IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID J. MITCHELL; LAS VEGAS LAND PARTNERS, LLC; MEYER PROPERTY, LTD.; ZOE PROPERTY, LLC; LEAH PROPERTY, LLC; WINK ONE, LLC; AQUARIUS OWNER, LLC; LVLP HOLDINGS, LLC; LIBERMAN HOLDINGS, LLC; and LIVE WORKS TIC SUCCESSOR, LLC, Appellants, vs. RUSSELL L. NYPE; REVENUE PLUS, LLC; and SHELLEY D. KROHN, Respondents.	)	**Case No.: 80693**

MITCHELL APPELLANTS' OPENING BRIEF

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[1] "Mitchell Appellants" and/or "Appellants" include: DAVID J. MITCHELL; MEYER PROPERTY, LTD.; ZOE PROPERTY, LLC; LEAH PROPERTY, LLC; WINK ONE, LLC; AQUARIUS OWNER, LLC; LVLP HOLDINGS, LLC; and LIVE WORKS TIC SUCCESSOR, LLC. [AA 1443-44].

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***NRAP* 26.1 DISCLOSURE**

The undersigned counsel of record certifies that the following are persons and entities as described in *NRAP* 26.1(a), and must be disclosed.

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These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. All parent corporations and listing any publicly held company that owns 10% or more of the party's stock or states that there is no such corporation:

There is no such corporation.

2. The names of all law firms whose partners or associates have appeared for the party or amicus in the case (including proceedings in the District Court or before an administrative agency) or are expected to appear in this Court:

COHEN | JOHNSON

COHEN | JOHNSON | PARKER | EDWARDS

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3. If any litigant is using a pseudonym, the statement must disclose the litigant's true name:

None.

DATED this 18th day of March 2021

/s/ H. Stan Johnson, Esq.

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JURISDICTIONAL STATEMENT

This is an Appeal from a January 17, 2020 Amended Findings of Fact, Conclusions of Law and Judgment ("**FFCL" and/or "Judgment**"),[2] arising from a lawsuit in the *Eighth Judicial District Court*, before the Honorable Elizabeth Gonzalez, by Plaintiffs/Respondents, RUSSELL L. NYPE ("**Nype**") and REVENUE PLUS, LLC (collectively "**Plaintiffs**" and/or "**Nype Respondents**"), against Defendants/Appellants, DAVID J. MITCHELL ("**Mitchell**"); MEYER PROPERTY, LTD. ("**Meyer**"); ZOE PROPERTY, LLC ("**Zoe**"); LEAH PROPERTY, LLC ("**Leah**"); WINK ONE, LLC ("**Wink**"); AQUARIUS OWNER, LLC ("**A-Owner**"); LVLP HOLDINGS, LLC ("**LVLP-H**"); and LIVE WORKS TIC SUCCESSOR, LLC ("**Live Work TIC**")(collectively "**Appellants**" and/or "**Mitchell Defendants**")[3] ("**Action**"). [AA 1221-38; 307-340; 1052-82].

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[2] Original Findings of Fact, Conclusions of Law and Judgment were entered on January 16, 2020. [AA 1203-20]. The District Court corrected a typographical error in the Judgment and incorporated pre-judgment interest in the Judgment in an Order entered on May 13, 2020. [AA 1511-17].

[3] Mitchell Defendants also sometimes includes Defendants, MITCHELL HOLDINGS, LLC ("**Mitchell-H**"); LIVE WORK, LLC ("**Live Work**"); LIVE WORK MANAGER, LLC ("**Live Work-M**"); and FC/LIVE WORK VEGAS, LLC ("**FC/LV**").

Additionally, Plaintiffs sued Defendants, BARNET LIBERMAN ("**Liberman**"), LIBERMAN HOLDINGS, LLC ("**Liberman-H**"); 305 LAS VEGAS, LLC ("**305 Vegas**"); CASINO COOLIDGE, LLC ("**Coolidge**") (collectively "**Liberman Defendants**").[4] Plaintiffs also sued Defendant, LAS VEGAS LAND PARTNERS, LLC ("**LVLP**"),[5]

On February 13, 2020, Plaintiffs filed a Motion to Alter/Amend the Judgment, pursuant to *NRCP* 59(e) and 60(a). [AA 1290-1324] and on February 14, 2020, Mitchell Defendants filed a Motion to Alter/Amend Judgment, pursuant to *NRCP* 52 and 59(e) [AA 1371-91] ("**Alter/Amend Motions**").

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[4] On February 25, 2020, Liberman and Coolidge separately appealed the Judgment and were represented by separate counsel in the District Court as well as in their Appeal. [AA 1440-42]. On February 26, 2021, this Court dismissed the appeal filed by Liberman and Coolidge. Liberman Defendants also filed Motions to Alter/Amend with the District Court. [SAA 73-513; AA 1325-52]. The Orders denying those motions were entered on March 30, 2020, with Notice of Entry filed on March 30, 2020. [AA 1483-88; 1492-1500].

[5] On August 19, 2019, **LVLP** filed for Chapter 7 Bankruptcy. Respondent, SHELLEY D. KROHN ("**Trustee**"), is the bankruptcy trustee. [AA 937-39]. The Judgment takes no action against LVLP or the Trustee. [AA 1226, *n*. 1].

The Orders resolving the Alter/Amend Motions were entered on March 30, 2020 [Mitchell Defendants] and May 13, 2020 [Plaintiffs], with Notice of Entry filed on March 30, 2020 and May 13, 2020. [AA 1489-94; 1511-17]. Appellants timely filed their Notice of Appeal on February 26, 2020. [AA 1443-60].[6]

ROUTING STATEMENT

Appellants respectfully submit that this Appeal should be heard by the *Nevada Supreme Court* as this Action originated in the Business Court of the *Eighth Judicial District Court*. *See NRAP* 17(a)(9).

STATEMENT OF ISSUES ON APPEAL

Appellants respectfully submit the following Statement of Issues in this Appeal:

1. Whether the District Court erred in finding in favor of Plaintiffs and awarding damages for civil conspiracy, notwithstanding that the cause of action was barred by the statute of limitations.

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[6] Pursuant to *NRAP* 4(a)(6), the Notice of Appeal was deemed filed on the date of notice of entry of the order resolving the last Alter/Amend Motion, i.e. Plaintiffs' on May 13, 2020. [AA 1511-17].

2. Whether the District Court erred in finding in favor of Plaintiffs and awarding damages for fraudulent conveyance.[7]

3. Whether the District Court erred in finding in favor of Plaintiffs and awarding damages for alter ego.

4. Whether the District Court erred in awarding Plaintiffs special damages in the form of attorney's fees, including in the award itself and the amount of such award, and whether Plaintiffs' failure to properly allege, either factually and/or legally, any entitlement to an award of attorney's fees as special damages rendered such claim for special damages improper.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This Appeal arises from an Action filed by Plaintiffs[8] on July 26, 2016 in the *Eighth Judicial District Court*. [AA 1-19; 307-40].

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[7] *See infra* re: Coolidge transaction. Additionally, the District Court's award of pre-judgment interest and attorney's fees on Plaintiffs' claims for civil conspiracy and fraudulent conveyance should properly be vacated and reversed based upon the issues presented herein relating to the two claims. Additionally, an incorrect calculation of pre-judgment interest was based upon an incorrect judgment amount, i.e. $19,983,450.40, as opposed to the total amount awarded of $19,641,515.90. [AA 1237; 1322; 1324; 1466; 1501-10; 1511-17].

[8] On November 18, 2019, the Trustee filed a Compliant in Intervention. [AA 994-1036; 1046-51; 1052-82].

After a six-day bench trial, the District Court found in favor of Plaintiffs on their causes of action for fraudulent conveyance, civil conspiracy and alter ego. Plaintiffs were awarded a total of **$19,641,515.90** in damages, as well as a further judgment on their alter ego claim. [AA 1237-38]. The District Court awarded pre-judgment interest/costs.[9] [AA 1516; 1518-24]. The District Court subsequently ordered additional attorney's fees. [AA 1501-10]

1. Underlying Action

The instant Action relates to an underlying lawsuit brought by LVLP, Live Work and Zoe Properties, LLC against Plaintiffs on November 2, 2007 in the *Eighth Judicial District Court*, bearing Case No.: A551073 ("**Underlying Action**"). [AA 2748-52]. Plaintiffs filed a counter-claim in the Underlying Action. [AA 2753-66].

On April 10, 2015, a judgment in the amount of **$2,608,797.50** was entered in the Underlying Action in favor of Plaintiffs and against LVLP only. [AA 2792-94].

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[9] With regard to the award of pre-judgment interest, Plaintiffs calculations were improperly based upon an incorrect total Judgment amount of $19,983,450.40. [AA 1322; 1324; 1466]. The District Court, in fact, awarded a total Judgment amount of $19,641,515.90. [AA 1237].

An amended Underlying Judgment, which included costs and interest, was entered on November 1, 2018 following an appeal of the Underlying Action to the *Nevada Supreme Court*. [AA 750-67; 2795-97]. ("**Underlying Judgment**"). The Underlying Judgment does not reflect any award of attorney's fees to Plaintiffs, nor did Plaintiffs seek such award in the Underlying Action.

B. COURSE OF PROCEEDINGS/DISPOSITION

On July 26, 2016, Plaintiffs sued all Defendants, wherein Plaintiffs' causes of action were: (1) constructive trust; (2) fraudulent conveyance; (3) civil conspiracy; (4) declaratory relief; and (5) alter ego. [AA 1-19].[10]

While the District Court denied a Motion to Dismiss filed by Defendants, on August 21, 2017, nevertheless, the District Court found:

> [T]hat the complaint as currently stated does not sufficiently give numerous defendants actual notice as to the specifics of what is being alleged regarding each such defendant, and therefore an amendment would be appropriate and will be required. [AA 303].

[10] All defendants were initially represented by the same counsel. [AA 49-59; 60-88]. On May 22, 2017, the District Court struck Plaintiffs' jury demand, wherein it found in part that "Plaintiff's third claim for relief for civil conspiracy/conspiracy to defraud is based on and seeks to facilitate post-judgment remedies and the fraudulent conveyance claim (sic); therefore it is equitable not legal in nature. [AA 49-59; 166].

