litigant cannot seek a do-over of their dismissed action based on arguments that dismissal is too harsh a penalty for

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

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

- 155. Although there is a policy favoring adjudication on the merits, Plaintiffs themselves have frustrated this policy by refusing to provide Defendants with their damages calculations or proper expert disclosures. Defendants have not frustrated this policy; instead, the record is clear that Defendants, and this Court, have repeatedly attempted to force Plaintiffs to comply with basic discovery obligations, to no avail.
- 156. Indeed, Defendants have served multiple rounds of written discovery upon Plaintiffs, in an attempt to obtain basic information on Plaintiffs' damages; have taken multiple depositions, and have been requesting compliant disclosures throughout this case so that they can address the merits. (Exhibits 24-35 of Defendants' Motion).
- 157. Plaintiffs should not be permitted to hide behind the policy of adjudicating cases on the merits when it is they who have frustrated this policy throughout the litigation. Defendants cannot reach the merits when they must spend the entire case asking Plaintiffs for threshold information and receiving no meaningful responses.
- 158. As the Nevada Supreme Court has held, the policy favoring adjudication on the merits "is not boundless and must be weighed against other policy considerations, including the public's interest in expeditious...resolution, which coincides with the parties' interests in bringing litigation to a final and stable judgment, prejudice to the opposing party; and

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

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

Dismissal is required to deter similar abusive conduct

- 160. The need to deter similar abusive conduct also weighs heavily in favor of dismissal.
 - 161. The discovery rules are in place for a reason, and are mandatory.
 - 162. Compliance with this Court's Orders is also mandatory.
- 163. Yet, Plaintiffs have completely ignored multiple Orders from this Court, deadlines imposed by this Court, and their obligations pursuant to the Nevada Rules of Civil Procedure.
- 164. Plaintiffs have received multiple opportunities and extensions to rectify their noncompliance, but have not even attempted to do so.
- 165. If Plaintiffs are permitted to continue prosecuting this case without severe consequences, then this type of abusive litigation practice will continue to the prejudice of defending parties and will make a mockery of the Nevada Rules of Civil Procedure and court orders. *Cf. generally Foster*, 126 Nev. at 66, 227 P.3d at 1049 (noting that "[i]n light of appellants' repeated and continued abuses, the policy of adjudicating cases on the merits would not have been furthered in this case, and the ultimate sanctions were necessary to demonstrate to future litigants that they are not free to act with wayward disregard of a court's orders."); see also Langermann v. Prop. & Cas. Ins. Co., 2015 WL 4714512 at *5 (D. Nev. 2015) (failing "to

comply with a scheduling order is not harmless, and re-opening discovery after the expiration of the deadlines only encourages cavalier treatment of deadlines").

166. Plaintiffs' disregard for this Court's orders and docket, Nevada law, and Defendants' rights to prepare a defense necessitates dismissal.

Dismissal would not violate Plaintiffs' due process rights

- 167. There is also no issue of due process deprivation upon dismissal.
- 168. Plaintiffs' response to Defendants' Motions, including Defendants' Motion for Sanctions, was originally due on December 4, 2017.
- 169. There is no dispute that Plaintiffs were served with the Motions. (December 12, 2017, transcript).
- 170. Through extensions granted by Defendants, and ultimately this Court, Plaintiffs were given until December 18, 2017, to file Oppositions. *Id*.
- 171. Defendants were expressly warned that this Court was seriously considering dismissal, and that Plaintiffs' oppositions needed to be "compelling." *Id*.
- 172. However, Plaintiffs did not file any Opposition by that time or any time thereafter; nor did Plaintiffs request another extension.
- 173. Thus, Plaintiffs, in voluntarily choosing to not respond to Defendants' Motions, are not being deprived of any due process. See DCR 13(3); Huckabay, 130 Nev. at ____, 322 P.3d at 436. No evidentiary hearing was needed. See Nevada Power Co. v. Fluor Illinois, 108 Nev. 638 (1992) ("If a party against whom dismissal may be imposed raises a question of fact as to any of [the] factors [for dismissal], the court must allow the parties to address the relevant factors in an evidentiary hearing.").
- 174. Indeed, this Court held a hearing on December 12, 2017, which was attended by both of Plaintiffs' counsel. As Plaintiffs have not filed anything with this Court since that hearing, or otherwise provided any new information, there would be nothing new to discuss at another hearing. See DCR 13(3).

