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; LIVE WORKS TIC SUCCESSOR, LLC, Appellants, vs. RUSSELL L. NYPE; REVENUE PLUS, LLC, and SHELLEY D. KROHN, Respondents.	Case No. 80693

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APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable ELIZABETH GONZALEZ, District Judge
District Court Case No. A-16-740689-C

RESPONDENTS' ANSWERING BRIEF

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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.l(a), and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Respondent Russell L. Nype is an individual residing in the State of Florida. Respondent Revenue Plus, LLC is a Florida limited liability company, is not a publicly traded company, does not have more than 10% of its stock owned by a publicly traded company, nor does it have any parent corporations. Respondent Shelly D. Krohn is U.S. Bankruptcy Trustee in the Bankruptcy Case of *Las Vegas Land Partners, LLC*, Case No. BK-19-15333-mkn. Respondents Russell L. Nype and Shelly D. Krohn are not publicly traded companies, do not have stock owned by a publicly traded company and do not have any parent corporations.

Respondents have previously been and are currently represented in the District Court by: John W. Muije, Esq., Attorney at Law. Respondents are currently represented in this Court by John W. Muije, Esq.

Dated this 28th day of October, 2021.

/s/ John W. Muije, Esq.
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II. STATEMENT OF THE CASE

This appeal arises from a final judgment in favor of Respondents Russell L. Nype ("Mr. Nype"), Revenue Plus, LLC (collectively, the "Nype Parties"), issued in Case No. A-16-740689-B, by The Honorable *Elizabeth Gonzalez* (the "District Court" or the "Second[1] Action"). (7AA1221-38.) Judgment was awarded on January 17, 2020, through Amended Findings of Fact, Conclusions of Law and Judgment (the "Second Judgment"). *Id.*

[1] As explained on pages 2-5, below, there was a first action involving the Nype Parties that preceded the Second Action and resulted in a first judgment.

On February 26, 2020, judgment debtors the Mitchell Parties[2] appealed from the Second Judgment. Judgment debtors Barnet Liberman ("Liberman") and Casino Coolidge, LLC ("Casino Coolidge"), also appealed from the Second Judgment. Liberman and Casino Coolidge's appeal was, however, dismissed by this Court on February 26, 2021. (*See* February 26, 2021, Order at 1.)[3] Judgment debtors LiveWork LLC ("Livework") and FC/LiveWork Vegas, LLC, *did not appeal from the Second Judgment*. (8AA1443-60.) In May 2020, the District Court entered orders granting pre-judgment interest on the Second Judgment and awarding the Nype Parties costs and additional attorney's fees (the "Additional Fees/Costs/Interest Orders"). (8AA1518-24; 8AA1501-10.) The Mitchell Parties did not file a notice of appeal (amended or otherwise) from the Additional Fees/Costs/Interest Orders.

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[2] The term "Mitchell Parties" refers to Appellants David J. Mitchell ("Mitchell"), Las Vegas Land Partners, LLC ("LVLP"), Meyer Property, LTD ("Meyer Property"), Zoe Property, LLC ("Zoe"), Leah Property, LLC ("Leah Property"), Wink One, LLC ("Wink One"), Aquarius Owner, LLC ("Aquarius"), LVLP Holdings, LLC ("LVLP Holdings"), and LiveWorks TIC Successor, LLC.

[3] In the same order, this Court also removed Liberman Holdings, LLC, as an appellant. (*See* February 26, 2021, Order at 1.)

III. STATEMENT OF RELEVANT FACTS AND BACKGROUND

A. The Nype Parties' First Judgment

This appeal is the latest ploy in Mitchell and Liberman's nearly *two-decade-long machination* to avoid paying the Nype Parties for the valuable services they performed on Mitchell and Liberman's behalf. (7AA1228-38; 16AA2748-52.)

In 2005, Mitchell and Liberman requested the Nype Parties' assistance with finding a development partner to assist them in developing certain real property located in Downtown Las Vegas. (3RA440; 7AA1228.) The Nype Parties successfully introduced Mitchell and Liberman to Forest City Enterprises ("Forest City"), a deep-pocketed, nationally-recognized developer. (7AA1228-38; 12AA2168-69, 2230; 3RA442-46, 552.) With the Nype Parties' crucial assistance, Mitchell and Liberman (through their various entities) closed a transaction with Forest City. (7AA1228; 3RA442-46, 552.) Because of Mr. Nype's close, personal relationships with Forest City's key decision makers and his insider's knowledge of how Forest City operated, he was able to facilitate a transaction that Mitchell and Liberman had attempted to develop for years, without success. (3RA440-44, 452; 13AA2178, 2182.)

At the initial closing of the transaction in 2007, Forest City invested approximately 101 million dollars into the development project. (3RA446; 16AA2808-09; 29SAA1715-1807.) At least $10,500,000 in cash went directly to

Mitchell and Liberman's entity, Livework. (7AA1228; 3RA446.) Mitchell and Liberman's entities also saved millions of dollars in interest payments on the project's existing loan financing. (3RA446.) Liberman and Mitchell were also able to extinguish more than $19,484,000 in personal loan guarantees. *Id.*

Prior to closing the transaction with Forest City, a dispute arose between Mitchell, Liberman and the Nype Parties over the amount the Nype Parties were entitled to be paid related to the transaction with Forest City. (7AA1228; 13AA2181-86.)

Mitchell and Liberman were fully aware that the Nype Parties were expecting to receive *at least two million dollars for their efforts*. (7AA1228; 13AA1273, 2181-86.) Despite understanding the Nype Parties' expectations, Mitchell and Liberman only set aside $430,000 for them. (7AA1228.) Shortly after setting aside that amount, in 2007, Mitchell and Liberman took personal distributions from LVLP Holdings in excess of $13,000,000. (7AA1228; 16AA2805-06, 2808-10.) The Nype Parties subsequently learned that these distributions left insufficient capital available to pay either the Nype Parties or Mitchell and Liberman's share of the development costs required under their transaction with Forest City. (16AA2805-06, 2808-10; 24SAA589-659; 3RA470-76.)

Instead of paying the Nype Parties what they were owed, on November 2, 2007, Mitchell and Liberman[4] sued the Nype Parties, in Eighth Judicial District Court Case No. A551073 (the "First Action"), seeking a declaration that the Nype Parties were not owed *a single penny for their services*. (07AA1229; 16AA2748-52.) The Nype Parties counterclaimed seeking compensation for services rendered. (16AA2753-66; 9AA1561.)

Litigation in the First Action lasted more than *seven years* and cost the Nype Parties *millions* of dollars. (16AA2748-52, 2792-94; 13AA2205-2010.) Unbeknownst to the Nype Parties at the time, Mitchell, Liberman, LVLP, LiveWork, and Zoe litigated the First Action in bad faith, and for improper purposes, driving up the costs and delaying the litigation. (*See* 16AA2883-4.) Ultimately, trial began in October of 2014 and concluded in January of *2015*. (46RA8871-73) The Nype Parties were finally awarded judgment against LVLP in April of 2015—nearly *eight years* after they had earned, and were entitled to, their commission (the "First Judgment"). (3RA440-444, 452-53; 7RA1221-38.) The First Judgment awarded $2,608,797.50, in principal, plus costs and pre- and post-judgment interest. (16AA2795-97.) As of the filing of this Answering Brief, approximately *$4,833,154.26* is due on the First Judgment, plus additional post-

[4] Mitchell and Liberman sued the Nype Parties through three of their wholly owned and controlled entities, LVLP, LiveWork and Zoe.

judgment interest currently accruing at *$395.47 per day*. (18AA3230 (updated to 10/28/21).)

LVLP, LiveWork and Zoe appealed to this Court in Case No. 68819, and this Court affirmed the First Judgment on November 14, 2017. *See Las Vegas Land Partners, LLC v. Nype*, 133 Nev. 1041, 408 P.3d 543 (2017). This Court denied rehearing of its order affirming the First Judgment on April 27, 2018. *Id*.

B. The Second Action

After obtaining the First Judgment, the Nype Parties engaged in significant attempts to collect on the First Judgment from LVLP. (7AA1229; 13AA2211-12.) The Nype Parties' efforts were almost entirely unsuccessful, however, collecting less than $10,000.00. (13AA2210-11.) Post-judgment discovery began in August of 2015. (3RA465-76, 496.) Discovery continued to flow in, on a sporadic and intermittent basis, until November 2019, just prior to trial of the Second Action. (7AA1230; 3RA470-76, 496-98; 6AA992-93; 16AA2815.) This new and previously undisclosed discovery revealed,[5] for the first time, that: (1) LVLP had no meaningful assets; and (2) Mitchell and Liberman had taken steps to (i) divert

[5] Prior to August 2015, the Nype Parties had only received limited tax returns and very limited bank statements for LVLP. (3RA365-76, 496-99.) Those tax returns suggested, in their asset summaries, that LVLP had millions of dollars of assets. (16AA2805-08; 24SA660, 668, 674, 678, 682, 693, 697.) Detailed financial and accounting records (such as general ledgers, financial statements, etc.) were first obtained during the months following the start of post-First Judgment discovery (i.e., after September 2015). (3RA365-76, 496-99.)

and drain all valuable assets away from LVLP, and (ii) ensure that assets that would normally have flowed into LVLP's coffers never actually made their way to LVLP. (16AA2805-15; 7AA1229.) Indeed, between 2007 and 2016, Mitchell and Liberman diverted more than $15,000,000 to themselves, despite being fully aware of the Nype Parties' claims, and later, the First Judgment. (16AA2805-08; 7AA1230.) These distributions caused or contributed to the insolvencies of Mitchell and Liberman's related entities or the inability of the entities to pay their debts as they became due. (16AA2805-08.)

Accordingly, on July 26, *2016*, the Nype Parties filed the Second Action against Mitchell, Liberman, LVLP[6], and related entities[7], alleging claims for declaratory relief, fraudulent conveyance, civil conspiracy, constructive trust, and alter ego. (1AA1-19.) The Nype Parties further sought punitive damages and attorney's fees as special damages. (1AA12, 15-16, 18-19.)

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[6] LVLP filed Chapter 7 Bankruptcy on August 19, 2019, in bankruptcy case no. 19-1533-mkn. The Bankruptcy Court appointed Ms. Shelly D. Krohn ("Plaintiff Trustee") as Bankruptcy Trustee for LVLP. On November 18, 2019, Plaintiff Trustee intervened in the District Court on behalf of LVLP, as a Plaintiff-In-Intervention. (06AA1052-82.) Plaintiff Trustee is a Respondent in this appeal and this Answering Brief is also filed on her behalf.

[7] These related defendants included: LVLP Holdings; Meyer Property; Zoe; Leah Property; Wink One; LiveWork; LiveWork Manager LLC ("LiveWork Manager"); Aquarius; LiveWorks TIC Successor, LLC; FC/LiveWork Vegas LLC; Mitchell Holdings, LLC ("Mitchell Holdings"); 305 Las Vegas, LLC ("305 Las Vegas"); and Casino Coolidge.