Plaintiffs filed their First Amended Complaint on August 21, 2017. [AA 60-88; 298-306; 307-340] ("**Amended Complaint**"). On September 5, 2017, Mitchell Defendants filed their Answer to the Amended Complaint. [AA 341-51]. On September 8, 2017, Liberman and 305 Vegas filed their Answer to the Amended Complaint. [AA 352-61].

On October 24, 2017, a Joint Case Conference Report ("**JCCR**") was filed in the instant Action.[11] [AA 362-470]. Plaintiffs' *NRCP* 16.1 Disclosures requested attorney's fees and costs "incurred in this case." [AA 383].

Mitchell Defendants filed a motion to compel ("**Mitchell Discovery Motion**") against Plaintiffs on April 19, 2018, seeking complete responses to Mitchell Defendants' interrogatories and requests for production of documents. [AA 490-725].

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[11] During the course of the instant Action, all counsel agreed to continuances relating to pre-trial, trial and discovery deadlines. [AA 471-78; 888-94]. For example, on February 15, 2018, all counsel stipulated to continue the discovery and trial dates in the instant Action, wherein it was stated, "[c]ounsel have been diligently pursuing and answering discovery on behalf of their respective clients." [AA 474].

In the Mitchell Discovery Motion, it was stated, "[d]espite receiving over six months to provide complete responses, Plaintiffs still have failed to provide any factual basis for the claims set forth in their Complaint." [AA 491].[12] On June 18, 2019, the District Court granted the Mitchell Discovery Motion. [AA 862-68].[13]

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[12] Nype's responses included: "Mitchell indicated in the Prior Case that Plaintiffs would never collect because defendants had set everything up so as to make LVLP Judgment proof." [AA 609]. Nype further stated:

> Significantly, after entering into a transaction which were the subject of the prior case, as between LVLP, Live Work, LLC, and Wink One, LLC, with Forest City Enterprises, and various of its affiliated and subsidiary entities. Those transactions which led to the litigation in the Prior Case, **literally resulted in monies in excess of $10 million flowing to LVLP, a very substantial portion of which was immediately distributed to Mitchell and Liberman, in total derogation of the rights of known existing creditors, such as Plaintiffs herein**. [AA 621] (emphasis).

[13] In May 2019, Mitchell Defendants' current counsel was retained in the instant Action. [AA 908]. On May 30, 2019, the District Court granted a motion to compel, filed prior to Mitchell Defendants' retention of its current counsel, that was filed by Plaintiffs. [AA 903-14]. Additionally, on September 24, 2019, following an evidentiary hearing, the District Court entered an Order on Plaintiffs' Motion for *NRCP* 37(b) sanctions, wherein the District Court sanctioned Mitchell Defendants $160,086.46 relating to compelling discovery ("**Sanctions Order**"). [AA 940-52]. The record reflects that Mitchell Defendants fully paid these discovery sanctions prior to the trial in this Action. [AA 1180-82].

On November 30, 2018, Liberman Holdings was dismissed from the instant Action. [AA 895-902]. On August 23, 2019, 305 Vegas filed a Motion for Summary Judgment, which was denied by the District Court. [AA 915-36]. On November 21, 2019, Mitchell Defendants filed a Motion to Dismiss/Motion for Summary Judgment ("**MSJ**"), which was denied by the District Court. [AA 1095-1123].

On November 18, 2019, the Trustee filed the Complaint in Intervention, following the granting of a Motion to Intervene. [AA 994-1036; 1052-82; 1083-88]. On December 19, 2019, Mitchell Defendants filed their Answer to the Complaint in Intervention. [AA 1156-60]. On December 23, 2019, Liberman and Coolidge filed their Answer to the Complaint in Intervention. [AA 1171-79].

1. Bench Trial

A bench trial was held between December 30-31, 2019 and January 2-3 and 6-7, 2020. [AA 1533-2421]. At the close of trial, 305 Vegas was granted a directed verdict, "as its failure to collect rent due from LVLP does not cause any damage to the Plaintiff." [AA 2294; 1226; 1435-39].

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On January 16, 2020, the District Court entered its original FFCL. [AA 1203-20]. On January 17, 2020, the District Court entered an amended FFCL, i.e. the Judgment. [AA 1221-38].[14]

2. The Judgment

The Judgment is in favor of Plaintiffs on their claims for fraudulent conveyance, civil conspiracy and alter ego.[15] [AA 1221-1238].

Fraudulent Conveyance Claim: **$4,835,111.37**

The District Court's award for fraudulent conveyance is comprised of two components, i.e. **$341,934.47** relating to the proceeds "of the Leah transaction with Casino Coolidge directly to Liberman and Mitchell, rather than to Leah's parent LVLP" and "**special damages in the form of attorney's fees, costs and expert expenses** related to the transfers in the total amount of **$4,493,176.90**." [AA 1235] (emphasis).

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[14] The amendment incorporated footnote 10 in reference to the District Court's prior evaluation of the factors enumerated in *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 455 P.2d 31 (1969). [AA 1235; 1180-82; 940-52]. However, *see infra*, regarding special damages.

[15] The Judgment reflects that Plaintiffs were unsuccessful on their other two claims, i.e. constructive trust and declaratory relief. [AA 1237]. However, Plaintiffs had abandoned the constructive trust claim prior to trial. [AA 1193].

With regard to the fraudulent conveyance award, the Judgment reflects that "[t]hese damages are duplicated in the civil conspiracy judgment." [AA 1237].

Civil Conspiracy Claim: **$19,641,515.90**

The District Court's award for civil conspiracy is comprised of two components, i.e. **$15,148,339.00** and "Nype is entitled to recover his **attorney's fees as special damages** as he was successful on his claim for civil conspiracy in the total amount of **$4,493,176.90**." [AA 1236-37].[16]

Finally, with regard to Plaintiffs' alter ego claim, the District Court awarded Plaintiffs' the "amount of the Underlying Judgment." [AA 1238].

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[16] The District Court states, "Mitchell, Liberman and the Related Entities' actions and inactions have caused Nype damages in the total amount of $19,641,515.90" and the damages awarded for the fraudulent conveyance claim "are duplicated in the civil conspiracy judgment." [AA 1237-38].

Special Damages Award

As reflected in the Judgment, the District Court awarded "special damages" in the amount of **$4,493,176.90** in the form of attorney's fees relating to the claims for fraudulent conveyance and civil conspiracy. [AA 1235-38]. However, the amount of **$4,493,176.90** awarded by the District Court for "attorney's fees" did **not** actually represent attorney's fees and/or costs allegedly incurred by Plaintiffs.

In fact, this exact amount, i.e. **$4,493,176.90**, was from a calculation submitted by Plaintiffs at trial in the instant Action reflecting the total amount, as of September 2, 2019, of the Underlying Judgment inclusive of costs and interest. [AA 2351-52; 3230 (Trial Exhibit 70060)].[17]

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[17] In this particular instance, the District Court's factual and legal determinations regarding the **amount** of attorney's fees, costs and expert expenses awarded as "special damages" were not based upon an analysis of Plaintiffs' actually requested attorney's fees, costs and expert expenses incurred in the instant Action. *See infra* argument section regarding the District Court's award of attorney's fees as special damages.

The Judgment does not reflect any consideration, including an analysis of the *Brunzell* factors, by the District Court of the amounts **actually requested** by Plaintiffs for attorney's fees as special damages. [AA 1235; 1501-10; 2348].[18]

STATEMENT OF FACTS RELEVANT TO APPEAL

Since the mid-1980's, Mitchell has been a real estate developer, primarily involved in real estate projects in New York City, as well as developing properties in Long Island, New York, Florida and New Jersey. [AA 2058]. Mitchell subsequently met Liberman in the late 1990's, who himself was also involved in real estate development. [AA 1890; 2059].

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[18] While the District Court notes in footnote 10 to the Judgment that it was incorporating its evaluation of the *Brunzell* factors from the Sanctions Order, this ignores the fact that the District Court was not even considering the actual amount of attorney's fees requested by Plaintiffs at trial in the instant Action. The District Court incorrectly believed that the requested attorney's fees were $4,493,176.90. [AA 1235]. At trial, Plaintiffs requested $1,274,337.90 subject to additional attorney's fees to be submitted for the time period of December 2019 to January 2020. [AA 2348; 1237-89; Trial Exhibits 70036-45; 70053-56; 70062-65; 70067; 70075-79].

In 2004, after Mitchell purchased an initial piece of property in Las Vegas, Nevada, Mitchell and Liberman began assembling additional properties in the downtown Las Vegas area with an eye towards future development. [AA 1891-92; 1994-95; 2059-63; 2153].

LVLP, which was created on August 17, 2004 and co-owned by Mitchell and Liberman, acquired the different Las Vegas land parcels through subsidiary entities. [SAA 28; AA 2062-63; 2087; 2461; *see also* Trial Exhibits 3, 9, 10, 17-18, 32, 34-35, 38, 40, 43-45, 52 and 90075].

Over the course of several years, Mitchell and Liberman assembled approximately 60 properties in the downtown Las Vegas area. [AA 2061-62]. These purchases were acquired through equity/cash and debt, all of which amounted to between 120-130 million dollars. [AA 2066].

Liberman testified that the main bank they utilized, i.e. Signature Bank, which was located in New York, would not loan out money in Las Vegas, and therefore, they took out personal loans and used it for development. [AA 1902-03].

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Plaintiffs' forensic accountant, Mark Rich, C.P.A. ("**Rich**"), testified that business expenses were being paid by Mitchell and Liberman personally, including loan payments, bills and travel expenses. [AA 1609-10].[19]

The subsidiary entities were set up for several reasons, i.e. to prevent property sellers from learning that a single buyer was acquiring multiple adjacent parcels of land, as well as for management and financing requirements of imposed by various lenders.[20] [AA 1892-93; 1879].

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[19] Liberman and Mitchell testified that the distributions taken later were to pay some of the obligations on the personal lines of credit from a number of banks that had enabled them to generate the funds necessary to assemble the properties. [AA 1964-65; 1973; 2152-53]. Later, a receiver requested that deposits be deposited into Heartland Bank instead of Signature Bank. [AA 2155; 2902].

[20] Rich agreed that this is a common practice in real estate development. [AA 1702-04]. However, the subsidiary entities were not set up in order to avoid paying Plaintiffs on the Underlying Judgment. [AA 2062-64]. Rich's initial report is designated as both Trial Exhibit 70043 and again as Trial Exhibit 50028. [AA 1618-19; SAA 1424-1704 (Trial Exhibit 70043)].

