IN THE SUPREME COURT OF THE STATE OF NEVADA

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

MITCHELL APPELLANTS' REPLY BRIEF

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[1] "Mitchell Appellants" and/or "Appellants" include: DAVID J. MITCHELL; MEYER PROPERTY, LTD.; ZOE PROPERTY, LLC; LEAH PROPERTY, LLC; WINK ONE, LLC; AQUARIUS OWNER, LLC; LVLP HOLDINGS, LLC; and LIVE WORKS TIC SUCCESSOR, LLC. [AA 8:1443-44].

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***NRAP* 26.1 DISCLOSURE**

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

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

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

There is no such corporation.

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

COHEN | JOHNSON

COHEN | JOHNSON | PARKER | EDWARDS

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

None.

DATED this 28th day of February 2022

/s/ H. Stan Johnson, Esq.

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

PAGE

STATUTES/RULES

TABLE OF AUTHORITIES

I. INTRODUCTION

Contrary to Plaintiffs/Respondents, RUSSELL L. NYPE ("**Nype**") and REVENUE PLUS, LLC (collectively "**Plaintiffs**"),[2] arguments in their Answering Brief, it is respectfully submitted that the District Court's January 17, 2020 Amended Findings of Fact, Conclusions of Law and Judgment (**"Judgment**"), as to its findings, conclusions and awards in favor of Plaintiffs, is clearly erroneous, as the Judgment is in violation of Nevada law, unsupported by substantial evidence and reflects an abuse of discretion by the District Court. [AA 7:1221-1238].

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[2] On August 19, 2019, Defendant, LAS VEGAS LAND PARTNERS, LLC ("**LVLP**"), filed for Chapter 7 Bankruptcy. [AA 5:937-39]. The Bankruptcy Trustee is SHELLEY D. KROHN ("**Trustee**"). On November 18, 2019, the Trustee filed a Complaint in Intervention in the instant Action. [AA 6:994-1036; 6:1046-51; 6:1052-82].

Defendants/Appellants, DAVID J. MITCHELL ("**Mitchell**"); MEYER PROPERTY, LTD. ("**Meyer**"); ZOE PROPERTY, LLC ("**Zoe**"); LEAH PROPERTY, LLC ("**Leah**"); WINK ONE, LLC ("**Wink**"); AQUARIUS OWNER, LLC ("**A-Owner**"); LVLP HOLDINGS, LLC ("**LVLP-H**"); and LIVE WORKS TIC SUCCESSOR, LLC ("**Live Work TIC**")(collectively "**Appellants**" and/or "**Mitchell Defendants**")

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

It is respectfully requested that this Court vacate and reverse the Judgment entered in the *Eighth Judicial District Court*, before the Honorable Elizabeth Gonzalez ("**Action**"), as requested, and further enter judgment against Plaintiffs on each of their claims presented, as well as any such further relief in accordance thereto.[3]

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[3] Plaintiffs note that this Court dismissed the separate Appeal filed by Defendants', BARNET LIBERMAN ("**Liberman**") and CASINO COOLIDGE, LLC ("**Coolidge**"). [February 26, 2021 Order]. Plaintiffs note that several underlying parties in the instant Action are not parties to the instant Appeal. [Answering Brief, Page 2]. However, this Court is empowered to and should properly reverse the adverse Judgment as to all such defendants, as such matters involve substantial questions of law and are necessarily interconnected thereto. *See NRS* 2.110 ("The supreme court may reverse, affirm or modify the judgment or order appealed from as to any or all the parties"); *see also NRS* 2A.170; *Bullion Mining Co. v. Croesus Gold & Silver Mining Co.*, 3 Nev. 337, 341 (1867)("[b]ut the judgment for the property being jointly against all, the reversal as to one necessarily reverses it as to all"). *See also In re Estate of Forsyth*, 45 Nev. 385, 394-95, 204 P. 887 (1922)("There is no doubt that, if there was error in the proceedings of the court below, as we have decided, this court had the power and discretion to reverse the entire judgment as to all parties, rather than to modify it or only give judgment for a partial reversal").

A. Post-Trial Tolling Motions

Appellants preserved for review all issues raised in the instant Appeal, including the District Court's award of additional attorney's fees and the award of pre-judgment interest. [AA 8:1501-10; 8:1511-17]. All parties, including Plaintiffs, filed post-trial Motions to Alter/Amend the Judgment ("**Alter/Amend Motions**") [AA 7:1290-1324; 7:1325-52; 7:1371-91; SAA 12:73 - 13:513].

The Orders resolving the Alter/Amend Motions were entered on March 30, 2020 [Mitchell Defendants], with Notice of Entry filed on March 30, 2020 [AA 8:1489-94], and on May 13, 2020 [Plaintiffs], with Notice of Entry filed on May 13, 2020. [AA 8:1511-17]. On May 13, 2020, Notice of Entry of the District Court's May 13, 2020 Order awarding additional attorney's fees and pre-judgment interest to Plaintiffs was filed with the District Court. [AA 8:1501-10].

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Appellants filed their Notice of Appeal on February 26, 2020, which pursuant to *NRAP* 4(a)(6), was deemed filed on May 13, 2020, or the date of the filing of the Notice of Entry of the Order resolving the last Alter/Amend Motion, i.e. Plaintiffs' on May 13, 2020. [AA 8:1443-60; 8:1511-17].

