Case. No. 77261

IN THE SUPREME COURT OF THE STATE OF NEVADA

PETER and CHRISTIAN GARDNER, individually and on behalf of minor child, LELAND GARDNER,

Appellants,

v.

R&O CONSTRUCTION, INC.

Respondent.

Appeal from the Eighth Judicial District Court of State of Nevada, in and for County of Clark

RESPONDENT'S OPENING BRIEF

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RULE 26.1 DISCLOSURE STATEMENT

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

R&O CONSTRUCTION is a closely held corporation, organized under the laws of Utah. It has no parent corporation and there is no publically held corporation that owns 10% or more of its stock.

R&O CONSTRUCTION has not been represented by any other attorneys in addition to GODFREY JOHNSON and OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI.

ROUTING STATEMENT

The Nevada Supreme Court should retain this writ proceeding because it is a matter raising as a principal issue questions of first impression involving common law as well as questions of statewide importance. NRAP 17(a)(13)-(14).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

RESPONDENT'S OPENING BRIEF

Respondent R & O Construction, Inc. ("R&O"), hereby submits its Response Brief to Appellants Peter and Christian Gardner, individually and on behalf of their minor child Leland Gardner's Opening Brief (Appellants collectively referred to as "Leland Gardner" or "Gardner" for ease of reference).

I. JURISDICTION

R&O concurs with Appellants' statement of jurisdiction as set forth in their Opening Brief.

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Appellants' Statement of the Issues sets forth a limited, straw-man set of "Issues Presented" intended to narrow the questions before this Court and frame their argument for reversal and remand. Their proposal to limit the relevant set of issues is incorrect. The issue before this Court is solely this: whether the district court erred by dismissing Appellants' claim for reverse veil-piercing against R&O? Because the appropriate standard of review of a grant of dismissal under NRS 12(b)(5) is *de novo*, this Court may affirm the dismissal upon any portion of the basis set forth in the district court's Order, upon any grounds raised by R&O in its Motion to Dismiss, or upon any other grounds appropriately raised by this Court *sua sponte*. *See Facklam v. HSBC Bank USA for Deutsche ALT-A Sec. Mortg. Loan Trust*, 401 P.3d 1068, 1070 (Nev. 2017); JA 450-506 ("R&O's Motion to Dismiss").

III. STATEMENT OF THE CASE

This case began over three years ago with the tragic, non-fatal drowning of Leland Gardner (the "Incident"), a 6-year-old boy, at the Cowabunga Bay Waterpark (the "Waterpark," owned and operated by Defendant Henderson Waterpark, LLC).

The Waterpark is owned by two holding companies, Double Ott Water Holdings, LLC and West Coast Waterparks, LLC. Double Ott Water Holdings, LLC, in turn, is owned by Orluff Opheikens, Chet Opheikens, Slade Opheikens, and Tom Welch. Each of the Opheikens and Mr. Welch, individually, also serve as managers of Henderson Waterpark, LLC, along with several other individuals. In reality, none of these individuals engaged in any day-to-day management of the Waterpark, but rather delegated that responsibility to its full-time manager, Shane Huish.

Roughly two years after the commencement of this case, Respondent R&O first entered this case when it was added as a Defendant. R&O had been the general contractor for the construction of the Waterpark, construction which was completed over a year prior to the Incident. Appellants had already asserted individual claims against all of the individual managers of the Waterpark, ostensibly on the theory that each had individually been involved in causing injuries to Leland Gardner. Now, however, Appellants sought leave to amend to implead R&O under a reverse veil-piercing theory as the alter ego of Defendant Orluff Ophiekens ("Orluff").

Appellants' counsel immediately made repeated inquiries to R&O's counsel as to whether this action would now trigger R&O's insurance policies. Despite the fact that R&O had no involvement in the allegedly negligent acts Appellants claim injured Leland Gardner, and that Appellants could point to no fraud or injustice that would occur should R&O not be impleaded, the district court granted leave to amend to add R&O under this pre-judgment, reverse veil-piercing claim.

Once added as a defendant in Appellants' Third Amended Complaint ("TAC"), Respondent R&O filed its Motion to Dismiss, JA 450-506, which was granted by the district court. JA 646-649. The instant appeal now follows.

