IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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-Appellants,

v.

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

Defendants-Appellees.

Ct. App. No. 32,731

(Santa Fe County Cause No. D-101-CV-2010-01766; Honorable Sarah M. Singleton, Trial Judge)

ANSWER BRIEF
OF
DEFENDANT-APPELLEE OASIS MANAGEMENT RESOURCES, LLC

Respectfully Submitted,

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SUPPLEMENT TO SUMMARY OF THE PROCEEDINGS

Appellants Mabry Construction, Inc., FFT, LLC, Placita de la Tierra, LLC f/k/a Town Center at Las Campanas, LLC, and Oso 3 Investments, LLC (collectively "Mabry") present a lengthy description of the proceedings that have occurred before the trial court below. Unfortunately, Mabry continues the same habits displayed before the trial court in cherry picking evidence from the record and drawing conclusions that are not supported by that evidence. Because many of the conclusions drawn by Mabry spring only from the collective imagination of the Appellants, Appellee Oasis Management Resources, LLC ("OMR") will supplement the Summary of Proceedings with a fuller picture of what occurred before the District Court leading to the dismissal of OMR from this proceeding.

Contrary to the assertions made by Mabry, neither the Las Campanas ("LC") development project, nor its sister projects located in Hawaii, Scotland, and Arizona are now owned or have ever been owned by the Lyle Anderson Company, Inc. ("LAC") [BIC at 7]. The LC development project is owned by Las Campanas Holding Company, LLC, which in turn is owned by LAFC Continental Holding Co, LLC, which in turn is owned by LAFC North America Holding Co. LLC ("LAFC NA").[1] **[4 RP 730]** All of the foregoing companies are ultimately owned

[1] The note securing the Bank of Scotland's mortgage interest in Las Campanas property was sold to a third party, which subsequently accepted transfer of all Las

by Lyle Anderson ("Anderson") as an individual. **[8 RP 1779, 1780]** LAC is a separate company owned by Anderson that historically provided back office services for all the Anderson family of companies, including LC, such as accounting services, assistance in the preparation of tax forms, information technology, and personnel services. **[3 RP 569-570; 8 RP 1780]**

Before 2008, the Anderson family of companies was comprised of fifty-three separate entities, including companies owning golf course development projects in New Mexico (LC), Arizona, Hawaii and Scotland. The development projects obtained their financing through a Master Credit Facility with the Bank of Scotland ("Bank"). **[3 RP 569]** In 2008, with the collapse of the real estate market, the development projects became unable to pay their debts. The master loan with the Bank was declared to be in default and the Bank exercised its right under stock pledge agreements to reconstitute the Boards of Directors of each borrower company. **[3 RP 569; 7 RP 1630]** Steve Marotta ("Marotta") and Phillip Gund ("Gund") were elected to the Board of LC, as well as the boards of the other Anderson companies. **[4 RP 730; 744-745]** Richard Altman ("Altman") originally was chosen as Vice-President of LC, but later became its president. **[3 RP 570; 630; 7 RP 1629]** Both Marotta and Gund are principals in Marotta, Gund, Budd & Dzera, LLC, ("MGBD"), a restructuring firm from New York. **[3**

Campanas assets in lieu of foreclosure. This Brief reflects the ownership interests at the time of briefing of OMR's Motion to Dismiss.

RP 641] MGBD provided management services to LC pursuant to an operating agreement between MGBD and LAFC NA. **[4 RP 745; 7 RP 1631]** MGBD is paid on an hourly basis for the services rendered to LC and its sister companies. **[7 RP 1632]** Both Marotta and Altman receive payment for their services through their employer, MGBD, not LC and not OMR. **[4 RP 744-746; 7 RP 1629, 1631-32]**

After the various company Boards were reconstituted and Anderson was removed from their management, two of the existing holding companies, LAFC NA and LAFC UK Holding Co. LLC ("LAFC UK"), together formed OMR, each holding a fifty percent interest.[2] OMR was formed for the sole purpose of taking over the back office services previously performed for the various entities by LAC. **[3 RP 570]**[3] It is a Delaware company with its principal place of business in Arizona. It has no offices in New Mexico and employs no one in New Mexico. It does not have a New Mexico tax number and pays no taxes of any kind in New Mexico. It maintains no bank accounts in New Mexico and is not registered to do business in New Mexico. It has never solicited business in or advertised in New

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[2] Mabry erroneously attributes formation of LAFC NA and LAFC UK holding companies to the period after the removal of management responsibilities from Anderson. These companies existed long before that event. **[7 RP 1505-1510]**

[3] LAC was not covered by the Master Credit Facility so the Bank had no authority to reconstitute its Board. Thus, a new entity was needed to provide the back office services to the Anderson companies that had formerly been provided by LAC.

on the date of filing of the motion, it would be considered filed under Rule 1-059(e) rather than under §39-1-1. Mabry's only hope to resurrect its appeal of the original order of dismissal lies in the Supreme Court's dicta stating that a post judgment motion for reconsideration will be treated either as a Rule 1-059(e) motion or a Rule 1-060 motion solely based on the timing of the motion. *Id.* ¶9.

