EXHIBIT A

EXHIBIT A

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Attorneys for Plaintiff
George Stuart Yount

DISTRICT COURT

WASHOE COUNTY, NEVADA

GEORGE STUART YOUNT, individually and in his capacity as owner of GEORGE YOUNT IRA, Plaintiff, *vs.* CRISWELL RADOVAN, LLC, a Nevada limited liability company; CR CAL NEVA, LLC, a Nevada limited liability company; ROBERT RADOVAN; WILLIAM CRISWELL; CAL NEVA LODGE, LLC, a Nevada limited liability company; POWELL, COLEMAN AND ARNOLD, LLP; DAVID MARRINER; MARRINER REAL ESTATE, LLC, a Nevada limited liability company; and DOES 1-10, Defendants.	Case No. CV16-00767 Dept. No. 7 **PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW, FOR RELIEF FROM JUDGMENT, TO ALTER AND AMEND THE JUDGMENT, TO AMEND THE FINDINGS, AND FOR NEW TRIAL**

Plaintiff George Stuart Yount moves for judgment as a matter of law, for relief from judgment, for a new trial, and to alter or amend the Court's findings and judgment. NRCP 50(b), 52(b), 59(a), 59(e), 60(b).

INTRODUCTION

The Court awarded damages to defendants—not on a counterclaim that they pleaded and proved, but on an affirmative of defense of unclean hands that does not apply to this legal action, that defendants did not prove, and that is not a basis for damages. Defendants never asked for leave to plead a counterclaim; even if they had, they had no evidence to support it. The judgment against Mr. Yount on a nonexistent counterclaim violated due process and calls for amended findings and a judgment in Mr. Yount's favor, or at least a new trial on the counterclaim of which he had no notice.

STANDARD OF REVIEW

A. Standard for Amending Findings

In a bench trial, the Court can amend its findings after the judgment where "the sufficiency of the evidence supporting the findings" is called into question. NRCP 52(b). This is true regardless of whether the party objected to the findings before entry of the judgment. *Id.*[1]

B. Standard for Altering and Amending the Judgment

A party can also ask the Court to amend its judgment on any basis, evidentiary or legal, within 10 days' notice of the judgment's entry. NRCP 59(e); *see also Schwartz v. Schwartz*, 126 Nev. 87, 90, 225 P.3d 1273, 1275 (2010)(addressing motion to alter and amend, which was based on post-decree statements).

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[1] Mr. Yount believes that Rule 52(b), rather than Rule 50(b), governs in bench trials. As a precaution, however, Mr. Yount does not waive any argument for judgment as a matter of law under Rule 50(b).

C. Standard for Relief from Judgment

The court may relieve a party from a final judgment, order, or proceeding for mistake, inadvertence, surprise, or excusable neglect or the judgment is void. NRCP 60(b).

D. Standard for a Motion for a New Trial

A new trial may be granted if there was an "[i]rregularity in the proceedings of the court . . . or any order of the court . . . or abuse of discretion by which either party was prevented from having a fair trial." NRCP 59(a)(1). "Accident or surprise which ordinary prudence could not have guarded against" is also grounds for a new trial. NRCP 59(a)(3). That relief is also called for when "[e]xcessive damages appear[] to have been given under the influence of passion or prejudice" or when the trial proceeds on an "[e]rror in law" after objection. NRCP 59(a)(6), (7). "On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment." NRCP 59(a).

II.

THIS COURT SHOULD ALTER THE FINDINGS AND JUDGMENT TO ELIMINATE AN AWARD AGAINST YOUNT

A. Defendants Failed to Prove Unclean Hands

The Court erred in finding the defendants proved their affirmative defense of unclean hands. The doctrine of unclean hands does not apply in every instance where the plaintiff has committed some misconduct in connection with the matter in controversy. Further, unclean hands is an equitable defense that does not apply to legal claims and is not a basis for seeking affirmative relief.

1. Mr. Yount's Alleged Misconduct Did Not Directly Relate to His Claims

For the doctrine of unclean hands to apply the alleged misconduct must

directly relate to the foundation of the underlying claim. *Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.*, 124 Nev. 272, 275, 182 P.3d 764, 766 (2008)(noting the unclean hands doctrine precludes a party from attaining an equitable remedy when that party's "connection with the subject-matter or transaction in litigation has been unconscientious"); *Powell v. Mobile Cab & Baggage Co.*, 83 So. 2d 191, 194 (Ala. 1955); *McKelvie v. Hackney,* 360 P.2d 746, 752 (Wash. 1961) ("The authorities are in accord that the 'clean hands' principle does not repel a sinner from courts of equity, nor does it disqualify a plaintiff from obtaining relief who has not dealt unjustly in the very transaction concerning which he complains"). Remote or indirect misconduct is not sufficient. *Powell,* 83 So.2d at 194.

Here, the defendants failed to prove the alleged wrongdoing was related to Mr. Yount's underlying claims. Defendants contended Mr. Yount interfered with a loan Criswell Radovan LLC lined up with Mosaic to fund the remaining construction. This alleged misconduct does not directly relate to the breach of contract, breach of duty, fraud, and conversion claims against the defendants. *See Barr v. Petzhold*, 273 P.2d 161, 166 (Ariz. 1954) (because the plaintiff did not engage in wrongful conduct in the contract that was the foundation of the claim, the doctrine of unclean hands was inapplicable). The basis of Mr. Yount's claim was that he had never received a Founder's share. The shares of Cal Neva LLC had nothing to do with a loan Criswell Radovan attempted to obtain months after the transaction occurred.