Appellants' Notice of Appeal provided that the instant Appeal was from, among other:

> 1. Amended Findings of Fact and Conclusions of Law filed on January 17th, 2020, with notice of entry of which was served electronically on January 17th, 2020, **as well as any and all orders, decisions, judgments, findings, conclusions and, or recommendations relating thereto**. Attached as Exhibit A.
>
> 2. **All judgments and orders** in this case; and
>
> 3. All rulings and interlocutory orders made appealable by any of the foregoing. [AA 8:1443-44] (emphasis).

The District Court's Order on Additional Attorney's Fees, Costs and Pre-Judgment Interest was entered on May 13, 2020, or the same date in which Mitchell Defendants' Notice of Appeal was deemed filed, which Notice of Appeal included all judgments and orders relating to the Judgment and the instant Action. [AA 8:1501-10; 8:1511-24].

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

While the District Court properly found that Plaintiffs had not established by a preponderance of the evidence the elements of civil conspiracy separate and apart from the distributions and fabrication of evidence, nevertheless, the District Court's findings and conclusions with respect to the matters upon which the District Court imposed liability are unsupported by substantial evidence and in violation of Nevada law.[4] [AA 7:1236; ¶ 21].

Secondly, the District Court's award of **$15,148,339.00** in compensatory damages on Plaintiffs' claim for civil conspiracy is grossly excessive, infirm and wholly unsupported by the record in the instant Action. *See Bongiovi v. Sullivan*, 122 Nev. 556, 138 P.3d 433 (2006).

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

Finally, the District Court should have found that the entirety of Plaintiffs' claim for civil conspiracy was barred by the applicable statute of limitations.[5]

A. Fabrication of Evidence - No Underlying Basis

Nevada law forbids a claim for civil conspiracy to be based upon "fabrication of evidence" and the District Court's findings, conclusions and award in contravention thereof violate Nevada law. [AA 7:1236; ¶ 21].

Plaintiffs' arguments regarding *Eikelberger v. Tolotti*, 96 Nev 525, 531-32, 611 P.2d 1086, 1091 (1980), ignore its holding, wherein this Court stated:

> **It is contended that** certain **accountings** prepared by Earl Rogers, a certified public account employed by the Tolottis, to be used in litigation between the Eikelbergers and the Tolottis were **false and inaccurate, thereby breathing life into the Eikelbergers present claim for relief based upon conspiracy**.

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

> **The Eikelbergers did not employ Rogers. Neither did they rely upon his accounting statements**. Because of this, we already ruled that there is no legal basis for damages claimed to have been incurred by the Eikelbergers. (emphasis).[6]

It is undisputed that Plaintiffs did **not** employ Sam K. Spitz, CPA ("**Spitz**"). [AA 12:2138; SAA 1:10]. It is undisputed that Plaintiffs did **not** rely upon Spitz's accounting statements, as Plaintiffs' forensic accountant, Mark D. Rich's ("**Rich**"), Supplement Report states:

> **We found that the records of the outside accounting Firm** are similarly fragmentary and incomplete, lacking supporting underlying documents **and cannot be relied upon**. [AA 16:2813; *see also* SAA 28:1433 (Rich's Initial Report)] (emphasis).

Rich's Initial and Supplemental Reports provided that in addition to Spitz's records, Defendants' entities' accounting records **also** "cannot be relied upon." [AA 16:2812; SAA 28:1432].

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[6] *See Eikelberger v. Rogers*, 92 Nev. 282, 283, 549 P.2d 748 (1976), wherein this Court stated:

> The Eikelbergers did not employ Rogers. The Eikelbergers did not rely upon the accounting statements prepared by Rogers. **To the contrary, they challenged those statements in the litigation with the Tolottis**. Absent a professional relationship between the Eikelbergers and Rogers, or reliance upon the accounting statements prepared, **we perceive no legal basis for damages** claimed to have been incurred by the Eikelbergers. (emphasis).

As a matter of law, the District Court improperly found in favor of Plaintiffs' claim for civil conspiracy based upon "fabrication of evidence." [AA 7:1236; ¶ 21]. There is no such legal and/or factual basis for the District Court's findings and conclusions.[7] *Eikelberger* does stand for:

> It is uniformly held that the giving of false testimony is not civilly actionable. **A claim of conspiracy does not avoid the doctrine that there is no civil action for giving false evidence**. *Id*., 96 Nev. at 531, 611 P.2d at 1090 (emphasis).[8]

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[7] Mitchell and Lieberman presented evidence at trial that they did not act to harm Plaintiffs. [Answering Brief, Page 21, Footnote 21; AA 11:1969; 12:2096]. *NRS* 86.341 allows for distributions by members. [Opening Brief, Page 37, n. 42; AA 7:1379-80].

[8] Plaintiffs' references to a criminal statute [*NRS* 199.210] and New Jersey law ignore *Eikelberger* providing that Nevada law prohibits a civil action based upon such conduct. *Id*. Plaintiffs reference to this Court's unpublished decision in *NCP Bayou 2, LLC v. Medici*, 2019 Nev. Unpub LEXIS 324, 437 P.3d 173 (March 21, 2019) incorrectly ascribes a holding, wherein this Court, in fact, stated "[t]o the extent the district court **may** have read *Cadle* too broadly when it stated that no accessory liability exists in fraudulent transfer actions regardless of whether the party is a transferee or nontransferee, the district court nevertheless reached the right result in dismissing the two causes of action." *Eikelberger* supports Appellants argument requiring a valid underlying wrong for a claim for civil conspiracy. *See also* Opening Brief, Page 28, n. 31; *Cadle Co. v. Woods & Erickson, LLC*, 131 Nev. 114, 120, 345 P.3d 1049, 1053 (2015)("**And although *NRS* 112.240 incorporates the traditional rules of law and equity into the statutory fraudulent transfer law, we agree with other states that such savings clauses do not create entirely new causes of action, such as civil conspiracy**")(emphasis).