Mitchell and Liberman's bad-faith and *unlawful* litigation tactics continued throughout the Second Action. (7AA1230, 1233, 1236; 5AA903-14; 5AA940-52; 2RA328-35.) For years, they refused to produce material emails and crucial financial/accounting records, taking the false position that such materials did not exist. (*Id*; 7AA1230, 1233, 1236; 5AA903-14, 940-52; 16AA2815; 6AA992-93; 1RA129-36.) The District Court ultimately found that Mitchell had failed to "meaningfully participate in discovery until the eve of trial[.]" (7AA1230.) Mitchell's discovery misconduct was so pervasive and severe that the District Court sanctioned him *$160,086.46*. (5AA940-52.) Mitchell's "failure to produce documents which should have been in his possession" led the District court to "conclude that if those documents had been produced[,] they would have been adverse to Mitchell." (7AA1230.) Perhaps most egregious, Mitchell worked with his New Jersey-based CPA, Sam Spitz ("Mr. Spitz"), to "*fabricate and backdate*[] *evidence to facilitate the destruction and/or concealment of material financial evidence* . . . that would have greatly assisted [the Nype Parties'] case." (7AA1236 (emphasis added); *see also* 14AA2318; 14AA2336-41; 47RA8987-9025.)[8] Overcoming Mitchell and Liberman's discovery abuses required burdensome and

[8] Prior to and during trial, Mitchell vehemently denied fabricating and backdating evidence. The District Court found Mitchell "not credible." (7AA1230.) After trial, he admitted that "[t]he conduct of Mitchell and his CPA was wrong." (07AA1377.) Importantly, the District Court's finding of *intentional spoliation* armed it to make *adverse inferences* that the withheld materials "would have been adverse to Mitchell." (7AA1230.)

expensive motion practice. (1RA144-55; 2RA238-23.) The Nype Parties were eventually able to obtain *some* of the long-sought-after discovery materials on the eve of trial, when *several hundred thousand pages* of previously non-disclosed materials were finally produced. (7AA1232; 3RA465-76; 16AA2815; 6AA992-93; 13AA2194, 2271; 5AA909; 14AA2318, 2387-88; 1RA194; 9AA1606.) The District Court concluded that "[b]ut for [the Nype Parties'] pretrial discovery, the fabrication of evidence would not have been uncovered." (7AA1236.)

A six-day bench trial was held in the Second Action, before The Honorable Elizabeth Gonzalez, between December 30, 2019, and January 7, 2020. (7AA1225.) The Nype Parties' case-in-chief included *multiple* days of expert testimony from their forensic accountant, Mark Rich, CPA, CFF ("Mr. Rich"). (9AA1599-1696; 10AA1700-83; 11AA1789-890.) His testimony *went unrebutted by any defense expert*. (9AA1533-1697; 10AA1698-1785; 11AA1786-1987; 12AA1988-2163; 13AA2164-2303; 14AA2304-2421.)

During trial, Mr. Nype also testified at length to the enormous amount of financial and emotional harm that Mitchell and Liberman had caused him. Their actions had: (1) significantly impacted his marriage and materially contributed to his divorce; (2) forced him to sell his New York City residence and encumber other real-property interests; (3) cost him millions of dollars in lost business opportunities; (4) damaged his business reputation; (5) caused him more than a

decade of ongoing, severe mental anguish and suffering; (6) forced him to incur more than $4.5 million in legal and expert fees; and (7) left him with an uncollectable First Judgment, presently worth *$4,833,154.26*. (13AA2167, 2205-10; 14AA2346-48; 7AA2918-3033; 18AA3230 (updated to 10/28/21).)

C. <u>The Second Judgment</u>

The District Court "reviewed the evidence admitted during the trial[,]" "heard and carefully considered the testimony of the witnesses called to testify and *weigh[ed] their credibility*[.]"[9] (7AA1226 (emphasis added).) On January 17, 2020, the District Court awarded the Nype Parties the Second Judgment, as follows: (1) in the amount of $19,641,515.90, jointly and severally against Mitchell and Liberman on the cause of action for civil conspiracy (the "Civil-Conspiracy Judgment"); (2) in the amount of $4,835,111.37, jointly and severally against Mitchell, Liberman and certain of their entities, on the cause of action for fraudulent conveyance (the "Fraudulent-Transfer Judgment"); and (3) imposing joint-and-several, alter-ego liability against Mitchell, Liberman and certain (but not all) of their entities, on the First Judgment and also the "the damages, attorney's

[9] The District Court specifically found that "Mitchell was not credible." (7AA1230.)

fees and costs awarded in [the Second Judgment]" (the "Alter-Ego Judgment").[10] (7AA1237-38.) The Court declined to award punitive damages. *Id*.

With regard to the Civil-Conspiracy Judgment, the District Court found that Mitchell and Liberman had engaged in the following conduct for the purpose of harming the Nype Parties: (1) "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 [the Nype Parties]"; (2) "Mitchell and Liberman received [millions of dollars in] distributions from LVLP and the Related [E]ntities"; (3) "Mitchell[] fabricated and backdated evidence to facilitate the destruction and/or concealment of material evidence by his agent that would have greatly assisted [the Nype Parties'] case"; and (4) Mitchell "fail[ed] to produce documents which should have been in his possession[.]" (*See* e.g., 7AA1230, 1236; 16AA2803-15; 9AA1599-1696; 10AA1700-83; 11AA1789-890.)

With respect to the Fraudulent-Transfer Judgment, the District Court found that "Mitchell, Liberman and the Related Entities [] made distributions to avoid satisfying [the Nype Parties'] claims and [First] Judgment." (7AA1232; 16AA2803-15; 9AA1599-1696; 10AA1700-83; 11AA1789-890.) These improper distributions included: (1) "[i]n December 2014, when Leah [Property] sold certain

[10] In addition to Mitchell and Liberman, other debtors on the Fraudulent-Transfer Judgment and the Alter-Ego Judgment include: Meyer Property; Zoe; Leah Property; Wink One; LiveWork; LiveWork Manager; Aquarius; LVLP Holdings; LiveWorks TIC Successor, LLC; FC/LiveWork Vegas LLC; and Casino Coolidge.

real property to Casino Coolidge for $1,000,000[,]" and "Mitchell and Liberman caused Leah [Property] to distribute sales proceeds in the amount of $341,934.47 directly to themselves, rather than Leah [Property's] parent company, LVLP[,]" (7AA1229); and (2) "[w]hen Mitchell and Liberman took personal distributions from the Related Entities, between 2007 and 2016, totaling $15,148,339."[11] (7AA1232; 16AA2803-15; 9AA1599-1696; 10AA1700-83; 11AA1789-890.)

The Fraudulent-Transfer Judgment is comprised of $341,934.47 in general damages (representing the value of the asset fraudulently transferred) and $4,493,176.90 in attorney's fees, costs and expert expenses the District Court awarded as special damages. (7AA1235.)[12]

With regard to the Alter-Ego Judgment, the District Court found "that Mitchell, Liberman and each of the Related Entities, is the alter ego of LVLP and each other." (7AA1234.) The District Court's finding was based upon consideration

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[11] The District Court found that these "earlier transfers [we]re barred by the limitations period for purposes of the fraudulent transfer claim, only[,]" as "those distributions were made outside the limitations period under NRS 112.230(1)." (7AA1235.) The District Court held, however, that "[t]he limitation for a civil conspiracy claim is not limited by NRS 112.230(1)(a) but is instead governed by NRS 11.220 and the discovery rule." (7AA1236 (citing *Siragusa*, 114 Nev. at 1391-93).

[12] To avoid "the possibility of duplicative awards given the various claims for relief[,]" (7AA1235, n.9), the District Court carefully held that the $4,835,111.37 in damages under the Fraudulent-Transfer Judgment was included within—rather than in addition to—the amount of the Civil-Conspiracy Judgment. (7AA1237, n.12.)

of the *totality of the circumstances* presented, including, among other things: (1) "[a]t all relevant times, each of the Related Entities was beneficially owned, controlled, and managed by Mitchell and Liberman"; (2) "[e]xcept with respect to Livework Manager and Casino Coolidge, none of these entities had its own bank account" and "Mitchell caused [such entities] to use the same bank accounts"; (3) "Mitchell and Liberman caused each of the Related Entities to use the same financial and accounting records, *which are not distinguishable by entity*"; (4) the "accounting records include a few Mitchell and Liberman personal transactions and postings *commingled* from multiple entities"; (5) "Mitchell, Liberman and the Related Entities *commingled funds*, including *personal loans* from various banks which are included in the LVLP accounting records and general ledger"; (6) "Mitchell and Liberman also used journal entries to post commingled transactions for themselves and the Related Entities"; (7) "[i]n 2016, [certain of] the Related Entities stopped using bank accounts and instead began using journal entries apparently transacted personally by Mitchell"; (8) "[t]he manner in which Mitchell and Liberman operated the Related Entities ma[de] it *virtually impossible to identify transactions by purpose and/or entity*"; and (9) as a result, "the individuality and separateness of the Related Entities—vis-à-vis themselves and Mitchell and Liberman—was and remains nonexistent as evidenced by the commingling of funds, transactions, revenues, expenses, assets, liabilities and

contributed capital." (*See* 7AA1230-31 (emphases added); 16AA2803-15; 9AA1599-1696; 10AA1700-83; 11AA1789-890.)

Based upon the above, the District Court concluded that: (1) "Mitchell, Liberman and the Related Entities commingled funds, transactions and assets"; (2) the Related Entities were and are undercapitalized"; (3) "Mitchell, Liberman and the Related Entities distributed funds to Mitchell and Liberman as individuals without regard to parent entities"; (4) "Mitchell, Liberman and the Related Entities treated assets of the other entities as their own"; and (5) "the related entities failed to observe corporate or LLC formalities." (7AA1231-32; 16AA2803-15; 9AA1599-1696; 10AA1700-83; 11AA1789-890.) The District Court also found that "Mitchell, Liberman and the Related Entities ha[d] made distributions to avoid satisfying [the Nype Parties'] claims and [First] Judgment." (7AA1232; 16AA2803-15; 9AA1599-1696; 10AA1700-83; 11AA1789-890.) And they had "ensure[d] that funds and/or assets that would otherwise be available to [the Nype Parties] to satisfy [their] claim (and [First] Judgment) were kept away from [the Nype Parties,]" thus contributing to the Nype Parties' inability to collect on their claims and First Judgment. (7AA1229; 16AA2803-15; 9AA1599-1696; 10AA1700-83; 11AA1789-890.)

Accordingly, the District Court concluded that "there [wa]s such unity of interest and/or ownership that Mitchell, Liberman and the Related Entities [we]re

inseparable from the other[,]" (7AA1232), and "[j]ustice and equity require[d] that the Court impose alter ego on Mitchell, Liberman and the Related Entities." (7AA1234.)

IV. SUMMARY OF THE ARGUMENT

Substantial evidence and applicable caselaw supports the District Court's Civil-Conspiracy Judgment. The District Court correctly held that Mitchell and Liberman's actions, taken for the purpose of harming the Nype Parties, provided the necessary predicate for the Civil-Conspiracy Judgment. Mitchell and Liberman engaged in substantial conduct that was criminal or unlawful, as a tort or otherwise, and/or done for criminal or unlawful purposes. Among other things, Mitchell and Liberman committed fraudulent transfers and fabricated and backdated evidence to harm the Nype Parties.