2. Unclean Hands Does Not Apply to Legal Claims

The Court erred in allowing the unclean hands defense in a case regarding legal claims. Unclean hands is an equitable defense that does not even apply to legal claims, such as breach of contract or conversion. *See Tracy v. Capozzi*, 98 Nev. 120, 123, 642 P.2d 591, 593 (1982)(noting unclean hands is a "well-established defense to equitable claims"); *See Also Cattle Nat'l Bank &*

Tr. Co. v. Watson, N.W.2d 906, 921 (Neb. 2016) (no unclean-hands defense to legal claim on a contractual guaranty); *Weiss v. Smulders*, 96 A.3d 1175, 1198 (Conn. 2014) ("the equitable defense of unclean hands bars only equitable relief," not breach-of-contract claim); *W. Bend Mut. Ins. Co. v. Procaccio Painting & Drywall Co.*, 928 F. Supp. 2d 976, 987 (N.D. Ill. 2013) ("The defense of unclean hands is also an equitable defense, not applicable to a claim for money damages for a breach of contract."); *Swisher v. Swisher*, 124 S.W.3d 477, 483 (Mo. Ct. App. 2003) ("The unclean hands doctrine is not available as a defense to proceedings at law, even though based on equitable principles."); *Ligon v. E. F. Hutton & Co.*, 428 S.W.2d 434, 437 (Tex. Civ. App. 1968) (unclean hands inapplicable to conversion, which is a common-law action).

Here, it was an error for the Court to allow the doctrine of unclean hands to legal causes of action. Mr. Yount did not plead any equitable claims but alleged breach of contract, breach of fiduciary duty, conversion, securities claims, and fraud. Accordingly, the affirmative defense of unclean hands was inapplicable.

B. Unclean Hands is Only an Affirmative Defense and Is Not a Basis for Damages

1. Defendants' affirmative defense did not entitle them to a damage award

It was an error for Judge Flanagan to award damages based on an affirmative defense. In the absence of counterclaim, a court cannot award affirmative relief to a defendant. *Westfield Sav. Bank v. Leahey*, 291 Mass. 473, 476, 197 N.E. 160, 162 (1935); *N. Chester Cnty. Sportsmen's Club v. Muller*, 174 A.3d 701, 707 n.3 (Pa. Commw. Ct. 2017)("The doctrine of unclean hands is a basis only for the denial of equitable relief and cannot support a grant of affirmative relief against the party who acted with unclean hands"); *Talton v. BAC Home Loans Servicing LP,* 839 F. Supp. 2d 896, 911 (E.D. Mich. 2012)("the

clean hands doctrine is an equitable defense, not a cause of action"); *In re McKesson HBOC, Inc. ERISA Litig.*, 391 F. Supp. 2d 812, 842 (N.D. Cal. 2005)("unclean hands is an equitable defense, not a cause of action"); *DiMauro v. Pavia*, 492 F. Supp. 1051, 1068 (D. Conn. 1979); *See Also Premiere Digital Access, Inc. v. Cent. Tel. Co.*, 360 F. Supp. 2d 1161, 1168 (D. Nev. 2005) (finding "no case under Nevada law" where a plaintiff has raised the affirmative defense of unconscionability as a cause of action); *Accord Keystone Commercial Props., Inc. v. City of Pittsburgh*, 347 A.2d 707, 709 (Pa. 1975) (granting plaintiff relief because the defendant's unclean hands "is an inappropriate application of the unclean hands doctrine. That doctrine is a basis for a court of equity to refuse affirmative relief to either a petitioner or respondent. It is not a basis for a court of equity to grant affirmative relief.").

The purpose of an affirmative defense is to protect a defendant from liability. *Rehn v. Fischley*, 557 N.W.2d 328, 333 (Minn. 1997); *Jafbros, Inc. v. American Family Mut. Ins. Co.*, 128 Nev. 908 (Nev. 2012) (noting an affirmative defense is "a response to a plaintiff's claim which attacks the plaintiff's legal right to bring an action, as opposed to attacking the truth of claim"); Nev. R. of Civ. Pro. 8(c). Accordingly, an affirmative defense entitles a defendant to dismissal of the claims. *Sheardy v. Baker*, 323 Mich. 364, 368, 35 N.W.2d 283, 284 (1948) (holding that in the absence of a cross claim by defendant, seeking affirmative relief, the decree should have been limited to a dismissal of the complaint.)

Here, it was clear that defendants never pleaded a counterclaim or asked for affirmative relief.[2] Rather, defendants alleged that Mr. Yount was not

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[2] MR. LITTLE: And, your Honor, importantly we pled - - we haven't sued him for a counterclaim, but we have pled affirmative defenses and whether you call it - -

THE COURT: Unclean hands.

entitled to a judgment based on the affirmative defense of unclean hands. Judge Flanagan nevertheless awarded unsupported damages based on the affirmative defense.[3] The Court could have dismissed the claims. But it should have never awarded damages where the defendants only sought to avoid liability.