A. Civic Center Project

Around the time that Mitchell and Liberman were assembling the various properties, the City of Las Vegas had been working on its own plan to create a consolidated civic center, including what would become the new Las Vegas City Hall ("**City Hall**") and the new Regional Transportation Center ("**RTC**") (collectively "**Civic Center Project**") in downtown Las Vegas. [AA 1891-92; 1896; 2066-70].

Ultimately, the RTC was built upon land initially acquired by Mitchell and Liberman, through various entities, and involved a 39 year lease, i.e. wherein the City of Las Vegas constructed the RTC and LVLP, through several entities, and a large national builder, Forest City Commercial Development, Inc. ("**Forest City**"), own the underlying land. [AA 1890-91; 2068-71; SAA 1715-1807].

1. First Wall Street Agreement

To secure additional funding for the development plans, on January 25, 2006, LVLP entered into a non-exclusive agreement with First Wall Street Capital International ("**Wall Street**") to find a joint venture and/or equity partner ("**WS Agreement**"). [SAA 821-25 (Trial Exhibit 60001)].

Mitchell first met Nype through Wall Street. [AA 2098]. The WS Agreement provided that Wall Street would be entitled to certain percentages in the form of commissions for assisting LVLP in acquiring a joint venturer and/or equity partner. [SAA 821]. While Nype introduced LVLP to Wall Street, the WS Agreement was only between LVLP and Wall Street. [SAA 793; 821].

Nype did not have any formal relationship with Wall Street. [AA 2227-78]. Nype ultimately had a falling out with Wall Street. [AA 2177]. LVLP and Nype never had a written agreement, nor did they ever come to a meeting of the minds regarding Nype's compensation. [AA 1870; 2082; 2183-84].

2. Forest City Investment

The development of the Civic Center Project, which ultimately included the development of the new RTC Center and the new Las Vegas City Hall, included approximately five city blocks. [AA 1891-92; 1896; SAA 1715-1807 (Trial Exhibit 90001)]. Forest City was a large national developer and had done similar projects throughout the country. [AA 1892]. At one time, Nype had worked for Forest City. [AA 2168].

In June 22, 2007, Forest City purchased a 60% interest in the properties from Live Work and Zoe, while they kept a 40% interest as tenants in common. [AA 2559; 2067; 2077; Trial Exhibits 40007; 90001].[21]

B. Underlying Action

Ultimately, LVLP, as well as LiveWork and Zoe, sued Nype and Revenue in the *Eighth Judicial District Court* on November 2, 2007 relating to Nype's contention that he was entitled to compensation under the same terms as provided in the WS Agreement ("**Commission Claim**"). [AA 2748-52]. Nype counter-sued LVLP. [AA 2753-66]. During the Underlying Action, Plaintiffs were provided with LVLP's income tax returns for the years 2007-2009 and the 2007 income tax return was discussed in the Underlying Trial. [AA 2088-89; 2249; 2252; 2271; 3525-43].[22]

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[21] The ownership interests were reduced due to later capital calls that LVLP did not fund. This occurred following the dramatic downturn in the economy and real estate market. [AA 1897; 1973; 2048; 2128-29; 2559-2563]. The current interest is apportioned at 90%/10%. [AA 2559].

[22] Rich was Plaintiffs' forensic account in the Underlying Action. [AA 1680]. Rich testified in the instant Action that he hadn't reviewed ledgers/accounting records (or could not recall if he saw overall financial records for LVLP) in the Underlying Action. Trial Exhibit 90079 reflects otherwise. [AA 1681; 3535; 3539]("Mr. Rich's review of accounting records" and "LVLP's Financial Distress and Financial Wherewithal").

District Judge Ronald Israel found in favor of Nype and Revenue and against LVLP and awarded damages in the amount of $2,608,797.50. [AA 2767-91]. The Underlying Judgment was appealed and following the appeal, an Amended Underlying Judgment was entered on November 1, 2018. [AA 2114; 2795-97].

C. Instant Action

In the instant Action, there was testimony from both Mitchell and Liberman that nothing they did with regard to the various developments was done in any attempt to hinder, delay or defraud Nype relating to the Underlying Judgment. [AA 2082; 2096].

1. Rich's Testimony[23]

Rich testified that the preferred method of real estate developers is to set up multiple limited liability companies in acquiring property for development, which allows for privacy during acquisition and assists in financing and lender requirements. [AA 1702].

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[23] Nype testified in the instant Action that he was principally relying on Rich's report as it pertains to Nype's allegations regarding fraudulent conveyance and alter ego. [AA 2242].

LVLP acquired the approximately 60 different parcels utilizing this same methodology. [AA 2061-63; 1878-79]. In Rich's experience, he has had clients set up single-purpose or special purpose entities in order to safeguard collateral. [AA 1702-03].

Rich further testified that the IRS allows disregarded entities with a common ownership and they may file a consolidated tax return. In such instances, it does not mean that the disregarded entities are not legally separate entities. [AA 1724-26; 2905-06 (Trial Exhibit 70003)]. The consolidated tax returns were filed under LVLP-H. [AA 1603; Trial Exhibits 10002-04; SAA 32-43].

a. Bank Accounts

LVLP utilized Signature Bank. [AA 1608].[24] Other entities, such as 305 Vegas, had its own bank account and Rich testified that he was not aware that Mitchell had any ownership interest in 305 Vegas. [1604]. Coolidge had its own bank account. [AA 1901; SAA 548].

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[24] Rich testified that while he doesn't personally recommend it, he has seen non-operating entities not have a bank account because there is a holding company above that entity. [AA 1703-04; 1858]. LVLP had a bank account with Signature Bank and later with Heartland Bank. [AA 1608].

D. Casino Coolidge

Liberman owns Coolidge. Mitchell was not an owner of Coolidge. [AA 1899; 1664]. Coolidge had its own bank account. [AA 1901; SAA 91-197; 548]. The Las Vegas property sold to Coolidge originally comprised the area around South Casino Center and South Third Street, wherein the larger portion was initially purchased through Leah and Live Work. [AA 2090]. Later, a portion of this property was sold to Coolidge for $1 million in 2014 through a real estate brokerage. [AA 1900-01; 2092-93; 2694; Trial Exhibits 40040-42]. Testimony at trial in the instant Action established that the $1 million sale price was a fair market value and the District Court so properly found. [AA 2095; 1229; 1900-01; 2694 (Trial Exhibit 40001); SAA 1808-20]. As part of the closing of the escrow between Leah and Coolidge, Mitchell and Liberman took $250,000 and $91,934.47 respectively from the closing. [SAA 460-66, 916, 1008-09].[25]

[25] While Rich testified that Mitchell and Liberman took different distributions directly from the escrow from the Coolidge transaction, he did not know why these amounts were taken. [AA 1667-68; 1753-54]. Mitchell and Liberman testified that the Coolidge transaction was not done to hinder, delay or defraud Nype relating to the Underlying Judgment. [AA 1969; 2096].

SUMMARY OF THE ARGUMENT

While the District Court properly found that nearly all of Plaintiffs' claims arising from the alleged fraudulent conveyances alleged in the Amended Complaint were properly time-barred, nevertheless, it improperly sought to punish Defendants (notwithstanding its proper determination that Plaintiffs were not entitled to punitive damages), including Mitchell Defendants, through the imposition of exorbitant and legally untenable compensatory damages awarded under Plaintiffs' claim for civil conspiracy, which claim was also properly time-barred.

The underlying basis for the District Court's decision on Plaintiffs' claim for civil conspiracy, i.e. the "intent to accomplish an unlawful objective for the purpose of harming another," rested in part upon alleged conduct (fabrication of evidence) that, as a matter of law, cannot form the basis for a claim of civil conspiracy. Further, the other conduct alleged, i.e. the alleged fraudulent conveyances in the form of distributions, were wholly time-barred and similarly could not form the basis for a claim of civil conspiracy. Plaintiffs were not entitled to any monetary award on their claim for civil conspiracy.

There was no basis for the District Court's imposition of $15,148,339.00 in compensatory damages for civil conspiracy and said Judgment was clearly erroneous and lacks substantial evidentiary support.

The District Court's findings and conclusions relating to fraudulent conveyance regarding the Coolidge transaction were clearly erroneous and lacked substantial evidentiary support as the evidence, including the testimony of Rich, failed to sufficiently establish that said transaction constituted a fraudulent conveyance pursuant to *NRS* 112.180(1)(a).

The District Court should have properly denied the entirety of Plaintiffs' request for attorney's fees as special damages, as Plaintiffs failed to properly allege their claim pursuant to *NRCP* 9(g). Further, the District Court's award of the same was clearly erroneous as it did not even properly consider, pursuant *Brunzell*, the true attorney's fees requested by Plaintiffs at trial in the instant Action, and in fact, improperly awarded Plaintiffs' millions more than even requested by Plaintiffs.

The District Court's award of pre-judgment interest and attorney's fees were improper based upon the prior errors stated herein.

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ARGUMENT

I. THE DISTRICT COURT ERRED IN RENDERING JUDGMENT IN FAVOR OF PLAINTIFFS ON THEIR CLAIM FOR CIVIL CONSPIRACY

The District Court erred in finding for Plaintiffs on their claim for civil conspiracy, which was properly time-barred by the applicable statute of limitations, wherein the Judgment was: (1) clearly erroneous and not based upon substantial evidence regarding its liability and damages determinations; (2) grossly excessive[26] and punitive in its award of compensatory damages, notwithstanding that the District Court found that punitive damages were not appropriate; and (3) contrary to established Nevada law governing claims for civil conspiracy. [AA 1236-38; ¶ 23].[27]

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[26] A district court's calculation of damages is reviewed under an abuse of discretion standard. *See Flamingo Realty v. Midwest Development*, 110 Nev. 984, 987, 879 P.2d 69, 71 (1994).

[27] "After a bench trial, this court reviews the district court's legal conclusions *de novo*. *Weddell v. H20, Inc.*, 128 Nev. 94, 101, 271 P.3d 743, 748 (2012). The district court's factual findings will be left undisturbed unless they are clearly erroneous or not supported by substantial evidence." *Wells Fargo Bank, N.A. v. Radecki*, 426 P.3d 593, 596 (2018). "Substantial evidence has been defined as that which a reasonable mind might accept as adequate to support a conclusion." *McClanahan v. Raley's, Inc.*, 117 Nev. 921, 924, 34 P.3d 573, 576 (2001).

