

1 the facts, disputed or otherwise, as to other elements are rendered immaterial and summary  
2 judgment is proper.” *Bulbman*, 108 Nev. at 111, 825 P.2d at 592.

3 “[A] representation which later proved to be technically in error, [does] not establish[  
4 in the record by clear and convincing evidence that” the defendant knew the representation was  
5 false. *Lubbe*, 91 Nev. at 599.

6 Damages alleged must be proximately caused by reliance on the misrepresentation or  
7 omission. *Nelson v. Heer*, 123 Nev. 217, 225, 163 P.3d 420 (2007). Proximate cause limits  
8 liability to foreseeable consequences that are reasonably connected to both the defendant's  
9 misrepresentation or omission and the harm that the misrepresentation or omission created. *Id.*  
10 at 225-226.

11 Moreover, to be held liable, a corporate officer must specifically direct, actively  
12 participate, or knowingly acquiesce in the fraud or wrongdoing of the corporation or its other  
13 officers. *See, e.g., L.D. Indus., Inc. v. Smith*, 817 F.2d 69, 71 (9<sup>th</sup> Cir. 1987).

14 As shown above in Section A, Plaintiff has not, and cannot, meet his heavy burden as  
15 no fraud was committed by any of the Defendants in this case.

16  
17 4. Has Plaintiff established a claim for conversion against CR Cal Neva LLC,  
18 Criswell, Radovan, or Criswell Radovan, LLC?

19 A claim for conversion requires a showing that (1) a defendant committed a distinct act  
20 of dominion wrongfully exerted over plaintiff's property; and (2) the act was in denial of, or  
21 inconsistent with, plaintiff's title or rights there; or (3) the act was in derogation, exclusion, or  
22 defiance of plaintiff's title or rights in the personal property. *Evans v. Dean Witter Reynolds,*  
23 *Inc.*, 116 Nev. 598, 5 P.3d 1043 (2000); *Ferreira v. P.C.H. Inc.* 105 Nev. 305, 774 P.2d 1041  
24 (1989); *Wantz v. Redfield*, 74 Nev. 196, 326 p.2d 413 (1958). A conversion must essentially be  
25 tortious; it must entail an unlawful act, or an act which cannot be justified or excused in law.  
26 *Ferreira v. P.C.H. Inc.* 105 Nev. 305, 774 p.2d 1041 (1989); *Wantz v. Redfield*, 74 Nev. 196,  
27 326 P.2d 413 (1958). Conversion generally is limited to those severe, major, and important  
28 interferences with the right to control personal property that justify requiring the actor to pay

1 the property's full value. *Edwards v. Emperor's Garden Restaurant*, 122 Nev. 317, 130 P.3d  
2 1280 (2006).

3 Here, Plaintiff's conversion claim is premised on the faulty assumption that Defendants  
4 intentionally took his money as part of some scheme to get money out because they allegedly  
5 knew the project was about to fail. This is factually untrue. Indeed, Defendants believed they  
6 had a major refinancing lined up with Mosaic at the time Plaintiff purchased his investment  
7 interest (which loan Plaintiff and certain other investors unlawfully sank). Construction was  
8 in full swing when Plaintiff invested. Further, Radovan believed the project's broker, Marriner,  
9 had informed Plaintiff that Les Busick had bought the last Founders' Share, and that CR Cal  
10 Neva would sell Plaintiff one of its Founders' Shares. *See* Radovan Depo., p. 71, 74-75, 91-92.  
11 Plaintiff has no evidence to the contrary. *See* Plaintiff depo, p. 14-15. At most, this is a mistake  
12 situation, which has not been plead; but it clearly does not rise to the level of an intentional tort.  
13 Moreover, Radovan and Criswell did not pocket Plaintiff's \$1 million. This money in large  
14 part went to pay off Project debts.

15 **D.**

16 **LIST OF SUMMARIES OF SCHEDULES**

17 There is a summary of the change orders which can be found in Defendants' trial Exhibit  
18 Nos. 149 and 151.

19 **E.**

20 **LIST OF NAMES AND ADDRESSES OF WITNESSES**

21 Reserving their right to call impeachment or rebuttal witnesses, Defendants intend to  
22 call:

23 Plaintiff, Robert Radovan, William Criswell, David Marriner, and Bruce Coleman.

24 All of the above are parties to the case and can be served care of their attorney.

25  
26  
27  
28  
///

F.

**ANY OTHER APPROPRIATE, COMMENT, SUGGESTION, OR INFORMATION  
FOR THE ASSISTANCE OF THE COURT IN THE TRIAL OF THE CASE**

Two of the parties to this case, Cal-Neva Lodge, LLC and New Cal-Neva Lodge, LLC are in bankruptcy. Plaintiff has not sought a lift stay order.

G.

**LIST OF SPECIAL QUESTIONS REQUESTED TO BE PROPOUNDED  
TO THE PROSPECTIVE JURORS**

Not applicable.

H.

**CERTIFICATION THAT DISCOVERY HAS BEEN COMPLETED**

I hereby certify that all discovery has been completed

I.

**CERTIFICATION THAT PRIOR TO THE FILING OF THE TRIAL STATEMENT,  
THEY HAVE PERSONALLY MET AND CONFERRED IN GOOD FAITH TO  
RESOLVE THE CASE BY SETTLEMENT**

I hereby certify that I tried, in good faith, to resolve this case by settlement.

This document does not contain the Social Security Number of any person.

I declare, under penalty of perjury under the law of the State of Nevada, that the foregoing is true and correct.

DATED this 25 day of August 2017.

HOWARD & HOWARD ATTORNEYS PLLC

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# **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.

On this day I served the foregoing **DEFENDANTS'**

**TRIAL STATEMENT** 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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*Attorneys for Defendants*  
*David Marriner and*  
*Marriner Real Estate, LLC*

I certify under penalty of perjury that the foregoing is true and correct, and that this Certificate of Service was executed by me on August 25, 2017 at Las Vegas, Nevada.

  
An Employee of HOWARD & HOWARD ATTORNEYS PLLC

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40

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1 **1750**

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10 Attorneys for Criswell Radovan, LLC, CR Cal Neva, LLC,

11 Robert Radovan, William Criswell, Cal Neva Lodge, LLC,

12 and Powell, Coleman and Arnold LLP

13 **IN THE SECOND JUDICIAL DISTRICT COURT OF**  
14 **THE STATE OF NEVADA IN AND FOR THE**  
15 **COUNTY OF WASHOE**

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

19 Plaintiff,

20 vs.

21 CRISWELL RADOVAN, LLC, a Nevada  
22 limited liability company; CR Cal Neva, LLC,  
23 a Nevada limited liability company; ROBERT  
24 RADOVAN; WILLIAM CRISWELL; CAL  
25 NEVA LODGE, LLC, a Nevada limited  
26 liability company; POWELL, COLEMAN and  
27 ARNOLD LLP; DAVID MARRINER;  
28 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' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1 Defendants Criswell Radovan, LLC (Criswell Radovan), CR Cal Neva, LLC ("CR Cal  
2 Neva"), Robert Radovan ("Radovan"), William Criswell ("Criswell"), and Powell, Coleman and  
3 Arnold LLP (PCA), (Collectively "Defendants"), by and through their undersigned counsel,  
4 respectfully submit their Proposed Findings of Facts and Conclusions of Law.

5 **PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

6 1. Criswell Radovan is a real estate development firm with decades of experience  
7 developing large, significant commercial projects, such as Four Seasons hotel in Dublin, the  
8 Calistoga Ranch in Napa Valley, and other high rise commercial properties.

9 2. Criswell Radovan purchased the historic Cal Neva Hotel in Lake Tahoe in 2013  
10 with the intent of re-opening it after a multi-million dollar renovation.

11 3. The Project was to be funded through conventional financing and \$20 Million of  
12 equity, which equity shares were offered to investors beginning in 2014 (the "Founder's Shares").

13 4. On or about February 18, 2014, Marriner met with Plaintiff about investing in the  
14 Project. See Second Amended Complaint, ¶ 13. Plaintiff was not interested at that time.

15 5. The general contractor, Penta Building Group ("Penta") mobilized to the site in  
16 November 2014 an substantial completion was initially targeted for December 2015 -- to be timed  
17 with an opening celebration on Frank Sinatra's 100<sup>th</sup> birthday.

18 6. By July 2015, the Project was progressing and all but \$1.5 Million of the  
19 Founders' Shares had been sold.

20 7. Around this time, the construction budget and schedule was being impacted by  
21 scope changes due to unforeseen construction issues, like code upgrades that became apparent  
22 after construction conditions were exposed during construction.

23 8. Because of impacts to the budget, it became necessary to sell the remaining \$1.5  
24 Million Founders' Share to help balance the loan and satisfy the lender.

25 9. This offering was put out to prospective investors through the Project's agent and  
26 broker, David Marriner ("Marriner") of Marriner Real Estate.  
27  
28

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1           10.     One of the prospective investors was Plaintiff.

2           11.     In July 2015, Plaintiff was informed the last \$1.5 million Founders' Share had  
3     been released.

4           12.     Plaintiff considers himself a sophisticated investor.

5           13.     Plaintiff is the CEO of Fortifiber Corporation, a company that supplies  
6     construction materials around the world.

7           14.     Plaintiff understands how to review financial statements and to assess risks when  
8     it comes to making an investment.

9           15.     In July, 2015, Plaintiff was provided with numerous investment documents,  
10    including a Private Placement Memorandum, which discussed the speculative nature and risk of  
11    the investment. Plaintiff read and understood the risks of this type of investment and had the  
12    opportunity to have his attorney and accountant review the same.

13           16.     In addition to the "Private Placement" documents, Plaintiff was provided financial  
14    statements, construction progress reports and answers to all of the specific questions he and his  
15    accountant had about the Project. Importantly, the construction progress reports addressed in  
16    detail the significant impacts that were occurring to the budget and schedule at the time due to  
17    unforeseen scope changes. See, e.g., July 2015 Monthly Progress Reported.

18           17.     As part of his due diligence, in July, 2015, Plaintiff did a 2-hour walk through of  
19    the Project with Marriner and a Penta representative, where Plaintiff was told about the ongoing  
20    changes to the Project that were impacting the budget and schedule and had the opportunity to  
21    have any questions he may have answered by Perna.

22           18.     Although Plaintiff knew the schedule was being compressed by scope changes,  
23    which were also already affecting the budget, he admittedly never asked any specifics about  
24    either prior to investing.

25           19.     Plaintiff did, however, speak with the Project's architect, Peter Grove, who he  
26    knew well – in fact, Peter Grove was Plaintiff's architect on one of his residence remodels.  
27  
28



1           20.     Plaintiff asked Peter Grove how he would rate the Project's chance of success,  
2 and was told "pretty good." Peter Grove told Plaintiff the Project was in fund raising mode, with  
3 construction costs exceeding budget and they were trying to get their arms around those  
4 increasing costs.

5           21.     Significantly, Peter Grove had detailed knowledge about all of the pending and  
6 proposed changes to the budget and schedule. In fact, as the Project Architect, he reviewed and  
7 signed off on all change orders.

8           22.     Plaintiff believes Peter Grove was honest with him and would not misrepresent  
9 facts about the Project's costs or schedule.

10          23.     Prior to investing, Plaintiff admittedly did not ask for anything that he was not  
11 given.

12          24.     Importantly, Plaintiff had his CPA review all this documentation and assist him  
13 with his due diligence. Plaintiff admits that Radovan timely responded to questions from his  
14 CPA. Plaintiff's CPA told him this seemed like a good project.

15          25.     In late July, 2015, Plaintiff made notes of his due diligence. These notes confirm  
16 Plaintiff's understanding that the construction budget was going to be at least \$10 million over  
17 budget from what was represented in the Private Placement Memoranda – double what he now  
18 claims he knew when he invested. Plaintiff's notes also confirm his understanding that the  
19 developer, CR Cal Neva, owned \$2 million of Founder Shares. Additionally, as of late July,  
20 Plaintiff understood the full opening was being pushed back to April 2016.

21          26.     Plaintiff was seeking to fund his potential investment through his 401(k), which  
22 took several months. During this time, Defendants did not know whether Plaintiff was going to  
23 invest.

24          27.     During Plaintiff's hiatus, in August 2015, Plaintiff was told the soft opening was  
25 being pushed back even further, to March 2016, with a grand opening on Father's Day, 2016.

26          28.     Given the demands of the Project, and the fact Plaintiff could not commit to  
27 investing, Criswell Radovan had to move forward with other funding alternatives. Les Busick,  
28

1 one of the original investors and a member of the Project's Executive Committee, purchased the  
2 last \$1.5 million Founder Share at the end of September 2015. Notably, Les Busick decided to  
3 make this significant additional investment after walking the Project with Penta and going over  
4 all of the anticipated cost overruns.

5 29. When Radovan learned that Plaintiff still wanted to invest, Radovan spoke to  
6 Marriner and told him that CR Cal Neva would sell Plaintiff one of its \$1 million Founder Shares.  
7 Radovan believed Marriner informed Plaintiff of this fact, but Marriner says he believed that  
8 Radovan informed Plaintiff of this fact. Plaintiff has no evidence to the contrary.

9 30. On October 1, 2015 -- after Mr. Busick closed out the last \$1.5 million Founder  
10 Share, Marriner sent Plaintiff wiring instructions to Criswell Radovan's bank account.

11 31. On October 2, 2015, Criswell Radovan's assistant, Heather Hill, who had stepped  
12 into a role formerly filled by an attorney who had recently left the company, informed the  
13 company's outside legal counsel, Bruce Coleman, that Plaintiff was going to buy one of CR Cal  
14 Neva's Founding Shares, and they wanted to use his firm's trust account to process the  
15 transaction. *See* October 2, 2015 e-mail. This e-mail demonstrates that Ms. Hill was unclear  
16 about the documentation needed to document this purchase.

17 32. On October 6, 2015, Bruce Coleman responded that he had not yet received the  
18 \$1 Million investment from Plaintiff. He also informed Ms. Hill that the Operating Agreement  
19 required the approval by Members holding at least 67% interest in the company of this sale of  
20 CR Cal Neva's interest to the Plaintiff. Ms. Hill subsequently informed Mr. Coleman that the  
21 company had approval to sell one of its shares. Indeed, it was well known from the operative  
22 Member documents that CR Cal Neva had the authority and planned to sell one of its two  
23 Founders' Shares. *See, e.g.*, Private Placement Memorandum (demonstrating CR would reinvest  
24 \$1 Million -- not \$2 Million -- as their investment in the Project); Amended and Restated  
25 Operating Agreement, Section 7.4 (also reaffirming that CR would be required to maintain a \$1  
26 Million investment in the project); Promissory Note dated 9/30/14, Section 22, stating that the  
27 developers shall not have less than \$1 Million equity); 4/24/14 (Cal Neva funding status);  
28

1 (confirming CR could reduce its equity from \$2 Million to \$1 Million if someone wanted to buy  
2 one of its shares).

3 33. On October 10, 2015 -- two days before Plaintiff invested, Radovan responded by  
4 email to Plaintiff's request for a schedule update, reaffirming that a soft opening was scheduled  
5 in Spring with grand opening on Father's Day 2016.

6 34. On October 12, 2015, Plaintiff signed and delivered a Subscription Agreement to  
7 Heather Hill and caused his \$1 million to be wired to the trust account of PCA.

8 35. On October 13, 2015, Radovan signed the Acceptance of Subscription on behalf  
9 of Cal Neva Lodge, LLC. Radovan signed this document under the mistaken belief that it was  
10 documenting the transaction between CR Cal Neva and Plaintiff.

11 36. PCA -- believing Plaintiff was buying one of CR Cal Neva's shares -- followed  
12 the only instructions it had been given and sent the funds to CR Cal Neva. In fact, PCA did not  
13 have the escrow instructions or Subscription Agreement that Plaintiff executed. PCA's only  
14 instructions were to send the money to Criswell Radovan, which made sense since everyone  
15 (except allegedly Plaintiff) believed Plaintiff was buying one of CR Cal Neva's Founder Shares.

16 37. Criswell Radovan used the majority of Plaintiff's investment to satisfy Project  
17 debts.

18 38. Plaintiff claims he first learned he had purchased one of CR Cal Neva's Founding  
19 Shares in January, 2016. See, Second Amended Complaint, p. 23. Prior to investing, Plaintiff  
20 says nobody told him Mr. Busick had purchased the last \$1.5 million Founder's Share.

21 39. Plaintiff also claims that, in December 2015, he learned for the first time that:

- 22 a. the project was more than \$5 - \$6 Million overbudget; and  
23 b. it was not going to open in December, 2015 because of construction delays.

24 40. As shown above, and explained in more detail below, this allegation is belied by  
25 the undisputed evidence in this case, including Plaintiff's own testimony. In fact, the change  
26 orders and pay applications on the Project show that costs were less than \$10 Million over budget  
27 by the time Plaintiff made his investment, and considerably less during the July time period when  
28

1 Plaintiff was doing his due diligence and communicating with Marriner and Radovan. This is  
2 consistent with the cost overruns Plaintiff's own notes show he understood to be imminent prior  
3 to investing.

4 41. Yount is unaware of any financial improprieties in the Project and hasn't  
5 identified any.

6 42. There is no information provided by Defendants to Yount which Defendants knew  
7 or believed to be false.

8 43. Moreover, CR Cal Neva's Founder's Share has the identical rights, obligations  
9 and value as the Founder's Share Plaintiff says he thought he was purchasing.

10 44. There is no evidence that the membership interest Yount received is materially  
11 different from the one he sold. Any assertion to this effect is speculative.

12 45. Notably, from the moment Plaintiff bought his interest, he clearly considered  
13 himself as, and was treated by the Executive Committee as, a full founding investor. He even  
14 requested a note be made to acknowledge his investment which was done but he refused to sign.  
15 He attended Executive Committee meetings and involved himself actively in those meetings. He  
16 also involved himself with a select group of investors who actively meddled in the financing  
17 efforts to try to supplant their own financing. In the spring of 2016, these investors (with  
18 Plaintiff's involvement) went behind Criswell Radovan's back and sabotaged the loan Criswell  
19 Radovan had lined up with Mosaic to fund the remaining construction.  
20

21 46. Yount was aware of the interference when it occurred.

22 47. Yount's alleged damages result in whole or in part from the interference in the  
23 Mosaic loan.

24 48. Without funding, the Project fell into bankruptcy and Plaintiff has since attempted  
25 to distance himself from his investment, including filing the instant lawsuit.  
26  
27  
28

**PLAINTIFF'S CLAIM FOR RELIEF****Breach of Contract**

49. Plaintiff claims that Criswell Radovan, CR Cal Neva, Cal Neva Lodge, LLC and New Cal Neva Lodge, LLC breached the Subscription Agreement because his \$1 Million was not deposited into the account of Cal Neva Lodge, LLC.

50. Cal Neva Lodge, LLC and New Cal Neva Lodge, LLC are in bankruptcy and the automatic stay applies to them.

51. Plaintiff has admitted, and the Subscription Agreement demonstrates, that his contract was with Cal Neva Lodge, LLC – an entity that is currently subject to Chapter 11 protections. CR Cal Neva, LLC and Criswell Radovan, LLC are not parties to the contract, and therefore, cannot legally breach said contract. Indeed, fundamental to a breach of contract claim is a valid and existing contract between the Plaintiff and the Defendant. *See Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000). Moreover, Plaintiff is essentially seeking a rescission of this contract, but he cannot do that against non-parties to the contract. His recourse is to request a lift of stay from the Bankruptcy Court to pursue his cause of action against Cal Neva Lodge, LLC, which is currently not subject to this Court's jurisdiction.

52. Plaintiff is not entitled to recover under his first cause of action.

**PLAINTIFF'S SECOND AND FOURTH CAUSES OF ACTION****Breach of Duty and Negligence Against PCA**

53. Plaintiff contends PCA breached its duties to him by releasing his funds to Criswell Radovan.

54. Plaintiff contends PCA breached its duties to him by releasing his funds to Criswell Radovan. This claim fails because PCA understood and believed Plaintiff was buying one of CR Cal Neva's shares, and Plaintiff admitted he has no evidence to the contrary. In fact, PCA did not have the escrow instructions that Plaintiff says were breached. PCA followed the only instructions it had, which was to send the money to Criswell Radovan for a purchase of its shares.

1 55. Plaintiff is not entitled to recovery under his Second and Fourth Causes of Action.

2 **PLAINTIFF'S THIRD, SIXTH AND SEVENTH CAUSES OF ACTION**

3 **Fraud and Punitive Damages**

4 56. Plaintiff has not met his heavy burden of proving fraud and punitive damages by  
5 clear and convincing evidence.

6 57. Plaintiff's fraud-based claims against Criswell fail as Plaintiff admitted that he  
7 never met, spoke to or communicated with Criswell prior to making his investment. Plaintiff's  
8 first dealings with Criswell was several months after he made his investment.

9 58. Plaintiff contends he was defrauded because the Project was more over-budget  
10 than represented by Marriner and Radovan. Specifically, Plaintiff testified he was led to believe  
11 the Project was only \$5-6 Million over budget. Plaintiff's own testimony, however, shows he  
12 really knew the Project was at least \$10 million over budget, which is consistent with the status  
13 of cost overruns when Plaintiff invested. Plaintiff has no evidence the Project was more  
14 overbudget than this when he made his investment: Thus, Plaintiff cannot prove by clear and  
15 convincing evidence that Defendants misrepresented the budget.

16 59. Moreover, Plaintiff admittedly cannot prove intent to induce reliance, as he cannot  
17 prove that when Radovan and Marriner made these representations to him that they knew the  
18 costs on the project would exceed \$10 Million.

19 60. Plaintiff also claims he was misled about the date the Project would open.  
20 Specifically, he says he knew it was not going to open by December, 2015, but says this was  
21 because of concerns over lack of tourism in the winter -- not because of construction delays. This  
22 claim must also fail.