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

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

EXHIBIT "15"

EXHIBIT "15"

EXHIBIT "15"

FILED
Electronically
CV14-01712
2018-04-16 09:34:29 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 6630162

1	2540	Transaction # 6630
•	DICKINSON WRIGHT	
2	JOHN P. DESMOND	
	Nevada Bar No. 5618	
3	BRIAN R. IRVINE	
	Nevada Bar No. 7758	
4	ANJALI D. WEBSTER	
	Nevada Bar No. 12515	
5	100 West Liberty Street, Suite 940	
_	Reno, NV 89501 Tel: (775) 343-7500	
6	Fax: (775) 786-0131	
7	Email: Jdesmond@dickinsonwright.com	
7	Email: Birvine@dickinsonwright.com	
8	Email: Awebster@dickinsonwright.com	
0		
9	Attorney for Defendants	
	Berry Hinckley Industries, and	
10	Jerry Herbst	
10		
11	IN THE SECOND JUDICIAL DISTRICT	COURT OF THE STATE OF NEVADA
	IN AND FOR THE CO	
12	IN AND FOR THE CO	DUNTY OF WASHOE
13	I ADDV I WILLADD individually and as	
	LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund;	CASE NO. CV14-01712
14	OVERLAND DEVELOPMENT	DEPT. 6
1.5	CORPORATION, a California corporation;	DLI 1. 0
15	EDWARD E. WOOLEY AND JUDITH A.	
16	WOOLEY, individually and as trustees of the	
10	Edward C. Wooley and Judith A. Wooley	
17	Intervivos Revocable Trust 2000,	
1,		
18		
	Plaintiff,	NOTICE OF ENTRY OF ORDER
19	VS.	
	DEDDY UDICKLEY DIDUCTORS N	
20	BERRY-HINCKLEY INDUSTRIES, a Nevada	
	corporation; and JERRY HERBST, an	
21	Individual;	
22	Defendants.	
22	Defendants.	
22		
23	DEDDY HINGH EX BIDLICEDIES	
24	BERRY-HINCKLEY INDUSTRIES, a	
24	Nevada corporation; and JERRY HERBST,	
25	an individual;	
23	Countaralaiments	
26	Counterclaimants, vs	
	\ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \	
27		
28		

1 2	LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;
3	•
4	Counter-defendants.
5	DI EACE TAKE NOTICE (1.4. A. 11.12.2010
6	PLEASE TAKE NOTICE that on April 13, 2018, an Order was entered in the above
7	captioned matter granting Defendants/Counterclaimants' Motion to Dismiss Counterclaims.
8	true and correct copy of the Order is attached hereto as Exhibit 1 .
9	<u>AFFIRMATION</u>
10	Pursuant to NRS 239B.030
11	The undersigned does hereby affirm that the preceding document does not contain the
12	social security number of any person.
13	DATED this 16th day of April, 2018.
14	DICKINSON WRIGHT
15	
16	/s/ Brian R. Irvine
17	DICKINSON WRIGHT JOHN P. DESMOND
18	Nevada Bar No. 5618 BRIAN R. IRVINE
19	Nevada Bar No. 7758 ANJALI D. WEBSTER
20	Nevada Bar No. 12515 100 West Liberty Street, Suite 940
21	Reno, NV 89501 Email: <u>Jdesmond@dickinsonwright.com</u>
22	Email: <u>Birvine@dickinsonwright.com</u> Email: <u>Awebster@dickinsonwright.com</u>
23	Attorney for Defendants Berry Hinckley
24	Industries, and Jerry Herbst
25	
26	
27	
28	

1	CERTIFICATE OF SERVICE
2	
3	I certify that I am an employee of DICKINSON WRIGHT, and that on this date, pursuant
4	to NRCP 5(b); I am serving a true and correct copy of the attached NOTICE OF ENTRY OF
5	ORDER on the parties through the Second Judicial District Court's EFlex filing system to the
6	following:
7	Richard D. Williamson, Esq.
8	Jonathan Joel Tew, Esq. ROBERTSON, JOHNSON, MILLER &
9	WILLIAMSON 50 West Liberty Street, Suite 600
10	Reno, Nevada 89501
	Attorneys for Plaintiffs/Counterdefendants DATED this 16th day of April 2018
11	DATED this 16th day of April, 2018.
12	/s/ Mina Reel An employee of DICKINSON WRIGHT
13	
14	
15	
16	
17	
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EXHIBIT LIST

		Description	Pages ¹
1 Order Granting Defendants/Counterclaimants' Motion to Dismiss Counterclaims, April 13, 2018		3	

¹ Exhibit page count is exclusive of exhibit slip sheet.

FILED
Electronically
CV14-01712
2018-04-16 09:34:29 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 6630162

EXHIBIT 1

EXHIBIT 1

FILED Electronically CV14-0171 2018-04-13 11:09 14 AM Jacqueline Bryant Clerk of the Court Transaction # 6628496

1 3105 DICKINSON WRIGHT, PLLC 2 JOHN P. DESMOND Nevada Bar No. 5618 3 BRIAN R. IRVINE Nevada Bar No. 7758 4 ANJALI D. WEBSTER Nevada Bar No. 12515 5 100 West Liberty Street, Suite 940 Reno, NV 89501 Tel: (775) 343-7500 Fax: (775) 786-0131 6 Email: Jdesmond@dickinsonwright.com Email: Birvine@dickinsonwright.com 8 Email: Awebster@dickinsonwright.com 9 Attorney for Defendants Berry Hinckley Industries and 10 Jerry Herbst 11 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA 12 IN AND FOR THE COUNTY OF WASHOE 13 CASE NO. CV14-01712 LARRY J. WILLARD, individually 14 and as trustee of the Larry James Willard Trust Fund: OVERLAND DEVELOPMENT DEPT. 6 15 CORPORATION, a California corporation; EDWARD C. WOOLEY AND JUDITH A. 16 WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley 17 Intervivos Revocable Trust 2000, 18 Plaintiff, VS. 19 BERRY-HINCKLEY INDUSTRIES, a 20 Nevada corporation; and JERRY HERBST, an individual 21 Defendants. 22 23 BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, 24 an individual; 25 Counterclaimants, 26 VS 27 28

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

Counter-defendants.