A. Elements of Cause of Action - Civil Conspiracy

An actionable civil conspiracy consists of a combination of two or more persons who, by some concerted action, intend to accomplish an unlawful objective for the purpose of harming another, and damage results from the act or acts. *See Hilton Hotels v. Butch Lewis Productions*, 109 Nev. 1043, 1048, 862 P.2d 1207, 1210 (1993)(*citing Sutherland v. Gross*, 105 Nev. 192, 196, 772 P.2d 1287, 1290 (1989)).[28]

1. District Court - Liability Determinations

The District Court found that "Plaintiff has **not** established by a preponderance of the evidence the elements of civil conspiracy **separate and apart from the distributions and fabrication of evidence**." [AA 1236; ¶ 21](emphasis).

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[28] The statute of limitations for civil conspiracy is governed by *NRS* 11.220 ("An action for relief, not hereinbefore provided for, must be commenced within 4 years after the cause of action shall have accrued"); *see also Siragusa v. Brown*, 114 Nev. 1384, 971 P.2d 801 (1998). The term "accrued" incorporates "diligent discovery" and centers on when a plaintiff knew or in the exercise of proper diligence should have known of the facts constituting the elements of a cause of action. *Oak Grove Investors v. Bell & Gossett Co.*, 99 Nev. 616, 668 P.2d 1075 (1983).

With regard to the distributions, the District Court found:

- That when Mitchell and Liberman took personal distributions from Related Entities **between 2007 and 2016**, totaling **$15,148,339**, **that those distributions were taken to avoid satisfying Nype's claims and Judgment**. [AA 1232; ¶ 59] (emphasis)[29]

With regard to the fabrication of evidence, the District Court found:

- Mitchell, fabricated and backdated evidence to facilitate the destruction and/or concealment of material financial evidence by his agent that would have greatly assisted Nype's case. But for Nype's pretrial discovery, the fabrication of evidence would not have been uncovered. [AA 1236 ¶ 19].

a. Unlawful Objective Requirement

In the instant Action, Plaintiffs sought to recover the Underlying Judgment, wherein Plaintiffs alleged in the Amended Complaint:

> 114. **This New Case is effectively an extension and development of the first litigation**, and is an effort by Plaintiffs to avoid the wrongful misconduct of Defendants and each of them, in attempting to avoid **NYPE's creditor rights** and protect the assets of LAS VEGAS LAND PARTNERS, LLC, which were, are, and should be available to satisfy Plaintiff's claims. [AA 331].

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[29] Of the total amount of distributions found by the District Court to have been taken by Mitchell and Liberman between the years 2007-2016, i.e. **$15,148,339**, almost the entirety of this amount (**$15,143,639**) was taken between the years 2007-2009. [SAA 660-677 (Trial Exhibit 10002); SAA 678-692 (Trial Exhibit 10003); SAA 693-709 (Trial Exhibit 10004)].

The alleged "unlawful objective" was the alleged fraudulent conveyance (distributions) by the Underlying Judgment debtor, LVLP, in contravention of Plaintiffs' claim or Underlying Judgment.[30] *See NRS* 112.180(1)(a). [AA 1235].

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[30] In Plaintiffs' Opposition to Defendants' Motion to Dismiss filed in the instant Action, Plaintiffs admitted:

> Defense counsel correctly notes that having failed to successfully **effectuate collection** of its judgment during the year after the entry thereof, **Plaintiff elected to bring a subsequent suit deriving in all respects from the underlying events and transactions addressed in the first litigation**. [AA 171] (emphasis).
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> In the Amended Complaint, Plaintiffs allege in their civil conspiracy claim:
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> 137. As alleged hereinabove, and upon information and belief, the **transfer of** the subject real estate and equity ownership interests and **substantial monetary amounts** were undertaken by Defendants with full knowledge as to the relevant circumstances and in an effort to participate in transactions **in derogation of the rights of Plaintiff**.
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> 138. The knowing and willful conduct of the entity Defendants in agreeing to receive the subject real property and act as a nominee for said LAS VEGAS LAND PARTNERS, LLC, LIBERMAN and MITCHELL constitute acts of civil conspiracy. [AA 334] (emphasis).

The District Court further found:

- Plaintiff cannot recover on a civil conspiracy claim (or accessory liability) for allegations arising out of *NRS* Chapter 112 against a nontransferor. *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 144 at 120, 345 P.3d 1049 (2015). [AA 1235; ¶ 17].

Aside from the Coolidge transaction, *see infra*, the District Court properly found that all of Plaintiffs' other alleged fraudulent conveyance claims were time-barred. [AA 1235]. Plaintiffs have not appealed this determination. These time-barred claims cannot serve as an "unlawful objective" basis for civil conspiracy liability.[31]

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[31] *See e.g., Jordan v. State ex rel. DMV & Pub. Safety*, 121 Nev. 44, 74, 110 P.3d 30, 51 (2005)("**Thus, an underlying cause of action for fraud is a necessary predicate to a cause of action for conspiracy to defraud**."), *overruled on other grounds in Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008); *Flowers v. Carville*, 266 F. Supp. 2d 1245, 1249 (D.C. Nev. 2003)("[**T**]**he essence of civil conspiracy is damages**." **The damages result from the tort underlying the conspiracy**. In fact, "**a cause of action for defamation is a necessary predicate to a cause of action for conspiracy to defame**."); and *Schwartz v. Univ. Med. Ctr. of S. Nev.*, 2020 Nev. Unpub. LEXIS 336, 460 P.3d 25 (March 28, 2020), cited for its persuasive effect (dismissal of a claim for civil conspiracy involving an underlying medical malpractice action that was filed without a medical affidavit. The unlawful objective alleged was the concealment of medical malpractice. "**To support their unlawful-objective and resulting-damage allegations, the Schwartses would necessarily have to prove the underlying medical malpractice** . . . .").

Separately, as a matter of law, "fabrication of evidence" cannot serve as an "unlawful objective" basis for civil conspiracy liability. [AA 1236]. As this Court expressly stated in *Eikelberger v. Tolotti*, 96 Nev. 525, 531, 611 P.2d 1086, 1090 (1980):

> It is uniformly held that the giving of false testimony is not civilly actionable. **A claim of conspiracy does not avoid the doctrine that there is no civil action for giving false evidence**. (emphasis)

b. Resulting Damages Requirement

A civil conspiracy requires resulting damages.[32] In awarding **$15,148,339.00** in compensatory damages, a grossly exorbitant amount, on Plaintiffs' claim for civil conspiracy, the District Court misconstrued the underlying legal and factual basis for Plaintiffs' claim, i.e. to recover the Underlying Judgment.

Aside from the Coolidge transaction, *see infra*, there can be no resulting damages from the distributions (transfers), as all the other alleged distributions (transfers) were properly time-barred. [AA 1235].

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[32] A *prima facie* element of the claim for civil conspiracy requires that "damage results from the act or acts." *Hilton Hotels*, 109 Nev. at 1048, 862 P.2d at 1210. As a matter of law, no damages resulted from any of the alleged fraudulent conveyances that the District Court properly found were time-barred.

In *Aldabe v. Adams*, 81 Nev. 280, 287, 402 P.2d 34, 37-38 (1965),[33] this Court stated:

> The damage for which recovery may be had in a civil action is not the conspiracy itself, but the **injury to the plaintiff produced by specific overt acts** -- the charge of conspiracy in a civil action is merely the string whereby the plaintiff seeks to tie together those who, acting in concert, may be held responsible in damages for any overt act or acts. (emphasis)

The amount of Plaintiffs' Commission Claim was established in the Underlying Action per the Underlying Judgment. In *Cadle Co. v. Woods & Erickson, LLC*, 131 Nev. 114, 118-19, 345 P.3d 1049, 1053 (2015), this Court stated:

> Creditors do not possess *legal claims* for damages when they are the victims of fraudulent transfers. Instead, creditors have recourse in *equitable* proceedings in order to recover the property, or payment for its value, by which they are returned to their pre-transfer position. **Nevada law does not create a legal cause of action for damages in excess of the value of the property to be recovered**." (emphasis)[34]

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[33] *See Siragusa*, 114 Nev. at 1393, 971 P.2d at 807.

[34] *See Grosjean v. Imperial Palace*, 125 Nev. 349, 212 P.3d 1068 (2009)("Although a plaintiff may assert both a §1983 claim and tort-based claims, he or she is not entitled to a separate compensatory damage award under each legal theory. **Instead, if liability is found, the plaintiff is entitled to only one compensatory damage award on one or both theories of liability**." (emphasis).

Plaintiffs did not have $15,148,339.00 in damages, nor any legally recognizable damages based upon their claim for civil conspiracy. *NRS* 112.210(1) does not create a new cause of action. *Cadle,* 131 Nev. at 119, 345 P.3d at 1053. Further, the amount of the Underlying Judgment was **$2,608,797.50**, exclusive of costs and interest. [AA 2792-97]. There is no nexus of facts or law in this Action, either pled, proven and/or found, in which Plaintiffs suffered compensatory damages in the amount of **$15,148,339.00**[35] when the amount of the Underlying Judgment, exclusive of costs and interest, was **$2,608,797.50**. [AA 2792-94 (Trial Exhibit 50007); 2795-97 (Trial Exhibit 50008)]. This Court in *Cadle* further stated:

> As an exception to the general rule, *NRS* 112.220(2) permits actions resulting in judgments against certain transferees. **But such judgments are only in the amount of either the creditor's claim or the value of the transferred property, whichever is less**. The statutory scheme **does not allow** a creditor to recover **an amount in excess of the transferred property's value, or to recover against a nontransferee**. And no similar exceptional authorization creates claims against nontransferees." *Id*., 131 Nev. at 119, 345 P.3d at 1053. (emphasis)

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[35] "The general rule is that where the evidence is conflicting and there is substantial evidence to support the judgment, it will not be disturbed. But there is an exception when it is clear that a wrong conclusion was reached. *Polaris Indus. Corp. v. Kaplan*, 103 Nev. 598, 601, 747 P.2d 884, 886 (1987).

The District Court awarded Plaintiffs a windfall of damages, notwithstanding that the District Court found that "Nype has not demonstrated that punitive damages are appropriate in this matter." [AA 1236; ¶ 23]. The District Court inexplicably gave Plaintiffs the total amount of distributions between 2007-2016. [AA 1232].