2. The Court impermissibly placed Mr. Yount in a worse position

Where a Court finds a party has unclean hands, he "should be left in the position in which the court finds him." *Talley v. Talley*, 566 N.W.2d 846, 852 (S.D. 1997); *See Also Barrowman Coal Corp. v. Kentland Coal & Coke Co.,* 196 S.W.2d 428, 433 (Ky. 1946). The purpose of the doctrine of unclean hands is to protect the integrity of the court; it does not address the liability of the party. *Gaudiosi v. Mellon*, 269 F.2d 873, 882 (3d Cir. 1959). Accordingly, if a plaintiff has unclean hands, the plaintiff is barred from obtaining equitable relief. *Las Vegas Fetish & Fantasy Halloween Ball.*, 182 P.3d at 766; *Omega Indus., Inc. v. Raffaele,* 894 F. Supp. 1425, 1431 (D. Nev. 1995) (stating that the doctrine "closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief). However, the Court should not place the party with unclean hands in a worse position. *See Talley*, 566 N.W.2d at 852.

That is exactly what happened here. The Court awarded unsupported damages where it should have, at the most, dismissed Mr. Yount's claims.

(Hr'g Tr. 9/08/2017, at 1054:16-19); (Defendants' Proposed Findings of Fact and Conclusions of Law, 8/25/2017, pg. 11)(contending that Mr. Yount's interference with the Mosaic loan harmed the defendants, which "offset" any damages owed to Mr. Yount)

[3] (Hr'g Tr. 9/08/2017, at 1139:13). While Judge Flanagan referred to unclean hands as a "counterclaim" rather than an affirmative defense, the Judge then articulated the two factor test of the affirmative defense of unclean hands. *See Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.*, 124 Nev. 272, 276, 182 P.3d 764, 767 (Nev. 2008).

C. The Defendants Could Not Have Been Granted Leave to Amend Under 15(b)

The Court did not and could not have granted defendants leave to amend their pleading to include a counterclaim for affirmative relief. When a party seeks leave to amend a pleading after the expiration of the deadline for doing so, they must first demonstrate "good cause" under NRCP 16(b) for extending the deadline. *Nutton v. Sunset Station, Inc.*, 357 P.3d 966, 131 Nev. Adv. Op. 34 (Nev. Ct. App. 2015). In general, Rule 15(a) governs amendment of pleadings, however rule 16(b) governs amendment of pleadings after a scheduling order deadline as expired. *Id.* In determining whether "good cause" exists under Rule 16(b) the basic inquiry is the diligence of the party seeking the amendment. *Id.* Disregard of the scheduling order disrupts the agreed-upon course of the litigation and rewards the indolent and the cavalier. *Id.* at 971.

Here, Criswell and Radovan fail to show good cause in deviating from the scheduling order. The scheduling order required that all amendments to pleadings be filed by April 15, 2017. Defendants had until March 15, 2017 to complete discovery and if Criswell and Radovan believed they had a viable intentional interference with contractual relations claim they had a considerable amount of time to amend the pleadings. Defendants acted dilatorily in failing to seek to file the amendment months earlier.

Even under the liberal standard of Rule 15, however, the Court still could not have granted leave to amend. A trial court abuses its discretion when an amendment of the pleadings violates a party's due process. *Deere & Co. v. Johnson*, 271 F.3d 613, 622 (5th Cir. 2001). A defendant fails to give a plaintiff adequate notice of an implied claim when evidence relevant to the new claim is also relevant to the claim originally pled. *See Addie v. Kjaer*, 737 F.3d 854, 867 (3d Cir. 2013). Implied consent is not established merely because evidence bearing directly on an unpleaded issue was introduced without objection; it must appear that the parties understood the evidence was aimed at the

unpleaded issue. *Viox v. Weinberg*, 861 N.E.2d 909, 917 (Ohio Ct. App. 2006). Therefore, the introduction of evidence arguably relevant to pleaded issues cannot serve to give a party fair notice that new issues entered the case. *In re Acequia, Inc.,* 34 F.3d 800, 814 (9th Cir. 1994)(quoting *Wesco Mfg. v. Tropical Attractions*, 833 F.2d 1484, 1487 (11th Cir. 1987).

Trial of unpleaded issues by implied consent is not lightly to be inferred under Rule 15(b). *Deere & Co. v. Johnson*, 271 F.3d 613, 622 (5th Cir. 2001). Leave to amend pleadings cannot be granted perfunctorily. *Bros. v. Surplus Tractor Parts Corp*., 161 Mont. 412, 506 P.2d 1362 (Mont. 1973). Moreover, it is an abuse of discretion for a trial judge to *sua sponte* enter judgment on an issue without providing notice or permitting an opportunity to be heard. *See Bob Schmidt Homes, Inc. v. Cincinnati Ins. Co.*, No. 68710, 1996 WL 17294, at *2 (Ohio Ct. App. Jan. 18, 1996) (holding it was an abuse of discretion for the trial court to award summary judgment without giving the opposing party notice or an opportunity to present evidence).

Here, at no time did Mr. Yount's counsel ever acquiesce to a trial regarding alleged intentional interference. Mr. Yount's counsel objected to the discussion of damages[4] and noted the irrelevance of the evidence of the Mosaic loan:

> MR. CAMPBELL: I think the Mosaic loan issue is a red herring. That happened way after the fact. There was no counterclaim against Mr. Yount for somehow derailing that loan and there's no evidence that he was involved in any discussions with Mosaic.

(Hr'g Tr. 9/08/2017, at 1016: 9-13).

Thus, while some evidence may have come in that might have been relevant to an interference claim, that introduction cannot justify amendment because it was relevant to the affirmative defense that had been raised.