23 61. In fact, two days before Plaintiff invested, Radovan told him by email the soft  
24 opening was in Spring and grand opening Father's Day, 2016. This email says nothing about  
25 tourism or weather. Plaintiff admittedly has no evidence to believe this statement was false when  
26 made.  
27  
28

001140





**SECOND JUDICIAL DISTRICT COURT  
COUNTY OF WASHOE, STAT 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: 8/25/17

HOWARD & HOWARD ATTORNEYS, PLLC

By: 

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001142

**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.

On this day I served the foregoing **DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** 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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Telephone: (775) 831-3666  
*Attorneys for Defendants*  
*David Marriner and*  
*Marriner Real Estate, LLC*

I certify under penalty of perjury that the foregoing is true and correct, and that this Certificate of Service was executed by me on August 25, 2015 at Las Vegas, Nevada.

  
An Employee of HOWARD & HOWARD ATTORNEYS PLLC

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41

**CODE 4220**  
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Attorneys for Plaintiff

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,

v.

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 1-10,

Defendants.

CASE NO. CV16-00767

DEPT. NO. B7

**PLAINTIFF'S TRIAL STATEMENT**

Plaintiff GEORGE STUART YOUNT ("Mr. Yount"), by and through his undersigned  
counsel, The Law Office of Richard G. Campbell, Jr. Inc., hereby files his *Trial Statement*.

**A. STATEMENT OF FACTS SUPPORTING PLAINTIFF'S CLAIMS OR DEFENSES**

1. Mr. Yount signed the Subscription Agreement required under the Private Placement

1 Memorandum ("PPM") to make an investment into the Cal Neva Lodge, and Robert Radovan  
2 signed the Acceptance of Subscription. The subscription agreement documents were the only  
3 documents sent to Mr. Yount to validate his investment of \$1 million.

4 2. Powell Coleman and Arnold was the Escrow Agent to receive funds under the  
5 Subscription Agreement and received a wire transfer from Mr. Yount's Trust Company handling  
6 his IRA for \$1 million into its client trust account.

7 3. The Escrow Instructions attached to the Subscription Agreement were the only  
8 written Escrow Instructions provided to Mr. Coleman and he did not receive any other written  
9 documents authorizing him to release Mr. Yount's \$1 million to Criswell and Radovan.

10 4. Mr. Coleman transferred Mr. Yount's \$1 million to Criswell and Radovan because  
11 his clients told him to do so.

12 5. Mr. Radovan never told Mr. Yount that he was purchasing one of the Criswell  
13 Radovan shares in the Cal Neva instead of purchasing a share under the remaining \$1.5 million of  
14 the PPM.

15 6. Mr. Marriner never told Mr. Yount that Les Busick had invested \$1.5 million under  
16 the PPM and that closed out any further investments under the PPM.

17 7. Mr. Marriner knew that Mr. Radovan intended to sell a CR share to Mr. Yount  
18 because no more money could be raised under the PPM and Mr. Marriner never told Mr. Yount of  
19 this intended transaction.

20 8. The Operating Agreement governing the Members of the Cal Neva Lodge, LLC  
21 required that before a Member could sell a share there had to be a vote with written confirmation  
22 that 67% the other members approved the Transfer.

23 9. Mr. Coleman knew that the Operating Agreement required a vote with written  
24 approval from the other members before they could transfer their share to Mr. Yount and told his  
25 clients Criswell and Radovan of this requirement, yet without receiving a copy of such written  
26 approval of the other members, transferred Mr. Yount's \$1 million to Criswell Radovan.

27 10. Mr. Radovan, Mr. Criswell and Mr. Coleman attempted to paper the sale of a  
28 Criswell Radovan share to Mr. Yount by sending him documents evidencing such a sale and

1 backdating the member approval of the transfer to be effective October 13, 2015, claiming that Mr.  
2 Yount erroneously executed a Subscription Agreement.

3 11. Mr. Yount refused to sign such documents and there has never been a vote of the  
4 Members of the Cal Neva Lodge, LLC approving the transfer of the Criswell Radovan share to Mr.  
5 Yount.

6 12. Mr. Yount was told in July 2015 that the project had incurred \$5 million in change  
7 orders and that Mr. Radovan was seeking \$15 million to refinance the Mezzanine Loan.

8 13. By September of 2015 the project had incurred over \$9 million in change orders and  
9 Mr. Yount was never told of this increased amount prior to tendering his \$1million.

10 14. Mr. Marriner was aware of the increased amount of change orders prior to Mr.  
11 Yount tendering his money and never told Mr. Yount of this increased number.

12 15. In July of 2015 Mr. Radovan was also seeking to refinance the entirety of the debt  
13 on the project and by the latest in September of 2015 was attempting to secure an additional \$21  
14 million in debt for the project.

15 16. Without a refinance of the project adding \$21 million in debt the project would not  
16 move forward.

17 17. Mr. Yount was never informed, by either Mr. Radovan or Mr. Marriner, that the  
18 project would not move forward unless it was refinanced with an additional \$21 million in debt.

19 **B. STATEMENT OF ISSUES OF LAW WITH MEMORANDUM OF AUTHORITY**

20 1. Did William Criswell, Robert Radovan, CR Cal Neva Lodge and Criswell Radovan  
21 LLC, breach the subscription agreement signed by Mr. Yount and accepted by Mr. Radovan?

22 Mr. Yount entered into a contract with Cal Neva Lodge LLC to purchase a share in the LLC  
23 under the terms of the PPM. Mr. Radovan, signing on behalf of CR Cal Neva Lodge who was the  
24 manager of the entity, is a party to that contract. By failing to follow the Subscription Agreement  
25 that Mr. Yount entered into and giving him a share under that Subscription Agreement CR violated  
26 the terms of the Subscription Agreement.

27 2. Did Powell Coleman and Arnold breach it duties owed to Mr. Yount as attorneys  
28 and escrow agents?

1 Powell Coleman and Arnold was the designated Escrow Agent to collect funds under the  
2 PPM. Mr. Yount was directed to wire transfer those funds to the Powell Coleman trust account,  
3 fully expecting that the money would then be transferred to the bank account of Cal Neva Lodge  
4 LLC. As an escrow holder and as the attorney for the Cal Neva Lodge LLC, Powell Coleman had  
5 a fiduciary duty to Mr. Yount to properly hold his money in escrow and then release it properly  
6 with specific directions on how to handle the money.<sup>1</sup>

7 A fiduciary relationship exists when one has the right to expect trust and confidence in the  
8 integrity and fidelity of another. *Powers v. United Services Automobile Association*, 114 Nev. 690,  
9 979 P.2d 1286 (1999). In *Robertson v. ADJ Partnership, Ltd*, 204 S.W. 3d 484 (Tex 2006) the  
10 court held that an attorney acting as an escrow agent had a fiduciary duty both as the attorney and  
11 as an escrow. As stated above, Powell Coleman was the designated Escrow Agent for the PPM  
12 and Mr. Yount's funds were deposited into their client trust account. Texas Disciplinary Rules of  
13 Professional Conduct 1.14 (b) requires that funds in a trust account shall promptly be delivered to  
14 a client or third party that the client or third party is "entitled to receive" ( Emphasis added). Nevada  
15 Rule of Professional Conduct 1.15 (d) has an identical requirement that funds should only be  
16 released to a firm's clients that they are entitled to receive. Even assuming Mr. Yount had agreed  
17 to buy a CR share, until the Members of the Cal Neva Lodge approved the transfer and sale of the  
18 share to Mr. Yount, Radovan and Criswell were not entitled to receive those funds. In addition, if  
19 Powell Coleman believed that Mr. Yount's money was received into the firm's trust account as part  
20 of a sale between CR and Mr. Yount and not part of the PPM, Mr. Coleman had a duty to insure  
21 that there was in fact such an agreement between Mr. Yount and CR before he released Mr. Yount's  
22 money.

23 Mr. Coleman has also acknowledged that he was acting as the attorney for the Cal Neva  
24 Lodge LLC which meant he was also representing its Members. Under either scenario of Mr.  
25 Yount purchasing under the PPM or purchasing a Criswell Radovan share of the PPM, Mr. Yount  
26 would have been a member of the LLC and thus owed a fiduciary duty from Powell Coleman.

27 \_\_\_\_\_  
28 <sup>1</sup> Despite the NRS Chapter 645A that it is unlawful to engage in the business of acting as an escrow agent in Nevada  
without a license, Powell Coleman never obtained such license.

1 There is no question that Powell Coleman breached that duty. Mr. Coleman had given specific  
2 instructions to his client Criswell and Radovan that they needed a vote of the members of the LLC  
3 before the transaction could be consummated. Releasing Mr. Yount's money to Criswell and  
4 Radovan without written proof that the members had voted to approve the transfer was a  
5 monumental breach of Mr. Coleman's duty both as an Escrow Agent and as counsel for Cal Neva  
6 Lodge LLC and its members.

7 3. Were William Criswell, Robert Radovan, CR Cal Neva, Criswell Radovan, LLC,  
8 David Marriner, and Marriner Real Estate, LLC guilty of fraud and misrepresentation against Mr.  
9 Yount?

10 In Nevada the elements of a fraud claim are (1) a false representation, (2) made with  
11 knowledge or belief that it is false or without sufficient basis or information, (3) intent to induce  
12 reliance and (4) damage resulting from the reliance. *Collins v. Burns* 103 Nev. 394, 397, 741 P.2d  
13 819,821 (1987). A material omission of fact or suppression of a material fact which a party is  
14 bound to disclose is equivalent to a false representation, *Nelson v. Herr* 123 Nev. 217, 163 P.3d.  
15 420 (2007).

16 In the instant case, Plaintiff has a plethora of grounds for his fraud claim based on material  
17 misrepresentations and material omissions, most of which Defendants have already admitted.

18 a. Mr. Yount was never told that he could not legally invest under the PPM and instead  
19 was purchasing one of the CR shares. Had Mr. Yount been so informed he would not have invested.

20 b. Mr. Yount was never told that the Hall loan was out of balance and that if equity  
21 was not put into the LLC that Hall would quit funding.

22 c. Mr. Yount was told by Mr. Radovan that the project was not going to open in  
23 December 2015 because he was afraid that a continued drought and lack of snow would impact  
24 revenues.

25 d. Mr. Yount was never told that Radovan was seeking a total refinance of both the  
26 Hall and Ladera loans and needed an additional \$20 million to finish the project and without a  
27 refinance the project could not go forward. Mr. Yount would not have invested in the project if  
28 that fact had been disclosed to him.



1           These important facts were not disclosed to Mr. Yount by either Mr. Criswell, Mr. Radovan  
2           or Mr. Marriner to insure that Mr. Yount would make his investment into the project and send his  
3           \$1 million to Powell Coleman who would in turn send the money to Criswell and Radovan.

4           4.       Was Defendant Powell, Coleman and Young LLP negligent when it released Mr.  
5           Yount's \$1 million from its trust account and sent the money to its client Criswell and Radovan?

6           In addition to the clear breach of duty by Powell Coleman, Mr. Coleman's actions in  
7           releasing Mr. Yount's money to his client, Criswell Radovan, constituted negligence. The elements  
8           of a cause of action for negligence are:

- 9                   1.       Defendant owed a duty to Plaintiff;
- 10                  2.       Defendant breached that duty;
- 11                  3.       The breach was the legal cause of Plaintiff's injuries; and,
- 12                  4.       Plaintiff suffered damages.

13       *Scialabba v. Brandise Construction Company*, 112 Nev. 965, 921 P.2d 928 (1996).

14           As set forth above, Powell Coleman had a duty to Plaintiff as an escrow holder for Mr.  
15           Yount's \$1 million and as the attorney for Cal Neva Lodge LLC. Powell Coleman breached that  
16           duty when they released Mr. Yount's \$1 million without specific authorization to do so in that Mr.  
17           Coleman knew that a sale of a Criswell Radovan share to a third party first required a vote of the  
18           members of the Cal Neva Lodge LLC and yet he released Mr. Yount's money to his clients Criswell  
19           and Radovan without any proof in writing that there was such a vote approving the transfer. As  
20           such Mr. Yount was damaged in that he has not been given his money back. There are no genuine  
21           issues of material fact related to this claim, Mr. Coleman clearly knew that a member vote and  
22           approval was necessary for a transfer of a member share and released the money without any proof  
23           of such approval being obtained.

24           5.       Are CR Cal Neva, LLC, William Criswell, Robert Radovan, Criswell Radovan,  
25           LLC; guilty of conversion for taking and keeping Mr. Yount's \$1 million?

26           Under Nevada law the elements for the claim of conversion are;

27           a.       Distinct and intentional act of dominion by one which is wrongfully exerted over  
28           the property of another;

1           b.       An act committed in denial of, or inconsistent with the rightful owner's use and  
2 enjoyment of the property;

3           c.       An act committed in derogation, exclusion, or defiance of the owner' rights or title  
4 to the property; and,

5           d.       Causation and damages.

6           *M.C. Multi-Family Development, L.L.C. v. Crestdale Associates, Ltd.*, 124 Nev. 901, 193  
7 P.3d 536, (2008).

8           In the instant case, Defendants CR Cal Neva, Criswell Radovan LLC and Mr. Criswell and  
9 Radovan, intentionally took Mr. Yount's \$1 million and converted it to their own use. Mr. Yount  
10 never agreed to purchase one of the CR shares and Defendants have not produced one scintilla of  
11 evidence that Mr. Yount agreed to such a purchase. Mr. Radovan acknowledged that he did not  
12 even tell Mr. Yount that he was selling him a CR share instead of purchasing a share under the  
13 PPM. Even assuming arguendo that Mr. Yount and Mr. Radovan had agreed to having Criswell  
14 Radovan sell one of its \$1 million shares to Mr. Yount, without the Member consent as required  
15 under the Operating Agreement, that transaction could not be consummated. Taking Mr. Yount's  
16 money and converting to their own use without paying Mr. Yount back, without question fulfills  
17 the factual elements necessary to substantiate a claim for conversion. There are simply no material  
18 issues of fact as to whether the shareholder ever approved the transfer and whether Mr. Yount's  
19 money has been returned to him, and as such summary judgment on this cause of action should be  
20 granted by the Court.

21           6.       Were the actions of Defendants egregious enough to justify an award of Punitive  
22 Damages?

23           Under NRS Chapter 42 punitive damages are available to a plaintiff in an action that does  
24 not arise under a contract where at trial the clear and convincing evidence shows that the defendant  
25 has been guilty of fraud or malice, express or implied. In the instant case the egregious nature of  
26 the intentional deception, misinformation and non-disclosure of material facts, all intended to make  
27 sure that Mr. Yount would make his investment rise to the level of actions that should serve as  
28 punitive damages to punish the Defendants.

1           7. Did the actions of the Defendants William Criswell, Robert Radovan, CR Cal Neva  
2 Lodge LLC, Criswell Radovan LLC, David Marriner and Marriner Real Estate constitute Securities  
3 Fraud under NRS 90.570 in the Offer, Sale and Purchase of a Security?

4           NRS 90.660 provides that a person who offers or sells a security in violation of certain  
5 provisions of NRS Chapter 90 is liable to a person purchasing the security. The relevant provisions  
6 that apply to Mr. Yount's claim against Marriner are NRS 90.310 and NRS 90.570. NRS 90.310  
7 makes it unlawful for either a broker dealer or a sales representative to transact business in Nevada  
8 unless they are licensed or exempt. NRS 90.570 provides that in connection with the offer to sell  
9 a security a person shall not

- 10           1. Employ any device, scheme or artifice to defraud
- 11           2. Make an untrue statement of material fact or omit to state a material fact necessary in  
12           order to make the statements not misleading in light of the circumstance under which  
13           they are made, or
- 14           3. Engage in an act, practice or course of conduct which operates as a fraud or deceit upon  
15           a person.

16           Radovan and Marriner made multiple statements to Mr. Yount that were untrue and omitted  
17 numerous material facts all of which were fraudulent and specifically intended to induce him to  
18 tender his \$1 million. Had these facts had been disclosed to Mr. Yount he would not have agreed  
19 to have tendered his \$1 million.

20           The basis for a fraud claim can be either active misrepresentations or material omissions.  
21 Intentional misrepresentation is established by three factors, (1) a false representation that is made  
22 with either knowledge or belief that it is false or without sufficient foundation, (2) an intent to  
23 induce another's reliance, and (3) damage that results from this reliance. With respect to the false  
24 representation element, the suppression of a material fact which a party is in good faith bound to  
25 disclose is equivalent to a false representation. *Nelson v. Heer*, 123 Nev. 217, 163 P.3d 420 (2007).  
26 In the instant case, Plaintiff has a plethora of grounds for his fraud claim based on material  
27 misrepresentations and material omissions, most of which Defendants have already admitted.

- 28           a. Mr. Yount was never told that he could not legally invest under the PPM and instead

1 was purchasing one of the CR shares. Had Mr. Yount been so informed he would not have invested.

2 b. Mr. Yount was never told that the Hall loan was out of balance and that if equity  
3 was not put into the LLC that Hall would quit funding.

4 c. Mr. Yount was told by Mr. Radovan that the project was not going to open in  
5 December 2015 because he was afraid that a continued drought and lack of snow would impact  
6 revenues.

7 d. Mr. Yount was never told that Radovan was seeking a total refinance of both the  
8 Hall and Ladera loans and needed an additional \$20 million to finish the project and without a  
9 refinance the project could not go forward. Mr. Yount would not have invested in the project if  
10 that fact had been disclosed to him.

11 These important facts were not disclosed to Mr. Yount by either Mr. Criswell Mr. Radovan  
12 or Mr. Marriner to insure that Mr. Yount would make his investment into the project and send his  
13 \$1 million to Powell Coleman who would in turn send the money to Criswell and Radovan.

14 8. Is Plaintiff entitled to attorney fees if he prevails in the instant litigation?

15 The Amended and Restated Operating Agreement which governs the legal obligations  
16 among the members of the LLC at Section 16.9 provides "if any Member of Manger Commences  
17 an action against the other Members and or Manger to interpret or enforce any of the terms of this  
18 agreement or as the result of a breach by the other Members or Mangers of any terms hereof, the  
19 losing (or defaulting) Members or Mangers will pay to the prevailing Member or Manger  
20 reasonable costs and expenses incurred in connection with the prosecution of defense of such  
21 action..." In the instant case Mr. Yount signed an agreement to become a Member of the LLC and  
22 Mr. Radovan as the Manger of the LLC signed an acknowledgment of that Agreement. Yet instead  
23 of giving Mr. Yount the share that he had bargained for Mr. Radovan instead did a bait and switch  
24 to Mr. Yount.

25 Plaintiff's complaint includes a claim for securities fraud under NRS Chapter 90. If  
26 Defendants are found guilty of securities fraud under the statute, NRS 90.660 also provides for an  
27 award of attorney fees and costs in addition to compensatory damages.

28 ///

**C. NAMES AND ADDRESSES OF ALL WITNESSES**

1. George Stuart Yount  
Box 308  
Crystal Bay, NV 89402
2. Robert Radovan  
1336-D Oak Street  
St Helena, CA 94574
3. William Criswell  
1336-D Oak Street  
St Helena, CA 94574
4. Bruce Coleman  
Powell, Coleman and Arnold LLP  
8-80 N Central Expressway Suite 1380  
Dallas, TX 75206
5. David Marriner  
c/o Andrew Wolf  
Incline Law Group, LLC  
264 Village Blvd, Suite 104  
Incline Village, NV 89451
6. Marriner Real Estate, LLC  
c/o Andrew Wolf  
Incline Law Group, LLC  
264 Village Blvd, Suite 104  
Incline Village, NV 89451
7. Les Busick  
Incline Village, NV
8. Brandon Cheney  
880 Northwoods Blvd  
Incline Village, NV 89451

**D. OTHER APPROPRIATE COMMENTS, SUGGESTIONS OR INFO**

N/A

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1     **E.     CERTIFICATION**

2             Plaintiff certifies that all discovery has been completed in this matter.

3             Plaintiff further certifies that, prior to filing of the Trial Statement, Plaintiff's counsel has  
4 personally met and conferred in good faith with Defendants' counsel to resolve the case by  
5 settlement.

6     DATED: August 25, 2017.

THE LAW OFFICE OF RICHARD G.  
CAMPBELL, JR. INC.

8             By: /s/ Richard G. Campbell, Jr.  
9                 RICHARD G. CAMPBELL, JR.  
10                Attorney for Plaintiff

**SECOND JUDICIAL DISTRICT COURT****COUNTY OF WASHOE, STATE OF NEVADA****AFFIRMATION****Pursuant to NRS 239B.030**

The undersigned does hereby affirm that the preceding document, filed in this case: **PLAINTIFF'S TRIAL STATEMENT**;

☒ 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

Dated: August 25, 2017.

THE LAW OFFICE OF RICHARD G.  
CAMPBELL, JR. INC.

By: /s/ Richard G. Campbell, Jr.

**PROOF OF SERVICE**

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is The Law Office of Richard G. Campbell, Jr. Inc., 200 S. Virginia Street, 8<sup>th</sup> Floor, Reno, NV 89501. On August 25, 2017, I served the following document(s):

**PLAINTIFF'S TRIAL STATEMENT**

- ☐ **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- ☐ **BY HAND:** by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- ☐ **BY MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Reno, Nevada addressed as set forth below.
- ☐ **BY EMAIL:** by causing the document(s) to be electronically served.
- ☐ **BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.
- ☐ **BY PERSONAL DELIVERY:** by causing personal delivery by **Reno Carson Messenger Service** of the document(s) listed above to the person(s) at the address(es) set forth below.
- ☒ **BY E-MAIL/ELECTRONIC FILING SYSTEM:** by causing the document(s) to be electronically served via the court's electronic filing system to the following attorneys associated with this case.

Martin A. Little  
Howard and Howard  
3800 Howard Hughes Parkway, Ste 1000  
Las Vegas, Nevada 89169

Andrew N. Wolf  
Incline Law Group, LLC  
264 Village Blvd, Suite 104  
Incline Village, NV 89451

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on August 25, 2017, at Reno, Nevada.

