

1 Case Number 09 PO 002/003

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6 IN THE JUSTICE COURT OF AUSTIN TOWNSHIP
7 COUNTY OF LANDER, STATE OF NEVADA
8

9 VIRGINIA (SISSIE) GALLEGOS,
10 Plaintiff

11
12 vs.

13
14 MICHAEL MARKING
15 and
16 ELIZABETH FLEMING,
17 Respondents
18

MOTION TO VACATE JUDGMENT UNDER
RULE 60(B)

19
20
21 COME NOW Michael Marking and Elizabeth Fleming, in proper person, as Respondents, and
22 hereby submit their MOTION TO VACATE JUDGMENT UNDER RULE 60(B).
23

24 WHEREAS

25 (1) Plaintiff in this matter (see *Background*, page 4) did not disclose to this Court, during the
26 proceedings of this matter, the paternity of then Judge Joe Dory to Plaintiff's daughter

27 Mary Hammon. (see *Disclosure of Judge Joe Dory's paternity*, page 4)

28 (2) The foregoing omission from the record constituted extrinsic fraud upon this Court, as it

29 (a) prevented Respondents from knowing their rights and defenses in this matter (see

30 *Respondents were prevented from knowing their rights and defenses*, page 5); and

31 (b) denied Respondents their due process rights (see *Respondents were denied their due*

32 *process rights*, page 5); and

33 (c) defrauded this Court by improperly giving Judge Dory jurisdiction of this matter (see

34 *Concealment defrauded this Court*, page 5); and

35 (3) Under Rule 60(b), this Court may vacate its judgment when extrinsic fraud has been

36 shown (see *Judgment may be set aside in cases of extrinsic fraud*, page 7); and

37 (4) There is no time limit for filing a motion to vacate a judgment for cause of extrinsic fraud

38 (see *No time limit on a Rule 60(b) motion predicated on extrinsic fraud*, page 10); and

39
40 THEREFORE, Respondents pray to this Court for an Order finding extrinsic fraud in this matter,
41 and vacating all previous judgments made by Judge Joe Dory in this matter. (see *Vacatur not*
42 *sought in other cases*, page 12; also see *Summary of points and authorities*, page 12)

43
44 THIS MOTION is based on law and on the record, and requires no affidavit.

45
46 IN SUPPORT of this Motion, Respondents have attached their MEMORANDUM OF POINTS AND
47 AUTHORITIES.

53 DATED this Wednesday, 25 March 2015.

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56 _____
57 Michael Marking, Respondent
58 e-mail: *marking@tatanka.com*
59

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61 _____
62 Elizabeth Fleming, Respondent
63 e-mail: *ryuuz@tatanka.com*
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68 TABLE OF CONTENTS
69

70	MEMORANDUM OF POINTS AND AUTHORITIES	<i>Page 4</i>
71	<i>Background</i>	<i>Page 4</i>
72	<i>Disclosure of Judge Joe Dory's paternity</i>	<i>Page 4</i>
73	<i>Respondents were prevented from knowing their rights and defenses</i>	<i>Page 5</i>
74	<i>Respondents were denied their due process rights</i>	<i>Page 5</i>
75	<i>Concealment defrauded this Court</i>	<i>Page 5</i>
76	<i>Judgment may be set aside in cases of extrinsic fraud</i>	<i>Page 7</i>
77	<i>No time limit on a Rule 60(b) motion predicated on extrinsic fraud</i>	<i>Page 10</i>
78	<i>Vacatur not sought in other cases</i>	<i>Page 12</i>
	<i>Summary of points and authorities</i>	<i>Page 12</i>
	CERTIFICATE OF SERVICE	<i>Page 15</i>

79
80 MEMORANDUM OF POINTS AND AUTHORITIES
81

82 1. **Background.** Plaintiff filed her application for a TPO with Judge Dory, who granted it
83 *ex parte* despite no attempt to show the harassment needed under the statutes. Dory prohibited
84 his clerk from filing a notice of appeal, so Plaintiffs, in a distinct case which was not an
85 appeal, asked for a writ of mandamus from Judge Wagner in the Sixth District Court. Judge
86 Wagner, apparently also a close friend of Plaintiff (who refers to him as “Rick”), granted the
87 writ but opined that TPO cases were not appealable.