IV. STATEMENT OF FACTS

R&O's sole involvement in this case was as general contractor to build the Waterpark. R&O was contracted by the original owners of the Waterpark as general contractor, and proceeded to expend millions of dollars toward that end. When the financing for the original owners of the Waterpark fell through, R&O was stuck with million in unpaid invoices, and even more concerning the inability to pay its subcontractors, many of which were smaller companies which would be forced into bankruptcy. Rather than stand by and watch this calamity occur, R&O leveraged itself to protect these dozens of small business—R&O loaned several million dollars to its Chairman, Orluf Opheikens ("Orluff"), so he could capitalize a new entity, Double Ott Water Holdings, LLC, to float the waterpark in exchange for an equity

stake. This funding by R&O permitted the Waterpark to reach operational status and open for business. The hope was that, by operating the Waterpark, rather than abandoning it, it would eventually reach profitability and be able to repay the loan from R&O, making R&O whole. In effect, R&O put itself at risk to cover the exposure of its dozens of smaller, local subcontractors. Yet, somehow, this decision by R&O—which was at worst a prudent business decision and more realistically an act of altruism—is now the "justification" Appellants are trying to ram like a square peg through the round hole of reverse veil-piercing jurisprudence.

Appellants now argue that because they have an individual claim against Orluff (for alleged actions wholly unrelated to his position as Chairman of R&O), that they should be permitted to reverse-pierce the corporate veil and hold R&O liable for any personal liabilities of Orluff as his *alter ego*.

V. SUMMARY OF THE ARGUMENT

Appellants' attempt to reverse pierce the corporate veil and hold R&O liable for any judgment against Orluff as his *alter ego* suffers from at least two fatal deficiencies. First, to support any finding of alter ego, Nevada Revised Statute § 78.747(2)(b) requires unity of ownership between the parties. Here, Appellants fail to effectively to plead that Orluff has any ownership in R&O, instead trying to sneak by on the vague and contradictor language that "Orluff, *through his family trust*, owns approximately eighty-five percent" of R&O. JA 381 ¶ 14 (emphasis added).

Next, Appellants entirely fail to plead the require element that failure to make a finding of alter ego would "sanction fraud or promote manifest injustice." NRS § 78.747(2)(c). Their only even theoretical position here is that *if* there is ultimately a judgment against Orluff, and *if* it cannot be collected, then it would be unjust to not provide some deep-pocketed corporation to pay the bill. Extenuated assumptions about unknown future events and their impact—indeed, events that it is the very purpose of trial to resolve—cannot serve as a pleading of present injustice. Furthermore, Appellants are impermissibly seeking an *equitable remedy* on the basis the their fully available (and asserted) *remedy at law* might ultimately pay them less money than they would like. For these reasons, this Court should affirm the dismissal of R&O.

VI. ARGUMENT

A. Standard of Review

Dismissal is permissible under NRCP 12(b)(5) "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Torres v. Nev. Direct Ins. Co.,* 131 Nev. Adv. Op. 54, 353 P.3d 1203, 1210 (2015)(quoting *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008)). This court "rigorously review[s] orders granting NRCP 12(b)(5) motions to dismiss, presuming all alleged facts in the complaint to be true and drawing all inferences in favor of the plaintiff." *Facklam v. HSBC Bank*

USA for Deustche ALT-A Sec. Mortg. Loan Trust, 401 P.3d 1068, 1070 (Nev. 2017). The Court reviews all legal conclusions de novo. *Id*.

B. Mandatory Elements to Prove an Alter Ego Claim in Nevada

Reverse veil-piercing is a species of *alter ego* claim, *see LFC Marketing Group, Inc. v. Loomis*, 8 P.3d 841, 846 (Nev. 2000), and must therefore meet the requirements set forth by the Nevada Legislature to prove *alter ego* in Nevada Revised Statute § 78.747 (2001). In order to conduct a reverse-pierce, the entity to be pierced must be found to be the *alter ego* of the entity to which liability has been assigned. While Nevada has significant *alter ego* jurisprudence, it is essential to consider the relationship between this case law and the 2001 statute passed by the Nevada Legislature in determining the current status of Nevada's *alter ego* law.