The District Court properly exercised its wide discretion in awarding civil-conspiracy damages to compensate the Nype Parties for the harm caused by Mitchell and Liberman's conspiratorial conduct. Civil conspiracy is a tort. Tort plaintiffs are entitled to compensation for all the natural and probable consequences produced by the defendant's specific overt acts taken in furtherance of the conspiracy. As a result of Mitchell and Liberman's overt actions, the Nype Parties were damaged by being: (1) left with an uncollectable First Judgment *presently* worth more than $4,800,000; (2) forced to incur more than $4.5 million

in attorney's fees and costs necessitated by Mitchell Liberman's bad-faith, unethical legal tactics; (3) subjected to more than a decade of continuing, severe mental anguish and suffering; (4) harmed in their business reputation; and (5) precluded from millions of dollars in business opportunities. The District Court's Civil-Conspiracy Judgment is, in no way, excessive or violative of the double-recovery doctrine.

The Mitchell Parties failed to establish that the applicable statute of limitations bars or impacts the Civil-Conspiracy Judgment. Claims for civil conspiracy are exclusively governed by NRS 11.220's four-year limitations period. The claim does not accrue until the plaintiff discovers or should have discovered all of the necessary facts constituting the conspiracy claim. The Nype Parties' civil-conspiracy claim did not accrue until, at the earliest, August of 2015, when they began to obtain post-First Judgment discovery. Accordingly, the civil-conspiracy claim—filed in 2016—was timely. It is irrelevant that the UFTA's statute of limitations barred UFTA remedies for certain earlier distributions. The transfers remained unlawful or done for an unlawful or improper purpose.

The District Court properly imposed alter-ego liability based upon the totality of the circumstances presented at trial. Contrary to Nevada law, the Mitchell Parties: (1) cherry-pick evidence that seemingly supports their position, while ignoring the substantial evidence supporting the Alter-Ego Judgment; (2)

focus on isolated facts—completely ignoring the bigger evidentiary picture; and (3) treat each fact as if it had to provide—on its own—an independent basis to fully support alter-ego liability. With regard to the third alter-ego element, this Court has specifically found resulting injustice—in cases just like this—where misconduct of the individual defendants has affirmatively contributed to the inability to collect on a judgment.

Substantial evidence supports the Fraudulent-Transfer Judgment. The evidence at trial demonstrated that at least five of the 11 badges of fraud were present. The confluence of multiple badges of fraud provided conclusive evidence of actual intent to hinder, delay or defraud creditors. The Mitchell Parties' self-serving testimony fails to overcome the District Court's determination of intent.

Substantial evidence supports the District Court's award of attorney's fees and costs. Nevada law permits attorney's fees and costs as special damages in actions, like this one, for equitable relief and declaratory relief necessitated by the opposing party's bad-faith conduct. Fees and costs may also be awarded as special damages in UFTA actions. The District Court properly found that Nype's Amended Complaint pled attorney's fees and costs as special damages. The evidence demonstrated that the District Court properly performed a *Brunzell* analysis.

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V. ARGUMENT

A. Standards Of Review

1. Findings of fact

This Court "will not disturb a trial court's findings of fact unless they are clearly erroneous and not based on substantial evidence." *Nevada Ins. Guar. Ass'n*, 108 Nev. at 1126. "'A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Unionamerica Mortg. & Equity Trust*, 97 Nev. at 211-12 (quoting *U. S. Gypsum Co.*, 333 U.S. at 395). "Substantial evidence is that which 'a reasonable mind might accept as adequate to support a conclusion.'" *Radaker*, 109 Nev. at 657 (quoting *State Emp. Security*, 102 Nev. at 608, *superseded by statute on other grounds as stated in Countrywide Home Loans*, 124 Nev. 725).

"The weight and credibility to be given trial testimony is solely the province of the trier of fact, and a district court's findings of fact will not be set aside unless clearly erroneous." *In re Guardianship of D.R.G.*, 119 Nev. at 40; *see also Bacher*, 122 Nev. at 1121 (stating this Court does not "examine witness credibility or reweigh the evidence"). Even the credible testimony of a *single* witness can provide sufficient evidence to support a court's findings of fact. *See Romy Hammes, Inc.*, 91 Nev. at 132 (rejecting a claim of insufficient evidence, stating

that "the testimony of the president of McNeil Construction Company . . . alone provides requisite support for the jury's apparent conclusion that the services were performed at the special instance and request of Romy Hammes, Inc."). "Where the trial court, sitting without a jury, makes a determination predicated upon conflicting evidence, that determination will not be disturbed on appeal where supported by substantial evidence." *Trident Const. Corp.*, 105 Nev. at 427; *accord Smith*, 96 Nev. at 202 (Where "there is conflicting evidence, this court is not free to weigh the evidence, and all inferences must be drawn in favor of the prevailing party.")

2. Conclusions of law

This Court reviews "the 'district court's conclusions of law, including statutory interpretations, de novo.'" *Canarelli*, 127 Nev. at 813 (quoting *Borger*, 120 Nev. at 1026). In reviewing findings that involve mixed questions of law and fact, however, the factual determinations are *not* reviewed de novo. *See e.g., Amfac, Inc.*, 74 Haw. at 89 ("A conclusion of law that presents mixed questions of fact and law is reviewed under the clearly erroneous standard because the court's conclusions are dependent upon the facts and circumstances of each individual case.").

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3. Damages award

"This court will affirm a damages award that is supported by substantial evidence." *Wyeth*, 126 Nev. at 470.

4. Alter ego

A district court's determination with regard to the alter-ego doctrine is reviewed under the substantial evidence standard. *See LFC Mktg. Grp., Inc.*, 116 Nev. at 904.

5. Fraudulent transfer

A district court's determination of whether a fraudulent transfer took place is a question of fact, reviewed under the substantial evidence standard. *See McCain Foods USA*, 275 Kan. at 12; *Labbe*, 115 Conn. App. at 835-36.

6. Attorney's fees

"Generally, [this Court] review[s] decisions awarding or denying attorney fees for a manifest abuse of discretion." *Pardee Homes*, 444 P.3d at 425.

B. Substantial Evidence And The Applicable Caselaw Supports The Civil-Conspiracy Judgment.

The Mitchell Parties challenge the Civil-Conspiracy Judgment on the alleged grounds that: (1) no actionable basis existed to form the necessary predicate upon which the District Court could impose civil-conspiracy liability and damages; (2) for various reasons, the Civil-Conspiracy Judgment was excessive in amount; and (3) the civil-conspiracy claim was barred by its statute of limitations under NRS

11.220. (AOB at 25-42.) As explained below, each of these arguments is without merit.

1. The District Court correctly held that Mitchell and Liberman's actions taken for the purpose of harming the Nype Parties provided the necessary predicate for the Civil-Conspiracy Judgment.

The cause of action at issue is that of civil conspiracy against Mitchell and Liberman. "A civil conspiracy is a combination of two or more persons by some concerted action to accomplish some *criminal or unlawful purpose or* to accomplish some *purpose not in itself criminal or unlawful by criminal or unlawful means*." *Eikelberger*, 96 Nev. at 528 n.1 (emphasis added). Nevada law *does not require* that the unlawful purpose/means arise to the level of a tort. *See Cadle*, 131 Nev. at 118 ("In Nevada, however, civil conspiracy liability may attach where two or more persons undertake some concerted action with the intent to commit an *unlawful objective, not necessarily a tort*." (emphasis added).) "The conspiratorial agreement need not be in any particular form and need not extend to all the details or the conspiratorial scheme so long as its primary purpose is to cause injury to another." *Eikelberger*, 96 Nev. at 528 n.1.[13]

Here, the District Court found that Mitchell and Liberman engaged in the following conduct for the *purpose* of harming the Nype Parties: (1) "Mitchell and

[13] The Mitchell Parties *do not challenge* the District Court's finding of a conspiratorial agreement between Mitchell and Liberman to harm the Nype Parties.

Liberman, engaged in conscious, concerted and ongoing efforts to conceal, hide, convey, keep secret and/or distribute millions of dollars in assets away from [the Nype Parties]"; (2) "Mitchell and Liberman received [millions of dollars in] distributions from LVLP and the Related [E]ntities"; (3) "Mitchell[] fabricated and backdated evidence to facilitate the destruction and/or concealment of material evidence by his agent that would have greatly assisted [the Nype Parties'] case";[14] and (4) Mitchell "fail[ed] to produce documents which should have been in his possession[.]" (7AA1230; 7AA1236.)

All of this conduct properly supported the District Court's Civil-Conspiracy Judgment as the conduct was both criminal or unlawful (as a tort or otherwise) and done for criminal or unlawful purposes.[15] (*See, e.g.,* 07AA1379 (acknowledging

[14] The Mitchell Parties argue the "District Court should have also denied [the Nype Parties'] claim for civil conspiracy" pursuant to the intra-corporate-conspiracy doctrine set forth in *Collins*, 99 Nev. at 303. (*See* AOB at 37, n.42.) *Collins* makes clear, however, that the doctrine only applies when agents and officers of the corporation "act in their official capacities on behalf of the corporation *and not as individuals for their individual advantage*." *Collins*, 99 Nev. at 303 (emphasis added). Here, Mitchell and Liberman conspired as individuals for their individual advantage. The conspiracy also involved numerous entities.

[15] Relying upon *Eikelberger*, the Mitchell Parties disingenuously argue that "'fabrication of evidence' cannot serve as an 'unlawful objective' basis for civil conspiracy liability." (AOB at 29 (quoting 7AA1236).) *Eikelberger*, however, acknowledged that the "creation of false and inaccurate" accountings could support a claim for civil conspiracy in circumstances where the false documents caused a recipient of those documents damage. 96 Nev. at 531-32. Accordingly, *Eikelberger* simply stands for the unremarkable proposition that a claim for civil conspiracy will not lie if the underlying overt acts do not cause the victim damage. Here, it is

that actionable fraudulent transfers provide the underlying predicate "necessary for the [District] Court to find civil conspiracy"));[16] NRS 199.210 (knowingly procuring forged or fraudulently altered material to offer the same into evidence at a trial or other proceeding constitutes a category D felony); *Rosenblit*, 166 N.J. at 405-07 (recognizing spoliation as a tort in New Jersey);[17] *Laxalt*, 622 F. Supp. at 751 ("In Nevada, the two essential elements of [the tort of] abuse of process are:

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beyond disputed that Mitchell's fabrication of evidence harmed the Nype Parties by causing them to incur substantial attorney's fees and expert costs to uncover and address the fabricated evidence. They also suffered the mental anguish, distress and frustration associated with their inability to obtain materials necessary to help the Nype Parties prevail in this action. Indeed, the fact that the District Court heavily sanctioned Mitchell for his discovery misconduct (which involved the fabrication and backdating of evidence) proves that the District Court found that the Nype Parties had been harmed by the misconduct.