While Mabry is correct that nomenclature is not decisive, **[BIC 3** (citing *Albuquerque Redi-Mix*, ¶10)], substance certainly is. *State v.* Paiz, 2011-NMSC-008, ¶31, 249 P.3d 1235, 1243 ("The movant need not cite the provision authorizing the motion; the substance of the motion, not its title, controls."); *Essex Chiropractic Office v. Amica Mut. Ins. Co.*, 2012 WL 116569, 1-2 (Mass.App.Div.) ("[T]he better approach ... is that substance, not labels, should control in determining whether a postjudgment motion is a rule 59(e) motion or a rule 60 motion."); *Jaylo v. Jaylo*, 248 P.3d 1219, 1227-1228 (Hawai'i App. 2011), *reversed on other grounds,* 262 P.3d 245 ("While Wife did not explicitly bring her ... Motion pursuant to ... Rule 60(b), we look to the substance of her motion to determine its nature."); *United Co-op. Farmers, Inc. v. Aro*, 2008 WL 3316525, 2 (Mass.Super.), *reversed on other grounds*, 2009 WL 3245456, 1 (Mass.App.Ct.) ("The substance of Defendants' Motion to Vacate was and remains one filed pursuant to Rule 60, not Rule 59(e). As such it cannot toll the applicable time period for filing an appeal with respect to the two motions untimely filed."); *Ade v.*

Batten, 878 P.2d 813, 815-16 (Idaho App. 1994) ("[S]ubstance controls in determining whether a post-judgment motion is a Rule 59(e) or a Rule 60 motion.").

This matter presents a fact situation much like that considered by the District of Columbia Circuit Court of Appeals in *Nuyen v. Luna*, 884 A.2d 650 (D.C. 2005), in which the appellant filed a NA that was timely under both their civil Rule 59(e) and Rule 60. Even though appellant termed the motion for reconsideration as one falling under Rule 59(e), the appellate court disagreed, finding that it was in reality a motion under Rule 60 because it sought consideration of additional circumstances rather than relief from the adverse consequences of the original order resulting from an error of law. Citing 12 James Wm. Moore Et Al., Moore's Federal Practice ¶60.03[4] at 60-25 (3d ed. 2005) ("... [E]ven if filed within the time limit for a motion under FED. R. CIV. P. 59(e), a motion seeking relief on grounds of excusable neglect will be treated as a Rule 60(b)(1) motion, since Rule 59(e) does not provide a vehicle for a party to undo its own procedural failures."). Consequently, the appellant had failed to timely file a NA.

The Tenth Circuit Court of Appeals has abandoned its previous pronouncements that all motions for reconsideration filed within ten days of entry of a judgment will be considered as Rule 59(e) motions. *Jennings v. Rivers*, 394 F.3d 850 (10th Cir. 2005). Recognizing earlier case law decided under a previous

version of the Federal Rules of Appellate Procedure allowing post-judgment motions filed within ten days to be treated as Rule 59(e) motions, the Tenth Circuit now considers these cases as a source of confusion. *Id.* at 855. Instead, the Tenth Circuit determined that postjudgment motions need to be evaluated based upon their substance, and not upon their timing. *Id.* ("District courts should evaluate postjudgment motions filed within ten days of judgment based on the reasons expressed by the movant, not the timing of the motion."); *see also*, *Obriecht v. Raemisch*, wherein the Seventh Circuit Court of Appeals observed:

> Recently, ..., we clarified that whether a motion filed within 10 days of the entry of judgment should be analyzed under Rule 59(e) or Rule 60(b) depends on the *substance* of the motion, not on the timing or label affixed to it. Therefore, the former approach—that, no matter what their substance, all post-judgment motions filed within 10 days of judgment would be construed as Rule 59(e) motions—no longer applies. In short, motions are to be analyzed according to their terms. When the substance and label of a post-judgment motion filed within 10 days of judgment are not in accord, district courts should evaluate it "based on the reasons expressed by the movant." (Internal citations omitted).

Obriecht v. Raemisch, 517 F.3d 489 (7th Cir. 2008) (emphasis added).

Mabry, having chosen to bring a Rule 1-060 motion, both in title and substance, alleging that the Court's earlier order should be withdrawn because of "fraud and misrepresentation," **[6 RP 1391]**, should have filed their NA within

thirty days of entry of the original order dismissing OMR.[12] Because they did not do so, this Court cannot consider the merits of any appeal from the provisions of the original order. *Capco Acquisub, Inc. v. Greka Energy Corp.*, 2007-NMCA-011, ¶16, 140 N.M. 920, 925-926, 149 P.3d 1017, 1022-1023 (A Rule 1-060 motion has "no effect on the parties' ability to calculate the time in which they must file their notice of appeal ... because a motion under Rule 1–060(B) 'does not affect the finality of a judgment or suspend its operation'."); *Hatfield v. Painter*, 671 S.E.2d 453, 460 (W.Va. 2008) ("Insofar as a Rule 60(b) motion does not stop the running of the appeal period, "[a]n appeal of the denial of a Rule 60(b) motion ... brings to consideration for review only the order of denial itself and not the substance supporting the underlying judgment nor the final judgment order."); *Rodriguez-Antuna v. Chase Manhattan Bank Corp.*, 871 F.2d 1, 2 (1st Cir. 1989) (Holding that appeal from order denying motion under Rule 60 does not resurrect an expired right to appeal the original judgment.).[13]

Thus, dicta in *Albuquerque Redi-Mix* regarding treating Rule 1-060 motions filed within ten days of a judgment as Rule 1-059(e) motions has no impact on the

[12] When queried as to why Mabry had brought its motion pursuant to Rule 1-060(B)(3) rather than Rule 1-060(B(2), Mabry's counsel reinforced that their decision was based upon the alleged misrepresentations and fraud of OMR and its principals, "which I think the court made its decision on." **[CD, 10-3-12, 9:17:35 to 9:18:52]**

