IN THE SUPREME COURT OF THE STATE OF NEVADA

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

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RESPONDENTS' SUPPLEMENTAL

ANSWERING BRIEF

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DISCLOSURE STATEMENT

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

1. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation ("BHI") is 100% owned by JH, Inc., a Nevada corporation. BHI and JERRY HERBST,[1] an individual, (collectively referred to herein as "Defendants") are represented by Dickinson Wright, PLLC. The law firm of Dickinson Wright, PLLC, represented BHI and Jerry Herbst below.

DICKINSON WRIGHT, PLLC

/s/ Anjali D. Webster

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[1] Mr. Herbst passed away on November 27, 2018. 1 Respondents' Appendix ("RA") 94-96.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

RESPONSE TO ROUTING STATEMENT

The Court of Appeals presumptively decides appeals from post-judgment orders. NRAP 17(b)(7). Defendants disagree with Willard's[2] statement that the case presents issues of statewide public importance involving clarification of NRCP 60(b)(6), because Willard's brief essentially ignores the two Nevada published opinions governing the precise issues raised in this appeal. However, Defendants have no objection to either Court deciding this appeal.

STATEMENT OF ISSUES

This appeal is from the District Court's Order denying Willard's Motion for Relief Pursuant to NRCP 60(b)(5) and 60(b)(6) (the "60(b)(6) Motion"). The issues presented in this appeal are:

1. Whether the District Court acted within its discretion in denying Willard's 60(b)(6) Motion when the Motion was filed more than two years after the alleged events upon which it was premised, and Willard offered no explanation or excuse whatsoever for his unreasonable delay.

2. Whether the District Court acted within its discretion in denying Willard's request for NRCP 60(b)(6) relief when the request was to use alleged "new"

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[2]"Willard" refers to Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund, and Overland Development Corporation, who are the appellants in this appeal.

evidence to corroborate arguments that Willard had made in his NRCP 60(b)(1) Motion three years prior, and Nevada law prohibits a movant from seeking NRCP 60(b)(6) relief on grounds set forth in NRCP 60(b)(1)-(5).

3. Whether the District Court acted within its discretion in denying Willard's request for 60(b)(6) relief where, as the District Court found, the Motion did not demonstrate the extraordinary circumstances necessary to warrant setting aside the judgment.

4. Whether the District Court acted within its discretion in denying Willard's request for 60(b)(5) relief where that rule plainly does not apply to this type of judgment and, as the District Court found, the alleged "new facts" argued by Willard were no different than the arguments that Willard had already unsuccessfully made to the District Court.

INTRODUCTION

As with Willard's Supplemental Opening Brief ("ASOB"), this Supplemental Answering Brief is in addition to, and supplements, Defendants' Answering Brief filed in consolidated Case No. 83640.

Willard, who was represented by two attorneys throughout the case, sought millions of dollars against Defendants in 2014 and then completely failed to comply with even basic discovery obligations, instead holding Defendants captive for *years* without letting them prepare their defenses, forcing three continuances, and violating

numerous court orders along the way. On the few issues which the parties were actually able to brief on the merits, the District Court found that Willard was seeking millions in damages to which he was not entitled as a matter of law. 7 AA 1495-1507. For example, Willard sought $5 million in "tax consequences" damages, but as the District Court found, subsequently "admit[ted] that [he] did not pay the taxes sought from Defendants as damages…." *Id*. at 1502; *see also* 1503-04 (rejecting Willard's claim for $549,852 in closing costs because Willard did not pay closing costs). At the virtual close of discovery, Willard moved for summary judgment based upon documents and expert opinions that had never been disclosed, and sought nearly $40 million more in damages than Willard ostensibly sought throughout the case, requesting "brand new, never-disclosed types, categories, and amounts of damages." 14 AA 2957-58; 17 AA 3754. Willard filed an accompanying 15-page affidavit, and averred that he "collaborated" with Moquin in preparing these alleged damages. 7 AA 1568. The District Court found this motion was in "bad faith," a "strategic decision," and an "ambush" upon Defendants.

Upon completing a detailed analysis of Willard's "egregious conduct throughout the case," the District Court dismissed Willard's case with prejudice in early 2018 (the "Sanctions Order").

The present appeal presents a further glimpse into why Willard's underlying case was dismissed in the first instance. As this Court is aware from the briefing in

Case Nos. 77780 and 83640, in April of 2018, Willard filed an unmeritorious and unsupported motion to set aside the District Court's Sanctions Order pursuant to NRCP 60(b)(1) (the "60(b)(1) Motion"), claiming that he had been abandoned by one of his attorneys—Moquin. The District Court denied the 60(b)(1) Motion for multiple reasons. Indeed, Willard failed to present any admissible evidence in support of his Motion; the *Yochum* factors strongly supported denial of Willard's Motion; and the District Court, which had presided over every hearing, status check, and motion in the case, also found that the conduct warranting dismissal was personally attributable to Willard, and that Willard had not been abandoned by his two attorneys. 17 AA 3750-95; 16 AA 3410-41.

In July of 2021, more than three years after the entry of the District Court's Sanctions Order, Willard filed another motion seeking NRCP 60(b) relief—this time pursuant to NRCP 60(b)(5) and 60(b)(6) (the "60(b)(6) Motion")—based upon Moquin's disciplinary proceedings that occurred in 2019 (the "Disciplinary Proceedings"). 19 AA 4011-27. Willard claimed that the Disciplinary Proceedings corroborated the statements and arguments that he had made in support of his 60(b)(1) Motion. In Willard's words—the Disciplinary Proceedings were "clearly unavailable when Willard Plaintiffs filed their Rule 60(b)(1) Motion in 2018, and thus could not have been presented in support thereof; however, [they] now exist

and [are] being presented by the Willard Plaintiffs pursuant to NRCP 60(b)(5) and (6)." 19 AA 4018.

Willard's 60(b)(6) Motion is striking in multiple respects: (1) Willard offers no explanation or excuse whatsoever as to why he waited more than **two years** from the occurrence of the Disciplinary Proceedings to file the motion; (2) Willard openly characterizes the 60(b)(6) Motion as a means to corroborate his 60(b)(1) Motion with alleged new evidence, which Nevada law prohibits; (3) the arguments therein are facially meritless and directly contradict, without any excuse or justification, numerous findings that the District Court already made; and (4) Willard seemingly admits that his 60(b)(1) Motion was *not* supported by competent evidence. *See, e.g.*, 19 AA 4023-24 (when Willard filed his 60(b)(1) Motion, he "could not possibly produce additional evidence to support [his] claims regarding Moquin's mental illness at that time"); 4352 ("Defendants cannot now claim that what transpired with Moquin falls within the ambit of Rule 60(b)(1).").