/s/ Danielle Bleecker



42

42

1 4185  
2 STEPHANIE KOETTING  
3 CCR #207  
4 75 COURT STREET  
5 RENO, NEVADA  
6

7 IN THE SECOND JUDICIAL DISTRICT COURT  
8 IN AND FOR THE COUNTY OF WASHOE  
9 THE HONORABLE PATRICK FLANAGAN, DISTRICT JUDGE

10 --oOo--

11 GEORGE S. YOUNT, et al., )  
12 Plaintiffs, )  
13 vs. ) Case No. CV16-00767  
14 CRISWELL RADOVAN, et al., ) Department 7  
15 Defendants. )  
16 \_\_\_\_\_)

17  
18 TRANSCRIPT OF PROCEEDINGS

19 TRIAL VOLUME I

20 August 29, 2017

21 9:00 a.m.

22 Reno, Nevada  
23

24 Reported by: STEPHANIE KOETTING, CCR #207, RPR  
Computer-Aided Transcription

1 APPEARANCES:

2 For the Plaintiff:

3 RICHARD G. CAMPBELL, ESQ.  
4 Attorney at Law  
5 100 W. Liberty  
6 Reno, Nevada

7 For the Defendant:

8 HOWARD & HOWARD  
9 By: MARTIN LITTLE, ESQ.  
10 3800 Howard Hughes Parkway  
11 Las Vegas, Nevada

12 ANDREW WOLF, ESQ.  
13 Attorney at Law  
14 264 Village Blvd.  
15 Incline Village, Nevada  
16  
17  
18  
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20  
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1 RENO, NEVADA, August 29, 2017, 9:00 a.m.

2

3 --oOo--

4 THE CLERK: Case number CV16-00767, George Yount,  
5 et al. versus Criswell Radovan. Matter set for nonjury  
6 trial. Counsel, please state your appearances.

7 MR. CAMPBELL: Richard Campbell on behalf of Mr.  
8 Yount.

9 MR. LITTLE: Good morning, your Honor. Martin  
10 Little on behalf of Mr. Criswell, Mr. Radovan, Criswell  
11 Radovan LLC and CR Cal Neva LLC.

12 THE COURT: Welcome. How was your trip?

13 MR. LITTLE: It was good.

14 MR. WOLF: Andrew Wolf on behalf of David Marriner  
15 and Marriner Real Estate LLC.

16 THE COURT: Thank you very much.

17 MR. WOLF: Also in the courtroom is my colleague  
18 Jeremy Krennek behind the bar.

19 THE COURT: Welcome to everyone here.

20 Mr. Campbell, first witness.

21 MR. CAMPBELL: Your Honor, I'd like to call Mr.  
22 Marriner as my first witness.

23 MR. LITTLE: Your Honor, just as a housekeeping  
24 matter, and absolutely no disrespect to Mrs. Yount, but if

1 the plaintiffs intend to call her as a witness, we would  
2 invoke the exclusionary rule. If they don't intend to call  
3 her, I have to problem with her being here.

4 THE COURT: Mr. Campbell.

5 MR. CAMPBELL: We do not. Do you want to invoke  
6 the rule throughout the trial for other witnesses?

7 MR. LITTLE: Yes.

8 MR. CAMPBELL: We're not going to call her.

9 THE COURT: All right.

10 (One witness sworn at this time.)

11 MR. CAMPBELL: Your Honor, before we start, are  
12 you okay with me questioning from the bench? It's crowded up  
13 here on the lectern.

14 THE COURT: That's fine.

15 MR. CAMPBELL: Thank you.

16 THE COURT: Thank you. Go ahead, Mr. Campbell.

17 DAVID FULTON MARRINER

18 called as a witness and being duly sworn did testify as

19 follows:

20 DIRECT EXAMINATION

21 BY MR. CAMPBELL:

22 Q. Good morning, Mr. Marriner.

23 A. Good morning.

24 Q. Could you please state your full name?

1 A. David Fulton Marriner.

2 Q. Where do you reside?

3 A. In Incline Village.

4 Q. How long have you resided there?

5 A. 26 years.

6 Q. What's your occupation?

7 A. Real estate.

8 Q. And how long have you been in the real estate  
9 business?

10 A. 39 years.

11 Q. Was that all at Lake Tahoe or somewhere else?

12 A. No. Southern California first.

13 Q. As you know, we're here today on the Cal Neva  
14 project and the developers of that project were Mr. Radovan  
15 and Mr. Criswell. When did you first meet either  
16 Mr. Criswell or Mr. Radovan?

17 A. I met Mr. Radovan when I had the listing on a  
18 private residence below the Cal Neva called the Fairwinds  
19 Estate. And I approached Mr. Radovan, because I thought the  
20 missing link at the Cal Neva was a beach access beach club,  
21 and through a common friend, Julie Brinkerhoff, in Newport  
22 Beach, a landscape company that was contracted to design the  
23 landscaping at Cal Neva, Julie Brinkerhoff, put me in touch  
24 with Robert.

1           So I called Robert up and met him at the Fairwinds  
2 Estate initially to just discuss, you know, having them  
3 consider buying or possibly allowing the owner to exchange  
4 their equity into the bigger Cal Neva Resort just up the  
5 hill. So that was February 2014.

6           Q.     And, ultimately, you entered into a contract with  
7 the Cal Neva Lodge, is that correct?

8           A.     Yes. In further discussion with Robert, I  
9 mentioned that my real estate company is a consulting firm  
10 that provides a service to landowners to help design and pull  
11 permits and do the sales and marketing brochures for new  
12 construction. Robert mentioned that he had permission to  
13 build 28 luxury residences on the Nevada side, and I said  
14 that's exactly what my company likes to do and we've been  
15 doing that for 25 years in Lake Tahoe.

16                 And he asked me to put together a consulting  
17 contract, which I did, and I submitted it to him for review.  
18 And he mentioned, oh, by the way, Dave, you've been in Tahoe  
19 for 25 years, we're short \$5 million in our equity raise, why  
20 don't you add five founding memberships to your consulting  
21 contract and maybe you can introduce me to some of the local  
22 VIP owners in the area that would help round out their Board  
23 of Directors or their equity.

24                 So I added, I just edited my contract and just put

1 five founding memberships. But it was confusing, because my  
2 consulting agreement said that to manage all aspects of sales  
3 and marketing, that was for the 28 residences, not the  
4 memberships.

5 Q. Let's look at that Exhibit 1 in the binder in  
6 front of you.

7 A. Okay.

8 Q. There should be two volumes there of Plaintiff's  
9 Exhibits.

10 THE COURT: Counsel, just for a matter of  
11 housekeeping, are there any objections to the exhibits that  
12 have been submitted to be admitted, Exhibits 1 through 213?

13 MR. LITTLE: No, your Honor.

14 MR. CAMPBELL: No, your Honor.

15 MR. WOLF: No, your Honor.

16 THE COURT: All right. Ms. Clerk, let's admit  
17 Exhibits 1 through 213.

18 BY MR. CAMPBELL:

19 Q. Mr. Marriner, have you found Exhibit 1 yet?

20 A. Sorry. It was in the binder over here. Yes.

21 Q. So on the first page of that exhibit, Mr.  
22 Marriner, you'll see where it says scope of the agreement?

23 A. Yes.

24 Q. Do you see that? And the document says, Marriner



1 will manage all aspects of the sales of the five founding  
2 memberships and 28 condominiums approved on the site plan,  
3 correct?

4 A. Correct.

5 Q. And you signed the agreement, which would be on  
6 the fourth page of this document?

7 A. Yes.

8 Q. So it appears the agreement is two-fold. One to  
9 sell the condominiums, that would be as a real estate agent  
10 or broker?

11 A. Right.

12 Q. And then the sale of the five founding  
13 memberships, you understood that there was a private  
14 placement memorandum seeking to raise money for equity for  
15 the project?

16 A. Yes.

17 Q. And Marriner Real Estate is your company that  
18 handles real estate transactions, correct?

19 A. Correct.

20 Q. But you understood in this case, you were also  
21 acting to sell securities under a private placement  
22 memorandum?

23 A. I met with Brandyn Criswell, who is the attorney  
24 for Criswell Radovan, and she mentioned that all you would be

1 doing is introducing us to prospective investors. I would  
2 not be involved in any aspect of the private placement. I  
3 never once went over a page in the private placement  
4 memorandum or represented any type of security.

5 Q. So that's not what the contract says, right, Mr.  
6 Marriner? It says you will manage all aspects of the sales  
7 of the five founding memberships, right?

8 A. Yes. And that --

9 Q. And you signed that agreement, right, Mr.  
10 Marriner?

11 A. Yes.

12 Q. Did you ever register as a licensed broker of  
13 securities or salesperson for sale of securities in Nevada?

14 A. No.

15 Q. Now, as a real estate broker, you sold a lot of  
16 houses up here, right, up in Lake Tahoe, right?

17 A. Yes.

18 Q. As a real estate broker, if someone came to you as  
19 a seller of their house and said, we've got mold infestation  
20 in this house, would you obligated as a real estate broker to  
21 tell the buyer of that house about that issue?

22 A. The seller's disclosure statement requires that  
23 the sellers disclose anything related to the condition of the  
24 house, so, yes.

1 Q. If the seller didn't disclose that and you knew  
2 personally, would you feel obligated to tell the buyer?

3 A. If I knew -- could you repeat the question?

4 Q. If you knew personally an issue that was not in  
5 the seller's statement, but you knew about it, would you be  
6 obligated to tell the buyer about that issue?

7 A. Well, the seller is obligated.

8 Q. I mean -- excuse me -- the buyer.

9 A. If I was representing a buyer?

10 Q. Yes.

11 A. And I personally knew there was mold?

12 Q. You were representing the seller.

13 THE COURT: Hold it. Take a step back and  
14 rephrase the question.

15 BY MR. CAMPBELL:

16 Q. Mr. Marriner, you were representing the seller of  
17 a house. I understand the sellers normally fills out a  
18 seller's disclosure statement.

19 A. That's required.

20 Q. If in fact the seller had not put something on  
21 that seller's disclosure statement and you knew about an  
22 issue, let's say mold infestation in the house, do you feel  
23 you have an obligation to tell the buyer about that issue?

24 A. Under real estate law, the seller is obligated to

1 disclose everything on that seller's disclosure statement.  
2 And as a broker, I'm not allowed to influence, fill out or  
3 discuss anything. The seller is taking the responsibility.  
4 If they've hidden something, I'm not sure what your question  
5 is referring to, because how would I know if there's mold in  
6 a house, or unless the seller was trying to deceive the  
7 buyer, and I would not participate in that.

8 Q. So then you would feel an obligation to tell the  
9 buyer about that issue if it wasn't on the seller's  
10 disclosure statement?

11 A. Sure. If they were trying to tell something,  
12 then, absolutely.

13 Q. Now, you talked earlier about the -- when you  
14 first introduced or you first met Mr. Radovan, you were  
15 thinking about trying to get him to potentially buy the  
16 Fairwinds Estate, correct?

17 A. Right.

18 Q. And ultimately that transaction took place, right?

19 A. Right.

20 Q. As you mentioned in your direct testimony, I  
21 believe it was Pay was the family that owed that?

22 A. Yes, John Pay.

23 Q. And you mentioned in your direct that you talked  
24 to Robert about potentially either buying it or having them

1 trade their equity into the Cal Neva Lodge?

2 A. Yes.

3 Q. And that's ultimately what happened, right?

4 A. That's correct.

5 Q. In fact, you took your commission -- in lieu of  
6 commission, you took an equity interest, also, in the Cal  
7 Neva Lodge LLC, correct?

8 A. Yes. I invested in the project.

9 Q. So you would have been provided with a copy of the  
10 operating agreement that governed the private placement  
11 memorandum?

12 A. Before my -- for my commission percentage?

13 Q. Yes. You just testified you were in fact a member  
14 through your waiving of your commission, a member of the Cal  
15 Neva Lodge LLC, correct?

16 A. I believe that -- I don't recall getting a copy of  
17 the documents, but I have seen them.

18 Q. Can you look at Exhibit Number 5 in the binder?

19 A. All right.

20 Q. And if you look at the very back of the binder,  
21 there's a list of signature pages behind the actual operating  
22 agreement. The back of the exhibit in the binder.

23 A. Yes.

24 Q. And do you see, I think it's the very last

1 signature page or next to the last signature page in that  
2 document?

3 A. Yes.

4 Q. Is that your signature?

5 A. Yes.

6 Q. And so you were a signatory to the amended  
7 restated operating agreement, correct?

8 A. Yes.

9 Q. So you must have -- did you review that prior to  
10 signing it?

11 A. Yes.

12 Q. So you signed your contract in February of 2014,  
13 did you immediately start contacting people that you knew to  
14 try to close out the rest of the 5 million available under  
15 the private placement memorandum?

16 A. Yes. I started making a list of possible  
17 investors in the surrounding community.

18 Q. Okay. And did you know how much money could  
19 legally be raised under that private placement memorandum?

20 A. Robert asked me to raise 5 million.

21 Q. Did it come to your attention later on that you  
22 were going to raise more than 5 million?

23 A. Much later, yes.

24 Q. How much later?

1           A.     Well, I think we raised that initial 5 million and  
2     Brandyn Criswell had an investor that fell out and that was  
3     probably in three or four months later. So I think the 8  
4     million from a group called Bellagio Partners had fallen  
5     through and I had introduced Robert to several people that  
6     met with Robert and met with their legal team and eventually  
7     executed the investment.

8           Q.     So that would have brought us up to March, April,  
9     May of 2014?

10          A.     Probably about May.

11          Q.     Now, when that 5 million was increased, did you  
12     understand how much could legally be raised under the private  
13     placement memorandum?

14          A.     There were several tranches, I'd guess you would  
15     call it. 14 million was the minimum and 18 million was a  
16     target and 20 was maximum without a vote of the executive  
17     committee or the investors to increase that.

18          Q.     So you knew that you could only sell so much under  
19     the private placement memorandum?

20          A.     Yes.

21          Q.     There was a legal cap?

22          A.     Yes.

23          Q.     Can you look at Exhibit 9 in the binder, the  
24     plaintiff's. Do you have that exhibit in front of you, Mr.

1 Marriner?

2 A. Yes.

3 Q. This is an e-mail from July 14th from Mr. Yount,  
4 can you identify what you were sending this to Mr. Yount for?

5 A. Yes. Mr. Yount, I believe it was after the site  
6 tour, I think that was on July 14th, he said, you know, of  
7 the people that have invested, would I know any of them, are  
8 they local, are there any, you know, people that you could  
9 share who had invested.

10 And so I wrote Stuart, per your request, because  
11 he asked me to give him a list, and I told him this is  
12 confidential, because I didn't want to spread the word,  
13 everyone that invested wants to keep it quiet. So I typed  
14 out all the names of people that I knew and also that Robert  
15 had represented that had invested, including the Sinatra  
16 family and Picketts.

17 And so that was just a quick e-mail to Stuart  
18 saying, here's the names of people that I'm familiar with  
19 that are involved.

20 Q. And so we can set the ground work here, let's go  
21 through the list real quick. The Pay Marriner, that's the  
22 equity that the Pays had in the Fairwinds Estate?

23 A. Yes.

24 Q. So they traded their equity for a \$2 million



1 share?

2 A. Yes.

3 Q. But that didn't count against the private  
4 placement 20 million cap, right?

5 A. Well, I found out later that the private placement  
6 20 million cap had to be in cash, so it could not be an  
7 equity in another piece of real estate. It would have to be  
8 a separate transaction approved by the board. The 20 million  
9 was tied to a sources and uses table, so if the 20 million  
10 was reduced to 18 million, because of the Pays non-cash  
11 investment, that the project would be 2 million short on the  
12 cap table.

13 So the way I understand it is that the non-cash  
14 investment was outside of the 20 million. 20 million was  
15 cash.

16 Q. What you just testified to, those are kind of the  
17 terms and conditions that were in that the private placement  
18 memorandum, correct?

19 A. Yes.

20 Q. And then we go down, so Sinatra family, and the  
21 Pickett brothers, that's not an investment, that's a debt,  
22 right?

23 A. Ladera is the mezzanine second trust deed. So,  
24 again, I was just putting names and numbers on a piece of

1 paper. So they were not part of the founders equity.

2 Q. So if we go through this list, Mr. Marriner, can  
3 you tell me which of the investors listed in here as of  
4 July 14th, 2015 you had arranged to participate in the  
5 private placement memorandum?

6 A. Of the founding members?

7 Q. On this list.

8 A. And I have another associate that works for me, a  
9 gentleman named Steve Kegel. So between Steve and I, we  
10 arranged for -- on the founding equity side, Busick,  
11 Erickson, John Miller, Gibson, Molly Kingston, Charles  
12 Munnerlyn, Dickson, Martin, Mariucci, and Men's Club, and you  
13 total that up.

14 Q. So just to be clear, if we totaled that up, that  
15 amounted to a certain total you raised under the private  
16 placement memorandum?

17 A. Correct.

18 Q. And under your contract, you were entitled to  
19 three percent?

20 A. Correct.

21 Q. Of that total?

22 A. Yes.

23 Q. So simple formula, we don't need to do it right  
24 now, that's what you received as of July 14th as your

1 commission under the contract Exhibit Number 1?

2 A. Yes. It was split between Steve Kegel and myself.

3 Q. But Steve Kegel worked for you?

4 A. Yes.

5 Q. Let's go back to Exhibit Number 2 in the  
6 plaintiff's binder. Do you have that in front of you, Mr.  
7 Marriner?

8 A. Yes.

9 Q. It appears at this point you and Mr. Yount had  
10 engaged in an e-mail exchange regarding a potential  
11 investment into the private placement memorandum, correct?

12 A. Correct.

13 Q. And in that e-mail, you mentioned a business plan.  
14 Do you see that about the middle of the page?

15 A. Yes.

16 Q. So what business plan were you talking about?

17 A. Brandyn Iverson gave me two electronic documents,  
18 the private placement memorandum that had all of the exhibits  
19 and tax information, that's a complete investment package.  
20 There was a shorter version that was called a confidential  
21 offering memorandum or something like that. But it was more  
22 of a preliminary, if someone is just starting to look, here's  
23 all of the kind of what would be considered kind of a  
24 marketing side that Criswell Radovan had put together of the

1 opportunities. Here's what we paid for the land, here's what  
2 we're going to pay for construction. So it was in my mind, I  
3 probably called it a business plan, but I think it had a name  
4 on the -- like an offering memorandum.

5 Q. And it appears from this e-mail that then you went  
6 through that offering memorandum and cut and pasted certain  
7 provisions of the offering memorandum and put them in the  
8 e-mailing to Mr. Yount?

9 A. He wanted some general information, so I did cut  
10 and paste just a couple of key pages. And then I was going  
11 to -- and I think I sent the whole thing. I thought I sent  
12 the whole package.

13 Q. But at least you --

14 A. Okay. I'm sorry. So you're referring to the cut  
15 and paste down here?

16 Q. Yeah, at the bottom. You say, I will copy some of  
17 our business plan, but will give you a bound copy when we  
18 meet. Do you see that?

19 A. Yes. The bound copy --

20 Q. It looks like the bottom part is where you did the  
21 cut and paste that continued on for several pages?

22 A. Right. I think I was making sure he had the  
23 confidential information, so he knew that this was  
24 confidential information to not be forwarded, and the bound

1 versions were at the -- at Roslyn's office on site.

2 Q. But you had reviewed the bound version in order to  
3 cut and paste certain portions of it?

4 A. The bound version, I had an electronic. I didn't  
5 have a bound copy. I only had the electronic. And that's  
6 how I copied and paste from a 150-page document. So I just  
7 took a few of the paragraphs out to say, well, here's kind of  
8 a sneak preview. And if you come out and tour the site, you  
9 have, if you're interested, you could take one of the bound  
10 copies.

11 Q. So you had an electronic version. The question  
12 is, did you -- you must have viewed the electronic version in  
13 order to cut and paste into an e-mail to Mr. Yount, right?

14 A. Of course.

15 Q. Let me just ask you, you refer to it as an  
16 offering memorandum. Could you look at Exhibit Number 4 in  
17 the binder?

18 A. Yes.

19 Q. Is that what you were referring to in your e-mail  
20 as a business plan?

21 A. Yes. I believe so. That's what it looked like.  
22 I believe this is the shortened version of the private  
23 placement memorandum.

24 Q. How did the communication between you and

1 Mr. Yount get initiated? Did you know Mr. Yount from  
2 somewhere?

3 A. They were guests of a client of mine in 1996 that  
4 we'd invited to our house for a 4th of July barbecue, Mel  
5 Schrivnick and Kathleen Gorney. And they said, we have some  
6 friends staying with us, would it be okay if they come to  
7 your barbecue? That was in 1996. That's the first time we  
8 ever met and we never met socially after that. I would see  
9 Stuart, you know, at the grocery store occasionally, but  
10 that's it.

11 Q. Can you look at Exhibit Number 60, Mr. Marriner?

12 A. Number what?

13 Q. 60.

14 A. 60.

15 Q. 60. Probably in the second volume. Do you have  
16 that in front of you, Mr. Marriner?

17 A. Yes.

18 Q. This is a fairly lengthy e-mail string, but at  
19 this point, I just want to go into the back and forth on  
20 page, it's marked CR168 in the e-mail string.

21 A. Yes.

22 Q. And do you see the bottom part, it says, dear  
23 executive committee?

24 A. I'm sorry?

1 Q. At the bottom of page 168, about the bottom third  
2 it, says, dear executive committee.

3 A. So it's not the top.

4 Q. No. No. Look at the very bottom right hand  
5 corner of each page?

6 A. 168 did you say?

7 Q. Yes.

8 A. Okay. Dear executive committee.

9 Q. And right above that says, below is an e-mail I  
10 sent to the EC last week to bring transparency to the Yount  
11 transaction. Right? So that's your e-mail that you're  
12 referencing and it looks like you cut and pasted this  
13 previous e-mail?

14 A. Yes, I believe so.

15 Q. In that e-mail, it starts out, it comes to my  
16 attention that a false rumor has been propagate that Robert  
17 asked me not to mention the cost overruns and change orders  
18 to Stuart Yount. Do you see that?