88 2. When Respondents went to appeal Wagner’s decision, he blocked his own clerk from
89 filing the notice of appeal. He relented when the Nevada Supreme Court suggested that they
90 would entertain a petition for a writ of mandamus were the Sixth District to continue to refuse
91 to file the notice. However, Judge Wagner sabotaged the appeal by removing the TPO itself
92 from the record, despite it being designated by Respondents as part of the record. The
93 Supreme Court refused to rule on the matter, on the grounds that the record was not complete.

94 3. Therefore, despite there being two related cases all the way up to the Supreme Court,
95 this case has never been appealed. It is clear from the record that Judge Dory completely
96 ignored Respondents’ arguments, neither approving or disapproving them: he simply ignored
97 them. In other words, *Respondents have been completely denied a hearing before an impartial*
98 *tribunal on the substantial issues in this case, and have been denied due process.*
99

100 4. **Disclosure of Judge Joe Dory’s paternity.** Any mention of Mary Hammon, or that
101 Judge Joe Dory is the father, is completely absent from the record of this case. The disclosure
102 was not made until a year later, in a subsequent case, *Gallegos v. Marking (II)*, Austin Justice
103 Court Case 10 CV 002. The transcript shows clearly that Judge Dory, upon learning that Mary
104 Hammon was his daughter, asked for confirmation and otherwise spoke as if he had not

105 previously been apprised of the situation.
106

107 **5. Respondents were prevented from knowing their rights and defenses.** It is clearly a
108 violation of the Nevada Code of Judicial Conduct for a judge to sit on a matter when the
109 mother of his child is a party to the action. Yet, by failing to disclose Judge Joe Dory's
110 paternity, Respondents were precluded from disqualifying Judge Dory on that basis, or raising
111 a defense based on presumption of Dory's bias, or seeking another venue, or doing any of a
112 number of things which might have been done, given the close relationship between Plaintiff
113 and the Judge.
114

115 **6. Respondents were denied their due process rights.** Respondents have a right to a
116 hearing before an impartial tribunal. Failure to disclose that Judge Dory was the father of
117 Mary Hammon denied them that impartial tribunal. How the omission of disclosure occurred
118 is not germane: "[...] Nor does it make a particle of difference from what source the act or
119 omission complained of emanates, for it is not the act or omission itself but its effect upon the
120 hearing accorded by the court to the defendant that results in, or does not result in, a denial of
121 due process of law." (*Mooney v. Holohan*, 55 S. Ct. 340, 294 U.S. 103 (U.S. 01/21/1935))
122

123 **7. Concealment defrauded this Court.** Improperly seeking a Court's jurisdiction is the
124 basis for a substantial portion of the cases involving extrinsic fraud against the court. The
125 instant case falls into that category: by failing to disclose Judge Dory's relationship to Mary
126 Hammon, Plaintiff subverted the integrity of the judicial process by inducing Judge Dory to
127 take jurisdiction over the application for the TPO and over the ensuing proceedings.

128 8. In *Price v. Dunn*, 106 Nev. 100, 787 P.2d 785 (Nev. 02/22/1990), it was held that Dunn
129 had not exercised due diligence in attempting to locate Price, therefore Price was entitled to a
130 new hearing. This was deemed extrinsic fraud upon the court. One of the most fundamental

131 actions required for a court to gain jurisdiction is proper service.

132 9. In *Gassett v. Snappy Car Rental*, 111 Nev. 1416, 906 P.2d 258 (Nev. 11/30/1995), the
133 court held that Snappy had not used due diligence in finding Gassett. The court reversed the
134 district court’s decision, upholding Gassett’s claim of extrinsic fraud. The court said,
135 “defective service rendered the district court's personal jurisdiction over Gassett invalid and
136 the judgment against her void. For a judgment to be void, there must be a defect in the court's
137 authority to enter judgment through either lack of personal jurisdiction or jurisdiction over
138 subject matter in the suit. *Puphal v. Puphal*, 669 P.2d 191 (Idaho 1983). In *Price v. Dunn*, 106
139 Nev. 100, 787 P.2d 785 (1990).” Once again, this was a question of improper jurisdiction.