The 60(b)(6) Motion is simply Willard's latest unavailing attempt to hold Defendants hostage to this now eight-year-old litigation, even after the District Court has already twice denied Willard's same post-judgment arguments. The 60(b)(6) Motion is procedurally improper, facially meritless, and certainly does not establish the "extraordinary circumstances" required to set aside the District Court's 2018 Sanctions Order. Rather, it is simply a poorly-disguised attempt to have the District

Court and this Court consider "new evidence" when deciding Willard's 60(b)(1) Motion. And if anything, the 60(b)(6) Motion only further confirms that the 60(b)(1) Motion lacks admissible evidence or merit.

Accordingly, the District Court acted well within its considerable discretion in denying the Motion, and should be affirmed.

STATEMENT OF THE CASE

In the underlying case, the District Court dismissed Willard's case as a sanction for his conduct, and Willard moved to set aside the dismissal under NRCP 60(b)(1). The District Court denied his Motion, and Willard appealed. This Court reversed and remanded the District Court's Order to set forth detailed findings on each *Yochum* factor. This Court also ordered that the District Court must decide the 60(b)(1) Motion on the record it had before it, and that neither party could present new evidence. 20 AA 4347.

On remand, the District Court entered written, detailed findings on the *Yochum* factors, and concluded that they strongly supported denial of Willard's 60(b)(1) Motion. 17 AA 3750-95. Willard appealed from the NRCP 60(b)(1) Order on remand, which is Case No. 83640.

Also during the remand, Willard filed a Motion seeking relief pursuant to NRCP 60(b)(5) and 60(b)(6), seeking to introduce alleged "additional evidence" that he claimed corroborated the arguments in his 60(b)(1) Motion. After it had denied

the 60(b)(1) Motion, the District Court also denied Willard's 60(b)(6) Motion, concluding that it was an impermissible attempt to supplement Willard's NRCP 60(b)(1) motion and that regardless, it lacked merit (the "60(b)(6) Order"). Willard has appealed from this Order.

This case has been consolidated with Case No. 83640. Notably, even though these appeals have been consolidated, Willard cannot ask this Court to consider the 2019 Disciplinary Proceedings when ruling on Willard's appeal in Case No. 83640 (even though the Disciplinary Proceedings do not entitle Willard to 60(b) relief regardless). Rather, as this Court has already made clear, Willard's request for 60(b)(1) relief must be decided upon the record that was before the District Court in 2018. 20 AA 4347.

STATEMENT OF FACTS

In addition to and in conjunction with the facts set forth in BHI's Answering Brief in Supreme Court Case No. 83640, the following facts are pertinent to this appeal:

August 2014: Willard commenced the underlying lawsuit against BHI after his first lawsuit against BHI in California was dismissed for lack of personal jurisdiction. Willard was represented by two attorneys throughout the case: Brian Moquin, a California attorney admitted *pro hac vice*, and David O'Mara, a Reno attorney. Indeed, O'Mara signed and filed the operative complaint, was the sole

signatory on the deficient initial disclosures which formed one of the central bases for dismissal, and attended every hearing and status conference in the case. 17 AA 3792; 11 AA 2392-98.

August 2014—December 2017: Willard committed multiple infractions, culminating in the District Court dismissing his case in its Sanctions Order.[3] Willard's sanctionable conduct and "strategic decision[s]" are specifically set forth in pages 6-8 of Defendants' Answering Brief in Case No. 83640. The District Court, which presided over every relevant hearing, status check, and motion, also attributed sanctionable conduct to Willard personally. *See, e.g.*, 17 AA 3779-80, 3774-77, 3782, 3784.

Despite these multiple infractions, Willard admits Moquin "was performing" and "did do his job" up until late 2017. AOB 29 in Case No. 83640 (arguing that

[3]Willard voluntarily dismissed his appeal of the Sanctions Order and therefore has no basis to challenge it on appeal, yet has continually attempted to challenge the Sanctions Order, even making flippant and inaccurate misrepresentations of the record that contradict the District Court's detailed and supported findings in the Sanctions Order. (August 14, 2019, Response to Order to Show Cause in Case No. 77780); AOB 31-36 in Case No. 83640; ARB 8-16, 2-3 in Case No. 83640 (arguing that "[Willard's] damages have essentially remained the same since the original complaint" when the District Court entered detailed and amply-supported findings that they had not, and instead changed at the eleventh hour in a "strategic" "ambush" of Defendants; and arguing that "Defendants "stipulated" to every continuance, when the record and findings demonstrate that the Defendants were forced to continue the trial). These arguments not only mischaracterize the record, they are also improper challenges to the amply-supported findings in the District Court's un-appealed Sanctions Order.

"[s]imply because Moquin attended depositions and filed motions before December 2017 is not relevant to what happened in December 2017 and afterwards," and that "Moquin **was performing** and then suddenly stopped without notice"); 18 AA 3974 at 12:9-11 (Willard's counsel stating that "I think [Moquin's] track record up until late 2017 was that he did do his job, then something terrible did happen"); ARB 6 in Case No. 83640 (claiming that "Moquin abandoned Willard in late 2017."). Indeed, even in October of 2017, Willard averred that he personally "collaborated with" Moquin to calculate and prepare his new damages in his summary judgment motion. 7 AA 1568.

December 2017: Moquin did not file oppositions to Defendants' sanctions motions. However, as the District Court found, "Mr. Willard was aware of Mr. Moquin's alleged problems prior to this Court's [Sanction Order], yet continued to allow Mr. Moquin to represent Plaintiffs"; "Mr. Willard was aware of Mr. Moquin's inaction"; and "Mr. Willard admits he was informed by Mr. O'Mara prior to the dismissal of Plaintiffs' claims that Mr. Moquin was not responsive," but "failed to replace Mr. Moquin or take other action due to perceived financial reasons." 17 AA 3776; 3770.

January 2018: The District Court entered its Order dismissing Willard's claims with prejudice based on Willard's failure to oppose BHI's Sanctions Motions and, independently, because BHI's "Motion ha[d] merit due to Plaintiffs' egregious

discovery violations throughout the pendency of this litigation and repeated failure to comply with this Court's Orders." 13 AA 2919.

March 2018: The District Court entered its Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions, wherein it provided detailed findings and analysis to conclude that dismissal was necessary based upon Willard's strategic and bad faith conduct and failure to comply with Orders and NRCP obligations, all to the prejudice of Defendants. 14 AA 2944-77.