IPROPOSEDI ORDER GRANTING DEFENDANTS/COUNTERCLAIMANTS' MOTION TO DISMISS COUNTERCLAIMS

Before this Court is Defendants/Counterclaimants' Motion to Dismiss Counterclaims, filed on March 8, 2018. No opposition was ever filed.

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

1	
1	Accordingly, and good cause appearing therefor,
2	IT IS HEREBY ORDERED that Defendants' Motion to Dismiss Counterclaims
3	granted. DATED this 13th day of March, 2018.
4	DATED this 131 day of March, 2018.
5	
6	DISTRICT COURT JUDGE
7	DISTRICT COOKT JOBGE
8	
9	Respectfully submitted by:
10	DICKINSON WRIGHT, PLLC
11	
12	/s/ Brian R. Irvine
13	JOHN P. DESMOND Nevada Bar No. 5618
14	BRIAN R. IRVINE Nevada Bar No. 7758
15	ANJALI D. WEBSTER Nevada Bar No. 11525
16	100 West Liberty Street, Suite 940 Reno, NV 89501
17	Tel: (775) 343-7500 Fax: (775) 786-0131
18	Email: <u>Jdesmond@dickinsonwright.com</u> Email: <u>Birvine@dickinsonwright.com</u>
19	Email: Awebster@dickinsonwright.com
20	Attorneys for Defendants Berry Hinckley Industries, and
21	Jerry Herbst
22	
23	
24	
25	
26	
27	

EXHIBIT "16"

EXHIBIT "16"

EXHIBIT "16"

FILED
Electronically
CV14-01712
2018-04-16 09:31:03 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 6630140

1	2540 DICKINSON WRIGHT	Transaction # 663
2	JOHN P. DESMOND	
	Nevada Bar No. 5618 BRIAN R. IRVINE	
3	Nevada Bar No. 7758	
4	ANJALI D. WEBSTER	
•	Nevada Bar No. 12515	
5	100 West Liberty Street, Suite 940 Reno, NV 89501	
	Tel: (775) 343-7500	
6	Fax: (775) 786-0131	
7	Email: <u>Jdesmond@dickinsonwright.com</u>	
	Email: <u>Birvine@dickinsonwright.com</u> Email: <u>Awebster@dickinsonwright.com</u>	
8	Email: Awebster@dickinsonwright.com	
9	Attorney for Defendants	
	Berry Hinckley Industries, and	
10	Jerry Herbst	
11	IN THE SECOND JUDICIAL DISTRICT	COURT OF THE STATE OF NEVADA
12	IN AND FOR THE CO	OUNTY OF WASHOE
12		
13	I ADDA I WILLADD ' 1' 'I II I	<u> </u>
	LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund;	CASE NO. CV14-01712
14	OVERLAND DEVELOPMENT	DEPT. 6
15	CORPORATION, a California corporation;	
	EDWARD E. WOOLEY AND JUDITH A.	
16	WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley	
17	Intervivos Revocable Trust 2000,	
1/	,	
18	District	NOTICE OF ENTRY OF ORDER
10	Plaintiff, vs.	NOTICE OF ENTRY OF ORDER
19	75.	
20	BERRY-HINCKLEY INDUSTRIES, a Nevada	
	corporation; and JERRY HERBST, an Individual;	
21	individual;	
22	Defendants.	
23		
24	BERRY-HINCKLEY INDUSTRIES, a	
24	Nevada corporation; and JERRY HERBST, an individual;	
25	an murviduar,	
26	Counterclaimants,	
26	vs	
27		
28		

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

1	<u>CERTIFICATE OF SERVICE</u>			
2		I certify that I am an employee of DICKINSON WRIGHT, PLLC and that on this date,		
3	pursua	ant to NRCP 5(b), I am serving a true and correct copy of the attached NOTICE OF		
4	ENTE	RY on the parties as set forth below:		
5	X	Placing an original or true copy thereof in a sealed envelope placed for collection and		
6		mailing in the United States Mail, Reno, Nevada, postage prepaid, following ordinary business practices.		
7	addres	ssed as follows:		
8		Edward C. and Judith A. Wooley		
9		1173 Via Casa Palermo Henderson, NV 89011		
10	X	By electronic service by filing the foregoing with the Clerk of Court using the E		
11 12		Flex system, which will electronically mail the filing to the following individuals.		
13	addres	ssed as follows:		
14				
15		Richard D. Williamson, Esq. Jonathan Joel Tew, Esq.		
16		ROBERTSON, JOHNSON, MILLER & WILLIAMSON		
17		50 West Liberty Street, Suite 600 Reno, Nevada 89501		
18		Attorneys for Plaintiffs/Counterdefendants		
19		DATED this 16th day of April, 2018.		
20				
21		/s/ Mina Reel An employee of Dickinson Wright, PLLC		
22		All employee of Dickinson wright, FLLC		
23				
24				
25				
26				
27				
28				

EXHIBIT LIST

Exhibit	xhibit Description	
1	Order dismissing the claims of Wooley plaintiffs with prejudice, April 13, 2018	2

¹ Exhibit page count is exclusive of exhibit slip sheet.