Plaintiffs arguments regarding abuse of process and spoilation of evidence also fail as they implicate the same issues presented in *Eikelberger* regarding fabrication of evidence. [Answering Brief, Page 24, n. 18].[9]

B. **Civil Conspiracy Claim - Time Barred**

The record in the instant Action reflects that the statute of limitations on Plaintiffs' claim for civil conspiracy had long expired prior to the filing of the instant Action. The Judgment should have properly been entered against Plaintiffs on their claim for civil conspiracy.

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[9] The instant Action was filed on July 26, 2016. [AA 1:1-19]. The alleged "fabrication of evidence," relating to the Spitz's document retention policy, allegedly occurred in February of 2018, or well after the instant Action was filed. [AA 14:2337]. The "damages" incurred by Plaintiffs related to attorney's fees and costs pertaining to Plaintiffs' Motion for *NRCP* 37(b) sanctions, wherein the District Court sanctioned Mitchell Defendants $160,086.46 relating to compelling discovery ("**Sanctions Order**") [AA 5:940-52]. As Mitchell paid the Sanctions Order, Plaintiffs had no additional damages relating thereto. [AA 6:1180-82]. During the time period overlapping the Sanctions Order, Mitchell Defendants provided Plaintiffs with an additional 1,320,444 pages of documents from Spitz and later providing a copy of Spitz's computer hard drive, which counsel for Appellants argued had not all been reviewed prior to trial of the instant Action, notwithstanding an offer by Appellants' counsel to allow for the same. [AA 16:2804; 9:1657-59; 10:1701; 12:2160; 14:2387-88].

Aside from the fabrication of evidence issues, *see supra*, Plaintiffs' civil conspiracy claim rests upon the distributions, as the District Court found that "Plaintiff has **not** established by a preponderance of the evidence the elements of civil conspiracy separate and apart from the distributions and fabrication of evidence." [AA 7:1236; ¶ 21].

Regarding distributions, the District Court found:

- That when Mitchell and Liberman took personal distributions from Related Entities **between 2007 and 2016**, totaling **$15,148,339**, **that those distributions were taken to avoid satisfying Nype's claims and Judgment**. [AA 7:1232; ¶ 59] (emphasis).[10]

Plaintiffs argue that the distributions were fraudulent conveyances. The District Court properly found these were time-barred. [AA 7:1235]. Both *NRS* 112.230(1)(a) [1 year from discovery] and *NRS* 11.220 have a four year statute of limitations.

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[10] The total amount of distributions found by the District Court to have been taken by Mitchell and Liberman between the years 2007-2016, i.e. **$15,148,339**, almost the entirety of this amount (**$15,143,639**) was taken between the years **2007-2009**. [SAA 24:660-677 (Trial Exhibit 10002); SAA 24:678-692 (Trial Exhibit 10003); SAA 24:693-709 (Trial Exhibit 10004)]. Nype's claims relate to a lawsuit brought by LVLP against Plaintiffs ("**Underlying Action**"), wherein Plaintiffs counterclaimed and obtained a judgment against LVLP ("**Underlying Judgment**")[AA 16:2748-66; 5:750-67; 16:2795-97].

Pursuant to *NRS* 11.220, Plaintiffs were required to file the instant Action "within 4 years after the cause of action shall have accrued." *See Siragusa,* 114 Nev. at 1393, 971 P.2d at 807 ("Based upon our post-*Aldabe* jurisprudence, we hold that an action for civil conspiracy accrues when the plaintiff discovers or should have discovered all of the necessary facts constituting a conspiracy claim"). Nevada law requires "diligent discovery" by a plaintiff relating to the time of accrual. *See Oak Grove, supra*.

Plaintiffs discovered all the necessary facts relating to their alleged claim for civil conspiracy more than four years prior to the filing of the instant Action on **July 26, 2016**. [AA 1:1-19].[11]

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[11] Plaintiffs discredit Rich:

> Mere knowledge that distributions had occurred – the sole basis for the District Court's findings that the Nype Parties related fraudulent-transfer claims were barred under *NRS* 112.230(a)(1) – is, however, no way tantamount to knowledge that the distributions were fraudulent in nature or part of a conspiracy. [Answering Brief, Page 31].

Rich's testimony, as well as his reports and memorandum, including the testimony of Nype, established that Plaintiffs were aware of all necessary facts relating to their claim for civil conspiracy more than four years prior to July 26, 2016. [AA 4:609; 4:621; 7:1326-33; 7:1376-77; 9:1615; 10:1707-08; 10:1717-18; 11:1835-42; 8:2249-62; 8:2271-72; 15:2469; 20:3525-43; SAA 24:662; SAA 24:681; SAA 24:696].