19 A. Yes.

20 Q. Then you go below and you say, the rumor is false,  
21 and then you finish and say, since Stuart and Geri Yount have  
22 been good friends of mine since 1993 and I would not  
23 knowingly participate in any activity that would hurt them  
24 and put their investment at risk. Those are your words, Mr.

1 Marriner?

2 A. Yes.

3 Q. So you considered yourself to be a good friend of  
4 the Younts since 1993?

5 A. Well, we had them over to our house for a barbecue  
6 in, I think, 1996 and no other connection. You know, if I  
7 ran into Stuart or Geri in the grocery store, we'd say hi.  
8 So I would say it was casual friendship at most. We'd never  
9 been invited to their home for dinner. I think that denotes  
10 whether you're a friend.

11 But I respect Stuart as a local businessman and I  
12 had the highest regard for him as an individual and would not  
13 intentionally hurt him or his family.

14 Q. Okay. Now, in this Exhibit Number 4, go back to  
15 that, that's the confidential offering memorandum. And then  
16 I believe your testimony earlier was you also received from  
17 Ms. Iverson a copy of the private placement memorandum,  
18 correct?

19 A. Yes.

20 Q. Again, in electronic form?

21 A. Yes.

22 Q. And there were a lot of representations in those  
23 documents as to what the project is going to do, how much  
24 it's going to cost, things like that, correct?



1           A.     Correct.

2           Q.     Did you vet any of those representations? Did  
3 you -- you know, vetting means double-checking. Did you go  
4 to the Cal Neva and crawl under the basement to see what the  
5 foundation looked like, anything like that?

6           A.     Could you be more specific? I didn't crawl under  
7 the foundation, because if you'd seen the foundation under  
8 the Circle Bar, you wouldn't be crawling under there.

9           Q.     Let me ask you this, what did you do to vet the  
10 representations in at least this confidential offering  
11 memorandum, double-check, you know, research, anything?

12          A.     Well, I met with Brandyn Iverson, who I respect as  
13 an attorney, Stanford grad, and she had put together what I  
14 considered, and I'm not an attorney, but I looked at the  
15 private placement offering, and they spent a lot of money  
16 putting it together. I would say it was an exceptionally  
17 well designed private placement memorandum.

18                 And I know there is a paragraph in there that  
19 allows the Cal Neva to pay a finder's fee for raising funds.  
20 So I know I had come across that. But I can't say that I  
21 read every page and digested it, because I'm not an attorney.

22                 So I did tell Robert that when -- if I introduce  
23 him to one of my friends or clients or local business people,  
24 I expect Robert and his attorney and his team to take

1 100 percent of the responsibility of going over the private  
2 placement. There's some very strong language in the first  
3 couple of pages about risk/reward. This project could run  
4 out of money. You could end up having to come up with  
5 additional funding.

6 Q. The question is not the conversations you had with  
7 Mr. Radovan. I want to know specifically what you did to vet  
8 the representations in here. You told me you talked to  
9 Ms. Iverson. Anything else?

10 A. I toured with Robert, he walked through the  
11 project, and I was very impressed with their business plan.  
12 And I'm not a commercial developer. I build homes, you know,  
13 individual homes and tract homes. And that's been my  
14 expertise. But I've lived in Incline for 25 years and I've  
15 driven by the Cal Neva a thousand times thinking someone  
16 should renovate this hotel.

17 So I was enamored with the fact that Criswell  
18 Radovan bought it for 13 million. The previous owner had  
19 paid 32 million. So in my mind, they got a great buy on the  
20 land. They had the only ten-story tower in Northern Nevada  
21 that will ever be. Be like having the only high rise tower  
22 on Waikiki and you will never have a neighbor.

23 So when you say vetting, I'm not a hotel  
24 developer, so I couldn't -- you don't ask a surgeon to help

1 you buy a car.

2 Q. So you understood, though, that you were going to  
3 go out and raise millions of dollars based on the  
4 representations of these documents when you were tasked and  
5 signed the contract with Cal Neva Lodge?

6 A. Every investor, I told them to do their own due  
7 diligence. I did not make any representations that Robert  
8 and Bill walk on water. I did not.

9 Q. Mr. Marriner, the question was, did you understand  
10 that you were potentially selling millions of dollars under a  
11 private placement memorandum and the terms contained therein?

12 A. Yes.

13 Q. Did you make any representations to the early  
14 investors that are listed in this one exhibit, we already  
15 listed everything, that you had in fact thoroughly  
16 investigated whatever the representations were in the private  
17 placement memorandum document?

18 A. No. I told every investor to meet with Robert and  
19 to have their counsel and accountants and due diligence team  
20 evaluate it for themselves. I am not an expert and I did not  
21 give an opinion.

22 Q. Let's move on to -- well, let's backup. You sent  
23 the e-mail in February of 2014, but Mr. Yount wasn't  
24 interested at that time, correct?

1           A.     Correct.

2           Q.     And then it looks like in June of 2015, if you can  
3 go to Exhibit 6 and 7 in the binder. Are you with me, Mr.  
4 Marriner?

5           A.     Yes.

6           Q.     It looks like, if you go to seven first, it looks  
7 like this may have started the communication between you and  
8 Mr. Yount as to the Cal Neva Lodge again?

9           A.     No. I was at lunch at Garwood's with my family  
10 and Stuart and the owner of Boulder Bay, Roger Wittenberg,  
11 they were having lunch together one table over. And I waved  
12 to Stuart. And as we were getting up, he walked by and I  
13 said hi. And he said, you know, how's the project going? We  
14 just talked for a few seconds.

15                     And then he sent me an e-mail, you know, it was --  
16 and that was in June, but he still didn't have interest. But  
17 I know his dear friend or on his Board of Directors Roger  
18 Wittenberg owns the land across the street. And one  
19 possible, you know, thought was that if Stuart could get the  
20 owners, developers of Boulder Bay and we could maybe work  
21 together and make that Crystal Bay area sensational.

22                     So he was having lunch with him and I think that  
23 might have sparked some conversation. And I think the next  
24 week or so, Stuart sent me an e-mail, you know, haven't heard

1 from you in a while. How is the project going? And I  
2 offered to give him a tour.

3 And the other thing I was certified to do, and  
4 there were only a few people certified by Penta, I was  
5 certified to take site tours. So after I made introductions  
6 to Robert and they started talking about the financial  
7 investment, I continued to offer to Stuart and Geri, you  
8 know, any time you want, I can meet you at the Cal Neva every  
9 week, every day if you want so you can see the progress. I  
10 had to deliver the hardhats and I had to stay with the group  
11 and make sure nobody got into any trouble.

12 Q. So that correctly is represented in Exhibit Number  
13 7?

14 A. Yes.

15 Q. And then if you go back to Exhibit Number 6, looks  
16 like there's a follow on or a separate e-mail string about  
17 the same time frame where it was just to Mr. Yount with some  
18 attached pictures, maybe a video, and then an incorporated  
19 e-mail to other founding members. Is that what we're looking  
20 at here with Exhibit Number 6?

21 A. Right.

22 Q. And in that exhibit, you told Mr. Yount that the  
23 project was on track to open December 12th, 2015?

24 A. Correct.

1 Q. Where did you get that information?

2 A. That was on the July report. I had forwarded and,  
3 again, Robert was very clear with me when I signed my  
4 contract that I was only allowed to forward executive  
5 committee reports. And so I sent him the only report that I  
6 had in July and it had the complete update.

7 Q. This is back in June, Mr. Marriner. So June 17th,  
8 you're representing to Mr. Yount that the project is on  
9 schedule. My question was, how did you come into that  
10 information that the project was on schedule?

11 A. On that day, as far as I was aware, and I'm not on  
12 the executive committee, the target date was still  
13 December 12th.

14 Q. And those target dates were in some of the  
15 offering memorandums, things like that?

16 A. Yes. I imagine. I know that some of the dates  
17 had changed, but at that particular day in June,  
18 December 12th was still the target and we were planning to  
19 have Frank Sinatra's 100th birthday party.

20 Q. Let's go to Exhibit Number 8. Do you have that in  
21 front of you, Mr. Marriner?

22 A. Yes.

23 Q. This is, again, an e-mail from you to Mr.  
24 Marriner. Now we're about a month out, July 14th of 2015

1 after your June e-mail string. It looks like you had a tour.  
2 You say, it was a pleasure showing you our exciting project.

3 A. I had been offering to give the Younts a site tour  
4 and they finally had time in their schedule and we walked the  
5 property and they were very pleased with what they saw and  
6 the progress. That was a very exciting time, because the 178  
7 room tower had been gutted and put back together and carpet  
8 and the bathrooms were complete, the carpet was down,  
9 brand-new windows floor to ceiling glass, the exterior had  
10 been painted, and everything still appeared to be, you know,  
11 on a fast track.

12 Q. Did you tell Mr. Yount that the schedule was still  
13 going to hold for the December 12th opening?

14 A. At that point, I believed that it was still  
15 scheduled for December 12th.

16 Q. You hadn't heard any information otherwise?

17 A. No.

18 Q. The next paragraph down, you say, as you mentioned  
19 on your tour, Robert had released an additional 1.5 million  
20 of equity. What did you tell Mr. Yount at that site visit  
21 about the equity for sale under the private placement  
22 memorandum?

23 A. I told him what Robert told me, that he had  
24 released an additional 1.5 million of equity.

1 Q. To be clear, that was under the private placement  
2 memorandum?

3 A. Correct.

4 Q. What was your understanding as of July 14th of  
5 2015 how much more could be raised under that private  
6 placement memorandum?

7 A. I'm not sure at this moment, but I think the 1.5  
8 would have completed the 20 million of cash, of the cash  
9 equity, yes.

10 Q. As soon as that was sold, no more investment under  
11 the PPM?

12 A. That's what I understood.

13 Q. And then at that point, it looks like also you  
14 forwarded Mr. Yount the PPM. Do you see that?

15 A. Yes. That is the -- yes, the private placement  
16 memorandum with exhibits.

17 Q. Can you look at Exhibit Number 3 in the binder?

18 A. Yes.

19 Q. Is that the private placement memorandum that you  
20 forwarded to Mr. Yount as of this July 14th, 2015 e-mail?

21 A. Yes.

22 Q. And you also say you attached the founders  
23 progress report. Do you see that?

24 A. That's the July construction report with the



1 pictures.

2 Q. If you could look to Exhibit Number 10?

3 A. Yes. That was the most current construction  
4 status report.

5 Q. One more question on that, Mr. Marriner. We've  
6 looked at Exhibit Number 4 before, which is the confidential  
7 offering memorandum.

8 A. Yes.

9 Q. Was that also provided to Mr. Yount as part of  
10 that package that you forwarded under Exhibit Number 8?

11 A. Yes. I believe Mr. Yount received the  
12 confidential offering memorandum and the PPM and they are  
13 consistent, I believe, with each other or the project.

14 Q. You had all of those documents whether in paper or  
15 electronic and you just forwarded them to Mr. Yount?

16 A. Yes. I only had the electronic versions. And I  
17 was allowed to forward those to qualified investors.

18 Q. And then it says the -- if you look at, I think  
19 you're referring to Exhibit Number 3, when you say attached  
20 are the signature pages?

21 A. Yes. Number 3, did you say the signature page?

22 Q. Yes. In your e-mail, number 8, you say you'd also  
23 forwarded signature pages. Do you see that in the e-mail?

24 A. That's part of the forwarding attachment. It came

1 to me with that information on it, that it includes this,  
2 this and this, including signature pages. It was -- and  
3 Stuart wanted to have the electronic version, because he was  
4 forwarding it to his accountant.

5 Q. Just to be clear, the signature pages would be the  
6 pages that a prospective member would sign to participate in  
7 the private placement memorandum?

8 A. I'm sure that's accurate.

9 Q. Okay. Then it looks like in the last line in your  
10 e-mail on top of Exhibit Number 8, you tried to arrange a  
11 meeting for Robert. You're talking about Robert Radovan?

12 A. Yes.

13 Q. Now, at that meeting in July, did you tell  
14 Mr. Yount that the project was again on schedule for --

15 A. I believe Robert was in that meeting and it was  
16 still that was the target date to open.

17 Q. Okay. Let's move next to Exhibit Number 11, Mr.  
18 Marriner. So it looks like this is the follow-up to your  
19 e-mail the previous day, because you say, I hope you received  
20 my documents. That's what we talked about, the PPM documents  
21 and the progress reports?

22 A. Yes.

23 Q. And then you put some basic term sheet for  
24 preferred investors. Where did this language come from?

1           A.     That came from Brandyn Iverson. She gave us kind  
2 of an basic outline of what the offering was, kind of a  
3 shortened version. But I made sure that I put a disclaimer  
4 at the bottom, this is a rough outline of our investment, and  
5 it must be verified by each investor's legal advisor. It was  
6 just kind of a rough idea of terms.

7           Q.     And then the language right above that is you were  
8 telling Mr. Yount that the -- about the return on investment.  
9 We project to have the hotel refinanced. That's what you're  
10 communicating there?

11          A.     Yeah. There were different discussions about at  
12 what point, and, again, I'm sure that changed over time, but,  
13 you know, if they expected to refinance it, the investors  
14 back. But those were all future discussions.

15          Q.     Let's go to Exhibit Number 12 next, Mr. Marriner.

16          A.     Okay.

17          Q.     And this looks like an e-mail string between you  
18 and Mr. Yount. At the bottom of it, we can see the previous  
19 investors sheet that you talked about in the last exhibit.  
20 And then we go on and Mr. Yount wrote a bunch of kind of  
21 questions to you numbered 1 through 12. Do you see those?

22          A.     Yes.

23          Q.     Okay. And it says in number four, it appears  
24 you're raising 20 million and you said the entire investment

1 is some 60 million. Did you tell Mr. Yount that the --

2 A. I'm sorry.

3 Q. -- that the project budget -- where did that 60  
4 million number come from?

5 A. Those are Stuart Yount's 11 questions and I  
6 immediately referred him to Robert. I said, Robert will  
7 answer your questions. And that was consistent with my  
8 consulting agreement is that I would not answer private  
9 placement questions. But these are all Stuart's questions,  
10 sent those to Robert, and I believe Robert answered each of  
11 those questions.

12 Q. I understand that, Mr. Marriner. Under number  
13 four it says, it appears you're raising 20,000. He's writing  
14 to you, right?

15 A. Right.

16 MR. LITTLE: 20 million.

17 BY MR. CAMPBELL:

18 Q. 20 million. And you said, the entire investment  
19 is some \$60 million. Did you tell Mr. Yount that the entire  
20 investment was going to be \$60 million?

21 A. No. He came up with that on his own.

22 Q. You're saying Mr. Yount's e-mail here about where  
23 you said, you never told Mr. Yount that the entire investment  
24 was going to be \$60 million?

1           A.     I never used the term \$60 million, because in the  
2 private placement memorandum, there were several different --  
3 if you totaled everything up, it was between 55 and  
4 \$60 million. But there wasn't any e-mail or communication  
5 where I used the term 60 million. It was generally 55  
6 million, which is if you add the cost of the land, and that's  
7 all in the private placement memorandum. There's a whole  
8 sources and uses breakdown. But, no, I did not come up with  
9 a \$60 million number.

10          Q.     Let's look at that. I believe the numbers you  
11 just talked about, about the budget, are contained in Exhibit  
12 Number 4. And if you look, that's the offering memorandum,  
13 if you look at page nine of that exhibit.

14          A.     Yes. That's the number I was talking about is  
15 \$50,729,787, and there was an additional 5 million equity  
16 available, kind of a contingency. So I always initially  
17 thought, if you look up at the top, the total sources would  
18 be \$55,896,000. As of March when this document was created,  
19 that's kind of what was represented to me is this is what  
20 it's going to take to build out.

21          Q.     This is the only document that Mr. Yount had in  
22 front of him that would show the budget for the project,  
23 right?

24          A.     I believe so.

1 Q. And so if you look in this document, it says 55,  
2 almost \$56 million if you add those numbers up, right?

3 A. Right.

4 Q. Did you tell Mr. Yount in the conversation you had  
5 with him prior to that Exhibit 12 e-mail that there were --  
6 as of July 2014, there were approximately \$5 million in  
7 change orders?

8 A. No, I did not. I forwarded -- the executive  
9 committee had circulated the July construction report and it  
10 had a list of about maybe 16 or 17 significant requirements  
11 from both Placer and Washoe County, fire suppression system,  
12 new sewer. And so all of the investors were brought  
13 up-to-speed in July as to all of these change orders that had  
14 hit unexpected. Some were improvements and some were  
15 required by Starwood to qualify as one of their preferred  
16 hotels.

17 And so my role was always to forward preapproved  
18 executive committee documents. I never created a document or  
19 told Mr. Yount a number that was not on an executive  
20 committee document.

21 So the back page of that report clearly stated  
22 significant impacts to the schedule, to the project. And  
23 Robert, I believe, responded with, we're going to increase  
24 the mezz from 6 to 15, which is approximately \$9 million, and

1 that's where the 9 million seems to have popped up.

2 Q. We haven't gotten to that, Mr. Marriner, yet. Let  
3 me ask you this, Exhibit Number 10, you just said -- your  
4 testimony was that the update to the executive committee  
5 members and the numbers that were provided to you were from  
6 Exhibit Number 10, right?

7 A. Well, number 10 is the most recent. When Stuart  
8 was looking at the investment, that was the most up-to-date  
9 monthly status report and there's quite a bit of detail.

10 Q. Now, you said the delineation of the change orders  
11 came from this monthly status report. I believe that was  
12 your testimony, correct?

13 A. Let me check. Page 16, construction summary, Cal  
14 Neva renovation is on schedule for the December 12th major  
15 event with the exception of the specialty restaurant, which  
16 will not be 100 percent completed at that time.

17 Construction schedule is being compressed due to  
18 some delays caused by scope changes, many of which were the  
19 result of value engineering exercises, as well as unforeseen  
20 issues. The tower works have proceeded very smoothly, which  
21 I confirmed and Stuart was, I believe, very impressed to see  
22 the tower, which had really started renovation in November of  
23 2014, was already in -- finished, carpet down, window  
24 coverings going up.

1           So the tower had proceeded smoothly. The original  
2 budget had been adversely impacted due to the items such as,  
3 and I've been in construction development my whole career,  
4 these are significant county regulations that you can't  
5 avoid.

6           Q.     So, Mr. Marriner, is there anywhere in this  
7 document that quantifies the number ascribed to these change  
8 orders?

9           A.     Robert said they were raising an additional --

10          Q.     No. Mr. Marriner, you have to listen to my  
11 question. Is there anything in this document that ascribes a  
12 number to these change orders?

13          A.     No.

14          Q.     Let's go to Exhibit Number 14. Are you with me?

15          A.     Yes.

16          Q.     Again, an e-mail string from you to Mr. Yount  
17 dated July 21, 2015. At the bottom of the string, it looks  
18 like Mr. Yount is sending you an e-mail asking you some  
19 specific questions about competitive other properties. Do  
20 you see that?

21          A.     Yes.

22          Q.     At the bottom, Mr. Yount says to you, as I  
23 understand it, you're over budget by more than \$5 million so  
24 far. Do you remember having that conversation with Mr. Yount



1 about the specific amount of the over budget for the change  
2 orders?

3 A. I referred --

4 MR. LITTLE: Hold on.

5 THE WITNESS: I referred this to Robert and he  
6 answered that question.

7 THE COURT: Hang on a second, Mr. Marriner.

8 MR. LITTLE: Your Honor, I have an objection. And  
9 I'm sure it was inadvertently, counsel read it wrong.  
10 Counsel said \$5 million. It says more than \$5 million.

11 THE COURT: All right. Next question.

12 THE WITNESS: Consistent with all of my responses  
13 to Stuart is I sent these or -- and Robert was cced on it and  
14 I always said, Robert will get back to you. And Robert did  
15 get back to him with we are paying for these change orders of  
16 5 million or more, minimum of five, with the new financing  
17 mezz going from 6 million to 15, which is \$9 million. And I  
18 believe, again, I'm not the developer, I think they were  
19 projecting out that they were going to need approximately 9  
20 million additional funds.

21 THE COURT: Next question.

22 BY MR. CAMPBELL:

23 Q. Did you know in July of 2014 it was going to be up  
24 to \$9 million?

1 A. No.

2 Q. So your testimony is that Mr. Yount's knowledge  
3 about the 5 million, more than 5 million over budget came  
4 from Mr. Radovan -- a discussion he had with Mr. Radovan?

5 A. Yes.

6 Q. Had he talked to Mr. Radovan by the time of this  
7 July 21st, 2015 e-mail?

8 A. Sure.

9 Q. You think so?

10 A. Yeah.

11 Q. That's your testimony?

12 A. I believe they had been in communication and  
13 that's where the information was either coming from Criswell  
14 Radovan documents. Those numbers either were picked out of  
15 an EC approved document or something, because I did not -- I  
16 didn't deliver any estimate like 5 million so far. So Stuart  
17 must have picked that up or maybe his accountant had picked  
18 it up from reviewing documents.

19 Q. Well, his accountant hadn't been provided any  
20 documents by this time, had he?

21 MR. WOLF: Objection, argument.

22 MR. CAMPBELL: If you know.

23 THE COURT: What's the personal knowledge? How  
24 would he know?

1 BY MR. CAMPBELL:

2 Q. Do you know if his accountant had been provided  
3 documents by this time?

4 A. Everything that I sent to Stuart, I assume he was  
5 forwarding to his accountant. I don't know where he picked  
6 up that information.

7 THE COURT: All right. Sustained.

8 BY MR. CAMPBELL:

9 Q. So let's go to Exhibit Number 18.

10 A. Okay.

11 Q. This is an e-mail from Mr. Radovan to Mr. Yount  
12 and you're copied it on, correct, Mr. Marriner?

13 A. Yes.

14 Q. Did Mr. Radovan copy you on most of his e-mail  
15 communications with his investors?

16 A. Not always.

17 MR. WOLF: Objection, speculation.

18 THE COURT: That's true. Just a minute, Mr.  
19 Marriner. Next question.

20 MR. CAMPBELL: Okay.

21 BY MR. CAMPBELL:

22 Q. And on this it says, thank you for the time  
23 yesterday to talk me through the Cal Neva project. This  
24 appears that Mr. Radovan and Mr. Yount talked would have been

1 July 24th, 2015?

2 A. Yes.

3 Q. Okay. And then Robert goes through some  
4 additional questions that were proposed by Mr. Yount earlier,  
5 it appears, right?