By statute, in order to state a claim for alter ego liability in Nevada, a plaintiff must allege all of the following:

> (a) The corporation is influenced and governed by the stockholder, director or officer;
> (b) There is such **unity of interest and ownership** that the corporation and the stockholder, director or officer are inseparable from each other; and
> (c) Adherence to the corporate fiction of a separate entity **would sanction fraud or promote manifest injustice**.

NRS § 78.747 (emphasis added). The two key questions in this appeal are (1) whether Appellants have adequately pleaded that there is "unity of . . . ownership" between Orluff and R&O, *see* **Section C**, *infra*, and (2) whether Appellants have

adequately pleaded that failure to find that R&O is the *alter* ego of Orluff "would sanction fraud or promote manifest injustice." *See* **Section D**, *infra*. If Appellants have failed to adequately plead either of these mandatory elements, then they have failed to state a claim for which relief may be granted, and the dismissal of R&O must be affirmed.

Nevada's statutory requirements for a finding of *alter ego* were expressly enacted in 2001 to narrow the potential for application of the *alter ego* doctrine in light of recent case law providing for flexible and open-ended tests for *alter ego*. For example, the Nevada Supreme Court, on September 19, 2000 in *Loomis*, set forth a flexible and disjunctive balancing test for a finding of *alter ego*, and stated that "[a]lthough ownership of corporate shares is a strong factor favoring unity of ownership and interest, the absence of corporate ownership is not automatically a controlling event." *Id*., 8 P.3d at 847. In response, less than one year later, on June 15, 2001, the Nevada Legislature enacted NRS § 78.747 which codified specific, fixed requirements all of which must be shown to establish *alter ego* liability.

The statutory language enacted by the Nevada Legislature does not create the kind of balancing test that is open to flexible interpretation, such as the Nevada Supreme Court had previously endorsed in *Loomis*. *Id*., 8 P.3d at 846. Rather, the statute's test is explicit and conjunctive—a finding of *alter ego* liability requires the existence of "unity of interest **and** ownership." NRS § 78.747(2)(b) (emphasis

added). The fundamentals of statutory construction as endorsed by the Nevada Supreme Court tell us that the word "and creates a conjunctive list," *Humphries v. New York-New York Hotel & Casino*, 403 P.3d 358, 362 (Nev. 2017) (citations omitted), and that it is presumed to be used in a statute conjunctively "unless there is *clear* legislative intent to the contrary." *Dezzani v. Kern & Assoc., Ltd*., 412 P.3d 56, 60 (Nev. 2018) (citations omitted) (emphasis in original).

Here, the legislative intent behind S.B. 577, the bill that enacted NRS § 78.747, shows no evidence that the phrase "interest and ownership" should not create a conjunctive *requirement* for *both*. *Id*., at § 78.747(2)(b). Rather, the legislature demonstrated a clear intent to "limit common law and statutory liability" under the *alter ego* doctrine. NV. Assem. Comm. Min. 6/1/2001 (Ways and Means), JA 469. Indeed, the intent of the legislature was to strike a bargain—to raise corporate filing fees to fund education, and in exchange "guarantee that Nevada was the 'domicile of choice' for corporations around the country" and "that Nevada's corporate laws were the best, most inviting for business." NV. Assem. Comm. Min. 6/1/2001 (Judiciary), JA 495. Critically, the legislature repeatedly questioned and summarized the negative effects of Nevada's common law *alter ego* jurisprudence, focusing on both the *Polaris Indus. Corp. v. Kaplan*, 747 P.2d 884 (Nev. 1987), case, and the problem of "no *fixed* criteria to use the *alter ego* doctrine to pierce the corporate veil" demonstrated in both *Polaris* and the then most recent *alter ego* case,

Loomis, 8 P.3d at 846. *See* JA 499. It was this need to create a clear, "fixed" criteria for the courts to use in making *alter ego* determinations that was "'the carrot' of the liability law . . . [to] 'the stick' of increased fees." *Id*. Accordingly, to the extent the plain language of the statute is not sufficiently clear on its face, the legislative history certainly shows intent that a court *must* find *both* unity of "interest *and ownership*" to make a finding of *alter ego*. NRS § 78.747(2)(b) (emphasis added). As argued below, Appellants' Third Amended Complaint contains no coherent allegation that Orluff Opheikens owns a single share of R&O. Therefore, R&O cannot be Orluff's *alter ego* because the Third Amended Complaint fails as a matter of law to allege the required unity of ownership.