FILED
Electronically
CV14-01712
2018-04-16 09:31:03 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 6630140

EXHIBIT 1

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

	2105	Transaction #
1	3105 DICKINSON WRIGHT, PLLC	
2	JOHN P. DESMOND	
3	Nevada Bar No. 5618 BRIAN R. IRVINE	
	Nevada Bar No. 7758	
+	ANJALI D. WEBSTER	
	Nevada Bar No. 12515 100 West Liberty Street, Suite 940	
	Reno, NV 89501	
	Tel: (775) 343-7500	
	Fax: (775) 786-0131 Email: Jdesmond@dickinsonwright.com	
	Email: Birvine@dickinsonwright.com	
	Email: Awebster@dickinsonwright.com	
1	Attorney for Defendants	
١	Berry Hinckley Industries and	
١	Jerry Herbst	
١	IN THE SECOND JUDICIAL DISTRICT CO	OURT OF THE STATE OF NEVADA
	IN AND FOR THE COUN	TY OF WASHOE
١		
1	LARRY J. WILLARD, individually	CASE NO. CV14-01712
١	and as trustee of the Larry James Willard	DERT 6
	Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;	DEPT. 6
	EDWARD C. WOOLEY AND JUDITH A.	
	WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley	
I	Intervivos Revocable Trust 2000,	
ı	Plaintiff,	
	VS.	
	BERRY-HINCKLEY INDUSTRIES, a	
١	Nevada corporation; and JERRY HERBST, an individual	
	marviduai	
I	Defendants.	
ı		
	BERRY-HINCKLEY INDUSTRIES, a	
	Nevada corporation; and JERRY HERBST,	
1	an individual;	
1	Counterclaimants,	
1	vs	
	2526	
	Page 1 of	2

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; 2 OVERLAND DEVELOPMENT CORPORATION, a California corporation; 3 Counter-defendants. 4 OF CLAIMS OF WOOLEY PLAINTIFFS OF CLAIMS OF WOODEROF DISMISSAL WITH PREJUDICE 5 6 Pursuant to the Stipulation for Dismissal with Prejudice of the parties and other good 7 cause appearing therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that all 8 of the claims of Plaintiffs EDWARD C. WOOLEY AND JUDITH A. WOOLEY, individually 9 and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000 10 asserted in the above-entitled action are dismissed with prejudice, the parties to bear their own 11 costs and attorney's fees. 12 IT IS SO ORDERED this 3 day of April 13 14 DISTRICT COURT JUDGE 15 16 Respectfully submitted by: 17 DICKINSON WRIGHT, PLLC 18 /s/ Brian R. Irvine JOHN P. DESMOND 19 Nevada Bar No. 5618 BRIAN R. IRVINE 20 Nevada Bar No. 7758 ANJALI D. WEBSTER 21 Nevada Bar No. 11525 100 West Liberty Street, Suite 940 22 Reno, NV 89501 Tel: (775) 343-7500 23 Fax: (775) 786-0131 Email: Jdesmond@dickinsonwright.com 24 Email: Birvine@dickinsonwright.com Email: Awebster@dickinsonwright.com 25 Attorneys for Defendants 26 Berry Hinckley Industries, and Jerry Herbst 27

EXHIBIT "17"

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Jacqueline Bryant
Clerk of the Court
Transaction # 7019340

1	2535	Transaction # 701
2	DICKINSON WRIGHT, PLLC	
2	JOHN P. DESMOND	
3	Nevada Bar No. 5618 BRIAN R. IRVINE	
4	Nevada Bar No. 7758	
	ANJALI D. WEBSTER	
5	Nevada Bar No. 12515 100 West Liberty Street, Suite 940	
6	Reno, NV 89501	
	Tel: (775) 343-7500	
7	Fax: (844) 670-6009 Email: Jdesmond@dickinsonwright.com	
8	Email: Birvine@dickinsonwright.com	
9	Email: Awebster@dickinsonwright.com	
9	Attorney for Berry Hinckley Industries and Jerry	Herbst
10	IN THE SECOND JUDICIAL DISTRICT	COURT OF THE STATE OF NEVADA
11		
10	IN AND FOR THE CO	DUNTY OF WASHOE
12		
13	LARRY J. WILLARD, individually and as	CASE NO. CV14-01712
14	trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT	DEPT. 6
17	CORPORATION, a California corporation;	
15	EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the	
16	Edward C. Wooley and Judith A. Wooley	
	Intervivos Revocable Trust 2000,	
17		
18	Plaintiffs,	
	vs.	
19	BERRY-HINCKLEY INDUSTRIES, a Nevada	
20	corporation; and JERRY HERBST, an	
21	Individual;	
	Defendants.	
22		
23	BERRY-HINCKLEY INDUSTRIES, a	
	Nevada corporation; and JERRY HERBST,	
24	an individual;	
25	Counterclaimants,	
26	vs	
	LARRY J. WILLARD, individually and as	
27	trustee of the Larry James Willard Trust Fund;	
28	OVERLAND DEVELOPMENT CORPORATION, a California corporation;	
	1 Cora Orallion, a Camonia Corporation,	

