IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

***AMENDED* ORAL ARGUMENT CALENDAR**

THURSDAY, JULY 24, 2014

10:00 A.M.

No. 32,731

MABRY CONSTRUCTION, INC., FFT LLC, PLACITA DE LA TIERRA, LLC, f/k/a TOWN CENTER AT LAS CAMPANAS LLC, and OSO 3 INVESTMENTS LLC,

Plaintiffs/Counter-Defendants-Appellants,

Erin B. O'Connell
D. Diego Zamora

vs.

LAS CAMPANAS LIMITED PARTNERSHIP, LAS CAMPANAS CORPORATION, STEPHEN MAROTTA and RICHARD ALTMAN,

Defendants-Counterclaimants;

Charles T. DuMars
Tanya L. Scott

OASIS MANAGEMENT RESOURCES, LLC,

Defendant-Appellee.

***PANEL: JUDGES SUTIN, VIGIL AND VANZI**

*Court of Appeals' panel members are listed in seniority order.

Panels may be changed without notice.

Oral Argument will be held in the Albuquerque Court of Appeals Pamela B. Minzner Law Center, 2211 Tucker NE., Albuquerque, NM 87106

Please park in the "L" parking lot and go to the clerk's office counter for a parking pass. Limit one parking pass to each party arguing before the Court. Please have your driver's license with you, as you must leave your driver's license with the clerk's office to receive a parking pass.

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

MABRY CONSTRUCTION, INC., FFT LLC, PLACITA DE LA TIERRA, LLC, FKA TOWN CENTER AT LAS CAMPANAS LLC and OSO 3 INVESTMENTS LLC,

Appellants-Plaintiffs,

v.

LAS CAMPANAS LIMITED PARTNERSHIP, LAS CAMPANAS CORPORATION, OASIS MANAGEMENT RESOURCES, LLC, STEPHEN MAROTTA and RICHARD ALTMAN,

Appellees-Defendants.

COA No. 32,731

CIVIL APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT
The Honorable Sarah M. Singleton
First Judicial Dist. Ct. No. D-0101-CV-2010-01766

APPELLANTS' BRIEF IN CHIEF

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ORAL ARGUMENT IS REQUESTED

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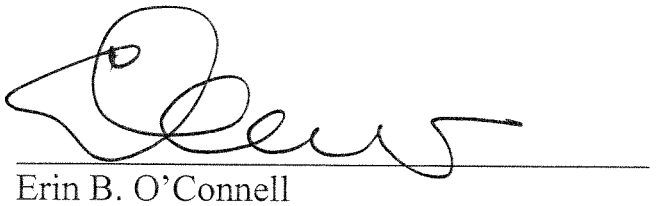
Rule 12-213(G) NMRA Statement of Compliance

I HEREBY CERTIFY that this Brief-in-Chief complies with the type-volume limitation under Rule 12-213 and was prepared using proportionally-spaced, 14-point, Times New Roman typeface in the Microsoft Word 2013 word-processing program. The body of the brief contains 10,964 words according to Microsoft Word's word-count function.



Erin B. O'Connell

Attorney for Plaintiffs-Appellants

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Pursuant to Rule 12-213(A)(1)(a)&(b) NMRA, the digital audio recordings in this matter were cited using FTR Gold Digital Court Recording software. The references to each digitally recorded transcript are by elapsed time from the start of the recording.

I. Statement of the Issues

1. Whether the district court erred in dismissing Defendant Oasis Management Resources, LLC ("OMR") on personal jurisdiction grounds after Plaintiffs provided an abundance of minimum contacts between OMR and New Mexico, thereby making a prima facie case for jurisdiction?

2. Whether the district court erred in holding that the evidence, together with all inferences that could be drawn, was such that reasonable minds could not differ as to whether Defendant OMR was providing management services to the Las Campanas community and therefore subject to personal jurisdiction in New Mexico?

3. Whether the district court erred in not granting Plaintiffs' Motion for Reconsideration, in light of evidence unquestionably establishing Defendant OMR reached out to and solicited members of the Las Campanas community through deliberate and purposeful communications?

II. Standard of Review

The issue of whether a district court has personal jurisdiction over a non-resident Defendant is a question of law the appellate court reviews de novo. *Santa Fe Techs., Inc. v. Argus Networks, Inc.*, 2002-NMCA-030, ¶ 12, 131 N.M. 772, 42 P.3d 1221. When a district court bases its ruling on the parties'

pleadings, attachments, and non-evidentiary hearings, as in this case,[1] the Court applies "a standard of review mirroring that of our standard governing appeals from summary judgment." *Sproul v. Rob & Charlies, Inc.*, 2013-NMCA-072, ¶ 6, 304 P.3d 18. "'We construe the pleadings and affidavits in the light most favorable to the complainant, and the complainant need only make a prima facie showing that personal jurisdiction exists.'" *Id.* (quoting *Sublett v. Wallin*, 2004-NMCA-089, ¶ 11, 136 N.M. 102, 94 P.3d 845). A dismissal is proper only if all specific facts alleged by Plaintiffs collectively fail to state a prima facie case for jurisdiction over OMR. *Id.*

III. Nature of the Case

Plaintiffs-Appellants directly appeal from the First Judicial District Court Order granting Defendant Oasis Management Resources, LLC's ("OMR") Motion to Dismiss for lack of personal jurisdiction, entered on April 20, 2012, 6 RP 1370-71, and from the district court Order denying Plaintiffs' Motion to Reconsider, entered on January 7, 2013. 9 RP 2048-49. The issue is whether the district court correctly ruled there was no personal jurisdiction over Defendant OMR after Plaintiffs demonstrated OMR had an abundance of deliberate contacts with New Mexico. The parties stipulated to stay the entire case pending the outcome of this appeal. Jan. 11, 2013, CD, 9:17:05 to -20.

[1] TR 29 (4/10/12) (confirming, at the Motion to Dismiss hearing on personal jurisdiction grounds, that this was not an evidentiary hearing).

The Court of Appeals, in its Calendar Assignment, filed Jul. 16, 2013, by the Honorable Timothy L. Garcia, requested that the parties address the application of *Albuquerque Redi-Mix, Inc. v. Scottsdale Ins. Co.*, 2007-NMSC-051, 142 N.M. 527, 168 P.3d 99, to the matters before the Court. In *Redi-Mix*, the Supreme Court examined whether a Rule 1-059(E) NMRA motion to alter or amend a judgment was subject to the automatic denial provision of NMSA 1978, Section 39-1-1 (1917). *Id.* ¶ 1. The Court held that the Rule, which did not have an automatic denial provision, was not subject to automatic denial. *Id.* ¶ 5.

The *Redi-Mix* Court had to decide, as a preliminary matter, whether to characterize the motion filed as a motion for reconsideration under Rule 1-059(E), or a Section 39-1-1 motion. *Id.* ¶ 7. Because the motion was filed no later than 10 days after entry of the judgment, the motion was treated as a motion to reconsider under Rule 1-059(E). *Id.* If timely filed, a motion to reconsider will be considered a Rule 1-059(E) motion regardless of the nomenclature used in the motion. *Id.* ¶ 10. In this case, Plaintiffs' Motion to Reconsider was filed no later than 10 days after entry of judgment by the district court, therefore the Motion to Reconsider in this case should be considered a Rule 1-059(E) motion to alter or amend the judgment. *Compare* 6 RP 1370 (Order on OMR's Motion to Dismiss on personal jurisdiction grounds, filed Apr. 20, 2012) *with* 6 RP 1380 (Plaintiffs' Motion to Reconsider, filed Apr. 30, 2012).

IV. Summary of Proceedings

This case began as a breach of lease agreement brought by Plaintiffs-Appellants against the Las Campanas Defendants ("Las Campanas"), in a Complaint filed May 19, 2010.[2] Prior to the breach of lease, Las Campanas had sold commercial-development property to Plaintiffs in March of 2006, and entered into a lease-back agreement with Plaintiffs, as the new owners.[3] About a year after Plaintiffs filed their original Complaint, Las Campanas filed a separate lawsuit against Plaintiffs for breach of contract and unjust enrichment. Las Campanas alleged, inter alia, that water rights had been donated to the Plaintiffs that were not part of the original purchase agreement between Plaintiffs and Las Campanas, and therefore no consideration was provided for the water rights given to Plaintiffs.[4] After considering motions to dismiss by both parties, at a hearing on July 14, 2011, the district court agreed that the second suit filed by Las Campanas was in fact a compulsory counterclaim (rather than a second suit), and permitted Las Campanas to amend their answer to state a compulsory counterclaim.[5] Plaintiffs filed an amended complaint on Aug. 30, 2011, which

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[2] 1 RP 1.
[3] 2 RP 296-300.
[4] 2 RP 229.
[5] 2 RP 215-16, 220.

included a counter-counterclaim for malicious abuse of process and conspiracy to commit malicious abuse of process.[6]

Plaintiffs' amended complaint added as parties Defendant Oasis Management Resources, Inc. ("OMR"), Defendant Stephen Marotta, the Chief Executive Officer of OMR and Las Campanas, and Defendant Richard Altman, the President of OMR and Las Campanas.[7] Plaintiffs' amended complaint explained that Defendants OMR, Altman and Marotta caused Las Campanas to breach the terms of the lease and interfered with the contractual relations between Las Campanas and Plaintiffs.[8] Plaintiffs further stated that the allegations filed in Las Campanas' second suit were false and that the suit was filed in malicious abuse of process against Plaintiffs.[9] Plaintiffs maintained that Defendants OMR, Altman and Marotta conspired with Las Campanas to file suit against Plaintiffs in an attempt to force Plaintiffs to settle the breach of contract claim originally brought.[10]