C. Appellants Have Failed to Plead the Required Unity of Ownership Between Orluff and R&O to Permit a Finding that R&O is the Alter Ago of Orluff

Without any ownership by Orluff of shares in R&O, it cannot be his *alter ego* as a matter of law. *See* NRS § 78.747, and **Section (B)**, *supra*. On this point, Appellants make only a single, internally contradictory allegation concerning ownership: that "Orluff, *through his family trust,* owns approximately eighty-five percent (85%) of the outstanding shares in R&O." JA 381 ¶ 14 (emphasis added). As a matter of law, either Orluff *or* The Opheikens Family Trust can own these shares, but not both. *See* Bogert's THE LAW OF TRUSTS AND TRUSTEES, § 148 ("trust creation has as one of its elements a *change* of possession" of the trust *res* from

grantor to trustee) (emphasis added); § 28 (defining property interest in trust *res* post-creation as "both trustee and beneficiary own the same thing," with no interest in grantor); *and* § 42 ("After a settlor has completed the creation of a trust . . . [he] has no rights, liabilities, or powers with regard to the trust administration . . . [and] has no power to revoke or modify [an irrevocable trust]."). Indeed, the fundamental purpose of placing any property in a trust is to legally and effectively separate it from the property of the grantor. *See id.* § 148. The Court has no obligation to accept as true Appellants' allegations concerning the question of ownership, not only because their sole allegation on this point contradicts itself, but because the concept of ownership is a legal conclusion which courts are not bound to accept. *Allen v. U.S.*, 964 F. Supp. 2d 1239, 1251 (D. Nev. 2013).

Here, Appellants also appear to have left their allegations concerning The Opheikens Family Trust intentionally vague, as though that would buy them 'wiggle room' in the face of a clear and strictly construed *alter ego* statute. They make no allegations, for example, as to the identity of the grantor, the trustee, or the beneficiaries, just the inadvertent implication that by calling it a "family trust," JA 381 ¶ 14, it presumably acts to *separate* ownership of R&O from Orluff.

The Third Amended Complaint fails to coherently and effectively allege that Orluff has *any ownership at all* in R&O. Accordingly, as a matter of law, without any allegation of ownership, there can be no "unity of interest *and ownership*"

between Orluff and R&O as required by NRS § 78.747(2)(b). *Id.* (emphasis added); *See also Cuomo v. Deluca & Assoc., P.C.,* Case No. 66484 (Nev. Jan 15, 2016), 2016 WL 207658 (where a single required element of a claim is missing, the claim must be dismissed under NRS 12(b)(5)). Therefore, Appellants have failed to state valid *alter ego* claim against R&O, and the dismissal of R&O should be affirmed.

D. Appellants Have Failed to Plead that, Absent a Finding that R&O Is the Alter Ego of Orluff, the Court Would be Sanctioning Fraud or Promoting manifest Injustice

As set forth above, one of the statutory requirements for any valid *alter ego* claim is a showing that, absent a finding of *alter ego*, the court would "sanction fraud or promote a manifest injustice." NRS § 78.747(2)(c). Appellants make no allegation at any point in the Third Amended Complaint that either Orluff or R&O are in any way involved in a "fraud."[1] *See generally*, JA 379-397. Therefore, Appellants instead must allege that maintaining R&O's corporate separateness from Orluff would somehow "promote a manifest injustice." NRS § 78.747(2)(c).

[1] While the word "fraudulent" occurs twice in a conclusory listing ("grossly negligent, reckless, willful, intentional, oppressive, fraudulent, malicious, and done in reckless disregard," JA 392, 394 ¶¶ 62, 70), there is no actual discussion of fraud, nor any allegations that could possibly meet the heightened pleading requirements of N.R.C.P. 9.