[16] Lest there be any doubt, *Cadle* permits a finding of civil conspiracy to commit fraudulent transfers among transferees and only precludes such civil-conspiracy liability against "*nontransferees*, i.e., those who have *not* received or benefited from the fraudulently transferred property[.]" 131 Nev. at 117; *see also NCP Bayou 2, LLC*, 2019 Nev. Unpub. LEXIS 324, at *6 n.2, 437 P.3d 173, Docket 73122, 73820, (March 21, 2019, Nev. Sup. Ct. (unpublished disposition) (holding that the district court's interpretation, that *Cadle* precluded civil-conspiracy liability "in fraudulent transfer actions regardless of whether the party is a transferee or a nontransferree[,]" was far too "broad[]" a reading and legally incorrect).)

[17] New Jersey is where Mitchell's CPA, Mr. Spitz, operates his business and where he worked in concert with Mitchell to fabricate and fraudulently backdate engagement letters. Spoliation of evidence includes both "'[t]he destruction, or the significant and meaningful alteration of a document or instrument.'" *Baxt*, 155 N.J. at 204 n.4 (quoting *Black's Law Dictionary* 1401 (citation omitted).)

(1) an ulterior purpose behind the issuance of process;[18] and (2) a willful act in the use of process not proper in the regular conduct of the proceeding."); *Consol. Generator-Nevada*, 114 Nev. at 1311 (providing the elements of the tort of intentional interference with prospective economic advantage).[19]

2. The District Court properly exercised its wide discretion in awarding civil-conspiracy damages to compensate the Nype Parties for the harm caused by Mitchell and Liberman's conspiratorial conduct.

In Nevada, damages for civil conspiracy are not those that arise from the mere fact of "the conspiracy itself, but the *injury to the plaintiff produced by [the] specific overt acts*" taken in furtherance of the conspiracy. *Aldabe*, 81 Nev. at 286-87 (emphasis added), *overruled on other grounds by Siragusa*, 114 Nev. at 1393. For civil conspiracy, a "plaintiff is entitled to recover *all damages* that 'naturally flow from the civil conspiracy.'" *Operation Rescue-National*, 937 S.W.2d at 83

[18] Mitchell and Liberman's discovery misconduct and litigation strategy—to annoy, harass and delay, and wear out the Nype Parties' financial resources—amounted to the tort of abuse of process. *See e.g., Hough*, 152 Wash. App. at 346 (Misuse of "[d]epositions, motions, interrogatories, and other requests for discovery or legal maneuverings to compel or prohibit action by an opponent . . . [are] the type of process that will support an abuse of process claim."); (*see also* 16AA2883-84 (admitting to Mitchell and Liberman's bad-faith legal strategy).)

[19] The trial evidence supported that Mitchell and Liberman took actions, in furtherance of their conspiracy, with the purpose of preventing the Nype Parties from doing further business with, among others, Forest City. (13AA2205-06.) Mr. Nype testified that the seemingly never-ending litigation with LVLP, Mitchell and Liberman prevented him from doing millions of dollars in business deals with Forest City (perhaps Mr. Nype's single-most significant business contact and recurring source of income). *Id.*

(emphasis added) (quoting *Fenslage*, 629 F.2d at 1110), *modified on other grounds by*, 975 S.W.2d 546; *accord Homoki*, 717 F.3d at 405 ("Damages for civil conspiracy are measured by the extent of the injury resulting from an act done pursuant to the conspiracy's common purposes[.]"). "Civil conspiracy is a tort and the measure of compensatory damages is the standard measure of tort damages." *Chesapeake Corp.*, No. 3:00cv816, 2002 U.S. Dist. LEXIS 28702, at *46. Generally in Nevada, "[a] successful plaintiff [in a tort case] is entitled to *compensation for all the natural and probable consequences of the wrong*, including injury to the feelings from humiliation, indignity and disgrace to the person, and physical suffering. The injury to health may be due to mental suffering." *Lerner Shops*, 83 Nev. at 79 (emphasis added).

The above-described overt actions of Mitchell and Liberman support a panoply of damage types that were properly compensated for in the District Court's Civil-Conspiracy Judgment: (1) a judgment for the value of their improper distributions, up to the amount of the Nype Parties' First Judgment (which is presently *$4,833,154.26*, plus *$395.47* of additional interest, per day) ; (2) attorney's fees, costs and expert expenses as special damages; (3) damage to reputation; (4) lost business opportunities; and (5) compensation for fear, anxiety, mental anguish, and injury to feelings. *See e.g.*, NRS 112.220(2) (supporting the first category); NRS 112.210(1)(c)(3) (permitting successful creditors in

fraudulent-transfer actions to obtain "*[a]ny other relief* the circumstances require" (emphasis added)); *Pardee Homes*, 444 P.3d at 426 n.3 (stating that an award of attorney's fees as special damages is appropriate in "*declaratory actions* compelled 'by the opposing party's bad faith conduct'" (citations for quotations omitted));[20] *Von Ehrensmann*, 98 Nev. at 337-38 ("Where equitable relief is sought,[21] an award of attorneys' fees is proper if awarded as an item of damages."); *Volk Constr. Co.*, 58 S.W.3d at 901 (stating that attorney's fees are justified under the Uniform Fraudulent Transfer Act[22] ("UFTA"), under the "special circumstances" exception

[20] In the District Court, the Mitchell Parties admitted that attorney's fees as special damages are appropriate in "situations that cannot be resolved without incurring legal fees such as slander of title." (7AA1387.) Here, the Nype Parties were required to engage counsel to unwind the consequences of the Mitchell Parties' fraudulent transfers and unethical litigation conduct and strategy.

[21] Notably, the District Court struck the Nype Parties' jury demand on the basis that the relief sought by them was equitable in nature. (01AA163-69.)

[22] *Cadle* does not suggest that NRS 112 does not support an award of attorney's fees as special damages. *Cadle* did not address attorney's fees as special damages, in any way, and its holding is limited to precluding accessory liability in UFTA actions from attaching to nontransferees. *Cadle*, 131 Nev. at 122. That Court's discussion of NRS 112.210(1)(c)(3)'s grant of authority to award "[a]ny other relief the circumstances require" was solely in the context of whether that provision permitted the attachment of liability outside the class of permissible defendants enumerated in NRS 112, i.e., to nontransferees. *Id.*at 119. Finally, this Court has never found that attorney's fees as special damages are impermissible in UFTA actions (or that the UFTA displaces Nevada's common-law exception for such damages). And numerous jurisdictions permit such awards under their substantively identical versions of the UFTA (provided that their state law provides an independent basis to award attorney's fees as damages). *See e.g., Volk Constr.*,

to the American Rule, where a party has engaged in intentional misconduct); *Tech. Comput. Servs., Inc.*, 844 P.2d at 1256 ("a claimant in a[n] . . . abuse of process action can recover attorney fees incurred in defending against the prior wrongful litigation") (citations omitted); *Van Vuuren*, 280 F. App'x at 766-67 (unpublished) ("[tort] damages [can] include, among other things, emotional distress [and] lost business opportunity[.]"); *Daily*, 14 F. App'x at 590 (stating that "damages for mental suffering[23] are recoverable in an action for civil conspiracy"); *Braswell*, 863 S.W.2d at 727 (same); *Fenslage*, 629 F.2d at 1110 ("Exemplary damages[24] and damages for mental anguish are recoverable against civil conspirators in the proper circumstances[.]"); *Bull*, 96 Nev. at 710 ("The compensatory damages recoverable

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58 S.W.3d at 901; *Harder*, 401 P.3d at 1045; *Macris & Assocs.*, 60 P.3d at 1179-80; *In re Youngstown Osteopathic Hosp. Ass'n*, 280 B.R. at 410.

[23] Awards of mental anguish and other similar damage types are left to "'the special province of the [fact finder] to determine the amount that ought to be allowed[,]' . . . [and] a court 'is not justified in reversing the case or granting a new trial on the ground that the verdict is excessive, unless it is so flagrantly improper as to indicate, passion, prejudice or corruption of the [fact finder].'" *Stackiewicz*, 100 Nev. at 454 (quoting *Forrester*, 36 Nev. at 295-96).

[24] While the District Court declined to award *exemplary* (i.e., punitive) damages against Mitchell and Liberman, their willful actions—taken for the purpose of harming the Nype Parties—readily demonstrate that they were "guilty of oppression, fraud or malice, express or implied[.]" *See* NRS 42.001 and 42.005. Accordingly, this is an alternative ground to support the District Court's Second Judgment. This Court "will affirm a district court's order if the district court reached the correct result, even if for the wrong reason." *Saavedra-Sandoval*, 126 Nev. at 599; *Jackson*, 881 F.2d at 643 ("[W]e may affirm on any ground finding support in the record[.]"); *id.* ("If the decision below is correct, it must be affirmed, even if the district court relied on the wrong grounds or wrong reasoning.").

in an action for abuse of process . . . include compensation for fears, anxiety, mental and emotional distress."); *Millennium Equity Holdings, LLC*, 456 Mass. at 645 (holding that "the costs of defending against the improper action; (2) the emotional harm he suffered; and (3) the harm to his reputation" were each "compensable category of damages for an abuse of process claim"); *id.* (stating "injury to business" is "available for abuse of process"); *Lerner Shops*, 83 Nev. at 79 (stating that tort plaintiffs are generally "entitled to compensation for all the natural and probable consequences of the wrong").

Accordingly, the Mitchell Parties mistakenly argue that the Civil-Conspiracy Judgment was excessive[25] because there "is no nexus of facts or law in this Action, either pled, proven and/or found, in which [the Nype Parties] suffered *compensatory damages* in the amount of *$15,148,339.00*." (*See* AOB at 31 (emphasis in the original).) As a result of Mitchell and Liberman's overt actions, the Nype Parties were damaged by being: (1) left with an uncollectable First

[25] This Court "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.'" *Guaranty Nat'l Ins. Co.*, 112 Nev. at 206-07 (quoting NRCP 59). "The size of the award alone is not conclusive evidence that it was the result of passion or prejudice." *Id.* The Mitchell Parties fail to point to anything in the record indicating that Judge Gonzalez acted under the influence of passion or prejudice. Indeed, the record reflects that Judge Gonzalez acted with restraint when she declined to award punitive damages. *See* 7AA1237-38; *see Guaranty Nat'l Ins. Co.*, 112 Nev. at 207 (noting that the district court's refusal to award future damages was an indication that the trial judge was not influenced by passion or prejudice).

Judgment *presently* worth more than $4,800,000; (2) forced to incur more than $4.5 million in attorney's fees and costs defending against Liberman and Mitchell's bad-faith, unethical legal tactics;[26] (3) subjected to more than a decade of continuing, severe mental anguish and suffering; (4) harmed in their business reputation; and (5) precluded from business opportunities. *See* discussion, *supra*, at pp. 9-10.[27]

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[26] In light of Mitchell and Liberman's discovery abuses—and Mitchell's admission that he, Liberman, LVLP, Livework, and Zoe litigated the First Action in bad faith and for improper purposes (*see* 16AA2883-84)—there is an alternative, statutory basis to affirm the awarded attorney's fees. *See* NRS18.010(2)(b) ("A court shall liberally construe" NRS 18.010(2)(b) in order to "punish and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public."); *see also Saavedra-Sandoval*, 126 Nev. at 599; *Jackson*, 881 F.2d at 643.