The full extent of the distributions, as well as their alleged nature, were known to Plaintiffs in 2011, as almost their entirety occurred between 2007-2009. [SAA 24:660-677 (Trial Exhibit 10002); SAA 24:678-692 (Trial Exhibit 10003); SAA 24:693-709 (Trial Exhibit 10004)]. Plaintiffs knew no later than **July 15, 2011**, as Rich authored Trial Exhibit 90079 (AA 20:3525-43)], which itself was produced by Nype in the Underlying Action. Rich testified the distributions, which were distributed "despite amounts owing to Nype," left LVLP "cash poor" and caused liquidity issues and were fraudulent since the threat from Nype was known.[12] [AA 9:1600; 9:1615; 10:1707-08; 10:1717-18; 11:1835-37; 11:1842; 11:1876-78]. Rich testified that "they set out to cause this entity to be illiquid and have no funds to satisfy a creditor, a major creditor." [AA 11:1878]. At the end of 2009, LVLP had $51,634 in the bank. [SAA 24:697]. In **2011**, Plaintiffs had all this information, their concomitant belief that these distributions were improper and non-payment of the Underlying Judgment by LVLP.

[12] LVLP entered into a non-exclusive agreement with First Wall Street Capital International ("**Wall Street**") to find a joint venture and/or equity partner ("**WS Agreement**"). [SAA 25:821-25 (Trial Exhibit 60001)]. Nype contended that he was entitled to compensation under the same terms as provided in the WS Agreement ("**Commission Claim**"). [AA 16:2748-52]. Nype's Commission Claim sought millions of dollars. [AA 7:1228].

Plaintiffs arguments regarding the "total assets" listed on LVLP's tax returns ignores the basis of the alleged civil conspiracy, i.e. the alleged fraudulent transfers.[13] Plaintiffs argued that the distributions were to prevent them from collecting the Underlying Judgment, i.e. under *NRS* 112.180(1)(a), and was the basis of Plaintiffs' claim for civil conspiracy.[14]

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[13] Plaintiffs' civil conspiracy claim alleges:

> 137. As alleged hereinabove, and upon information and belief, the **transfer of** the subject real estate and equity ownership interests and **substantial monetary amounts** were undertaken by Defendants with full knowledge as to the relevant circumstances and in an effort to participate in transactions **in derogation of the rights of Plaintiff**. [AA 2:334].

Aside from the Coolidge transaction, the real estate transactions were time-barred. *See also* Rich's testimony that LVLP's financial records "cannot be relied upon." [AA 16:2812-13; SAA 28:1432-33]. Plaintiffs claims that they needed more post-judgment discovery prior to filing the instant Action belies Rich's opinion and reports that **none** of Defendants' **or Defendants' accountant's financial records** could be relied upon. Nype relied upon Rich's opinions at trial [AA 13:2242].

[14] *NRS* 112.180(2) provides factors that "may" be considered in determining actual intent under *NRS* 112.180(1)(a). *See Plotkin v. Pomona Valley Imports (In re Cohen)*, 199 B.R. 709, 716-17 (B.A.P. 9th Cir. 1996), referring to California's *Uniform Voidable Transfer Act* and "actual intent" claims, i.e. "[t]he focus in the inquiry into actual intent is on the state of mind of the debtor. Neither malice nor insolvency are required."

Once Plaintiffs were aware of the distributions, which they themselves argued where fraudulent when made and designed to avoid paying Nype's claim, the statute of limitations commenced. Plaintiffs' baseless arguments regarding post-judgment discovery relating to the Underlying Judgment seeks to avoid their failure to timely assert their alleged claim. [Answering Brief, Page 16]. Appellants are not required to "cherry pick" evidence, as the evidence is overwhelming that Plaintiffs were fully aware of the distributions and their **then belief** as to the reasons for such distributions more than four years prior to the filing of the instant Action. [AA 9:1600; 9:1615; 10:1707-08; 10:1717-18; 11:1835-37; 11:1842].[15] Plaintiffs arguments regarding the ability to make adverse inferences based upon allegations of spoilation of evidence ignore that the evidence supporting the expiration of the statute of limitations comes from Rich and Nype.

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[15] The District Court so found as well. [AA 7:1228-30]. As cited above, Rich's testimony reflected that Plaintiffs believed that these distributions were fraudulent when made (2007-2009) and that Plaintiffs were aware of the distributions no later than July 15, 2011, which was more than four years prior to the filing of the instant Action. Plaintiffs' arguments regarding *Bank of Nevada v. Friedman*, 82 Nev. 417, 420 P.2d 1 (1966), involving an unrelated matter of tolling based upon being out of state, ignores that Plaintiffs were fully aware of all necessary facts relating to their alleged claim more than four years prior to the filing of the instant Action.

Plaintiffs argue that Nype's discovery response in the instant Action, wherein he stated "Mitchell indicated in the Prior Case that Plaintiffs would never collect because defendants had set everything up so as to make LVLP Judgment proof" is unavailing because it is unknown when the statement was made. [Answering Brief, Page 34, n. 31; AA 4:609]. **Not so**.

Nype testified that in the summer of **2007** when he and Mitchell met for lunch to discuss his disputed Commission Claim related to the WS Agreement and Forest City Commercial Development, Inc. ("**Forest City**") that Mitchell advised him that it "was going to be very difficult for me [Nype] to collect" and that Mitchell refused to advise how much money was being left for Nype but that Nype wasn't "going to be happy." [AA 13:2184-88].[16] Plaintiffs argue that to make this conversation relevant, it would have had to occur before July 26, 2012. **It did**.[17]

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[16] Rich's **July 15, 2011** Memorandum (Trial Exhibit 90079) reflected that he was aware, and therefore Nype as well, that only $430,068 had been held in reserve for Nype relating to the Forest City transaction. [AA 20:3537].

