IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA TRUST COMPANY, PETER H. KINGMAN, JAMES KRISS,

Petitioners,

vs.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE JOANNA S. KISHNER,

Respondents,

and

DARRYL JAMES LEWIS, MICHAEL TARASKA, as Trustee for the DARRYL JAMES LEWIS LIFETIME TRUST,

Real Parties in Interest.

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Clerk of Supreme Court

Supreme Court Case No.

District Court Case No. A-22-852594-B

APPENDIX OF EXHIBITS TO PETITION UNDER NRAP 21 FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF PROHIBITION

Volume IX of IX

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10	[2/16/2023] Darryl James Lewis and Michael Taraska, as trustee of the Darryl James Lewis Lifetime Trust Verified Second Amended Complaint	I	AA00211-AA00243
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DISTRICT COURT

CLARK COUNTY, NEVADA

DARRYL JAMES LEWIS, an individual, and MICHAEL TARASKA, as Trustee for the DARRYL JAMES LEWIS LIFETIME TRUST, Plaintiff, v. NEVADA TRUST COMPANY, a Nevada Corporation, PETER H. KINGMAN, an individual, JAMES KRISS, an individual, DOES 1 through 10, and ROE BUSINESS ENTITIES 1 through 10, Defendants.	Case No. A-22-852594-C Dept. No.: 31 **DEFENDANTS' REPLY IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT** **Hearing Date: February 27, 2024** **Hearing Time: 8:30 a.m.**

Defendants Nevada Trust Company ("NT"), Peter H. Kingman and James Kriss (collectively "Defendants"), by and through their counsel of record, Sheri M. Thome, Esq. and Adam P. McMillen, Esq., of the law office of Wilson, Elser, Moskowitz, Edelman & Dicker LLP, hereby submit this Reply in Support of the Motion for Summary Judgment, filed herein on January 10, 2024.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The crux of Defendants' Motion is that if Plaintiff Lewis wanted to bring the claims he now brings, he should have done so within the 90 days of each accounting, or, at the very latest, in the 2020 in rem proceeding. *See* Defendants' Motion for Summary Judgment, filed herein on 1/10/24

("Motion"), 13:18-19:16. It is undisputed that Lewis did not object to any of the quarterly accounting statements from 2009 through 2020 and that he never objected to any accounting within the 90-day statutory period. *See* Motion, Exhibit 3, NT000075. Further, it is undisputed that Lewis did not object or raise any claim in the 2020 in rem proceeding. *Id.*

In fact, Plaintiffs' Opposition does not dispute that in 2020 Lewis told the Court that he agreed Nevada Trust Company's ("NT") accountings should be deemed approved and final and that NT should be discharged. *See* Motion at 3:5-8 and Exhibit 2; *see also* Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, filed 2/6/24 ("Opposition"). By not objecting and having the accountings deemed approved and final and discharging NT in 2020, pursuant to NRS 165.1214(4), res judicata serves as a bar to any claims Lewis may have had against Defendants.

It is particularly salient that Plaintiffs' Opposition does not dispute, and in fact, admits, that in May of 2019 Lewis was made aware by his lawyers of his "potential claims" against Defendants, which was well over a year prior to the 2020 in rem proceeding. *See* Opposition at 20:26-28. Despite admitting to being so aware of his potential claims, and despite being represented by counsel in the 2020 legal proceeding, Lewis did not raise any of the objections (i.e., claims) he now raises and did not object to NT being discharged in 2020 but in fact agreed to it. *See* Opposition at 13:22-24; Motion at Exhibit 2.

Given the matters set forth in the 2020 proceeding were approved and deemed final and involve the same matters Plaintiffs are attempting to re-litigate now (the depletion of the trust), the order discharging NT is res judicata and bars the claims asserted in this action.

Even if, *arguendo*, the 90-day statute of limitations for each accounting, or the 2020 order discharging NT pursuant to NRS 165.135 and 165.1214, were simply ignored, Plaintiffs' claims would also be barred by their respective statute of limitations. Otherwise, Plaintiffs would also have the same claims against every trustee who invaded and depleted any principal of the trust, for any reason, going back over 30 years.

Finally, Plaintiffs' breach of contract and breach of the implied covenant claims fail as a matter of law since lawsuits that arise out of a trust relationship are not suits arising out of a contract and instead arise out of a fiduciary relationship.

II. LEGAL STANDARD

Once the moving party meets its burden of demonstrating an absence of evidence to support the non-moving party's case, the burden shifts to the non-moving party to set forth specific facts demonstrating that there exists a genuine issue of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554 (1986). The non-moving party must raise factual disputes which are material. *Id*. A failure to show that a dispute of material fact exists effectively "renders all other facts immaterial." *Id.* at 323, 106 S. Ct. at 2552.

A "genuine issue of material fact is one where the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Posadas v. City of Reno*, 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993). But the non-moving party cannot build its case on "gossamer threads of whimsy, speculation and conjecture." *Id.* at 452; *see also Garvey v. Clark County*, 91 Nev. 127, 130, 532 P.2d 269, 271 (1975) (holding that mere allegations are insufficient to defeat summary judgment). Thus, "[a]lthough evidence presented in support of a motion for summary judgment is to be construed in the light most favorable to the nonmoving party, [the non-moving] party must set forth facts demonstrating the existence of a genuine issue in order to withstand a disfavorable summary judgment." *Sustainable Growth Initiative Committee v. Jumpers, LLC*, 122 Nev. 53, 61, 128 P.3d 452, 458 (2006).

Plaintiffs' Opposition fails to set forth specific facts demonstrating that there exists a genuine issue of material fact for trial.

III. LEGAL ARGUMENT

A. Plaintiffs' Fail to Raise any Factual or Legal Argument that Demonstrates Res Judicata Does Not Apply to Plaintiffs' Action and Defendants are Entitled to Summary Judgment Since the 2020 Order Approving the Petition is Final and Binding on Plaintiffs' and Defendants.

All of Plaintiffs' causes of action are barred by NRS 165.1214, the 2020 order discharging NT and the doctrine of res judicata. Plaintiffs' Opposition fails to provide any legal or factual citation to dispute this legal argument. Instead, Plaintiffs argue (1) this Court rejected the res judicata argument at the motion to dismiss stage, (2) that there is no order of any court that supports "this entire argument", (3) that Judge Gloria Sturman's Order on the Petition discharging NT is also a

basis to ignore Judge Sturman's Order, and (4) that the filing of the Petition was somehow born out of a "ruse". *See* Opposition at 11:16-14:25. Plaintiffs' arguments fail for the following reasons:

a. Defendants are Entitled to Present Their Full Legal Argument at Summary Judgment.

Regarding Plaintiffs' argument (1) that this court rejected the res judicata arguments at the motion to dismiss stage, the Court's order on the motion to dismiss does not contain any language that "rejects" the legal arguments that Plaintiffs' causes of action are barred by NRS 165.1214, the 2020 order discharging NT and the doctrine of res judicata. *See* Order Granting in Part and Denying in Party Motion to Dismiss Plaintiffs' Amended Complaint and Granting Leave to Amend, filed herein on 1/25/23. In addition, while there was a discussion of Judge Sturman's order at the hearing on the motion to dismiss, there was no ruling by this Court that "rejected" any of these arguments. *See* Plaintiffs' Appendix, 2/7/24, Exhibit B.

Even though Defendants' motion to dismiss was essentially denied, Defendants are entitled to present their full legal argument to the Court at summary judgment. *See Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 825, 407 P.3d 702, 710 (2017) (Party who has motion to dismiss denied, "will have further opportunity to present its full legal argument to the district court at summary judgment").

b. Nevada Law and Related Case Law Demonstrates Res Judicata Applies.

Regarding Plaintiffs' argument (2) that there is no order of any court that supports "this entire argument", first, Plaintiffs fail to cite any legal authority to support their argument. Moreover, "Res judicata applies to probate cases." *McGuire v. Lear*, 602 F. Supp. 1385, 1387 (D. Nev. 1985) (citing *Matter of Estate of Firsching*, 94 Nev. 252, 578 P.2d 321, 322 (1978)). "The effect of res judicata is explained as follows: 'A judgment on the merits by a proper court will operate to bar every matter offered and received to sustain or defeat the claim and every other matter which might with propriety have been litigated and determined in that action in subsequent litigation between the parties or their privies involving identical causes of action.'" *McGuire*, 602 F. Supp. at 1387 (citing *Bissell v. College Development Co.*, 89 Nev. 558, 517 P.2d 185, 187 (1973)).

/ / /

In addition, based on the plain meaning of NRS 165.1214(4), "approved and final" means: if a beneficiary, who received an account, did not object to it within the 90-day time period allowed, or if you have a court order deeming the accountings approved and final, then the beneficiary cannot come back later and present an objection to distributions that were contained in the accountings.[1] NRS 165.1214(4) states this as follows:

> An account must be deemed **approved and final** as follows:
>
> (a) By **a beneficiary who received a copy of the account if no written objection is delivered to the trustee in accordance with subsection 2 within 90 days** after the date on which the trustee provided the account to that beneficiary; or
>
> (b) By all beneficiaries who are not required to receive an account, such as nonvested and contingent beneficiaries, remote beneficiaries, minor beneficiaries, and unborn or unknown beneficiaries **if the account is deemed approved and final by a beneficiary who has a similar, but preceding interest, in the trust estate**, in conformance with NRS 164.038, or as to any beneficiary who has waived an account pursuant to NRS 165.121.
>
> Notwithstanding the foregoing, if an account is submitted to the court for approval under a petition pursuant to chapter 164 of NRS, the account must **be deemed final and approved upon by order of the court**, subject only to the right of an interested person to appeal.

NRS 165.1214(4) (emphasis added).

Further, the following order demonstrates res judicata applies in this situation. In the case of *In re Tr. By Bush*, 249 Minn. 36, 50, 81 N.W.2d 615, 624 (1957), it shown that it is well settled that a trustee has a right to insist that the trustee's accounts be settled by the proper court, as follows:

> Not only can the trustee be compelled to give an account of his trust administration, but he himself as trustee has an interest in the settlement of his accounts and **has a right to insist that the accounts shall be examined and settled by the proper court**. **This right is important to the trustee since a settlement gives him protection against further litigation with respect to matters in the accounting and give him the defense of res judicata as to those matters**.

(emphasis added) (citing Restatement, Trusts, §§ 172 and 260; 4 Bogert, Trusts and Trustees, § 969; 3 Scott, Trusts (2 ed.) § 260; Lewin, Trusts (15 ed.) pp. 403, 404).[2]

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[1] "It is well established that when the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it." *Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 225, 19 P.3d 245, 247 (2001). The plain meaning of a statute is generally "ascertained by examining the context and language of the statute as a whole." *Karcher Firestopping v. Meadow Valley Contractors, Inc.*, 125 Nev. 111, 113, 204 P.3d 1262, 1263 (2009).