[27] Relying on *Elyousef*, 126 Nev. 441, the Mitchell Parties make the non-sensical argument that the Civil-Conspiracy Judgment "violat[es] the double recovery doctrine." (AOB at 32-33.) The doctrine, however, has no application to this case. In the First Action, the Nype Parties were awarded quantum meruit to compensate them for the injury caused by LVLP's refusal to pay them for their services. In the Second Action, the Nype Parties were awarded damages for the injuries caused by Mitchell and Liberman's fraudulent transfers, fabrication of evidence, and other unlawful actions taken for the purpose of ensuring that the Nype Parties could never collect on their claims/First Judgment. Accordingly, the double-recovery doctrine does not apply because the Nype Parties have not received judgments "twice for the same injury simply because [they] ha[d] two legal theories." *Elyousef*, 126 Nev. at 443. Moreover, the Mitchell Parties failed to raise this argument before the District Court. It is well established that "[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc.*, 97 Nev.

C. The Mitchell Parties Failed to Establish That The Applicable Statute of Limitations Bars or Impacts The Civil-Conspiracy Judgment.

The Mitchell Parties incorrectly argue that proper application of the statute of limitations requires either a reduction in the amount of the Civil-Conspiracy Judgment or a complete reversal of the award. They have failed to establish, however, that the Nype Parties knew or should have known *all necessary facts constituting the Nype Parties' conspiracy claim*. And the limitations periods associated with *other, separate* claims related to the conspiratorial misconduct are irrelevant; the limitations period governing the distinct civil-conspiracy claim did not lapse.

This Court has conclusively held (as did the District Court) that "[c]ivil conspiracy is governed by the catch-all provision of NRS 11.220." *Siragusa*, 114 Nev. at 1391. NRS 11.220's "bar of limitations is four years from the date the cause of action accrues." *Aldabe*, 81 Nev. at 286. For statute of limitations purposes, "an action for civil conspiracy accrues when the plaintiff discovers or should have discovered *all of the necessary facts constituting a conspiracy claim*." *Siragusa*, 114 Nev. at 1393 (emphasis added); *see also Petersen*, 106 Nev. at 274 ("Under the discovery rule, the statutory period of limitations is tolled until the injured party discovers or reasonably should have discovered [the necessary] facts

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at 52. This Court has said on numerous occasions that it "will not consider issues raised for the first time on appeal." *Wade*, 105 Nev. at 209.

supporting a cause of action."). Thus, while NRS 112.230(a)(1) bars a fraudulent-transfer claim based purely upon knowledge of the transfers, *see* NRS 112.230(a)(1), NRS 11.220 only bars a civil-conspiracy claim, based on those transfers, if the plaintiff fails to bring the claim within 4 years of actual or constructive knowledge of *all of the necessary facts constituting the conspiracy claim*.

The Mitchell Parties cannot (and did not) argue that the Nype Parties knew or should have known of *all of the* necessary facts constituting the conspiracy claim prior to them initially starting to receive post-judgment discovery in late 2015. Instead, the Mitchell Parties focus almost exclusively upon the Nype Parties' knowledge in 2011, from tax returns and limited bank statements, that Mitchell and Liberman had taken distributions[28] from LVLP. (*See* AOB at 35-40.) Mere knowledge that distributions had occurred—the sole basis for the District Court's finding that the Nype Parties' related fraudulent-transfer claims were barred under NRS 112.230(a)(1)—is, however, in no way tantamount to knowledge that the distributions were fraudulent in nature or part of a conspiracy. It was not until

[28] The Mitchell Parties advance a stunning misstatement of Nevada law: that NRS 11.220's statute of limitations for civil conspiracy "*runs from the date of injury rather than the date the conspiracy is discovered*." (AOB at 41 (citing *Siragusa*, 114 Nev. at 1391-92 (emphasis in the original).) To the contrary, *Siragusa* states that *Aldadbe*, 81 Nev. at 286, *improperly held* that the statute of limitations for a civil-conspiracy claim "runs from the date of injury rather than the date the conspiracy is discovered." *Siragusa*, 114 Nev. at 1393.

2015, when the Nype Parties began to obtain post-First Judgment discovery (operating agreements, lists of disregarded entities, general ledgers, balance sheets, etc.), that the Nype Parties knew or should have known of Mitchell and Liberman's conspiracy to prevent them from collecting on their claims/First Judgment.

The Mitchell Parties also make the novel suggestion that civil-conspiracy damages must be limited to damages that can be awarded for the underlying, predicate claims whose statutes of limitations have not lapsed. They cite no authority for this argument, however, because it is wholly inconsistent with *Siragusa*'s holding that claims for civil conspiracy are governed exclusively by NRS 11.220. Moreover, courts specifically addressing this issue have concluded that the expiration of statutes of limitation for *other claims* that have been brought (based upon the same underlying conduct) is irrelevant so long as the statute of limitation applicable to a civil-conspiracy claim has not run.[29] *See e.g., Chevalier,*

[29] The Mitchell Parties further argue that the Nype Parties' civil-conspiracy claim was barred because the statute of limitations governing the predicate claims left no *actionable wrong* to serve as the underlying predicate for the civil-conspiracy claim. (*See e.g.,* AOB at 28.) In addition to the other reasons set forth herein, the Mitchell Parties' arguments in this regard fail because the statute of limitations could not have possibly barred claims based upon the 2014 distributions to Mitchell and Liberman of the Casino Coolidge/Leah Property sales proceeds (found by the District Court to be a fraudulent transfer). Nor could the statute of limitations have barred claims based upon Mitchell's 2018 fabrication of evidence and subsequent conduct related thereto. Moreover, "[a] statute of limitation affects the remedy and does not destroy the substantive cause of action." *Bank of Nev.*, 82 Nev. at 422. Indeed, statutes of limitations are affirmative defenses that can "be waived." *Wilcox*, 5 Nev. at 213. Accordingly, it is irrelevant that NRS

839 F. Supp. at 1233 ("Although the remedy for defamation may be destroyed if the statute has run on Plaintiff's defamation claim, the liability for that alleged defamation remains. As long as Plaintiff timely filed his conspiracy claim, the remedy for it is unscathed and the extant liability of an underlying defamation claim supports it regardless of the fate of a remedy for that underlying claim.").[30]

The District Court has "*wide discretion* in calculating an award of damages," and this Court will not disturb the damages award on appeal "absent an abuse of discretion." *Asphalt Products Corp.*, 111 Nev. at 802 (internal quotations omitted) (emphasis added). This Court requires only that substantial evidence support the damages award. *See id.* at 802-03.

112.230(a)(1)'s limitations period for certain fraudulent-transfer claims provided the Mitchell Parties with an affirmative defense to an NRS-112 remedy for the distributions. The transfers remained unlawful and thus subject to a claim for civil conspiracy.

[30] For this reason, alone, the Mitchell Parties' arguments regarding NRS 86.343 are erroneous. Separately, the plain text of NRS 86.343 demonstrates that the provision is inapplicable, here, as it only pertains to actions predicated upon distributions made in violation of NRS 86, on the basis of an entity's insolvency. *See* NRS 86.343 ("A member who receives a distribution from a [LLC] in violation of this section is not liable . . . in the event of its dissolution or insolvency . . . ."); *see also A Commun. Co.*, 55 F. Supp. 3d at 1125-27 (interpreting Illinois' and Delaware's similar LLC statutory provisions and concluding, for various applicable reasons, that those provisions did not bar a claim for breach of fiduciary duty based upon "distributions paid out more than three years prior to the filing of the instant case"). This case did not involve arguments regarding transfers made in violation of NRS 86, on the basis of insolvency or otherwise.

The Mitchell Parties have failed to provide this Court with a reason to reverse or alter the Civil-Conspiracy Judgment. It is supported by substantial evidence—including the unrebutted testimony of the Nype Parties' expert and Mr. Nype's testimony regarding the harm he suffered from Mitchell and Liberman's conspiratorial conduct. The evidence provides numerous bases appropriately supporting the Civil-Conspiracy Judgement, its amount and that the claim was not barred by the statute of limitations.[31]

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[31] The Mitchell Parties note that the Nype Parties (in responding to discovery in the *Second Action*) stated that they "were advised by Mitchell *in the [First] Action* that [they] would never be able to collect[.]" (AOB at 37 n.42 (emphasis in the original).) The Mitchell Parties' problem is that the discovery responses do not indicate when, *during the First Action*, Mitchell made this statement. Because the First Action ran from 2007 through *2015*, it is impossible to know whether this statement occurred at a timeframe that could possibly implicate NRS 11.220's 4-year limitations period. To even be relevant to the statute-of-limitations analysis, the statement would have had to have been made *before* July 26, 2012 (i.e., 4 years from the filing of the Complaint in the Second Action). Regardless, simply being advised by a defendant that he is judgment proof does not put the plaintiff on notice that the defendant engaged in a conspiracy to commit fraudulent transfers. Lastly, the Mitchell Parties failed to raise this before the District Court and, therefore, waived the argument. *See Old Aztec Mine, Inc.*, 97 Nev. at 52; *Wade*, 105 Nev. at 209.

D. Substantial Evidence Supports The District Court's Alter-Ego Judgment.

1. The District Court properly imposed alter-ego liability based upon the totality of the particular circumstances presented at trial.

The Mitchell Parties attack the District Court's findings and conclusion that alter-ego liability is appropriate, as to them, challenging the evidentiary basis for the second and third elements[32] of the claim. (*See* AOB at 58-62.) The Mitchell Parties cherry-pick evidence that seemingly supports their position, however, while ignoring the substantial evidence admitted at trial that supports the Alter-Ego Judgment. They focus on isolated facts—completely ignoring the bigger evidentiary picture. They treat each fact as if it had to provide—on its own—an independent basis to fully support the imposition of alter-ego liability.

As this Court knows, however, "the following factors, *though not conclusive*, may indicate the existence of an alter ego relationship: (1) commingling of funds; (2) undercapitalization; (3) unauthorized diversion of

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[32] The Mitchell Parties thus concede the claim's first element: influence and control. In *Polaris Indus. Corp.*, 103 Nev. at 601, this Court identified the following elements for alter ego:

> 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.

funds; (4) treatment of corporate assets as the individual's own; and (5) failure to observe corporate formalities." *LFC Mktg.*, 116 Nev. at 904 (emphasis added). These factors are not exclusive, however, *Lorenz*, 114 Nev. at 808, and this Court has emphasized that "there is no litmus test for determining when the corporate fiction should be disregarded; the result depends on the circumstances of each case." *Polaris*, 103 Nev. at 602. "It is enough if the recognition of the two entities as separate would result in an injustice." *Id.* at 601. "The essence of the alter ego doctrine is to do justice." *Id.* at 603.