April 2018: Willard moved to set aside the Sanctions Order pursuant to NRCP 60(b)(1) (the "60(b)(1) Motion"), claiming that the District Court should find excusable neglect because Moquin "was suffering from a psychological disorder that caused him to constructively abandon the case" in December of 2017 (after the vast majority of Willard's "egregious conduct throughout the case" already occurred). 14 AA 3024. As part of his 60(b)(1) Motion, Willard claimed, *inter alia*, that Moquin purportedly misled Willard's local counsel, 15 AA 3295; that Moquin "failed to do what he promised" and made Willard the "victim of his assurances," 14 AA 3035, 3039; that Moquin abandoned Willard, *id*., and that even after Willard retained new counsel, Moquin allegedly refused to cooperate with Willard in his efforts to file a 60(b) Motion.

November 2018: the District Court entered its Order Denying Willard's 60(b)(1) Motion because, *inter alia*: Willard failed to support his 60(b)(1) Motion

with any admissible evidence; Moquin, who made multiple filings throughout the case and attended every hearing, did not abandon Willard; Willard's personal conduct, knowledge, and lack of client diligence precluded Willard's requested relief; and O'Mara's representation of Willard throughout this case precluded Willard's requested relief (the "First 60(b)(1) Order"). 16 AA 3410-41. Willard appealed therefrom.

March 2019: NRCP 60 was amended to add NRCP 60(b)(6), which provides "any other reason that justifies relief" as a basis for seeking relief from a judgment. NRCP 60(b)(5) was also amended to now state that relief may be provided if "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 inequitable…."

April 2019: Moquin entered into a Conditional Guilty Plea in April of 2019. 19 AA 4029-39.

August 2019: Willard filed his Opening Brief in his appeal from the First 60(b)(1) Order. Therein, he argued, *inter alia*, that this Court should take judicial notice of Moquin's Conditional Guilty Plea as a basis to support Willard's arguments requesting NRCP 60(b)(1) relief, and argued that "Attorney Moquin's disciplinary file is closely and entirely related to this appeal." 19 AA 4156-59.

October 2019: this Court entered an order affirming the Conditional Guilty Plea and the discipline imposed against Moquin (the "Disciplinary Order"). 19 AA 4051-59.

December 2019: Willard filed his Reply Brief in his appeal from the First 60(b)(1) Order. Although Defendants had argued in their Answering Brief that Willard's attempt to present the Disciplinary Proceedings was untimely under NRCP 60(b)(1) and 60(b)(2) and therefore could not have been considered by the District Court, (RAB 24-26 in Case No. 77780), Willard asked this Court to take judicial notice of the Disciplinary Order, and also made substantive arguments based upon the Guilty Plea and the Disciplinary Order in support of his request for NRCP 60(b)(1) relief. (ARB 9-12 in Case No. 77780).

August 2020: This Court reversed the District Court's First 60(b)(1) Order and remanded to the District Court solely to consider the factors set forth in *Yochum v. Davis*.

October 2020: BHI filed a Petition for Rehearing, to which Willard responded. Willard represented, in pertinent part, that "the truth came to light through the Moquin disciplinary file and guilty pleas (**which simply validated and corroborated the admissible evidence Willard advanced in support of the Rule 60(b) Motion**)" that Willard had filed seeking NRCP 60(b)(1) relief. 19 AA 4195 (emphasis added). He also argued that "Moquin had abandoned Willard due to

Moquin's mental illness, was misleading Willard and O'Mara, and could not function as an attorney." *Id*. at 4204.

December 2020: BHI filed a Petition for En Banc Reconsideration, and also expressed concern about Willard's continual improper attempts to introduce untimely alleged evidence regarding Moquin's disciplinary proceedings. NRCP 60(c)(1). Willard responded, and, pertinent here, reiterated his position that the Disciplinary Proceedings "simply validated and corroborated the admissible evidence Willard advanced in support of the Rule 60(b)[(1)] Motion." 19 AA 4234. He also argued that "as this Court has taken judicial notice, Moquin entered a conditional guilty plea admitting what was obvious even at the time of the [NRCP 60(b)(1)] proceedings below—that he had abandoned Willard, was diagnosed as bipolar, and simply could not function." 19 AA 4234-35.

February 2021: This Court entered its Order Denying En Banc Reconsideration. Although it denied En Banc Reconsideration, importantly, it clarified that "neither party may present any new arguments or evidence on remand; the district court's consideration of the [*Yochum* factors]…is limited to the record currently before the court." 20 AA 4347.

July 2021: despite this Court's prohibition against presenting new evidence and arguments, Willard waited until the case was on remand—**two years** after Moquin's Conditional Guilty Plea and the Disciplinary Order (and more than **three**

years after the entry of the Sanctions Order that it sought to set aside)—to file and submit his NRCP 60(b)(6) Motion presenting Moquin's disciplinary proceedings. Indeed, Willard submitted his 60(b)(6) Motion for the District Court's decision prior to the District Court entering its 60(b)(1) Order. The Motion claimed to provide "additional evidence…to support [Willard's] claims surrounding Moquin's mental illness" that Willard has made in his 60(b)(1) Motion. 19 AA 4013.

September 2021: upon express, detailed, and written findings considering the *Yochum* factors, the District Court denied Willard's NRCP 60(b)(1) Motion (the "Second 60(b)(1) Order"). 17 AA 3750-95. Willard appealed from the Second 60(b)(1) Order in Supreme Court Case No. 83640.

November 2021: the District Court withheld issuing an order on Willard's 60(b)(6) Motion, pending the disposition of the appeal in Case No. 83640. 21 AA 4357-60. However, Willard moved for reconsideration, arguing that the 60(b)(6) Motion **could and should** be decided during the pendency of his appeal from the Second 60(b)(1) Order, either through denial or *Huneycutt* remand. Respondents' Supplemental Appendix ("RA") 1-6. Defendants filed a Response which did not oppose Willard's Motion for Reconsideration, but did note that "in arguing in the present Motion for Reconsideration that Nevada law permits the Willard Plaintiffs to file, and this Court to decide, a motion for Rule 60(b) relief, the Willard Plaintiffs are conceding that the pendency of their prior appeal from this Court's Rule 60(b)(1)

Order did not form a basis for the Willard Plaintiffs' egregious delay in filing their Rule 60(b)(6) Motion." 1 RSA 13.

May 2022: upon deciding that it could rule on the 60(b)(6) Motion while the Appeal in 83640 was pending, the District Court entered an Order Denying the 60(b)(6) Motion (the "60(b)(6) Order"). 21 AA 4366-72.