[17] The issue of the statute of limitations being expired on Plaintiffs' claim for civil conspiracy was raised throughout the instant Action. [AA 1:63; 1:82-83; 2:172; 2:347; 6:1098-1104; 6:1200; 7:1376-77; 10:1709-10]. The above testimony was presented at trial.

C. Civil Conspiracy Damages - Impermissibly Excessive

The District Court's imposition of $15,148,339.00 in compensatory damages are not the natural and probable consequences of any injury suffered by Plaintiffs and represents an impermissible windfall of damages. The amount of the Underlying Judgment was only **$2,608,797.50**, exclusive of costs and accrued interest. [AA 16:2792-94 (Trial Exhibit 50007); 16:2795-97 (Trial Exhibit 50008)].

The amount of the supposed "natural and probable damages" cannot equal the exact amount of the total distributions taken by Mitchell and Liberman. [AA 7:1232]. That the District Court found Plaintiffs' compensatory damages to equal the same amount of the distributions reflects that it was an impermissible award and an abuse of discretion. *See Flamingo Realty v. Midwest Development*, 110 Nev. 984, 987, 879 P.2d 69, 71 (1994)("A district court is given wide discretion in calculating an award of damages and an award will not be disturbed on appeal **absent an abuse of discretion**").

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Plaintiffs arguments regarding this Court affirming on any grounds ignores the fact that the District Court properly found no punitive damages. [AA 7:1236]. This Court cannot substitute its judgment for that of the District Court and find that there was sufficient evidence to award punitive damages. *See Canterino v. The Mirage Casino-Hotel*, 117 Nev. 19, 24, 16 P.3d 415, 418 (2001)(quoting *Stackiewicz v. Nissan Motor Corp*., 100 Nev. 443, 455, 686 P.2d 925, 932 (1984)). Appellants argued that the amount of the compensatory award was excessive. [AA 7:1374-79].[18]

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[18] Plaintiffs argue that the fraudulent conveyance claim relating to the Coolidge transaction supports the total damages awarded by the District Court. The argument ignores the fact that the District Court impermissibly based the compensatory damages on the amount of the distributions. The Coolidge transaction represented $341,934.47 [AA 7:1235]. Plaintiffs argument regarding the Coolidge transaction *vis á vis* their claim for civil conspiracy, i.e. *Chevalier v. Animal Rehabilitation Ctr*., 839 F. Supp. 1224 (U.S.D.C. N.D. Tx. 1993), ignores its holding, as Plaintiffs did not timely file their claim for civil conspiracy. Further, *Chevalier* is inconsistent with Nevada case law requiring a valid underlying wrong. *See Eikelberger, supra*; *see also* Appellants' Opening Brief, Page 28, n. 31.

While Nype argues that he was advised he would not be permitted to do business with Forest City due to the ongoing litigation, nevertheless, Nype testified that he did not "really actively" try to solicit business and that Forest City was ultimately sold. [AA 13:2216-17].

Plaintiffs offered no testimony to quantify any lost earnings and/or emotional distress, as such testimony amounted to pure speculation. *See Clark County Sch. Dist. v. Richardson Constr., Inc*., 123 Nev. 382, 397, 168 P.3d 87, 97 (2007)("The plaintiff has the burden to prove the amount of damages it is seeking. Although the amount of damages need not be proven with mathematical certainty, testimony on the amount may not be speculative"). Plaintiffs offered no substantial testimony, nor expert testimony, as to the amount of any emotional distress damages.[19]

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[19] Plaintiffs did not allege or prove damages for emotional distress. [AA 2:307-40]. In closing, counsel for Plaintiffs requested "some" damages for "distress, his pain and suffering." [AA 14:2352]. The Judgment does not reflect any findings supporting any emotional distress damages. *See e.g., Olivero v. Lowe*, 116 Nev. 395, 400, 995 P.2d 1023, 1026 (2000), *citing Republic Iron & Steel Co. v. Self,* 192 Ala. 403, 68 So. 328 (1915)(holding that a jury may award nominal or compensatory damages for an assault where the only injury was insult, indignity, hurt feelings, mental suffering and fright caused by the assault).

Plaintiffs reference to the unpublished non-controlling case, *Chesapeake Corp. v. Sainz*, 2002 U.S. Dist. LEXIS 28702 (U.S.D.C. ED. VA. 2002) is unavailing as Plaintiffs' alleged emotional distress damages do not "proximately flow from the conspiracy." *See Lerner Shops v. Marin*, 83 Nev. 75, 79-80, 423 P.2d 398, 401 (1967), cited by Plaintiffs cite, wherein this Court required expert testimony related to future pain and suffering arising from physical injury. Plaintiffs provided no such testimony.