1. Appellants have failed to plead any grounds on which R&O's dismissal will "promote manifest injustice."

Appellants, however, nowhere allege that reverse veil-piercing in this case would avoid *manifest* injustice. Rather, they make only the conclusory and facially-insufficient allegation that "adherence to the corporate fiction of R&O [would] . . . promote injustice." JA 396 ¶ 79. First, Appellants are pleading a conclusion of law, and this Court is in no way required to accept it as true. *Allen*, 964 F. Supp. 2d at 1251. However, even if this Court were to accept that conclusory allegation as true, it does not meet the statutory requirement for "manifest injustice." NRS § 78.747(3). The Nevada Legislature specifically added the word "manifest" to the prior Nevada Supreme Court's expression of the common law requirement that a proponent of an *alter ego* claim must allege it would "promote injustice." *Loomis*, 8 P.3d at 847 (quoting *Polaris*, 747 P.2d at 886). They did so to "ensure that Nevada's corporate laws were the best, the most inviting for business." JA 495.

The importance of this statutory 'manifest injustice' requirement goes far beyond a single word. Its effect is to create a heightened pleading requirement that any pleading of the *legal conclusion* of injustice must be supported by a detailed and coherent set of factual allegations such that it is *manifest* – "clear and obvious."

OXFORD ENGLISH DICTIONARY, 3d.[2] Despite throwing out additional legal conclusions, such as calling it a "scheme," JA 386 ¶ 36, and stating without factual adornment the legal conclusion that Orluff was "a straw man owner," *id*., Appellants have pleaded no facts that in any way support the conclusion that protecting the corporate separateness of R&O would be in any way unjust. Appellants even admit that "R&O did not make a profit from the construction of Cowabunga Bay and even waived its lucrative general contractor fee." *Id*. Indeed, Appellants' own allegations of the motivation behind the waterpark's business structure explain that the goal was not to defraud a young boy and his family, but rather to "eventually generate sufficient funds to [repay the loan and thereby] make R&O whole," "so R&O could recover its construction costs and pay its subcontractors." JA 385, 396 ¶¶ 29, 81. That is nothing more than a prudent business decision, and Appellants make ***no*** allegation of how this "scheme," JA 386 ¶ 36, would ever work an injustice on anyone, let alone the required "manifest injustice" to Appellants. NRS § 78.747(2)(c).

[2] Black's Law Dictionary (10th ed. 2014) defines manifest injustice only as it operates as a standard for appellate review: "A direct, obvious, and observable error in a trial court, such as a defendant such as a defendant's guilty plea that is involuntary or is based on a plea agreement that the prosecution has rescinded."

2. Pre-Judgment, the theoretical potential for an uncollectable judgment cannot be used to meet the statutory requirement to plead manifest injustice.

In reality, the "injustice" Plaintiffs are concerned about is the theoretical potential for an unpaid judgment. Their concern is that, *if* there is a judgment against Orluff Opheikens, and *if* that judgment cannot be satisfied, then Appellants' attorneys may lose out on a multi-million-dollar contingency fee unless they can find some—*any*—deep pockets to pay. Here, Appellants believe they have found a suitable set of deep pockets in R&O.

Appellants' attempt to disguise their avarice by setting up a straw-man standard that they propose this Court reject: they claim this Court must either adopt the rule that reverse piercing is never available pre-judgment, or else reverse and remand this dismissal. But that is not the question before the Court on this appeal. The correct question is this: Appellants have no evidence to support the required element that refusal to find R&O to be the *alter ego* of Orluff would sanction fraud or promote an injustice other than their highly-tenuous argument that, theoretically, if R&O isn't liable for Orluff's alleged torts they may not get paid. The link to even theoretical "injustice" here is tenuous at best—Appellants have no direct claim against R&O, and, indeed, do not allege that R&O has done *anything* wrong. Does the theoretical possibility that a judgment may be entered against Orluff, and then the further theoretical possibility that Orluff may not be able to pay whatever this

judgment is, suffice to create *present manifest injustice*? It is a virtual tautology that the purpose of trial—*a trial which has not yet occurred*—is to resovle these unknowns. Here, Appellants seek this extraordinary equitable relief before the availability of relief at law is known or is even knowable. *If* there is ultimately a judgment against Orluff, and *if* he ultimately can't pay it, then Appellants could at that time attempt to make a case for post-judgment relief. But to sanction this kind of overreaching now would effectively allow any plaintiff to drag any defendant through discovery purely on the theory that their deep pockets may one day be desireable to satisfy a potential judgment for actions in which they were uninvolved! This cannot be the law. Rather, this Court should hold that the theoretical potential for a future judgment to go unpaid does not constitute evidence that a court would "sanction fraud or promote manifest injustice" as required by NRS § 78.747(2)(c).