The District Court's award of $15,148,339.00 is almost six times the amount of the Underlying Judgment.[36] While the District Court remarked that it was "cognizant of the possibility of duplicative awards," the Judgment is necessarily in violation of the double recovery doctrine. [AA 1235].

In *Elyousef v. O'Reilly & Ferrario, LLC*, 126 Nev. 441, 245 P.3d 547 (2010), Elyousef sued his former lawyer relating to the losses incurred in a business transaction and obtained a judgment which the parties later settled. Elyousef then sought additional damages from the former lawyer's law firm in a subsequent lawsuit.

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[36] Furthermore, the District Court limited the award for Plaintiffs' claim for alter ego to the amount of the Underlying Judgment. [AA 1238]. The amount of $15,148,339.00, as against Mitchell and Liberman, who were not judgment debtors to the Underlying Judgment, would vastly and impermissibly exceed this limitation.

In rejecting any such right, this Court in *Elyousef* stated:

> Under the double recovery doctrine, there can be only one recovery of damages for one wrong or injury. **Thus a plaintiff may not recovery twice for the same injury simply because he or she has two legal theories**. *Id*. at 549 (internal citations omitted)(emphasis)[37]

In *Elyousef*, with regard to the **prior judgment** obtained by Elyousef, it was further held that such prior judgment amount was the **maximum** amount he could recover and not run afoul of the double recovery doctrine, wherein this Court stated:

> Thus, the double recovery doctrine applies here because the **judgment** established **total recoverable damages** before settlement, and the settlement completely satisfied the judgment. *Id*.

While it is submitted that Plaintiffs were not entitled to any award of damages for their claim of civil conspiracy, as provided for herein, nevertheless, the District Court did not limit the damages awarded to the amount of the Underlying Judgment.

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[37] The application of the double recovery doctrine is a question of law that is reviewed *de novo*. *See, e.g. Nev. Classified Sch. Emples. Ass'n v. Quaglia*, 124 Nev. 60, 63, 177 P.3d 509, 511 (2008). *See Diamond Enters., Inc. v. Lau*, 113 Nev. 1376, 1379, 951 P.2d 73, 74 (1997)(a district court's calculation of an award of damages is reviewed under an abuse of discretion standard).

The amount awarded by the District Court, as the amount of the total distributions taken by Mitchell and Liberman during the time period of 2007 through 2016, i.e. **$15,148,339.00**, bears no factual and/or legal relationship whatsoever to Plaintiffs alleged damages arising from the Underlying Judgment**.** [AA 1236; ¶ 22]. There is no factual and/or legal basis for this damage amount and its imposition was impermissibly punitive in nature.[38]

B. Statute of Limitations - Civil Conspiracy Time-Barred

The District Court should have properly found that Plaintiffs' claim for civil conspiracy was time-barred, as the record in the instant Action reflects that Plaintiffs waited well more than four years from the accrual of their alleged claims to bring the instant Action. *See NRS* 11.220 ("An action for relief, not hereinbefore provided for, must be commenced within 4 years after the cause of action shall have accrued").[39]

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[38] "We will affirm an award of compensatory damages unless the award is so excessive that it appears to have been given under the influence of passion or prejudice." *Bongiovi v. Sullivan*, 122 Nev. 556, 577, 138 P.3d 433, 448 (2006).

[39] Plaintiffs filed the instant Action on July 26, 2016. [AA 1-19].

1. District Court's Findings

The District Court found:

- Nype's disclosure of the tax returns and its own consultant's report on or about April 25, 2014, in A551073, **are the latest date of discovery for purposes of *NRS* 112.230(1)(a)**. [AA 1230; ¶ 42] (emphasis).

In determining the April 25, 2014 date, the District Court referenced Trial Exhibit 90079 which was a 10th Supplement to *NRCP* 16.1 Disclosures submitted by Plaintiffs in the Underlying Action. [AA 1230; 2259-61; 3525-43 (Trial Exhibit 90079)]. However, the District Court's reference to **April 25, 2014** was in **error**, as the dates of the referenced document, i.e. Trial Exhibit 90079, were actually **August 3, 2011 (July 15, 2011)**. [AA 3527; 3537]. The District Court actually determined that Plaintiffs' "latest date of discovery" would be **August 3, 2011** (**July 15, 2011**) and **not** April 25, 2014.[40] As a matter of law, this finding, i.e. **August 3, 2011 (July 15, 2011**), renders Plaintiffs' claim for civil conspiracy based upon the distributions time-barred.

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[40] The District Court's reference to "the latest date of discovery for purposes of *NRS* 112.230(1)(a) [Fraudulent Conveyances] is instructive as *NRS* 112.230(1)(a) **and** the *NRS* 11.220 [Civil Conspiracy] **both** include the "discovery rule" in determining the running of the statute of limitations. [AA 1236, n. 11].

Trial Exhibit 90079

Plaintiffs' 10th Supplement to *NRCP* 16.1 Disclosures, dated **August 3, 2011**, included a **July 15, 2011** Memorandum from Rich, wherein Rich stated the following:

> Distributions received by Mitchell and Liberman from LVLP Holdings, LLC:
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> **Despite amounts owing to NYPE, Mitchell and Liberman took distributions**:[41]
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> 1. **Distributions in 2007 $14,831,139 (P010951, line 19)**
> 2. **Distributions in 2008 $312,500 (P010970, line 19a)**
> 3. **Distributions in 2009 $800,000 (P010985, line 19a)**

[AA 3525-3543 (Trial Exhibit 90079)](emphasis).

The bates-numbers associated with the 2007-2009 tax returns listed in Rich's July 15, 2011 Memorandum, i.e. P010951, etc, are similarly reflected in the tax returns admitted at the trial in the instant Action. [SAA 662; 681; and 696]. Nype conceded in testimony in the instant Action that he would have known of this information in 2011 and that the distributions were made. [AA 2254-61; *see also* AA 1326-33; 1376-77].

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[41] The information is contained in LVLP's tax returns. [SAA 660-709 (Trial Exhibits 10002-04)].

The District Court further found:

- Prior to September of 2015, Nype had reason to know that the limited transfers were transfers made to debtors under the UFTA. [AA 1234; ¶ 10].[42]

With regard to Plaintiffs' clam for civil conspiracy, the District Court concluded as follows:

> 19. The Court concludes that the evidence demonstrates that:
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> (a) Mitchell and Liberman, engaged in conscious, concerted and ongoing efforts to **conceal, hide**, convey, **keep secret and/or distribute millions of dollars in assets** away from Nype;

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[42] This finding would be consistent with either August 3, 2011 or July 15, 2011. In fact, Plaintiffs responded to discovery in the instant Action alleging that they were advised by Mitchell in the Underlying Action that Plaintiffs would never be able to collect and that Plaintiffs believed the transfers "in excess of $10 million" were distributed in "total derogation of the rights of known creditors, such as Plaintiffs." [AA 609; 621].

Independently, the distributions were from LVLP to Mitchell and Liberman. [SAA 664; 666; 684; 686; and 700]. Mitchell and Liberman were the owners of LVLP and authorized to receive distributions. *See NRS* 86.341. [AA 2646; 2469]. The distributions are covered by a three year limitations period provided under *NRS* 86.343(7). The District Court should have also denied Plaintiffs' claim for civil conspiracy as "[a]gents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their advantage." *Collins v. Union Fed. S&L Ass'n*, 99 Nev. 284, 303, 662 P.2d 610, 622 (1983).

(b) Mitchell and Liberman **received distributions from LVLP** and the Related Entities;

(c) Mitchell, fabricated and backdated evidence to facilitate the destruction and/or **concealment of material financial evidence** by his agent that would have greatly assisted Nype's case

(d) **But for Nype's pretrial discovery, the fabrication of evidence would not have been uncovered**.

[AA 1236; ¶ 19].

Sections (a) and (b) above, which deal with the distributions, are entirely refuted by Trial Exhibit 70079. [AA 3525-43]. The evidence admitted at trial in the instant Action established that Plaintiffs had actual knowledge of the distributions, at a minimum, as early as 2011 and Plaintiffs and their expert, Rich, believed these were improper distributions **at the time they were made** and designed to avoid payment of the Underlying Judgment.

A summary of Rich's trial testimony in the instant Action reveals:

- Rich testified that the distributions to Mitchell and Liberman in 2007-2008 of approximately $15 million caused LVLP to be cash poor and couldn't pay the capital call that came from Forest City. [AA 1615; 1835-36].

- Rich testified that "flags" of fraudulent transfers would be those that cause liquidity issues. [AA 1707-08].

- Rich testified that beginning in 2007 there are liquidity issues. LVLP's bank account at beginning of 2007 had almost $9 million and by 2017 it was zero, and therefore, certainly the $15 million is an element of fraud. [AA 1600; 1707-08].[43]

- Rich testified that each of the distributions that created a liquidity issue **or** insolvency from 2007 to present are elements of fraud. [AA 1708]. Rich further testified that all the distributions from 2007 on were fraudulent since the threat was known (Plaintiffs' Commission Claim). [AA 1717-18; 1837; 1842].

With regard to the remainder of the District Court's conclusions, again it is Plaintiffs' themselves that were in possession of this information more than four years prior to the filing of the instant Action. Plaintiffs knew of the accrual of their claims in 2011. Plaintiffs filed the instant Action on July 26, 2016 or well **after** the statute of limitations for civil conspiracy had expired. [AA 1-19].

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[43] These cash balances are reflected in the corresponding tax returns. However, while LVLP did have $8,972,492 in the bank at the beginning of the 2007, it had $2,397,103 at the end of 2007. [SAA 663]. At the end of 2008, LVLP had **$46,457** in the bank. [SAA 682]. At the end of 2009, LVLP had **$51,634** in the bank. [SAA 697]. Plaintiffs and Rich were fully aware of these numbers no later than **2011**, as these tax returns were part of his July 15, 2011 Memorandum, wherein Rich described "LVLP's distress and financial wherewithal." [AA 3540 (Trial Exhibit 90079)]. *See also* AA 1830: Rich's testimony regarding LVLP's ability to pay its creditors at the time of the Forest City closing on June 22, 2007. However, at the end of 2008, LVLP had **$46,457** in the bank. Plaintiffs and Rich were fully aware of this information no later than 2011.