While Plaintiffs argue that *NRS* 112.210(1)(c)(3) allows for "any other relief the circumstances require," as reflected in Nevada's fraudulent transfer law, in support of their claim for excessive damages, this ignores the fact that the District Court only found $341,934.47 in damages for fraudulent transfers. *See Cadle,* 131 Nev. at 118-19, 345 P.3d at 1053 ("**Nevada law does not create a legal cause of action for damages in excess of the value of the property to be recovered**"); *NRS* 112.210; *see also Grosjean v. Imperial Palace*, 125 Nev. 349, 212 P.3d 1068 (2009)("Although a plaintiff may assert both a §1983 claim and tort-based claims, he or she is not entitled to a separate compensatory damage award under each legal theory. **Instead, if liability is found, the plaintiff is entitled to only one compensatory damage award on one or both theories of liability**") (emphasis).

The District Court's award vastly and impermissibly exceeding even the amount of the Underlying Judgment.[20] In Appellants' Alter/Amend Motion, it was argued that Plaintiffs were not allowed to excess payment on the Underlying Judgment, wherein it was stated:

> Even assuming they did thwart Nype's collection attempts, they only kept him from collecting his $2.6 million dollar judgment and associated interest. Accordingly, as civil conspiracy damages must be tied to the underlying overt acts, if Nype is to recover anything at all, **he should only be allowed to recover an amount equivalent to that which he was prevent from recovery. Therefore, damages in this case should be limited to the amount of the underlying case's judgment plus interest**. [AA 7:1374-75].[21]

The excessive damages reflects double recovery and multiple excessive recoveries. *See Elyousef v. O'Reilly & Ferrario, LLC*, 126 Nev. 441, 245 P.3d 547 (2010).

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[20] *Cadle* provides: "True, *NRS* 112.210(1) permits creditors to obtain 'any other relief the circumstances may require.' But we agree with other jurisdictions that this language, taken from the Uniform Fraudulent Transfer Act, 'was intended to codify an existing but imprecise system,' not to create a new cause of action." *Id*., 131 Nev. at 119, 345 P.3d at 1053.

[21] *See Old Aztec Mine v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981), "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* stated, "the appellant could have moved the district court for an amended judgment . . . ." *Id*. The issue of the excessiveness of the Judgment was presented to the District Court. [AA 7:1374-79].

III. THE AWARD OF ATTORNEY'S FEES MUST BE REVERSED AS THEY NEITHER REFLECT AN AMOUNT REQUESTED BY PLAINTIFFS NOR CONSIDERATION OF THE SAME BY THE DISTRICT COURT

Plaintiffs did not specially plead attorney's fees under *NRCP* 9 or as required pursuant to *Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 35 P.3d 964 (2001).

Plaintiffs agree that the "mere mention of attorney's fees in a complaint's general prayer for relief is insufficient to meet this requirement." [Answering Brief, Page 53]. Plaintiffs merely used boilerplate language at the end of each cause of action. [AA 2:307-40; 13:2241].[22]

Plaintiffs cites to *Von Ehrensmann v. Lee*, 98 Nev. 335, 647 P.2d 377 (1982) for the proposition that where equitable relief is sought attorney's fees are proper. However, both equitable causes of action were dismissed, i.e. constructive trust and declaratory relief, and with regard to Nevada's *Fraudulent Transfers Act*, attorney's fees are not provided in the statute.

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[22] Plaintiffs dispute as to *City of Las Vegas v. Cragin Industries*, 86 Nev. 933, 478 P.2d 585 (1970) ignores that this Court utilized *Cragin* in *Horgan v. Felton*, 123 Nev. 577, 587, 170 P.3d 982, 989 (2007), which modified *Sandy Valley*, for the proposition that "award of attorney fees not proper when the complaint only alleged the necessity for the services of counsel and simply requested attorney fees."

Plaintiffs attempt to include as special damages attorney's fees incurred from the Underlying Action. [Answering Brief, Page 10; AA 8:2205]. Plaintiffs' arguments regarding "special damages" in the form of attorney's fees cannot necessarily include attorney's fees and costs incurred in the Underlying Action. Plaintiffs were not awarded attorney's fees in the Underlying Action. [AA 5:750-67; 16:2795-97].

At trial, Plaintiffs **neither requested** $4,493,176.90 in attorney's fees **nor** $4,716,401.90 in attorney's fees. [Answering Brief, Page 56]. The District Court's award of $4,493,176.90 was in total error as this amount only represented the amount of the Underlying Judgment, inclusive of interest through September 2, 2019. [AA 14:2351-52; 18:3230 (Trial Exhibit 70060)].[23] Plaintiffs argue that *NRS* 18.010(2)(b) allows for an award of attorney's fees. While Plaintiffs prevailed in the instant Action, they did not prevail on all matters, including matters related to the statute of limitations regarding alleged fraudulent transfers. [AA 7:1235].

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[23] At trial, Plaintiffs requested a "grand total" of $1,274,337.90 in "attorney's fees and costs" exclusive of some additional attorney's fees for the time period of December 2019 to January 2020. [AA 14:2348; 2352]. There was no "swapping these very similar numbers" by the District Court. [Answering Brief, Page 56].

While the District Court cited to alleged conduct in the Underlying Action, the express language of *NRS* 18.010 does not provide for attorney's fees to be awarded relating to a separately filed lawsuit. The District Court improperly sought to punish defendants based upon conduct alleged in the Underlying Action. [AA 8:1507]. Regarding the Sanctions Order, Mitchell Defendants were already sanctioned and paid. [AA 5:940-52; 6:1180-82].[24]

In the instant Action, Plaintiffs only sought attorney's fees "in this action" and "in this case." [AA 2:341-51 (¶ 121, 135, 143, 147 and 152); 3:AA 383]. Attorney's fees and costs from the Underlying Action were neither alleged nor supported.