[13] Rules 1-059(e) and 1-060 serve different purposes and have different criteria. *See, e.g., Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000); *Boone v. Daughtery*, 2013 WL 5836329, 1 (W.D. Pa.).

long-standing rule that the substance of the motion determines its treatment, and that the filing of a Rule 1-060 motion does not toll the time for an appeal. Even though there have been recent amendments to Rule 12-201 clarifying that certain post-judgment motions toll the time in which to file a NA, a Rule 1-060 motion is not among them. *See Rosales v. State Taxation and Revenue Dept., Motor Vehicle Div.*, 2012-NMCA-098, ¶¶9-11, ___N.M.___, 287 P.3d 353, 355-56 (Noting that the Supreme Court amended Rule 12-201 to clarify that the automatic denial portion of §39-1-1 was superseded). Having failed to timely file its NA, this aspect of the appeal must be dismissed.

II. ASSUMING THAT MABRY'S NOTICE OF APPEAL FROM 4/20/2012 ORDER WAS TIMELY, THE COURT DID NOT ERR IN DISMISSING OMR FOR LACK OF PERSONAL JURISDICTION.

Even if the Court concludes that Mabry's Notice of Appeal was timely with respect to the Court's 04/20/2012 Order dismissing OMR, the Court did not err in determining that OMR lacks the necessary contacts with New Mexico to subject it to the jurisdiction of New Mexico courts. The standard of review to be applied by the Court of Appeals is *de novo*. *Sproul v. Rob & Charlies, Inc.*, 2013-NMCA-072, ¶6, 304 P.3d 18; *M.R. v. Serenicare Funeral Home, LLC*, 2013-NMCA-022, ¶7, ___N.M.___, 296 P.3d 492. Because the original motion was determined on affidavits and briefs, the Court of Appeals will apply the same review it applies in a motion for summary judgment. *Sproul*, 2013-NMCA-072, ¶6 ("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."). The plaintiff must sustain the burden of proof of jurisdiction when it is controverted. *Allen v. Toshiba Corp.*, 599 F.Supp. 381, 387 (D.N.M. 1984) ("Where the alleged jurisdictional basis is controverted, the Plaintiff must sustain the burden of proof on the jurisdictional issue."); *Tercero v. Roman Catholic Diocese of Norwich, Connecticut*, 2002-NMSC-018, ¶5, 132 N.M. 312, 316, 48 P.3d 50, 54 ("Where, as here, a timely challenge is raised under Rule 1-012(B)(2) NMRA 2002 contesting personal jurisdiction, the party asserting such jurisdiction has the burden of establishing that fact.").

New Mexico jurisprudence is well developed that, before personal jurisdiction can be asserted over an out-of-state defendant, the "key focus" is whether the defendant has purposefully availed itself of the benefits and protections of New Mexico law. *F.D.I.C. v. Hiatt*, 1994-NMSC-094, ¶9, 117 N.M. 461, 464, 872 P.2d 879, 882 ("[O]ur inquiry will focus on whether the transaction entered into by the Hiatts amounts to a purposeful decision by the Hiatts to participate in the local economy and to avail themselves of the benefits and protections of New Mexico law."). The touchstone of a minimum contacts analysis continues to be whether the defendant personally established minimum contacts in the state. *Sproul*, 2013-NMCA-072, ¶9.

A New Mexico court has general jurisdiction over a nonresident defendant, "when its 'affiliations with the [s]tate are so continuous and systematic as to render [it] essentially at home in the forum [s]tate.'" *Id.* at ¶12.[14] Consequently, due process considerations prohibit general jurisdiction over a corporate defendant whose contacts with the forum state are isolated and tenuous. *Id.* at ¶12 ("[D]ue process prohibits general jurisdiction over corporations when corporate ties arise from 'the casual presence of the corporate agent or even his conduct of single or isolated' acts unrelated to the claim.") In evaluating general jurisdiction over corporations, the Court will evaluate such factors as whether the company is incorporated under the laws of New Mexico; whether it has corporate employees, officers, or agents in New Mexico; and whether it has manufacturing facilities in the state. *Id.* at ¶13. Purchases of a corporation's products, even if done at regular intervals, do not sustain a finding of general jurisdiction over a corporate defendant. *Id.* at ¶14.

To subject a defendant to specific jurisdiction, the defendant must have purposefully availed itself of the benefits and protections of New Mexico's laws. *Id.* at ¶16. The Court will then assess "purposeful availment" by examining the defendant's activities directed to New Mexico. *Id.* In addition, "specific

[14] *See also, Zavala v. El Paso County Hospital District*, 2007–NMCA–149, ¶¶17–29, 143 N.M. 36, 172 P.3d 173 (setting out differences between general personal jurisdiction and specific jurisdiction).

jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Id.* at ¶17 (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, ___U.S.___, __, 131 S.Ct. 2846, 2853, 180 L.Ed.2d 796 (2011)). The Court will determine specific jurisdiction on a case-by-case basis as it is not susceptible to a "mechanical formula or rule of thumb." *Id.* ¶17.