With respect to NRCP 60(b)(5), the District Court found that "the newly published disciplinary actions of Mr. Moquin do not constitute significant changes in factual conditions." 21 AA 4369. Indeed, it found that "the newly published disciplinary actions are still based on the information the Court had before it previously." *Id*. Therefore, it found that "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," and found that "NRCP 60(b)(5) does not provide a basis for relief from the Court's prior ruling." *Id*. at 4369-70.

With respect to NRCP 60(b)(6), the District Court found that pursuant to *Byrd v. Byrd*, 137 Nev. Adv. Op. 60, 501 P.3d 458, 463 (Nev. App. 2021) and persuasive federal authority interpreting FRCP 60(b)(6), relief may not be sought under NRCP 60(B)(6) when it would have been available under NRCP 60(b)(1)-(5). 21 AA 4371. The District Court found that because Willard's request for NRCP 60(b)(6) relief was precluded because like Willard's 60(b)(1) Motion, the 60(b)(6) Motion was

"based on NRCP 60(b)[(1)] and specifically on the facts of Mr. Moquin's mental illness and the effect on his representation of Plaintiffs." *Id*. Indeed, the District Court found that in the 60(b)(6) Motion, Willard argues "newly published disciplinary records of Mr. Moquin are additional evidence the Court can now, and should, consider which in effect supplements their previously filed [60(b)(1)] Motion." *Id*. The District Court also cited to repeated instances in which Willard claimed in his 60(b)(6) Motion that "[n]ow, additional evidence exists to support the Willard Plaintiffs' claims surrounding Moquin's mental illness. This evidence was not previously available." *Id*. at 4371 n.2.

Finally, the District Court explained that even despite these fatal procedural deficiencies, "the Court did consider whether the circumstances at hand are extraordinary and justify reopening the Court's decision. *Id*. at 4372. However, it found that "all of the circumstances that were before it then, and those that are argued now," did not warrant the relief requested. *Id*.

June 2022: Willard filed an appeal from the District Court's 60(b)(6) Order, and this appeal was consolidated with Willard's appeal from the District Court's Second 60(b)(1) Order.

SUMMARY OF ARGUMENT

The District Court acted well within its discretion in denying Willard's 60(b)(6) Motion and there are many independent paths to affirmance, any one of which is sufficient to affirm.

Willard's request for 60(b)(6) relief is categorically prohibited because (1) it is an improper attempt to untimely introduce "new evidence" as a means to untimely corroborate Willard's 60(b)(1) Motion, which Nevada law prohibits; and (2) the 60(b)(6) Motion is egregiously late—in fact, Willard waited for *two years* from the precipitating events to file this Motion without any excuse or justification for doing so. Further, even beyond these glaring, fatal deficiencies, the Motion is completely meritless.

Willard's 60(b)(5) request fares no better. NRCP 60(b)(5) is inapplicable to the type of judgment at issue here. And even if it applied, Willard cannot satisfy its requirements, as the District Court so found.

Thus, the District Court should be affirmed.

ARGUMENT

1. Standard of review.

This Court has held that "[t]he district court has wide discretion in deciding whether to grant or deny a motion to set aside a judgment under NRCP 60(b). Its determination will not be disturbed on appeal absent an abuse of discretion." *Cook v. Cook*, 112 Nev. 179, 181–82, 912 P.2d 264, 265 (1996).

Indeed, as First Circuit Court of Appeals has described, appellants in Willard's position face "two formidable hurdles": first, "Rule 60(b) relief is extraordinary relief reserved for exceptional circumstances, given the countervailing interest in the finality of such orders," and second, "the district court's decision to deny relief under Rule 60(b) is, in turn, reviewed on appeal for abuse of discretion." *Paul Revere Variable Annuity Ins. Co. v. Zang*, 248 F.3d 1, 5 (1st Cir. 2001) (holding that the appellants failed to clear "these considerable hurdles" in appealing from the denial of their Rule 60(b)(5) and 60(b)(6) motions).

2. <u>The District Court acted well within its considerable discretion in denying Willard's request for NRCP 60(b)(6) relief for multiple, independent reasons</u>.

Willard claims that "[t]he best and most appropriate resolution for this case is to grant relief under Rule 60(b)(1) due to the Willard Plaintiffs' excusable neglect," but additionally, "Moquin's disciplinary proceedings, his documented crimes, his admitted misconduct, and the advent of Rule 60(b)(6) all provide supplemental bases for relief." ASOB 12.

Willard is flatly wrong on both counts. Willard's completely meritless request for NRCP 60(b)(1) relief is addressed in detail in the briefing in Case No. 83640, and as set forth in Defendants' Answering Brief therein, there are numerous reasons to affirm the District Court's Order denying Willard's 60(b)(1) Motion, each of which is an independent basis for affirming.

The same is true here. A motion for relief under Rule 60(b)(6) must satisfy three requirements: "(1) the motion cannot be premised on another ground delineated in Rule 60; (2) it must be filed within a reasonable time; and (3) it must demonstrate 'extraordinary circumstances' justifying reopening the judgment. *Nw. Env't Advocs. v. United States Env't Prot. Agency*, 2022 WL 2209635, at *2 (W.D. Wash. 2022). Here, as the District Court found, Willard completely failed to satisfy even *one* of these requirements, much less all of them.

a. <u>Nevada law prohibits Willard from bringing this type of Motion</u>.

First, Nevada law flatly prohibits Willard's NRCP 60(b)(6) request, which is a blatant misuse of NRCP 60(b)(6) to improperly seek untimely relief under NRCP 60(b)(1) and NRCP 60(b)(2). Accordingly, the District Court acted well within its discretion in denying Willard's Motion.

This Court has unambiguously held that "relief may not be sought under NRCP 60(b)(6) when it would have been available under NRCP 60(b)(1)-(5)," *Vargas v. J Morales Inc.*, 138 Nev. Adv. Op. 38, 510 P.3d 777, 781 (2022), relying upon multiple federal authorities interpreting FRCP 60(b)(6) in support. *Id*. Indeed, "'clause (6) and clauses (1) through (5) are mutually exclusive,'" *id*. (quoting *Liljeberg v. Health Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 393 (1993)), and "'if a motion is the type that must be brought within [six months] and that [time] passed without filing, the movant cannot resort to Rule 60(b)(6); rather,

it finds…itself without Rule 60(b) remedy altogether.'" *Id*. (quoting *United States v. Fernandez*, 797 F.3d 315, 319 (5th Cir. 2015)). Thus, in *Vargas*, this Court concluded that because the relief requested "would have fallen under NRCP 60(b)(1) had it been timely sought," the district court abused its discretion in granting relief based upon the movant's NRCP 60(b)(6) Motion. *Id*.