Plaintiffs' amended complaint identified OMR as a Delaware limited liability company, with its principle place of business in Scottsdale, Arizona,

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[6] 2 RP 286-302.
[7] 2 RP 286-302.
[8] 2 RP 290-302.
[9] 2 RP 300-02.
[10] 2 RP 301-02.

doing business in New Mexico.[11] Plaintiffs explained that in the course of negotiations for the purchase of the property from Las Campanas, Las Campanas represented that all water rights were in place for the development of the real property.[12] Prior to closing on the real property, Las Campanas agreed to provide Plaintiffs with the water rights required to develop the real property, which were included in the purchase price.[13] Plaintiffs further explained that they relied on Las Campanas' misrepresentation regarding neighborhood support for the proposed development, when in fact the neighbors surrounding the real property were opposed to the property development.[14]

After the purchase of the property, in March 2006, Plaintiffs were not only advised that the neighbors were opposed to the development of the property, the neighbors collectively hired an attorney opposing all applications for Santa Fe County approvals, which delayed approval and increased the cost of development.[15] At the same time the parties entered into the purchase agreement, the parties also entered into a repurchase agreement, which allowed Las Campanas to repurchase the property in the event Plaintiffs were not diligently

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[11] 2 RP 291.
[12] 2 RP 293.
[13] 2 RP 293-96.
[14] 2 RP 293-96.
[15] 2 RP 296.

pursuing the development of the property.[16] Las Campanas neither sought nor exercised its right of repurchase.[17]

On Dec. 2, 2011, Defendant OMR filed a Motion to Dismiss for lack of personal jurisdiction ("MTD"), stating it had insufficient contacts with New Mexico.[18] Defendant OMR is a real estate management company specializing in distressed real estate situations, and it maintained it had no offices, employees or bank accounts in New Mexico, was not registered to do business, never solicited business nor advertised, or otherwise availed itself of any business opportunities in the State.[19] Prior to OMR's involvement with Las Campanas, Las Campanas was originally one property among a group of development projects around the world owned by the Lyle Anderson Company, Inc. ("LAC").[20] There were fifty-three LAC entities, including Las Campanas, financed by the Bank of Scotland.[21] The fifty-three LAC entities or properties included, but are not limited to, Las Campanas; an exclusive golf club near Glasgow, Scotland; a luxury master community and Jack-Nicklaus-designed golf club in Arizona; and a master

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[16] 2 RP 296.
[17] 2 RP 296.
[18] 3 RP 554-66.
[19] 3 RP 554-66.
[20] 7 RP 1399-1400, 1431.
[21] 3 RP 556, ¶¶ 14-15; 4 RP 730, 746, ¶¶ 11-12.

community and Jack-Nicklaus-designed golf club along the Kona Coast of Hawaii.[22]

In 2008, the LAC defaulted on its debts and the Bank of Scotland exercised its right under a stock-pledge agreement to replace the directors for all fifty-three LAC companies.[23] The properties were still owned by Lyle-Anderson-owned companies, but Mr. Anderson was no longer permitted to play an active role in their management.[24] The Bank of Scotland had a senior lien on all assets and properties owned by LAC and has been assessing and advancing costs to preserve the value of the LAC assets, subject to foreclosure.[25] In reconstituting the boards-of-directors for all fifty-three entities and in setting up new management of the properties, Defendant Marotta became a director and Chief Executive Officer ("CEO") for both Las Campanas and OMR, and Defendant Altman became the President for both Las Campanas and OMR.[26] Mr. Marotta's own website represented that he was the CEO and "founder" of OMR, "a real estate executive management and back office support entity."[27]

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[22] 3 RP 652; 7 RP 1399. Defense counsel stated at the MTC hearing that the Bank of Scotland "loaned a billion dollars to Lyle Anderson and his companies." TR 12 (4/10/12).
[23] 3 RP 556, ¶ 15; 4 RP 730, 746; 7 RP 1399.
[24] 7 RP 1399, 1406; TR 5-6 (4/10/12).
[25] 3 RP 636; 4 RP 705-06, 731, 746.
[26] 4 RP 738, 744-45; 3 RP 556-57, 568.
[27] 3 RP 641, 657.

Defendant OMR was formed after the LAC defaulted on its loans and was no longer permitted to manage the properties.[28] As Lyle Anderson continued ownership (although not management) of the properties, Mr. Anderson formed two holding companies for the properties, the Lyle Anderson Financial Company North America Holding Co., LLC ("LAFC NA"), and the Lyle Anderson Financial Company UK Holding Co., LLC ("LAFC UK").[29] OMR was owned equally between the LAFC NA and LAFC UK.[30] In asserting its stock-pledge rights, the Bank of Scotland hired a restructuring company, Marotta, Gund, Budd & Dzera, LLC ("MGBD"), and appointed Stephen Marotta and Philip Gund as directors of each of the fifty-three LAC companies.[31] MGBD, of which Marotta, Gund and Altman are officers and principals, is a company specializing in crisis management and distressed real estate situations, and represented that "[w]hen there is a loss of management or lack of experience in restructuring, we assume executive roles to stabilize, rehabilitate, and restructure the business."[32]

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[28] 4 RP 730; TR 6 (4/10/12) (providing OMR was "created after the insolvency").
[29] 7 RP 1399; 4 RP 730, 737, 749; TR 5-7 (4/10/12).
[30] 7 RP 1399; 4 RP 730, 737, 749.
[31] 7 RP 1432; 4 RP 730, 744-45.
[32] 3 RP 648.

According to Defendant OMR's own correspondence sent to over 900 members and owners of Las Campanas,[33] OMR was a new management company formed after the appointment of MGBD, and OMR retained most of the Arizona staff that had previously been involved in the LAC's project administration of Las Campanas.[34] MGBD's website represented: "Through our affiliate, [OMR], we provide executive oversight and back office services to real estate projects across the country and internationally."[35] One of OMR's webpages explained, "[w]e provide executive oversight complemented by complete back office service capabilities,"[36] and further provided that "OMR's real estate management experience is enhanced by our thorough understanding of business, credit and financial principles."[37] OMR was characterized as "a real estate executive management and back office support entity."[38]

In OMR's Motion to Dismiss, OMR maintained it had insufficient contacts with New Mexico to subject it to suit.[39] Relying on an affidavit by Defendant

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[33] The Affidavit of Bob Buddendorf, attached to Plaintiffs' MTR, indicates that there were over 900 members of Las Campanas at the time these letters were sent, in 2008. 7 RP 1464-66 (Affidavit of Buddendorf); 7 RP 1385 (Plf's MTR).
[34] 7 RP 1398-1404, 1454; 7 RP 1464-66 (Affidavit of Bob Buddendorf).
[35] 3 RP 645-46, 651, 654.
[36] 3 RP 651.
[37] 3 RP 651.
[38] 3 RP 657.
[39] 3 RP 554-66.

Altman,[40] OMR argued it was formed solely for the purpose of providing back office, accounting, tax preparation, and payroll services for all of the development companies previously owned by LAC, including Las Campanas.[41] OMR maintained it was an independent contractor, did not make management decisions for Las Campanas, and only performed certain administrative services, in Arizona, at the direction of the Las Campanas' Board of Directors.[42]

Plaintiffs' Response presented evidence, inter alia, showing that OMR represented that it provided executive oversight in addition to back office services, that Las Campanas had paid management fees to OMR, reimbursed OMR officers and employees for various expenses, and that the operating account of Las Campanas was controlled by OMR.[43] Plaintiffs provided correspondence from OMR to a Las Campanas' homeowner, in which OMR's own logo states it was "providing community and club management services" to Las Campanas.[44] In OMR's Reply, OMR added an additional affidavit by Defendant Marotta, which attempted to distinguish Marotta's role as an officer and director of Las Campanas from his role as an officer and director of OMR.[45]

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[40] 3 RP 568-72.
[41] 3 RP 554-66.
[42] 3 RP 555-58, 562.
[43] 3 RP 629 (Plf's MTD Response Mot.); 4 RP 709 (Plf's MTD Response Brief in Support of Mot.).
[44] 3 RP 700.
[45] 4 RP 729, 744-50.