1 Counter-defendants. 2 3 NOTICE OF ENTRY OF JUDGMENT 4 PLEASE TAKE NOTICE that on December 11, 2018, a Judgment was entered in the 5 above-captioned matter in favor of Defendants and against the Willard Plaintiffs on all of the 6 Willard Plaintiffs' claims and that such claims are dismissed with prejudice. A true and correct 7 copy of the order is attached hereto as Exhibit 1. 8 **AFFIRMATION** 9 Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding 10 document does not contain the social security number of any person. 11 DATED this 11th day of December, 2018. 12 DICKINSON WRIGHT, PLLC 13 14 /s/ Brian R. Irvine 15 JOHN P. DESMOND Nevada Bar No. 5618 16 BRIAN R. IRVINE Nevada Bar No. 7758 17 ANJALI D. WEBSTER Nevada Bar No. 12515 18 100 West Liberty Street, Suite 940 Reno, NV 89501 19 Tel: (775) 343-7500 Fax: (844) 670-6009 20 Email: Jdesmond@dickinsonwright.com Email: Birvine@dickinsonwright.com 21 Email: Awebster@dickinsonwright.com 22 23 24 25 26 27

1 **CERTIFICATE OF SERVICE** 2 I certify that I am an employee of DICKINSON WRIGHT PLLC, and that on this date, 3 pursuant to NRCP 5(b); I am serving a true and correct copy of the attached NOTICE OF 4 ENTRY OF JUDGMENT on the parties through the Second Judicial District Court's E-Flex 5 filing system to the following: 6 7 Richard D. Williamson, Esq. Brian P. Moquin LAW OFFICES OF BRIAN P. MOQUIN Jonathan Joel Tew, Esq. 8 ROBERTSON, JOHNSON, MILLER & 3287 Ruffino Lane **WILLIAMSON** San Jose, California 95148 50 West Liberty Street, Suite 600 10 Reno, Nevada 89501 Attorneys for Plaintiffs/Counterdefendants 11 12 DATED this 11th day of December, 2018. 13 /s/ Mina Reel 14 An employee of DICKINSON WRIGHT PLLC 15 16 17 18 19 20 21 22 23 24 25 26 27 28

EXHIBIT TABLE

Exhibit	Description	Pages ¹
1	December 11, 2018, Judgment	3

¹ Exhibit page counts are exclusive of exhibit slip sheets.

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EXHIBIT 1

EXHIBIT 1

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Jacqueline Bryant
Clerk of the Court
Transaction # 7018896

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

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

Counter-defendants.

JUDGMENT

This action, having come before this Court, the Honorable Lynne K. Simons presiding, and all of the claims of Plaintiffs Larry J. Willard, individually and as trustee of the Larry James Willard Trust (the "Willard Plaintiffs"), having been dismissed by this Court with prejudice in its Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions filed herein on March 6, 2018, this Court having denied the Willard Plaintiffs' NRCP 60(b) Motion for Relief on November 30, 2018, and all of the counterclaims of Defendants Berry-Hinckley Industries ("BHI") and Jerry Herbst having been dismissed by this Court in its Order granting Defendants' Motion for voluntary dismissal filed herein on April 13, 2018,

IT IS ORDERED AND ADJUDGED that Judgment is entered in favor of Defendants and against the Willard Plaintiffs on all of the Willard Plaintiffs' claims and that such claims are dismissed with prejudice.

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27

1	IT IS FURTHER ORDERED AND ADJUDGED that Defendants' counterclaims are
2	dismissed without prejudice.
3 4	DATED this
5	
6	The same of the sa
7	DISTRICT COURT JUDGE
8	Respectfully submitted by:
9	DICKINSON WRIGHT, PLLC
10	
11	/s/ Brian R. Irvine
12	JOHN P. DESMOND Nevada Bar No. 5618
13	BRIAN R. IRVINE Nevada Bar No. 7758
14	ANJALI D. WEBSTER Nevada Bar No. 11525
15	100 West Liberty Street, Suite 940 Reno, NV 89501
16	Tel: (775) 343-7500 Fax: (844) 670-6009
17	Email: <u>Jdesmond@dickinsonwright.com</u> Email: <u>Birvine@dickinsonwright.com</u>
18	Email: Awebster@dickinsonwright.com
19	Attorneys for Defendants Berry Hinckley Industries, and
20	Jerry Herbst
21	
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Alicia L. Lerud
Clerk of the Court
Transaction # 9047927