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[24] Rich is not an attorney. Plaintiffs' alternative argument, i.e. *NRS* 18.005(5), for Rich's fees ignores that the District Court did not make findings relating to the true amount of attorney's fees and costs requested. Plaintiffs did not request Rich's fees under *NRS* 18.005(5). *See Old Aztec, supra. NRS* 18.005(5) limits expert fees to $1,500 unless the District Court makes findings. [AA 5:763]. Rich's fees from the Underlying Action were overruled. [AA 8:2276]. The District Court improperly sought to include them with the attorney's fees. The District Court's *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 455 P.2d 31 (1969) analysis was non-existent as it did not analyze all attorney's fees/billings from the Underlying Action as they were not part of the record and any analysis of the submitted bills in the instant Action was non-existent because the District Court was not analyzing the correct requested amount.

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

The record in the instant Action does not support the District Court's findings and conclusions with respect to Plaintiffs' fraudulent transfer claim pertaining to the Coolidge transaction.[25]

The District Court's determination rested upon a finding that sale proceeds, i.e. $341,934.47, were transferred to Mitchell and Liberman instead of first going to LVLP. [AA 7:1235; ¶ 11 and 14; *see also* 7:1232; ¶ 59(a)].[26]

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

[26] Leah, the seller of the Coolidge property, was not the debtor as defined in *NRS* 112.150(6), as the debtor was only LVLP. [AA 2792-94]. Mitchell had nothing to do with Coolidge. [AA 11:1800]. While Plaintiffs cite to this Court's unpublished decision in *Magliarditi v. TransFirst Grp., Inc*., 2019 Nev. Unpub. LEXIS 1156, 450 P.3d 911 (October 21, 2019), it is not controlling law in Nevada. *See NRAP* 36(c)(2). The Coolidge transaction occurred in **2014** [AA 7:1252]. *Magliarditi* was issued in 2019.

No substantial evidence was presented that any of the "badges of fraud" were present relating to the Coolidge transaction.[27] The record did **not** establish that those monies did not go "upstream" to LVLP. On this question, Rich stated that they "**may have**." [AA 9:1666]. Rich's response renders the District Court's determinations invalid. Plaintiffs repeatedly make reference to Mitchell's credibility - this was Rich's testimony. Nype relied upon Rich's testimony. [13:2242].

Rich did not know why the distributions were made or whether they were to pay down debt. [AA 10:1753-54; SAA 25:916 and 1008-09]. Neither Plaintiffs nor Rich actually presented evidence in support of the Coolidge transaction to establish actual fraud.[28]

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[27] *See NRS* 112.180(2)(a)-(k) for the list of factors in determining actual intent. [Opening Brief, Page 52, n. 57].

[28] Plaintiffs argue Appellants did not dispute the District Court's finding of a conspiratorial agreement between Mitchell and Liberman. [Answering Brief, Page 49, n. 41]. Incorrect. Appellants' Opening Brief: "the testimony from both Mitchell and Liberman reflected that the Coolidge transaction was not done in any fashion to hinder, delay or defraud Nype relating to the Underlying Judgment. [AA 11:1969; 12:2096]." [Opening Brief, Page 56].

Plaintiffs citation to two out-of-state cases, i.e. *McCain Foods USA, Inc*., 275 Kan. 1, 61 P.3d 68 (Kan. 2002) and *Gilchinsky v. Nat'l Westminster Bank N.J.*, 159 N.J. 463, 732 A.2d 482 (N.J. 1999), are unavailing as they support a finding Plaintiffs failed to prove and the District Court improperly found actual intent. *See McCain*, 275 Kan. at 13, 61 P.3d at 77 ("The determination of whether a creditor has proved a debtor's fraudulent intent entails a case-by-case factual examination of all relevant circumstances involving the challenged transfer or obligation"); and *Gilchinsky*, 159 N.J. at 476, 732 A.2d at 489 ("Both inquiries involve fact-specific determinations that must be resolved on a case-by-case basis. The person seeking to set aside the conveyance bears the burden of proving actual intent").

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

The District Court's imposition of alter ego liability was unsupported by substantial evidence, which imposition further lacked required findings as to each party in which the District Court imposed alter ego liability.[29] The Judgment should have properly been entered against Plaintiffs on their claim for alter ego.

Aside from identifying each party in the Judgment, the District Court failed to make any substantial effort to separately analyze, and thereafter rule upon, each separate party based upon the required *Polaris* factors. [AA 7:1230-34]. "The corporate cloak is not lightly thrown aside." *Baer v. Amos J. Walker, Inc*., 85 Nev. 219, 220, 452 P.2d 916 (1969).

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[29] Plaintiffs had the burden of proof to establish each element required for a finding of alter ego as to each separate party. In *Polaris Industrial Corp. v. Kaplan*, 103 Nev. 598, 601, 47 P.2d 884 (1987), this Court stated:

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

The particular circumstances of each party should determine whether the application of alter ego liability is applied. In *LFC Mktg. Group, Inc. v. Loomis*, 116 Nev. 896, 904, 8 P.3d 841, 846 (2000), this Court stated:

> Accordingly, we conclude that reverse piercing is appropriate in those limited instances **where the particular facts** and equities show the existence of an alter ego relationship and require that the corporate fiction be ignored so that justice may be promoted. (emphasis).