[2] *See also In re Bailey's Tr.*, 241 Minn. 143, 157, 62 N.W.2d 829, 838 (1954) ("In a trustee's accounting, the 'matters' involved include the transactions set forth in the trustee's account and the petition for the allowance thereof and the

Therefore, since NT's accountings were deemed approved and final, by Lewis and the Court in 2020, Defendants are protected from any further litigation under the defense of res judicata. *See supra and see also* NRS 164.015(6) ("The order is final and conclusive as to all matters determined and is binding in rem upon the trust estate and upon the interests of all beneficiaries"); NRS 165.141(5)("A beneficiary is not entitled to demand an account pursuant to this section if the accounting period for which the demand is made is deemed final pursuant to subsection 4 of NRS 165.1214").[3]

c. Judge Sturman's Order Approved the Petition, Deemed NT's accountings Approved and Final, Discharged NT as Trustee and, Therefore, Is Res Judicata and Bars This Action.

Plaintiffs improperly argue (3) that Judge Gloria Sturman's Order is a basis to ignore Judge Sturman's Order, the law cited in the Order, and the legal doctrine of res judicata. *See* Opposition at 11:26-12:7. The only basis for this argument is the citation to the Order where it states as follows: "IT IS FURTHER ORDERED that nothing in this Order be construed as a release of potential liability except to the extent provided by NRS 165.135 and 165.1214." *See id.* However, Plaintiffs fail to explain what the plain meaning of that sentence is and how applying the doctrine of res judicata would render that section of the Order superfluous, if at all.

In addition, Plaintiffs conveniently leave out the entirety of Judge Sturman's Order where the Court ruled that NT "provided unrefuted testimony that accounting statements were generated, printed and mailed via first class mail regularly to Lewis by the 5th of the month subsequent to the end of the statement cycle." Motion, Exhibit 3, NT000075. Judge Sturman's Order also found that Lewis received the accounting statements covering the period from July 9, 2009 through July 21,

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objections thereto, if any. The pleadings consist of the account and the petition on the one side and of the objections thereto on the other. *Matter of Hearns*, 214 N.Y. 426, 108 N.E. 816. The issues are framed by the account and the petition and the objections thereto as the pleadings in an accounting proceeding. 4 Bogert, Trusts and Trustees, § 969, p. 2820. Here, since there were no objections to the annual accounts, the matters determined by the orders allowing the annual accounts were those put in issue by the accounts and the petitions for the allowance thereof filed by the trustees."); *Fraser v. Se. First Bank*, 417 So. 2d 707, 712 (Fla. Dist. Ct. App. 1982) ("The correctness of the amounts distributed, as well as the fact of their distribution are concluded by the prior accountings."); *In re Swart's Estate*, 332 Mich. 404, 409, 51 N.W.2d 903, 905 (1952) ("This Court has repeatedly held that in the absence of fraud or concealment an order by the probate court approving the account of a fiduciary is final."); *In re Estate of Gray*, 9 Mich. App. 262, 271, 156 N.W.2d 594, 599 (1967) ("an order of the probate court allowing an account of an executor or administrator is an adjudication and the general rules of *res judicata* are applicable").

[3] Plaintiffs' Opposition failed to address the legal authorities cited in the Motion at 13:21-15:11.

2020 (the entire 11 year period covering NT's time as trustee) and the Court found that no objections were ever received and that Lewis had no objection. *Id.* As a result, Judge Sturman discharged NT as trustee and relieved NT of any continuing duties. *Id.* at NT000076. Likewise, Judge Sturman deemed all of NT's accountings "approved and final". *Id.* Plaintiffs do not dispute that these are the findings and orders as contained within Judge Sturman's Order.

As a result, it is undisputed that Judge Sturman deemed NT's accountings approved and final under NRS 165.135 and 165.1214, and, as a result, pursuant to NRS 165.135 and 165.1214, Plaintiffs' claims are now barred under the doctrine of res judicata. *See* Motion at 13:21-15:11; and *supra.*

d. Nevada Trust was Entitled to Petition for Discharge.

Plaintiffs frivolously argue (4) that the act of filing the 2020 Petition itself was somehow born out of a "ruse". *See* Opposition at 14:12-16. More specifically, Plaintiffs argue that Defendants created a "ruse" "to allow them to continue to represent Nevada Trust and buying a few more days to file their 'In Rem Proceeding'" and that NT did this on July 22, 2020, when NT provided Lewis' counsel with an email stating that the June 17, 2020 letter from Lewis' counsel was not adequate notice of removal and nomination from Lewis. *See id.* However, the July 22, 2020 email was far from any ruse. If it were a "ruse", then it would make no sense for NT to tell the Court about the ruse in the Petition, as follows:

> On or about Friday, July 17, 2020, the Petitioner received a letter from the law firm of MacDonald Wilde, LLC purporting to represent Lewis. *See* July 17, 2020 letter, a true and correct copy of which is attached hereto as Exhibit 3. The July 17, 2020 letter stated that Lewis was removing Petitioner as Trustee and appointing MacDonald & Associates as the successor trustee. *See id.* The July 17, 2020 letter did not include any confirming documents executed by Lewis affirming the representations in the letter.
>
> On July 21, 2020, Petitioner, through its counsel, requested that Lewis provide a signed and dated removal and nomination and advised that, with the receipt of such, Petitioner would cooperate fully with the transition desired by Lewis.
>
> On July 23, 2020, Petitioner, through its counsel, received a formal statement of removal and nomination [sic] have been received from the beneficiary, Lewis. *See* the Removal an Nomination, a true and correct copy of which is attached hereto as Exhibit 4.

See Motion, Exhibit 1, NT000003, NT000045, NT000047. Thereafter, on July 27, 2020, NT filed the Petition. *See* Motion, Exhibit 1, NT000001-NT000013.

When Lewis filed his two-page response to the Petition, there was no mention of any "ruse". *See* Motion, Exhibit 2, NT000069-NT000070. In addition, the Order approving the Petition found that, indeed, the "July 17, 2020 letter did not include any confirming documents executed by Lewis affirming the representations in the letter." *See* Motion, Exhibit 3, NT000074. Therefore, it is simply frivolous for Plaintiffs to argue that it was a "ruse".

Further, it is well settled that NRS Chapter 153 permits probate courts to retain jurisdiction over testamentary trusts for the purpose of the settlement of accounts and for the distribution of the residue to those entitled to it. *Diotallevi v. Sierra Dev. Co.*, 95 Nev. 164, 165, 591 P.2d 270, 270 (1979); *see also Hannam v. Brown*, 114 Nev. 350, 362-63, 956 P.2d 794, 802 (1998) ("A district court's order regarding distribution or administration of trust funds will generally not be disturbed unless it clearly demonstrates an abuse of discretion.") (citing *Diotallevi*, 95 Nev. 164*; Abel v. Lowry*, 68 Nev. 284, 231 P.2d 191 (1951)).[4] More specifically, pursuant to NRS 153.031, a "trustee or beneficiary may petition the court regarding any aspect of the affairs of the trust", including the following:

> (f) Settling the accounts and reviewing the acts of the trustee, including the exercise of discretionary powers;
>
> (g) Instructing the trustee; […]
>
> (j) Fixing or allowing payment of the trustee's compensation, or reviewing the reasonableness of the trustee's compensation;
>
> (k) Appointing or removing a trustee;
>
> (l) Accepting the resignation of a trustee;
>
> (m) Compelling redress of a breach of the trust; […]
>
> (q) Compelling compliance with the terms of the trust or other applicable law[.]

Therefore, it is undisputed that as soon as Lewis made the proper request to terminate and replace NT as trustee, that NT had the right to have the accounts examined and settled by the Court in order to give NT protection against further litigation with respect to the matters in the accounting and give NT the defense of res judicata as to those matters.

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[4] "In Nevada, probate matters are considered to be civil actions and subject to the laws and rules relating to civil cases." *McGuire*, 602 F. Supp. at 1387 (citing *Peters v. Peters*, 92 Nev. 687, 557 P.2d 713, 715 (1977); NRS 155.180). "A court sitting in probate may exercise the full panoply of its equitable powers in a case where it has subject matter jurisdiction." *McGuire*, 602 F. Supp. at 1387 (citing *Diotallevi*, 591 P.2d at 272).

B. Res Judicata Applies to the Instant Probate Proceedings.

As cited above, "Res judicata applies to probate cases." *McGuire v. Lear*, 602 F. Supp. 1385, 1387 (D. Nev. 1985) (citing *Matter of Estate of Firsching*, 94 Nev. 252, 578 P.2d 321, 322 (1978)). Despite this being clearly stated in the law, Plaintiffs argue res judicata does not apply because the action was "in rem" and not "in personam". *See* Opposition at 15:13-16. However, Plaintiffs fail to provide any direct legal support for this argument.

In contrast, in the context of "in rem" probate proceedings, the Nevada Supreme Court has addressed the doctrine of res judicata as follows:

> A judgment on the merits by a proper court will operate to bar every matter offered and received to sustain or defeat the claim and every other matter which might with propriety have been litigated and determined in that action in subsequent litigation between the parties or their privies involving identical causes of action. The test of a cause of action for res judicata purposes is the identity of facts essential to maintain the two suits; if the facts show only one right of the plaintiff and one wrong by the defendant involving that right there is only one cause of action.

Bissell v. Coll. Dev. Co., 89 Nev. 558, 561, 517 P.2d 185, 187 (1973) (citing *Tomiyasu v. Golden*, 81 Nev. 140, 400 P.2d 415 (1965)).

In *Bissell*, Mary Harvey was the owner of 160 acres in Clark County, Nevada. In 1950 she willed her estate to heirs. However, prior to her death she lost the property for non-payment of taxes. Subsequently, someone forged a deed and was allowed to redeem the property. The then current titleholders had no knowledge of the prior forgery and when the forgery was brought to their attention they brought a quiet title action and judgment was in their favor.

Under the above res judicata analysis, the *Bissell* court found res judicata applied since the "one right that is the subject of the action" was "the interest in the disputed property" and that "[a]ll of the claims alleged by the heirs derive[d] from a claimed interest in that property." *Bissell*, 89 Nev. at 561, 517 P.2d at 187. The *Bissell* court also noted that "[t]agging the facts with the label of conspiracy does not alter the thrust of the lawsuit." *Id.*

Similarly, here, all of Plaintiffs' causes of action are based upon their interest in the corpus of the trust and depletion thereof from 2009 to 2020. Despite Plaintiffs "tagging" the facts with all the differing labels and claims in the Opposition and the Complaint, such labels and claims does not alter the thrust of the lawsuit. Here, both the 2020 lawsuit and the present suit are predicated upon

Lewis' interest in and right to the corpus of the trust. Manifestly, the facts essential to the maintenance of both suits are identical; therefore, both suits involve but one cause of action and accordingly, the 2020 Order is a final judgment on the merits and the 2020 lawsuit "bars subsequent litigation involving any matter which was or might, with propriety, have been litigated therein." *In re Estate of Firsching*, 94 Nev. 252, 255, 578 P.2d 321, 322 (1978) (citing *Bissell v. College Development Co.*; *Tomiyasu v. Golden*, 81 Nev. 140, 400 P.2d 415 (1965); *Reno Club v. Harrah et al.*, 70 Nev. 125, 260 P.2d 304 (1953)). Since the claims brought in this action could have been tendered in the former 2020 action and Lewis having failed to do so, Plaintiffs are barred from litigating this matter in the present suit. *See Olson v. Iacometti*, 91 Nev. 241, 533 P.2d 1360 (1975); *Reno Club v. Harrah et al.*, cited above.