Defendant Marotta's affidavit stated that OMR "exercises no judgment" on behalf of Las Campanas, is "a totally separate company" from Las Campanas, and that OMR's "only responsibility" was to physically write checks at the direction of Las Campanas' Board of Directors.[46]

At the hearing on OMR's MTD, Apr. 10, 2012, the district court granted OMR's Motion.[47] The district court first stated the evidence available fell short of what was needed to establish "continuous and systematic contacts with the state."[48] The district court believed that Plaintiffs' evidence "might support an inference," but that Plaintiffs did not have enough information to rebut the affidavits filed by OMR.[49] The district court further stated that on the evidence presented, the court did not have enough information to rule that OMR had purposely established contact with New Mexico and that the cause of action arose from that purposeful contact.[50] The court stated it could not rule in favor of Plaintiffs based on the "isolated instances identified by the plaintiff."[51] The only issue that gave the district court "pause" was the "alleged discrepancy between who [had] control over the bank accounts," but the district court noted it did not think this was enough to show the necessary ties between OMR and the issues in

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[46] 4 RP 746, ¶ 14, 748, ¶ 19.
[47] 6 RP 1370-71.
[48] TR 34 (4/10/12).
[49] TR 35 (4/10/12).
[50] TR 35 (4/10/12).
[51] TR 35 (4/10/12).

the case.[52] Plaintiffs' Response had referenced and attached exhibits showing OMR took management fees from Las Campanas and that OMR was controlling bank accounts.[53]

Plaintiffs filed a Motion to Reconsider ("MTR") within 10 days of the Order, and attached as exhibits various letters, affidavits and email correspondence showing that OMR had the necessary contacts with New Mexico to confer jurisdiction.[54] Plaintiffs attached new evidence of a 2008 letter that OMR had sent to Las Campanas' members and property owners, on OMR letterhead and signed by Mr. Marotta, as the CEO of OMR,[55] explaining that OMR was the "new management company"[56] and that "OMR will handle all of the project management."[57] The letter twice requested that all members send their questions to OMR@LasCampanas.com,[58] in explaining: "In our effort to address owners' and members' most pressing issues, we have also created a centralized communications system to collect your questions, concerns and suggestions. Please address these questions to OMR@LasCampanas.com."[59] Another letter was also attached as new evidence, from Lyle Anderson to the

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[52] TR 36 (4/10/12).
[53] 3 RP 673, 663-73; 4 RP 701-04.
[54] 6 RP 1380 to 7 RP 1417 (MTR).
[55] 7 RP 1398-1404; 6 RP 1383-84.
[56] 7 RP 1400, ¶ 4.
[57] 7 RP 1402, ¶ 12.
[58] 7 RP 1398, 1404.
[59] 7 RP 1398.

members of Las Campanas, which explained that OMR was "a new management company" formed to fill the void as a result of the Bank refusing to allow the LAC to continue managing the property.[60]

OMR's MTR Response stated that "Altman and Marotta are officers and a director of *all* the Lyle Anderson Companies, including both OMR and Las Campanas."[61] Defendant OMR maintained it was a "separate company," owned jointly by LAFC NA and LAFC UK, and that it had no authority to act on behalf of Las Campanas without that authority being delegated to it by the directors of Las Campanas.[62] OMR argued that the Plaintiffs made "no showing that OMR has ever had authority to act on behalf of Las Campanas."[63] In stating "Marotta and Altman in all transactions with the Plaintiffs were acting as officers and a director of Las Campanas," OMR focused on distinct corporate forms rather than on the substance of the contacts as demonstrated in the letters and other evidence.[64] OMR drew lines between Marotta's and Altman's role as officers and a director of Las Campanas versus their roles as officers and a director of

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[60] 7 RP 1406.
[61] 7 RP 1432.
[62] 7 RP 1432.
[63] 7 RP 1432.
[64] 7 RP 1436.

OMR, attaching new evidence and affidavits in addition to referring to its previously submitted evidence.[65]

OMR maintained that Marotta's correspondence, as the CEO of OMR, on OMR letterhead, to over 900 Las Campanas members did not demonstrate "continuous and systematic" contact,[66] yet in that precise correspondence OMR explained it was a new management company and directed all members' questions and future concerns to an OMR email address.[67] The letter was signed by Defendant Marotta, as "CEO, Oasis Management Resources LLC."[68] Straining to distance itself from its deliberate communications reaching out to the forum, OMR claimed it "never mentioned as being on-site, or providing any kind of management services to Las Campanas."[69] In wanting the analysis to focus on each entity's corporate form rather than examining OMR's particular contacts, OMR stated that "OMR has no ownership in Las Campanas or control over its activities."[70]

At the first of two hearings on Plaintiffs' MTR, Oct. 3, 2012, the district court queried Plaintiffs' counsel as to the procedural posture of the Motion.[71]

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[65] 7 RP 1418-52.
[66] 7 RP 1437.
[67] 7 RP 1398-1404, 1467-73.
[68] 7 RP 1398, 1467.
[69] 7 RP 1431.
[70] 7 RP 1432.
[71] Oct. 3, 2012, CD, 9:17:31 to 9:18:05.

The MTR was a Rule 1-059 motion to alter or amend the judgment, as it was filed no later than 10 days after entry of the Order. While the Motion was brought generally under Section B of Rule 1-060 NMRA, the Motion primarily focused on OMR's conduct evidencing fraud, misrepresentation and other misconduct, which is reflected in Section (B)(3) of Rule 1-060.[72] The district court expressed concern as to whether it could grant relief under any of the five other sections of Rule 1-060(B) if it did not find that the evidence rose to the level of misrepresentation or fraud.[73] In particular, the court asked the parties if it could, in its discretion, find that the letters attached to Plaintiffs' Motion fell under the "newly discovered" evidence provision, Rule 1-060(B)(2), without an explicit demand for relief by one of the parties.[74]

OMR argued that the district court should not rule beyond the fraud and misrepresentation allegations,[75] but the district court expressed concern over the OMR letters attached to Plantiffs' MTR.[76] The district court told OMR's counsel that "if I had had this evidence [at the Motion to Dismiss hearing] I couldn't have said that it was not possible to draw an inference that OMR was doing more than

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[72] 6 RP 1380 to 7 RP 1417 (MTR).
[73] Oct. 3, 2012, CD, 9:17:31 to 9:18:05.
[74] Oct. 3, 2012, CD, 9:17:31 to 9:18:05.
[75] Oct. 3, 2012, CD, 9:19:45 to 9:20:11.
[76] Oct. 3, 2012, CD, 9:20:47 to 9:22:42.

the back office functions you alleged."[77] The court at one point went so far as to state it would not have granted OMR's MTD had the court had the evidence in front of it that was presented in Plaintiffs' MTR.[78] The district court explained, for example, that OMR's letter reflected that OMR was writing to members of Las Campanas, on OMR letterhead, which was signed by the CEO of OMR, and that the letter was telling members to contact OMR if they had any questions.[79] The district court questioned why a factfinder could not read OMR's letter and conclude that OMR was providing management services.[80]

The district court ruled it did not believe the evidence was sufficient to grant relief under Rule 1-060(B)(3), relating to fraud and misrepresentation, but the court did think the Motion was potentially justified under Rule 1-060(B)(2) if the court was permitted to grant relief on its own motion.[81] The court asked the parties to brief "whether the new information that was attached to the Rule 60(B) motion would qualify as newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial."[82] The judge asked the parties to brief the narrow point regarding the legal posture of Rule 1-060(B)(2) and why the evidence may or may not qualify for that, and explicitly

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[77] Oct. 3, 2012, CD, 9:20:47 to 9:21:35.
[78] Oct. 3, 2012, CD, 9:21:35 to 9:21:41.
[79] Oct. 3, 2012, CD, 9:22:47 to 9:23:21; 9:25:32 to -55.
[80] Oct. 3, 2012, CD, 9:20:47 to 9:21:35; 9:28:23 to -36.
[81] Oct. 3, 2012, CD, 9:39:07 to 9:40:50.
[82] Oct. 3, 2012, CD, 9:39:55 to 9:40:50.

requested that the parties refrain from rearguing the evidence or "what the evidence means or anything of that nature."[83]

Plaintiffs' supplemental brief explained that Rule 1-060(B) is construed liberally and that a district court may rule on its own motion and under any of the provisions under Rule 1-060(B).[84] The brief cited an abundance of New Mexico law indicating the purpose of Rule 1-060(B) is to permit the court to act in the interest of justice when attention has been called to an issue.[85] Plaintiffs' Reply further explained that the letters attached to Plaintiffs' MTR were "newly discovered" because they should have been produced pursuant to a legitimate discovery request.[86] The documents were never produced by Defendants and were independently discovered by Plaintiffs only after OMR's MTD had been granted.[87] Plaintiffs' Reply provided the relevant discovery request, including Defendants' answer, as follows:

> **REQUEST NO. 10**: Produce all documents from January 1, 2005 to the present including, but not limited to, emails, correspondence, memoranda, Board of Director Minutes, Committee Minutes or contracts, concerning or related to any contract or any agreement among or between Marotta, Gund, Budd and Dzera, LLC, Oasis Management Resources, LLC, Stephen Marotta or Richard Altman

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[83] Oct. 3, 2012, CD, 9:41:38 to 9:42:06.
[84] 8 RP 1836-41 (Plfs' Supp. Brief).
[85] 8 RP 1836-41.
[86] 9 RP 1975-76; *see also* Dec. 21, 2012, CD, 9:52:21 to 9:53:31 (stating the correspondence "should have been disclosed pursuant to our prior request for discovery but weren't"); 9 RP 1971-80 (Plfs' Supp. Reply).
[87] 9 RP 1975-76; Dec. 21, 2012, CD, 9:52:21 to 9:53:31.

> and the Bank of Scotland and/or Lloyds Banking Group for the management of Lyle Anderson Companies' properties in New Mexico, Arizona and Hawaii, including but not limited to properties owned by Las Campanas Limited Partnership and/or Las Campanas Corporation in Santa Fe, New Mexico.
>
> **RESPONSE**: There are no documents responsive to this request.[88]

Plaintiffs explained that Defendants had been asked to produce all communications of any kind related to any contract or agreement among all of the relevant entities in this litigation, and that the attached letters were responsive to this request but had not been provided.[89] The OMR and Lyle Anderson letters attached to Plaintiffs' MTR spoke directly to new business agreements that flowed from the LAC's default in 2008, and despite Plaintiffs' due diligence in making this discovery request, the documents were never produced.[90] Plaintiffs reiterated that a district court is not limited by any specific ground set forth in a motion requesting relief from an order, and that the district court had broad and liberal discretion under Rule 1-060 to rule, sua sponte, to ensure justice and fairness.[91]

After supplemental briefing and a second hearing, on Dec. 21, 2012, the district court denied Plaintiffs' MTR.[92] The district court first ruled that Plaintiffs

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[88] 9 RP 1975.
[89] 9 RP 1975-76.
[90] 9 RP 1975-76.
[91] 9 RP 1979; Dec. 21, 2012, CD, 9:56:01 to 9:58:05; 10:07:19 to 10:09:15.
[92] 9 RP 2048-49; Dec. 21, 2012, CD, 10:13:51 to -54.

did not show they could get relief under Rule 1-060(B)(2), for newly discovered evidence.[93] The district court did not believe that the Plaintiffs' discovery request was broad enough to include the letters attached to Plaintiffs' MTR, and briefly indicated the letters may have been provided to two of the Plaintiffs, in the ordinary course of business, when the letters were originally sent in October and November 2008,[94] which was almost two years before Plaintiffs' Complaint was filed, in May of 2010.