6 A. This was a response to his 11 questions, I  
7 believe.

8 Q. Just a minute ago, you testified again that an  
9 e-mail that Robert sent about a \$15 million mezzanine finance  
10 was some notice to Mr. Yount? Is that your testimony?

11 A. This is Robert's response and it talks about, we  
12 are refinancing the mezzanine piece with a less costly 15  
13 million mezzanine. This is to cover the added cost of  
14 regulatory and code requirements which changed or were added  
15 by the two counties and TRPA, which we deal with. We've also  
16 added some costs for design upgrades within the project,  
17 predevelopment of the condo units, and also included we have  
18 just received confirmation from TRPA on the 28 units.

19 That is a very clear response to Stuart's question  
20 of, how are you going to pay for these additional scopes from  
21 the July reports? So I thought that \$15 million was  
22 significant to cover the six or more.

23 Q. Mr. Yount had said five or more, correct, in his  
24 e-mail?

1           A.     Well, five -- let's read it again, because it's  
2 and most likely more. So he was already, being in the  
3 construction industry his whole life --

4           MR. CAMPBELL: Objection. You don't have any  
5 foundation for that that he's been in the construction  
6 industry.

7           THE COURT: Overruled. Go ahead, Mr. Marriner.  
8 Just a minute. Let's leave Mr. Yount's background. Just  
9 focus on what you know and your participation in this.

10 BY MR. CAMPBELL:

11          Q.     Mr. Marriner, let me ask you this, your testimony,  
12 I believe, was just that somehow Mr. Yount was apprised of  
13 the exact amount of the change orders because of this e-mail?  
14 Is that your testimony?

15          A.     I believe Robert's response was an adequate  
16 response to Stuart's questions.

17          Q.     And there's no quantification of the number  
18 ascribed to the change orders on this document, is there?

19          A.     That number could change by the minute in  
20 construction.

21          Q.     I'm asking you, is there any quantification in  
22 this document that says these are how much the change orders  
23 or the over budget amount is as of July 25th, 2015?

24          A.     I don't know how that would be possible in

1 construction. I think it was an adequate response.

2 MR. CAMPBELL: Could I ask the Court to instruct  
3 the witness to answer?

4 THE COURT: I think the document speaks for  
5 itself. Go ahead, ask another question.

6 BY MR. CAMPBELL:

7 Q. Mr. Marriner, were you familiar with the terms of  
8 the mezzanine loan?

9 A. No.

10 Q. Do you know how much the loan was for?

11 A. \$6 million, I understand, but --

12 Q. Do you know if there was --

13 A. It was --

14 THE COURT: Hang on a second. Let him answer.

15 THE WITNESS: It was approximate little six, but I  
16 was never involved in any details with any of the financing  
17 or the private placement to be clear.

18 BY MR. CAMPBELL:

19 Q. Do you know whether there was accrued interest or  
20 fees associated with the payoff of the mezzanine loan at that  
21 time?

22 A. No. I had no knowledge of that.

23 Q. Do you have any knowledge as to the amounts  
24 ascribed to the TRPA issues --

1 A. No.

2 Q. -- in this e-mail?

3 A. No.

4 Q. Just to be clear, Mr. Marriner, what did you  
5 believe the amount of the change orders were as of July 25th  
6 of 2015.

7 MR. LITTLE: I'm going to object. It's vague and  
8 overbroad what they were, actual change orders, or  
9 contemplated change orders, pending change orders. There's a  
10 difference.

11 THE COURT: Overruled. It's a proper question for  
12 cross examination. Go ahead, you can answer the question.

13 THE WITNESS: I was not on the executive committee  
14 or a member of the development company. I was not given  
15 access to those kinds of figures. My role was introducing  
16 potential investors and that's it.

17 BY MR. CAMPBELL:

18 Q. Do I take that as a no answer, that you had no  
19 idea what the amount of the change orders or the over budget  
20 number was as of July 25th, 2015?

21 A. I did not have a specific amount.

22 Q. Did you have an amount in mind?

23 A. I was relying on Robert said 15 million mezz will  
24 cover the added costs and he was referring back to Stuart's

1 11 questions, how are you going to pay for these additional 5  
2 million and more -- and possibly more?

3 Q. Okay.

4 MR. LITTLE: Your Honor, do we have a morning  
5 break at some point?

6 THE COURT: We can take it now.

7 MR. LITTLE: Thank you.

8 THE COURT: You can step down, Mr. Marriner.  
9 Watch your step going down. Okay. We'll be in recess.

10 (A short break was taken.)

11 THE COURT: Mr. Marriner. We were on Exhibit 18.

12 BY MR. CAMPBELL:

13 Q. Do you have Exhibit 18 there?

14 A. Yes.

15 Q. Did you talk to Mr. Radovan after Mr. Radovan had  
16 sent this e-mail to Mr. Yount?

17 A. I'm sure at some point we talked. I don't recall  
18 whether it was immediately after. I'm sure we did.

19 Q. To the best of your recollection, within a week or  
20 so you think you may have talked to Mr. Radovan about his  
21 conversation with Mr. Yount as reflected in this Exhibit  
22 Number 18?

23 A. Yes.

24 Q. And at that meeting, did Mr. Radovan tell you what



1 he had told Mr. Yount about the amount of change orders?

2 A. It wasn't a meeting. I'm sure -- Robert spent  
3 most of his time down in St. Helena.

4 Q. Telephone call?

5 A. Yes. And it wasn't a specific phone call to talk  
6 about this e-mail.

7 Q. Did you have a conversation regarding a meeting --  
8 I mean regarding Mr. Yount's meeting with Mr. Radovan and  
9 this Exhibit 18 e-mail?

10 A. Not specifically about this e-mail.

11 Q. Okay. Did Mr. Radovan at some point within a week  
12 or two after this Exhibit 18 time frame tell you what he had  
13 told Mr. Yount about the amount of the change orders?

14 A. There wasn't any specific phone call to -- at that  
15 point, I just figured this was a sufficient answer to his  
16 questions and didn't need additional follow-up.

17 MR. CAMPBELL: May I approach the witness, your  
18 Honor?

19 THE COURT: Sure.

20 BY MR. CAMPBELL:

21 Q. Mr. Marriner, I'd like you to take a look at your  
22 deposition. It's at page 50, counsel. Mr. Marriner, in the  
23 deposition, it says --

24 THE COURT: What line?

1           MR. CAMPBELL: The question and answer starts at  
2 line 12.

3           THE COURT: All right.

4 BY MR. CAMPBELL:

5           Q. And I ask you a question in your deposition about  
6 this time frame, this July time frame, about the amount of  
7 the change orders. And you said, Robert's responses, and  
8 again, I always refer Stuart to Robert to answer any  
9 financial questions, and he said, I told Mr. Yount that we  
10 needed an additional 9 million of debt and the 1.5 million  
11 was considering investing, it would give the 10.5 million to  
12 cover actual proposed change orders. Did you say that in  
13 your deposition?

14          A. Yes.

15          Q. So Mr. Radovan had told you that an additional  
16 10.5 million was needed to cover the actual and proposed  
17 changed orders?

18          A. Around -- it was basically around that number,  
19 because I know it was about 9 million of additional financing  
20 and the million five of additional cash, so that would bring  
21 it up to 10.5 million.

22          Q. Did you ever tell Mr. Yount that the amount of the  
23 change orders or the over budget items would be approximately  
24 \$10.5 million?

1           A.     I did not give him a specific number.

2           Q.     Now, all of your conversations with Mr. Yount in  
3 the July and the August 2015 time frame, you were talking to  
4 him about investing in the private placement memorandum,  
5 correct?

6           A.     Correct. At one point, Stuart said, I'm in direct  
7 communication with Robert, thank you for your help, and I  
8 didn't have any communication with him after that.

9           Q.     The question, Mr. Marriner, in that July and  
10 August time frame, all of your conversation with Mr. Yount  
11 were centered around him investing in the private placement  
12 memorandum?

13          A.     Yes.

14          Q.     And you knew that 1.5 million, I think your  
15 previous testimony, you knew that was all that was available  
16 under the private placement memorandum?

17          A.     I believe so.

18          Q.     Did you know in July of 2015 that the first or the  
19 construction lender on the project, Hall was the name of the  
20 lender, that the potential loan to equity balance was out of  
21 balance and that another cash infusion needed to be made into  
22 the equity in order to make sure that Hall would continue to  
23 fund?

24                 MR. WOLF: Objection, foundation.

1 MR. CAMPBELL: I'm asking if he knows.

2 THE COURT: All right. Sustained. Lay a better  
3 ground work.

4 BY MR. CAMPBELL:

5 Q. Were you familiar with the Hall loan and the terms  
6 about the balancing of the Hall loan?

7 A. No. I was never involved in any business  
8 development discussions with regard to Hall.

9 MR. CAMPBELL: May I approach again, your Honor?

10 THE COURT: Yes, you may.

11 MR. CAMPBELL: Counsel, this starts on Mr.  
12 Marriner's deposition, page 61, line 25, and goes on to the  
13 next page.

14 BY MR. CAMPBELL:

15 Q. Can you read there starting at line 20, Mr.  
16 Marriner?

17 A. I think Robert wanted the money in July when  
18 Stuart first applied, and after three months of due  
19 diligence, I think he was getting to a point where he needed  
20 the money.

21 Q. My question, the next line there, go ahead and  
22 read that.

23 A. Let me back you up. I'll interrupt here. Sure.  
24 Robert needed the money in July?

1 Q. Keep going.

2 A. Why did Robert need the money? The change orders  
3 that are explained in the construction report, there's a  
4 balancing act that has to take place in construction. If you  
5 have a change order, construction lenders require that that  
6 be balanced with additional capital. It's common if there's  
7 a change order, the lender will only loan a certain amount if  
8 you have to balance that out with cash.

9 Q. Then go on to the next two lines.

10 A. The reason for the 1.5 million was to satisfy the  
11 balancing of the debt to equity ratios required by Hall.

12 Q. So, Mr. Marriner, did you know about the balancing  
13 act that had to be done in the Hall construction loan?

14 A. My background is construction and so I was using  
15 the information from my own background that if there are  
16 change orders, a construction lender likes you to balance.  
17 But I never had a discussion with Hall about a required  
18 balancing, but that's common practice.

19 Q. Did you ever tell Mr. Yount that his 1 million  
20 would satisfy part of the balancing act that was required  
21 under the construction loan?

22 A. All of the investor money and loans would apply --  
23 would go toward the project's funding. So I don't know what  
24 amount would be earmarked for one or the other, but the whole

1 purpose of raising additional capital was that the project  
2 was incurring necessary change orders, so that would make  
3 anyone in construction realize, well, there's going have to  
4 be additional cash to balance the loan.

5 Q. So the question was, again, Mr. Marriner, did you  
6 tell Mr. Yount that his 1 million was going to in fact help  
7 balance the loan to equity ratio, or the debt to equity  
8 ratio?

9 A. I did not have a specific discussion with  
10 Mr. Yount specifically to say his proposed investment, no.

11 Q. To follow up on the statement you just made, you  
12 said that the money raised under the PPM was going to go into  
13 the Cal Neva Lodge project in order to help construction and  
14 finish out the project?

15 A. Yes.

16 Q. And you knew that's where Mr. Yount's potential  
17 investment was going to go, right?

18 A. Sure. Yes.

19 Q. Let's jump to September of 2015. If you look at  
20 Exhibit Number 29, Mr. Marriner.

21 A. Okay.

22 Q. This is an e-mail string between you and  
23 Mr. Yount. It looks like it started back in the end of  
24 August, the 26th, and then finished September 8th, 2015,

1 correct?

2 A. Yes.

3 Q. And the first part of the string, you were giving  
4 kind of an update to Mr. Yount at the bottom, we're in the  
5 final stages of fixture installation. At that time,  
6 August 26th, 2015, what was your understanding of what the  
7 construction date or the opening date of the casino was going  
8 to be?

9 A. I'm sorry. You said August? This says  
10 September 8th.

11 Q. No. The first e-mail is from you and to Mr. Yount  
12 on the second page is dated August 26th, 2015.

13 A. August 26th?

14 Q. Yes. Bates number 2495, second page of the  
15 e-mail.

16 A. Okay.

17 Q. Do you see that at the bottom?

18 A. Is it 2495 is the page?

19 Q. Yeah.

20 A. Repeat the question.

21 Q. So it looks like part of the e-mail you were  
22 giving Mr. Yount an update on the status of the project,  
23 correct?

24 A. Yes.

1 Q. What was your understanding as of August 26th,  
2 2015, about the opening date for the project was going to be?

3 A. I was not aware of any change from the  
4 December 12th opening at that stage.

5 Q. And if you go back the next page of that e-mail,  
6 page 2496.

7 A. Okay.

8 Q. On the August 17th e-mail to Mr. Yount.

9 A. The new guest house.

10 Q. Where it starts, guest house. So was the purpose  
11 of this e-mail to, again, push Mr. Yount or help Mr. Yount  
12 invest in the property under the private placement  
13 memorandum?

14 A. He had asked me a question about an agent. We are  
15 trying to secure an agent to legally handle this transaction.  
16 There was something about setting up a trust. And I referred  
17 him to Jim Litchie at Starker Services in Los Gatos. I  
18 thought that might help. He was having trouble setting up a  
19 facility to move money around. So as I do with all of my  
20 clients, I was just trying to be helpful.

21 Q. You were trying to facilitate the close of  
22 Mr. Yount's \$1 million investment into the private placement  
23 memorandum, correct?

24 A. Well, he was trying to figure out how he was going



1 to move money around. I was trying to be helpful.

2 Q. You were trying to help him facilitate that  
3 investment?

4 A. Sure.

5 Q. And then if you go to Exhibit Number 30, which is  
6 an e-mail string from you and Mr. Yount. The top of that,  
7 you sent Mr. Yount an e-mail on March -- excuse me --  
8 September 16th of 2015?

9 A. Yes.

10 Q. And, again, you're asking him how his funding with  
11 the IRA is proceeding, right?

12 A. Yes.

13 Q. And --

14 A. And I was offering to give him another tour so he  
15 could see progress from his last tour in July. Significant  
16 progress that had been made. So I was just trying to be  
17 helpful, not pushy.

18 Q. And then you told him that Robert hopes to close  
19 out the final founding membership, this very soon.

20 A. Correct.

21 Q. That's the final founding piece, other than the  
22 private placement memorandum?

23 A. Yes.

24 Q. About this same time frame in mid September of

1 2015, Mr. Marriner, did you also know that a Mr. Les Busick  
2 was looking at taking the last piece of the private placement  
3 memorandum?

4 A. Well, Les Busick was one of the founding  
5 investigators on the executive committee and he was aware of  
6 Robert's, you know, talking to many people. Robert probably  
7 talked to 20 prospective investors. I had talked to quite a  
8 few. Someone at \$500,000, someone at a million, Stuart was  
9 interested in 1 million, but Stuart never made a commitment.  
10 He never signed the documents and had not been able to  
11 arrange funding, so we considered him as kind of a, maybe  
12 he'll fund or maybe he won't. There was never in my mind or  
13 in Robert's mind a commitment and he actually was in due  
14 diligence for almost four months, so --

15 Q. Mr. Marriner, can you listen a little more closely  
16 to my question. The question was, did you know if Les Busick  
17 at that mid September time frame was also looking at  
18 investing under the private placement memorandum, yes or no?

19 A. I think Robert might have mentioned it to him.  
20 Robert stayed at Mr. Busick's home in a guest house  
21 occasionally and it wouldn't surprise me if they were talking  
22 about it. But I wasn't aware of his serious intent until  
23 later, you know, later in September.

24 I recall Robert sending an e-mail to Stuart, you

1 know, kind of to speed things up. He had been looking at  
2 this investment since June. And I think we were all  
3 concerned that he might just be kicking tires. I mean, no  
4 one spent four months in due diligence. And it was -- I look  
5 at it like getting a loan approval, if you don't get the loan  
6 approval. So Stuart was never committed.

7           And we did have quite a few other people looking  
8 at the offering, including Mr. Busick, who, you know, was --  
9 I think Robert was spending the night at his house. And I  
10 think Les Busick said, well, you know, maybe I'd be  
11 interested in filling out that. He was already an investor  
12 and loved the project, felt the progress was moving smoothly.  
13 So that was a private conversation that Robert continued and  
14 they ended up coming to terms at some point the end of  
15 September.

16           Q.    Mr. Marriner, again, listen a little more closely  
17 to my question. The question was, did you know as of  
18 September 15th or September 16th when you sent this e-mail to  
19 Mr. Yount if Les Busick was in fact looking at taking that  
20 last 1.5 million of the private placement memorandum? Did  
21 you know?

22           A.    I believe it was later in September. I think it  
23 might have been around the 24th of September. And Les Busick  
24 moves quickly if he decides to do something. He could have

1 made a decision in the 25th or 26th and closed by the end of  
2 the month. But the offering was still available and I was  
3 still talking to several other prospects.

4 Q. So by September 24th, Mr. Yount still had not  
5 funded, right?

6 A. Correct.

7 Q. Earlier, we talked about the mezzanine loan,  
8 right? That was the \$6 million Ladera loan?

9 A. Yes.

10 Q. Did you also know in this August, September time  
11 frame that Mr. Radovan was also looking at a potential  
12 refinance of the entire project? Not a refinance of the  
13 mezzanine loan, but refinancing all the debt?

14 A. Yes. It was commonly discussed they were talking  
15 to a company called Mosaic and another company North -- not  
16 North Light, but I think Robert had talked to maybe five or  
17 six other potential complete refinances of the Hall loan,  
18 because it was very restrictive.

19 It maxed out at 29 million and Robert thought if  
20 he could 50 or 55 million, the project could be complete and  
21 open in a reasonable schedule. So the 15 million mezz was  
22 maybe -- you know, the 50 to 55 million with Mosaic would  
23 give them some padding if there were additional change orders  
24 or improvements to the property.

1 Q. You knew that Robert was talking to a lender named  
2 Mosaic and the amount of the refinance in total would be 55?

3 A. I think it was 50 million. And I also asked  
4 Stuart to put Robert in touch with North Light, who was  
5 funding Boulder Bay across the street. So I think Robert  
6 might have talked to, I don't know, he'll have to answer that  
7 question, more than three or four, because he was looking for  
8 a complete financial solution to get the hotel finished and  
9 open.

10 Q. Did you ever tell Mr. Yount that Mr. Radovan was  
11 looking at a total refinance of the project, adding some  
12 additional significantly more debt than was on the project?

13 A. I believe that could have come up, but, again, by  
14 this time, Stuart and Robert were in direct communication. I  
15 do not recall specifically calling Mr. Yount and saying,  
16 Robert is putting \$50 million mezzanine -- or \$50 million  
17 loan. I think everyone knew --

18 Q. I'm not asking if you knew.

19 A. I did not specifically tell Mr. Yount about the  
20 Mosaic loan in particular. It might have been part of a  
21 group.

22 Q. But you don't remember that specific conversation  
23 with him?

24 A. And I think --

1 Q. Yes or no?

2 A. No. I don't believe so. Can I change the answer  
3 to I don't recall? It's possible that --

4 Q. Your counsel can ask you questions.

5 A. There were an awful lot of discussions with  
6 lenders at that time. It's hard to keep track of all of  
7 them.

8 THE COURT: Next question.

9 BY MR. CAMPBELL:

10 Q. So we pinned down that you knew about Busick  
11 around September 24th of 2015. And you also knew that if  
12 that took place, Mr. Yount could no longer legally invest  
13 under the private placement memorandum, right?

14 A. There was no commitment to Mr. Yount at that  
15 point.

16 Q. The question was, you knew as of September 24th  
17 that Busick was interested in putting in another 1.5 million  
18 into the project?

19 A. I think he was in discussion with Robert, but had  
20 not made a commitment that I'm aware of.

21 Q. But you knew that if Mr. Busick did that,  
22 Mr. Yount could not then legally invest under the private  
23 placement memorandum?

24 A. If anyone had taken that investment that was

1 offered to Stuart and a variety of other investors, he would  
2 be out. Stuart had the option to sign the documents and send  
3 in his investment and that would have secured his position.  
4 But, you know, Stuart was so concerned about the cost  
5 overruns and the additional financing --

6 MR. CAMPBELL: Objection, your Honor.

7 THE WITNESS: Sorry.

8 THE COURT: It's okay.

9 MR. CAMPBELL: I move to strike that. That wasn't  
10 the question.

11 THE COURT: It's all right. At a bench trial, I  
12 can sift the wheat from the chaff.

13 THE WITNESS: I'm sorry.

14 THE COURT: It's okay. You're doing fine, Mr.  
15 Marriner. Just listen to the question.

16 BY MR. CAMPBELL:

17 Q. Busick was on your list of contacts that you made  
18 to Mr. Radovan, correct?

19 A. He was one of -- he was the first founding  
20 investor.

21 Q. And then if Busick invested another 1.5 million  
22 into the project under the PPM, you would receive a  
23 commission of \$45,000, is that correct?

24 A. Per my consulting agreement, yes.

1 Q. Do you know when Mr. Busick funded?

2 A. I don't recall what date exactly, because Robert  
3 and Mr. Busick had become very good friends. And as I  
4 mentioned, Robert was staying at his house. And they made  
5 arrangements to transfer the money, and I believe it was the  
6 last day or two of September or first couple of days of  
7 October.

8 Q. And, in fact, you actually did a site tour with  
9 Mr. Busick to the hotel I believe at the end of September?

10 A. On October 30th, he wanted to just walk over and  
11 see how the progress was going and so we walked over to -- we  
12 drove over to the property.