Personal jurisdiction will not exist when a defendant steps into an already existing business relationship and did not purposefully avail itself of the privilege of conducting business in New Mexico. *F.D.I.C.*, 1994-NMSC-094, ¶10. Confirmation of a business agreement already established and not initiated by the defendant will not subject the defendant to personal jurisdiction in New Mexico. *Customwood Mfg., Inc. v. Downey Const. Co., Inc.*, 1984-NMSC-115, ¶6, 102 N.M. 56, 691 P.2d 57. *Cf Valley Wide Health Services, Inc. v. Graham*, 1987-NMSC-053, ¶10, 106 N.M. 71, 72, 738 P.2d 1316, 1318 (Holding that a telephone call from out of state physician did not subject him to personal jurisdiction in New Mexico courts when physician/patient relationship had previously begun in Colorado.). A business relationship initiated outside the state will not subject an out of state defendant to the jurisdiction of New Mexico courts even though the effects of that relationship will be experienced in New Mexico. *Serenicare*, 2013-NMCA-022, ¶16.

It is the acts of OMR, and not any other entity or third party, that determines whether it should be subjected to the personal jurisdiction of New Mexico courts. *Sublett v. Wallin*, 2004-NMCA-089, ¶28, 136 N.M. 102, 109, 94 P.3d 845, 852 ("[W]e have also recognized that "[i]t is [a] defendant's activities which must provide the basis for personal jurisdiction, not the acts of other defendants or third parties."); *Sanchez v. Church of Scientology of Orange County*, 1993-NMSC-034, ¶10, 115 N.M. 660, 663, 857 P.2d 771, 774. Random, fortuitous or attenuated contacts are not sufficient. *Id.* at ¶15. Nor does the use of mail, telephones, or other means of communication constitute purposeful availment of the state's benefits. *Id.* This is particularly significant when the defendant did not solicit, advertise, or initiate a business transaction in New Mexico. *CABA Ltd. Liability Co. v. Mustang Software, Inc.*, 1999-NMCA-089, ¶22, 127 N.M. 556, 564, 984 P.2d 803, 811. Telephone communications that are ancillary to the defendant's primary functions, and which occur outside of New Mexico, do not constitute sufficient contacts with the state. *DeVenzeio v. Rucker, Clarkson &* McCashin, 1996-NMCA-064, ¶13, 121 N.M. 807, 810, 918 P.2d 723, 726. Similarly, use of a passive website that imparts information but does not involve interactive communication does not subject a company to personal jurisdiction. *Sublett*, 2004-NMCA-089, ¶29.

When assessing the rendering of services by an out of state defendant during a minimum contacts analysis, the "focus must be on the place where the services are rendered, since this is the place of the receiver's ... need." *Serenicare*, 2013-NMCA-022, ¶18 (quoting *Tarango v. Pastrana*, 1980-NMCA-110, ¶13, 94 N.M. 727, 729, 616 P.2d 440, 442). Providing personal services outside the state without evidence that the defendant reached into the forum state does not subject the defendant to personal jurisdiction in New Mexico. Even the commission of an intentional tort whose effects will be suffered in New Mexico will not result in personal jurisdiction over the tortfeasor without minimum contacts. *Serenicare*, 2013-NMCA-022, ¶17 ("The constitutional inquiry...is not dependent upon the type of tort or the underlying transaction in dispute. The inquiry is whether [the d]efendants have such minimum contacts with New Mexico so that the suit does not offend due process.") (quoting *Santa Fe Technologies., Inc. v. Argus Networks, Inc.*, 2002–NMCA–030, ¶19, 131 N.M. 772, 42 P.3d 1221).

Mere allegations that a defendant has committed a business tort by interfering with contractual relationships will not subject a defendant to personal jurisdiction in New Mexico without the constitutionally required minimum contacts. *Santa Fe Technologies*, 2002-NMCA-030 at ¶21. Instead, the court must conduct a particularized inquiry into the prior negotiations, anticipated future consequences, terms of the contract, and the parties' course of dealings. *Id.* at ¶21.

Because the constitutional test is one of "purposeful availment," the court will analyze the business activities directed towards New Mexico. *Id.* at ¶21.

Applying general principles of constitutional law governing minimum contacts with a forum state as set forth above to the facts viewed in the light most favorable to Mabry, it is clear that New Mexico courts have neither general nor specific personal jurisdiction over OMR. It is undisputed that OMR is a Delaware company, with its principal place of business in Arizona. It has no employees in New Mexico; it pays no taxes in New Mexico; it maintains no offices in New Mexico; it has no bank accounts in New Mexico; it has no telephone numbers in New Mexico; and the back office services it performs for LC are done in Arizona. **[3 RP 568-572]** It receives its instructions for the services it performs from the officers and directors of the Anderson companies, who reside in New Jersey. It has, on one occasion, sent an employee to New Mexico to organize and inspect LC's accounting files as part of the accounting functions it performs. On another occasion, it sent an IT expert to Santa Fe to disengage The Club from the LC's server once ownership of the Club was conveyed. As part of its loan servicing functions, it notifies people who are paying off notes of the final balance on the note.[15] These contacts with New Mexico are hardly "so continuous and systematic

[15] Mabry redacted the date on the letter on which it relies. **[4 RP 700]** Activities engaged in by a foreign defendant after the activities of which plaintiff complains are irrelevant to a minimum contacts analysis. *Tercero v. Roman Catholic Diocese*

as to render [it] essentially at home" in New Mexico. *Sproul,* 2013-NMCA-072, ¶12. Instead, these are random and fortuitous contacts that arise from its existing contract to provide back office services to all the Anderson companies from its home office in Arizona: contacts that do not meet the minimum contacts requirements of due process. *Id.* New Mexico courts have no general jurisdiction over OMR.