Similarly, the Court of Appeals has held that "NRCP 60(b)(6) provides an independent basis for relief that is mutually exclusive of clauses (1)-(5)." *Byrd*, 137 Nev. at ___, 501 P.3d at 463. Thus, in *Byrd*, because the movant's motion "fell within the ambit of NRCP 60(b)(1) or 60(b)(3)," the Court held that relief under NRCP 60(b)(6) was "unavailable," and the district court abused its discretion in granting relief under NRCP 60(b)(6). The Court further clarified that because the motion was brought more than six months after the written notice of the entry of the judgment, "even if the district court had construed [the] motion as seeking relief under NRCP 60(b)(1) or 60(b)(3), rather than 60(b)(6), such a motion would have been untimely here, and the relief on that basis would likewise have been improper." *Id*.

In sum, it is incontrovertible that when the basis for relief "sound[s] in" or "falls within the ambit of" NRCP 60(b)(1)-(3) relief but is filed after the mandatory six-month time limit for such motions, a district court abuses its discretion in granting NRCP 60(b)(6) relief. *Id*. And here, Willard has admitted, and the record

amply supports, that Willard's 60(b)(6) Motion "sounds in" and "falls within the ambit of" NRCP 60(b)(1) (and NRCP 60(b)(2)) and is flatly prohibited under Nevada law.

i. <u>Willard's own Motion admits that Willard was simply seeking to corroborate his 60(b)(1) arguments</u>.

First, Willard's own 60(b)(6) Motion makes clear that it is simply an attempt to improperly and untimely bolster the arguments in Willard's 60(b)(1) Motion (or to bring a clearly time-barred NRCP 60(b)(2) motion). Indeed, Willard repeatedly emphasized this throughout his 60(b)(6) Motion, claiming:

- Moquin's "2019 disciplinary action and the documents filed therein were not available at the time the Willard Plaintiffs filed their Rule 60(b)(1) Motion in 2018. Thus, the Willard Plaintiffs could not have presented this important information to the Court. Accordingly, the Court should now consider this additional evidence supporting the Willard Plaintiffs' requests for relief from the Sanctions Orders." 19 AA 4014.

- The Disciplinary Proceeding was "unavailable when the Willard Plaintiffs filed their Rule 60(b)(1) Motion in 2018, and thus could not have been presented in support thereof; however, it now exists and is being presented by the Willard Plaintiffs pursuant to NRCP 60(b)(5) and (6)." 19 AA 4018.

- "Now, additional evidence exists to support the Willard Plaintiffs' claims surrounding Moquin's mental illness. This evidence was not previously available." 19 AA 4013.

- Willard "incorporate[s his] briefing in support of the Rule 60(b)(1) Motion and all exhibits thereto, as though set forth in full" in the 60(b)(6) Motion. 19 AA 4014-15.

- "Where Moquin was the resistant gatekeeper for [the alleged] evidence at the time of the Rule 60(b)(1) Motion, the sought-after evidence is now contained in the Conditional Guilty Plea and the final Supreme Court decision suspending Moquin from practicing law in Nevada."[4] 19 AA 4023.

This Court need look no further than Willard's *own* statements to conclude that Willard's request for purported 60(b)(6) relief is simply a prohibitively untimely request to supply "new" evidence in support of Willard's previously requested NRCP 60(b)(1) or 60(b)(2) relief.[5]

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[4]It is not clear how Willard can claim this. For example, despite Willard's claim that the Disciplinary Proceedings somehow "now" show that Moquin "evaded local counsel's attempts to ensure that responses were filed," ASOB 15; 19 AA 4023, as the District Court found, Willard's 60(b)(1) Motion inexplicably did not include any supporting declaration by O'Mara, with no explanation for this omission. 17 AA 3758; *see also id*. 3771 ¶ 114. In fact, despite O'Mara's prominent role in the 60(b) analysis, O'Mara has never filed any declaration in support of Willard's 60(b) Motions.

[5]Perhaps in realizing that his 60(b)(6) Motion is not permitted to "fall within the ambit" of NRCP 60(b)(1) or NRCP 60(b)(2), Willard subsequently attempted to

ii. The record contains ample evidence that Willard's 60(b)(6) Motion is simply a repackaged version of his 60(b)(1) Motion.

Even beyond the admissions in the 60(b)(6) Motion, Willard has attempted to (incorrectly) claim that the Disciplinary Proceedings supported his request for 60(b)(1) relief. In his briefing on appeal from the First 60(b)(1) Order, Willard repeatedly claimed that "the Moquin disciplinary file and guilty pleas…**simply validated and corroborated** the admissible evidence Willard advanced in support of the **Rule 60(b)[(1)] Motion**." 19 AA 4195, 4234-35 (emphases added). Willard argued throughout that appeal that the alleged evidence which forms the basis for this 60(b)(6) Motion supported Willard's arguments with respect to 60(b)(1) and the *Yochum* factors. *See supra* pp. 13-14.

Indeed, even in Case No. 83640, Willard continues to take the position that "[t]he facts of [the] disciplinary action are the same circumstances presented to the district court in Willard Plaintiffs' Rule 60(b) Motion for Relief (the 60(b)(1) Motion)." ARB 1 in Case No. 83640.

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separate his 60(b)(6) request from his 60(b)(1) request in his 60(b)(6) Reply. In his 60(b)(6) Reply, Willard concocted a bizarre argument that because "Defendants have fiercely maintained that Mr. Willard's circumstances do not constitute excusable neglect under Rule 60(b)(1)," they are now "judicially estopped" from claiming that what transpired with Moquin falls within the ambit of Rule 60(b)(1). 19 AA 4352. This argument is so nonsensical that it is difficult to oppose, but it certainly does not demonstrate that Willard's 60(b)(6) Motion is sufficiently independent from his 60(b)(1) Motion.

iii. Willard's arguments on appeal are demonstrably false.

On appeal, Willard attempts to disavow the fact that his 60(b)(6) Motion is simply an untimely repeat of his unmeritorious 60(b)(1) Motion, claiming that his 60(b)(6) Motion "has nothing to do with excusable neglect." ASOB 15. But every argument that Willard sets forth as being "distinct from" his 60(b)(1) Motion was already argued by Willard in the context of his 60(b)(1) Motion. A side-by-side comparison readily demonstrates this:

NRCP 60(b)(6) Motion and Appeal therefrom	NRCP 60(b)(1) Motion and Appeals therefrom
Willard argues that Moquin "evaded local counsel's attempts to ensure that responses were filed." ASOB 15, 7.	Willard argued that "O'Mara himself was misled by Moquin's promises to perform. O'Mara took steps to ensure that Moquin would respond to critical motions in late 2017 and was repeatedly assured that everything was fine." Reply Brief in Case No. 77780 at 22, 23, 27-28; 19 AA 4183, 4186-87; 15 AA 3295.
Willard argues that Moquin "never provided…the promised documents that would support the NRCP 60(b)[(1)] Motion," that Moquin "actively refused to help the Willard Plaintiffs seek relief from the problems he caused," and that Moquin knowingly violated RPC 1.16. ASOB 15-17.	Willard argued at length that Moquin allegedly represented to Willard and his counsel that he would provide documents and affidavits that would allegedly support the 60(b)(1) Motion, but never did so despite requests from Willard on multiple occasions. 19 AA 4136, 4152-56. In fact, Willard argued that this was "the most glaring evidence of Moquin's abandonment." 19 AA 4172.