The District Court found that prior to the closing with Forest City, which occurred on June 22, 2007, a dispute arose between Nype and Mitchell/Liberman regarding Nype's Commission Claim. [AA 1228]. It also found that Nype expected to receive millions on his Commission Claim and only $430,000 was set aside at the closing for Forest City. [AA 1228].

The District Court found that after setting aside the $430,000, Mitchell and Liberman took personal distributions "in excess of thirteen million dollars." [AA 1228]. The District Court found that the distributions occurred at a time "that Mitchell and Liberman were fully aware of Nype's claims." [AA 1229].

Rich further states in his **July 15, 2011** Memorandum that "despite amounts owing to Nype" the distributions occurred and the District Court found that Mitchell and Liberman engaged in efforts to "**distribute millions of dollars in assets** away from Nype." [AA 3525-43 (Trial Exhibit 90079); 1236; ¶ 19; 1694-95]. Plaintiffs were fully aware of these distributions, at a minimum, in 2011 and failed to act upon the accrual of their alleged claims which stemmed from the basis and timing of the above-referenced distributions.

In *Siragusa,* 114 Nev. at 1391-92, 971 P.2d at 806, this Court stated:

> Civil conspiracy is governed by the catch-all provision of *NRS* 11.220, which provides that an action "must be commenced within 4 years after the cause of action shall have accrued." **We have previously held that the four-year statute of limitations runs from the date of the injury rather than the date the conspiracy is discovered**. (emphasis)[44]

Plaintiffs were fully aware of both the timing and amounts of the distributions **more** than four years prior to filing the instant Action. Plaintiffs' own expert opined that the distributions when made were fraudulent. However, the District Court's acknowledgment of Trial Exhibit 90079, requires a finding that Plaintiffs were fully aware, **no later than August 3, 2011 (July 15, 2011)**, that Mitchell/Liberman had taken the bulk of the distributions, i.e. **$15,143,639**, between **2007-2009**. [AA 1230; 3525-43 (**Trial Exhibit 90079**); SAA 664; 666; 684; 686; and 700].

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[44] *See also* Plaintiffs' instant Complaint, wherein it is alleged that on or about **August 14, 2014** that LVLP "**first provided tax returns** and detailed financial information which revealed to Nype, for the first time, that it had **transferred** its beneficial interests as to numerous real estate parcels, as well as **many millions of dollars, to** the entity defendants and/or **Liberman and Mitchell**, during the ongoing pendency of the first case." [AA 13; 145]. **Not so**. **Plaintiffs produced the tax returns themselves in 2011**. [AA 3525-43 (Trial Exhibit 90079)].

Plaintiffs were required to bring the instant Action within four years of July 15, 2011, i.e. by July 15, 2015. Plaintiffs filed the instant Action on **July 26, 2016**. [AA 1-19]. The cause of action for civil conspiracy should have properly been dismissed as time-barred.[45]

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[45] Mitchell also testified in the instant Action that the 2007 tax return was produced in the Underlying Action and that taxes were discussed. [AA 2087-89]. While Nype acknowledges that he may have seen them in the Underlying Action, the *NRCP* 16.1 disclosure confirms that he was fully aware of not only the 2007 tax return, but the 2008-09 tax returns as well. [AA 2249; 2252; 2258 (Trial Exhibit 90079)].

In this Action, pursuant to both the governing documents and *NRS* 86.343, both Mitchell and Liberman were within their rights to take distributions from LVLP. [AA 1876]. These would be lawful actions. The only potentially "unlawful objective" would be to take said distributions in violation of Nevada's fraudulent conveyance statute. Plaintiffs were aware of these distributions in 2011. However, the District Court found, aside from the Coolidge transaction which involved $341,934.47, all of the distributions were time-barred for purpose of Nevada's fraudulent conveyance statute. Plaintiffs have not appealed this determination.

II. THE DISTRICT COURT ERRED IN AWARDING ATTORNEY'S FEES AS SPECIAL DAMAGES

The District Court erred in awarding attorney's fees as special damages to Plaintiffs on their claims for fraudulent conveyance and civil conspiracy.[46] [AA 1235; 1237; 1501-10]. Not only did Plaintiffs fail to specifically allege any entitlement to attorney's fees as special damages, as expressly required by *NRCP* 9(g), there was no legal basis for the District Court to award the attorney's fees and the fees awarded were grossly excessive and not based upon the evidence admitted at trial.[47]

A. The American Rule

In Nevada, attorney's fees are generally not recoverable absent a statute, rule or contractual provision. *Young v. Nevada Title Co.*, 103 Nev. 436, 442, 744 P.2d 905 (1987).

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[46] *See Pardee Homes v. Wolfram*, 444 P.3d 423, 425 (2019) ("Generally, we review decisions awarding or denying attorney fees for a manifest abuse of discretion. But when the attorney fees matter implicates questions of law, the proper review is *de novo*.").

[47] *NRCP* 9(g) provides, "Special Damage: If an item of special damage is claimed, it must be specifically stated." In the Judgment, the District Court awarded attorney's fees, costs and expert expenses in the amount of **$4,493,176.90** for Plaintiffs' claims for fraudulent conveyance and civil conspiracy. [AA 1235; 1237].

However, there are limited exceptions for an award of attorney's fees as special damages. *See Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 956, 35 P.3d 964, 969 (2001).

There are three scenarios that may support an award of attorney's fees to a party as special damages:

(1) The party becomes involved in a third-party legal dispute as a result of a breach of contract or tortious conduct by the defendant;

(2) The party incurred legal fees in recovery of real or personal property acquired through the wrongful conduct of the defendant or in removing a cloud upon the title to the property; and

(3) Injunctive or declaratory relief actions compelled by the opposing party's bad faith conduct.

Sandy Valley, 117 Nev. at 957-58, 35 P.3d at 969.

In *Horgan v. Felton*, 123 Nev. 577, 583-86, 170 P.3d 982, 986-88 (2007), this Court clarified *Sandy Valley* involving the second scenario related to a party's ability to recover attorney's fees as special damages that were incurred in a specific type of civil action, i.e. to clarify or remove a cloud on title. *See also, Liu v. Christopher Homes, LLC*, 130 Nev. 147, 151-52, 321 P.3d 875, 877-88 (2014).

However, none of the limited exceptions provided in *Sandy Valley* are properly presented in the instant Action.[48]

B. <u>Special Pleading Requirements</u>

Even in those cases falling within an enumerated exception, in order to seek attorney's fees as special damages, it must be specifically alleged in the complaint, as opposed to merely alleging the necessity for retaining counsel and simply requesting attorney's fees. *See Las Vegas v. Cragin Indus*., 86 Nev. 933, 940, 478 P.2d 585, 590 (1970).[49]

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[48] This Court in *Horgan* further stated:

> We acknowledge as a practical matter, attorney fees are rarely awarded as damages simply because parties have a difficult time demonstrating that the fees were proximately and necessarily caused by the actions of the opposing party and that the fees were a reasonably foreseeable consequence of the breach or conduct. **Because parties always know lawsuits are possible when disputes arise, the mere fact that a party was forced to file or defend a lawsuit is insufficient to support an award of attorney fees as damages**. 117 Nev. at 957, 35 P.3d at 969. (emphasis)

[49] Rich's fees were not attorney's fees at all, as he was the forensic accountant retained by Plaintiffs. *See NRS* 18.005(5)(expert witness fees). *See also Cadle*, 131 Nev. at 120, 345 P.3d at 1054("In *Bobby Berosini, Ltd.*, we explained that a party must 'demonstrate how such [claimed costs] were necessary to an incurred in the present action.").

In both the original Complaint, as well as the Amended Complaint, Plaintiffs only generally alleged the necessity for retaining the services of an attorney and simply requested attorney's fees.[50] [AA 1-19; 307-340]. Plaintiffs' *NRCP* 16.1 Disclosures only sought attorney's fees and costs "**incurred in this case**." [AA 383].[51]

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[50] "In contrast, when a party claims it has incurred attorney fees as foreseeable damages arising from tortious conduct or a breach of contract, such fees are considered special damages. They must be pleaded as special damages in the complaint pursuant to *NRCP* 9(g) and proved by competent evidence just as any other element of damages. **The mention of attorney fees in a complaint's general prayer for relief is insufficient to meet this requirement**. *Sandy Valley*, 117 Nev. at 956-57, 35 P.3d 969. (emphasis)

Nype was asked at trial in the instant Action regarding his request for attorney's fees as special damages, wherein he testified:

> Q. Okay. And I can give you time to review this document if you would like. To your knowledge **does this complaint at any point request attorneys' fees and costs as special damages**?
>
> A. **I don't believe so**. [AA 2241](emphasis).

[51] *See Suma Corp v. Greenspun*, 96 Nev. 247, 256, 607 P.2d 569, 574 (1980)("In *Petersen*, the trial court made no findings regarding fees, and its award thereof admittedly included services which were not in connection with the case. The case at hand is different in each respect. The court made its finding, and the award was only for services rendered in the present litigation."). *See* the District Court's improper decision regarding the Underlying Action with regard to attorney's fees awarded in the instant Action. [AA 1507 (Lines 7-12); 2880; 2884].

Plaintiffs' allegations do not comply with the special pleading requirements contained in *NRCP* 9(g). The District Court should have properly found that Plaintiffs' claim for attorney's fees as special damages were barred for failure to pled specially their entitlement. [AA 1235; 1237; 2300; 1501-10].[52]

Furthermore, the District Court erred in awarding an amount of attorney's fees not even requested by Plaintiffs. [AA 2348; 1235; 1237; 1239-89; 1501-10]. *See infra*.

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[52] In *Horgan*, 117 Nev. at 957, 35 P.3d at 969, this Court stated:

> **We affirm our holding in *Sandy Valley* that attorney fees as damages must be specially pleaded under *NRCP* 9(g)**. We acknowledge that the cases cited by *Sandy Valley* for the proposition that attorney fees must be specially pleaded do not directly address *NRCP* 9(g) and when attorney fees must be specially pleaded under this rule. *See International Indus. v. United Mtg. Co.*, 96 Nev. 150, 606 P.2d 163 (1980) (holding that when a lessor did not recover compensatory damages nor attorney fees as damages, an award of attorney fees was improper); *City of Las Vegas v. Cragin Industries*, 86 Nev. 933, 478 P.2d 585 (1970) (**award of attorney fees not proper when the complaint only alleged the necessity for the services of counsel and simply requested attorney fees**); *Brown v. Jones*, 5 Nev. 374 (1870) (complaint must allege with distinctness fees resulting only from dissolution of injunction). However, the plain language of *NRCP* 9(g) requires that "[w]hen items of special damages are claimed, they shall be specifically stated."