Similarly, New Mexico courts have no specific jurisdiction over OMR. Upon examining the activities that OMR has directed to New Mexico, it is clear that OMR has not purposefully availed itself of the benefits and protections of New Mexico. Mabry cannot demonstrate that OMR reached out to New Mexico to entice anyone to do business with it. Instead, it was formed by two out-of-state holding companies to provide back office services to multiple Anderson companies from its offices in Arizona. Mabry cannot show that it advertised in New Mexico, other than maintaining a general informational website that is not interactive in nature. Such a website does not subject a company to the jurisdiction of New Mexico courts. *Sublett*, 2004-NMCA-089, ¶ 29. Finally, the use of mails or telephones to communicate with anyone in New Mexico does not subject OMR to personal jurisdiction. *Sanchez*, 1993-NMSC-034, ¶15. This is particularly true

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of Norwich, Connecticut, 2002-NMSC-18, ¶9, 132 N.M. 312, 317, 48 P.2d 50, 55 ("As a general rule, the existence of personal jurisdiction may not be established by events which have occurred after the acts which gave rise to Plaintiff's claim.") It is impossible to determine when this letter was sent.

given that OMR never initiated any business transactions with New Mexico. *CABA Ltd.*, 1999-NMCA-089, ¶22.

OMR performs services for LC. Thus, an analysis of its contacts focuses on where the services are rendered – Arizona. *Serenicare*, 2013-NMCA-022, ¶18. Performance of personal services outside New Mexico, coupled with the fact that OMR did not reach into the forum state to initiate any business transaction, does not translate into personal jurisdiction over OMR. *Id.*

Mabry relies heavily on activities of MGBD to establish jurisdiction over OMR. MGBD is not a party to this litigation even though Mabry continues to act as though it is. Importantly, activities of other defendants and/or third parties are not relevant in considering whether OMR is subject to personal jurisdiction in New Mexico. *Sublett*, 2004-NMCA-089, ¶28. MGBD providing information regarding OMR on its website is irrelevant to OMR's purposefully reaching out to New Mexico as the forum state.

OMR's defense of litigation initiated against it in New Mexico does not subject it to the personal jurisdiction of New Mexico Courts. All litigation in which OMR participated was in a defensive posture, including one lawsuit brought to impose liability on it for activities that occurred prior to its formation. **[4 RP 729, 735]** This is hardly personal availment of the benefits and protections of New Mexico.

Thus, Mabry is left with two remaining arguments: 1) that the overlapping directorships of OMR, LC, and every other Anderson company, subjects OMR to suit in New Mexico; and 2) that OMR is, in reality, managing all of LC's functions and activities, thus amounting to personal availment of the benefits and protections of New Mexico. Mabry is incorrect on both counts.

New Mexico courts have held that corporate forms do not determine personal jurisdiction. Instead, the constitutional inquiry remains the same – minimum contacts by the defendant with the forum state. *Alto Eldorado Partnership v. Amrep Corp.*, 2005-NMCA-131, ¶7, 138 N.M. 607, 124 P.3d 585. ("[T]he true inquiry must be focused on minimum contacts and not substantive principles of corporate law...."). In *Alto*, the Court of Appeals considered whether an out-of-state corporation was subject to suit in New Mexico based upon the corporate theory of it being the alter ego of its New Mexico subsidiary. The appellate court rejected such an analysis, holding instead that a minimum contacts analysis is personal and depends upon the activities of the out-of-state defendant, not its subsidiary. In analyzing the specific facts, the Court found that the parent's mere ownership of the subsidiary would not subject it to jurisdiction. Only when that ownership amounted to complete control over the subsidiary's actions, to the extent the subsidiary was little more than a complete instrument of the parent, was the parent subject to personal jurisdiction in New Mexico. *Id.* at ¶33.

In the case at bar, the overlapping directorships of OMR and LC are not determinative of whether OMR has minimum contacts with New Mexico. Instead, the Court must consider OMR's own contacts with the state to determine whether it has such contacts that it may reasonably anticipate being hailed into a New Mexico court. *Id.* at ¶31. As part of this analysis, the Court may consider whether OMR has complete control over LC so that it has subjected itself to the jurisdiction of New Mexico. As extensively discussed, OMR is a separate company from LC. **[3 RP 569-570]** LC is not a subsidiary of OMR. OMR has continually disputed that it has any control or right to control LC in any manner and Mabry presents no evidence to the contrary.[16] Because there is no corporate right to control LC, OMR could only control it through a delegation of authority to do so. The record is undisputed that no such authority has ever been delegated to OMR. **[4 RP 744-750]** The record is further undisputed that OMR exercises no judgment on behalf of LC, but acts only on the instructions of the officers and directors of the specific Anderson companies. *Id.*

Related to the foregoing is Mabry's claim that OMR is managing LC such that it has subjected itself to personal jurisdiction. In support of this theory, Mabry

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[16] Indeed, OMR is not even a subsidiary of LAFC NA, which owns only a fifty percent interest in OMR. A "subsidiary corporation" is defined as "one in which another corporation (i.e. parent) owns at least a majority of the shares, and thus has control. Said of a company more than 50 percent of whose voting stock is owned by another." Black's Law Dictionary, 5th Ed. (1979).

points to several factors it claims establishes the management relationship: OMR's control of LC's bank account; a website that (Mabry claims) touts OMR's management of LC; entries on LC's books that (Mabry claims) show extensive "management" fees paid to OMR; letters on OMR stationery; and admissions that OMR is "managing" LC. Again, Mabry overstates its case.