Willard argues that "Moquin deceived the Willard Plaintiffs throughout this matter." ASOB 16. In support, he cites only to his declaration in support of his **60(b)(1) Motion.** *Id*. (citing 15 AA 3302-03, 3311, 3313). Willard argues that "Moquin failed to adequately communicate with the client about the status of the case…." ASOB 16.	When claiming he could satisfy the *Yochum* factors for excusable neglect, Willard argued that "Mr. Moquin failed to do what he promised," and that Willard is a "victim of Mr. Moquin's assurances." 19 AA 3035. Willard also argued that "Mr. Moquin repeatedly assured Mr. Willard that the case was proceeding fine," that "Willard now realizes that while Moquin was assuring him that he was working on the case, he was missing deadlines and failing to properly pursue the case, 19 AA 4147, 4165, 4168; and that "Moquin misled, lied to, and then abandoned Willard." Reply Brief in Case No. 77780 at 24; 14 AA 3031; 19 AA 4204 ("Moquin had abandoned Willard due to Moquin's mental illness, was misleading Willard and O'Mara, and could not function as an attorney. His bipolar condition necessitated requests for extensions, and those desperate requests in no way evidence an intent to delay the proceedings; they evidence a troubled attorney who could not function normally.").
Willard argues that Moquin "failed to file any responses to any of the defendants' motions by the extend deadline." ASOB 7.	Willard argued that Moquin failed to file any response to any of the defendants' motions by the extended deadline.
Willard argues that Moquin "told [Willard's counsel that he] had been diagnosed with bipolar disorder and had recently been arrested in California on	Willard argued that Moquin told him that he had been diagnosed with bipolar disorder and had recently been arrested in California on charges of domestic violence. 14 AA 3049; 15 AA 3305.

charges of domestic violence." ASOB 7.	Willard also argued that "Moquin's mental illness and abandonment of the Plaintiffs demonstrates clear *excusable neglect*." 19 AA 4167.

Thus, the only difference between his 60(b)(1) Motion and his 60(b)(6) Motion is the form of alleged evidence upon which Willard relies. Despite his protests to the contrary, the briefs and record show that Willard is simply attempting to use Rule 60(b)(6) as a vehicle to present "new" evidence in support of his 60(b)(1) arguments. *See, e.g.*, 19 AA 4167, 4204.

In sum, it is beyond dispute that Willard's 60(b)(6) Motion "sounds in," "falls within the ambit of," and/or supplements his prior 60(b)(1) Motion. Thus, Nevada law flatly prohibits Willard's Motion, and the District Court's 60(b)(6) Order must be affirmed.

b. <u>Willard's Motion fails because it is untimely</u>.

The duplicative nature of the 60(b)(6) Motion warrants, if not compels, affirmance. *Cf. generally Vargas*, 138 Nev. at ___ n.4, 510 P.3d at 781 n.4 ("To the extent Vargas challenges the timeliness of JMI's NRCP 60(b)(6) motion, we need not reach this issue because the motion was not properly seeking relief under NRCP 60(b)(6)."). But even beyond that ground, the timing of the 60(b)(6) Motion, which is indisputably beyond *any* measure of "reasonable time," provides an independent basis to affirm.

Motions brought pursuant to NRCP 60(b)(1) or 60(b)(2) must be filed within six months. NRCP 60(c)(1). Here, as discussed *supra*, Willard's 60(b)(6) Motion is plainly an attempt to introduce "additional evidence" to allegedly corroborate his 60(b)(1) arguments. Thus, Willard's 60(b)(6) Motion, which was filed **more than three years after the judgment is seeks to set aside**, is past the six-month limit five times over.

But even if treated as a motion pursuant to NRCP 60(b)(5) and (6), it is still egregiously—and strategically—untimely. NRCP 60(b)(5) and (6) motions must still be filed "within a reasonable time." NRCP 60(c)(1). Further, "the movant bears the burden of showing timeliness." *Wells Fargo Bank, N.A. v. AMH Roman Two NC, LLC*, 859 F.3d 295, 300 (4th Cir. 2017).

Here, there is no definition of "reasonable time" that would satisfy Willard's burden to demonstrate that his 60(b)(6) Motion is timely. "The definition of a reasonable time varies with the circumstances, and a court must balance the interests of justice and the sanctity of final judgments in determining whether a delay is reasonable." *Carvajal v. Drug Enf't Admin.*, 286 F.R.D. 23, 26 (D.D.C. 2012). However, "Rule 60(b)(6) relief normally will not be granted unless the moving party is able to show circumstances beyond its control prevented taking earlier, more timely action to protect its interests." *Id*. at 26.

It is beyond dispute that Willard failed to satisfy his burden to demonstrate the timeliness of his Motion. In fact, Willard does not even try to satisfy this burden. *See generally* ASOB. And a simple review of the events demonstrates the abject untimeliness of Willard's Motion.

Willard's Motion is premised upon Moquin's Conditional Guilty Plea, entered in April of 2019, and the Nevada Supreme Court's October 2019 Order affirming the same. Further, Willard claims that the laws upon which his Motion is based—NRCP 60(b)(6) and the amended version of NRCP 60(b)(5)—have been in effect since March of 2019. 19 AA 4022.

Yet, Willard offers no explanation as to why Willard until July of 2021 to file a Motion allegedly based on events that occurred in April of 2019, **more than two years before Willard filed the Motion**. Even this Court's October 2019 Order was entered **21 months** before Willard's 60(b)(6) Motion. Certainly, Willard was aware of Moquin's disciplinary proceeding from its inception, as "[t]he Willard Plaintiffs and their new attorneys reported Moquin to the Nevada State Bar…." 19 AA 4015. Further, Willard attempted to rely extensively upon Moquin's conditional guilty plea in every one of his filings since August of 2019.

Thus, Willard's 60(b)(6) Motion is incontrovertibly untimely, and the District Court acted well within its discretion in denying the Motion. Indeed, even under an extremely generous read of Willard's 60(b)(6) Motion, the only *possible* events that

even *relate* to timing—some correspondence with the California bar in 2021 and Willard's NRCP 60(b)(1) appeal—are total nonstarters.