140 10. The most recent, and perhaps the most complete, attempt to define “fraud upon the
141 court”, in Nevada is from *NC-DSH, Inc. v. Garner* (218 P.3d 853 (Nev. 10/29/2009)). Nevada
142 said,

143 “ ‘Fraud upon the court’ has been recognized for centuries as a basis for
144 setting aside a final judgment, sometimes even years after it was entered. *Hazel-*
145 *Atlas Co. v. Hartford Co.*, 322 U.S. 238, 245 (1944) (discussing ‘the historic power
146 of equity to set aside fraudulently begotten judgments’ and canvassing cases and
147 treatises and vacating a judgment entered nine years earlier), overruled on other
148 grounds by *Standard Oil Co. of Cal. v. United States*, 429 U.S. 17, 18 (1976). It is,
149 of course, true that ‘in most instances society is best served by putting an end to
150 litigation after a case has been tried and judgment entered.’ *Id.* at 244. For this
151 reason, a final judgment, once entered, normally is not subject to challenge.
152 However, the policy of repose yields when ‘the court finds after a proper hearing
153 that fraud has been practiced upon it, or the very temple of justice has been
154 defiled.’ *Universal Oil Co. v. Root Rfg. Co.*, 328 U.S. 575, 580 (1946). ‘[A] case of
155 fraud upon the court [calls] into question the very legitimacy of the judgment.’
156 *Calderon v. Thompson*, 523 U.S. 538, 557 (1998). Put another way, ‘[w]hen a

157 judgment is shown to have been procured’ by fraud upon the court, ‘no worthwhile
158 interest is served in protecting the judgment.’ Restatement (Second) of Judgments
159 70 cmt. b (1982).

160 The problem lies in defining what constitutes ‘fraud upon the court.’
161 Obviously, it cannot mean any conduct of a party or lawyer of which the court
162 disapproves; among other evils, such a formulation ‘would render meaningless the
163 [time] limitation on motions under [Rule] 60(b)(3).’ *Kupferman v. Consolidated*
164 *Research & Mfg. Corp.*, 459 F.2d 1072, 1078 (2d Cir. 1972) (Friendly, J.), cited
165 with approval in *Occhiuto*, 97 Nev. at 146 n.2, 625 P.2d at 570 n.2, and *Murphy*, 103
166 Nev. at 186, 734 P.2d at 739. The most widely accepted definition, which we adopt,
167 holds that the concept embrace[s] only that species of fraud which does, or attempts
168 to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of
169 the court so that the judicial machinery cannot perform in the usual manner its
170 impartial task of adjudging cases . . . and relief should be denied in the absence of
171 such conduct.

172 11. The failure by Plaintiff to disclose Judge Dory’s relationship with Plaintiff meets
173 these requirements, making it an instance of fraud upon the court. Certainly, the very
174 legitimacy of the judgment is questionable. Certainly, no worthwhile interest is served in
175 protecting the judgment. Certainly, the integrity of this Court was subverted. And certainly,
176 “judicial machinery cannot perform in the usual manner its impartial task of adjudging cases”
177 when the judge shares a child with one of the parties: such a situation is defined as biased by
178 common sense as well as by the Code of Judicial Conduct.

179
180 **12. Judgment may be set aside in cases of extrinsic fraud.** Rule 60(b) allows the
181 vacatur of judgments in case of fraud.

182 (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud,

183 Etc. On motion and upon such terms as are just, the court may relieve a party or a
184 party's legal representative from a final judgment, order, or proceeding for the
185 following reasons: [...] (3) fraud (whether heretofore denominated intrinsic or
186 extrinsic), [...] The motion shall be made within a reasonable time, and for reasons
187 (1), (2), and (3) not more than 6 months after the proceeding was taken or the date
188 that written notice of entry of the judgment or order was served. A [...] This rule
189 does not limit the power of a court to entertain an independent action to relieve a
190 party from a judgment, order, or proceeding, or to set aside a judgment for fraud
191 upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of
192 review and bills in the nature of a bill of review, are abolished, and the procedure
193 for obtaining any relief from a judgment shall be by motion as prescribed in these
194 rules or by an independent action. (JCRCP 60(b))

195 13. The salient point from this rule as invoked here is that a judgment may be set aside for
196 extrinsic fraud, which applies in the instant case. Although the Rule implies a six-month time
197 limit for some bases of a Rule 60(b) motion, that limitation does not apply when the basis of
198 the motion is extrinsic fraud, as explained below in *No time limit on a Rule 60(b) motion*
199 *predicated on extrinsic fraud* , page 10.