E. Appellants Request This Court Stretch the Leniency of Notice Pleading Past Its Breaking Point—Accordingly, if This Court Cannot Already Affirm the Dismissal on the Above Brounds, then This Is the Appropriate Case to Adopt the Twombly Pleading Standard and to Affirm Dismissal

Ultimately, the only way Appellants' argument for reversal can succeed is if this Court accepts as sufficiently pleaded ALL of the following:

1. The ownership of some portion of R&O by a family trust somehow related to Orluff is sufficient to show that Orluff has such ownership of R&O as to create a "unity of interest" such that the two are "inseparable from each other"; and
2. Appellants' conclusory pleading of injustice, without more, suffices to meet the statutory requirement of manifest injustice—

> even assuming that Orluff pays in full any judgment that might be entered against him.

Only if the Court accepts these pleadings of bare legal conclusions as facts, accepts that the boundaries of notice pleading can be stretched indefinitely to the point of being meaningless, could Appellants' pleadings suffice to state a claim for relief against R&O. Either the leniency permitted under notice pleading has a reasonable limit, or notice pleading itself must be revised. Indeed, clever plaintiffs' attorneys and their ability to shoehorn virtually anything past a notice-pleading gatekeeper highlight precisely why the US Supreme Court ultimately decided that plaintiffs must plead enough specific facts to *show* that their claims are *plausible*—not merely to claim without support that anything is possible. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Should, however, this Court determines that it would be otherwise bound by the legacy "no set of facts" standard to permit Appellants' claim against R&O to proceed, *see, e.g., Dezzani v. Kern & Asssoc., Ltd*., 412 P.3d 56, 64 (Nev. 2018) (Pickering, J., dissenting), then this is the case where this Court should adopt the *Iqbal-Twombly* "plausibility" standard to prevent such an internally contradictory and transparently deficient claim from being allowed to proceed. "Nevada hasn't adopted the *Twombly/Iqbal* doctrine, ***at least not yet****." MG & S Enterprise, LLC v. Travelers Casualty Ins. Co. of Am*., Case No. 69622 (Nev. App., Sept. 29, 2017), 2017 WL 4480776 at *7 (emphasis added). But this Court may, and indeed should,

do so now. Indeed, just as there was a gradual but steady tide of state courts adopting the prior notice-pleading standard after *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), state courts are gradually adopting the *Iqbal-Twombly* standard, and it is likely only a matter of time before Nevada does so. *See Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 424-25 (2018) (noting Colorado, the District of Columbia, Massachusetts, Nebraska, South Dakota, and Wisconsin have now adopted the *Iqbal-Twombly* standard). While the adoption of the *Iqbal-Twombly* standard at the state court level may seem slow, the same was the case with state court adoption of modified summary judgment standards promulgated by the Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In the 32 years since that 1986 opinion, 39 state courts have now adopted the *Celotex* standard—approximately the same pace as the ongoing adoption of *Iqbal/Twombly*. *Procedural Retrenchment and the States* at 429-432. The same is likely to happen in Nevada with respect to *Iqbal-Twombly*, particularly with this state's recognition that the Nevada Rules are modeled after the Federal Rules, and Nevada's general desire to reduce wasteful discovery costs—the same policy concern that underscored *Iqbal-Twombly*.

1. Adopting Iqbal-Twombly in Nevada state courts will reduce wasteful discovery costs spent on implausible claims by increasing early judicial management.

In deciding *Iqbal*, Justice Kennedy explained that requiring parties to plead ***plausible*** claims precludes "unlock[ing] the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 556 U.S. at 678-79. Before the U.S. Supreme Court adopted the plausibility standard in *Twombly*, the mere threat of discovery expense in federal civil litigation could push "defendants to settle even anemic cases." *Twombly*, 550 U.S. at 559.

The requirement to plead plausible claims thus serves two vital purposes: "to ensure that a defendant is placed on notice of his or her alleged misconduct sufficient to prepare an appropriate defense," and "to avoid ginning up the costly machinery associated with our civil discovery regime on the basis of 'a largely groundless claim.'" *Pace v. Swerdlow*, 519 F.3d 1067, 1076 (10th Cir. 2008) (citing *Twombly*, 550 U.S. at 1964, 1966). Where the presumptive motive of impleading R&O is solely to reach its insurance policies, and not because R&O itself is alleged to be in any way at fault, this jurisprudential argument becomes even more clear-cut.