Here, the District Court properly determined that the Mitchell Parties are the alter egos of each other, Liberman, LVLP, and the other Related Entities, based upon consideration of the *totality of the circumstances* present. These particular circumstances include, among other things, that: (1) "[a]t all relevant times, each of the Related Entities was beneficially owned, controlled, and managed by Mitchell and Liberman"; (2) "[e]xcept with respect to Livework Manager and Casino Coolidge, none of these entities had its own bank account" and "Mitchell caused [such entities] to use the same bank accounts"; (3) "Mitchell and Liberman caused each of the Related Entities to use the same financial and accounting records, *which are not distinguishable by entity*"; (4) the "accounting records include a few Mitchell and Liberman personal transactions and postings *commingled* from multiple entities"; (5) "Mitchell, Liberman and the Related Entities *commingled*

funds, including *personal loans* from various banks which are included in the LVLP accounting records and general ledger"; (6) "Mitchell and Liberman also used journal entries to post commingled transactions for themselves and the Related Entities"; (7) "[i]n 2016, [certain of] the Related Entities stopped using bank accounts and instead began using journal entries apparently transacted personally by Mitchell"; (8) "[t]he manner in which Mitchell and Liberman operated the Related Entities ma[de] it *virtually impossible to identify transactions by purpose and/or entity*"; and (9) as a result, "the individuality and separateness of the Related Entities—vis-à-vis themselves and Mitchell and Liberman—was and remains nonexistent as evidenced by the commingling of funds, transactions, revenues, expenses, assets, liabilities and contributed capital." (*See* 7AA1230-31 (emphasis added).)

Based upon the foregoing, the District Court concluded that: (1) "Mitchell, Liberman and the Related Entities commingled funds, transactions and assets"; (2) the Related Entities were and are undercapitalized"; (3) "Mitchell, Liberman and the Related Entities distributed funds to Mitchell and Liberman as individuals without regard to parent entities";[33] (4) "Mitchell, Liberman and the Related

[33] The District Court specifically found that:

> In December 2014, Leah[Property] sold certain real property to Casino Coolidge for $1,000,000. Mitchell and Liberman caused Leah [Property] to distribute sales proceeds [from that sale] in the amount

Entities treated assets of the other entities as their own"; and (5) "the related entities failed to observe corporate or LLC formalities." (7AA1231-32.)

The District Court specifically found that "Mitchell, Liberman and the Related Entities ha[d] made distributions to avoid satisfying [the Nype Parties'] claims and [First] Judgment." (7AA1232.) And they had "ensure[d] that funds and/or assets that would otherwise be available to [the Nype Parties] to satisfy [their] claim (and [First] Judgment) were kept away from [the Nype Parties,]" thus contributing to their inability to collect on their claim and First Judgment. (7AA1229.) Accordingly, the District Court concluded that "there [wa]s such unity of interest and/or ownership that Mitchell, Liberman and the Related Entities [we]re inseparable from the other[,]" (7AA1232), and that "[j]ustice and equity require[d] that the Court impose alter ego on Mitchell, Liberman and the Related Entities." (7AA1234.)

The District Court's findings and conclusions are supported by, among other proof, the following substantial evidence: the unrebutted expert testimony of Mr. Rich; the testimony of Messrs. Nype, Liberman and Mitchell; and the trial exhibits contained at 4RA605-695; 5RA815-899; 19RA3750-22RA4330; 23RA4355-4434, 4452-59; 25RA4652-8; 46RA8575-8855; 48RA9270-9331; 39RA7532-7608;

> of $341,934.47 directly to themselves, rather than Leah[] [Property's] parent company, LVLP.

(7AA1229; 16AA2807, 2810.)

39RA7687-40RA967; 37RA7358-7409; 46RA8856-73; 15AA2457-2566, 2604-66; 16AA2673-93, 2703-4, 2731-39, 2803-15; 25SAA826-27SAA1414; 01AA163; and 25SAA821-25.

2. Numerous facts support the District Court's finding that the second alter-ego element—unity of interest and ownership—was met.

The Mitchell Parties assert there was no basis to find commingling because the parent/subsidiary relationship among LVLP and the Related Entities excused things such as a lack of separate tax returns, bank accounts or independent accounting records. (*See* AOB at 58-59.) The District Court did not find alter ego, however, based simply upon the fact that the Related Entities shared tax returns, bank accounts and financial records. Rather, the District Court focused on the fact that Mitchell and Liberman operated the Related Entities in such a jumbled, undocumented and scattered way that (1) the financial and accounting records were "not distinguishable by entity," and (2) it was "virtually impossible to identify transactions by purpose and/or entity." (7AA1231.) As a result of Mitchell and Liberman's "commingling of funds, transactions, revenues, expenses, assets, liabilities and contributed capital[,]" the "individuality and separateness of the Related Entities . . . was and remains nonexistent." *Id.*

This lack of individuality and separateness is not surprising given that the totality of the evidence established that Mitchell and Liberman view and treat their

numerous entities as mere extensions of themselves, rather than separate and distinct entities. As Liberman testified:

> Q. Given that they all appear to run through one ledger and one checkbook, how are you able to allocate income and expenses between those entities?
> A. I don't know why we would.
> . . .
> A. Why would we? It all was part of – they were all derivative of one entity, and all the money came in and all of the money went out. Did it matter that I took a cab from one piece of property to another piece of property? No. I don't see why it mattered. That's an account's question. I don't know.

(29SAA1681-82.)

The lack of separate bank accounts and the jumbled, commingled and indistinguishable financial and accounting records also permitted Mitchell and Liberman to benefit themselves at the Nype Parties' expense, it facilitated their efforts to divert assets and hide and conceal them (and relevant financial details) from the Nype Parties. Indeed, Mr. Rich opined that Mitchell and Liberman "attempt[ed] to recharacterize millions of dollars in capital contributions and distributions as loan activity in an attempt to conceal funds available to satisfy [the Nype Parties' First Judgment.]" (16AA2808.)

The Mitchell Parties disingenuously highlight *cherry-picked excerpts* of Mr. Rich's testimony to create the misimpression that the manner in which Mitchell and Liberman operated, structured and used the Related Entities was normal, and even something Mr. Rich advised his clients to do. (*See e.g.,* AOB at 58-59, 61.) While

Mr. Rich did acknowledge that some of his clients operate without separate bank accounts or accounting records, he specifically testified that he recommended against such conduct—precisely because it is improper and opens the door for alter-ego liability. (11AA1858.) He certainly *did not testify* that he advises his clients to jumble and commingle their financial and accounting in a manner that makes it impossible to identify transactions by purpose or entity, or to distinguish the records relevant to any specific entity.

The Mitchell Parties also challenge the District Court's finding that Mitchell and Liberman caused one or more of the Related Entities to be undercapitalized. They argue a distinction between subsequent insolvency and capitalization at entity formation. (AOB at 60-61.) However, this was *not* a case of innocent entities becoming insolvent simply because they were hit by "the dramatic down-turn in . . . the real estate market in Las Vegas" during the great recession. *Id.* at 61. The District Court specifically found that Mitchell and Liberman's intentional misconduct—in taking distributions for the purpose of avoiding and harming the Nype Parties—contributed to and/or caused the insolvency. (7AA1232; *see also* 16AA2803-15.)

Moreover, as Liberman argued in his own trial brief, "'the obligation to provide adequate capital begins with incorporation and is a continuing obligation thereafter during the corporation's operations.'" (4RA601 (quoting *De*

Witt Truck Brokers, Inc., 540 F.2d at 686).) Hiding and diverting assets plainly does not meet one's obligation to continue providing adequate capital. Regardless, the Mitchell Parties' entire argument (regarding initial capitalization) is self-defeating. Capitalizing an entity with just $10 and a piece of real estate *is* undercapitalization when the real-estate asset is being held for development purposes: $10 is inadequate to pay even the carrying costs and taxes—let alone the significant capital required to develop real property.[34]

Contrary to the Mitchell Parties' assertions, there *was* also substantial evidence supporting the District Court's findings of unauthorized diversion of funds and treatment of corporate assets as one's own.[35] Indeed, Mitchell and Liberman caused corporate assets and funds to be diverted, hidden and generally made unavailable to the Nype Parties. (*See e.g.*, 7AA1229; 16AA2803; 9AA1599-1696; 10AA1700-83; 11AA1789-890.) The Leah Property/Casino Coolidge

[34] As a perfect example of this, the evidence demonstrated that Mitchell and Liberman formed their entity, Charleston Casino Partners, LLC ("Casino Partners"), with an initial capitalization of just $10.00. (18RA9524.) At the same time, they caused Casino Partners to enter into a 49-year lease with yearly rental obligations totaling $2,179,995 (at the beginning of the lease, and increasing to $10,710,799 per year by the end of the lease term). (*See* 37RA7358, 7393.) Certainly, $10 is inadequate capital to pay rental obligations of this magnitude.

[35] The Court should ignore the Mitchell Parties' argument in this regard, entirely, as the argument is nothing more than a 3-4 line, self-serving conclusion, devoid of analysis or application. (AOB at 61 ("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." (emphasis in the original).)

transaction discussed above is but one example of this. *See* discussion, *supra,* at pp. 11, 49-51. The 305 Las Vegas/LiveWork/Casino Partners transactions are another example. Mitchell and Liberman received direct distributions from this sale totaling at least $1,096,374. (16AA2806-10.) Rather than properly distributing the funds in accordance with the corporate structure (i.e., running the funds through LVLP), Mitchell and Liberman took the proceeds directly (just as with the Leah Property transaction). *Id.* Mitchell and Liberman also caused LiveWork to write off—for absolutely no consideration flowing to LiveWork—more than $12,000,000 owed to it by Liberman's other entity, 305 Las Vegas. *Id.* LiveWork's enforcement of that obligation would have caused 305 Las Vegas to, in turn, enforce Casino Partners' multi-million-dollar obligation to 305 Las Vegas (which liability had been fully and *personally* guaranteed by Mitchell and Liberman). *Id.*; (16AA2731-47.) Simply put, Mitchell and Liberman viewed, structured and used their entities and transactions for their own personal benefit—often at the expense of the Nype Parties, and always at the expense of their ostensibly separate entities.

The Mitchell Parties' argument regarding corporate formalities is also misplaced and erroneous. (*See* AOB at 62.)[36] This case is not about whether certain entities had operating agreements or other organizational documents. The case is about Mitchell and Liberman's operation and use of their numerous entities for

[36] This argument is also nothing more than three lines of self-serving conclusion and should be disregarded. (*See* AOB at 62.)

their sole personal advantage. This case is about Mitchell and Liberman's total disregard for the separate and distinct legal interests that should have existed (but did not) among the entities. Distributing funds directly to Mitchell and Liberman, without regard to parent entities, is hardly following corporate formalities. Recharacterizing millions of dollars in capital contributions and distributions, as loan activity, for the purpose of hiding and concealing assets from the Nype Parties, is also not following corporate formalities. Neither is refusing to enforce guarantees against themselves and/or writing off millions of dollars owed from allegedly separate entities.

The Mitchell Parties' arguments reflect cherry-picked facts and circumstances rather than the consideration of the totality of the circumstances present. Again, for purposes of alter-ego liability, no one factor is conclusive, factors are not exclusive, and there is no litmus test. *See Polaris*, 103 Nev. at 601-03.

3. The Mitchell parties' self-serving testimony fails to defeat the substantial evidence supporting the District Court's conclusion that the third alter-ego element was met.