[4] (Hr'g Tr. 8/31/2017, at 493:6-8)

D. Defendants Failed to Prove a Counterclaim of Intentional Interference with Contractual Interference

Even if the defendants' claim could have been amended they did not prove any of the elements of intentional interference with contractual relations. To prove a claim of intentional interference with contractual relations a party must show proof of (1) the existence of a valid contract, (2) the defendant's awareness of the contract, (3) intentional acts intended to disrupt the contractual relationship, (4) actual disruption of the contract and, (5) resulting damage. *Sutherland v. Gross*, 105 Nev. 192, 196, 772 P.2d 1287, 1290 (1989). At the heart of an intentional interference action is whether the plaintiff has proved intentional acts intended or designed to disrupt a contractual relationship. *J.J. Indus., LLC v. Bennett*, 119 Nev. 269, 275, 71 P.3d 1264, 1268 (2003).

Here, defendants did not present or prove a claim for intentional interference with contractual relations. Defendants' Answer asserted only affirmative defenses. Further, throughout the trial defendants never indicated that they were pursuing a counterclaim.[5] They never even mentioned the elements of this tort. Judge Flanagan nevertheless concluded that the intentional interference with the contractual relations between Mosaic and Cal Neva caused the project to fail and "the counterclaim from the defendants [was] granted." That conclusion was factually and legally erroneous. *See Sutherland,* 105 Nev. at 196, 772 P.2d at 1290.

Furthermore, Judge Flanagan never found Mr. Yount intended to undermine the loan. In fact, Judge Flanagan concluded that it was the intent of a nonparty to intentionally interfere with the contractual relationship.

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[5] MR. CAMPBELL: Did you file a compulsory counterclaim against Mr. Yount from his lawsuit?

MR. RADOVAN: No.

(Hr'g Tr. 8/31/2017, at 512:18-20)

> THE COURT: This Court finds that it was the intent of *the IMC* to kill this loan, divest CR from its shares on the threat of legal, civil, criminal actions for their own benefit and not the benefit of the project.

(Hr'g Tr. 9/08/2017, at 1140:12-15)(emphasis added).

This Court has an obligation to revisit Judge Flanagan's ruling because it was fundamentally flawed. Where, as here, a party fails to prove each element of a claim, a court cannot find liability. *J.J. Indus., LLC*, 119 Nev. at 276, 71 P.3d at 1269 (rejecting liability where the plaintiff failed to prove that the defendant had a specific motive or purpose to injure by his interference and noting that the "fact of a general intent to interfere, under a definition that includes imputed knowledge of consequences, does not alone suffice to impose liability" (quoting *Nat'l Right To Life Political Action Comm. v. Friends of Bryan*, 741 F. Supp. 807, 814 (D. Nev. 1990))).

The judgment in favor of defendants was unjustified. The legal error is even more severe when combined with the outrageous award of speculative damages.

III.

MR. YOUNT IS ENTITLED TO A NEW TRIAL

It is fundamental to the concept of due process that a party be given notice of the claims against him and notice of the specific relief which is sought. Mr. Yount did not have adequate notice of an intentional interference with contractual relations counterclaim and was unaware he could be held liable for damages. Further, the Court erred in permitting speculative evidence of damages. The Court's unsupported identical award of damages to dissimilarly situated parties demonstrates Judge Flanagan's prejudice.

A. Mr. Yount Was Denied Due Process Because He Had No Notice of a Counterclaim

Mr. Yount did not have adequate notice of an intentional interference with contractual relations counterclaim. Parties must be given reasonable

advance notice of the major issues to be raised. *Schwartz v. Schwartz*, 95 Nev. 202, 206, 591 P.2d 1137, 1140 (1979). An opposing party cannot be deprived of a fair opportunity to defend and offer additional evidence. *Deere & Co. v. Johnson*, 271 F.3d 613, 622 (5th Cir. 2001); *Vaught v. Vaught*, 189 So. 3d 332, 334 (Fla. Dist. Ct. App. 2016) ("To 'allow a court to rule on a matter without proper pleadings and notice is violative of a party's due process rights'") quoting *Sanchez v. Marin*, 138 So.3d 1165, 1167 (Fla. 3d DCA 2014); *Whitesides v. Whitesides*, 290 Neb. 116, 122, 858 N.W.2d 858, 864 (2015)(noting a court's determination of questions raised by the facts, but not presented in the pleadings, should not come at the expense of due process); *Van Sickle v. Gilbert*, 196 Cal. App. 4th 1495, 1520, 127 Cal. Rptr. 3d 542, 560 (2011)(noting it is fundamental to the concept of due process that a defendant be given notice of the specific relief sought). The Nevada Supreme Court has noted that where a party is surprised by a development in the case it is required that the party be given a reasonable opportunity to respond. *Schwartz,* 95 Nev. at 206, 591 P.2d at 1140.

Here, Mr. Yount did not have sufficient notice of an intentional interference with contractual relations claim against him and therefore did not have notice he could be liable for monetary damages. Mr. Yount did not have an opportunity to present witnesses who could have corroborated his testimony and did not have an adequate opportunity to prepare his case. This gross violation of due process entitles Mr. Yount to a new trial.