200 14. It remains in this section to be discussed the distinction between “intrinsic” and
201 “extrinsic” fraud, and to show that the fraud complained of in this motion was extrinsic.

202 15. One explanation for the terms, intrinsic and extrinsic, is their appearance on the
203 record: extrinsic fraud involves to an omission or act which does not appear on the record.
204 That clarification was used by California, and repeated in *Mooney v. Holohan* (cited above).

205 16. Regardless of the origin of the terms, however, the distinction has been clarified at
206 various times by Nevada and by the United States Supreme Court.

207 *fn18 It has frequently been said that where the ground for review fraud, review
208 will not be is granted unless the fraud was extrinsic. See *United States v.*

209 *Throckmorton*, 98 U.S. 61. The distinction between extrinsic and intrinsic fraud is
210 not technical but substantial. The statement that only extrinsic fraud may be the
211 basis of a bill of review is merely a corollary of the rule that review will not be
212 granted to permit relitigation of matters which were in issue in the cause and are,
213 therefore, concluded by the judgment or decree. The classical example of intrinsic
214 as contrasted with extrinsic fraud is the commission of perjury by a witness. While
215 perjury is a fraud upon the court, the credibility of witnesses is in issue, for it is one
216 of the matters on which the trier of fact must pass in order to reach a final
217 judgment. An allegation that a witness perjured himself is insufficient because the
218 materiality of the testimony, and opportunity to attack it, was open at the trial.
219 Where the authenticity of a document relied on as part of a litigant's case is
220 material to adjudication, as was the grant in the *Throckmorton* case, and there was
221 opportunity to investigate this matter, fraud in the preparation of the document is
222 not extrinsic but intrinsic and will not support review. [...] (*Hazel-Atlas Glass Co.*
223 *v. Hartford-Empire Co.*, 64 S. Ct. 997, 322 U.S. 238, at footnote 18 (U.S.
224 05/15/1944))

225 17. In the instant case, Joe Dory's fathering of Mary Hammon was not on the record,
226 there was no opportunity for Respondents to avail themselves of it, and therefore the fraud
227 was extrinsic.

228 18. Nevada's use of the term is consistent. "[...] We there recognized that perjury alone
229 does not constitute extrinsic fraud. However, we held that such perjury, together with the
230 fraudulent concealment of the true facts from the opponent, thereby preventing the exposure
231 of such perjury at the time of trial, does constitute extrinsic fraud." (*Moore v. Moore*, 78 Nev.
232 186, 370 P.2d 690 (Nev. 4/9/1962)) In the instant case, Plaintiff certainly concealed a material,
233 true fact from this Court. Rather than preventing the exposure of perjury, however, it
234 prevented the exposure of Judge Dory's disqualification.

235 19. The scope of fraud recognized under Rule 60(b) was broadened in 2004. According to
236 the Advisory Committee's Notes (*q.v.*), prior to 2004 the language restricted motions under
237 the fraud portion of the Rule. Then, the Rule permitted relief only when the fraud "would
238 have justified collateral attack upon the judgment"; that restriction was removed effective
239 2005. Nevertheless, even under the more restrictive, former version of the Rule, a collateral
240 attack based on Judge Dory's disqualification is justified by the fraud, so this Motion would
241 have qualified under the earlier Rule.

242
243 **20. No time limit on a Rule 60(b) motion predicated on extrinsic fraud.** Nevada has
244 consistently held that the time limit for other Rule 60(b) motions does not apply to those
245 based on extrinsic fraud.

246 21. "[...] The first guideline, that the moving party must show some excuse for setting
247 aside the judgment, is addressed by NRCP 60(b) which provides that a court may relieve a
248 party from a final judgment for extrinsic fraud upon a court with no time limitation. [...]"
249 (*Price v. Dunn*, 106 Nev. 100, 787 P.2d 785 (Nev. 02/22/1990), footnote omitted)

250 22. "The six-month limitation on allegations of fraud is inapplicable to fraud upon the
251 court. *Savage v. Salzman*, 88 Nev. 193, 195, 495 P.2d 367, 368 (1972)." (*Murphy v. Murphy*,
252 103 Nev. 185, 734 P.2d 738 (Nev. 3/31/1987))

253 23. "[...] While a motion under NRCP 60(b)(3) must be made 'not more than 6 months
254 after the proceeding was taken or the date that written notice of entry of the judgment or order
255 was served,' NRCP 60(b) does not specify a time limit for motions seeking relief for "fraud
256 upon the court." (*NC-DSH, Inc. v. Garner*, 218 P.3d 853 (Nev. 10/29/2009)) Nevada, in the
257 same case, goes on to explain the possibly confusing wording of Rule 60(b) in this regard.