The Mitchell Parties argue "[w]ith regard to the third factor, i.e., fraud and/or injustice, there was no substantial evidence[37] to support the District Court's

[37] The Mitchell Parties acknowledge that "[a] district court's determination with regard to the alter ego doctrine is reviewed under a substantial evidence standard." (AOB at 57 n.57 (citing *LFC Mktg.*, 116 Nev. at 904).)

determination imposing alter ego liability." (AOB at 62.) The entirety of their argument rests, however, upon Mitchell and Liberman's self-serving testimony regarding their motives: "Testimony from both Mitchell and Liberman reflect that nothing they did with regard to the various developments was done in an attempt to hinder, delay or defraud Nype relating to the [First] Judgment." *Id*. Notably, the District Court specifically found that "Mitchell was not credible." (7AA1230.)

At most, citing to Mitchell and Liberman's self-serving testimony establishes that competing evidence existed for the District Court to weigh and consider. However, the presence of competing evidence in no way establishes that the District Court's determination was not supported by substantial evidence.[38] Here, the evidence at trial demonstrated that Mitchell and Liberman engaged in intentional misconduct for the specific purpose of ensuring that the Nype Parties could not collect on their claims/First Judgment. (7AA1228-36; 5AA903-14, 940-52; 16AA2803-2815; 2RA325-33; 47RA8987-9025.)

This Court has specifically found resulting injustice—in cases just like this—where misconduct of the individuals contributed to the inability to collect on

[38] Appellate courts "leave witness credibility determinations to the district court and will not reweigh credibility on appeal." *Ellis*, 123 Nev. at 152. "Where evidence is conflicting, the lower court's determination of the credibility of witnesses will not be disturbed on appeal." *Vincent*, 98 Nev. at 342 (citation omitted). This Court has found that the credible testimony of a *single* witness can provide sufficient evidence to support findings of fact. *See Romy Hammes, Inc.*, 91 Nev. at 132.

a judgment. *See LFC Mktg.*, 116 Nev. at 905-06 (finding that "adherence to the corporate fiction would sanction a fraud or promote injustice" where the alter-ego's conduct in manipulating the "carefully designed business arrangements between the LFC entities, William, and NLRC contributed to the Loomises' inability to collect their judgment"); *Polaris*, 103 Nev. at 603 (finding fraud or injustice where "CRI's officers treated corporate funds as their own by making ad hoc withdrawals at the bank in the form of advances to themselves at a time when the corporation's debt to Polaris was not being paid, and that Polaris was damaged because these actions left the corporation without funds to repay the debt"); *see also Flynt Distrib. Co.*, 734 F.2d at 1393-94 (concluding that the defendants' conversion and transfer of corporate assets, which left the corporations undercapitalized, constituted a "prima facie showing that it would be unjust to shield the [defendants] behind the corporate veil").

Based on the foregoing, substantial evidence supports the District Court's Alter-Ego Judgment.

E. Substantial Evidence Supports The District Court's Fraudulent-Transfer Judgment.

The Mitchell Parties argue that the "District Court erred in finding for [the Nype Parties] on their claim for fraudulent conveyance relating to the Coolidge transaction as the decision was not supported by substantial evidence." (AOB at 51.) They assert that the evidence purportedly "did *not* establish that the Coolidge

transaction was done 'with the actual intent to hinder, delay or defraud' as required by NRS 112.180(1)(a)." *Id.* at 52 (emphasis in the original).

Nevada's version of the UFTA "is designed to prevent a debtor from defrauding creditors by placing the subject property beyond the creditors' reach." *Herup*, 123 Nev. at 232. Under NRS 112.180(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[.]" (Emphasis added). "[A] creditor may recover judgment for the value of the asset transferred" against a "first transferee of the asset *or the person for whose benefit the transfer was made*." NRS 112.220(2)(a) (emphasis added).

This Court has concluded that the alter ego of a "debtor" *is* "a 'debtor' under UFTA" and that "transfers to or between alter egos can be 'transfers' under [the] UFTA." *Magliarditi*,[39] No. 73889, 2019 Nev. Unpub. LEXIS 1156, at *17 (unpublished disposition).[40]

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[39] *Magliarditi* defeats the Mitchell Parties' assertion that Leah Property "was not the debtor as defined in NRS 112.150(6), as the debtor for the [First] Judgment was only LVLP." (AOB at 52 n.58.) Here, the District Court found that Leah Property was the alter ego of LVLP, (7AA1234); thus, under *Magliarditi*, Leah Property was a debtor. *Magliarditi*'s conclusion, that the alter ego of a debtor is a debtor under the UFTA, is perfectly consistent with the UFTA's definition of a debtor. *See* NRS 112.150(6) (defining a "[d]ebtor" as a "person who is liable on a

NRS 112.180(2) sets forth certain factors, often referred to as "badges of fraud," that may be considered in determining whether transfers were made with the actual intent to hinder, delay or defraud creditors. These factors, include, whether:

> (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.

NRS 112.180(2).

"Courts construing UFTA have found that when several badges of fraud are established, *a presumption of fraud exists*. *When one or more of these badges is present, fraudulent intent can be inferred*." *McCain Foods USA, Inc.*, 275 Kan. at

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claim"); (*see also* 7AA1238 (holding Leah Property liable on the First Judgment as LVLP's alter ego).)

[40] This case is cited for its persuasive value, pursuant to NRAP 36(c)(3). It has been published in "table format" in the Pacific Reporter at 450 P.3d 911.

14 (emphasis added) (interpreting Kansas' version of the UFTA) (citing *In re Taylor*, 133 F.3d at 1338-39). Indeed, Courts have found that "the confluence of several [badges of fraud] in one transaction generally provides *conclusive evidence of an actual intent to defraud*." *Gilchinsky*, 159 N.J. at 477 (emphasis added) (citing *Max Sugarman Funeral Home, Inc.*, 926 F.2d at 1254–55).

Here, the District Court found that Mitchell, Liberman and Leah Property "made distributions to avoid satisfying [the Nype Parties'] claims and [First] Judgment,"[41] including, "[w]hen Leah Property sold certain real property to Casino Coolidge on or about December 17, 2014, and did not transfer the funds to LVLP." (7AA1232.) Indeed, "Mitchell and Liberman caused Leah [Property] to distribute [the] sales proceeds in the amount of $341,934.47 directly to themselves, rather than Leah[Property's] parent company, LVLP." (7AA1229.) The Nype Parties' expert, Mr. Rich, testified that he saw no evidence that these funds ever made their way to LVLP. (10AA1753; 9AA1612-15, 1664-67.)

In determining that this distribution was made with the actual intent to hinder, delay or defraud the Nype Parties, and after carefully considering NRS 112.180(2),[42] the District Court found that:

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[41] Notably, the Mitchell Parties do not challenge the District Court's finding of a conspiratorial agreement between Mitchell and Liberman to harm the Nype Parties.

[42] Indeed, during trial, Judge Gonzalez stated that "I am reading NRS 112.180(2) to myself right now. (11AA1888.)

a. They were made to "insiders" or other entities of which Mitchell and Liberman own or control (in whole or in part);

b. They were made at times when Mitchell and Liberman were fully aware of [the Nype Parties'] claims, [First] Judgment and/or [the Nype Parties'] intent to sue for the amounts owed to [them];

c. The distributions rendered or contributed to LVLP's and/or the Related Entities' insolvency, and left LVLP and/or the Related Entities unable to pay their debts as they became due;

d. Mitchell, Liberman and the Related Entities attempted to conceal the distributions and their assets, through their discovery misconduct in this matter, which required enormous and expensive effort on [the Nype Parties'] part to *attempt* to obtain full and proper disclosure; and

e. Mitchell, Liberman and the Related Entities removed or concealed assets.

(7AA1232-33 (emphasis in the original).)

Accordingly, the District Court found that *five* of the eleven badges of fraud existed. The Mitchell Parties do not, in any way, challenge these findings or their evidentiary basis; and substantial evidence supports the findings. Mitchell and Liberman were "insiders" of Leah Property and LVLP. The sale of the property and improper distributions of the sales proceeds to Mitchell and Liberman took place well after the Nype Parties had sued for compensation in the First Action. Indeed, this improper distribution occurred *during* the trial in the First Action. Mitchell, Liberman and their entities played numerous games in discovery attempting to conceal their improper transactions and distributions. And the distribution of the sales proceeds directly to Liberman and Mitchell contributed to

LVLP's insolvency and the Nype Parties' resulting inability to collect on the First Judgment.

The District Court properly determined that at least five of the eleven badges fraud existed—the confluence of which "provide[d] *conclusive evidence of an actual intent to defraud*."[43] *Gilchinsky*, 159 N.J. at 477 (emphasis added).

Accordingly, substantial evidence supports the District Court's Fraudulent-Transfer Judgment.[44]

F. Substantial Evidence Supports The District Court's Award of Attorney's Fees And Costs.

The Mitchell Parties challenge the District Court's award of attorney's fees, costs and expert expenses as special damages on the asserted bases that: (1) this case did not support fees and costs as special damages; (2) the Nype Parties failed

[43] The Mitchell Parties' half-hearted challenge to the Fraudulent-Transfer Judgment comes nowhere close to overcoming this standard. They focus on Mitchell and Liberman's self-serving testimony regarding their intent, the transaction's sales price and the amounts they received. (*See* AOB at 53-56.) Again, the District Court found that Mitchell "was not credible." (7AA1230.) And the District Court's issue with the transaction was not its sales price or that Mitchell and Liberman pocketed different amounts—the issue was that Mitchell and Liberman pocketed the sales proceeds directly, avoiding the corporate structure, to keep the funds away from LVLP.

[44] Indeed, this case is just like *Magliarditi* in which this Court recently held that transfers between alter egos, or between the judgment debtor and an alter ego made for the purpose of hindering, delaying or defrauding creditors, are fraudulent transfers under NRS 112. *See Magliarditi*, 2019 Nev. Unpub. LEXIS 1156, at *1-2.

to plead special damages with the required particularity; and (3) the District Court failed to conduct a *Brunzell* analysis. Each of these arguments is easily defeated.

1. Nevada law permits attorney's fees as special damages in cases just like the second action.

In *Sandy Valley Assocs.*, 117 Nev. at 958,[45] this Court held that attorney's fees may be awarded as special damages in "actions for declaratory or injunctive relief . . . when [such] actions were necessitated by the opposing party's bad faith conduct." *See also Pardee Homes*, 444 P.3d at 426 n.3 (same). This Court has also held that "[w]here equitable relief is sought, an award of attorneys' fees is proper if awarded as an item of damages." *Von Ehrensmann*, 98 Nev. at 337-38. Courts also permit awards of attorney's fees as special damages in UFTA actions provided that state law permits such an award. *See* cases cited, *supra*, at 26-27 n.22.