C. The 2020 Order is Binding In Rem Upon the Trust Estate and All Beneficiaries.

Plaintiffs erroneously argue Lewis was not a party to the in rem proceeding and therefore res judicata does not apply to Plaintiffs' claims. *See* Opposition at 16:5-11. However, NRS 164.010(1) confers in rem jurisdiction on the district court over trust property in all trust administration actions. *See also* NRS 164.015 (providing the district court with plenary authority to order any "appropriate relief" with respect to "the administration and distribution of trusts, the declaration of rights and the determination of other matters involving trustees and beneficiaries of trusts," including relief set forth in NRS 153.031). Moreover, NRS 164.015(6) provides that a district court's order in a trust administration action is "binding in rem upon the trust estate and upon the interests of all beneficiaries." A "proceeding in rem is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants." *Chapman v. Deutsche Bank Nat'l Trust Co.*, 129 Nev. 314, 318, 302 P.3d 1103, 1106, (2013) (citing *Pennoyer v. Neff*, 95 U.S. 714, 734 (1877), *overturned in part on other grounds by Shaffer v. Heitner*, 433 U.S. 186, 205-06 (1977); *see also* Restatement (Second) of Judgments §§ 6, 30 (1982) (recognizing that, when an action is in rem, the resulting judgment applies against the whole world).

Therefore, the 2020 in rem proceeding does apply to Plaintiffs' claims and this action is barred by the doctrine of res judicata.

D. NRS 165.1214(4)(a)'s 90 Day Statute of Limitations Bars this Action.

The plain language of NRS 165.1214(4)(a) provides a 90 day statute of limitations within which Lewis had to object to each accounting or the accounting would be deemed approved and final. Without providing any legal support, Plaintiffs baldly argue that allowing such a statute of limitations to stand would render NRS 11.190 meaningless and produce "absurd" and "unreasonable" results. *See* Opposition at 17:3-12. Plaintiffs also argue such a statute would deny them due process. *See id.*

However, the limitation periods described in NRS 11.190 may be "further limited" by "specific statute", such as NRS 165.1214(4)(a), and the Nevada Supreme Court has upheld a similar 90-day limitations period. *See* NRS 11.190 ("Except as otherwise provided in NRS 40.4639, 125B.050 and 217.007, actions other than those for the recovery of real property, **unless further limited by specific statute**, may only be commenced as follows") (emphasis added); *see also Crane v. Cont'l Tel. Co.*, 105 Nev. 399, 400, 775 P.2d 705, 705 (1989) (Nevada Supreme Court upheld 90 day limitations period as not being violative of due process).

Therefore, Plaintiffs claims are barred by the 90-day statute of limitations contained in NRS 165.1214(4)(a).

E. Plaintiffs' Claims are Barred by The Statutes of Limitations Applicable to Each Claim.

Again, even if, assuming arguendo, we were to ignore 165.1214(4)(a), the in rem proceeding and the resulting 2020 Order Approving the Petition, Plaintiffs' claims are also barred by the applicable statutes of limitation for each claim.

1. <u>Breach of Fiduciary Duty, Alter Ego, Aiding and Abetting, Injury to Vulnerable Person and Violation of NRS 628A Claims are Limited to Three Years before Suit was filed</u>.

Plaintiffs do not dispute that these claims are subject to a 3-year statute of limitations. *See* Opposition at 20:26-21:3. Plaintiffs admit that Lewis was made aware of these potential claims no later than May 16, 2019. *See id.* at 20:26-27. Therefore, there is no dispute the applicable period of limitations began to run from, no later than, May 16, 2019, the date Plaintiffs admit the cause of

action accrued. *See Clark v. Robison*, 113 Nev. 949, 951 (1997) ("A cause of action 'accrues' when a suit may be maintained thereon.").

Nevertheless, Plaintiffs believe there is no time limit to their claims and that they reach far beyond the three-year statute of limitations and go all the way back to 2009 and cover the entire 11-year period that NT served as trustee. *See* Opposition at 20:22-22:20. If Plaintiffs argument were followed, then Plaintiffs' claims would not only cover NT's time as trustee but to every distribution from every trustee of the trust where principal was depleted, including in 1993 when the trustees invaded principal due to Lewis' poor financial decisions and warned Lewis that such behavior "might destroy the Trust in a few months or a few years". *See* Motion at 4:11-14 and Exhibit 8 StoelRives 3, 35, 565.

In addition, Plaintiffs' Opposition fails to point to any specific distribution from the trust, within the three-year statute of limitations, that fits within any of these claims. Instead, Plaintiffs merely argue their claims "for the depletion of principal" go "back as far as 2009 and continuously moving forward". *See* Opposition at 22:18-20. As a result, Plaintiffs have not produced and cannot point to any admissible evidence within the three-year statute of limitations period which would entitle them to any relief.

Therefore, as a matter of law, Plaintiffs' claims are time barred, according to the three-year statute of limitations.

2. <u>Plaintiffs' Negligence, Gross Negligence and Concert of Action Claims</u>.

Plaintiffs' admit these claims were filed well after the statute of limitations expired. *See* Opposition at 23:18-20. Despite this admission, Plaintiffs go on to baldly argue that "a trier of fact" could consider the 2020 litigation constituted Negligence, Gross Negligence and Concert of Action "as an alternative finding to Defendants' Breach of Fiduciary Duty bringing those claims within the two years of discovery." *See id.* at 23:21-24. Plaintiffs provide no factual or legal support for this argument, as there is no such support.

Therefore, these claims are barred by the statute of limitations since they were not brought within the limitations period.

/ / /

3. Misrepresentation.

Plaintiffs' misrepresentation claim arises from frivolous allegations that prior to and during the transfer from Whittier to NT, in 2009, and an ambiguous "continually thereafter", Defendants made false representations about their role and abilities to serve as trustee between September 28, 2009 and September 6, 2020. *See* Amended Complaint at ¶¶ 101-110. More specifically, Plaintiffs allege "Defendants made false representations to Plaintiffs that NEVADA TRUST would be a fiduciary devoted to settlor's wishes and the terms of the LIFETIME TRUST." *Id.* at ¶ 103. In addition, Plaintiffs allege "Defendants made false representations that the LIFETIME TRUST corpus would be protected and sustained as it had been by the previous trustee". *Id.* at ¶ 106. Thus, the true nature of Plaintiffs' misrepresentation claim revolves around alleged misrepresentations that were made prior to the transfer from Whittier to NT in 2009. Therefore, as a matter of law, this claim is time barred by the statute of limitations.

Further, Plaintiffs do not dispute Plaintiffs' misrepresentation claim is subject to a three-year statute of limitations for intentional misrepresentations and four-years for negligent misrepresentations. Therefore, Plaintiffs' misrepresentation claim is barred as a matter of law for any alleged conduct that occurred prior to May 13, 2019 for intentional misrepresentations and prior to May 13, 2018 for negligent misrepresentations. Plaintiffs' Opposition does not dispute this.

Moreover, Plaintiffs' Amended Complaint, and now Plaintiffs' Opposition, fails to demonstrate any conduct that occurred between May 13, 2018 (or May 13, 2019) and May 13, 2022, which could support a claim for misrepresentation, whether negligent or intentional. Not only is Plaintiffs' frivolous misrepresentation claim barred for any alleged conduct that occurred before May 13, 2018 for negligent misrepresentation or May 13, 2019 for intentional misrepresentation, Plaintiffs have not produced and cannot point to any admissible evidence within the four or three years prior to filing the original complaint on May 13, 2022 which would entitle them to any relief as a matter of law.

Instead, in an attempt to avoid summary judgment, Plaintiffs attempt to move the target on the misrepresentation claim by arguing "Defendants either intentionally or negligently omitted to disclose that they lost their Banking License in 2010 just after the signing of the July 28, 2009

Agreement for the Services of Nevada Trust to become Trustee." *See* Opposition at 24:1-4. First, this argument makes no sense, since Lewis chose NT to be trustee in 2009 and Southwest USA Bank, which is not related to NT, was closed in 2010. https://archive.fdic.gov/view/fdic/3993.[5] Therefore, Plaintiffs' argument should be dismissed out of hand.

Second, Plaintiffs do not cite to any material evidence or legal authority to support the argument that NT had an obligation to inform Lewis in 2010, or at any time, that an unrelated entity, such as Southwest USA Bank was closed.[6] Also, Plaintiffs fail to demonstrate the existence of any actual fraud, omission or misrepresentation, at any time, by any Defendant, regarding that unrelated bank being closed by regulators.

Third, the October 10, 2019 Administrative Consent Order came 10 years after Lewis chose NT to be trustee, and again, Plaintiffs fail to point to any legal requirement that NT was required to inform Lewis of the consent order or it would be considered a misrepresentation. Further, Plaintiffs fail to demonstrate the existence of any actual fraud, omission or misrepresentation, at any time, by any Defendant, regarding the 2019 consent order.

Therefore, again, Plaintiffs' misrepresentation claim is barred as a matter of law for any alleged conduct that occurred prior to May 13, 2019 for intentional misrepresentations and prior to May 13, 2018 for negligent misrepresentations. Plaintiffs' Opposition does not dispute this.

4. Securities Act.

Plaintiffs acknowledge this claim was filed beyond the two-year statute of limitations. *See* Opposition at 24:24. Therefore, the claim should be dismissed. Nevertheless, Plaintiffs maintain, "Defendants continued to sell off the last remaining stocks and securities left in the Trust as late as June 2020". *See id.* at 24:26-25:1. Since securities act violations under NRS 90 are subject to a two-year statute of limitations under NRS 90.670, therefore, Plaintiffs' claim is time barred for any conduct prior to May 13, 2020, when Plaintiffs filed the original complaint herein.

[5] Such documents are subject to judicial notice pursuant to NRS 47.130(2)(b) since they are public records "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute." *See Jory v. Bennight*, 91 Nev. 763, 766, 542 P.2d 1400, 1403 (1975).

[6] Also, SouthwestUSA Bank was the 102nd FDIC-insured institution to fail in the nation in 2010, and the fourth in Nevada. *See* https://archive.fdic.gov/view/fdic/3993.

5. Unjust Enrichment.

Plaintiffs admit this claim is subject to a four-year statute of limitations. *See* Opposition at 25:6. Instead of addressing the Motion on this claim, and without explanation, Plaintiffs argue they have plead this claim in the alternative, per NRCP 8(d)(2). *See id.* at 25:7-8. Plaintiffs also argue, without explanation, that they brought this suit within four years of the May 16, 2019 Fennemore memorandum. *See id.* at 25:8-9. As a result, Plaintiffs' unjust enrichment claim is barred as a matter of law for any alleged conduct that occurred prior to May 13, 2018.

F. Plaintiffs' Breach of Contract and Breach of the Implied Covenant Claims are Not Properly Before the Court.

There is no actual dispute that the breach of contract and breach of the implied covenant claims are also barred as a matter of law since lawsuits that arise out of a trust relationship are not suits arising out of a contract. Despite this clear and undisputed fact, Plaintiffs argue the "instant case is an exception and the Court should deny summary judgment". *See* Opposition at 25:16-17. However, Plaintiffs provide no legal authority that allows any such exception.