B. <u>The Court Cannot Award Speculative Damages</u>

1. Defendants' Evidence of Damages was Speculative

It is well established that testimony on the amount of damages may not be speculative. *Clark Cty. Sch. Dist. v. Richardson Const., Inc.*, 123 Nev. 382, 397, 168 P.3d 87, 97 (2007). The party seeking damages has the burden of proving the fact that he was damaged and the amount thereof. *Gibellini v.*

Klindt, 110 Nev. 1201, 1206, 885 P.2d 540, 543 (1994). Although the amount of damages need not be mathematically certain, the injured party is required to establish a reasonable basis for ascertaining their damages. *Cent. Bit Supply, Inc. v. Waldrop Drilling & Pump, Inc.,* 102 Nev. 139, 142, 717 P.2d 35, 37 (1986).

Further, the court cannot assume the role of an expert and thereby relieve the injured party of the need to present evidence in support of their claim. *Mort Wallin of Lake Tahoe, Inc. v. Commercial Cabinet Co.*, 105 Nev. 855, 857, 784 P.2d 954, 956 (1989). Evidence essential to sustain a damages award must be in the record and available for meaningful appellate review. *Mort Wallin of Lake Tahoe, Inc.,* 105 Nev. at 857, 784 P.2d at 956.

Here, there was no evidence quantifying any specific dollar amounts to either Criswell, Marriner, or Radovan of any type of damages accruing against them individually or of them being entitled to two years salary, nor was there evidence that CR Cal Neva was entitled to development fees. During the seven day trial, defendants' counsel only asked one defendant one question regarding damages. In response, Radovan guessed that his operating company would have made over a million dollars in revenue and yet presents no evidence of where he came up with such a figure.[6] *See Knier v. Azores Const. Co.*, 78 Nev. 20, 24, 368 P.2d 673, 675 (1962) ("Where the loss of anticipated profits is claimed as an element of damages, the business claimed to have been interrupted must be an established one and it must be shown that it has been successfully conducted for such a length of time and has such a trade established that the profits therefrom are reasonably ascertainable"); *Eaton v. J. H., Inc.*, 94 Nev. 446, 450, 581 P.2d 14, 17 (1978) (noting that evidence must provide a basis for determining lost profits with reasonable certainty and a record of past profits of

[6] (Hr'g Tr. 8/31/2017, at 493:11-16)

an established enterprise provides a valid basis for determining such future profits with reasonable certainty).

Aside from Radovan's speculation as to his potential revenue, there is no other discussion of any of the defendants' damages or the amount thereof.

2. The Court Awarded Unsupported and Capricious Damages

Unsupportable or speculative damages awards are clear, legal error. Since findings in a bench trial "must be sufficient to indicate the factual basis for the court's ultimate conclusions," *Robison v. Robison*, 100 Nev. 668, 673, 691 P.2d 451, 455 (1984) (*citing Bing Constr. v. Vasey-Scott Eng'r*, 100 Nev. 72, 674 P.2d 1107 (1984)), courts that use a speculative method of calculating damages will be reversed. *See Goldie v. Yaker*, 432 P.2d 841, 844 (N.M. 1967) (noting that in a bench trial, the Court must justify an award of damages with factual findings that support the amount). For example, in *Central Bit Supply, Inc. v. Waldrop Drilling & Pump, Inc.*, the trial court used the plaintiff's payment on one drilling job to determine what was owed for a second, different job. 102 Nev. 139, 142, 717 P.2d 35, 37 (1986). That miscalculation did not receive any deference on appeal. *Id.*

So, too, the unsupportable awards of damages to defendants here rises to the level of legal error. Notably, the Court improperly awarded identical damages to differently situated defendants. *See Nev. Cement Co. v. Lemler*, 89 Nev. 447, 450-51, 514 P.2d 1180, 1182 (1973)(noting that since the purpose of a general damage award is to compensate the aggrieved party for damage actually sustained, an identical award to multiple plaintiffs who are dissimilarly situated is erroneous on its face.) Judge Flanagan concluded Criswell, Radovan and Marriner were all entitled to $1.5 million dollars.[7] However, the three defendants invested different capital contributions and held

[7] Amended Order 9/15/2017, at page 2: 1-11

different roles in the LLC.[8] The identical damage award demonstrates Judge Flanagan's prejudice. Such an unsupported and inappropriate award violated Mr. Yount's due process and entitles him to a new trial

CONCLUSION

The Court committed errors of law that materially affected the outcome and violated Mr. Yount's due process rights. This Court should alter or amend the Court's findings and judgment to eliminate an award against Mr. Yount. Further, this Court should grant a new trial to correct the manifest injustice.

The undersigned hereby affirms that this document does not contain the social security number of any person.

Dated this 30th day of March, 2018.

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[8] Criswell Radovan LLC invested $2,000,000 whereas Marriner Real Estate LLC invested $187,500. Operating Agreement, Schedule 4.2

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of March, 2018, I served the foregoing "Plaintiff's Motion for Judgment as a Matter of Law, for Relief from Judgment, to Alter and Amend the Judgment, to Amend the Findings, and for New Trial" on counsel by the Court's electronic filing system to the persons and addresses listed below:

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EXHIBIT B

EXHIBIT B

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IN THE SECOND JUDICIAL DISTRICT COURT OF

THE STATE OF NEVADA IN AND FOR THE

COUNTY OF WASHOE

GEORGE STUART YOUNT, Individually and in his Capacity as Owner of GEORGE STUART YOUNT IRA,

Plaintiff,

vs.