13 Q. Maybe you're confused. Did you have a site visit  
14 with Mr. Busick on the Cal Neva property at the end of  
15 September?

16 A. September 30th, I believe, is the date that Les  
17 and I went over and walked the site. And I believe he was in  
18 the process of talking to Robert about funding, but he hadn't  
19 funded yet. So that's why I'm suggesting it's probably the  
20 last day of September or the first day or two of October.

21 Q. And on that site visit with Mr. Busick, did you  
22 talk with him about the amount of the change orders or over  
23 budget items on the project?

24 A. We specifically asked Lee Mason to walk us through



1 all of the items that were on that July report, you know,  
2 sewer, new sewer line. Because Mr. Busick just wanted to  
3 make sure that those change orders were necessary and  
4 required. So it was -- he walked us through that they needed  
5 a new sewer line, the other one had been crushed. A lot of  
6 the buildings had been built in 1937, 1940s, 1950s, and the  
7 newest building was 1960, late '60s. So a lot of the  
8 underground foundation that they thought was going to be  
9 decent was not.

10 So we wanted -- Les Busick before he put in the  
11 additional funding wanted to walk and have Lee point out were  
12 these things just on a piece of paper or were they actually  
13 done? And most of the items were done. All new foundation  
14 under the Circle Bar was complete, the sewer, the new sewer  
15 line was complete.

16 They had the opportunity to conceal asbestos, but  
17 Robert made a wise decision to remove the asbestos. That was  
18 a big change order. They were talking about a show kitchen  
19 for a famous television chef and so that was going to be a  
20 recommendation. Not -- because there were, you know, Lee was  
21 saying, here's things that the county demanded, Washoe and  
22 Placer, he had to deal with both counties. So there were  
23 certain items that were required. You can't argue with the  
24 county. Some were Starwood upgrades to the rooms. So 178

1 rooms times whatever items they needed.

2 But Les was very pleased with the site tour and  
3 Lee Mason, you know, said, almost all of the items on that  
4 change order in July have already been completed. And he was  
5 very, you know, happy with the progress of the hotel. The  
6 carpet was down in the tower. I believe he chose to put an  
7 additional million five in because he was happy with the  
8 status of the project.

9 Q. From your site visit, you saw there were a lot of  
10 things that had been done or needed to be done?

11 A. Yes.

12 Q. My initial question was, did you and Mr. Busick  
13 with Mr. Mason now discuss the amount, the dollar amount of  
14 those change orders that you just talked about?

15 A. No. We just pointed out sewer line, foundation.  
16 I would have to receive permission, first of all, I'm not on  
17 the executive committee, but we would have had to go to Hal  
18 Thannisch, who is the project manager. And Penta is not  
19 authorized to hand out financials to anybody walking in his  
20 trailer. So he was kind enough to just point out all the  
21 things that had been done.

22 Q. But Mr. Radovan had told you previous to that time  
23 that another \$10.5 million was needed, right?

24 A. That was an estimate, approximately.

1 Q. And Mr. Radovan also told you that the project was  
2 potentially was going to need a \$50 million refinance?

3 A. Well, that would be the total refinance of the  
4 first and second trust deed.

5 Q. Did Mr. Radovan ever tell you that without that  
6 Mosaic loan or another total refinance of the project, that  
7 the hotel was not going to open in December?

8 A. Are you asking specifically the Mosaic loan or a  
9 loan?

10 Q. At that point, you were only talking about --  
11 Robert was only taking to Mosaic, correct, to your knowledge?

12 A. Yeah. I think Robert had several options. One  
13 was a \$15 million refinance of the mezz, or an even better  
14 solution would be 50 to 55 million for the completion and  
15 opening of the hotel.

16 Q. So did you know in this -- prior to Mr. Yount --  
17 let's say prior to October 1st, that without an additional  
18 funding in equity that the project would not stay on  
19 schedule?

20 A. That's a given. In construction, if you stop  
21 funding, a contractor -- you pay contractors every two weeks.  
22 So if funding stops on the project, the contractor most  
23 likely will pull off the job.

24 Q. So did you ever tell Mr. Yount that without the

1 additional funding from a refinance, that the project would  
2 not meet its December opening schedule?

3 MR. WOLF: I'm going to object. It lacks  
4 foundation and it assumes facts.

5 THE COURT: Overruled. You can answer the  
6 question.

7 THE WITNESS: I didn't have a specific  
8 conversation with Mr. Yount that said if Mosaic doesn't fund,  
9 the project will halt.

10 BY MR. CAMPBELL:

11 Q. But you knew that, right, before he funded?

12 A. Every project relies on funding.

13 Q. So, yes or no, you knew that?

14 A. No, I did not.

15 THE COURT: Just a minute.

16 THE WITNESS: I did not specifically tell  
17 Mr. Yount that if the Mosaic loan did not fund, the project  
18 would stop. No, I did not say that.

19 BY MR. CAMPBELL:

20 Q. But you knew that before --

21 THE COURT: Ms. Koetting is probably one of the  
22 best court reporters around, but she can only take one voice  
23 at a time. So try not to talk over each other. All right.

24 MR. CAMPBELL: I'm sorry, your Honor.

1           THE COURT: Don't apologize to me. Apologize to  
2 Ms. Koetting. All right. Go ahead, Ms. Campbell.

3 BY MR. CAMPBELL:

4           Q. I want it to be clear on the record, you knew  
5 prior to October 1st that without a refinance of the project,  
6 which is additional debt, that the project was not going to  
7 open by the September time frame?

8           MR. LITTLE: Did you say September?

9 BY MR. CAMPBELL:

10          Q. December.

11          A. You're confusing me. Restate the question.

12          Q. You knew that by October 1st, 2015, that without  
13 additional funding through a refinance from Mosaic at that  
14 time, the project was not going to make its opening date in  
15 December of 2015?

16          A. I don't believe that's true, because the Hall loan  
17 had only funded about 19 or 20 million of its 29 million. So  
18 there was still an additional 9 million that the Cal Neva  
19 could draw from Hall. There was the mezz refinance that was  
20 imminent. And the PPM does allow the developer to do a cash  
21 call or additional fund raising. So, no, I don't believe the  
22 project could have necessarily failed if the Mosaic loan  
23 didn't fund. I guess that's --

24          MR. CAMPBELL: May I approach, your Honor?

1 THE COURT: Sure.

2 MR. CAMPBELL: Counsel, page 70 of Mr. Marriner's  
3 deposition.

4 BY MR. CAMPBELL:

5 Q. Starting at the bottom of page 70, I ask you, Mr.  
6 Marriner, line 22, at the same time, though, you knew that  
7 the loan might be out of balance and that Hall was going to  
8 quit financing, too, if it wasn't put in the balance, right?  
9 And your answer is starting at line 25?

10 A. The mezz and the equity, I believe, had to be  
11 funded at some point. It isn't open-ended. So as I  
12 understand, between July, August, September, that additional  
13 funding and equity was necessary for the project to stay on  
14 schedule. So that's accurate.

15 Q. Let's move to Exhibit Number 32, Mr. Marriner.  
16 This is an e-mail string. It looks like it starts back on  
17 October 1st and then continues a couple of e-mails between  
18 you and Mr. Yount. Do you see that?

19 A. Yes.

20 Q. And this e-mail string, Mr. Yount was e-mailing  
21 Mr. Radovan, but you were copied on the first e-mail string  
22 October 1 at 10:55 a.m., right?

23 A. Right.

24 Q. And, basically, without having to read it,

1 Mr. Yount looks like he's ready to fund, isn't that correct?

2 A. Are you talking about 2334?

3 Q. 2335.

4 A. Okay.

5 Q. Would you agree with me that e-mail message to  
6 Mr. Radovan and copied to you was Mr. Yount saying I'm ready  
7 to fund this deal?

8 A. Certainly sounds like they're getting close, but  
9 it seems like they had been close before.

10 Q. And then you respond to Mr. Yount with a couple of  
11 e-mails kind of giving him some progress updates on the  
12 hotel, right?

13 A. Yes.

14 Q. And the last one in the string, you say the  
15 exterior is on final push, but on schedule, right?

16 A. I believe so, yes.

17 Q. Now, if Mr. Yount also funded, you were going to  
18 make a \$30,000 commission on his \$1 million, right?

19 A. Per my contract, yes.

20 Q. Do you remember having a discussion with  
21 Mr. Radovan about the potential of Mr. Yount and Mr. Busick  
22 funding at or about the same time?

23 A. It was starting to look, and, again, I wasn't sure  
24 what date if the -- Les Busick was moving quickly towards

1 funding, and I think a day or two later, this e-mail came.  
2 And I called Robert and said, looks like we might have a  
3 perfect storm. What if Les Busick funds and Stuart's money  
4 comes in at the same time? And Robert said, we have an  
5 additional founding membership we can make available if that  
6 happens.

7 And I had mentioned, you want me to let Stuart  
8 know? And he said, no, I'll take care of it. So it was --  
9 and I was just leaving town for our son's birthday. So I  
10 just, it's like, oh, great. At that point, I wanted  
11 Mr. Yount to participate. He wanted to be one of our  
12 founding investors. And Robert had indicated that it was a  
13 preferred founding membership. It was still part of the  
14 original 20.

15 Q. Everything that you provided to Mr. Yount, all the  
16 communications you had with Mr. Yount, all were based on him  
17 taking out part of the last \$1.5 million under the private  
18 placement memorandum, right?

19 A. That's the only paper work I ever saw.

20 Q. Okay. And so you're now saying that Robert then  
21 told you that if Busick funds, Mr. Yount can't do that, but  
22 I'll sell Mr. Yount's shares. Is that what I'm understanding  
23 you're saying?

24 A. No. That's not correct. Mr. Busick was moving



1 quickly, because Yount was lagging and was having trouble  
2 getting his funding. So Mr. Busick, I think, because he had  
3 cash liquid assets, I think he moved quickly and closed  
4 around the 1st, 2nd or 3rd of October. So as Les Busick is  
5 taking the million five, because Stuart Yount never signed  
6 the paper -- he never made a commitment. He wanted it, but  
7 he had been in due diligence for four months and I think Les  
8 Busick is saying, I'll take it.

9 So I said, what happens if, you know -- if Les  
10 funds an hour before, just like in any real estate  
11 transaction, it's a race, a foot race to the finish, what if  
12 Les Busick funds first, what are you going to do with Stuart  
13 Yount? And Robert said, don't worry about it, we have  
14 another founding membership that we can offer them and it's  
15 part of the original founding membership.

16 Q. But it was not under the private placement  
17 memorandum, correct?

18 MR. LITTLE: Objection.

19 THE COURT: Overruled. Go ahead.

20 THE WITNESS: I didn't know there was a  
21 distinction. It was a founding membership, part of the  
22 original 20, and, again, I left all of the investment  
23 discussions and negotiations up to Robert and his attorney.  
24 I was never on the phone talking to people about funding.

1 You know, that is a -- that was done in Texas or Bruce  
2 Coleman's office.

3 So the fact that they were talking, although  
4 Stuart's -- I understand Stuart's money still didn't come in  
5 and he hadn't signed any paper work, even until the 13th, so  
6 it was it was almost two weeks after Les Busick funded. And  
7 there was no written commitment to the Younts that they had  
8 an exclusive right to that investment.

9 BY MR. CAMPBELL:

10 Q. But you knew from your conversation with  
11 Mr. Radovan that once Mr. Busick funded, he had to do a  
12 different deal than what Mr. Yount would have been told  
13 before funding under the private placement memorandum, right?  
14 You knew it was a different deal?

15 A. I didn't know there was a difference. As far as I  
16 was concerned, there was 20 million in private placement  
17 founding memberships. They've been called several different  
18 things. As far as I was concerned, Stuart was getting what  
19 he wanted. He wanted to be a part of the founding  
20 membership.

21 Q. Why did you offer to call Stuart?

22 A. I just said, do you want me to give him a call?  
23 He said, no, don't worry about it. I'll take care of it. He  
24 didn't know if the money was going to arrive. Stuart had

1 been talking about this funding for four months. So it was  
2 if Stuart's money ever arrives, we'll deal with it at that  
3 time and he would take care of it. So it wasn't in my  
4 responsibility to -- because I had other people that were  
5 looking at the investment at the same time. And so,  
6 honestly, that was in, you know -- that was Robert's and his  
7 attorney's call.

8           If all of a sudden, because I didn't know whose  
9 money was going to come in first, someone would have had to  
10 make that call, but it certainly wasn't me.

11           Q. But you still offered to call Mr. Yount to tell  
12 him about this perfect storm, right? That was your words?

13           A. I was not in direct communication with Stuart at  
14 that point. Robert and Stuart -- Stuart wanted to talk with  
15 the developer and said, thank you, Dave, I'll take it from  
16 here. I'm in direct communication with Robert.

17           And I signed an NDA when I first was hired by  
18 Robert, and the NDA was very specific, do not -- I was not  
19 allowed to talk about investments, and private, confidential  
20 information was to be handled by the developer only. I was  
21 not allowed and I could be in trouble if I was to circumvent  
22 the developer. The developer and the attorney were basically  
23 dealing with possibly two deposits coming in at the same  
24 time, but I was allowing them to deal with that.

1 Q. You say you weren't in communication with  
2 Mr. Yount. You sent him an e-mail on October 1st, right,  
3 Exhibit Number 32, right after he told Robert that he was  
4 going to fund and where to send the money?

5 A. Well, Busick was talking about funding and Stuart  
6 had been talking about funding for four months. So, you  
7 know, an e-mail about pictures of the project still on track  
8 has no bearing on the fact that -- you know, there's foot  
9 races in real estate all the time. It comes down to the  
10 person that actually gets their money and the paper work  
11 accomplished.

12 And Stuart still wasn't ready on August 1st.  
13 October 1st, Stuart was still not ready to sign the private  
14 placement or fund and so Les Busick beat him to the punch.

15 Q. This wasn't a real estate deal. This was a  
16 securities investment, right, Mr. Marriner?

17 MR. LITTLE: Objection.

18 THE COURT: Is there an objection?

19 MR. LITTLE: Sorry, your Honor.

20 THE COURT: Is there an objection.

21 MR. LITTLE: Objection, your Honor, argumentative.  
22 I'll withdraw it.

23 THE COURT: Okay.

24 THE WITNESS: I recall the PPM stating it was not

1 a security. It was a real estate development investment.  
2 And as far as I was concerned, the project was still booming  
3 and the project was looking great and it still looked like it  
4 was on track.

5 BY MR. CAMPBELL:

6 Q. Let's go back and talk about your conversation  
7 with Mr. Radovan again. Your testimony was that he told you  
8 to stay out of it, stay out of it?

9 A. No. He didn't say stay out of it. I said that he  
10 said, I'll take care of it. Which is consistent with all of  
11 my involvement with Robert is he would take care of the  
12 investment discussions so there wasn't a conflict or a  
13 misunderstanding. So the -- so it wasn't, stay out of it.  
14 It was, don't worry about it, I'll handle it. If Stuart --  
15 Stuart's money ever arrives, then I'll deal with it.

16 MR. CAMPBELL: May I approach, your Honor?

17 THE COURT: Yes.

18 MR. CAMPBELL: Counsel, page 67 of Mr. Marriner's  
19 deposition starting with the question on line 14.

20 BY MR. CAMPBELL:

21 Q. Mr. Marriner, I asked you, did you ever tell  
22 Mr. Yount on or about October 1st, oh, by the way, Busick is  
23 also looking like he might invest and that is going to close  
24 out the private placement memorandum on your 1 million. And

1 can you read the next seven or eight lines, your answer to  
2 the question starting at line I believe 18?

3 A. Called Robert because I report directly to Robert.  
4 I said we could have a perfect storm if Busick and Yount fund  
5 on the same day, because it was feeling like two people were  
6 sending their money in at the same time. Robert said, don't  
7 worry, stay out of it. Criswell Radovan has a million dollar  
8 piece or the developer could put another million unit up. So  
9 he told me to stay out, because I offered to call Mr. Yount.  
10 I said, if Busick funds, you know, we should call Mr. Yount  
11 and call him off, because his funds hadn't arrived.

12 Q. And you never called Mr. Yount to call him off?

13 A. No.

14 Q. And did you ever ask Mr. Radovan if he called  
15 Mr. Yount to call him off?

16 A. I don't recall.

17 Q. So your understanding of what Mr. Radovan told you  
18 that he was going to sell one of the CR shares to Mr. Yount?

19 A. He said he had an additional founding membership  
20 he could make available and I don't know what that means. It  
21 was called CR Cal Neva, so to me, I worked for the Cal Neva.  
22 So I didn't have a clear understanding of what is CR Cal  
23 Neva.

24 Q. Mr. Marriner --

1           A.     So he simply said he has a founding membership  
2 that he could make available.

3           Q.     Okay. Mr. Marriner, you knew that CR Cal Neva had  
4 a part -- had shares under the private placement memorandum,  
5 correct?

6           A.     I had only seen the name on the list. So I -- I  
7 wasn't sure exactly sure what that meant. Maybe they had  
8 invested a million dollars each. There were two separate  
9 lines, so I didn't know if it was two separate investments or  
10 why wasn't it CR Cal Neva, 2 million. So, obviously -- but  
11 Robert is the developer and I signed an NDA to not interfere  
12 with his business. So when he said he had an additional  
13 member, founding membership that he could offer the Younts, I  
14 left it at that and did not pursue any kind of business  
15 interruption.

16          Q.     Mr. Marriner, you knew under the -- you had  
17 earlier testified that you had signed off on the amended  
18 restated operating agreement, Exhibit Number 5, and you  
19 signed it. Can you look at that Exhibit Number 5 again?

20          A.     Okay.

21          Q.     And look at schedule 4.2 at the back of the  
22 exhibit. Do you see where it says, CR Cal Neva LLC, and  
23 lists 2 million as part of the --

24          A.     Where is that? On page 12?

1 Q. It's schedule 4.2 at the back of the exhibit.

2 A. I'm sorry. I'm on page 12. So you're saying go  
3 back to the schedule?

4 Q. Yes.

5 A. Okay 4.1.

6 Q. 4.2 and this is an attachment to the operating  
7 agreement that you were a signatory to, right?

8 A. Yes.

9 Q. In that it shows the capital contributions of  
10 preferred members and it shows CR Cal Neva LLC as holding  
11 \$2 million of that capital contribution?

12 A. Right.

13 Q. And you knew that 2 million counted against the 20  
14 million, which could be raised under the PPM, right?

15 A. At that point, I didn't know if that had been paid  
16 for or it was being held back to be released at a later date.  
17 So I really had no knowledge of what that CR Cal Neva,  
18 because it's confusing, because Cal Neva, it sounded, well,  
19 that's the developer is Cal Neva in the project.

20 And there's quite a few entities that are  
21 confusing. There's, you know, there's Cal Neva, there's CR  
22 Cal Neva, there's CR Hospitality, CR. So as far as I was  
23 concerned, it just appeared that it was a million dollar unit  
24 that maybe the developer had held back for a capital raise.



1 I had no knowledge of what CR Cal Neva LLC was or who the  
2 owners were. And I tried to stay out of the investment side  
3 of the business and left it up to the developer.

4 Q. Mr. Marriner, in the operating agreement, it  
5 spells out specifically that CR Cal Neva LLC is the manager  
6 of the entity. Are you telling me you didn't know who the  
7 manager was?

8 A. Well, then, the manager was holding back --

9 Q. Excuse me. Are you telling me you didn't know  
10 that CR Cal Neva LLC was the manager of the LLC?

11 A. There's several confusing LLCs that -- no, it  
12 wasn't on the top of my mind, because I wasn't dealing with  
13 CR Cal Neva. I was hired by Cal Neva LLC or Cal Neva Lodge  
14 LLC or New Cal Neva LLC. So when this perfect storm was  
15 happening and Robert said, don't worry, I have a preferred  
16 membership, which is what the Younts wanted, I said, great,  
17 good. And the project was humming along, so I thought it was  
18 what Mr. Yount wanted.

19 THE COURT: Counsel, let's take our lunch break  
20 here. Mr. Marriner, you can step down. Watch your step.  
21 Let's get back together here at about quarter after. That  
22 will give you enough time. There's some restaurants up along  
23 the river here.

24 MR. LITTLE: Thank you, your Honor.

1 MR. CAMPBELL: Thank you, your Honor.

2 (A short break was taken.)

3 THE COURT: Mr. Marriner, come on up.

4 Mr. Campbell, you're on Exhibit 5, section 4.2. Your  
5 witness.

6 BY MR. CAMPBELL:

7 Q. Mr. Marriner, I just want to revisit for a brief  
8 moment here the sale to Mr. Yount or the transfer to  
9 Mr. Yount. Was it your understanding that Mr. Radovan was  
10 going to negotiate that transaction with Mr. Yount?

11 MR. LITTLE: Vague.

12 THE WITNESS: I'm sorry.

13 THE COURT: Overruled.

14 THE WITNESS: I'm sorry. What was the question?

15 BY MR. CAMPBELL:

16 Q. Let me rephrase it. In lieu of Mr. Yount buying  
17 the share under the PPM, you knew Mr. Radovan had told you  
18 that instead he was going to get some other kind of share,  
19 right? Is that correct?

20 A. Well, he was going to take care of it. That's the  
21 extent of my conversation.

22 Q. Didn't he tell you that he was going to negotiate  
23 that second option? Not that he was going to take care of  
24 it, but he was going to negotiate that with Mr. Yount?

1 MR. LITTLE: Objection, mischaracterizes.

2 THE COURT: I'll let you clear that up.

3 THE WITNESS: He said he had a founding membership  
4 available.

5 BY MR. CAMPBELL:

6 Q. If I may approach, your Honor. Page 69, the  
7 question starts at line nine. Mr. Marriner, I asked you in  
8 your deposition, now, you testified that Robert told you,  
9 don't worry about it, don't get involved, and I will work our  
10 way around it by selling some of the units to Mr. Yount for 1  
11 million, right? You answered, he said do not -- well, I was  
12 told not to be involved in any conversation with any  
13 investors. You know, it was all left up to Robert and Bruce  
14 Coleman. And then what is the rest of your answer there in  
15 line 15?