In fact, Plaintiffs fail to address the fact that the Complaint alleges the basis for the breach of contract claims is based upon the "terms and duties outlined in the LIFETIME TRUST". *See* Amended Complaint, ¶¶ 129, 136 and 164. In other words, there is no dispute that the entire basis for the breach of contract claims, as alleged in the Complaint, is the trust instrument, which is not a contract between Defendants and Plaintiffs. Moreover, Plaintiffs do not dispute that the trust is not a contract.

Further, Plaintiffs do not dispute the law that says Plaintiffs breach of contract and breach of the covenant claims fail as a matter of law if the claims are based upon the trust itself. *See In re White*, 61 B.R. 388, 395 (Bankr. W.D. Wash. 1986) ("the Trust is not a contract"); *In re Newman-Pauley Residential Trust*, 2014 Ariz. Super. LEXIS 2064, *14 ("The trust is not a contract. **'[S]uits that arise out of a trust relationship are not suits arising out of a contract**'") (emphasis added) (citing *In re Naarden Trust*, 195 Ariz. 526, 530, 990 P.2d 1085, 1089 (Ct. App. 1999), as amended (June 16, 1999)); *Moore v. Kieber (In re Naarden Tr.)*, 195 Ariz. 526, 530, 990 P.2d 1085, 1089 (Ct. App. 1999) ("the undertaking between the settlor and trustee is not properly characterized as

contractual"… "Therefore, although the trustee may be liable for a breach of fiduciary duties, its undertakings or promises in a trust instrument are not normally 'contractual.'").

Plaintiffs ignore the above-cited case law and arguments and move away from arguing the terms of the trust serve as the basis for the breach of contract claims and argue that NT's "Schedule of Fees" for NT's "Trust Administration Services" is now the basis for the breach of contract claims. *See* Opposition at 25:24-26:16, Exhibit f at DEFS011884-11885. However, the fee schedule is just that, a fee schedule, for the fiduciary duties NT performed on behalf of the trust and the beneficiary. It is not a contract for services between the parties. The fee schedule is simply the fee schedule for the trustee services.

Therefore, the breach of contract and breach of the implied covenant claims are barred as a matter of law since lawsuits that arise out of a trust relationship are not suits arising out of a contract but are for breach of fiduciary duty.

G. The "Clawback Documents" are Privileged and Irrelevant to Summary Judgment.

Plaintiffs argue that "clawback documents" preclude summary judgment without showing how they preclude summary judgment. *See* Opposition at 26:21-28:18. Instead, Plaintiffs generally argue that without the documents the Court will not have a clear picture of Plaintiffs' claims. *Id.* More specifically, Plaintiffs argue that the "clawback documents" demonstrate Defendants and their attorneys conspired to "cut off the legal rights of Lewis by way of the "In Rem" proceeding." *See id.* at 27:23-28:1. However, as demonstrated more fully above, NT was entitled to file the Petition to have its accounts settled and to be discharged. As stated in *In re Tr. by Bush*, 249 Minn. 36, 50, 81 N.W.2d 615, 624 (1957), it is well settled that a trustee has a right to insist that the trustee's accounts be settled by the proper court, as follows:

> Not only can the trustee be compelled to give an account of his trust administration, but he himself as trustee has an interest in the settlement of his accounts and **has a right to insist that the accounts shall be examined and settled by the proper court**. **This right is important to the trustee since a settlement gives him protection against further litigation with respect to matters in the accounting and give him the defense of res judicata as to those matters**.

(emphasis added) (citing Restatement, Trusts, §§ 172 and 260; 4 Bogert, Trusts and Trustees, § 969; 3 Scott, Trusts (2 ed.) § 260; Lewin, Trusts (15 ed.) pp. 403, 404).[7]

Even the request that Plaintiffs erroneously point to as evidence of breach of fiduciary duty contains a privileged communications with NT immediately prior to filing the Petition regarding whether or not NT had ever received an objection to any account statements. *See* Opposition at 28:3-10. Such a question is hardly evidence of any breach. Moreover, subsequently Lewis admitted during the in rem proceeding that he in fact never objected to any accounting statements and/or represented to the Court that he had no objection. *See* Motion, Exhibits 1, 2 and 3.

Therefore, since NT's accountings were deemed approved and final, by Lewis and the Court in 2020, Defendants are protected from any further litigation under the defense of res judicata.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request the Court grant the Motion for Summary Judgment.

DATED this 20th day of February, 2024.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

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[7] *See also In re Bailey's Tr.*, 241 Minn. 143, 157, 62 N.W.2d 829, 838 (1954) ("In a trustee's accounting, the 'matters' involved include the transactions set forth in the trustee's account and the petition for the allowance thereof and the objections thereto, if any. The pleadings consist of the account and the petition on the one side and of the objections thereto on the other. *Matter of Hearns*, 214 N.Y. 426, 108 N.E. 816. The issues are framed by the account and the petition and the objections thereto as the pleadings in an accounting proceeding. 4 Bogert, Trusts and Trustees, § 969, p. 2820. Here, since there were no objections to the annual accounts, the matters determined by the orders allowing the annual accounts were those put in issue by the accounts and the petitions for the allowance thereof filed by the trustees."); *Fraser v. Se. First Bank*, 417 So. 2d 707, 712 (Fla. Dist. Ct. App. 1982) ("The correctness of the amounts distributed, as well as the fact of their distribution are concluded by the prior accountings."); *In re Swart's Estate*, 332 Mich. 404, 409, 51 N.W.2d 903, 905 (1952) ("This Court has repeatedly held that in the absence of fraud or concealment an order by the probate court approving the account of a fiduciary is final."); *In re Estate of Gray*, 9 Mich. App. 262, 271, 156 N.W.2d 594, 599 (1967) ("an order of the probate court allowing an account of an executor or administrator is an adjudication and the general rules of *res judicata* are applicable").

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP and that on this 20th day of February, 2024, I served a true and correct copy of the foregoing **DEFENDANTS' REPLY IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT** as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;

☒ via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk;

☐ via hand-delivery to the addressees listed below;

☐ via facsimile;

☐ by transmitting via email the document listed above to the email address set forth below on this date before 5:00 p.m.

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BY: /s/ Tiffany Dube
An Employee of
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

Tupouata, Lotononga

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DARRYL LEWIS, Plaintiff, vs. NEVADA TRUST COMPANY, Defendant. AND RELATED PARTIES	)	CASE NO. A-22-852594-B DEPT NO. XXXI **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE JOANNA S. KISHNER, DISTRICT COURT JUDGE

TUESDAY, FEBRUARY 27, 2024

TRANSCRIPT OF HEARING RE:

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

PLAINTIFFS' MOTION FOR DETERMINATION OF DEFENDANTS' CLAIM OF PRIVILEGE AND CLAWBACK REQUEST

APPEARANCES:

FOR THE PLAINTIFFS AND TRUSTEE: GREGORY L. WILDE, ESQ.

FOR THE DEFENDANTS: ADAM P. McMILLEN, ESQ.

RECORDED BY: LARA CORCORAN, COURT RECORDER
TRANSCRIBED BY: JD REPORTING, INC.

Case Number: A-22-852594-B

LAS VEGAS, CLARK COUNTY, NEVADA, FEBRUARY 27, 2024, 8:49 A.M.

*** * * * ***

THE COURT: So let me call the case. Page 2 is Lewis versus Nevada Trust, 852594. Counsel...

MR. WILDE: Yes, Your Honor. Greg Wilde, Bar Number 4417, on behalf of the plaintiffs.

MR. McMILLEN: Good morning, Your Honor. Adam McMillen on behalf of defendants, and I have my client James Kriss here.

THE COURT: Okay. Thank you so much. So now whatever you need to do, perfectly fine, but you don't have anyone on Zoom; correct?

MR. WILDE: I expected both the clients on Zoom calling in.

THE COURT: Okay. Well, then --

MR. WILDE: I gave them the --

THE COURT: Okay. Let's see if they're there. As you heard, you all --

COURT RECORDER: That's why I was going to go back and have Tracy log in and see.

THE COURT: Okay.

MR. WILDE: I know the Court had its protocol changed mid-February.

THE COURT: Right. Our IT department changed. We all went from BlueJeans now to Zoom.

MR. WILDE: Sure.

THE COURT: February 12 for this department.

MR. WILDE: Sure.

THE COURT: Okay. So you've got two options. It appears some people may be having some challenges on Zoom, so we're fine. I can see if I can call another case while we're trying to figure that out, or we can pause for a few minutes to figure it out. I'm just trying to -- I don't think I have every party on my 9:00 o'clock matter. So I have a calendar call. I was going to try and take care of that if I had everyone, but I don't.

MR. WILDE: I have all morning. If the Court doesn't mind waiting a bit, I'm not --

COURT RECORDER: It should just be a second. I just need to go figure out --

THE COURT: Okay. So let's just go off the record for a few moments. We're going to pause. We're going to see if they can fix whatever the Zoom link is. Okay?

MR. McMILLEN: Thank you.

MR. WILDE: Thank you.

THE COURT: Appreciate it. Thanks.

(Proceedings recessed at 8:51 a.m., until 9:01 a.m.)

THE COURT: So after no further ado, we're now going to actually go to your case, page 2, Lewis versus Nevada Trust Company, 852594.

Counsels, can I have appearances, please.

MR. WILDE: Yes, Your Honor. Greg Wilde on behalf of the plaintiffs.

MR. McMILLEN: Good morning, Your Honor. Adam McMillen on behalf of the defendants with my client, James Kriss here as well.

MR. KRISS: Good morning.

THE COURT: Good morning.

Okay. So here's what we have. We have Plaintiffs' Motion for Determination of Defendants' Claim of Privilege and Clawback Request, and then I have an *ex parte* motion to vacate or continue the hearing on defendants' motion for summary judgment.

So, folks, I guess my first question to you is on the privilege/clawback. Technically -- I need a little bit of clarification because, technically, since this is a C case, not a B case, right, and generally it's a discovery issue except for the fact you're saying it's attached to certain documents that are technically before this Court. So can I get a two-minute explanation, if that's where you're going, on why it's before me versus discovery commissioner.

MR. WILDE: Your Honor, it's my understanding that all discovery issues when it comes to business court are before the Court instead of the discovery commissioner. That's -- that's always been my understanding. In addition, I didn't

consider it a discovery motion in the sense that we needed a meet and confer.

THE COURT: Okay. Here may be the issue, folks. I think it's -- I'm looking at your actual pleadings. Okay. Your pleadings, you put a C, not a B.

MR. WILDE: Okay.

THE COURT: When I was saying what I was saying is because I was looking at your pleadings. Your pleadings, you put C. C does not mean B. B means business court. C means general civil, and I see from both, right, you put the C on this which is what I was looking at rather than Odyssey, which is why I was going to ask the question of -- but Odyssey shows it's a B case.

MR. McMILLEN: I'm now realizing that, Your Honor.