The only facts that Mabry can point to regarding OMR's (alleged) control of LC's bank account are discovery responses from LC disclosing that it does not control any bank accounts at this juncture, and that checks drawn on a bank account in 2010 have an Arizona address. **[3 RP 635-636; 4 RP 701-708]** Based on these facts, Mabry concludes that it is OMR that controls LC's bank accounts. However, as explained *ad nauseum* by OMR, it has only signature authority on any bank account and can exercise no judgment as to what to pay and not to pay. It acts only on instruction of LC's officers and directors. Mabry can point to no evidence to the contrary.

As previously discussed, OMR's website advertises that it provides both executive oversight and back office services. It also discloses LC as one of its clients. However, nowhere on the website does it disclose what services it has provided for LC. This "evidence" certainly does not rise to a level that leads to a conclusion that OMR "manages" LC.

Mabry relies heavily on entries on LC's books showing allocations to LC for "service fees" to OMR. Also as extensively explained by OMR and LC, the entries are bookkeeping entries that allocate costs and expenses for the services rendered by OMR among the various Anderson companies. The general ledger produced in discovery shows LC's share of the allocations. These are not service fees that are paid by LC. No cash changes hands from LC to OMR. Mabry provides no evidence to the contrary. Similarly, Mabry points to a single category on LC's balance sheet entitled "management service fees" that does even mention OMR. **[4 RP 663]** However, as OMR has repeatedly stated, LC pays no money to OMR or any other entity for management services. All management comes from its officers and directors, who are paid by their employer MGBD. There is no evidence in the record to the contrary.

Mabry primarily relies upon a letter on OMR letterhead sent by Marotta introducing himself to members of the golf community as a director of LC. Even though this information was part of Mabry's MR, which the Court rejected as neither amounting to "fraud and misrepresentation" nor "newly discovered evidence," and therefore not properly a part of this discussion, OMR will nonetheless discuss its impact on the Court's analysis of minimum contacts.

Contrary to Mabry's cherry picking of those portions of the documents that suit its needs and ignoring the remainder, the correspondence clearly identifies

LC's *new directors* and their management team from MGBD as the persons responsible for the management of LC. Examples abound: "MGBC has been charged with managing the operations, setting strategic direction and liaison with members, property owners, creditors, vendors and employees of all the parties." **[7 RP 1399]** "Stephen Marotta has assumed the role of Chief Executive Officer and is utilizing several senior personnel from MGBD to manage the communities." **[7 RP 1400]** "The newly appointed Directors ... have the primary management responsibility for all the projects." **[7 RP 1400]** "MGBD has assigned senior level personnel to oversee the day-to-day management of each property..." **[7 RP 1401]** Only two entries seemingly contradict these representations: "A new management company called Oasis Management Resources, LLC (OMR) became operational in August 2008" and "OMR will handle all the project management, accounting and personnel functions previously performed by the Lyle Anderson Company, Inc." **[7 RP 1402]** As previously explained, however, there is nothing contradictory in these statements. LAC previously provided all back office services to LC, which were taken over by OMR. Mabry's focus on one clause in the sentence does not change that fact.[17]

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[17] Mabry also relies upon a letter from Anderson noting that MGBD has formed a "new management company." Anderson never indicates what the new management company is charged with doing. Furthermore, having been removed from any involvement in Las Campanas, there is no foundation that Anderson had any knowledge what the internal workings of the new management arrangements

Finally, Mabry also focuses closely on Michelle Hoeft's "belief" that LC was being managed by OMR, referencing both a memo furloughing the employees and a newspaper article naming OMR as the managing entity. First, as previously discussed, the memo did not come from OMR; it came from LC. **[8 RP 1653-1654]** Second, a newspaper article that relies on anonymous sources and is hearsay can hardly rise to the level of proof necessary to prove complex management relationships.[18] **[7 RP 1416]**

In addition, to establish specific jurisdiction over OMR, Mabry has the burden of establishing that its cause of action against OMR arose from the very circumstances that subject it to the New Mexico's jurisdiction. *Sproul*, 2013-NMCA-072, ¶9. If this Court were to conclude that informing LC residents about the reconstitution of the Board of LC and the carrying out of OMR's back office functions through attenuated contacts in New Mexico amounts to OMR's purposeful availment of the benefits and protections of New Mexico law, then

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would be. Notably, Anderson also explains that as directors of Las Campanas, Marotta and Gund "decide the full range of issues normally decided by directors." 7 RP 1405.

[18] Mabry also tries to slide in evidence outside the record in the form of references to websites that reportedly describe OMR as the manager of LC. It is inappropriate to refer to matters outside the record on appeal and any reference to outside matters should be stricken from the record. *State v. Reynolds*, 1990-NMCA-122, ¶16, 111 N.M. 263, 267, 804 P.2d 1082, 1086 ("Matters outside the record present no issue for review."); *State v. R.D.S.*, 2011 WL 1642628, 5 (Minn.App. 2011) ("Appellate courts may not consider matters outside the record on appeal and will strike references to such matters from the parties' briefs.").