The request asked for all communications of any kind "concerning or related to any contract or any agreement among or between" any of the entities involved in this litigation, including MGBD, OMR, Stephen Marotta, Richard Altman, the Bank of Scotland or any of the Lyle Anderson companies, yet the district court did not believe the request covered the letters.[95] Plaintiffs' counsel explained that the request plainly asked for any communications, including correspondence, that concerned or related to any agreements between the parties,[96] but the district court believed that the request was only "regarding contracts between certain people and this evidence was not about contracts."[97] Although the district court requested at the first MTR hearing that the parties not

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[93] Dec. 21, 2012, CD, 10:12:09 to -22.
[94] Dec. 21, 2012, CD, 10:12:09 to 10:13:16.
[95] 9 RP 1975; Dec. 21, 2012, CD, 10:12:09 to 10:13:16.
[96] Dec. 21, 2012, CD, 10:05:11 to 10:06:00.
[97] Dec. 21, 2012, CD, 10:12:56 to 10:13:16.

reargue the facts nor "what the evidence means,"[98] and Plaintiffs' counsel had provided the basis for why the letters were newly discovered evidence,[99] the district court curiously noted in its ruling that Plaintiffs "probably ignored the invitation that was given to them which was to show whether or not [Rule 1-0]60(B)(2) would apply."[100]

After ruling on the newly discovered evidence provision of Rule 1-060(B), the district court further concluded that Plaintiffs were not entitled to relief under Rule 1-060(B)(6).[101] Plaintiffs had cited case law explaining that the court could grant the MTR under Rule 1-060(B)(6), which permits relief for "any other reason," but the court disagreed.[102] Plaintiffs' counsel indicated that in the interests of justice the court could rule as it was leaning in the first hearing, which was that the evidence was enough to grant Plaintiffs' MTR.[103] While all pleadings, affidavits and other evidence must be construed, for the purposes of assessing personal jurisdiction, in the light most favorable to the party asserting jurisdiction, and the MTR was promptly filed within 10 days of the MTD Order, the district court did not think it did "justice to the principle of finality" to rule in

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[98] Oct. 3, 2012, CD, 9:41:38 to 9:42:06.
[99] 9 RP 1975-76; Dec. 21, 2012, CD, 9:52:21 to 9:53:31.
[100] Dec. 21, 2012, CD, 10:10:40 to 10:10:57.
[101] Dec. 21, 2012, CD, 10:11:34 to 10:13:40.
[102] 9 RP 1976-79.
[103] Oct. 3, 2012, CD, 9:22:47 to 9:23:21; 9:25:32 to -55; Dec. 21, 2012, CD, 10:06:30 to 10:08:52.

favor of Plaintiffs' MTR.[104] The district court's Order stated, inter alia, "Plaintiffs/Counter-Defendants are not entitled to relief under Rule 1-060(B)(6) NMRA because any claim for relief asserted by Plaintiffs/Counter-Defendants arises under either Rule 1-060(B)(2) or Rule 1-060(B)(3) NMRA."[105] In denying Plaintiffs' MTR, the court's ruling affirmed the dismissal of OMR on personal jurisdiction grounds.

V. Argument

A. Law governing personal jurisdiction over an out-of-state defendant.

The test for whether personal jurisdiction over a party exists is whether the defendant had "minimum contacts" with the forum state. *Alto Eldorado P'ship v. Amrep Corp.*, 2005-NMCA-131, ¶ 31, 138 N.M. 607, 124 P.3d 585 (quoting *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945)); *Santa Fe Techs.*, 2002-NMCA-030, ¶ 16. "If a defendant has continuous and systematic contacts with New Mexico such that the defendant could reasonably foresee being haled into court in that state for any matter, New Mexico has general personal jurisdiction and the plaintiff need not demonstrate a connection between the defendant's contact and the cause of action." *Zavala v. El Paso Cnty. Hosp. Dist.*, 2007-NMCA-149, ¶ 12, 143 N.M. 36, 172 P.3d 173. "If a defendant's contacts do not rise to that level, but the defendant nonetheless purposefully established contact with New

[104] Dec. 21, 2012, CD, 10:13:30 to -40.
[105] 9 RP 2048.

Mexico, New Mexico will have jurisdiction only if the cause of action arose out of the contacts with New Mexico." *Id.* Therefore, "the minimum contacts required for the state to assert personal jurisdiction over a defendant depends on whether the jurisdiction asserted is general (all-purpose) or specific (case-linked)." *Sproul*, 2013-NMCA-072, ¶ 9.

Because New Mexico permits the exercise of personal jurisdiction to the full extent permitted by due process, the issue of whether a district court has personal jurisdiction over a nonresident defendant depends on whether the plaintiff has alleged minimum contacts between defendant and the State for purposes of general or specific jurisdiction. *Sproul*, 2013-NMCA-072, ¶ 8; *F.D.I.C. v. Hiatt*, 1994-NMSC-044, ¶ 7, 117 N.M. 461, 872 P.2d 879, 881. "[I]t is no longer necessary to determine whether a defendant has committed one of the acts enumerated by our long-arm statute." *M.R. v. SereniCare Funeral Home, L.L.C.*, 2013-NMCA-022, ¶ 8, 296 P.3d 492, *cert. denied*, 2013-NMCERT-001.

"If a defendant has 'continuous and systematic contacts with [New Mexico] such that the defendant could reasonably foresee being haled into court in that state for any matter,' New Mexico has general personal jurisdiction and the plaintiff need not demonstrate a connection between the defendant's contacts and the cause of action." *Zavala*, 2007-NMCA-149, ¶ 12 (quoted authority

omitted). "A state has specific jurisdiction over a nonresident defendant if that defendant's contacts do not rise to the level of general jurisdiction, but the defendant nevertheless 'purposefully established contact with New Mexico.'" *Sproul*, 2013-NMCA-072, ¶ 16 (quoting *Zavala*, 2007-NMCA-149, ¶ 12). To exercise specific personal jurisdiction, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Alto Eldorado P'ship*, 2005-NMCA-131, ¶ 28.

Importantly, courts "are mindful that the combination of a number of individually insufficient contacts might support a finding of personal jurisdiction." *Zavala*, 2007-NMCA-149, ¶ 16; *see Kathrein v. Parkview Meadows, Inc.*, 1984-NMSC-117, ¶ 5, 102 N.M. 75, 691 P.2d 462, 463 (concluding that all of the defendant's acts "taken together" were sufficient to justify exercise of personal jurisdiction).

B. Plaintiffs established Defendant OMR had such minimum contacts with New Mexico to exercise jurisdiction.

The evidence presented by Plaintiffs below, taken together, shows that Plaintiffs made a prima facie case for personal jurisdiction. Defendant OMR was formed only after the LAC default, in 2008, and soon after its creation it reached out to New Mexico in an orchestrated campaign to soothe the fears of the Las Campanas community, to answer any questions or concerns that might arise, and

to solicit commentary.[106] While OMR maintained below that it only provided "back office services" such as bookkeeping and accounting to Las Campanas, from Arizona, and not any management services,[107] the totality of the evidence reflects that OMR purposefully availed itself of the privilege of conducting activities in New Mexico. The district court erred in resolving the issue in OMR's favor because the evidence reflects Plaintiffs met their prima facie burden establishing jurisdiction.

OMR argued it had no offices, employees, or bank accounts in New Mexico,[108] had never been delegated authority to provide any management services,[109] was a separate company from Las Campanas,[110] and that Defendants Marotta and Altman only acted as officers of Las Campanas, never as officers of OMR regarding any of the evidence presented.[111] While Marotta was CEO and a director for both Las Campanas and OMR, and Altman was President of both Las Campanas and OMR, OMR's position was that Marotta and Altman only communicated to New Mexico in their roles as officers and a director of Las Campanas, never in their roles as officers and a director of OMR.[112] OMR's

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[106] 7 RP 1398-1404.
[107] 3 RP 568-72.
[108] 4 RP 555.
[109] 4 RP 748; 7 RP 1432, 1435.
[110] 7 RP 1432.
[111] 7 RP 1436.
[112] 7 RP 1432.

argument throughout this case has been that OMR only provided "back office services" from Arizona and that it had neither the authority nor ability to reach out to any New Mexicans, despite evidentiary support providing otherwise.

Plaintiffs do not deny that OMR provided back office services to Las Campanas. But the evidence is more than sufficient for a factfinder to determine or infer that OMR also provided management services, as explained throughout OMR's own website, and as shown in the correspondence, affidavits and other evidence provided to date. Mr. Marotta, on OMR letterhead and signed in his capacity as CEO of OMR, intentionally solicited over 900 members of Las Campanas to inform them of the status of the Las Campanas development in the aftermath of the Lyle Anderson default, and instructed that all communications be sent to OMR@LasCampanas.com.[113] The correspondence was for the purpose of addressing the owners' and members' "most pressing issues" in light of the default. On OMR letterhead, and signed as the CEO of OMR, Mr. Marotta stated: "In our effort to address owners' and members' most pressing issues, we have also created a centralized communications system to collect your questions, concerns and suggestions. Please address these question to OMR@LasCampanas.com."[114]

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[113] 7 RP 1398, 1404.
[114] 7 RP 1398.