16 A. I said, should we tell him Robert said don't get  
17 involved, we have an additional 1 million unit that we will  
18 negotiate and settle with Yount. Don't worry about it.  
19 We'll settle with Yount.

20 Q. Did you ever ask Mr. Radovan if he went ahead and  
21 reached out to Mr. Yount and negotiated that transfer?

22 A. I don't recall. I had just left town with my  
23 family and wasn't even sure if the transaction was going to  
24 happen. So, no, I didn't have any, you know, immediate

1 follow-up.

2 Q. Did you understand that under the operating  
3 agreement that governed the other members that before one  
4 member could transfer his share, that the other members had  
5 to vote to approve that?

6 MR. LITTLE: Objection, mischaracterizes the  
7 document.

8 THE COURT: Overruled. The question is just what  
9 his understanding was.

10 THE WITNESS: Can you repeat the question?

11 BY MR. CAMPBELL:

12 Q. Did you understand under the operating agreement,  
13 for a member of the LLC to transfer a share to somebody, that  
14 the other members -- there was a mechanism for the other  
15 members to vote to approve that?

16 A. That had never come up before, so we didn't  
17 discuss it.

18 Q. So as of the time that Mr. Yount was intending to  
19 invest, you had no knowledge that there was some kind of  
20 operating agreement provision that governed the transfer of  
21 shares of members?

22 A. I didn't know what -- it had never come up before,  
23 so I didn't understand what the policy would be, but I  
24 assumed Robert would take care of it.

1 MR. CAMPBELL: May I approach, your Honor?

2 THE COURT: Certainly.

3 MR. CAMPBELL: Counsel, page 59 and starting at  
4 question on line nine.

5 BY MR. CAMPBELL:

6 Q. I asked you in your deposition, Mr. Marriner, do  
7 you have any general information related to how and when an  
8 investor could take money out of the project? You answered,  
9 I believe that's outlined in the investment document.  
10 Question, did you review those documents at about the same  
11 time in the summer of 2015? Your answer was, I think I, you  
12 know, read through, looked at them, but I'm not an expert in  
13 investment. Then I asked, what was your general  
14 understanding about the developer's ability to take money out  
15 of the project? What was your answer at line 18?

16 A. I don't believe they are allowed to take money out  
17 except per operating agreement.

18 Q. Now, you were a member of the LLC, right?

19 A. You mean as a founding member?

20 Q. You had a piece of a founding membership, right?

21 A. I believe so.

22 Q. Okay. As a member of the LLC, did you ever see  
23 anything from CR, Mr. Radovan, Mr. Criswell, or any of the CR  
24 entities that sought approval of the transfer of a share to

1 Mr. Yount?

2 A. I was not on the executive committee, so I would  
3 not have see seen any discussions or votes, things like that.

4 Q. Not as to the executive committee. I know you're  
5 not on the executive committee. As a member, did you ever  
6 see any e-mail communication, anything from Mr. Radovan,  
7 Mr. Criswell, or any of the Criswell Radovan entities that  
8 asked the members to approve this transaction with Mr. Yount?

9 A. I do not recall.

10 THE COURT: If you could move the mic a little bit  
11 closer so Ms. Koetting can pick up. Thank you.

12 BY MR. CAMPBELL:

13 Q. So Exhibit 37, do you have that in front of you,  
14 Mr. Marriner?

15 A. Yes.

16 Q. This is an e-mail, it looks like it starts at the  
17 bottom of the page from you to Mr. Marriner and -- from you  
18 to Mr. Yount and it's dated October 10th, correct?

19 A. Okay. The lower one, yes.

20 Q. So Mr. Yount was communicating to you  
21 October 10th. And then it looks like you responded -- well,  
22 now, I'm sorry. Mr. Yount responded to you, how about this  
23 Thursday. We'll be flying in, but we'll try to close at  
24 3:30. Looking forward to seeing the progress.

1           A.     Yes. I think it's discussing welcoming the new  
2 general manager.

3           Q.     Okay. So this was before Mr. Yount funded on  
4 October 13th, correct?

5           A.     Yes.

6           Q.     Exhibit Number 41, this is a little tough to read  
7 the way it was printed out, but this looks like an e-mail  
8 string where you were trying to set up another tour with  
9 Mr. Yount, a tour of the property?

10          A.     Yes. I kept offering and was waiting for a time  
11 that would work out. So I know I checked several times just  
12 to show him the progress.

13          Q.     Did you ultimately have that meeting, a site tour?

14          A.     I think it was pushed back to later in October,  
15 around the 26th or 28th.

16          Q.     Any discussions with Mr. Yount at that site tour  
17 about the CR transaction of Mr. Yount buying a share from the  
18 Criswell Radovan or some other CR entity?

19          A.     If it's the October 28th site visit, is that what  
20 you're referring to?

21          Q.     Yeah. The site visit that actually took place.

22          A.     I think at that site visit, it was welcome aboard,  
23 you know, this is one of our new founding members. And we  
24 had a very good tour and I believe that progress was

1 substantial. So it was a good tour and I think at that point  
2 Mr. Yount was a founding investor.

3 Q. Did you talk to Mr. Yount at that tour about  
4 whether or not -- how his transaction went Mr. Radovan on the  
5 transfer of some other share that you were -- that was going  
6 to take place?

7 A. Well, again, I was never involved in the private  
8 placement discussions, money changing hands, paper work, that  
9 was all done with the attorney in Texas. So, no, as far  
10 as -- and I had gone out of town. Our son that passed away  
11 three years earlier, his birthday is October 11th, and I told  
12 Robert that's a difficult time of the year for my family, so  
13 we went down to San Francisco to visit her family to get  
14 through that period of time. And his birthday is  
15 October 11th, so I know that was, you know, I was not on  
16 site. And maybe that's indicative of the tour, you know,  
17 being pushed back to the 28th. But I figured everything went  
18 smooth and welcomed Mr. Yount to the founding investor team.

19 Q. But you did know that Mr. Yount invested, because  
20 you got a \$30,000 commission, right?

21 A. Yeah, by the 28th walk-through, he had been  
22 welcomed to the Cal Neva founding membership.

23 Q. And you also received the commission from  
24 Mr. Busick, the \$75,000 commission?



1           A.     Yes.  Yes.  That was the only income I received in  
2     2015 from Cal Neva.

3           Q.     And you already received, according to what you  
4     testified to earlier, you sold about 14 million in membership  
5     interests.  So a commission at three percent, that would be  
6     \$420,000.  So your total commission on the sales of these was  
7     \$495,000, does that sound about right?

8           A.     Split between two brokers.

9           Q.     The one that worked with you in your office?

10          A.     Yeah.  Over about a three-year period of time, in  
11     my business, sometimes you don't make anything for a year,  
12     and then you'll get it all in one lump sum and then nothing  
13     for the next year.  So I'd only expected to raise 5 million  
14     and Robert needed additional funding, and, fortunately, the  
15     project was fairly easy to present to people, because it was  
16     an attractive project.

17          Q.     Let's move into December of 2015 next.  I don't  
18     have a document yet.

19          A.     But what tab?

20          Q.     I don't have a document.  I'm shifting the focus  
21     here.  Let's move up on the time line to December of 2015.

22          A.     Yes.

23          Q.     Did you attend the -- strike that.  December 12th,  
24     2015 was the date slated for the opening of the casino hotel,

1 right?

2 A. That was Frank Sinatra's 100th birthday, yes.

3 Q. But it didn't open on December 12th, right?

4 A. That's correct.

5 Q. When did you find out that it was not going to  
6 open on December 12th?

7 A. I think it was becoming evident probably in early  
8 December or late November that there was a problem in the  
9 Circle Bar foundation was completely -- the sub floor was dry  
10 rot, so they had to completely take it out, rebuild it.

11 And so what would have been where the big party  
12 would have been in the famous Circle Bar, that had gone  
13 through a major redesign engineering and that was thrown off.  
14 The actual hotel was ready for furniture and could have been  
15 open. So it -- I would say that it was the unfortunate  
16 condition of a building built in probably 1938 or '40 or '50,  
17 whenever the Circle Bar and the Indian Room was built.

18 It was a last minute, well, we're not going to be  
19 able to open, because the county is not going to release a  
20 use permit on a partially completed building. But the tower  
21 could have been furnished and probably been opened.

22 Q. But I think your earlier testimony was, you also  
23 knew that wasn't going to happen back in the September time  
24 frame unless the project was refinanced?

1           A.     I think Robert was trying to figure out what are  
2 we do for Frank Sinatra's 100th birthday, because they had a  
3 marketing company that was planning a big event. So each  
4 week, I'm sure, they were trying to figure out if the county  
5 is not going to a certificate of occupancy, we're going to  
6 have to move the party. The party was going to be moved to  
7 the Las Vegas where the Sinatra family had another event.

8                     And then a lot of the investors called Robert and  
9 said, why don't we just have it at the Fairwinds and call it  
10 Frank Sinatra's 100th birthday and the project has been  
11 delayed. I think by that time, by December, most people knew  
12 that the project, you know, was pushed to Father's Day, I  
13 believe, in 2016.

14           Q.     But the question I asked was not about having the  
15 party there, it was having the opening of the casino hotel.  
16 Your previous testimony was that you knew back in September?

17           A.     Yeah, it was pretty obvious when the foundation  
18 had to be taken out and redone that that was a major delay.

19           Q.     That was back in September?

20           A.     Probably September, October. I think it was  
21 completed in October.

22           Q.     Your earlier testimony was the refinance of the  
23 project with additional debt had to be done before the  
24 project could be open on time?

1           A.     Well, the financing is a separate question than  
2 the construction certificate of occupancy, so I'm confused.  
3 So the party would have had to have had a certificate of  
4 occupancy to have a party in the building. Financing was  
5 being pursued.

6           Q.     In order to open the hotel?

7           A.     Well, to finish the hotel, of course.

8           Q.     Okay. So did you attend that event at the  
9 Fairwinds?

10          A.     At the Fairwinds, yes.

11          Q.     My understanding there was first a meeting, like  
12 an executive committee meeting?

13          A.     Yes. My wife and daughter and I had a Christmas  
14 tree cut down and we decorated a tree for the party and we  
15 wrapped presents. In a separate room, the executive  
16 committee that I'm not a part of, had a meeting, I think,  
17 starting at 5:00 or 6:00.

18          Q.     Were the other members invited to that executive  
19 committee meeting?

20          A.     No. It was just the executive committee.

21          Q.     So you weren't there and to your knowledge no  
22 other members were there?

23          A.     Other members were showing up, I believe, at about  
24 6:00 for the actual Frank Sinatra 100th birthday party. But

1 the executive committee was having a meeting, you know, in a  
2 private room.

3 Q. And only the executive committing was attending?

4 A. I believe so.

5 Q. And then there was a party started after that, you  
6 testified?

7 A. Right.

8 Q. What was your recollection of what happened after  
9 the executive committee meeting finished and the party  
10 started?

11 A. Well, my wife and I arranged for the catering and  
12 the house was set up for a party. And when the financial  
13 meeting broke up and they left this private room and came  
14 into the living room, there was some heated discussion and  
15 some arguing about, you know, financing or construction  
16 overruns. I wasn't in the meeting.

17 So all I know is it was, you know, kind of  
18 pointing fingers and accusations. And I called my wife and  
19 daughter, who were on their way back to the party, I said, I  
20 don't think this is going to be Frank Sinatra's 100th  
21 birthday party. So I suggested that they not to come back.  
22 It kind turned into a financial discussion and -- but I  
23 wasn't in the meeting, so I don't know even to this day what  
24 was discussed.

1           Q.    You were in the party, though, and you could see  
2 what was going on with the other members?

3           A.    Yeah.  I was in the kitchen getting ready with the  
4 caterer.

5           Q.    Was it fair to say that the other members of the  
6 LLC were pretty upset?

7           A.    There was a particular group called the Incline  
8 Men's Club, they invested 6 million, they specifically were  
9 very upset and, you know, kind of shouting across the room.  
10 And that's when I realized that, you know, it was -- you  
11 know, there was some discussion.  And I'm not sure if it was  
12 about financing or cost overruns.

13          Q.    So you have no idea what the discussion -- what  
14 the executive committee -- the members were talking about  
15 once the party started?

16          A.    Well, once the party started, Robert and Bill  
17 stood next to the fireplace and started kind of welcoming  
18 people to the party and tried to keep it a party, but there  
19 was a lot discussion.  I just can't recall the specific  
20 comments.  But I think they were concerned about, you know,  
21 financing and cost overruns.  And it was, you know, at that  
22 point, it was really the first time that it felt like -- at  
23 that particular point, it was kind of like the cost overruns  
24 or the lack of financing.  I know they were trying to close

1 on the Mosaic loan. There was something going wrong there.

2 And the party really only lasted maybe an hour or  
3 so and then everybody took off. The caterers stayed in the  
4 kitchen, because it was a confidential conversation. So I  
5 think it was, you know, appropriate that --

6 Q. Did Mr. Criswell address the members of the LLC in  
7 that party setting meeting of general address?

8 A. They both had kind of a general address and then  
9 there were people broke off into separate groups for private  
10 discussions.

11 Q. Were you there for that general address?

12 A. Yes.

13 Q. And what was mentioned in that general address as  
14 to budget or cost overruns, if you recall?

15 A. I don't recall the detail, but they were talking  
16 about, you know, the status of the project. That, you know,  
17 obviously, it wasn't opening for Frank Sinatra's birthday,  
18 but it was pushed to March. I think it was, you know, March  
19 or April that it would be most likely opening. But they were  
20 still in need of closing on the Mosaic loan would have been  
21 the ideal solution.

22 Q. Did Mr. Criswell tell the other investors that  
23 they needed that Mosaic loan to finish the project?

24 A. I think that was one of the possible solutions.

Case No. 74275

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**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, 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.,

Respondent.

Electronically Filed  
Mar 05 2019 08:46 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

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**APPEAL**

from the Second Judicial District Court, Washoe County, Nevada

The Honorable N. PATRICK FLANAGAN, District Judge

The Honorable JEROME POLAHA

The Honorable EGAN WALKER

District Court Case No. CV16-00767

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**APPELLANT'S APPENDIX**

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1 A Right.

2 Q I didn't see anything in the email that says anything  
3 about raising 1.5 million to stay in balance.

4 How did you come to this knowledge, that Robert needed  
5 Stuart's 1 million or, I guess you also testified, Les Busick's  
6 1.5 million to keep the loan in balance? How did that information  
7 come to your attention?

8 A I'm a developer and I deal with that as well.

9 But I think Robert was getting concerned that the Yount  
10 money wasn't -- possibly not going to ever materialize. And he  
11 was talking to other people.

12 It was not exclusively offered to Stuart, because he was  
13 only taking 1 million of the 1.5. He was talking to people about  
14 the 5 -- 500,000 or the total of 1.5.

15 Q The question was, when did this information come to your  
16 attention?

17 You've kind of given me a general outline of how it  
18 works, but did Robert tell you this in July, "I need Yount's money  
19 so we're not out of balance on the loan"?

20 A I don't recall. He asked me to raise an additional  
21 million 5 and was also in the process of refinancing the mez 215-.  
22 And as the developer, that's his responsibility.

23 Q Did you deduce it on your own that the loan was going to  
24 be out of balance and that's why the money was needed, or did  
25 Robert tell you that we need this money to make sure the loan is

1 in balance?

2 A I don't recall if he specifically told me that, but it  
3 was a combination.

4 Q So in your mind, as of -- in July or August of 2015, you  
5 knew that an additional -- that Mr. Yount's \$1 million was needed  
6 to balance the loan, yes or no?

7 A Yes.

8 MR. LITTLE: I think he testified it was 1.5.

9 THE WITNESS: What's that?

10 MR. CAMPBELL: Well, I was asking about Mr. Yount's  
11 1 million.

12 BY MR. CAMPBELL:

13 Q Let's go back to the Busick.

14 A Right.

15 Q You said Robert came up to meet with Mr. Busick  
16 specifically. When did that happen?

17 A I think the last week of September, he was -- he came  
18 up, and he was meeting with several people that were also looking  
19 at the same opportunity. A local restaurant owner was also going  
20 to possibly fund the 1 -- either half a million or a million.

21 But he came up specifically to see if Les wanted to take  
22 the full 1.5 million, since he was already an existing investor.

23 And so he went and met with Les. And they, you know,  
24 worked out an agreement that Les wanted the project to move  
25 forward. And obviously, the 1.5 million needed to be funded, and

1 Les wanted the project to keep moving forward.

2 So I think it was -- I think Robert was -- from what I  
3 could tell, he was -- he was getting nervous about needing the  
4 1.5.

5 And -- I mean, I'm just going from what I understand  
6 about construction, that, you know, Les might be easier to get the  
7 funding out of because he didn't have to go through the due  
8 diligence process.

9 **Q And you said he was getting -- Robert was getting**  
10 **nervous. Was that because of the loan coming -- not being in**  
11 **balance?**

12 A He just wanted to get it funded. I mean, obviously, the  
13 project had needs, and it wasn't a secret that the project needed  
14 to be refinanced with mez.

15 It also needed a new -- they were talking about -- I  
16 mean, every meeting, Robert would talk about a complete refinance  
17 with a company called Mosaic, who was looking at the project.

18 Kind of the general understanding is that the project --  
19 based on the construction report, the change orders needed to be  
20 funded with a combination of either new financing or equity or a  
21 combination.

22 And so he was -- couldn't wait forever.

23 **Q Okay. And this need for financing, that existed prior**  
24 **to October 13th, 2016?**

25 A I think it probably started forecasting -- in July, they

1 probably were forecasting we need, you know, 9 million more in  
2 debt and probably another million and a half in equity.

3 And he was openly seeking debt and equity contributions,  
4 you know, to avoid a cash call, because in the PPM, I guess,  
5 that's the next step.

6 Q So Mr. Busick met with Mr. Radovan. Were you in that  
7 meeting?

8 A No.

9 Q Okay. And Mr. Busick ultimately made the investment,  
10 right?

11 A I believe they spent a couple of days talking about it.  
12 And Mr. Busick agreed to fund the 1.5 million, I think, you know,  
13 by the end of September or early October.

14 Q And you heard that it had, in fact, been funded?

15 A That he was negotiating to fund it.

16 I wasn't sure if it would fund. I think by  
17 October 1st -- I called Robert, I think it was on October 1st.  
18 And I said, Robert, I know you are talking to Les Busick about  
19 1.5 million, Stuart Yount is still indicating that he might fund  
20 in the next three or four weeks. He had all of these hurdles to  
21 go over.

22 And I said what are you going to do if Busick funds and  
23 Yount's money is on its way, because it seemed like right about  
24 October 1st, Robert is closing in on Yount -- I mean, on Busick  
25 meeting immediate needs quickly.



1 Yount's money was not sure. I mean, it wasn't a sure  
2 thing. It was still -- I still have this IRA paperwork. I mean,  
3 the September email, I think, made Robert nervous.

4 That's why, as a sure thing, he went to Busick.

5 Q Okay. Do you know what date they actually closed on the  
6 Busick loan or the Busick investment?

7 A First week of October.

8 Q So you knew by October 1st that it was getting very  
9 close and was about to fund?

10 A Yes.

11 Q And you knew that it would close out the 1.5 million  
12 available under the PPM?

13 A Yes.

14 Q Did you ever tell Mr. Yount on or about October 1st  
15 that, oh, by the way, Busick is also looking like he may invest  
16 and that's going to close out the private placement memorandum on  
17 your 1 million?

18 A I called Robert, because I report directly to Robert. I  
19 said we could have a perfect storm if Busick and Yount fund on the  
20 same day, because it was feeling like two people were sending  
21 their money in at the same time.

22 And Robert said don't worry, stay out of it. We --  
23 Criswell Radovan has a \$1 million piece -- or, the developer could  
24 put another \$1 million unit up.

25 And so he told me to stay out of -- because I offered to

1 call Mr. Yount. I said if Busick funds, you know, we should call  
2 Mr. Yount and call him off, because his funds hadn't arrived.

3 Q Okay. So you were soliciting --

4 MR. WOLF: Are you finished with your answer?

5 THE WITNESS: What?

6 MR. WOLF: Are you finished with your answer?

7 THE WITNESS: Yes.

8 BY MR. CAMPBELL:

9 Q So you were actively soliciting Mr. Yount on or about  
10 October 1st --

11 A Robert was.

12 Q You were, too, right? You were sending emails and  
13 saying --

14 A Oh, corresponding, yes.

15 Q And you were going to obtain a \$30,000 commission out of  
16 that deal?

17 A Right.

18 Q And you knew that Les Busick was about to fund on or  
19 about October 1st?

20 A Yes.

21 Q Did you -- and you never told Mr. Yount that Les Busick  
22 might be closing out the private placement memorandum \$20 million  
23 cap?

24 A I called Robert --

25 Q I know, you just testified about calling Robert.

1 MR. WOLF: Let him answer. You are arguing with him.

2 MR. CAMPBELL: Well, I don't think he understands my  
3 question.

4 BY MR. CAMPBELL:

5 Q The question is, did you ever tell Mr. Yount that  
6 Les Busick was about to fund and was going to close out the  
7 \$20 million cap?

8 A No.

9 Q Now, you testified that Robert told you don't worry  
10 about it, don't get involved, and that I will work our way around  
11 it by selling some other unit to Yount for 1 million, right?

12 A He said do not -- well, I was told to not be involved in  
13 any conversations with any investors. You know, it was all left  
14 up to Robert and Bruce Coleman.

15 And I said should we tell him. Robert said don't get  
16 involved, we have an additional \$1 million unit that we will  
17 negotiate and settle with Yount. Don't worry about it. We'll  
18 settle with Yount.

19 And I said is that part of the original 20 million?  
20 Yes.

21 MR. CAMPBELL: Let's move to the next exhibit here.

22 (Exhibit 31 marked for identification.)

23 BY MR. CAMPBELL:

24 Q Mr. Marriner, Exhibit 31 is an email from you to  
25 Mr. Yount on October 1st, 2015.

1 A Right.

2 Q And at the bottom, there's a starting email in the  
3 string to Stuart. And then Stuart comes back and says "Thanks.  
4 Great pics. Looking a bit behind."