CRISWELL RADOVAN, LLC, a Nevada limited liability company; CR Cal Neva, LLC, a Nevada limited liability company; ROBERT RADOVAN; WILLIAM CRISWELL; CAL NEVA LODGE, LLC, a Nevada limited liability company; POWELL, COLEMAN and ARNOLD LLP; DAVID MARRINER; MARRINER REAL ESTATE, LLC, a Nevada limited liability company; NEW CAL-NEVA LODGE, LLC, a Nevada limited liability company; and DOES 1 through 10, Inclusive,

Defendants.

CASE NO.: CV16-00767
DEPT NO.: B7

DEFENDANTS' MOTION TO AMEND JUDGMENT

Defendants Criswell Radovan, LLC (Criswell Radovan), CR Cal Neva, LLC ("CR Cal Neva"), Robert Radovan ("Radovan"), William Criswell ("Criswell"), and Powell, Coleman and Arnold LLP ("PCA"), (Collectively "Defendants"), by and through their undersigned counsel, hereby move this Court to amend the Judgment entered on March 12, 2018, to include lost

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IN THE SECOND JUDICIAL DISTRICT COURT OF

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Plaintiff,

vs.

CRISWELL RADOVAN, LLC, a Nevada limited liability company; CR Cal Neva, LLC, a Nevada limited liability company; ROBERT RADOVAN; WILLIAM CRISWELL; CAL NEVA LODGE, LLC, a Nevada limited liability company; POWELL, COLEMAN and ARNOLD LLP; DAVID MARRINER; MARRINER REAL ESTATE, LLC, a Nevada limited liability company; NEW CAL-NEVA LODGE, LLC, a Nevada limited liability company; and DOES 1 through 10, Inclusive,

Defendants.

CASE NO.: CV16-00767
DEPT NO.: B7

DEFENDANTS' MOTION TO AMEND JUDGMENT

Defendants Criswell Radovan, LLC (Criswell Radovan), CR Cal Neva, LLC ("CR Cal Neva"), Robert Radovan ("Radovan"), William Criswell ("Criswell"), and Powell, Coleman and Arnold LLP ("PCA"), (Collectively "Defendants"), by and through their undersigned counsel, hereby move this Court to amend the Judgment entered on March 12, 2018, to include lost

management and development fees, consistent with the Amended Order filed on September 15, 2017.

This Motion is made and based on the attached Memorandum of Points and Authorities, the pleadings and papers on file herein, and the arguments of counsel at any hearing hereof.

DATED this 27th day of March, 2018.

HOWARD & HOWARD ATTORNEYS PLLC

By: _____

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

This matter came before the Honorable Patrick Flanagan for a bench trial on August 29, 2017. On September 8th, at the conclusion of the trial, Chief Judge Flanagan issued an oral decision on the record in open court lasting over two hours. A copy of the transcript of the issued decision is attached hereto as **Exhibit 1**. Significantly, in those findings, Chief Judge Flanagan entered a sweeping defense verdict in favor of the Defendants, dismissing all of Mr. Yount's claims against the Defendants with prejudice. Chief Judge Flanagan then specifically found that Mr. Yount had colluded with another investor, IMC Investment Group ("IMC") to intentionally interfere with Criswell Radovan's refinancing efforts with Mosaic, which ultimately led to the demise of the Project:

> In this case, but for the intentional interference with the contractual relations between Mosaic and Cal-Neva, this Project would have succeeded. That is undisputed. . . .

> This Court has documented dozens of email exchanges between Mr. Yount and the IMC in their efforts to undermine the Mosaic loan and there is no more solid evidence of that than in Exhibit 124. That deal was done. That deal has been executed. That deal was in place. Mosaic had evidenced its enthusiasm to close this deal. And yet the day that individuals from the IMC went to the Mosaic offices without the knowledge of [Criswell Radovan], that deal was dead. The testimony is unequivocal, there was never an attempt by the IMC to resurrect it, despite the open invitation by Mosaic to reintroduce the loan.
>
> **This Court finds that it was the intent of the IMC to kill this loan, divest [Criswell Radovan] from it shares on the threat of legal, civil, criminal actions for their own benefit and not the benefit of the project.**

Id. at 52-53 (emphasis added).

Chief Judge Flanagan then awarded Radovan and Criswell $1.5 million each in compensatory damages, two year's salary, management fees, attorney fees and costs. *Id.* A week later, on September 15, 2017, he issued a separate Amended Order clarifying his damage award and including lost development fees to Criswell Radovan. *See* Amended Order, **Exhibit 2** hereto.

II.

LEGAL ARGUMENT

AN AMENDED JUDGMENT SHOULD BE ENTERED

A. LEGAL STANDARD

A motion to alter or amend the judgment shall be filed no later than 10 days after service of written notice of entry of the judgment. NRCP 59(e). The purpose of such a motion is "to seek correction at the trial court level of an erroneous order or judgment." *Chiara v. Belaustegui*, 86 Nev. 856, 858, 477 P.2d 857, 859 (1970). Specifically, a motion to alter or amend the judgment is a proper method for challenging the total amount of the judgment. *See Fleischer v. August*, 103 Nev. 242, 247, 737 P.2d 518, 521 (1987).

Here, the Judgment should be amended to conform to Judge Flanagan's decision, including the Amended Order, pursuant to which Criswell and Radovan were awarded lost management fees, and Criswell Radovan was awarded lost development fees. The basis for this award was squarely in the record, as was the amount of lost development fees, leaving only the amount of the lost management fees to be quantified.