The letter, answering the question of who is now managing the community in the absence of Lyle Anderson, stated that "[a] new management company called Oasis Management Resources (OMR) became operational in August 2008."[115] OMR explained, "OMR will handle all of the project management, accounting and personnel functions previously performed by The Lyle Anderson Company, Inc."[116] Thus, although OMR's CEO explained to the community that it was providing back office services, such as accounting, it also affirmed it was handling "all of the project management."[117] As such, a reasonable person reading this letter, in addition to Lyle Anderson's letter sent to the community one day before OMR's letter was sent,[118] could reasonably believe that OMR was managing the development.

In addition to the correspondence, Plaintiffs provided affidavits by two former employees and a third person familiar with the operations of Las Campanas, who all understood that OMR was managing Las Campanas.[119] Bob Buddendorf,[120] formerly the President of The Club at Las Campanas and

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[115] 7 RP 1400.
[116] 7 RP 1402.
[117] Plaintiffs also provided evidence showing OMR took management fees from Las Campanas was controlling bank accounts. 3 RP 673, 663-73; 4 RP 701-04.
[118] 7 RP 1405-07.
[119] 7 RP 1408-09, 1413-15, 1464-66.
[120] While Mr. Buddendorf's affidavit was originally attached to Plaintiffs' MTR, 6 RP 1397, only the first of three pages appears to be actually filed. The complete affidavit was attached to the Plaintiffs' MTR Reply. 7 RP 1464-66.

Chairman of the Las Campanas Advisory Board, explained in an affidavit that OMR's correspondence was sent to over 900 Las Campanas members, and further explained that in other dealings regarding the transfer of certain Las Campanas' assets over to the members, he personally met and spoke with Defendants Altman and Marotta many times, in Santa Fe and by phone.[121] Mr. Buddendorf understood he was negotiating, on behalf of the members, with OMR and that OMR was the manager of the Las Campanas development.[122] Caroline Stevenson, who also provided an affidavit, averred she was a former employee and understood that OMR was the manager of the Las Campanas operations.[123]

Michelle Hoeft, who was the founder and managing member of Presence Marketing Communications and Public Affairs, LLC, headquartered in Santa Fe, also provided an affidavit.[124] Ms. Hoeft handled marketing, public relations and was a spokesperson for the Las Campanas development from 2007 through part of 2010.[125] Ms. Hoeft testified she was instructed to refer any media or other matters beyond local employees' authority to OMR, was aware that OMR had a local phone number, and believed that she was dealing with OMR after the

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[121] 7 RP 1465-66. The master plan for Las Campanas included, inter alia, transferring the Club assets of Las Campanas over to the membership. 7 RP 1400, 1403.
[122] 7 RP 1465-66.
[123] 7 RP 1408-09.
[124] 7 RP 1413-17.
[125] 7 RP 1413-14.

dismissal of Phil Edlund as the president of Las Campanas.[126] She understood that OMR was managing Las Campanas and controlled its business affairs.[127]

Ms. Hoeft attached a newspaper article to her affidavit, dated September 2009, in which she gave a statement as the Las Campanas spokesperson, indicating OMR was "the company appointed to run the [Las Campanas] development."[128] While defense counsel attempted to dismiss Ms. Hoeft's affidavit as biased, in light of Ms. Hoeft later suing OMR (in August of 2010) for non-payment of services,[129] at the time that Ms. Hoeft spoke to the newspaper (in early September 2009) she was working in her public-relations capacity for Las Campanas.[130] There was no benefit or reason for her to lie to the paper regarding OMR's management responsibilities at the time she was interviewed. OMR's response was that the newspaper article "relies upon anonymous sources and speculation, which identifies OMR 'as the company appointed to run the development.'"[131] The news article indicates, however, that it was Ms. Hoeft

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[126] 7 RP 1414.
[127] 7 RP 1414.
[128] Phaedra Haywood, *Las Campanas club closes amid financial troubles: Memo to members predicts short-term shutdown*, Santa Fe New Mexican (Sept. 10, 2009). 7 RP 1416-17.
[129] 7 RP 1422, 1434, 1477-79.
[130] 7 RP 1413-14.
[131] 7 RP 1434.

who was the source of this information.[132] The article reads, in relevant part, as follows:

> The memo [notifying all Las Campanas members that employees have been furloughed] was signed by Richard Altman, Las Campanas spokeswoman Michelle Hoeft said. Altman is an executive with Oasis Management Resources, the company appointed to run the development.
>
> Hoeft declined to answer other questions about the reason for the shutdown or how long it is expected to last.[133]

Despite the evidence, such as the affidavits and correspondence to the Las Campanas community, on OMR letterhead, and signed by the CEO of OMR, OMR's position was that no reasonable juror could possibly believe or infer that OMR was acting in any sort of management capacity.[134] According to OMR, there was no way anyone could think that OMR provided any more than remote back office services, given the evidence.[135] OMR's focus was on the various corporate forms distinguishing the Lyle-Anderson companies, MGBD, OMR and Las Campanas,[136] rather than on OMR's actual contacts grounded in the evidence. But providing separation of formal corporate identities does not impose a constitutional barrier to the exercise of jurisdiction over a non-resident corporation; rather, what is necessary to establish jurisdiction is what is necessary

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[132] 7 RP 1417.
[133] 7 RP 1417.
[134] 7 RP 1435-37; Oct. 3, 2012, CD, 9:20:47 to 9:21:35; 9:28:23 to -36.
[135] 7 RP 1435-37; Oct. 3, 2012, CD, 9:20:47 to 9:21:35; 9:28:23 to -36.
[136] 4 RP 745, 747-48; 7 RP 1424-38.

in any and all cases, the satisfaction of due process. *Alto Eldorado P'ship*, 2005-NMCA-131, ¶ 25.

In fact, the Santa Fe New Mexican was not the only newspaper reporting that OMR was managing the Lyle Anderson properties after the Bank's takeover. The Pacific Business News reported, in 2008, that after the Lyle Anderson companies lost control of the properties the Bank of Scotland handed management over to OMR.[137] "Marotta's firm [MGBD] formed Oasis Management Resources to handle the day-to-day activities of the Anderson projects."[138] The Arizona Republic reported that OMR was hired to manage Las Campanas and the properties in Hawaii and Scotland, stating: "The Scottsdale-based developer's lender and partner in the projects, the Bank of Scotland, has taken control of the properties and handed over management to a firm named Oasis Management Resources."[139]

Plaintiffs also provided evidence of OMR's contacts in attaching evidence from OMR's own website.[140] While not dispositive of OMR's contacts with Las

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[137] Janis L. Magin, *Hokulia will resume building, under new management*, Pacific Business News (Nov. 9, 2008), at http://www.bizjournals.com/pacific/stories/2008/11/10/story8.html.

[138] *Id.*

[139] Catherine Reagor, *Golf community developer loses 4 projects*, The Arizona Republic (Nov. 1, 2008), at http://www.azcentral.com/arizonarepublic/business/articles/2008/10/31/20081031biz-anderson1103-ON.html?nclick_check=1.

[140] 3 RP 640-62.

Campanas, it bolsters the evidence amassed in this matter in favor of jurisdiction. "[E]ven if the defendant's website is not sufficient in and of itself to establish jurisdiction, it may be an additional contact that facilitates a finding that the defendant's cumulative contacts with the forum state are sufficiently continuous and systematic to subject the defendant to the federal court's general jurisdiction." 4A Arthur R. Miller & Mary Kay Kane, et al., *Fed. Pract. & Proced.* § 1073.1 (2013).

OMR provided, on its website, that through "Oasis Management Resources, LLC ("OMR"), we provide executive oversight and back office services to real estate projects across the country and internationally." 3 RP 645; *see* 3 RP 646 (explaining the management services OMR has to offer); 3 RP 651 (stating OMR "is a real estate management company specializing in distressed real estate situations. We provide executive oversight complemented by complete back office service capabilities."); 3 RP 654, 656 (descriptions of OMR services, all consistent with management services); 3 RP 661 (explaining that Janele Bergstrom, as the Director of Retail Operations for OMR, has "operated as the Director of Retail for the Lyle Anderson communities," including Las Campanas).

Even if OMR was only acting on the instructions of the Las Campanas Board and other Lyle-Anderson entities,[141] as maintained by defense counsel, OMR nonetheless established minimum contacts with New Mexico because they represented or held themselves out as being the liaison or contact point for the members of Las Campanas. In addition, employees and other people who had dealings with OMR (including newspaper reporters around the country) understood that OMR was managing the Las Campanas development. As acknowledged by the district court, the organizational chart reflecting that OMR is "not controlling" Las Campanas does not answer the question as to whether OMR had the requisite contacts with the forum.[142] It does not matter if OMR had no ownership interest in Las Campanas Corporation or any other related entity,[143] it matters if OMR reached out to the forum (New Mexico) in such a way as to establish the requisite contacts.