		Alicia L. Ler
1	2540	Clerk of the C Transaction # 90
1	DICKINSON WRIGHT PLLC	Transaction # 30
2	JOHN P. DESMOND	
_	Nevada Bar No. 5618	
3	BRIAN R. IRVINE	
	Nevada Bar No. 7758	
4	ANJALI D. WEBSTER	
5	Nevada Bar No. 12515	
3	100 West Liberty Street, Suite 940	
6	Reno, NV 89501	
	Tel: (775) 343-7500	
7	Fax: (844) 670-6009	
	Email: <u>Jdesmond@dickinsonwright.com</u>	
8	Email: <u>Birvine@dickinsonwright.com</u>	
9	Email: <u>Awebster@dickinsonwright.com</u>	
	Attorney for Berry Hinckley Industries and Jerry	Herbst
10	IN THE SECOND JUDICIAL DISTRICT	COURT OF THE STATE OF NEVADA
11		
11	IN AND FOR THE CO	DUNTY OF WASHOE
12	LARRY J. WILLARD, individually and as	İ
	trustee of the Larry James Willard Trust Fund;	CASE NO. CV14-01712
13	OVERLAND DEVELOPMENT	DEPT. 6
14	CORPORATION, a California corporation;	
1	EDWARD E. WOOLEY AND JUDITH A.	
15	WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley	
	Intervivos Revocable Trust 2000,	
16	intervives reveeasie Trast 2000,	
17	Plaintiffs,	
1 /	VS.	
18	DEDDY HINGH EVINDHOTDIES - N 1-	
	BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an	
19	Individual;	
20	Defendants.	
20		
21	DEDDY HINCKLEY DIDUCTDIES	
	BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST,	
22	an individual;	
23	Counterclaimants,	
24	VS	
Z 4	I ADDV I WII I ADD individually and as	
25	LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund;	
	OVERLAND DEVELOPMENT	
26	CORPORATION, a California corporation;	
27	_	
27	Counter-defendants.	
28		
		I .

1	NOTICE OF ENTRY OF ORDER			
2	PLEASE TAKE NOTICE that on the 10 th day of May, 2022, an Order was entered in the			
3	above-captioned matter denying Willard Plaintiffs' Motion for Relief Under NRCP			
4	60(B)(5)&(6). A true and correct copy of the order is attached hereto as Exhibit 1 .			
5	<u>AFFIRMATION</u>			
6	Pursuant to NRS 239B.030			
7	The undersigned does hereby affirm that the preceding document does not contain the			
8	social security number of any person.			
9	DATED this 13 th day of May, 2022.			
10	DICKINSON WRIGHT, PLLC			
11				
12	/s/ Brian R. Irvine JOHN P. DESMOND			
13	Nevada Bar No. 5618 BRIAN R. IRVINE			
14	Nevada Bar No. 7758 ANJALI D. WEBSTER			
15	Nevada Bar No. 12515			
16	100 West Liberty Street, Suite 940 Reno, NV 89501			
17	Tel: (775) 343-7500 Fax: (844) 670-6009			
18	Email: <u>Jdesmond@dickinsonwright.com</u> Email: <u>Birvine@dickinsonwright.com</u>			
19	Email: <u>Awebster@dickinsonwright.com</u>			
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CERTIFICATE OF SERVICE

1					
2	I certify that I am an employee of DICKINSON WRIGHT PLLC, and that on this dat				
3	pursuant to NRCP 5(b); I am serving a true and correct copy of the attached NOTICE 0				
4	ENTRY OF ORDER on the parties through the Second Judicial District Court's E-Flex filing				
5	ystem to the following:				
6	Richard D. Williamson, Esq.	Robert L. Eisenberg, Esq.			
7	Jonathan Joel Tew, Esq. ROBERTSON, JOHNSON, MILLER &	LEMONS, GRUNDY & EISENBERG 6005 Plumas Street, Third Floor			
8	WILLIAMSON 50 West Liberty Street, Suite 600	Reno, NV 89519 Telephone: (775) 786-6868 Facsimile: (775) 786-9716			
9	Reno, Nevada 89501				
10	rich@nvlawyers.com jon@nvlawyers.com	<u>rle@lge.net</u>			
11	Attorneys for Plaintiffs/Counterdefendants	Attorneys for Plaintiffs/Counterdefendants			
12					
13					
14	DATED this 13 th day of May, 2022.				
15					
16		/s/ Angela M. Shoults An employee of DICKINSON WRIGHT PLLC			
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EXHIBIT TABLE

Exhibit	Description	Pages ¹
1	ORDER DENYING WILLARD PLAINTIFFS' MOTION FOR RELIEF UNDER NRCP 60(b)(5) & (6)	8

¹ Exhibit Page counts are exclusive of exhibit slip sheets.

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Clerk of the Court
Transaction # 9047927

EXHIBIT 1

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

Case No. CV14-01712

ORDER DENYING WILLARD

PLAINTIFFS' MOTION FOR

RELIEF UNDER NRCP 60(B)(5)&(6)

Dept. No. 6

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

Plaintiffs,

VS.

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

Defendants.

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

Counterclaimants,

VS

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

Counter-defendants.