THE COURT: Okay. So let's circle back. Inadvertently put C's rather than B's on pleadings. This is a business court case which is why it was set at 8:30. Yes, it would come before me regardless of which way it comes, so it's before me. Okay. That part's taken care of.

So let's get to the order in which you wish these to be heard because we have defendants' motion for summary judgment, Document 45; the opposition thereto, 53, the declaration in support of the opposition, Document 55; Taraska's declaration in support of plaintiffs' Opp, Document 56; defendants' reply, Document 60; and we have

plaintiffs' motion for determination of defendants' claim of privilege, Document 49; opposition thereto, 58; and plaintiffs' reply, 59.

So which order do you wish them to be heard? The Court understands which one makes more practical sense to me, but let's see what you all say. Go ahead.

MR. McMILLEN: I would say motion for summary judgment, Your Honor.

MR. WILDE: I would agree, Your Honor.

THE COURT: Okay. Then that's the one we're going to do first. That's defendants' motion for summary judgment, Document 45.

Go ahead, Counsel.

MR. McMILLEN: It's very simple, Your Honor. The undisputed facts are that from 2009 to the end of the trusteeship by Nevada Trust in 2020, Lewis never objected to any of the accounting. That's undisputed. Take it even a step further, in the 2020 *in rem* proceeding, Lewis did not object, and, in fact, agreed that the accounting should be deemed approved and final. As a result, this matter is barred by *res judicata* because Lewis could have brought the same claims he's bringing in this action in the 2020 action. It's really that simple, Your Honor.

And with that, we would submit.

THE COURT: Okay. Counsel, you have a different view

of this, not that simple.

MR. WILDE: Yes, Your Honor, and I expected a little more argument. One never knows how much to prepare. Would the Court like me to get into any of the factual issues or should we stick to the law to start out?

THE COURT: Realistically, it's a motion for summary judgment; right? You're saying there's material issues of fact in dispute. You're saying that there's a distinct difference and that this is not barred. So you have an opportunity to present what you think you wish to present, and then they'll have final word. Okay?

MR. WILDE: I'll do so, Your Honor. Thank you.

Again, Your Honor, as acknowledged by the defendants, this was set up as a lifetime trust. There's no dispute that when the Nevada Trust received the trust, there was 2.1 million. There's no dispute that there was income of about 1.6. So between 2009 and 2019, the trust essentially spent $3.7 million.

Today, I'm grateful that the Court needs to view the facts in the light most favorable to my client. The first seven pages of the motion for summary judgment tries to blame my client for continually coming back to the well and asking for money.

There's no dispute that my client properly pled the injury to vulnerable person. The docket -- excuse me, the

record is full. On page 5 and 6 of my motion, I point out several documents. They knew that my client was a vulnerable person. So the whole crux of my client's case is that grandma set up a trust. It was supposed to be for his lifetime, and it wasn't. $3.6 million was spent.

Your Honor, I have two daughter-in-laws and seven grandkids and I'm afraid of my daughter-in-laws. If they say don't give my kids ice cream but my kids come and ask me for ice cream -- my grandkids, and I say, no, I'm not going to give you ice cream, but then I keep giving them ice cream, I can't blame the kids. And so we know that my client is a vulnerable person.

As for the material specific facts, I point to Exhibit 7. Now, keep in mind that Exhibit 7 is essentially my client's deposition transcript taken by the defendants and all the documents that they showed him. They continually put in front of him emails -- email after email showing how much he spent, and this went on from -- I'm referring to page 202 of his deposition, which is Nevada Trust Bates stamp number 294. And on page 202, line 21, the question -- and they're referring to a budget they tried to put him on, line 21:

"Question: So that's at defendants' 481, but you and Wendy" -- who's the wife of my client -- "did not stick to the budget and spent over $215,000 on credit cards; correct?"

Okay. So they knew he spent 215,000 in credit cards

the first year.

Jumping over to the next page, page 203 of the transcript, line 12:

"On July 16th, 2010, you sent an email to Nevada Trust and you said you still wanted Nevada Trust to keep paying on the credit cards" -- that's defendants' 702 -- "Do you remember doing that?"

Your Honor, and there's no dispute. They just kept paying the credit cards. They would warn him and then they would keep paying the credit cards.

I don't want to belabor this issue, but going to the next page, it happened again in 2013, page 210 of the transcript, line 12, 2013. 2014, page 212, line 2, on November 24th, 2014, again, he's asking for more money. He's asking them to pay his credit cards. And it's my client's testimony that the credit card statements always went to -- always went to Nevada Trust, okay.

Your Honor, this alone what I've pointed out are plenty of material facts in dispute that would make it so the Court should deny their request for summary judgment.

Your Honor, we still need to take the deposition of the Defendant Kriss and defendant Kingman. I still need the source documents, copies of the checks to see what was paid.

Now into the legal argument, this isn't *res judicata*. First of all, it was an *in rem* proceeding, as we've argued in

the paper. That deals with the property of the estate. It's not an in personam where you have multiple parties coming before the Court under the idea of due process where there's a summons, a complaint, where there's responsive pleadings, where there's a trial, where there's discovery. That isn't what happened here.

Your Honor, it's important to know that when the Lewises brought me this case -- and these dates are important -- on June 17th, 2020, is when we sent the letter to Nevada Trust Services saying, hey, your services are no longer needed. We have a new trust, MacDonald -- a new trustee, MacDonald & Associates, turn over the trust, okay. They ignored us for a month.

We identified the new trustee. They asked for a second letter on July 22nd which we provided. We think it was a ruse. They needed my client's signature on the letter, they said. I told them as much when I sent that to them, so that was the second firing, okay. So the trustee was removed pursuant to the terms of the trust.

Instead, they filed the in rem action, okay. That was the only thing before the Court, was the in rem action, the property of the trust, okay.

The bottom of 15, I go into the difference between in rem and in personam.

THE COURT: Right.

MR. WILDE: If the Court will look at the pleading itself, the only party listed is Lifetime Trust. My client was not listed as a party, Darryl Lewis, neither was the new trustee, MacDonald & Associates. And, again, they had been fired a month or two previously.

So in respect to -- well, when they talk about res judicata, I'm assuming they're talking about NRS 165.135 and 165.121. If the Court buys this argument, that meets that statute which is a rolling 90-day statute, cuts off all liability for tortious conduct. It wipes out three-year statute of limitations, four-year statute of limitations, six years of statute of limitations, and that just can't be -- that would be an absurd result if the Court allowed that to happen.

Your Honor, they cite to three main cases in their reply. The first one is *McGuire versus Lear*. Okay. And it's important to have this distinction with the first two cases. The second case is the matter of *Estate of Firsching*, which is actually *Firsching versus Ferrara*. Those two cases are important. I looked at them. Again, they had dueling parties. The caption contained parties fighting against each other, a summons, a complaint, discovery, pleadings, okay.

Then the third case is out of Minnesota, In Re trustee [sic] by Bush, 249 Minnesota 36. Okay. It's a Minnesota case from 1957, okay, and they want this Court to follow that precedent out of Minnesota over 67 years ago for

the idea that proceedings in probate can lead to *res judicata*, which I agree. They can lead to *res judicata* when you have two dueling parties, not a summary proceeding.

I tried to read that case. First of all, it's impossible to read the way that they archaically wrote back then. I think it's older -- that case is older than anybody in this courtroom. Second of all, it's a Minnesota case. It's not a Nevada case. It's not a California case. It's not something out here closer. And, Your Honor, that case relies -- and as I read it, I could pick out that it relied on a Minnesota statute, MSA -- I'm assuming it stands for Minnesota annotated -- 501.33. So I looked at that statute to see if it compared to NRS 165, and it's been repealed in 1989, so I couldn't even -- couldn't even make a comparison.

So I hope the Court won't follow that precedent or what they're claiming it stands for and use a 90-day statute to cut off three, four, six year statute of limitations.

I cited in my brief at the bottom of 16 --

THE COURT: And, I mean, the Court's read everything, so can we kind of just --

MR. WILDE: Sure.

THE COURT: (indiscernible). Because where the Court's trying to get you to, right, is pretty much starting right on page 23 of your brief, right, your opposition. You seem to concede certain things were filed after certain statute

of limitations, but then you're trying to -- right, what you called the Fennemore Memorandum of 2019.

So, really, the Court was -- are you conceding? But then you say that there is some basis that somehow a vulnerable person status gets you to extend those but yet the issues of the actual trust corpus was in a 2020 proceeding. So I really was trying to get to the gist of where -- which claims you're saying actually do survive versus ones that you would concur might be barred by the statute of limitations versus the claimed preclusion that is being asserted.

MR. WILDE: Okay. Your Honor, again, the three-year statute of limitations, the main core, the --

THE COURT: Right.

MR. WILDE: -- breach of fiduciary duty, and when my client received the Fennemore Craig memo, okay, we did file this lawsuit within three years of the date of that memo. So we made it under the statute. It was close, but we made it. And there's a lot of different reasons people wait for statute of limitations, and we don't need to get into that.

THE COURT: No.

MR. WILDE: And I'm -- and, Your Honor, I don't know if the Court wants us to address how to calculate that. It's our position, as put in the brief that the statute of limitations preserves a claim as long as you file it timely. For some reason, they're arguing that it's a rolling statute

that you only go back three years. So, for example, we filed in 2022 --

THE COURT: Right, they're saying entry by entry, each issue or each distribution triggers its own statute of limitations, so you can't go back to 2010. Is that in essence what you're saying?

MR. McMILLEN: Yes, Your Honor.

THE COURT: Okay.

MR. WILDE: Your Honor, if I could, in my -- in the brief, I talked about the continuing tort --

THE COURT: Right. No, no, I understand you have different positions, but, I mean --

MR. WILDE: Again, Your Honor, this is their motion. I'm not sure what you want me to argue.

THE COURT: Whatever you want to.

MR. WILDE: Okay. All right. It's simple. My client filed the lawsuit timely under the continuing tort doctrine when he first found out from the Fennemore Craig memo that the corpus of the trust had been invaded since 2010 -- 2009. He brought the lawsuit, and we think that it should survive, okay.

Again, all the three-year statute -- the statutes of limitations regarding three years, four years for unjust enrichment, six years for a contract dispute, okay.

The bottom of page 23, the negligence and gross

negligence claims. The in rem proceeding took place in August of 2020. The lawsuit was brought in May of 2022, so we think we're in -- we think the in rem proceeding itself, as pled in the verified complaint, was a breach of fiduciary duty. They should have turned over the trust immediately.

The Court's indulgence.

THE COURT: Sure.

MR. WILDE: Again, unjust enrichment is four years.

And as far as the Securities Act, they continued to -- they continued to sell -- at least what I can tell from the statements, they continued to sell off assets until the trust was dissipated into the summer of 2022, and we filed our lawsuit -- or, excuse me, the summer of 2020, and we filed our lawsuit May of 2022, within the three years, and within the two years of that particular statute.

So with that, I'll be glad to answer any other questions the Court might have. I hope the Court agrees with us as far as how to calculate the statute of limitations.

In addition, that's a question of fact when my client knew. And I think my client -- because there's no dispute that he's a vulnerable person, he should be given even greater deference as to -- or the jury could give him greater deference as to when he knew or should have known about this breach.