The district court acknowledged that "some totally unrelated entity could be hired by Las Campanas to manage it here in New Mexico, and there would be jurisdiction over that unrelated entity for its management activities."[144] OMR stated in its Motion to Dismiss that OMR's "only connection to New Mexico involves accounting services for a local corporation and payroll preparation for a

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[141] TR 14 (4/10/12); 7 RP 1430-36.
[142] TR 7, 14 (4/10/12).
[143] TR 7 (4/10/12).
[144] TR 9 (4/10/12).

single employee of Las Campanas."[145] Plaintiffs' discovery of OMR's correspondence to the Las Campanas community, in addition to the affidavits and other evidentiary support, however, reflects that OMR's contention was either not true or, at a minimum, subject to more than one reasonable interpretation. Defense counsel at the MTC hearing defended the website advertising information by stating that the fact that OMR provides executive management services does not mean they were actually providing those services for Las Campanas,[146] yet the correspondence alone in this matter reflects that after the creation of OMR, it reached out to the forum and was soliciting continuous contact for the purpose of answering any questions or concerns and to receive commentary.[147]

The evidence presented, together with all inferences that can be drawn therefrom, is such that reasonable minds can differ on the conclusion of whether OMR ***only*** provided "back office services," as alleged by OMR. *See Kathrein*, 1984-NMSC-117, ¶ 5 (holding defendant's phone call to the plaintiff, and

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[145] 3 RP 562. OMR, in responding to Plaintiffs' MTD Response, provided an additional affidavit expanding the services previously acknowledged by OMR in its Motion. The Marotta affidavit stated that OMR's "back office services include human resources services, accounting services, loan servicing, and assistance with tax form preparation. OMR does not now and has never provided any type of management services to any of the Lyle Anderson entities." 4 RP 745, ¶ 8 (Marotta Affidavit); 4 RP 729-42 (OMR's MTD Reply).

[146] TR 12 (4/10/12).

[147] 7 RP 1398-1404.

mailing of a brochure to her, taken together with defendant's general solicitation activities within the State, were of sufficient magnitude, and were sufficiently related to the cause of action, that jurisdiction over defendant was proper). The evidence must be viewed, together with all reasonable inferences that can be drawn, in the light most favorable to the Plaintiffs. *Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶ 16, 141 N.M. 21, 150 P.3d 971; *see also Sproul*, 2013-NMCA-072, ¶ 6 (affirming personal jurisdiction standard of review closely mirrors our summary judgment standard; facts must be construed in the light most favorable to confer jurisdiction); *Zavala*, 2007-NMCA-149, ¶ 13 (providing if district court did not hold an evidentiary hearing, as in this case, the "affidavits and pleadings will be considered in the light most favorable to jurisdiction").

Minimum contacts exist in this case because OMR's activities within the State were continuous and purposeful. The foregoing evidence supports both general and specific jurisdiction. The totality of the evidence, such as establishing a relationship with the community through correspondence intended to address and solicit all future questions, concerns and suggestions, and that OMR was believed by more than one person to have had management responsibilities,[148] shows that OMR availed itself "of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its

[148] 7 RP 1408-09, 1413-15, 1464-66.

laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). OMR not only initiated the contact in reaching out to New Mexico, it solicited an ongoing relationship through future correspondence with the members and property owners of Las Campanas.

OMR's conduct and actions were entirely voluntary, since it could have, for example, sent its correspondence on Las Campanas' letterhead, signed as an officer or director of Las Campanas, rather than as the CEO of OMR on OMR letterhead. *See Santa Fe Techs.*, 2002-NMCA-030, ¶ 24 (stating business interactions that were "not 'random' or 'fortuitous' contacts, but rather deliberate actions to further a potentially lucrative business relationship," were evidence of jurisdiction). OMR's activities show it reasonably could have contemplated being subject to New Mexico jurisdiction. "The [United States] Supreme Court has recognized that personal jurisdiction need not be based on physical contacts with the forum state; in modern commerce substantial contacts are often made through other means, such as mail and telephone communication." 16 James Wm. Moore, *Moore's Federal Practice* § 108.44, at 108-87 (3d ed. 2013).

While the evidence reflects OMR had such continuous contacts with New Mexico to support general jurisdiction, without question OMR purposefully established contact with Las Campanas' residents and Plaintiffs' claims arise out of or results from OMR's forum-related activities, justifying specific jurisdiction.

See Zavala, 2007-NMCA-149, ¶ 12 (requiring, for specific jurisdiction, that defendant purposefully established contact with New Mexico and that cause of action arose out of the contacts with New Mexico); *Sproul*, 2013-NMCA-072, ¶ 16. The lack of physical contact with the forum will not defeat personal jurisdiction; "[s]o long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (quoted authority omitted).

Plaintiffs' amended complaint states that Defendants OMR, Altman and Moratta caused Las Campanas to breach the terms of the leases at issue, interfered with the contractual relations between Plaintiffs and Las Campanas, and that OMR's, Altman's and Moratta's actions were in malicious disregard of the rights of Plaintiffs.[149] The facts, and all properly drawn inferences, reflect that OMR and its officers and directors had management responsibilities regarding Las Campanas, which included participation in and knowledge of the breached leases at issue and subsequent malicious persecution of Plaintiffs for trying to enforce the breached leases. Not only do the allegations support personal jurisdiction over each Defendant separately, New Mexico recognizes that a conspiracy allegation can provide the constitutional basis for personal

[149] 2 RP 299-302.

jurisdiction over an out-of-state defendant. *See Santa Fe Techs.*, 2002-NMCA-030, ¶ 47 ("We base jurisdiction over Defendants on their purposeful and concerted contacts with New Mexico, individually and together."). The facts and inferences therefrom, including Plaintiffs' amended complaint and other evidence, show that Plaintiffs made a prima face case for conspiracy.

"'A conspiracy may be established by circumstantial evidence; generally, the agreement is a matter of inference from the facts and circumstances, including the acts of the persons alleged to be conspirators.'" *Id.* ¶ 46 (quoting *Morris v. Dodge Country, Inc.*, 1973-NMCA-100, 85 N.M. 491, 513 P.2d 1273, 1274). In *Santa Fe Techs.*, the Court held that viewing the facts in the light most favorable to the party pleading conspiracy, the party made a prima facie case of conspiracy for intentional interference with contractual relations where reasonable inferences supported such an agreement. *Id.* ¶ 45. The Court was clear that the party alleging a conspiracy "is not required to prove this alleged conspiracy for personal jurisdiction purposes;" the merits of the claim are for the factfinder to decide. *Id.* ¶ 46.

In this case, as argued below, OMR was aware that its own President, Richard Altman, did not make payments on the leases at issue in this case and that OMR participated in this decision by not funding and not transmitting

payments on the leases for the balance of the terms of the leases.[150] Notably, Altman's and Marotta's own filings, correspondence and website show they are officers for many of the relevant entities involved in this suit and used identical (or virtually identical) titles and addresses in their respective roles for all of the entities, and that they chose to comingle their roles as officers and directors of MGBD, Las Campanas, OMR, and other entities.[151] OMR, Altman and Moratta caused the Las Campanas Defendants, or conspired with them, to breach the leases at issue, interfere with contractual relations, and maliciously filed allegations against Plaintiffs without cause.[152]

The evidence reflects that OMR deliberately entered into an arrangement contemplating ongoing interactions with owners, members and employees of Las Campanas. Like *Burger King*, the officers and directors of OMR were "experienced and sophisticated businessmen" who at no time were subject to economic duress or disadvantage. *Burger King*, 471 U.S. at 484-85. OMR purposefully reached out to New Mexico requesting that members of Las Campanas contact OMR with any questions or concerns, led people to believe they were managing Las Campanas, and knew or should have known of the leases that were breached with Plaintiffs in addition to the malicious filing of

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[150] 4 RP 718.
[151] 3 RP 641-42, 654-58.
[152] 3 RP 286-302.

claims against Plaintiffs after Plaintiffs filed suit for breach of contract. A de novo review of the evidence, including all inferences therefrom, demonstrate Plaintiffs' claims arise out of or results from OMR's forum-related activities.

C. Under Rule 1-060(B), the district court abused its discretion in failing to consider evidence unquestionably establishing Plaintiffs' prima facie case for personal jurisdiction.

Rule 1-060(B) pertains to relief from final judgments, orders or proceedings and is liberally construed to ensure the ends of justice are met. In refusing to consider the evidence presented in Plaintiffs' Motion to Reconsider, the district court's Order does not reflect the true merits of the personal jurisdiction matter at issue. The district court in this case erroneously believed that (1) it could not rule sua sponte as to whether the evidence attached to Plaintiffs' MTR was "newly discovered," under Rule 1-060(B)(2), (2) the evidence was not newly discovered as it was not responsive to a discovery request, (3) Defendants' conduct did not rise to the level of fraud, misrepresentation or other misconduct, under Rule 1-060(B)(3), and (4) it could not rule for "any other reason," under Rule 1-060(B)(6), because Plaintiffs did not show that they could get relief under Section (B)(2) or (B)(3).[153] Plaintiffs timely filed their MTR under Rule 1-059, which was subsequently evaluated using the standards under Rule 1-060(B).

[153] Dec. 21, 2012, CD, 10:11:34 to 10:13:51; Oct. 3, 2012, CD, 9:17:31 to 9:18:05.

In New Mexico, "[t]he court should be liberal in determining what constitutes good cause to vacate a judgment so that the ultimate result will address the true merits and substantial justice will be done." *Phelps Dodge Corp. v. Guerra*, 1978-NMSC-053, ¶ 21, 92 N.M. 47, 582 P.2d 819, 823. In this case, permitting relief under Rule 1-060(B) was proper as Plaintiffs made a prima facie case for personal jurisdiction, as shown above. Reversing the district court's judgment will allow the parties to address the true merits of the case.

i. Law governing Rule 1-060(B).