ORDER DENYING WILLARD PLAINTIFFS' MOTION FOR RELIEF UNDER NRCP 60(B)(5)&(6)

Before this Court is *Willard Plaintiffs' Motion for Relief Under NRCP 60(b)(5)&(6)*("*Motion*") filed by Plaintiffs LARRY J. WILLARD, individually, and as Trustee of the Larry

James Willard Trust Fund, and OVERLAND DEVELOPMENT CORPORATION (collectively,

"Plaintiffs" unless named individually), by and through its counsel of record, Robertson,

Johnson, Miller & Williamson, and Lemons, Grundy & Eisenberg.

Defendants BERRY-HINCKLEY INDUSTRIES, a Nevada corporation, and JERRY HERBST (collectively, "Defendants" unless named individually) filed *Defendants' Opposition* to the Willard Plaintiffs' Motion for Relief Under NRCP 60(b)(5)&(6) ("Opposition"), by and through their counsel of record, Dickinson Wright, PLLC.

Plaintiffs filed their *Reply in Support of Willard Plaintiffs' Motion for Relief Under NRCP 60(b)(5)&(6)* ("*Reply*") and the matter was thereafter submitted for the Court's consideration.

I. RELEVANT FACTUAL AND PROCEDURAL HISTORY.

On April 18, 2018, Plaintiffs filed *Willard Plaintiffs' Rule 60(b) Motion for Relief* ("*NRCP 60(b) Motion*") on the grounds Brian Moquin's ("Mr. Moquin") mental illness constituted excusable neglect.

On December 11, 2018, the Court entered *Judgment* in favor of Defendants and dismissed Plaintiffs' claims with prejudice.

On September 13, 2021, the Court entered its *Order After Remand Denying*Plaintiffs' Rule 60(b) Motion for Relief, which Plaintiffs appealed on October 11, 2021, and is presently pending appeal.

In their *Motion*, Plaintiffs argue there are exceptional circumstances to warrant NRCP 60(b)(6) relief because the Court has been presented with newly available evidence of Mr. Moquin's disciplinary records, which were previously unavailable to Plaintiffs because Mr. Moquin purportedly deceived Plaintiffs by failing to provide such evidence and Mr. Moquin was disciplined after Plaintiffs filed their request for relief under NRCP 60(b)(1). See generally *Motion*, pp. 7, 11-12. Furthermore, Plaintiffs identify fifteen (15) purported significant changes in the factual conditions of this case to warrant relief under NRCP 60(b)(5). *Motion*, pp. 13-14.

In their *Opposition*, Defendants assert each of the six (6) categories of relief under Rule 60 of the Rules of Civil Procedure are mutually exclusive. *Opposition*, pp. 8-9 (citing various persuasive federal authority). Defendants argue Plaintiffs' arguments demonstrate their *Motion* is an attempt to improperly and untimely bolster their NRCP 60(b)(1) arguments. *Opposition*, pp. 9-11. Defendants contend Plaintiffs' *Motion* is untimely because Plaintiffs fail to explain why the *Motion* comes two (2) years after Mr. Moquin's conditional guilty plea entered in April 2019. *Opposition*, pp. 13-14. Likewise, Defendants contend Plaintiffs request for relief under NRCP 60(b)(5) is untimely and NRCP 60(b)(5) relief does not apply prospectively to final judgments. *Opposition*, pp. 21-22.

In their *Reply*, Plaintiffs assert they did not state the *Motion* is a supplement to their previously filed NRCP 60(b) motion. *Reply*, p. 2. Plaintiffs contend they filed their *Motion* within a reasonable time because disciplinary and conviction records were not publicly filed. Furthermore, Plaintiffs cite authority they urge is persuasive for the premise NRCP 60(b)(6) relief is available when personal problems of counsel cause counsel to grossly neglect a client's case and mislead the client. *Reply*, p. 3. Additionally, Plaintiffs argue their *Motion*

was filed within a reasonable time and Mr. Moquin's abandonment of Plaintiffs constitutes extraordinary circumstances to award relief under NRCP 60(b)(6). *Reply*, pp. 3-4.

II. <u>APPLICABLE LAW AND ANALYSIS</u>.

A. NRCP 60(b)(5)

Section 60(b)(5) of the Nevada Rules of Civil Procedure provides, in pertinent part, a court may relieve a party from a final judgment, order, or proceeding for the following reasons, including "the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable." NRCP 60(b)(5).

A motion for relief under NRCP 60(b)(5) requires the district court find "a significant change either in factual conditions or in law." S.E.C. v. Coldicutt, 258 F.3d 939, 942 (9th Cir. 2001) (citing Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384, 112 S. Ct. 748, 760 (1992)). A two-step process is required for relief under NRCP 60(b)(5): (1) the moving party must satisfy their burden of showing significant change either in factual conditions or in the law; and (2) "whether the proposed modification is suitably tailored to resolve the problems created by the changed factual or legal conditions." U.S. v. Asarco Inc., 430 F.3d 972, 979 (9th Cir. 2005) (citing Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384, 391, 112 S. Ct. 748 (1992)).