Plaintiffs never sought further amendment of the Amended Complaint to comply with the special pleading requirements nor did Plaintiffs seek to amend during or after trial in the instant Action. *See NRCP* 15(b)(1)("If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended.").

The attorney's fees were the subject of repeated objections. [AA 2298-2300; 1402-08; 1506-07].[53] *See Watson Rounds, P.C. v. Eighth Judicial Dist. Court*, 131 Nev. 783, 790, 358 P.3d 228, 233 (2015)(rejecting the award of attorney fees as special damages when the request was not pleaded in accordance with *NRCP* 9(g)).

C. No *Brunzell* Analysis of True Attorney's Fees

The District Court's award of $4,493,176.90 in attorney's fees as special damages must be reversed, as the record in this instant Action does not reflect that it analyzed, either factually and/or legally, the "true" amount of attorney's fees sought in the instant Action.

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[53] *See Pardee*, 444 P.3d at 425, wherein attorney's fees were awarded as special damages (although the complaint did not seek them as special damages, as the district court allowed for an amended complaint to plead attorney's fees as special damages). Plaintiffs never requested further amendment to the Amended Complaint.

The amount awarded as attorney's fees, **$4,493,176.90**, was not attorney's fees but a calculation submitted by Plaintiffs at trial in the instant Action reflecting, as of September 2, 2019, the amount of the Underlying Judgment, inclusive of costs and interest. [AA 3230 (Trial Exhibit 70060)].

In this particular instance, the District Court's factual and legal determinations regarding the **amount** of attorney's fees, costs and expert expenses awarded as "special damages" were not based upon an analysis of Plaintiffs' actually requested attorney's fees, costs and expert expenses incurred in the instant Action. [AA 2348; 1239-89]. In *Logan v. Abe*, 131 Nev. 260, 350 P.3d 1139 (2015), this Court stated:

> In determining the amount of fees to award, the [district] court is not limited to one specific approach; its analysis may begin with any method rationally designed to calculate a reasonable amount, so long as the requested amount is reviewed in light of the *Brunzell* factors. *Haley v. Eighth Judicial Dist. Court*, 128 Nev., Adv. Op. 16, 128 Nev. 171, 273 P.3d 855, 860 (2012) (internal quotations omitted). While it is preferable for a district court to expressly analyze each factor relating to an award of attorney fees, express findings on each factor are not necessary for a district court to properly exercise its discretion. *Certified Fire Prot., Inc. v. Precision Constr., Inc.*, 128 Nev., Adv. Op. 35, 128 Nev. 371, 283 P.3d 250, 258 (2012). **Instead, the district court need only demonstrate that it considered the required factors, and the award must be supported by substantial evidence**. *See Uniroyal Goodrich Tire*, 111 Nev. at 324, 890 P.2d at 789.

The Judgment does not reflect any consideration, including an analysis of the *Brunzell* factors,[54] by the District Court of the amounts **actually requested** by Plaintiffs for attorney's fees as special damages. [AA 1235; 2348]. The award of all attorney's fees must be reversed.

While the District Court notes in footnote 10 to the Judgment that it was incorporating its evaluation of the *Brunzell* factors from the Sanctions Order, this ignores the fact that the District Court was not even considering the actual amount of attorney's fees requested by Plaintiffs at trial in the instant Action. The District Court incorrectly believed that the requested attorney's fees were $4,493,176.90. [AA 1235]. In fact, Plaintiffs requested $1,274,337.90 subject to additional attorney's fees to be submitted for December 2019 to January 2020. [AA 2348; Trial Exhibits 70036-45; 70053-56; 70062-65; 70067; 70075-79].

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[54] "We will not substitute our opinion for that of the trial court **unless as a matter of law there has been an abuse of discretion**. The value to be placed on the services rendered by counsel lies in the exercise of sound discretion by the trier of the facts." *Id*., 85 Nev. at 350, 455 P.2d at 33-34. An award of attorney fees is reviewed for an abuse of discretion. *See Albios v. Horizon Communities, Inc*., 122 Nev. 409, 417, 132 P.3d 1022, 1027-28 (2006). An award must be supported by substantial evidence. *See Uniroyal Goodrich Tire Co. v. Mercer*, 111 Nev. 318, 324, 890 P.2d 785, 789 (1995), superseded by statute on other grounds in *RTTC Commc'ns, LLC v. Saratoga Flier, Inc.*, 121 Nev. 34, 110 P.3d 24 (2005).

III. THE DISTRICT COURT ERRED IN RENDERING JUDGMENT IN FAVOR OF PLAINTIFFS ON THEIR CLAIM FOR FRAUDULENT CONVEYANCE

The District Court erred in finding for Plaintiffs on their claim for fraudulent conveyance relating to the Coolidge transaction as the decision was not supported by substantial evidence.[55] The District Court found:

> 11. Nype has proven, by a preponderance of the evidence his claims for fraudulent transfer, including that certain of the distributions constitute fraudulent transfer within the meaning of *NRS* 112.180(1)(a).[56]
>
> 14. Nype has proven by a preponderance of the evidence that he suffered damages in the amount of $341,934.47 as a result of the fraudulent transfer of the proceeds of the Leah transaction with Casino Coolidge directly to Liberman and Mitchell, rather than to Leah's parent LVLP. [AA 1235; ¶ 11 and 14; *see also* 1232; ¶ 59(a) to Findings of Fact].

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[55] The District Court found that all of Plaintiffs' alleged fraudulent conveyances claims, aside from the Coolidge transaction, were time-barred pursuant to *NRS* 112.230(1)(a).

[56] *NRS* 112.180(1)(a) provides:

> 1. A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (a) With actual intent to hinder, delay or defraud any creditor of the debtor.

The evidence and testimony presented in the instant Action did not establish that the Coolidge transaction was done "with actual intent to hinder, delay or defraud" as required by *NRS* 112.180(1)(a).[57] The District Court should have properly denied Plaintiffs' fraudulent conveyance claim relating to Coolidge.[58]

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[57] *See NRS* 112.180(2)(a)-(k) for factors in determining actual intent, i.e. (a) the transfer or obligation was to an insider; (b) the debtor retained possession or control of the property transferred after the transfer; (c) the transfer or obligation was disclosed or concealed; (d) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit; (e) the transfer was of substantially all the debtor's assets; (f) the debtor absconded; (g) the debtor removed or concealed assets; (h) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; (i) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; (j) the transfer occurred shortly before or shortly after a substantial debt was incurred; and (k) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

[58] Further, Leah, the seller of the Coolidge property, was not the debtor as defined in *NRS* 112.150(6), as the debtor for the Underlying Judgment was only LVLP. [AA 2792-94]. In this Court's unpublished decision in *Magliarditi v. TransFirst Grp., Inc*., 2019 Nev. Unpub. LEXIS 1156, 450 P.3d 911 (October 21, 2019), this Court held that "an alter ego of a judgment debtor is a 'debtor' under Nevada's Uniform Fraudulent Transfer Act (NUFTA) and a transfer between alter ego or between the judgment debtor and an alter ego is a transfer under NUFTA." However, pursuant to *NRAP* 36(c)(2), an unpublished disposition does not establish mandatory precedent except in matters not implicated in the instant Appeal.

A. Rich's Reports

The bulk of Rich's January 11, 2019 Report ("**Initial Report**"), with regard to the Coolidge transaction, related to his erroneous understanding of the history of the various parcels owned by Leah and the resulting sale to Coolidge for $1,000,000 of only a **portion** of the original parcels owned by Leah. Rich erroneously believed that the sale from Leah to Coolidge involved all the parcels owned by Leah. [SAA 1442; 1808-20; AA 1900-01; AA 2090; 2092-93; Trial Exhibit 40001; Trial Exhibits 40041-42].

However, the District Court correctly understood the subsequent sale to Coolidge, wherein it found: "Plaintiff has **not established** that given the market conditions at the time that Mitchell and Liberman sold the Leah Property without obtaining reasonably equivalent value in exchange." [AA 1229; ¶ 33; AA 2092-96; 1900-01; Trial Exhibit 40001; AA 2694; SAA 1808-20](emphasis).

In Rich's November 22, 2019 Supplemental Report (**"Supplemental Report**"), he added that Mitchell and Liberman received $250,000 and $91,934.47 "from the sale of the Leah property to Coolidge." [AA 2810; *see also* SAA 460, 872, 889, 891, 901, 907, 910, 916, 1008-09].

B. **Rich's Trial Testimony**

At trial, Rich was asked about the Coolidge transaction, including his opinion whether it was a fraudulent conveyance, wherein the following testimony was presented:

> Q. Okay. All right. Let's see. Now, is there anything else **other than what you have in your report** that you would say was an indication of a fraudulent conveyance or some sort of fraud involving that transaction?[59]
>
> A. Well, I think it's notable from that standpoint as well as, you know, alter ego that Mr. Liberman, as I testified yesterday, and Mr. Mitchell received the funds personally through escrow. [AA 1753] (emphasis).

While Rich testified that Mitchell and Liberman took different distribution amounts directly from the escrow from the Coolidge transaction, he did **not** know why the amounts were different. [AA 1667-68; 2694; SAA 872].

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[59] Aside from saying he "thought they were alter egos," Nype testified at trial in the instant Action:

> Q. So just a few more things here. As you sit here today do you have any facts or evidence **other than what was included in Mark Rich's report** that the defendants are alter egos of each other?
>
> A. **No**. [AA 2262] (emphasis).

When asked whether the distributions to Mitchell and Liberman ultimately went into LVLP, Rich testified:

> Q. And it didn't go upstream to LVLP?
>
> A. The entries -- **it may have**. **You can't tell from these entries whether or not it did**. I know the escrow closing papers show that it went to Mr. Liberman and Mr. Mitchell personally. [AA 1666] (emphasis).

Rich did not know if the distributions were to pay down debt. [AA 1753-54; SAA 916, 1008-09]. Rich testified that he did not even know why the distributions had been made. [AA 1753-54]. Rich further testified:

> Q. Okay. But you don't know the reason behind why those distributions were made?
>
> A. **No**.
>
> Q. And is that -- my question was, were there any other reasons or facts that you based your opinion on why this was included in the section regarding defendant transfers?
>
> A. Just what's stated in my report as well as my supplement. [AA 1754](emphasis).