B. THE JUDGMENT SHOULD BE AMENDED TO INCLUDE LOST DEVELOPMENT FEES

As the decision and Amended Order correctly note, Criswell Radovan was the developer of the subject project, entitled to a $1.2 million Development Fee, payable in monthly installments of $60,000. *See* Confidential Private Placement Memorandum, Trial Ex. 3, p.8. Criswell Radovan earned all of its Development Fee, but "recontributed to the Company $480,000 of its Development Fee as of 6/1/14." *See* Section 7.4 of the Amended and Restated Operating Agreement, Trial Ex. 5; *see also* Trial Testimony of William Criswell, Volume I, pp. 186-188. Importantly, Criswell Radovan was not repaid its Development Fee before the project failed. *See* Trial Testimony of Robert Radovan, Volume VI, pp. 953-956. Accordingly, pursuant to the Amended Order, the Judgment should be amended to include an award of $480,000 to Criswell Radovan.

C. THE JUDGMENT SHOULD BE AMENDED TO INCLUDE LOST MANAGEMENT FEES

Criswell and Radovan had a binding agreement with Cal Neva Lodge, under which they would manage the operations of the property once it was completed and open. This fact is reflected in the Confidential Private Placement Memorandum, Trial Ex. 3 (recognizing that Cal Neva Lodge will enter into a hotel management agreement with Criswell Radovan or its affiliate) and the Amended and Restated Operating Agreement, Trial Ex. 5 ("Day-to-day management of the Project will be performed by an Affiliate of CR").

As demonstrated by the attached Declaration of William Criswell, key provisions of the Management Agreement were:

- A separate entity, CR Hospitality, LLC was formed by Criswell and Radovan for the purpose of serving as the hotel manager under a franchise agreement with Starwood Hotels and as part of the Starwood Luxury Collection. Criswell and Radovan each owned 30.5% of the membership interest in the entity. The remaining interests were held by key executive personnel in the operation.
- A copy of the Management Agreement was reviewed and approved by the Executive Committee before closing with the investors, and was one of the documents provided to investors such at closing.
- The minimum term of the agreement was 10 years from the date of opening, with two options for CR Hospitality to extend the term by five additional years each.
- The fees to be paid to CR Hospitality or management of the hotel were:
    - A Basic Fee equal to 3% of Revenue; and
    - An incentive fee equal to 10% of Net Operating Income before reserves and debt service.

- The total fees to be earned by CR Hospitality for the initial term of ten years following opening were estimated in the Financial Pro Forma section of the Confidential Private Offering Memorandum dated March, 2014 and accepted in evidence at trial as Trial Exhibit 4.

The following chart shows the estimates of total management fees for each of the first ten years of operation as shown in Trial Exhibit 4 and calculates the share of those fees that would have been received by each of Radovan and Criswell were it not for Yount's actions:

Lost Management Fees Per Trial Exhibit 4 dated March 2014

1st Ten Year Term

Year	Base Fee[1]	Base Incentive Fee[2]	Total Annual Fees	Criswell Share[3]	Radovan Share
1[4]	650,250	-0-	650,250	198,326	198,326
2	809,416	617,266	1,426,682	435,138	435,138
3	862,039	772,100	1,634,139	498,412	498,412
4	887,900	725,115	1,613,015	491,970	491,970
5	914,537	751,291	1,665,828	508,078	508,078
6	941,973	778,252	1,720,225	524,669	524,669
7	970,232	806,022	1,776,254	541,757	541,757
8	999,339	834,625	1,833,964	559,359	559,359
9	1,029,320	864,086	1,893,406	577,489	577,489
10	1,060,199	881,368	1,941,567	592,178	592,178
				4,927,376	4,927,376
TOTAL					

[1] Found in fourth line from bottom of Financial Pro Forma of Trial Exhibit 4.

[2] The 30.5% share owned by each of Criswell and Radovan in the total management fees to be paid to CR Hospitality. Because this management agreement was for a single property, costs of on site management, record keeping, office space, etc. would have been costs of the hotel itself and are not shown as a reduction in these values.

[3] 2015 was assumed to be a partial year as the first operating year when this projection was prepared in 2014. 2016 was to be the first full year of operations.

[4] Found under Fixed Charges Section of Financial Pro Forma of Trial Exhibit 4.

Importantly, the Financial Pro Forma which forms the basis for these damages was not only thoroughly vetted by several experts in the hotel industry, including Starwood Hotel and Resorts, but according to testimony at trial, by Yount's own accountant, Ken Tratner, who looked at the pro forma for reasonableness, and then gave the Pro Forma to a hospitality expert to review who told him it was reasonable; and then accountant Tratner gave Yount the go ahead to invest. *See* Trial Testimony of Ken Tratner, Volume VI, pp. 849-50, 855.

The above estimate of management fees is taken from Trial Exhibit 4, which was prepared in early 2014 and reflected a then depressed hotel market in the area. A more recent, and much higher, projection can be found in an updated pro forma (the "2015 Forecast") dated December 15, 2015 and prepared by Orion Hospitality, an outside consultant in the hospitality industry. Using those projections, the total of projected management fees which were lost by Criswell and Radovan due to the actions of Yount and others would be $7,546,000.

Accordingly, pursuant to the Amended Order, the Judgment should be amended to include an award of **at least** $4,927,376 in lost management fees to each of Criswell and Radovan.

III.