258 "Labeling the basis for the Garners' motion 'intrinsic' rather than
259 'extrinsic' fraud does not bring it within NRCP 60(b)(3) or make NRCP 60(b)(3)'s
260 six-month limitations period apply. Ever since its 1981 amendment to import the

261 parenthetical phrase-- ‘(whether heretofore denominated intrinsic or extrinsic)’
262 --from its federal model, NRCP 60(b)(3) has applied to both intrinsic and extrinsic
263 fraud. See *Carlson v. Carlson*, 108 Nev. 358, 362 n.6, 832 P.2d 380, 383 n.6 (1992);
264 *Occhiuto*, 97 Nev. at 146 n.2, 625 P.2d at 570 n.2.*fn3 The 1981 amendment to
265 NRCP 60(b)(3) abrogated the older cases like *Gilbert v. Warren*, 95 Nev. 296, 299,
266 594 P.2d 696, 698 (1979), and *Manville v. Manville*, 79 Nev. 487, 489-90, 387 P.2d
267 661, 662 (1963), to the extent they relied on the distinction between intrinsic and
268 extrinsic fraud to decide whether a motion fell under NRCP 60(b)(3) and its six-
269 month deadline. See 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane,
270 *Federal Practice and Procedure* 2868 (2d ed. 1995) (noting that the distinction
271 between extrinsic and intrinsic fraud ‘rests on clouded and confused authorities, its
272 soundness as a matter of policy is very doubtful, and it is extremely difficult to
273 apply’) (footnote omitted).

274 More germane: NRCP 60(b)(3) by its terms only applies to fraud ‘of an
275 adverse party.’ The district court found that neither Valley Hospital nor its lawyer
276 had any knowledge of or complicity in Davidson's fraud. Davidson victimized
277 them, equally with the Garners. NRCP 60(b)(3) and its six-month limitations
278 period thus do not apply, because the Garners’ motion was not based on ‘fraud
279 (whether . . . intrinsic or extrinsic), misrepresentation or other misconduct of an
280 adverse party.’ NRCP 60(b)(3) (emphases added). Other courts, applying like rules
281 to like facts, have so held, and we read our rule no differently. *McKinney v. Boyle*,
282 404 F.2d 632, 633-34 (9th Cir. 1968) (holding that where the movant's lawyer and
283 nonparty wife committed fraud in concluding his case, the motion did not involve
284 fraud ‘of an adverse party,’ taking it outside Fed. R. Civ. P. 60(b)(3) and its one-
285 year time limit); *Flowers v. Rigdon*, 655 N.E.2d 235, 236 (Ohio Ct. App. 1995)
286 (holding that, while ‘[f]raud, inter partes, without more, should not be a fraud upon

287 the court, but redress should be left to a motion under [the Ohio counterpart to
288 NRCP] 60(b)(3) or to the independent action,’ a lawyer who defrauds his clients by
289 stipulating to a bogus judgment concluding their claims commits a ‘fraud upon the
290 court’) (quotation omitted); see *Latshaw v. Trainer Wortham & Co., Inc.*, 452 F.3d
291 1097, 1102 (9th Cir. 2006) (holding that ‘[s]ubsection (b)(3) permits relief only
292 when the fraud was committed by ‘an adverse party’’)”

293 (*NC-DSH, Inc. v. Garner*, footnote omitted).

294 24. In the instant case, the fraud was both extrinsic (it involved an issue which never
295 came before this Court) and against this Court (because this Court was induced to take
296 jurisdiction, when it should not have done so). The above opinion (in *NC-DSH, Inc. v.*
297 *Garner*) was not a change in the interpretation of the Rule. Rather, it was a clarification. In
298 fact, several of the Nevada Supreme Court cited herein continue to use the terms “intrinsic
299 fraud” and “extrinsic fraud” even after the mentioned 1981 amendment of the Rule. A close
300 reading shows that the substance of the interpretation has not changed, while the Nevada court
301 is recommending a new way to understand the distinction.