Rich's Initial Report and Supplemental Report do not sufficiently provide facts upon which Rich based his opinion. The distribution amounts, i.e. $250,000 and $91,934.47 were entered in the general ledgers for LVLP. [AA 2149; 1717; SAA 770, 872, 1008-09; AA 1583; 1658-59].

In contrast to Rich's testimony and the lack of any documentary evidence supporting his unsubstantiated conclusion of a fraudulent conveyance regarding the Coolidge transaction, the testimony from both Mitchell and Liberman reflected that the Coolidge transaction was not done in any fashion to hinder, delay or defraud Nype relating to the Underlying Judgment. [AA 1969; 2096].

The District Court's findings relating to the Coolidge transaction are not supported by substantial evidence. *See Dewey v. Redevelopment Agency of Reno*, 119 Nev. 87, 93, 64 P.3d 1070, 1075 (2003); *Leonard v. Stoebling*, 102 Nev. 543, 728 P.2d 1358 (1986); *see also NRCP* 52(a)(6).

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IV. THE DISTRICT COURT ERRED IN RENDERING JUDGMENT IN FAVOR OF PLAINTIFFS ON THEIR CLAIM FOR ALTER EGO

The District Court erred in finding for Plaintiffs on their claim for alter ego, as the record does not provide substantial evidence to support the District Court's findings and conclusions imposing alter ego liability.[60]

In *Polaris,* 103 Nev. at 601, 747 P.2d at, this Court stated:

> There are three general requirements for the application of the alter ego doctrine: (1) the corporation must be influenced and governed by the same person asserted to be the alter ego; (2) there must be such unity of interest and ownership that one is inseparable from the other; and (3) the facts must be such that adherence to the corporate fiction of a separate entity would, under the circumstances, sanction fraud or promote injustice.

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[60] A district court's determination with regard to the alter ego doctrine is reviewed under a substantial evidence standard. *See LFC Mktg. Group, Inc. v. Loomis*, 116 Nev. 896, 904, 8 P.3d 841, 846 (2000). An exception to the deferential standard arises where it is clear that a wrong decision has been reached. *See Polaris*, 103 Nev. at 601, 747 P.2d at 886. The corporate cloak is not lightly thrown aside. *See Nevada Tax Comm'n v. Hicks*, 73 Nev. 115, 310 P.2d 852 (1957). The Judgment imposed alter ego liability upon Mitchell, Liberman, Meyer, Zoe, Leah, Wink One, Live Work, Live Work Manager, Aquarius Owner, LVLP-H, Live Work-TIC, FC/Live Work and Coolidge. [AA 1231-32; 1238]. However, the Judgment only superficially identified instances relating to the application of the alter ego doctrine and largely failed to apply them to each individual person and/or entity. *See NRCP* 52(a)("the court must find the facts specially").

Regarding the second factor, i.e. unity of interest, factors that may be considered include: co-mingling of funds, undercapitalization, unauthorized diversion of funds, treatment of corporate assets as the individual's own and failure to observe corporate formalities. But, there is no litmus test and no single factor is determinative. *Polaris*, 103 Nev. at 601, 747 P.2d at 887.

A. <u>Multiple Entities - Common in Industry</u>

Rich testified that the IRS allows for disregarded entities with a common ownership and they may file a consolidated tax return. Disregarded entities still maintain their legally separate status. [AA 1603; 1701-04; 1724-26; 2905-06 (Trial Exhibit 70003)]. Rich further testified:

> A. A nonoperating would be an investment. It could be a nonoperating entity where it solely as a bank account, solely has investment properties or market securities.
>
> Q. And have you seen it occur where a nonoperating entity does not have a bank account?
>
> A. I've seen that, yes.
>
> Q. And is that because there's a holding company above that entity?
>
> A. It could be. Yes. [AA 1704].

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LVLP operated as a holding entity for the sub-entities that were classified as disregarded entities on the consolidated tax returns. [AA 2905-06 (Trial Exhibit 70003); 1820]. As Rich testified, this is common in the real estate development industry and the entities were properly organized.[61]

B. Financial/Banking Matters

The utilization by LVLP of a common banking organization did not equate to impermissible co-mingling of funds. *See Fletcher v. Atex*, 68 F.3d 1451, 1459 (2nd Cir. 1995)("Courts have generally declined to find alter ego liability based upon a parent corporation's use of a cash management system.").

While Mitchell and Liberman utilized personal funds during the course of the real estate development efforts in Las Vegas, the evidence presented at trial reflected that such efforts were utilized due to financing limitations by out-of-state banks and the need fund their business operations. [AA 1902-03; 1609-10].

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[61] *See* various organizational and execution documents. [AA Trial Exhibits 1-3; 9-10; 17; 30; 32; 34-35; 38; 40; 43-45; 52; 70003; 70023; and 90075; SAA 514-547].

C. Capitalization

Testimony reflected that a single-purpose entity can have a single asset or even a bank account and this is not improper. [AA 1702-04; 1878-79]. "The adequacy of capital is to be measured as of the time of formation of a corporation. A corporation that was adequately capitalized when formed but subsequently suffers financial reverses is not undercapitalized." 1 Fletcher Cyc. Corp. §41.33; *see also Trustees of the Nat'l Elevator Indus. Pension, Health Benefit and Educ. Funds v. Lutuk*, 332 F.3d 188, 196 (3rd Cir. 2003) ("mere insolvency is distinct from undercapitalization").

Insolvency is insufficient grounds to pierce the corporate veil. *See Paul Steelman, Ltd. v. Omni Realty Partners*, 110 Nev. 1223, 1225, 885 P.2d 549 (1994); *In re Branding Iron Steak House*, 536 F.2d 299, 302 (9th Cir. 1976).[62]

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[62] Even undercapitalization alone is insufficient grounds to disregard an entity. *See North Arlington Medic. Bldg, Inc. v. Sanchez Constr.*, 86 Nev. 515, 522, 471 P.2d 240, 244 (1970)("Undercapitalization, where it is clearly shown, is an important factor in determining whether the doctrine of alter ego should be applied. However, in the absence of fraud or injustice to the aggrieved party, it is not an absolute ground for disregarding the corporate entity").

The District Court stated in the Judgment that "One or more of the Related Entities was formed with an initial capitalization of just $10" [AA 1230]. However, this ignores the fact that such entities were single-purpose entities created to hold valuable real estate and, at times, created at the request of the lender. Rich acknowledged that this was common practice in the real estate development industry. [AA 1702-04; 1858].

The testimony in the instant Action reflected the dramatic down-turn in the economy and more specifically the real estate market in Las Vegas during the operative times involved in the instant Action. [AA 1897; 2048].

D. Diversion of Funds

There was no substantial evidence of "diversion of funds" or "treatment of corporate assets as the individual's own" with regard to purposes other than business purposes for each of the entities subject to alter ego liability. *See North Arlington*, 471 P.2d at 244 (the burden is on the plaintiff to prove illegitimate use of corporate funds). [AA 1609-10; 1902-03; 1964-65; 1973; 2152-53; Trial Exhibits 27, 10002-4, 20024, 20026, 30002, 30031, 70021, 70072 and 70074].

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E. Corporate Formalities

Contrary to the District Court's determination, the substantial evidence presented in the instant Action reflected that the entities observed corporate formalities. *See* various organizational and execution documents. [SAA 514-47, 1413; Trial Exhibits 1-3; 9-10; 12; 17-18; 30; 32; 34-35; 38; 40; 43-45; 52; 70003; 70023; 90052 and 90075]. *See also Weddell*, 128 Nev. at 103, 271 P.3d at 749 ("An LLC may, but is not required to, adopt an operating agreement, *NRS* 86.286."). The corporate formalities required are those required by law. *See Fusion Capital Fund II, LLC v. Ham*, 614 F.3d 698, 701 (7th Cir. 2010).

F. No Fraud or Injustice

With regard to the third factor, i.e. fraud and/or injustice, there was no substantial evidence to support the District Court's determination imposing alter ego liability.

Testimony from both Mitchell and Liberman reflected that nothing they did with regard to the various developments was done in an attempt to hinder, delay or defraud Nype relating to the Underlying Judgment. [AA 2082; 2096].

V. THE DISTRICT COURT ERRED IN ITS AWARD OF PRE-JUDGMENT INTEREST

The District Court improperly based its award of pre-judgment interest upon an incorrect amount, i.e. $19,983,450.40, as opposed to the correct total amount awarded of $19,641,515.90 in the Judgment. [AA 1237; 1322; 1324; 1466; 1501-10; 1511-17]. The District Court's award of pre-judgment interest was in error and must be reversed.

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CONCLUSION/PRAYER FOR RELIEF

Based upon the above arguments, it is requested that this Court vacate and reverse the Judgment with respect to the Plaintiffs' claims for civil conspiracy and alter ego, as the District Court improperly found in favor Plaintiffs and improperly awarded damages. It is further requested that this Court vacate and reverse the Judgment with respect to the Plaintiffs' claims for fraudulent conveyance regarding the Coolidge transaction, as the District Court improperly found in favor Plaintiffs and improperly awarded damages. Finally, it is requested this Court vacate and reverse the Judgment with respect to the award of attorney's fees awarded as special damages, the subsequent award of attorney's fees and pre-judgment interest and costs.

Respectfully submitted.

DATED this 18th day of March 2021

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CERTIFICATE OF COMPLIANCE

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

[x] This *Opening Brief* has been prepared in a proportionally spaced typeface using Word Perfect - Version X4 in 14 Point Times New Roman.

2. I further certify that this *Opening Brief* complies with the page or type-volume limitations of *NRAP* 32(a)(7) because it is less than 30 pages in length and, excluding the parts of the brief exempted by *NRAP* 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and contains **13,206** words; and

3. Finally, I hereby certify that I have read this *Opening Brief* and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

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I further certify that this *Opening Brief* complies with all applicable *Nevada Rules of Appellate Procedure*, including *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*.

Respectfully submitted.

DATED this 18th day of March 2021

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of March 2021, the above-referenced **MITCHELL APPELLANTS' OPENING BRIEF AND APPENDIX**, was filed electronically with the Clerk of the *Nevada Supreme Court* and served electronically through the Court's electronic service to the following persons:

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