Our Supreme Court is clear that Rule 1-060(B) should be liberally applied to assure justice is done and permits a judge to sua sponte grant relief from a judgment or order. *Martinez v. Friede*, 2004-NMSC-006, ¶¶ 15, 20, 135 N.M. 171, 86 P.3d 596, *superseded by rule on other grounds as recognized in State v. Moreland*, 2008-NMSC-031, ¶ 11, 144 N.M. 192, 185 P.3d 363. "'A judge can initiate relief from a judgment or order under Rule 60 on his [or her] own motion.'" *Id.* ¶ 15 (quoting *Desjardin v. Albuquerque Nat'l Bank*, 1979-NMSC-052, 93 N.M. 89, 596 P.2d 858, 860). "'Rule 1-060(B)(6) should be 'liberally applied' to further the ends of justice." *Id.* ¶ 20 (citing *Koppenhaver v. Koppenhaver*, 1984-NMCA-017, 101 N.M. 105, 678 P.2d 1180, 1184). "Rule 1-060(B) requires courts to balance interests of finality versus relief from unjust

judgments." *Kinder Morgan CO2 Co., L.P. v. State Taxation and Revenue Dept.*, 2009-NMCA-019, ¶ 10, 145 N.M. 579, 203 P.3d 110.

In relevant part, Rule 60(B) provides:

> **B. Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 1-059 NMRA;
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party;
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> * * * * *
>
> (6) [or] any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one-year after the judgment, order or proceeding was entered or taken. A motion under this paragraph does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to set aside a judgment for fraud upon the court. . . . the proceeding for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

ii. The district court abused its discretion in omitting newly discovered correspondence demonstrating Plaintiffs made a prima facie case for personal jurisdiction.

While the district court was concerned that Plaintiffs' MTR did not explicitly reference the newly discovered evidence provision of Rule 1-060(B)(2), and expressed doubt as to whether it could rule, sua sponte, on the new evidence provision,[154] the case law in New Mexico instructs that nomenclature is not controlling so long as the basis for relief is evident. "Recitation of the precise basis for the relief sought is not controlling; the court must look to the substance of the relief sought." *Mendoza v. Mendoza*, 1985-NMCA-088, ¶ 24, 103 N.M. 327, 706 P.2d 869, 874; *id.* ¶ 21 (reviewing case under Rule 60(B), nine years after judgment, even though parties did not refer to Rule 60(B) in their motions). "The manner in which the relief is requested and the nomenclature used is not significant." *Phelps Dodge Corp.*, 1978-NMSC-053, ¶ 18; *id.* (granting relief under Rule 60(B) even where the request for relief did not specifically mention Rule 60(B)). Because the basis under Rule 1-060(B) was evident from the briefing and argument before the district court, the court had the discretion to ensure that justice would be done and the result would address the true merits.

In this case, the correspondence sent from OMR to over 900 Las Campanas members, in addition to the Lyle Anderson correspondence, was new evidence identified after the entry of the Court's Order granting OMR's Motion

[154] Oct. 3, 2012, CD, 9:17:31 to 9:18:05.

to Dismiss.[155] As provided above, Plaintiffs' discovery request asked for all correspondence, inter alia, "concerning or related to any contract or any agreement among or between" MGBD, OMR, Marotta, Altman, the Bank of Scotland, Las Campanas, or any of the Lyle Anderson companies.[156] While Plaintiffs' briefing and argument explained that the discovery request was broad enough to encompass the correspondence provided in Plaintiffs' MTR,[157] and had been intentionally withheld, the court was not persuaded. The district court stated, with no more than a sentence of elaboration, that the request "may have been about the relationship [between these certain people or entities] but it wasn't about contracts."[158]

The correspondence, however, is relevant to Plaintiffs' discovery request because the letters provide an abundance of specifics regarding the new business agreements established to fill the void as a result of Lyle Anderson's default on the Las Campanas development. The letters were for the purpose of soothing the community's legitimate concerns as to unfinished work, ongoing maintenance, and future plans for the Las Campanas development, and explained the new agreements and contracts formed in order to maintain the value and continue the stewardship of the property. For example, the OMR correspondence addressed

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[155] 7 RP 1398-1407; 9 1975-76.
[156] 9 RP 1975.
[157] 9 RP 1975-76; Dec. 21, 2012, CD, 10:05:11 to 10:06:00.
[158] Dec. 21, 2012, CD, 10:12:56 to 10:13:16.

the agreements between the Bank of Scotland and the Lyle Anderson companies, OMR and Las Campanas, and MGBD and OMR, among others. The letter discussed the agreement between the Bank of Scotland and the LAC in addition to the appointment of Marotta and others as directors of Las Campanas through the Bank of Scotland's stock-pledge agreement to replace the directors for all LAC companies.[159] The letter specifically answered "Who actually 'owns' the properties now," in explaining the new agreements formed in the wake of the default.[160] The letter also discussed the formation of OMR and the appointment of OMR as the "new management company."[161] Lyle Anderson's letter to the community, which was also withheld, complemented the OMR letter in reiterating the new agreements and contracts formed, such as the appointment of MGBD and the formation of OMR as the "new management company."[162]

The omission of this correspondence substantially interfered with Plaintiffs' ability to fully and fairly prepare for the personal jurisdiction hearing on OMR's Motion to Dismiss. Given that discovery requests are liberally and broadly construed under the Rules of Civil Procedure,[163] the district court's

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[159] 7 RP 1398-1404.
[160] 7 RP 1399.
[161] 7 RP 1402.
[162] 7 RP 1405-07.
[163] Requests for discovery are broadly construed and are considered relevant if there is ***any*** possibility that the information sought may be relevant to the subject matter of the action. *United Nuclear Corp. v. General Atomic Co.*, 1980-NMSC-

abrupt decision holding that the discovery request was not relevant to the correspondence at issue was an abuse of discretion. *See Phelps Dodge Corp.*, 1978-NMSC-053, ¶ 20 (providing standard for review on Rule 60 motion is abuse of discretion). This correspondence is relevant and would have unquestionably changed the personal jurisdiction outcome in this matter, had it been provided to the district court at the Motion to Dismiss hearing, and was neither cumulative, insignificant, or of marginal relevance.

Because the request asked for all "communications" relevant to any agreements or contracts, including correspondence, between the various entities relevant to this litigation, the court erred in its narrow interpretation, which resulted in the court unreasonably excluding the evidence from consideration altogether. "An abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." *Sims v. Sims*, 1996-NMSC-078, ¶ 65, 122 N.M. 618, 930 P.2d 153. "To reverse the district court under an abuse-of-discretion standard, 'it must be shown that the

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094, ¶ 70, 96 N.M. 155, 629 P.2d 231, 250. "The pretrial discovery rules, including Rule 26, intend a liberal pretrial discovery, to enable the parties to obtain the fullest possible knowledge of the facts before trial." *Marchiondo v. Brown*, 1982-NMSC-076, ¶ 13, 98 N.M. 394, 649 P.2d 462, 465. "The key phrase in this definition—'relevant to the subject matter involved in the pending action'—has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

court's ruling exceeds the bounds of all reason . . . or that the judicial action taken is arbitrary, fanciful, ***or unreasonable***.'" *Martinez*, 2004-NMSC-006, ¶ 20 (emphasis added) (quoting *Meiboom v. Watson*, 2000-NMSC-004, ¶ 29, 128 N.M. 536, 994 P.2d 1154).

In this matter, the exclusion of this evidence for consideration prejudiced Plaintiffs' case because the court used the exclusion of this evidence as the basis to deny personal jurisdiction. *Cf. State v. Guerra*, 2012-NMSC-014, ¶ 33, 278 P.3d 1031 ("Courts should apply the extreme sanction of exclusion of a party's evidence sparingly."). To refuse consideration of relevant evidence firmly establishing Plaintiffs' prima facie case for jurisdiction was unreasonable and prejudiced Plaintiffs as it resulted in the extreme sanction of dismissal of this case. Because our law requires that the substance of the relief sought is more important than the form or nomenclature of the relief requested, *Phelps Dodge Corp.*, 1978-NMSC-053, ¶ 18, the district court abused its discretion in omitting this evidence, which this Court may consider in its de novo determination of the personal jurisdiction issue.

iii. Because Defendants misrepresented or engaged in other misconduct that prevented Plaintiffs from fully and fairly presenting their case for personal jurisdiction, the district court erred in dismissing Plaintiffs' Motion to Reconsider under Rule 1-060(B)(3).

The district court erred in not granting Plaintiffs' MTR, under Rule 1-060(B)(3) NMRA, after receiving evidence that Defendants, including Defendant OMR, misrepresented or engaged in misconduct by withholding deliberate communications (i.e., the correspondence at issue) between OMR and the members of Las Campanas. Plaintiffs' MTR explicitly referenced Rule 1-060(B)(3),[164] which provides relief from a judgment obtained by fraud, misrepresentation, or other misconduct of an adverse party, and must be proved by clear and convincing evidence. "[T]he fraud must have prevented the moving party from fully and fairly presenting his case." 11 C. Wright & A. Miller, *Fed. Pract. & Proced.* § 2860, at 413 (2012) [hereinafter "11 Wright & Miller 2012"]. "The rule applies to misconduct in withholding information called for by discovery and it does not require that the information withheld be of such a nature as to alter the result in the case. The rule is addressed to judgments that are unfairly obtained and not at those which are factually incorrect." *Dunn v. Consol. Rail Corp.*, 890 F.Supp. 1262, 1269 (M.D.La. 1995).