And, Your Honor, one last thing. The defendants are the ones that first asked for a jury. I always planned on it,

but the defendants asked for it first.

Thank you.

THE COURT: Sure. I've got two quick questions for you. One, you made a reference that you still had a couple of depositions to take. I did not see any countermotion for 56(d) relief, nor all the requirements thereto. So when you made the reference to the depositions you need to take, is that -- that you're making a 56(d) because -- or what?

MR. WILDE: Well, I -- I may not -- I'd have to look through the pleadings, but I may have not referenced 56(d), but certainly I've made a lot of arguments that we still need those source documents, that we agreed to postpone those two depositions until the Court heard this motion, so, yes, under 56(d), I need -- I need that information for the Court to obtain a whole picture.

THE COURT: Okay. You get the last word, Counsel.

MR. McMILLEN: Thank you, Your Honor.

There's no other discovery that could be done that would change the decision that can be made today because based on the undisputed facts, as acknowledged by plaintiffs' counsel, even his client acknowledged in the complaints, both the original and the amended, and in the pleadings, he became aware of his potential claims in May of 2019. Whether he's a vulnerable person or not is actually a disputed fact. It's not part of the motion for summary judgment. The issue before the

Court is whether *res judicata* applies.

THE COURT: Well, those are two separate concepts; right?

MR. McMILLEN: Correct.

THE COURT: The first one is statute of limitations. The second one is vulnerable person aspect with regards to said statute of limitations. And the third one is *res judicata*, i.e., claim preclusion --

MR. McMILLEN: Correct.

THE COURT: -- right?

MR. McMILLEN: And that's the crux of this matter is claim preclusion because even if he was a vulnerable person, him and his counsel, who is the same counsel here today, was the same counsel in 2020, same counsel who filed the limited opposition to the petition in 2020, the same limited opposition that said, we agree Nevada Trust should be discharged; we agree that all the past account statements should be deemed approved and final as provided in NRS 165.135 and NRS 165.1214. There was no objection --

THE COURT: So how are you interpret -- sorry. I've got to stop you a second -- is how are you interpreting shall be deemed final? Because you're basically saying it's a waiver argument or it's a notice or a waiver argument depending on which way you're -- you've argued it kind of both ways, so...

MR. McMILLEN: Right. Meaning once they're deemed

approved and final, the beneficiary has an objective. The Court has deemed them final. That means you can't reopen the accountings and say, hey, I dispute this distribution or that distribution or any distribution within that accounting unless there's fraud, and there's no fraud that's been presented to this Court.

THE COURT: And the language of Judge Sturman that you quote, right, that it's not releasing anything other than specifically the 165, how does that --

MR. McMILLEN: Yeah, so --

THE COURT: -- assist you in your motion?

MR. McMILLEN: So I think what you're pointing to is this statement from Judge Sturman: It is further ordered that nothing in this order be construed as a release of potential liability except to the extent provided by NRS 165.135 and NRS 165.1214 and pursuant to those statutes, once the accountings are deemed approved and final, that forecloses all liability for those accountings. So the beneficiary can't go back at a later time and object to those accountings. That's the plain meaning of the statute.

THE COURT: Then what are you contending as a matter of law this Court should be ruling that Judge Sturman's statement, right, nothing precludes, right, any liability other than? Doesn't it make that sentence a nullity if you're saying 165 subsumes all; so, therefore, wouldn't that statement be a

nullity?

MR. McMILLEN: Obviously, I've thought a lot about this, Your Honor, since our last hearing --

THE COURT: Because I kind of asked that at the motion to dismiss stage too, didn't I?

MR. McMILLEN: That's what I'm saying. And maybe counsel can speak more to it because he's the one that inserted that language into the order, but I think you can say, if you look at the beneficiary's limited opposition which the Court at the time saw as a non-objection to the petition, you'll see in that limited opposition, the plaintiff said that he agreed that the Court should grant the petition that all past account statements for the period of July 9th, 2009, through March 31st, 2020, be deemed approved and final as provided in NRS 165.135 and NRS 165.124.

The same thing for the quarter accounting statement for April 1st, 2020, through June 30th of 2020. The same thing for the July 20th accounting statement, July 1st, 2020, through July 22nd, 2020, which is the last day of Nevada Trust's trusteeship.

So the beneficiary, as represented by counsel, agreed that the accounting should be approved and deemed final.

THE COURT: But doesn't 165.200, right, it has a specific penalties provision for that chapter, right, and doesn't have a limitation on penalties?

What I'm trying to get at is I understand what you're saying is basically everything's foreclosed. The pie is gone, okay. And basically what they're saying is there's still pieces of the pie left to be decided by the Court, i.e., this Court in this action. And so where my question goes is 165.200 -- and I pulled it up just so I could quote it correctly. "When a trustee fails to perform any of the duties imposed upon the trustee by this chapter, the trustee may be removed, the trustee's compensation may be reduced or forfeited, or other civil penalty inflicted in the discretion of the Court."

So --

MR. McMILLEN: Exactly.

THE COURT: How does that language preclude other claims? Are you saying that it is a specific inclusion provision, and that's the only thing that can happen?

MR. McMILLEN: Great question, Your Honor. It goes to the fact that --

THE COURT: I'm just asking what your position is; right?

MR. McMILLEN: Yeah. The -- if the beneficiary wanted to punish the trustee for any action, so to speak, then, instead of filing a non-objection to the petition, they file an objection and they ask for discovery. They litigate, and they can ask for a trial. So that -- if a beneficiary wants to

bring those claims or any objection or any punishment upon the trustee, then you have to bring that claim or objection or whatever it may be within the in rem proceeding.

You don't just say I agree they should be discharged; I don't have any issue to bring before the Court, and then two, three years later say, actually, I did have an issue. That's the whole purpose of claim preclusion in *res judicata* is to avoid the multiple proceedings, give the trustee comfort in knowing that I took my accountings before the Court, gave the beneficiary an opportunity to object. In this case the beneficiary did not object and, therefore, is foreclosed from bringing the claims now.

THE COURT: Okay. Go ahead and finish whatever -- go ahead, please.

MR. McMILLEN: With that, Your Honor, I'll submit.

THE COURT: Okay. Well, I'm going to go to the underlying complaint in this case.

So, first off, the Court does not see a 56(d) request, okay. And the Court doesn't find that there's been compliance with the provisions of 56(d). However, the newest version, i.e., the 2019 version of 56(d) does tell the Court, interestingly enough, versus its prior version, is -- well, the problem with 56(d) is a nonmovant has to show by affidavit or declaration. For specified reasons, it cannot present facts essential to justify its opposition. Okay. I don't have any

said affidavit, so the 56(d) provision can't apply.

Realistically, then the Court has to go to 56(e). 56(e) is "If a party fails to properly support an assertion of fact, or fails to properly address another party's assertion, under 56(c), the Court may" -- and it gives some options there. But the Court doesn't see that 56(e) applies because there has been no basis to say something couldn't have been responded to, quote, an assertion. Because a 56(d) issue to need additional discovery is separate and distinct from responding to actual assertions in the underlying motion.

So the Court cannot address a 56(d) that somehow is being viewed as potentially implicit where it's not even cited. There is no affidavit. There is no explanation. And none of the requirements, both pre-2019 or post-2019 -- and it would really be post-2019 because this case wasn't even filed since -- until 2022.

So now the Court has to look at the underlying motion for summary judgment, and then in order to do so has to look, right, at the operative complaint which is the second amended complaint. The parties agree it's the second amended complaint, right, is the operative complaint.

MR. McMILLEN: Correct.

MR. WILDE: That's correct, Your Honor.

THE COURT: Okay. So then I have to look at the operative complaint, the second amended complaint. We look at

the second amended complaint and the various issues raised therein and the assertions with regards to claim preclusion.

The Court's going to have to deny it because at this juncture, what the Court has to look at is what is the underlying proceeding that is being sought to be claim preclusion? Well, there's assertions, right, that it's in rem proceeding and that they had an opportunity to file an objection.

The Court really has to take two different things. One, the actual case and who are the parties to that case and what were the issues in this case?

Two, I have to take the ruling in that case, and the ruling in that case only says that other than 165, there's still -- that the order does not impact liability other than 165 and I already read 165.200, right. 165.200 relates to certain duties.

Here, the underlying complaint as articulated in the papers and on the face of the complaint isn't necessarily going to be accounting duties. It's the invading of the corpus duties. That issue this Court doesn't see was actually litigated in the in rem proceedings. It was on the accounting. Now -- so therefore the Court has to deny without prejudice the motion for summary judgment.

Moving on to plaintiffs' motion for determination, defendants' claim of privilege and clawback request,

realistically, my inclination there is, yes, they get a clawback. Yes, they did not waive any privilege by inadvertently providing documents because that's the whole concept with regards to a clawback. That's just an inclination.

Counsel for plaintiff, it's your motion. Go ahead.

MR. WILDE: And I'll be brief. I just think that the law that I cited, clearly it goes into that the Court should -- any Court should sparingly allow the privilege to happen because it flies in the face of getting to the truth, getting to the bottom of things.

THE COURT: But there's two different issues here; right? The issue here isn't that there's been a motion to compel or a motion to contest the underlying privilege. Here what you have is you have actual documents that were inadvertently produced, and that was a clawback request, right. So the form of how it's before the Court, isn't it different?

MR. WILDE: I don't -- not -- the way that I do -- the way that I've seen this done is exactly what I've done and bring it before the Court for the Court to determine if those documents are privileges -- privileged and pushing back on the party claiming privilege, the burden of giving enough information to the Court that it can make a decision as to whether or not the privilege is waived, whether or not those are confidential documents. And I go into great detail.

They filed a seven-page reply, and they didn't give -- they didn't give any explanation. All they said is that the documents were inadvertently -- inadvertently disclosed. They don't say why they were inadvertently disclosed, why they shouldn't be waived, and why they shouldn't be used.

In addition, as I put in ad nauseam in my pleadings, Your Honor, that they listed the actual attorneys where these communications were being exchanged as witnesses. They provided a privilege log of all the other documents that they wanted privileged, but these weren't in it.

So I don't know -- again, they have to provide some kind of explanation to the Court to determine -- and I cited that at the bottom of page 6. They have to give the Court enough information to decide the reasonableness of the precautions used to prevent inadvertent disclosure, the time taken to rectify the error, the scope of discovery, the extent of the disclosures, and the overriding issues of fairness. And, Your Honor, these documents are out there now.

What happened is they provided them. We referred to them in his follow-up discovery, and that's when they -- that's when they sought to claw them back.

So I think the burden's on them, and I don't think that they have shown they have met that burden of privilege.

Thank you.

THE COURT: Thank you so much.

Counsel, go ahead.

MR. McMILLEN: Sure. As soon as we saw that we had inadvertently disclosed the documents, within 24 hours, we sent the clawback request to plaintiffs' counsel detailing the 31 documents out of the 1500 plus documents that have been disclosed with -- you know, spanning 26,000 pages of documents. Like I said, as soon as we found out -- or as soon as I realized that we had disclosed those documents, I sent the clawback request, and I have done everything in my power to preserve that privilege. The documents are clearly between the attorneys and my client, including at least one document from my office and my clients.