Mabry's cause of action must arise from those activities in order to subject it to personal jurisdiction. *Sproul*, 2013-NMCA-072, ¶9. Mabry's causes of action against OMR, however, are tortious interference with contract and civil conspiracy to file a counterclaim against Mabry for breach of contract and unjust enrichment. **[2 RP 396]** Neither claim arises from the acts that Mabry asserts subject OMR to personal jurisdiction. While true that a civil conspiracy may subject an out-of-state defendant to the Court's jurisdiction, mere allegations of such a conspiracy are not sufficient to do so. *Santa Fe Technologies,* 2002-NMCA-30, ¶41 ("A prima facie showing consists of specific facts that, if proven, would allow a factfinder to find the existence of a conspiracy."). Mabry can point to no facts that implicate OMR in any conspiracy or interference with contract. Despite this case pending for over two years, Mabry has never taken the depositions of Marotta, Altman, or anyone else involved with OMR to make a factual showing of any conspiracy. Mabry has failed to make its prima facie case. The Court's dismissal of OMR must stand.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING MABRY'S MOTION FOR RECONSIDERATION UNDER EITHER RULE 1-060(B)(2) OR 1-060(B)(3).

Mabry erroneously frames its argument under its Point C as the Court abusing its discretion "in refusing to consider the evidence presented in Plaintiff's Motion to Reconsider." **[BIC at 40]** However, the Court very much considered the "new" evidence attached by Mabry to its MR in the context in which it was

argued, that OMR had committed a fraud upon the Court through its alleged misrepresentation of facts concerning OMR's relationship with LC. However, the District Court concluded that there was no clear and convincing evidence of any fraud or misrepresentation by OMR that justified any relief under Rule 1-060(b)(2).[19] **[9 RP 2048]**

The law governing Rule 1-060(b)(2) motions is clear – any fraud under the rule must be proven by clear and convincing evidence. *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir. 1978) ("One who asserts that an adverse party has obtained a verdict through fraud, misrepresentation or other misconduct has the burden of proving the assertion by clear and convincing evidence."), *cited with approval by Rios v. Danuser Mach. Co., Inc.*, 1990-NMCA-031, ¶23, 110 N.M. 87, 93, 792 P.2d 419, 425.[20] Despite Mabry's attempts to label representations by Marotta and Altman as fraudulent and intended to mislead the District Court, the Judge found otherwise and refused to withdraw the previous ruling on that basis. **[9 RP 2048; CD, 10-3-12, 9:39:15 to 9:39:45]**

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[19] Mabry belatedly now claims that they "timely filed their MTR under Rule 1-059" in order to salvage any appeal of the original order. **[BIC at 40]** Nevertheless, they concede that the motion was evaluated "using the standards under Rule 1-060(B). *Id.*

[20] Indeed, whenever there is an allegation of fraud by an opposing party or counsel, such must be proven by clear and convincing evidence. *Wallace v. Bank of America, N.A.*, 2003 WL 1736445, 1 (10th Cir. 2003) ("[F]raud by one's adversary in the course of litigation must be proven by clear and convincing evidence.").

At the hearing on the MR, the District Court did speculate whether it could, on its own motion, consider the "new" evidence as "newly discovered evidence" under Rule 1-060(b)(3) and asked for briefing on that point. **[CD, 10-3-12, 9:39:45 to 9:44:00]** Unfortunately, however, Mabry made not the slightest effort in its supplemental opening brief to explain to the District Court why the several affidavits, letters, and other evidence attached to its MR and subsequent Reply Brief were not available for consideration in the original briefing and argument. **[CD, 12-21-12, 10:10:05 to 10:11:00]** "Newly discovered evidence" has a specific meaning under Rule 1-060(b)(2), and specific rules govern its consideration.

While there is a paucity of New Mexico case law discussing Rule 1-060(B)(2), cases from the federal courts are legion. Because the Federal Rule of Civil Procedure 60(B)(2) is virtually identical to the New Mexico rule, federal cases discussing the rule are persuasive. *Kinder Morgan CO2 Co., L.P. v. State Taxation and Revenue Dept.*, 2009-NMCA-19, ¶11, 145 N.M. 579, 583, 203 P.3d 110, 114 ("Because our rule closely tracks this language, the federal construction of Rule 60(b) is persuasive authority for the construction of Rule 1-060(B)."). The federal cases are clear that to qualify as "newly discovered evidence," the evidence must have been unobtainable prior to the hearing even after the exercise of due diligence. *See, e.g., Dronsejko v. Thornton*, 632 F.3d 658, 671-672 (10th Cir.

2011) (Holding that to obtain relief under Rule 60(B), movant must show that they could not have discovered the new evidence after searching with due diligence and that movant, in fact, exercised due diligence in the search) ("Actual diligence is one of the requirements for relief under Rule 60(b)(2).").

The record discloses that Mabry made no showing of any due diligence in trying to discover the "new" evidence to present it to the Court in a timely manner. In a final attempt to meet this requirement, they try to lay the blame for their lack of due diligence at the door of OMR. That point will be discussed in Point III below. The Court's holding on this point can only be reversed for an abuse of discretion. *State ex rel. Human Services Dept. v. Rawls*, 2012-NMCA-052, ¶8, ___N.M.___, 279 P.3d 766, 768 ("We review denials of Rule 1–060(B) motions generally for abuse of discretion, unless the issue is one of law."). The Court did not abuse its discretion on this point.

Mabry then tried to press the point that the Court should have withdrawn its previous Order based upon the catch-all provision of Rule 1-060(b)(6). **[8 RP 1836]** As the Court correctly noted, however, section 6 is only available when none of the other provisions of Rule 1-060 apply. **[CD, 12-21-12, 10:12:00 to 10:13:53]**

It is hornbook law that a party seeking relief under Rule 1-060(B)(6) must base its request on reasons other than those enumerated in sections (1) through (5).