Plaintiffs established, by clear and convincing evidence, that Defendants misrepresented or engaged in "other misconduct" in withholding relevant discovery documents (and submitting affidavits controverting this relevant evidence) that prevented Plaintiffs from fully and fairly presenting the personal

[164] 6 RP 1380-92; 7 1453-66.

jurisdiction issue below.[165] For OMR to have withheld the correspondence at issue from Plaintiffs permitted OMR to unfairly obtain a favorable judgment on its Motion to Dismiss; the evidence indicates reasonable people could disagree as to whether OMR had management responsibilities at Las Campanas. "Failure to disclose or produce materials requested in discovery can constitute 'misconduct' within the purview of this subsection." *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 923 (1st Cir. 1988). Not only did OMR withhold this information, OMR attached affidavits from Altman and Marotta that directly contradicted OMR's contacts with the forum, as shown in the correspondence.[166] The term misconduct "can cover even accidental omissions," is broadly construed, and "does not demand proof of nefarious intent or purpose as a prerequisite to redress." *Id.* at 923-24.

Given the materiality and relevance of the withheld correspondence, this misconduct (including OMR's affidavits of Altman and Marotta directly contradicting this evidence and supporting this misconduct[167]) prevented Plaintiffs from full and fair preparation and presentation of the personal jurisdiction issue. As such, it was an abuse of discretion for the district court to have denied Plaintiffs' MTR under Rule 1-060(B)(3).

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[165] 6 RP 1380-92; 7 RP 1453-63; 9 RP 1971-84.
[166] 3 RP 568-72; 4 RP 744-52.
[167] 3 RP 568-72; 4 RP 744-50.

iv. Rule 60(B)(6) should not be construed as mutually exclusive with Rule 60(B)(2).

There is a tension in New Mexico law between the liberality with which Rule 1-060(B) is to be applied, and cases applying this standard, and case law suggesting the provisions of Rule 60(B)(1)-(5) and 1-060(B)(6) are mutually exclusive. Because the district court denied Plaintiffs relief under (B)(2) or (B)(3), which Plaintiffs dispute, the court did not believe it had discretion to grant relief under (B)(6).[168] Under (B)(6), a district court may grant relief for "any other reason justifying relief" if made within a reasonable time and under exceptional circumstances, and the rule is applied liberally. *See Matter of Drummond*, 1997-NMCA-094, ¶ 15, 123 N.M. 727, 945 P.2d 457 (providing (B)(6) "is the 'exceptional circumstances' provision of Rule 60(B), which allows a judgment to be reopened within a reasonable time if such circumstances are present"). While the evidence should not have been excluded under (B)(2) or (B)(3), as explained above, the district court had discretion to rule under Rule 1-060(B)(6), in the interest of justice.

This determination, however, depends on whether this Court demands that a plaintiff be bound by a strict categorization of particular claims under Section B of Rule 1-060. Plaintiffs suggest that such a bright-line rule unnecessarily infringes upon the district court's power to reverse an order or reopen judgment

[168] Dec. 21, 2012, CD, 10:13:16 to -51.

under Rule 1-060(B), without materially advancing the primary purpose of the Rule, which is to ensure justice is done in any given case.

New Mexico, on the one hand, interprets Rule 1-060(B) liberally, demanding that neither the nomenclature nor form of the relief sought is important; if the basis under the rule is evident, the court has discretion to ensure that justice will be done and the result will address the true merits. *Phelps Dodge Corp.*, 1978-NMSC-053, ¶ 18. Under Rule 1-060(B), the substance of the relief sought is what is important, not the form. *Mendoza*, 1985-NMCA-088, ¶ 24. "'Nomenclature is not important. The label or description that a party puts on its motion does not control whether the party should be granted or denied relief [under Rule 60(B)]. . . ." *In re Estate of Harrington*, 2000-NMCA-058, ¶ 11, 129 N.M. 266, 5 P.3d 1070 (quoting 12 James Wm. Moore, *Moore's Federal Practice* § 60.64 (3d ed. 1997)); *see Barker v. Barker*, 1980-NMSC-024, ¶ 29, 94 N.M. 162, 608 P.2d 138, 143 (stating, in a personal jurisdiction case, that "[i]t is of little consequence and of no particular materiality whether the wife's application for relief, which is within the purview of Rule 60(b), is stated with precision and particularity. Under Rule 60(b) the trial court has authority to vacate a final judgment and to grant relief therefrom sua sponte.").

On the other hand, there is also law in New Mexico indicating that Rule 60(B)(1)-(5) and 1-060(B)(6) are mutually exclusive. *See Meiboom*, 2000-

NMSC-004, ¶ 33 ("[P]arties seeking relief under Rule 1-060(B)(6) must demonstrate the 'existence of exceptional circumstances and reasons for relief other than those set out in Rules 1-060(B)(1) through (5)'") (quoted authority omitted); *Fowler-Propst v. Dattilo*, 1991-NMCA-030, ¶ 4, 111 N.M. 573, 807 P.2d 757, 758 (providing (B)(6) is "limited in scope to reasons not addressed in the five preceding clauses").

The Tenth Circuit addressed this precise question, concluding that when "the motion is timely filed under any of the 60(b) clauses, the court should not be bound by a strict categorization of particular claims." *In re Four Seasons Sec. Laws Litig.*, 502 F.2d 834, 841 (10th Cir. 1974). The Court stated that, "[w]e must at the outset dismiss appellants' contention that the provisions of Rule 60(b)(1)-(5) and 60(b)(6) are mutually exclusive." While "the weight of authority indicates that a Rule 60(b)(6) motion must be based upon some reason other than those stated in clauses (1)-(5). . . . this rule stems of necessity from the one-year time limitation which attaches to motions for relief under 60(b)(1)-(3)." *Id.* The Tenth explained that "Rule 60(b)(6) requires only that the motion be made within a 'reasonable time' and it would obviously frustrate the one-year limitation if a 60(b)(6) motion could be brought after this period for reasons articulated in 60(b)(1)-(3)." *Four Seasons*, 502 F.2d at 841.

Because the motion at issue was brought within the one-year time limitation, the Court stated: "We thus do not consider it necessary to attempt to pinpoint which, if any in particular, of the 60(b) clauses formed the basis for the decision of the court below." *Id.*; *see also Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 578 (D.C. Cir. 1980) (deciding "case under rule 60(b)(6) rather than under rule 60(b)(1). Because the motion was timely under either subsection, it is not crucial that a distinction between the two be made in this case") (citing 11 C. Wright & A. Miller, *Fed. Pract. & Proced.* § 2864, at 212 (1973)).

While there is authority for the proposition that clause six and the first five clauses are mutually exclusive, these cases are primarily concerned with attempts to circumvent the one-year time limit under clauses (B)(1)-(3) or other time restrictions, such as the 10-day deadline within which to file a Motion to Reconsider under Rule 1-059. "For the most part, cases brought under clause (6) are attempts to avoid either the one-year limit in other clauses of Rule 60(b) or time restrictions for other types of post-trial review imposed in other rules." 11 Wright & Miller 2012, *supra*, § 2864, at 502. "There has not been much difficulty in construing or applying the rule in cases in which the motion is made within a year of judgment. In those cases it is not important to decide whether the motion in fact comes under clause (6) or under one of the earlier clauses.

These prompt motions for relief are granted if the court thinks that justice requires it and denied if the court feels otherwise." *Id.* § 2864, at 491 (footnotes omitted).

The exceptional circumstance here is the dismissal of this case, on personal jurisdiction grounds, when the letters and affidavits attached to Plaintiffs' MTR unquestionably reflect that Plaintiffs have made a prima facie case for jurisdiction, with all evidence construed in Plaintiffs' favor by law. *Sproul*, 2013-NMCA-072, ¶ 6. There is no untimeliness issue here, as in other cases, because Plaintiffs' MTR was not only filed within one-year after entry of the Order, the Motion was timely filed within 10 days of the Order. *Compare* 6 RP 1370 *with* 6 RP 1380. There was no attempt to circumvent any of the time limitations under Rule 1-059 or Rule 1-060(B), and no prejudice to OMR given only 10 days had elapsed from the district court's Order. Given the low burden a plaintiff has in establishing personal jurisdiction (only requiring a prima facie case be established), for the district court to have omitted from its consideration the evidence included in Plaintiffs' MTR, resulting in the extreme sanction of dismissal of this case, is unjust and does not reflect the true merits.

To dismiss this case does not reflect the policy and purpose behind Rule 1-060, which is to ensure that any judgment reflects the true merits of the issue or case before the court. *Martinez*, 2004-NMSC-006, ¶ 20. Because a district court

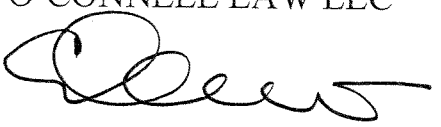
has the discretion to order a new trial or reconsider an order sua sponte under the Rule, *id.* ¶ 15, and is instructed to focus on the substance of the relief sought, rather than its form, reversing the district court Order granting Defendant OMR's Motion to Dismiss on Personal Jurisdiction grounds is proper.

VI. Conclusion

Because the evidence collectively indicates Plaintiffs established a prima facie case for personal jurisdiction over Defendant OMR, Plaintiffs respectfully request this Court reverse the district court's Order granting OMR's Motion to Dismiss on personal jurisdiction grounds and permit this case to proceed on the merits.

Respectfully submitted,

O'CONNELL LAW LLC



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Request for Oral Argument

Plaintiffs-Appellants respectfully request oral argument in this matter, pursuant to Rule 12-214 NMRA. Oral argument will assist the Court in reaching a sound and efficient resolution of any questions or concerns that may remain after briefing is completed, thereby ensuring that an opinion can be drafted and filed as quickly as possible.

Certificate of Service

I hereby certify that on September 16, 2013, I served a true and correct copy of this Brief in Chief via email on:

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