First, the alleged 2021 events that Willard describes in his brief and his 60(b)(6) Motion are completely irrelevant. ASOB 2, 10-11; 19 AA 4018. Willard claimed that the California bar suspended Willard on September 10, 2019, after he failed to pay child and/or family support, and further suspended him on October 1, 2020, after he failed to pay fees. 19 AA 4018. These irrelevant assertions, even if true, plainly do not constitute the basis for Willard's Motion, and provide no justification for the delay (especially because even these occurred more than eight months prior to Willard filing his Motion). Similarly, Willard is plainly not seeking to set aside this Court's Sanctions Order on the basis that "[o]n March 25, 2021, the Office of Chief Trial Counsel for the State Bar of California indicated that it was moving forward with further action on the bar complaint against Mr. Moquin" (an event which in itself occurred nearly three months before Willard filed this Motion). 19 AA 4018. Thus, the reference to these later events, which themselves occurred months before Willard filed his Motion, plainly do not constitute the basis for the Motion, and rather have only been referenced as a surreptitious way to attempt to justify Willard's delay.

Second, Willard's appeal of the District Court's 60(b)(1) Order did not provide Willard with any additional time to file the present Motion. Nevada law is

clear that an appeal does **not** toll the running of NRCP 60(b)'s time limit. *Foster v. Dingwall*, 126 Nev. 49, 54–56, 228 P.3d 453, 456–57 (2010). In *Foster*, this Court noted the "overwhelming[]" federal authority concluding that the one-year period for seeking relief under FRCP 60(b) [is] not tolled by the filing of a notice of appeal, and found this approach "to be sound practice." *Id*. Further, Willard himself argued that his 60(b)(6) Motion **could and should** be decided during the pendency of his appeal from the Second 60(b)(1) Order, either through denial or through a *Huneycutt* remand. 1 RS 1-6. He has therefore expressly conceded that the pendency of any 60(b)(1) appeal has not formed a basis for his egregious delay in filing the Rule 60(b)(6) Motion.[6]

Accordingly, the 60(b)(6) Motion is untimely, and must independently be denied on that basis.

c. <u>The arguments in Willard's 60(b)(6) Motion are meritless</u>.

Finally, even if Willard's Motion was somehow not categorically barred on the grounds discussed *supra*, Willard's Motion is also meritless. A Rule 60(b)(6) Motion must demonstrate extraordinary circumstances justifying reopening the

[6]Willard also argues that he could not file his 60(b)(6) Motion after this Court's Order prohibiting the parties from presenting new evidence during the remand. ASOB 2. This does not explain why Willard did not file the 60(b)(6) Motion prior to February of 2021; nor does it explain why Willard filed, and submitted, the 60(b)(6) Motion during the remand before the District Court entered its Second 60(b)(1) Order.

judgment. Willard resoundingly fails to demonstrate extraordinary circumstances here.

While not entirely clear, the ostensible bases for the 60(b)(6) Motion are that Willard was "deceived by Moquin throughout his representation of [Willard] in this matter—at least partially as a result of Moquin's mental illness," that "Moquin has admitted that he suffers from a mental illness," that Willard "could not have anticipated Moquin's mental illness, which resulted in his failures, missed deadlines, and ultimate abandonment of his clients," and that Willard is "undeniably entitled to relief…based on Moquin's mental illness [and] his abandonment…." *Id*. at 4023, 4025, 4013 ("[n]ow, additional evidence exists to support the Willard Plaintiffs' claims surrounding Moquin's mental illness"). According to Willard, the case should be reinstated "in light of the additional, admissible evidence of Moquin's mental illness leading to numerous wrongdoings and abandonment of the Willard Plaintiffs." *Id*. at 4023.

This does not demonstrate the extraordinary circumstances necessary for Rule 60(b)(6) relief. First, the 60(b)(6) Motion brazenly contradicts multiple findings that the District Court had already made which categorically prohibit the arguments in Willard's 60(b)(6) Motion.[7] Indeed, the District Court already found that (1) Willard

[7]Willard also continues to purport to support his 60(b)(6) Motion with "evidence" that the District Court has now twice ruled is plainly inadmissible. For example, Willard continues to opine that "Moquin's problems culminated in Mr.

was represented by **two** attorneys throughout the case, thereby precluding 60(b) relief for Moquin's alleged conduct; (2) that "Moquin did not abandon Plaintiffs. He appeared at status hearings, participated in depositions, filed motions and other papers, including a lengthy opposition to Defendants' motion for partial summary judgment. Mr. Moquin participated in oral arguments and filed two summary judgment motions with substantial supporting exhibits and detailed declarations" [8];

Moquin suffering what I can only describe as a total mental breakdown in December 2017," or that "Moquin later explained to me that Dr. Mar had diagnosed him with bipolar disorder and that he needed money to pay Dr. Mar for treatment," or that "[h]aving now received Mr. Moquin's diagnosis and learning more about his personal problems, I can see how Moquin's issues affected our case," despite the District Court's prior findings expressly rejecting Willard's ability to make such assertions. *Compare, e.g.*, 19 AA 4085, 4087, *with* 17 AA 3815-22.

[8]Indeed, Moquin answered Defendants' counterclaim, 2 AA 299-307; defended Willard's deposition, 3 AA 500-01; opposed Defendants' Motion for Partial Summary Judgment with a 22-page opposition accompanied by three affidavits and 51 exhibits, 4 AA 795-6 AA 1361; filed lengthy objections to Defendants' proposed order, 7 AA 1425-43; and filed a Motion for Summary Judgment in October 2017 which Willard claims "contained a detailed description of the damages Plaintiffs were seeking," AOB 11, and was accompanied by three detailed affidavits and more than 50 exhibits. 7 AA 1542-1615. Moquin also participated in every hearing prior to Willard obtaining new counsel, including in December 2017. 18 AA 3856-3970. Even in October of 2017, Willard averred that he personally "collaborated with" Moquin to calculate and seek his new damages in his summary judgment motion. 14 AA 2958. And Willard admits that Moquin "was performing" and "did do his job" up until late 2017. AOB 29 in Case No. 83640 (arguing that "Moquin **was performing** and then suddenly stopped without notice"); 18 AA 3974 (Willard's counsel stating that "I think [Moquin's] track record up until late 2017 was that he did do his job, then something terrible did happen"). The District Court also found that "[a]s reflected in the court file, Plaintiffs' multiple instances of non-compliance, including Plaintiffs' failure to provide a compliant damages disclosure, occurred **well before** Mr. Moquin's purported breakdown in

(3) that "Plaintiffs knew of Mr. Moquin's alleged condition and alleged non-responsiveness prior to the Sanctions Order and did nothing…."; and (4) that "Mr. Willard admits he was informed by Mr. O'Mara prior to the dismissal of Plaintiffs' claims that Mr. Moquin was not responsive," but he "failed to replace Mr. Moquin or take other action due to perceived financial reasons." 17 AA 3776-77, 3780 ¶¶ 166-167, 3789, 3843, 3844, 3846. Willard's 60(b)(6) Motion does nothing to overcome these express findings or provide any excuse as to why Willard can simply disregard them.