The District Court's findings do not support the wholesale finding that each person and/or entity, i.e.: Mitchell; Liberman; Meyer; Zoe; Leah; Wink, Live Work; A-Owner; LVLP-H; Live Work TIC; FC/LV; and Coolidge, was the alter ego of LVLP and each other. [AA 7:1230-38]. The party seeking to pierce the corporate veil must show by a preponderance of the evidence that the financial structure of the suspect corporation "is only a sham and caused an injustice." *North Arlington Med. v. Sanchez Constr.*, 86 Nev. 515, 522, 471 P.2d 240, 244 (1970).

The District Court's findings do not reflect that LVLP was a sham or caused injustice. LVLP was formed to: acquire and develop as many as sixty parcels of land in downtown Las Vegas; to develop and operate various commercial ventures in Las Vegas; and to shield its members, Mitchell and Liberman, from individual liability. [Opening Brief, Pages 13-18].

The facts indicate LVLP was adequately capitalized and the manner in which LVLP operated was not uncommon for LLC's of its type. [Opening Brief, Pages 19-21, 61; AA 10:1702-04; AA 16:2905-6; AA 11:1820; AA 11:1902-03; AA 9:1609-10; AA 11:1878-79; AA 11:1858; SAA 24:660-709; SAA 25:861-1039; 26:1164-1290; SAA 27:1291-1353].

The imposition of alter ego liability against Mitchell and Liberman must be analyzed separately and differently than the other entity defendants. The District Court did not do this and failed to identify specific evidence or transactions that would support a finding that the individuals, Mitchell and Liberman, were the alter ego of LVLP.

Instead of showing the specific evidence that would support the District Court's findings, Plaintiffs argue the "totality of the circumstances" based upon the following circumstances:

1. Each of the related entities was owned, controlled, and managed by Mitchell and Liberman.

This does not support the finding of alter ego, since as managers and members, Mitchell and Liberman legally and properly controlled and managed LVLP.

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This Court has found that a mere showing that one corporation is owned by another, or that the two share interlocking officers or directors is insufficient to support a finding of alter ego. *See Lipshie v. Tracy Investment Co.*, 93 Nev. 370, 566 P.2d 819 (1977).

2. None of the entities had its own bank accounts.

Plaintiffs ignore the fact that it is undisputed that Mitchell and Liberman had their own bank accounts and did not co-mingle their personal finances with LVLP, except for a "few Mitchell and Liberman personal transactions and postings." If some of the entities did not have their own bank accounts this does not apply to Mitchell and Liberman.

3. Mitchell and Liberman and the related entities commingled funds, including personal loans from various banks.

Plaintiffs wrongfully characterize entries or funds that showed up on the general ledger of LVLP as "commingled funds." This was never the case with Mitchell and Liberman. If personal funds from their own resources or personal bank loans were deposited into the LVLP account, the funds were either loans or additional capital as shown on the balance sheets and tax returns of LVLP. [SAA 24:660-709; 26:1164-1290; SAA 27:1291-1353; SAA 25:861-1039]. This is not commingling; is normal business practice.

There was no substantial evidence that LVLP was acting as the alter ego of Mitchell and Liberman to support the District Court's findings and conclusions. *See McCleary Cattle Co. v Sewell*, 73 Nev. 279, 160 P.3d 878 (1957). Based upon a paucity of evidence against Mitchell and Liberman, it was error for the District Court to find Mitchell and Liberman are the alter ego of LVLP.[30]

VI. THE DISTRICT COURT IMPROPERLY AWARDED PRE-JUDGMENT INTEREST

As the issue of the award of pre-judgment interest was properly preserved and Plaintiffs agree that the District Court improperly based its award upon an incorrect Judgment amount, it is respectfully submitted that such award of pre-judgment interest should be reversed. [Answering Brief, Page 57, n. 49; *see also* AA 8:1443-60; 8:1501-10 and *NRAP* 4(a)(6)].[31]

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[30] The same lack of proper analysis, showing that Plaintiffs established by a preponderance of evidence, the three elements necessary for the District Court to find alter ego as set forth in *Loomis*, applies to the other defendant entities as well.

[31] Appellants submit based upon the instant Appeal, the District Court improperly entered the Judgment in the first instance, and therefore, ultimately no award of pre-judgment interest or attorney's fees is permissible.

CONCLUSION/PRAYER FOR RELIEF

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

Respectfully submitted.

DATED this 28th day of February 2022

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CERTIFICATE OF COMPLIANCE

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

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

2. I further certify that this *Reply Brief* complies with the page or type-volume limitations of *NRAP* 32(a)(7) because it is less than 30 pages in length and, excluding the parts of the brief exempted by *NRAP* 32(a)(7)(c), it is proportionally spaced, has a typeface of 14 points or more and contains **6,909** words; and

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

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I further certify that this *Reply Brief* complies with all applicable *Nevada Rules of Appellate Procedure*, including *NRAP* 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the *Nevada Rules of Appellate Procedure*.

Respectfully submitted.

DATED this 28th day of February 2022

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of February 2022, the above-referenced **MITCHELL APPELLANTS' REPLY BRIEF**, was filed electronically with the Clerk of the *Nevada Supreme Court* and served electronically through the Court's electronic service to the following persons:

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