THE COURT: Okay. You get last word. It's your motion. Go ahead, Counsel.

MR. WILDE: I'd just rest, Your Honor. I think that we've made our point clear, both in the pleadings and the argument today.

THE COURT: Remember -- okay. Here's the Court's ruling.

The plaintiffs' motion for determination, defendants' claim of privilege in clawback request. Realistically, the Court has to look at this as a clawback request, right, because I can't combine the two, right, because I didn't have a motion before me that -- look, it really is a two-step process, right.

The clawback is going to happen because, appropriately, they're contending that these were attorney-client privileged communications, and so therefore they need to be provided back pursuant to clawback in accordance with the applicable law as cited in the opposition.

So then the next step is, well, if they're clawed back, would they then have -- are they improperly being asserted as attorney-client privileged communications? When I look at that, based on what has been presented to this Court at this juncture, I can't say that they are anything other than documents to which an attorney-client privilege communication could be asserted without prejudice.

Now, the reason why I'm saying without prejudice is because what you have is little bit different issue here is you've kind of moved on down the path a little bit; right? You then utilized some of those documents in subsequent requests before the clawback, which that means this Court may have to look at it. If it's re-presented to the Court, of an improper privilege based on other documents, then the Court may have to revisit its ruling, but based on what I have today, I need to deny -- well, you phrased it as a determination, which is why I'm kind of figuring out if this is a granting or a denying. It really is -- okay.

So to the extent plaintiffs' motion for determination of defendants' claim of privilege and clawback request, I have

to say that the Court finds that the clawback request must be granted. Those documents need to be retained. At this juncture, the Court is going to find them as privileged without prejudice to subsequent information being presented to this Court, that the Court may need to reevaluate that determination. Based on what I currently have, the Court would find that they are privileged, and so they need to be returned, and they'd be viewed at this juncture as attorney-client privilege.

It is so ordered.

And that means -- who's doing the orders on the two motions? Since I have denied the motion for summary judgment, that means counsel for plaintiff and, technically, since I have denied the plaintiffs' position on the motion for determination, that means defense on the other one. Does that work for you all? EDCR 7.21, 14 days to the DC 31 inbox according to the administrative order.

Go ahead, Counsel. You're asking a question. Go ahead.

MR. McMILLEN: So with regards to the remainder of the motion for summary judgment on the statute of limitations issue, what is the Court's ruling on those?

THE COURT: At this juncture, realistically, with the statute of limitations issue, I don't think you articulated -- I don't think you met your initial burden to show as a matter

of law that the way you have presented it that this is a distribution by distribution would get you a statute of limitation. So I have to deny it on that basis.

And that one does tie into the aspect of the 165 claim that was the in rem proceeding before Judge Sturman because there, there was the actual accountings, right, of each and every one of those documents. And that issue at that juncture -- trying to think of how to best phrase this -- was, I think, left open at this juncture.

So I don't think you've met your initial burden as to how that statute of limitations argument would apply under the specific case law because of the tie-in and the in rem proceeding under 165. So it's denied without prejudice.

MR. McMILLEN: Quick question on that. So is the Court's understanding that the claims can go back to 1993 then?

THE COURT: I am saying you haven't met your initial burden. So I'm saying you haven't met your initial burden means that you haven't shown that the Court should be making a ruling as to how far they should go back because you haven't established your burden to show that they should go something different than what the complaint currently shows, okay.

So -- because you haven't tied in everything to show this Court, look, this was taken care of here. This was taken care of here. This was taken care of here. You've made a broad assertion, right, that there's a general statute of

limitations, but you haven't provided support and how that applies to each and every one.

That's the Court's ruling. I appreciate you might disagree with it or maybe you agree with it. Who knows? I think you -- so that's the Court's ruling.

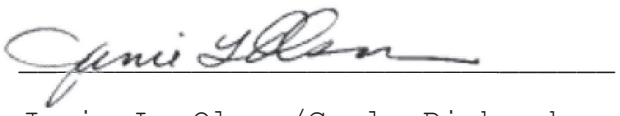
The time for further argument -- you can appreciate each party's had a full opportunity to argue. So I need to -- I was already done with the ruling. I was going to answer any question just from a point of clarification, okay.

I appreciate it. Thank you so very much.

(Proceeding concluded 9:39 a.m.)

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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Janie L. Olsen/Carla Richardson
Transcriber

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MR. WILDE: [28] 2/5 2/13 2/16 2/22 3/1 3/3 3/12 3/20 4/2 4/22 5/6 6/9 7/2 7/12 11/1 12/21 13/11 13/14 13/21 14/9 14/13 14/16 15/8 16/9 22/23 24/7 24/18 26/16
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you've [5] 3/4 17/24 27/15 29/10 29/24
your [51]
Your Honor [34]

Z

Zoom [5] 2/12 2/13 2/25 3/5 3/18

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03/20/2024 1:14 PM
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ORDR
Sheri M. Thome, Esq.
Nevada Bar No. 008657
Adam P. McMillen, Esq.
Nevada Bar No. 010678
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Sheri.Thome@wilsonelser.com
Adam.McMillen@wilsonelsercom
Attorneys for Defendants Nevada Trust Company, Peter H. Kingman and James Kriss

DISTRICT COURT

CLARK COUNTY, NEVADA

DARRYL JAMES LEWIS, an individual, and MICHAEL TARASKA, as Trustee for the DARRYL JAMES LEWIS LIFETIME TRUST,

Plaintiff,

v.

NEVADA TRUST COMPANY, a Nevada Corporation, PETER H. KINGMAN, an individual, JAMES KRISS, an individual, DOES 1 through 10, and ROE BUSINESS ENTITIES 1 through 10,

Defendants.

Case No. A-22-852594-B
Dept. No.: XXXI

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants' Motion for Summary Judgment came before the Court for a hearing on February 27, 2024. Plaintiffs being represented by Gregory L. Wilde, Esq., of Wilde & Associates, LLC, and Defendants being represented by Adam P. McMillen, Esq., of Wilson Elser Moskowitz Edelman & Dicker, LLP. THE COURT having reviewed the pleadings on file, having heard oral arguments, and good cause appearing, rules as follows:

FINDINGS

The Court makes the following findings for purposes of the Motion.

In 1971, Lewis' grandmother, Ruth Harris Stewart, established The Darryl James Lewis Lifetime Trust with 825 shares of the common voting stock of the Utah Construction and Mining Company. Since 1971, Lewis' trust had multiple trustees, one of which was Nevada Trust Company ("NT"). NT became trustee in 2009. By 2020, the trust funds were depleted.

On January 10, 2024, Defendants moved for summary judgment on three separate grounds. First, Defendants argued the 2020 judicial proceeding which resulted in Judge Sturman's Order approving NT's petition, discharging NT as trustee and deeming NT's accountings approved and final, is res judicata and bars this action. Defendants argued that since Lewis was a represented party to that 2020 judicial proceeding and did not object and/or otherwise contest the petition, the trustee's accountings were approved and deemed final, discharging NT from liability for the claims Plaintiffs now bring. Further, Defendants argued that the matters set forth in the 2020 in rem proceeding are the same matters Plaintiffs are attempting to litigate now. As a result, Defendants argued that Judge Sturman's order is res judicata on the matters that Lewis could have raised and bars the claims now asserted in this action.

Second, Defendants argued that Plaintiffs' claims are also barred by the statute of limitations as the claims cover a period from 2009 to 2020.

Third, Defendants argued that Plaintiffs' breach of contract and breach of the implied covenant claims fail as a matter of law since lawsuits that arise out of a trust relationship are not suits arising out of a contract and instead arise out of a fiduciary relationship.

On February 6, 2024, Plaintiffs filed their opposition. Plaintiffs opposed the motion for summary judgment on several bases.

Having considered the parties briefs and oral argument, the Court finds that the 2020 in rem proceeding does not impact liability other than NRS 165. The underlying complaint does not go to the accounting duties, but the complaint addresses the invading of the corpus duties. The invading

of the corpus duties was not actually litigated in the 2020 in rem proceeding. Therefore, the Court denies the motion for summary judgment.

With regards to the statute of limitations, the Court finds Defendants did not meet their burden to show as a matter of law that this is a distribution-by-distribution statute of limitations issue. Further, the Court finds Defendants have failed to meet their burden to demonstrate how the statute of limitations applies to the in rem proceeding or NRS 165.

CONCLUSION

IT IS HEREBY ORDERED ADJUDGED AND DECREED that:

1. The Court DENIES the Defendants' Motion for Summary Judgment, without prejudice.

Dated this 20th day of March, 2024

Joanna S Kishner

6BE D95 840B 0044
Joanna S. Kishner
District Court Judge

Respectfully submitted by:

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

/s/ Adam McMillen
Sheri M. Thome, Esq.
Nevada Bar No. 008657
Adam P. McMillen, Esq.
Nevada Bar No. 010678
6689 Las Vegas Blvd. South, Suite 200
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Sheri.Thome@wilsonelser.com
Adam.McMillen@wilsonelsercom
Attorneys for Defendants Nevada Trust Company, Peter H. Kingman and James Kriss

Approved As To Form:

WILDE & ASSOCIATES, LLC

/s/ Gregory Wilde
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Telephone: (702) 562-1202
greg@wildelawyers.com
Attorney for Plaintiffs
Darryl James Lewis, Michael Taraska, Trustee for the Darryl James Lewis Lifetime Trust

Dube, Tiffany

From: McMillen, Adam
Sent: Tuesday, March 19, 2024 2:34 PM
To: LV Secy Team 2 (NA)
Subject: FW: A-22-852594-B Lewis v NV Trust: Proposed Order on Defendants' Motion for Summary Judgment(294127316.1)
Attachments: Proposed Order on Defendants' Motion for Summary Judgment(294127316.1).docx

Please add Plaintiff's counsel electronic signature and submit to the court for signature. Thanks!

Adam McMillen
Attorney at Law
Wilson Elser Moskowitz Edelman & Dicker LLP
6689 Las Vegas Blvd. South, Suite 200
Las Vegas, NV 89119
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775.870.6178 (Cell)
702.727.1400 (Main)
702.727.1401 (Fax)
adam.mcmillen@wilsonelser.com

From: Gregory Wilde <greg@wildelawyers.com>
Sent: Tuesday, March 19, 2024 2:33 PM
To: McMillen, Adam <Adam.McMillen@wilsonelser.com>
Subject: Re: A-22-852594-B Lewis v NV Trust: Proposed Order on Defendants' Motion for Summary Judgment(294127316.1)

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Gregory L. Wilde, Esq.
Wilde & Associates, LLC
7473 W. Lake Mead Blvd., #100

Las Vegas, Nevada 89128
Phone (702) 562-1202
Email: Greg@wildelawyers.com

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On Mar 19, 2024, at 2:21 PM, McMillen, Adam <Adam.McMillen@wilsonelser.com> wrote:

Hi Greg,

I revised the proposed order to include the Court's reasoning for denying the remaining portions of the motion.

Please let me know if I can add your electronic signature and provide to the court.