The Court finds the newly published disciplinary actions of Mr. Moquin do not constitute significant changes in factual conditions. The Court's prior finding that Plaintiffs were represented by Mr. Moquin and Mr. O'Mara has not changed. *Order*, pp. 42-43. Further, the newly published disciplinary actions are still based on the information the Court had before it previously. Therefore, the proposed modification is not suitably tailored to

resolve the problems created by claimed changed factual conditions argued to support Plaintiffs' position Moquin's mental illness constituted excusable neglect. The Court finds NRCP 60(b)(5) does not provide a basis for relief from the Court's prior ruling.

B. NRCP 60(b)(6)

ADKT 0522 amended Rule 60(b) of the Nevada Rules of Civil Procedure adding subsection six (6) to Rule 60(b) to conform with Rule 60(b)(6) of the Federal Rules of Civil Procedure. See ADKT 0522 and Advisory Committee Note-2019 Amendment ("[t]he amendments generally conform to Rule 60 to FRCP 60, including incorporating FRCP 60(b)(6) as Rule 60(b)(6)."). NRCP 60(b)(6) provides, in pertinent part, a court may relieve a party from a final judgment, order, or proceeding for the following reasons, including "any other reason that justified relief." NRCP 60(b)(6) (emphasis supplied). NRCP 60(b)(6) was specifically amended to conform with FRCP 60(b)(6). As such, it has long been held federal decisions interpreting the "Federal Rules of Civil Procedure are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts." Exec. Mgmt., Ltd. v. Ticor Title Ins. Co., 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (internal quotations omitted) (citing Las Vegas Novelty v. Fernandez, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990)); see also Nelson v. Heer, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005).

"The district court has broad discretion to grant or deny a motion to set aside a judgment under NRCP 60(b), and [i]ts determination will not be disturbed on appeal absent an abuse of discretion." Byrd v. Byrd, No. 80548-COA, 2021 WL 4494633, at *3, 137 Nev. Adv. Op. 60, (Nev. Ct. App. Sept. 30, 2021) (internal quotations omitted); see also Cook v. Cook, 112 Nev. 179, 181-82, 919 P.2d 264, 265 (1996). An abuse of discretion occurs if

the district court's discretion is arbitrary, capricious, or exceeds the bounds of law or reason.

Byrd, 2021 WL 4494633, at *3.

Recently, the Nevada Court of Appeals held "NRCP 60(b)(6) provides an independent basis for relief that is mutually exclusive of clauses (1)-(5)." Byrd, 2021 WL 4494633, at *4. Federal courts have also concluded the same.¹ A party seeking relief under NRCP 60(b)(6) must satisfy three (3) elements: (1) the motion "cannot be premised on another ground delineated in" NRCP 60; (2) the motion was filed within a reasonable time; and (3) there are extraordinary circumstances justifying reopening the judgment. Bynoe v. Baca, 966 F.3d 972, 979 (9th Cir. 2020).

In this case, the Court concludes Plaintiffs' NRCP 60(b)(6) relief is precluded because the *Motion* is premised on another ground delineated in NRCP 60. Both the *NRCP 60(b) Motion* and the instant *Motion* request relief based on NRCP 60(b)(5) and specifically on the facts of Mr. Moquin's mental illness and the effect on his representation of Plaintiffs. In the instant *Motion*, Plaintiffs argue newly published disciplinary records of Mr. Moquin are additional evidence the Court can now, and should, consider which in effect supplements their previously filed *NRCP 60(b) Motion*.²

See Gonzalez v. Crosby, 545 U.S. 524, 528-29, 125 S. Ct. 2641, 2646 (2005) ("Rule 60(b)(6) . . . permits reopening [of a judgment] when the movant shows any . . . reason justifying relief from the operation of the judgment other than the more specific circumstances set out in Rules 60(b)(1)-(5).") (internal quotations omitted); Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 863, 108 S. Ct. 2194, 2204 (1988) (to prevail under Rule 60(b)(6) the motion must be "made within a reasonable time and is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5).").

² *Motion*, p. 2 ("Now, additional evidence exists to support the Willard Plaintiffs' claims surrounding Moquin's mental illness. This evidence was not previously available."); p. 3 (Plaintiffs state the Court should now consider Mr. Moquin's 2019 disciplinary action and documents filed therein as additional evidence.); pp. 12-13 ("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 decide on its merits.").

Notwithstanding this, the Court did consider whether the circumstances at hand are extraordinary and justify reopening the Court's decision. The Court finds, based on all of the circumstances that were before it then, and those that are argued now, do not warrant the relief requested.

II. <u>ORDER</u>.

Accordingly, and good cause appearing therefor,

IT IS HEREBY ORDERED the Willard Plaintiffs' Motion for Relief Under NRCP 60(b)(5)&(6) is DENIED.

DATED this 9th day of May, 2022.

DISTRICT JUDGE

CERTIFICATE OF SERVICE I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 10th day of May, 2022, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following: JOHN DESMOND, ESQ. ANJALI WEBSTER, ESQ. ROBERT EISENBERG, ESQ. RICHARD WILLIAMSON, ESQ. BRIAN IRVINE, ESQ. JONATHAN TEW, ESQ. And, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows: Holly W. Longe