Nevada and federal courts share the goal of using pretrial rules to ensure "the just, speedy, and inexpensive determination of every action." *Compare* NRCP 1, *with* Fed. R. Civ. P. 1. Likewise, both Nevada and federal rules require the identical "short and plain statement of the claim *showing* that the pleader is entitled to relief."

Compare NRCP 8 *with* Fed. R. Civ. P. 8. (emphasis added). Case law interpreting a federal rule, where they are very similar to the analogous Nevada rule, present "strong persuasive authority" for Nevada state courts. *Vanguard Piping v. Eighth Jud. Dist. Ct.*, 309 P.3d 1017, 1020 (Nev. 2013). Accordingly, this Court should adopt the *Iqbal-Twombly* 'plausibility' standard as the pleading requirement contained in NRCP 8—"showing that the pleader is entitled to relief" must require more than stating conclusions. *Id*.

2. The deficiencies in the instant claim are a showcase for the merits of Iqbal-Twombly: a corporation should not be dragged to the conclusion of litigation in light of these highly-implausible claims of injustice.

Here, even if this Court determines that the TAC satisfies a purely theoretical 'possibility of future injustice standard,' let alone that this theoretical future injury could state a claim under Nevada law, there is certainly no *plausible* claim sufficient to demand that R&O be dragged into this case. Appellants make no "show[ing]", even if every *factual* allegation in the TAC is accepted as true, that there is a plausible concern of actual, present, and *manifest* injustice. *See Iqbal*, 556 U.S. at 576. Rather, Appellants present the Court with nothing but the wholly speculative concern that without R&O's deep pockets, there might not be enough money to pay a theoretical future judgment against another party. This highlights a fundamental flaw in the legacy "no set of facts" pleading standard—if that bar is not high enough to stop this claim of 'injustice,' what claim could it stop? *Cohen v. Mirage Resorts,*

Inc., 62 P.3d 720, 734 (2003). Under Appellants' proposal, injustice would, by definition, exist *everywhere*, as every complaint for money damages carries with it from the outset at least the theoretical possibility that a judgment could go unpaid. Nevada's statutory requirement of "manifest injustice" must require more than that, or it would become an impermissible nullity. NRS § 78.747(2)(c).

Adoption of the *Iqbal-Twombly* pleading standard here would avoid such an impermissible nullification of the legislatively mandated requirement for "manifest injustice." NRS § 78.747(2)(c). This Court should, at a minimum, impose a plausibility standard for pleading the required *manifest* injustice—a standard that Appellants certainly have not met here. At *most*, the TAC has "alleged—but it has not show[n]" that declining to find R&O to be the *alter ego* of Orluff Opheikens would promote a manifest injustice. *Iqbal*, 556 U.S. at 576. If that were sufficient to state a 'claim' for *alter ego*, the floodgates would open and the corporate form would cease to provide any meaningful protection in Nevada. That is the exact opposite of the expressed intent of the Legislature. *See, e.g.,* JA 495 (legislative intent of alter ego statute is for Nevada's corporate laws to be the "most inviting for business" in the nation). Accordingly, this Court should adopt the plausibility requirement from *Iqbal-Twombly* and dismiss Appellants' claim against R&O for, among other things, failing to state plausible allegations of manifest injustice.

VII. CONCLUSION

Based on the foregoing, R&O respectfully requests this Court affirm the district court's dismissal of Appellants' claim against it for reverse veil-piercing.

Dated this 4th day of January 2019

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NRAP 28.2 CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, size 14 font.
2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7)(A)&(C) because it does not exceed 30 pages.
3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 4th day of January, 2019 .

/s/ Jeffrey S. Vail

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of January, 2019, I served a true and correct copy of the foregoing document (and any attached) entitled **RESPONDENT'S OPENING BRIEF** in the following manner:

(ELECTRONICALLY SERVICE) Pursuant to Administrative Order 14-2, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by the Court's facilities to those parties listed on the Court's Master Service List:

and when necessary: by placing a copy in a sealed envelope, first-class postage fully prepaid thereon, and by depositing the envelopes in the U.S. mail at Las Vegas, Nevada address as follows:

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