Thanks,

Adam McMillen
Attorney at Law
Wilson Elser Moskowitz Edelman & Dicker LLP
6689 Las Vegas Blvd. South, Suite 200
Las Vegas, NV 89119
702.727.1391 (Direct)
775.870.6178 (Cell)
702.727.1400 (Main)
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Thank you.
<Proposed Order on Defendants' Motion for Summary Judgment(294127316.1).docx>

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Darryl Lewis, Plaintiff(s) vs. Nevada Trust Company, Defendant(s)	CASE NO: A-22-852594-B DEPT. NO. Department 31

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order Denying was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 3/20/2024

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Sheri Thome	sheri.thome@wilsonelser.com
Lani Maile	lani.maile@wilsonelser.com
Gregory Wilde	greg@wildelawyers.com
Adam McMillen	adam.mcmillen@wilsonelser.com
Tracee Loveland	tracee@wildelawyers.com
Tiffany Dube	tiffany.dube@wilsonelser.com

Bagnas, Harry

From: no-reply@efilingmail.tylertech.cloud
Sent: Wednesday, March 20, 2024 1:15 PM
To: EfileLasVegas
Subject: Notification of Service for Case: A-22-852594-B, Darryl Lewis, Plaintiff(s)vs.Nevada Trust Company, Defendant(s) for filing Service Only, Envelope Number: 13453666

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Notification of Service

Case Number: A-22-852594-B
Case Style: Darryl Lewis, Plaintiff(s)vs.Nevada Trust Company, Defendant(s)
Envelope Number: 13453666

This is a notification of service for the filing listed. Please click the link below to retrieve the submitted document.

Filing Details	
Case Number	A-22-852594-B
Case Style	Darryl Lewis, Plaintiff(s)vs.Nevada Trust Company, Defendant(s)
Date/Time Submitted	3/20/2024 1:14 PM PST
Filing Type	Service Only
Filing Description	Order Denying
Filed By	DC EFile Service
Service Contacts	Nevada Trust Company: Efile LasVegas (efilelasvegas@wilsonelser.com) Sheri Thome (sheri.thome@wilsonelser.com) Lani Maile (lani.maile@wilsonelser.com) Adam McMillen (adam.mcmillen@wilsonelser.com) Tiffany Dube (tiffany.dube@wilsonelser.com) Darryl James Lewis:

	Gregory Wilde (greg@wildelawyers.com) Tracee Loveland (tracee@wildelawyers.com)

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Adam P. McMillen, Esq.
Nevada Bar No. 010678
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Facsimile: 702.727.1401
Sheri.Thome@wilsonelser.com
Adam.McMillen@wilsonelsercom
Attorneys for Defendants
Nevada Trust Company, Peter H. Kingman and James Kriss

DISTRICT COURT

CLARK COUNTY, NEVADA

DARRYL JAMES LEWIS, an individual, and MICHAEL TARASKA, as Trustee for the DARRYL JAMES LEWIS LIFETIME TRUST,

Plaintiffs,

v.

NEVADA TRUST COMPANY, a Nevada Corporation, PETER H. KINGMAN, an individual, JAMES KRISS, an individual, DOES 1 through 10, and ROE BUSINESS ENTITIES 1 through 10,

Defendants.

Case No. A-22-852594-B
Dept. No.: XXXI

NOTICE OF ENTRY OF ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Case Number: A-22-852594-B

Please take notice that on the 20th day of March, 2024, an Order Denying Defendants' Motion for Summary Judgment, was entered by the Court in the above referenced matter, a true and correct copy of which is attached hereto and incorporated herein by this reference.

DATED this 5th day of April, 2024.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

/s/ Adam P. McMillen

Sheri M. Thome, Esq.
Nevada Bar No. 008657
Adam P. McMillen, Esq.
Nevada Bar No. 010678
6689 Las Vegas Blvd. South, Suite 200
Las Vegas, Nevada 89119
Sheri.Thome@wilsonelser.com
Adam.McMillen@wilsonelsercom
Attorneys for Defendants Nevada Trust Company, Peter H. Kingman and James Kriss

CERTIFICATE OF SERVICE

Pursuant to JRCP 5, I certify that I am an employee of Wilson Elser Moskowitz Edelman & Dicker LLP, and that on this 5th day of April, 2024, I served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

☒ via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk; and/or

☐ via hand-delivery to the addressees listed below; and/or

☐ via facsimile; and/or

☐ by transmitting via email the document listed above to the email address set forth below on this date before 5:00 p.m. (PST/PDT).

Gregory Wilde, Esq.
WILDE & ASSOCIATES, LLC
7473 W. Lake Mead Blvd, #100
Las Vegas, NV 89134
Telephone: (702) 562-1202
greg@wildelawyers.com
Attorneys for Plaintiffs

BY */s/Tiffany Dube*
An Employee of
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

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ORDR
Sheri M. Thome, Esq.
Nevada Bar No. 008657
Adam P. McMillen, Esq.
Nevada Bar No. 010678
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Telephone: 702.727.1400
Facsimile: 702.727.1401
Sheri.Thome@wilsonelser.com
Adam.McMillen@wilsonelsercom
Attorneys for Defendants Nevada Trust Company, Peter H. Kingman and James Kriss

DISTRICT COURT

CLARK COUNTY, NEVADA

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Plaintiff,

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Defendants.

Case No. A-22-852594-B
Dept. No.: XXXI

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CONCLUSION

IT IS HEREBY ORDERED ADJUDGED AND DECREED that:

1. The Court DENIES the Defendants' Motion for Summary Judgment, without prejudice.

Dated this 20th day of March, 2024

Joanna S Kishner

6BE D95 840B 0044
Joanna S. Kishner
District Court Judge

Respectfully submitted by:

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

/s/ Adam McMillen
Sheri M. Thome, Esq.
Nevada Bar No. 008657
Adam P. McMillen, Esq.
Nevada Bar No. 010678
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Sheri.Thome@wilsonelser.com
Adam.McMillen@wilsonelsercom
Attorneys for Defendants Nevada Trust Company, Peter H. Kingman and James Kriss

Approved As To Form:

WILDE & ASSOCIATES, LLC

/s/ Gregory Wilde
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Las Vegas, Nevada 89134
Telephone: (702) 562-1202
greg@wildelawyers.com
Attorney for Plaintiffs
Darryl James Lewis, Michael Taraska, Trustee for the Darryl James Lewis Lifetime Trust

Dube, Tiffany

From: McMillen, Adam
Sent: Tuesday, March 19, 2024 2:34 PM
To: LV Secy Team 2 (NA)
Subject: FW: A-22-852594-B Lewis v NV Trust: Proposed Order on Defendants' Motion for Summary Judgment(294127316.1)
Attachments: Proposed Order on Defendants' Motion for Summary Judgment(294127316.1).docx

Please add Plaintiff's counsel electronic signature and submit to the court for signature. Thanks!

Adam McMillen
Attorney at Law
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Las Vegas, NV 89119
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775.870.6178 (Cell)
702.727.1400 (Main)
702.727.1401 (Fax)
adam.mcmillen@wilsonelser.com

From: Gregory Wilde <greg@wildelawyers.com>
Sent: Tuesday, March 19, 2024 2:33 PM
To: McMillen, Adam <Adam.McMillen@wilsonelser.com>
Subject: Re: A-22-852594-B Lewis v NV Trust: Proposed Order on Defendants' Motion for Summary Judgment(294127316.1)

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Gregory L. Wilde, Esq.
Wilde & Associates, LLC
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Las Vegas, Nevada 89128
Phone (702) 562-1202
Email: Greg@wildelawyers.com

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On Mar 19, 2024, at 2:21 PM, McMillen, Adam <Adam.McMillen@wilsonelser.com> wrote:

Hi Greg,

I revised the proposed order to include the Court's reasoning for denying the remaining portions of the motion.

Please let me know if I can add your electronic signature and provide to the court.

Thanks,

Adam McMillen
Attorney at Law
Wilson Elser Moskowitz Edelman & Dicker LLP
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775.870.6178 (Cell)
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Thank you.
<Proposed Order on Defendants' Motion for Summary Judgment(294127316.1).docx>

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DISTRICT COURT
CLARK COUNTY, NEVADA

Darryl Lewis, Plaintiff(s) vs. Nevada Trust Company, Defendant(s)	CASE NO: A-22-852594-B DEPT. NO. Department 31

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Adam McMillen	adam.mcmillen@wilsonelser.com
Tracee Loveland	tracee@wildelawyers.com
Tiffany Dube	tiffany.dube@wilsonelser.com

Bagnas, Harry

From: no-reply@efilingmail.tylertech.cloud
Sent: Wednesday, March 20, 2024 1:15 PM
To: EfileLasVegas
Subject: Notification of Service for Case: A-22-852594-B, Darryl Lewis, Plaintiff(s)vs.Nevada Trust Company, Defendant(s) for filing Service Only, Envelope Number: 13453666

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Case Style: Darryl Lewis, Plaintiff(s)vs.Nevada Trust Company, Defendant(s)
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Filing Details	
Case Number	A-22-852594-B
Case Style	Darryl Lewis, Plaintiff(s)vs.Nevada Trust Company, Defendant(s)
Date/Time Submitted	3/20/2024 1:14 PM PST
Filing Type	Service Only
Filing Description	Order Denying
Filed By	DC EFile Service
Service Contacts	Nevada Trust Company: Efile LasVegas (efilelasvegas@wilsonelser.com) Sheri Thome (sheri.thome@wilsonelser.com) Lani Maile (lani.maile@wilsonelser.com) Adam McMillen (adam.mcmillen@wilsonelser.com) Tiffany Dube (tiffany.dube@wilsonelser.com) Darryl James Lewis:

	Gregory Wilde (greg@wildelawyers.com) Tracee Loveland (tracee@wildelawyers.com)

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To: EfileLasVegas
Subject: Notification of Service for Case: A-22-852594-B, Darryl Lewis, Plaintiff(s)vs.Nevada Trust Company, Defendant(s) for filing Notice of Entry of Order - NEOJ (CIV), Envelope Number: 13545509

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Notification of Service

Case Number: A-22-852594-B
Case Style: Darryl Lewis, Plaintiff(s)vs.Nevada Trust Company, Defendant(s)
Envelope Number: 13545509

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Filing Details	
Case Number	A-22-852594-B
Case Style	Darryl Lewis, Plaintiff(s)vs.Nevada Trust Company, Defendant(s)
Date/Time Submitted	4/5/2024 3:31 PM PST
Filing Type	Notice of Entry of Order - NEOJ (CIV)
Filing Description	Notice of Entry of Order Denying Defendants' Motion for Summary Judgment
Filed By	Tiffany Dube
Service Contacts	Darryl James Lewis: Gregory Wilde (greg@wildelawyers.com) Tracee Loveland (tracee@wildelawyers.com) Nevada Trust Company: Efile LasVegas (efilelasvegas@wilsonelser.com) Sheri Thome (sheri.thome@wilsonelser.com)

	Lani Maile (lani.maile@wilsonelser.com) Adam McMillen (adam.mcmillen@wilsonelser.com) Tiffany Dube (tiffany.dube@wilsonelser.com)

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