Here, the Second Action was an action for declaratory relief that sought equitable relief and asserted UFTA claims. (1AA1-19, 165-68; 2AA307-40.) The Second Action was necessitated by Mitchell, Liberman and the Related Entities' bad faith conduct in fraudulently transferring assets to avoid satisfying the Nype Parties' claims and First Judgment. (*See e.g.*, 16AA2803-15); *see also* discussion, *supra*, at pp. 6-11. Accordingly, this was the type of case for which Nevada law permits attorney's fees to be awarded as special damages. Indeed, the Mitchell Parties effectively admitted as much in their post-trial motion. (*See* 07AA1387

[45] Overruled on other grounds by *Horgan*, 123 Nev. 577.

(admitting that attorney's fees as special damages are appropriate in "situations that cannot be resolved without incurring legal fees such as slander of title").)

2. The Nype parties' amended complaint adequately pled attorney's fees as special damages.

Attorney's fees as special damages must generally be pled as special damages in a party's complaint pursuant to NRCP 9. In this regard, this Court has held that the mere "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.

The Nype Parties' Amended Complaint goes much further than simply mentioning fees in the general prayer. In addition to requesting attorney's fees in the prayer, the Amended Complaint alleges the following as part of the claims for fraudulent transfer, civil conspiracy and declaratory relief: "It has been necessary for Plaintiff to retain the services of an attorney to prosecute this action, and Plaintiff is, therefore entitled to reasonable attorney's fees." (2AA332, 334-37, 339.)

The Mitchell Parties argue that this language was inadequate. They disingenuously cite to *Cragin Indus.*, 86 Nev. at 940, for the proposition that NRCP 9's pleading requirement is not met when a complaint "allege[s] the necessity for services of counsel and simply request[s] attorney fees." However, the issue of NRCP 9's pleading requirement was not even before the court in that case. Rather, the Court reverse the fee award because it was improperly based upon

NRS 18.010(3)(a). *Cragin Indus.*, 86 Nev. at 940. "[T]hat statute as a condition precedent requires the award of a money judgment[,]" and the complaint "did not allege damages, but [only] alleged the necessity for the services of counsel and simply requested attorney fees." *Id.*.[46]

Importantly, the Mitchell Parties raised this exact challenge before the District Court during trial. The District Court considered the specific language in the Amended Complaint and rejected the Mitchell Parties' arguments, stating:

> So[,] the allegations contained in the amended complaint do contain sufficient allegations to permit attorneys' fees. In addition, they specifically talk about the intent to delay and a continuation of this action from the [First Action] as part of the claims. For that reason, the attorneys' fees are adequately pled for purposes of the claims for relief that are presented including civil conspiracy.

(13AA2300.)

The Mitchell Parties have failed to provide this Court with any grounds to overturn the District Court's conclusion that the Nype Parties' Amended Complaint adequately pled attorney's fees as special damages.[47]

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[46] Indeed, that Court found that "[h]ad the respondent asked for damages, or the trial awarded attorney fees as an item of damage . . . , the award would have been proper because the institution of this litigation by the respondent resulted from the improper action of the appellants, and the expenditure by the respondent for the services of counsel was necessary." *Cragin Indus.*, 86 Nev. at 940 (internal citation omitted).

[47] Importantly, this Court has held that the "failure to properly plead special damages pursuant to NRCP 9(g) does not necessarily bar an award of attorney fees when evidence of attorney fees as damages has been litigated at trial. In such a

3. The District Court's award properly performed a *Brunzell* analysis.

The Mitchell Parties acknowledge that the Second Judgment reflects that the District Court *did* evaluate attorney's fees and costs under "the *Brunzell* factors[.]" (AOB at 50; *see also* 07AA1235 n.10; 08AA1507-10 (analyzing *Brunzell* factors).) They also acknowledge this Court's caselaw, stating that: "express findings on each factor are not necessary for a district court to properly exercise its discretion. . . . Instead, the district court need only demonstrate that it considered the required factors[.]" *Logan*, 131 Nev. at 266.[48]

Unable to challenge the award on the lack of a *Brunzell* analysis, the Mitchell Parties argue that the award must be reversed because the District Court failed to perform a *Brunzell* analysis of the "true attorney's fees." (AOB at 48.) The

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case, motions under NRCP 54(c) or NRCP 15(b) may be appropriate mechanisms for resolving a conflict between the pleadings and the trial evidence." *Sandy Valley Assocs.*, 117 Nev. at 959. Without even acknowledging this standard, the Mitchell Parties attempt to rebut it by noting that no motions under NRCP 54 or 15 were filed by the Nype Parties. What they miss, however, is that the Nype Parties would have filed such motions *if* the District Court had found that the Amended Complaint had not adequately pled fees as special damages.

[48] The Mitchell Parties challenge the inclusion of the fees incurred by the Nype Parties' expert, Mr. Rich, in the award of attorney's fees and costs, as special damages, on the basis that the Nype Parties failed to establish that his fees were necessary to and incurred in the actions. (AOB at 45 n. 49.) The testimony and other evidence submitted at trial, however, easily demonstrates the necessity of Mr. Rich's fees and that they were incurred in the Second Action. (*See e.g.*, 17AA2969-3045.) The testimony and evidence further support upholding these costs, on other grounds, pursuant to NRS 18.005(5) and *Logan*, 131 Nev. at 267-68.

basis for their argument is that the District Court awarded $4,493,176.90—the amount provided to it in Trial Exhibit 70060, (18AA3230), representing the balance owing on the First Judgment—instead of $4,716,401.90, representing the amount of fees and costs introduced into evidence at trial. (*See* 14AA2346-48; 8AA2205-12; 17AA2918-3033.) The District Court's mistake in swapping these *very similar numbers* is completely understandable, however, given the sheer number of trial exhibits. The mistake does not indicate, however, that the District Court failed to perform the *Brunzell* analysis "of [the Nype Parties'] *actually requested* attorney's fees, costs and expert expenses[.]" (AOB at 49.) The District Court simply confused two *similar* figures.

The District Court properly considered the true fees and costs under *Brunzell* and awarded an amount consistent with these fees and costs.

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VI. CONCLUSION

For the foregoing reasons, this Court should affirm the Second Judgment in its entirety.[49]

DATED this 28th day of October, 2021.

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[49] As the Mitchell Parties failed to appeal from the Additional Fees, Costs and Interest Orders, the Court should ignore the Mitchell Parties' arguments regarding pre-judgment interest. The Nype Parties do concede, however, that pre-judgment interest was improperly based upon the amount of $19,983,450.40, instead of the correct amount of $19,641,515.90. The proper remedy, if the Court decides to entertain the issue, is to reverse the award of pre-judgment interest, only, and remand for recalculation based upon the correct amount.

CERTIFICATE OF COMPLIANCE

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 in Times New Roman and 14 point font size.

I FURTHER CERTIFY that, under NRAP 32(a)(7), and excluding the parts of the brief exempted by NRAP 32(a)(7)(C), the brief is proportionally spaced, has a typeface of 14 points or more and contains 13,944 words.

FINALLY, I HEREBY CERTIFY that I have read this RESPONDENTS' ANSWERING 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 Opening 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.

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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 28th day of October, 2021.

JOHN W. MUIJE & ASSOCIATES

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of October, I have caused a true and correct copy of the foregoing RESPONDENTS' ANSWERING BRIEF to be served by electronic service by the Supreme Court of Nevada Electronic Filing System to the following:

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INDEX OF EXHIBITS TO RESPONDENTS' ANSWERING BRIEF

Exhibit	Document Description
1	Full Text of NRS 18.010
2	Full Text of NRS 11.220
3	Full Text of NRS 112.180
4	Full Text of NRS 112.210
5	Full Text of NRS 112.220
6	Full Text of NRS 112.230

Exhibit 1

NRS 18.010 Award of attorney's fees.

1. The compensation of an attorney and counselor for his or her services is governed by agreement, express or implied, which is not restrained by law.

2. In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to a prevailing party:

(a) When the prevailing party has not recovered more than $20,000; or

(b) Without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations. It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public.

3. In awarding attorney's fees, the court may pronounce its decision on the fees at the conclusion of the trial or special proceeding without written motion and with or without presentation of additional evidence.

4. Subsections 2 and 3 do not apply to any action arising out of a written instrument or agreement which entitles the prevailing party to an award of reasonable attorney's fees.

Exhibit 2

NRS 11.220 Action for relief not otherwise provided for. An action for relief, not hereinbefore provided for, must be commenced within 4 years after the cause of action shall have accrued.

Exhibit 3

NRS 112.180 Transfer made or obligation incurred with intent to defraud or without receiving reasonably equivalent value; determination of intent.

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; or

(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(1) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(2) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond his or her ability to pay as they became due.

2. In determining actual intent under paragraph (a) of subsection 1, consideration may be given, among other factors, to whether:

(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.

Exhibit 4

NRS 112.210 Rights of creditor in action for relief against transfer or obligation.

1. In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in NRS 112.220, may obtain:

(a) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(b) An attachment or garnishment against the asset transferred or other property of the transferee pursuant to NRS 31.010 to 31.460, inclusive; and

(c) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure:

(1) An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

(2) Appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(3) Any other relief the circumstances may require.

2. If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

Exhibit 5

NRS 112.220 Avoidance of transfer or obligation: Protection of good faith transferee or obligee; recovery of judgment for value of asset transferred; certain transfers not voidable.

1. A transfer or obligation is not voidable under paragraph (a) of subsection 1 of NRS 112.180 against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

2. Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under paragraph (a) of subsection 1 of NRS 112.210, the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection 3 of this section, or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

(a) The first transferee of the asset or the person for whose benefit the transfer was made; or

(b) Any subsequent transferee other than a transferee who took in good faith for value or from any subsequent transferee.

3. If the judgment under subsection 2 is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

4. Notwithstanding voidability of a transfer or an obligation under this chapter, a transferee or obligee who took in good faith is entitled, to the extent of the value given the debtor for the transfer or obligation, to:

(a) A lien on or a right to retain any interest in the asset transferred;

(b) Enforcement of any obligation incurred; or

(c) A reduction in the amount of the liability on the judgment.

5. A transfer is not voidable under paragraph (b) of subsection 1 of NRS 112.180 or NRS 112.190 if the transfer results from:

(a) Termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or

(b) Enforcement of a security interest in compliance with NRS 104.9101 to 104.9709, inclusive.

6. A transfer is not voidable under subsection 2 of NRS 112.190:

(a) To the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless the new value was secured by a valid lien;

(b) If made in the ordinary course of business or financial affairs of the debtor and the insider; or

(c) If made pursuant to a good faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

Exhibit 6

NRS 112.230 Limitation of actions; exception for spendthrift trusts.

1. A claim for relief with respect to a fraudulent transfer or obligation under this chapter is extinguished unless action is brought:

(a) Under paragraph (a) of subsection 1 of NRS 112.180, within 4 years after the transfer was made or the obligation was incurred or, if later, within 1 year after the transfer or obligation was or could reasonably have been discovered by the claimant;

(b) Under paragraph (b) of subsection 1 of NRS 112.180 or subsection 1 of NRS 112.190, within 4 years after the transfer was made or the obligation was incurred; or

(c) Under subsection 2 of NRS 112.190, within 1 year after the transfer was made or the obligation was incurred.

2. This section does not apply to a claim for relief with respect to a transfer of property to a spendthrift trust subject to chapter 166 of NRS.