Meiboom v. Watson, 2000-NMSC-004, ¶30, 128 N.M. 536, 544, 994 P.2d 1154, 1162. ("Under that rule [1-060(B)(6)], a party may seek relief from a final judgment or final order upon a motion filed within a reasonable time *for any reason not outlined in Rule 1–060(B)(1)–(5).*") (emphasis added.); *see also, Resolution Trust Corp. v. Ferri*, 1995-NMSC-055, ¶10, 120 N.M. 320, 324, 901 P.2d 738, 742 ("However, we have long held that SCRA 1-060(B)(6) provides relief only for reasons *other* than those enumerated in SCRA 1-060(B)(1) through (5).") (emphasis in original); *Marinchek v. Paige*, 1989-NMSC-019, ¶9, 108 N.M. 349, 351-352, 772 P.2d 879, 881-882 ("[Movant] cannot take evidence of a communication breakdown between his counsel and himself offered to demonstrate excusable neglect, and now refashion it into grounds under Rule 60(B)(6), which allows the trial court to consider exceptional circumstances other than reasons under Subsections (B)(1) to (B)(5) to justify relief from the operation of the judgment.").

Mabry sought relief under section 3 and later section 2 of Rule 1-060, alleging both fraud and misrepresentation and newly discovered evidence. The Court rejected both arguments. They cannot now seek relief under section 6 as a catch-all to escape the effects of the Order dismissing OMR. The District Court did not abuse its discretion in denying Mabry's MR under section 6. *Rawls*, 2012-NMCA-052, ¶8.

IV. RELEVANT DISCOVERY WAS NOT WITHHELD FROM MABRY.

Having failed to convince the Court that it did not have the "new" evidence presented in support of its MR despite having exercised due diligence to obtain it,[21] Mabry then complains that OMR and its principals withheld the evidence despite discovery attempts to obtain it. **[8 RP 1836]** Again it is Mabry, not OMR, that misleads the Court.

Referring the Court to its Request for Production ("RFP") #10, **[BIC 18]**, Mabry asserts that it requested communications of any kind related to any contract or agreement among or between "MGBD, OMR, Stephen Marotta, Richard Altman, the Bank of Scotland, or any of the Lyle Anderson companies." **[BIC at 20]** In fact, however, the RFP asks for communications about contracts among or between MGBD, OMR, Marotta, Altman, on the one hand, and the Bank and/or Lloyds Banking Group, on the other hand, "for the management" of Anderson companies' properties.[22] As OMR has previously explained, the contract for the management of LC (and the other Anderson companies) arises from an operating agreement between MGBD and LAFC NA. **[4 RP 744-745]** There is no agreement between MGBD and the Bank to manage LC. These facts were

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[21] Mabry ignores the evidence before the trial court that at least two of the plaintiffs were recipients of the letters claimed to have been withheld in discovery. **[9 RP 1956]**

[22] Contrary to Mabry's assertion, RFP #10 does not ask for communications regarding any contract *with* an Anderson company; it asks for communications regarding contracts for management *of* any Anderson company.

disclosed to Mabry as early as January 13, 2012, yet Mabry has never followed up by seeking additional discovery on the actual managerial structure of LC and the other Anderson companies. **[4 RP 745]**

During discussions to resolve a motion to compel brought by Mabry, which motion specifically included RFP #10, Mabry's counsel was warned that it was framing its discovery requests based upon mistaken assumptions about the managerial structure governing the Anderson companies. **[8 RP 1768, 1769]** Because these assumptions were incorrect, there would be no documents responsive to the discovery. Mabry was specifically admonished by the court that they needed to frame their discovery requests as broad, open-ended questions that asked LC to describe the management structure – not to frame discovery based upon presumed relationships between specific entities that do not exist.[23] Thus, Mabry's motion to compel was mostly denied.[24] **[7 RP 1517]**

As the Court also correctly pointed out, the letters Mabry claims to have been purposefully withheld are not requested by RFP #10. LAFC NA is not a party to this litigation and is not identified as an entity about which Mabry is seeking discovery. Furthermore, the letters themselves do not discuss or involve

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[23] The discovery conference before Judge Singleton was off the record, but is reflected at 8 RP 1769 and at CD, 12-21-12, 10:02:25 to 10:05:00.

[24] The actual agreements whereby the Bank is entitled to reconstitute the Boards of Directors have been made available to Mabry at the Scottsdale office but Mabry has yet to inspect them. **[7 RP 1517, 1524]**

any contracts for the management of the properties. As the court correctly observed, they might involve relationships, but not contracts as the RFP requested. **[CD, 12-21-12, 10:12:35 to 10:13:20]** OMR has not withheld any discovery from Mabry and the District Court's order should be affirmed.

CONCLUSION

For the reasons asserted above, the District Court's Orders should be affirmed in all respects.

Respectfully submitted,

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STATEMENT OF COMPLIANCE

In accordance with Rule 12-213(G) NMRA, the undersigned hereby certifies that the foregoing Answer Brief used Times New Roman typeface, a proportionally-spaced type style or typeface, and that the number of words contained in the body of this Answer Brief, as defined in Rule 12-213(F)(1) is 10,895.

Tanya L. Scott

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Answer Brief was served via first class mail, on this 14th day of November, 2013 to all parties entitled to notice as follows:

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