302 25. The common thread, both before and after *NC-DSH, Inc. v. Garner*, is that a matter
303 which subverts the proper functioning of the court, is grounds for review and not subject to
304 the time limitation. This is consistent with other due process decisions. The assumption is
305 that, if facts are brought before a court, then the court will deal with them appropriately, but in
306 cases of extrinsic fraud the court is prevented from acting properly (such as in jurisdictional
307 decisions) because the facts were not before it.

308
309 **26. Vacatur not sought in other cases.** This Motion does not seek vacatur of judgments
310 in any cases except the instant case.

311
312 **27. Summary of points and authorities.** This Motion is based upon a claim of extrinsic

313 fraud against the court, which, under Rule 60(b), is grounds for vacatur of the judgment
314 without time limit.

315 28. The United States Supreme Court, relies on the distinction between intrinsic and
316 extrinsic fraud to determine whether of not the time limit is effective. A diligent search of the
317 opinions shows that the U.S. Court's opinions are consistent, in that, where a fact was
318 concealed or misrepresented to the court, such that the opposing party had no opportunity to
319 take advantage of the fact or to question it during the trial, extrinsic fraud existed and the time
320 limit did not apply. There appear to be no contrary cases.

321 29. Nevada cases are consistent in the same way: there appear to be no contrary cases.
322 Although in *NC-DSH, Inc. v. Garner*, Nevada held that the intrinsic-extrinsic distinction was
323 not what was important, but rather the presence or absence of fraud upon the court, the facts
324 of *NC-DSH, Inc. v. Garner* are still consistent with the extrinsic-intrinsic distinction: the fraud
325 by Davidson in *NC-DSH, Inc. v. Garner* was not about the issues before the court; rather, it
326 was about Davidson's authority to settle a case. (Davidson forged his clients' signatures.)

327 30. In this case, the fraud is extrinsic, and against the court. The omission was not related
328 to the claims or defenses, and – being undisclosed – was never litigated. Nevertheless, it was
329 material to this Court's jurisdiction over this case.

330 31. Although it was learned afterward, Judge Dory was disqualified from sitting on this
331 case. Because of Judge Dory's disqualification, there has never been a hearing before an
332 impartial tribunal of the issues of this case. According to this criterion, as well, setting aside
333 the judgment is justified, according to relevant opinions. Once again, this is consistent with
334 other readings of the opinions: due process was denied because of the fraud, and, as a
335 consequence, the function of this Court as an impartial tribunal was subverted.

336 32. In summary, the concealment of the fact of Judge Dory's paternity of Plaintiff's
337 daughter Mary Hammon precluded his disqualification, so that no hearing was ever had
338 before an impartial tribunal, denying them due process. The concealment was a fraud against

339 this Court, and was extrinsic to the record. Rule 60(b) allows this motion, and puts no time
340 limit on bringing it before this Court. Respondents respectfully request that this Court set
341 aside the granting of the TPO, and all amended judgments, and vacate all rulings and orders
342 made by Judge Dory in this matter. Justice demands no less.

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366 CERTIFICATE OF SERVICE
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368 I hereby certify under penalty of perjury that on this date I served true and correct copies of
369 the foregoing document by depositing them for mailing, in sealed envelopes, US. postage
370 prepaid, at Austin, Nevada, addressed as follows:

371 Ruben Gallegos and Virginia (Sissie) Gallegos; Post Office Box 221; Austin,
372 Nevada 89310

373 Austin Justice Court; Post Office Box 100; Austin, Nevada 89310

374 Dated Wednesday, 25 March 2015.
375

376 _____
377 Nancy E. Fleming
378

379 AFFIRMATION

380 (Pursuant to NRS 239B.030)
381

382 I hereby affirm that the preceding document filed in the above-described manner does
383 not contain the social security number of any person.

384 Dated Wednesday, 25 March 2015.
385

386 _____
387 Michael Marking
388

389
390 (Respondents' electronic document name: *gvmf_motion_vacate_judgment_rule_60(b)_20150323c*)