CONCLUSION

Based on the foregoing, Defendants respectfully request that their Motion to Amend Judgment be granted in its entirety.

DATED this 27th day of March 2018.

HOWARD & HOWARD ATTORNEYS PLLC

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SECOND JUDICIAL DISTRICT COURT
COUNTY OF WASHOE, STATE OF NEVADA

AFFIRMATION

X Document does not contain the social security number of any person

- OR -

_____ Document contains the social security number of a person as required by:

_____ A specific state or federal law, to wit:

_____
(State specific state or federal law)

- OR -

For the administration of a public program

- OR -

_____ For an application for a federal or state grant

- OR -

_____ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230, and NRS 125B.055

Date: March 27th, 2018

HOWARD & HOWARD ATTORNEYS, PLLC

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HOWARD & HOWARD ATTORNEYS PLLC

CERTIFICATE OF SERVICE

I hereby certify that I am employed in the County of Clark, State of Nevada, am over the age of 18 years and not a party to this action. My business address is that of Howard & Howard Attorneys PLLC, 3800 Howard Hughes Parkway, Suite 1000, Las Vegas, Nevada, 89169.

I served the foregoing **DEFENDANTS' MOTION TO AMEND JUDGMENT** in this action or proceeding electronically with the Clerk of the Court via the E-File and Serve system, which will cause this document to be served upon the following counsel of record:

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I certify under penalty of perjury that the foregoing is true and correct, and that this Certificate of Service was executed by me on March 27th, 2018 at Las Vegas, Nevada.

An Employee of HOWARD & HOWARD ATTORNEYS PLLC

EXHIBIT C

EXHIBIT C

2550

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DISTRICT COURT

WASHOE COUNTY, NEVADA

GEORGE STUART YOUNT, individually and in his capacity as owner of GEORGE YOUNT IRA, Plaintiff, *vs.* CRISWELL RADOVAN, LLC, a Nevada limited liability company; CR CAL NEVA, LLC, a Nevada limited liability company; ROBERT RADOVAN; WILLIAM CRISWELL; CAL NEVA LODGE, LLC, a Nevada limited liability company; POWELL, COLEMAN AND ARNOLD, LLP; DAVID MARRINER; MARRINER REAL ESTATE, LLC, a Nevada limited liability company; and DOES 1-10, Defendants.	Case No. CV16-00767 Dept. No. 7 **NOTICE OF HEARING**

Notice is hereby given that the following motions have been set for hearing on September 19, 2018 at 2:00 p.m., in Department 7 of the Second Judicial District Court, 75 Court Street, Reno, Nevada, 89501:

1. "Plaintiff's Motion for Judgment as a Matter of Law, for Relief from Judgment, to Alter and Amend the Judgment, to Amend the Findings, and for New Trial;"

2. "Defendants' Motion to Amend Judgment;"

3. "Defendants' Motion to Disqualify;"

4. "Defendants' Motion for Attorneys' Fees and Interest;" and

5. "Marriner's Motion for Attorney's Fees."

The undersigned hereby affirms that this document does not contain the social security number of any person.

Dated this 20th day of July, 2018.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of July, 2018, I served the foregoing "Notice of Hearing" on counsel by the Court's electronic filing system to the persons and addresses listed below:

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An Employee of Lewis Roca Rothgerber Christie LLP

Case No. 74275

In the Supreme Court of Nevada

GEORGE STUART YOUNT, individually and in his capacity as owner of GEORGE YOUNT IRA,

Appellant,

vs.

CRISWELL RADOVAN, LLC; CR CAL NEVA, LLC; ROBERT RADOVAN; WILLIAM CRISWELL; CAL NEVA LODGE, LLC; POWELL COLEMAN AND ARNOLD LLP; DAVID MARRINER; and MARRINER REAL ESTATE, LLC,

Respondents.

MOTION TO DETERMINE APPELLATE JURISDICTION

Appellant asks this Court to review whether it has jurisdiction over this appeal. *See Hallicrafters Co. v. Moore*, 102 Nev. 526, 728 P.2d 441 (1986).

An appeal is premature if filed "before entry of the written disposition of the last-remaining timely motion listed in Rule 4(a)(4)"—including a motion for judgment under NRCP 50(b), a motion to amend the findings under NRCP 52(b), and a motion for a new trial or to alter and amend the judgment under NRCP 59. NRAP 4(a)(4), (6).

Here, after the entry of a final judgment, appellant timely filed

post-judgment motions for judgment as a matter of law, for relief from the judgment, to alter and amend the judgment, to amend the findings, and for a new trial. (Attached as Ex. A, filed Mar. 30, 2018 (citing NRCP 50(b), 52(b), 56(a), 59(e), 60(b)); *see also* Ex. 2 to "Amended Notice of Appeal," Doc. 2018-12164, filed in this Court on Mar. 29, 2018 (indicating notice of entry on Mar. 13, 2018).) Respondents (defendants below) also filed a motion to amend the judgment. (Attached as Ex. B, filed Mar. 27, 2018.) Those motions remain pending in the district court. (Ex. C, "Notice of Hearing," filed July 20, 2018.) Appellant therefore believes that the appeal is premature.

The Court should also consider suspending the briefing schedule while it assesses the jurisdictional question.

Dated this 9th day of August, 2018.

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CERTIFICATE OF SERVICE

I certify that on August 9, 2018, I submitted the foregoing MOTION TO DETERMINE APPELLATE JURISDICTION for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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