Further, Moquin's alleged admissions in the Disciplinary Proceedings are *still* inadequate to establish that Moquin had a mental illness, much less that his mental illness caused him to abandon Willard. Moquin's alleged admission that he told "Williamson that he had been diagnosed with bipolar disorder," 19 AA 4034, does not establish that he suffers from bipolar disorder, and certainly does not establish that Willard is entitled to Rule 60(b)(6) relief. *Cf. In re FM Forrest, Inc.*, 587 B.R. 891, 925 (Bankr. S.D. Tex. 2018) (explaining that an attorney's affidavit stating that she suffered from a mental incapacity was inadequate; rather, "with respect to

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December 2017…." 17 AA 3774. In sum, the record amply supports the District Court's express finding that Willard was not abandoned by Moquin. *Cf. Huckabay Props. v. NC Auto Parts*, 130 Nev. 196, 204 n.4, 322 P.3d 429, 434 n.4 (2014) (declining to find abandonment in an appeal where the attorney ignored court rules and orders).

satisfying the high threshold of Rule 60(b)(6), if a movant wants to establish that he is entitled to relief due to his attorney's mental illness, then he must introduce evidence from a **medical doctor** that such illness existed, when it existed, and that it in fact impaired the attorney's ability to represent the movant"). And even assuming *arguendo* that this "admission" somehow establishes a medical diagnosis, it still does not explain how Moquin's "alleged psychological impairment caused [his] failure to oppose [the sanctions motions]…but did not prevent [him]" from attending every hearing, defending every deposition taken, and filing multiple oppositions and two lengthy motions for summary judgment. *Id*. at 925-26 (declining to find "extraordinary circumstances" present to justify Rule 60(b)(6) relief). Accordingly, the purported new evidence provided by Willard is *still* inadequate to entitle Willard to NRCP 60(b)(6) relief.

Finally, as set forth in detail in pages 14-23 of Defendants' Answering Brief in Case No. 83640, the District Court also acted well within its considerable discretion in concluding that Willard was not "abandoned," especially not in any sense that would entitle him to legal relief based upon the alleged actions of his freely-selected agent.

3. <u>The District Court acted well within its considerable discretion in denying Willard's request for NRCP 60(b)(5) relief</u>.

Willard's request for NRCP 60(b)(5) relief is, if possible, even less meritorious than his request for NRCP 60(b)(6) relief.

As a threshold matter, this Court need not even reach the merits (or resounding lack thereof) or Willard's NRCP 60(b)(5) request, because it is egregiously untimely without any justification or excuse for delay. *See supra*.

And even beyond this fatal deficiency, NRCP 60(b)(5) is facially inapplicable here. NRCP 60(b)(5) permits the District Court to modify or vacate a judgment when applying it prospectively is no longer equitable. According to Willard, "[b]efore March 1, 2019, Rule 60(b)(5) only allowed relief from an injunction if applying the injunction prospectively was no longer available." ASOB 17. Willard claims that by removing the reference to injunctions in the March 2019 amendments, the scope of the rule was "significantly broadened" and now allows a party to obtain relief from "any judgment, not just an injunction, if applying it prospectively is no longer equitable." *Id*.

But the Sanctions Orders plainly do not constitute the type of judgment to which NRCP 60(b) applies. "Courts have generally held that dismissals with prejudice are not prospective within the meaning of Rule 60(b)(5)." *Coltec Indus., Inc. v. Hobgood*, 280 F.3d 262, 272 (3d Cir. 2002) (collecting cases); *In re Zostavax (Zoster Vaccine Live) Prod. Liab. Litig.*, 329 F.R.D. 151, 154 (E.D. Pa. 2018), *aff'd sub nom. Juday v. Merck & Co Inc*, 799 F. App'x 137 (3d Cir. 2020) ("The judgment entered against the plaintiffs in effect simply dismissed their case. The judgment

ended the action and imposed no future obligations on any of the parties. There is nothing prospective or ongoing about it.").

And even past this categorical prohibition on Willard's NRCP 60(b)(5) request, Willard did not demonstrate that he is entitled to NRCP 60(b)(5) relief. NRCP 60(b)(5) permits a court to relieve a party from a judgment when "applying it prospectively is no longer equitable…" Further, "[t]he movant bears the burden of establishing that changed circumstances warrant relief." *SEC v. Novinger*, 40 F.4th 297, 307 (5th Cir. 2022).

Here, Willard simply recites a laundry list of Moquin's purported admissions to summarily state that "[t]his case presents a significant change in both legal and factual conclusions," and that "it is neither just nor equitable to continue to maintain the Sanctions Order and the [60(b)(1) Order] against Willard. ASOB 18. But as the District Court found, "the newly published disciplinary actions are still based on the information the Court had before it previously." 21 AA 4369. Accordingly, the District Court acted well within its discretion in denying NRCP 60(b)(5) relief, and Willard's truncated conclusions on appeal do not satisfy his burden to demonstrate otherwise.

CONCLUSION

Based on the foregoing, BHI respectfully requests that this Court affirm the District Court's 60(b)(6) Order in its entirety.

DATED this 10th day of October, 2022.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Supplemental Answering Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[x] This Supplemental Answering Brief has been prepared in a proportionally spaced typeface using Microsoft Word version 14.0.6129.5000 (2010) in 14 point Times New Roman font;

2. I further certify that this Supplemental Answering Brief complies with the page – or type – volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7), it is:

[x] Proportionately spaced, has a typeface of 14 points or more and contains 8,459 words.

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

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 10th day of October, 2022.

By: */s/ Anjali D. Webster*

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CERTIFICATE OF SERVICE

I certify that I am an employee of DICKINSON WRIGHT, PLLC, and that on this date, pursuant to NRAP 25(d), I am serving the attached **RESPONDENTS' SUPPLEMENTAL ANSWERING BRIEF** on the party(s) set forth below by:

☒ By electronic service by filing the foregoing with the Clerk of Court using the ECF Electronic Filing System, which will electronically mail the filing to the following individuals.

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