5 Your response is "The towers and finish detail with the  
6 carpet and window covering installed, exteriors and final push put  
7 on schedule."

8 Were you telling Mr. Yount that the completion of  
9 construction was still going to be at the Frank Sinatra birthday  
10 party on December 12th, 2015?

11 A I was only referring to specific parts of the project.  
12 The tower, carpet -- the tower was ready for furniture, I mean, by  
13 December. So it appeared no problem to meet the schedule.

14 Q Okay. You just testified --

15 A The exterior -- so this information is accurate to the  
16 specific items, I believe.

17 Q And you said -- I think you just said -- I don't want to  
18 misquote you. You said it appeared that the project was going to  
19 be finished on time.

20 A It did, and no schedule change was issued from the  
21 developer.

22 Q At that same time, though, you knew that the loan might  
23 be out of balance and that Hall was going to quit financing, too,  
24 if it wasn't put in balance, right?

25 A The mezzanine and the equity, I believe, had to be

1 funded at some point. It isn't open ended.

2 So as I understood, between July, August, September,  
3 that additional funding and equity was necessary for the project  
4 to stay on schedule.

5 **Q Okay. Did you ever tell Mr. Yount that additional**  
6 **funding was necessary for the project to meet that scheduled**  
7 **completion date?**

8 A Yes, that was -- in all the emails, it was clear that --  
9 in fact, Mr. Yount suggested talking to his friend, Roger  
10 Wittenberg, who was funding Boulder Bay, as an alternative.

11 I think they were talking to three or four lenders.

12 But, yes, Mr. Yount -- whether it was Robert telling him  
13 or myself, before he invested, he knew additional financing of  
14 15 million was being sought, not approved, and additional equity  
15 was necessary.

16 And that was in an email from Stuart. He said based on  
17 my evaluation of the project, you are over \$5 million already and  
18 possibly more than 5 million, how are you going to meet these  
19 needs. And he knew that in July.

20 **Q Was that answer -- was that question ever answered?**

21 A Yes.

22 **Q Who answered it?**

23 A Robert.

24 **Q And that would have been in the email string --**

25 A July 25th, he answered Stuart's question about so you

1 are over 5 million and most likely more.

2 Because he's in construction, owns a construction  
3 material company, he's aware that big projects have big delays and  
4 costs, change orders and overruns, and it's common every day that  
5 a project of this size is going to have a problem.

6 But, yes, Mr. Yount was fully aware and actually trying  
7 to help locate a lender.

8 Q So just to be clear, your answer that Mr. Yount was  
9 aware that the project was going to be completed -- was not going  
10 to be completed on time unless there was additional funding, came  
11 from the email string that we talked about today?

12 A Yes.

13 MR. LITTLE: Objection, mischaracterizes his testimony,  
14 asked and answered.

15 MR. WOLF: Join.

16 BY MR. CAMPBELL:

17 Q And there's no specific email communication that I see  
18 that says, Stuart, if the project is not refinanced and/or new  
19 mezzanine financing is in place, we will not finish on time, or we  
20 will not meet -- we will not open on time in December.

21 Have you seen any email to that effect?

22 MR. LITTLE: Objection, form.

23 THE WITNESS: That's covered in the investment  
24 documents, that funding could be required, additional funding.

25 ///



1 BY MR. CAMPBELL:

2 Q Did you ever tell Mr. Yount that if additional -- in  
3 July, August or September, that if additional funding was not  
4 received, the project was not going to meet its completion  
5 schedule for December 2015?

6 A I was not authorized to even discuss schedules or  
7 budgets.

8 Q So the answer was no, you didn't tell him anything like  
9 that?

10 A No.

11 MR. CAMPBELL: Let's have this marked in order.

12 (Exhibit 32 marked for identification.)

13 (A recess was taken.)

14 MR. CAMPBELL: Back on the record.

15 BY MR. CAMPBELL:

16 Q Mr. Marriner, did you get commission on the Busick  
17 \$1.5 million investment?

18 A Yes.

19 Q And you testified earlier before the break that  
20 Mr. Radovan said he had a way to handle Mr. Yount's investment.

21 Did Mr. Radovan ever tell you how he handled it?

22 A He told me to not be involved. He didn't like two  
23 voices.

24 He said if they fund -- and this was before Busick had  
25 funded. If Busick funds and Younts funds -- you know, because I

1 said there's a perfect storm, they might fund -- if Stuart's came  
2 in on the 1st or 2nd of October, they might have been converging  
3 at the same time.

4 And Robert said don't worry, I will work it out with  
5 Younts that they get a million -- we have a million dollar piece  
6 that we've held back that we could give or offer them.

7 And I did specifically say does it -- is it part of the  
8 20 million PPM and do you need executive committee approval. And  
9 he said it's part of the 20 million and, no, we can do it without  
10 executive committee approval, because I was concerned that, you  
11 know, it had to be done properly.

12 Q Okay. Did Mr. Radovan tell you that, in fact, he did  
13 handle it differently when Yount's money came in?

14 A No.

15 Q Did you have any conversations with Mr. Radovan when  
16 Mr. Yount's money came in as to this is how it happened, this is  
17 how it went down --

18 A No.

19 Q -- this is what was needed?

20 A No.

21 Q And you thought that there was some kind of approval  
22 process needed?

23 A I asked if the executive committee needed to vote,  
24 because the 1 million that CR had, I didn't know if it was just  
25 inventory that he's putting on, just like the 1.5, because he came



1 out of -- you know, the 1.5 kind of came up and I didn't know it  
2 was available.

3 You know, he said I'm releasing another 1.5. Well, I'll  
4 release another 1 million and I'll work it out with Younts.

5 Q Okay. But you did know that the 1.5 was the max  
6 available under the 20 million?

7 A Yes, if the CR 2 million was funded.

8 Q Yeah, within that 20 million?

9 A Right.

10 Q And so after Mr. Yount funded, did you have any  
11 follow-up conversations with Mr. Radovan or Mr. Criswell or  
12 anybody at CR as to how Mr. Yount's transaction was handled?

13 A No.

14 Q So this Exhibit 32 is a two-page email string. Let's  
15 look on the second page.

16 Who was Heather Hill?

17 A She works for Robert.

18 Q And you were copied on this email, looks like, from  
19 Heather Hill to Mr. Yount?

20 A Yes.

21 Q And she was asking if there's anything else you needed  
22 with this transaction?

23 A Right.

24 Q And did you follow up with Mr. Yount on that email from  
25 Heather?

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Electronically  
CV16-00767  
2017-07-28 02:46:27 PM  
Jacqueline Bryant  
Clerk of the Court  
Transaction # 6221305 : yvilorla

# PLAINTIFF'S EXHIBIT 10

001014

001014

**CODE 1030**

THE LAW OFFICE OF RICHARD G.  
CAMPBELL, JR. INC.  
RICHARD G. CAMPBELL, JR. (Bar No. 1832)  
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rcampbell@rgclawoffice.com

Attorneys for Plaintiff

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,

CASE NO. CV16-00767

DEPT. NO. B7

Plaintiff,

v.

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 1-10,

Defendants.

**AFFIDAVIT OF KENNETH TRATNER**

STATE OF ~~NEVADA~~ *California* (VA)

) ss.

COUNTY OF ~~WASHOE~~ *Los Angeles* (VA)

Kenneth Tratner, being first duly sworn, upon oath states:

1           1.       I am over the age of 18, have personal knowledge of the facts in this matter, and if  
2 called upon to testify, could and would competently do so. I make this Affidavit in support of  
3 Stuart Yount's *Opposition to Marriner's Motion for Summary Judgment*.

4           2.       I am an accountant that does work for Mr. Yount and some of his business interests.

5           3.       Mr. Yount informed me that he was looking at investing in the Cal Neva Lodge and  
6 asked me to look at some of the pro forma and financial projections that the developers of the Cal  
7 Neva had sent to him to assist him in determining if the project penciled out, in essence, would the  
8 projected revenues in the pro formas cover operating overheads and provide investors with a  
9 potential to earn on their investment. I was also asked to determine if a retirement fund could invest  
10 in a project like this and the tax ramifications of such an IRA investment.

11          4.       On or about July and August 2015 I was provided with documents from Mr. Yount  
12 and I believe from one of the developers, Mr. Robert Radovan, again primarily relating to pro forma  
13 and financial projections all of which I believe were prepared sometime in 2014. I later asked for  
14 updated pro formas and received updates which only included a 10 year pro forma and projections  
15 for the condo project from Criswell Radovan on August 10, 2015. I may have received additional  
16 documents after that related to financial projections for the project.

17          5.       I was never asked to investigate whether the Cal Neva's projected building budget  
18 was accurate or was adequate to fund the construction of the project, nor was I ever asked to  
19 opine on whether the project was on budget or on time, or if any change orders to the original  
20 construction might impact the project.

21          6.       I ultimately told Mr. Yount that as far as the pro forma projections and other  
22 financial documents I reviewed that the investment opportunity appeared to be sound.


23          7.       I declare under penalty of perjury under the law of the State of Nevada that the  
24 foregoing is true and correct.

25       DATED: July 27, 2017.

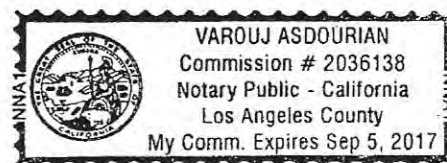
  
KENNETH TRAINOR

26  
27  
28       Subscribed and sworn to before me

1 this 27 day of July, 2017.

2   
3 Notary Public

4 Commission Expires: 09-05-2017



5  
6 **SECOND JUDICIAL DISTRICT COURT**

7 **COUNTY OF WASHOE, STATE OF NEVADA**

8 **AFFIRMATION**  
9 **Pursuant to NRS 239B.030**

10 The undersigned does hereby affirm that the preceding document, filed in this case: **AFFIDAVIT**  
11 **OF KENNETH TRATNER;**

12 ☒ Document does not contain the social security number of any person

13 - OR -

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

15 ☐ A specific state or federal law, to wit:

16 \_\_\_\_\_  
(State specific state or federal law)

17 - or -

18 ☐ For the administration of a public program

19 - or -

20 ☐ For an application for a federal or state grant

21 Dated: July 27, 2017.

22 THE LAW OFFICE OF RICHARD G.  
23 CAMPBELL, JR. INC.

24 By: /s/ Richard G. Campbell, Jr.

**PROOF OF SERVICE**

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is The Law Office of Richard G. Campbell, Jr. Inc., 200 S. Virginia Street, 8<sup>th</sup> Floor, Reno, NV 89501. On July 27, 2017, I served the following document(s):

**AFFIDAVIT OF KENNETH TRATNER**

- ☐ **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- ☐ **BY HAND:** by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- ☐ **BY MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Reno, Nevada addressed as set forth below.
- ☐ **BY EMAIL:** by causing the document(s) to be electronically served.
- ☐ **BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.
- ☐ **BY PERSONAL DELIVERY:** by causing personal delivery by Reno Carson Messenger Service of the document(s) listed above to the person(s) at the address(es) set forth below.
- ☒ **BY E-MAIL/ELECTRONIC FILING SYSTEM:** by causing the document(s) to be electronically served via the court's electronic filing system to the following attorneys associated with this case.

Martin A. Little  
Howard & Howard  
\*\*  
Las Vegas, Nevada 89169

Andrew N. Wolf  
Incline Law Group, LLC  
264 Village Blvd, Suite 104  
Incline Village, NV 89451

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on July 27, 2017, at Reno, Nevada.

/s/ Danielle Bleecker

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2017-07-28 02:46:27 PM  
Jacqueline Bryant  
Clerk of the Court  
Transaction # 6221305 : yvilorla

# PLAINTIFF'S EXHIBIT 11

001019

001019

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5 SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

6 IN AND FOR THE COUNTY OF WASHOE

7 ---o0o---

8

9 GEORGE STUART YOUNT,  
10 individually and in his  
11 Capacity as Owner of  
12 GEORGE STUART YOUNT IRA,

11 Plaintiff,

12 -vs-

Case No. CV16-00767  
Department No. B7

13 CRISWELL RADOVAN, LLC, a  
14 Nevada limited liability  
15 company; CR CAL NEVA, LLC,  
16 a Nevada limited liability  
17 company, ET AL.,

16 Defendants.

17

18

19 DEPOSITION OF ROBERT RADOVAN

20 Friday, May 26th, 2017

21 Reno, Nevada

22

23

24

25 Reported by:  
Job No.: 396077

KATE MURRAY, CCR #599



1 is how you first got involved with him?

2 A. Uh-huh.

3 Q. You ultimately hired him to do some  
4 marketing?

5 A. Uh-huh.

6 Q. Some kind of money-raising function,  
7 right?

8 A. Correct.

9 Q. What was your understanding of what his  
10 deal was with Cal Neva?

11 A. That he would be -- he would work with us  
12 to initially raise five memberships, million dollar  
13 blocks, and then once that was there, we just  
14 decided to keep going with it and continue on, and  
15 then he would be kind of a sales and marketing guy  
16 with the condominium side of things and run that as  
17 well.

18 Q. Did you give him specific instructions as  
19 to the scope of what he could represent to potential  
20 investors? How did that work?

21 A. No. He would bring those people forward.  
22 He would send them business plans, docs, and it  
23 varied with the different parties. Some people  
24 wanted me way more involved, and other people, I was  
25 involved very little.

1           **Q.    So on some of the raises of capital, he**  
2           **would have taken the lead on negotiating?**

3           A.    Uh-huh.  It was just how -- specific to  
4           any one person.  There were some that I had a phone  
5           call with before they funded; others that I was way  
6           more involved in.

7           **Q.    Okay.  Let's now move to the timeframe of**  
8           **about June of 2015.**

9           A.    Uh-huh.

10          **Q.    Do you remember Mr. Marriner contacting**  
11          **you and telling you that Mr. Yount was interested in**  
12          **investing?**

13          A.    Well, we had only issued 18.5 of the 20,  
14          and so I think what it was -- I don't remember how  
15          that conversation first came about, but we decided  
16          June, July to finish out the raise because we had  
17          the right to go raise out 20 million, so I think  
18          that is how that conversation got started.

19          **Q.    Okay.  So prior to that, June, July time,**  
20          **you were just kind of holding the 1.5 million back**  
21          **and not trying to raise it?**

22          A.    Yeah, right.  If not required, then we  
23          wouldn't raise it out.

24          **Q.    Was there a reason that you needed to**  
25          **raise it in that June, July 2015 timeframe?**

1           A.    Yes.  We were getting to some change  
2   orders that were taking the loan out of balance with  
3   Hall, and we knew that we were coming up in another  
4   month or two where we would need to put \$1.4 million  
5   of equity in with Hall so that they saw that we  
6   raised this other 1.4 to rebalance the loan, given  
7   the change orders.

8           **Q.    And those would have been change orders**  
9   **that were approved in that June, July timeframe?**

10          A.    Correct.  By July at that point.

11          **Q.    Explain to me the balancing requirements**  
12   **under the Hall note, how that worked.  What was the**  
13   **percentages?**

14          A.    I don't recall what the percentages were  
15   exactly.  If you have a loan and they have an equity  
16   requirement that X percentage of equity is there for  
17   X percentage of loan, if the construction side,  
18   which is kind of what they're primarily funding, if  
19   change orders take that number above in the overall  
20   budget, they require an extra cash infusion to cover  
21   that element of the loan.

22                They're not advancing further funds, but  
23   they want to know funds are there to complete.

24          **Q.    Okay.  So when you decided to, A, to**  
25   **raise the additional 1.5, had that been from a**

1     **still on track to open on December 12th, 2015?**

2             A.     On June, it could well have been still in  
3     June.

4             **Q.     It could have been on track?**

5             A.     It could have been. I would have to go  
6     back and check the records.

7             **Q.     Why might it not have been?**

8             A.     As we started getting some of these  
9     larger hits of unforeseen things mainly in the older  
10    building, there were not just budget issues, but  
11    they became schedule issues as well, the foundation  
12    issues, issues around the sewage lines, things that  
13    just took a while.

14            There were exterior that had cut-off  
15    dates that were involved within the November period  
16    that you couldn't work past that, so we were up  
17    against some of those timeframes.

18            I'm not sure when we got to the point  
19    that we were looking at pushing back into April, May  
20    for opening, but it was something that was  
21    definitely being discussed around that time and at  
22    the end of July.

23            **Q.     What you just said, you would have to**  
24    **review something to make sure whether or not you**  
25    **were still on track as of June 17th, 2015, what**

1     **would you --**

2           A.     Just check the documents on discussions  
3     with the contractor and what information I was  
4     getting from folks as well.

5           I'm just not sure when -- I know that  
6     sometime in July, we were saying it's going to push  
7     back.

8           **Q.     Okay. By the end of July, you're pretty**  
9     **sure that's when you knew the schedule would have to**  
10    **be pushed out?**

11          A.     Certainly.

12          **Q.     What was that based on? The review of**  
13    **those same documents?**

14          A.     Well, as a result of what we were  
15    finding. The sewage line is a good example.

16                 There was the main sewage line. TRPA or  
17    whoever the governing agency was refused to hook up  
18    our sewer line that would have been worked on that  
19    summer.

20                 As we found out, the entire bottom  
21    one-third of that sewage line was nonexistent. It  
22    had been deteriorated away, so we were forced to go  
23    back and put in a new sewer line, so it's not the  
24    same four- or five-inch sewer line that was hooked  
25    to the building previously.

1 strike that.

2 Had you given Mr. Marriner updates on the  
3 progress of the project and when the construction  
4 was going to be completed?

5 A. He was always involved in understanding  
6 all of that.

7 Q. So Mr. Marriner would have known about  
8 the same time you knew that the project schedule was  
9 going to be pushed?

10 A. Yes.

11 Q. It's not something that you held back  
12 from him?

13 A. Of course not.

14 Q. Did you ever give Mr. Yount or instruct  
15 Mr. Marriner to give Mr. Yount any updates or  
16 supplements to any of the documents that he was  
17 provided as far as the private placement memorandum  
18 package?

19 A. Not at all, no.

20 Q. No?

21 A. No.

22 Q. But there had been changes both on the  
23 budget and potentially on the scope of completion as  
24 represented in any of the PPM documents?

25 A. Yes. With any of these updates, that



1 him on his deck and said, We are raising this other  
2 1.5, and I said, Is that something you'd be  
3 interested in?

4 He thought about it because that would  
5 give him another ability to buy another discounted  
6 condo, and so he thought about it, and that was  
7 about it at that point in time.

8 **Q. Were there further discussions, though?**

9 A. Yes.

10 **Q. Tell me about those further discussions?**

11 A. I think it was a week or 10 days, within  
12 the next 10 days, Phil Busick, his son, lives in  
13 Napa Valley, came by the office and we had lunch,  
14 and he just kind of wanted to talk further about it.

15 There was -- Les is a construction guy,  
16 and they were concerned about what was, at that  
17 point, known as a \$9 million plus bust on  
18 construction.

19 He had wanted to be a little more  
20 involved in those type of -- you know, understanding  
21 what is going on, but what Phil said, he said, Look,  
22 Les just wanted me to come down and have a  
23 conversation with you.

24 He liked the idea of it, and so we were,  
25 I don't know, how much past that. Then I was up in

1 Tahoe for two days, two, three days, a week or two  
2 later, and I know that during that time, Dave and  
3 Les went with Lee Mason, the construction manager at  
4 Penta, and spent half a day going through all the  
5 change order reconciliations.

6 What each one was, what is required, what  
7 is not required, and there is probably -- of all the  
8 change orders that were there, there was probably  
9 one that was maybe due, meaning it wasn't a  
10 requirement, that okay, wow, we found we don't have  
11 foundations.

12 It was the kitchen that was being built  
13 in the fine dining restaurant, and that happens to  
14 sit right beside the Circle Bar, kind of almost in  
15 the lobby basically, and so that is something that I  
16 think was the \$1.2 million number to build that out.

17 To do that, you have to get grease traps,  
18 ventilation, and all of a sudden, when you do that,  
19 that starts pumping up that number, so that was a  
20 \$1.2 million add. There was a lot of discussions on  
21 whether you need it or not.

22 I can tell you that even though it's a  
23 \$1.2 million number, when you look at how that  
24 operates then later down the line with that being  
25 our fine dining restaurant, I certainly recommended



1 that is something we do now versus doing it in a  
2 couple years because if you don't do it now, you  
3 will certainly be coming back because the first time  
4 somebody asks for a grilled steak, you can't do it.

5 When you look at our competition base on  
6 the restaurant side, it's the Lone Eagle Grill to  
7 start with, and so you have to be able to do at  
8 least what they do, and you need to be better than  
9 what they are.

10 If you didn't do it then, you would come  
11 back later, and it will cost you four or five times  
12 as much.

13 **Q. Was that upgrade part of the nine to \$10**  
14 **million in change orders?**

15 A. Yes.

16 **Q. Was Mr. Busick told at that time that**  
17 **Penta was actually owed \$1.4 million?**

18 A. Yes.

19 **Q. Why wasn't Hall funding that \$1.4**  
20 **million?**

21 A. That was the out-of-balance piece of the  
22 Hall, of the loan.

23 **Q. When did Hall quit funding?**

24 A. August, I believe in there, so it was the  
25 next due.

1 Q. And they pretty much cut off any further  
2 advances?

3 A. Until \$1.4 million was brought in.

4 Q. Was Mr. Yount told that prior to making  
5 his investment?

6 A. I don't know if he was or not.

7 Q. Was Mr. Marriner aware of that?

8 A. Yes.

9 Q. Was Mr. Busick told that his 1.4 was  
10 going to go to the Hall loan to keep it in balance?

11 A. Yes.

12 Q. What was Penta saying about being owed  
13 \$1.4 million in that September timeframe?

14 A. They were saying we would like our \$1.4  
15 million.

16 Q. Were they threatening to walk off the  
17 job?

18 A. No.

19 Q. Were they threatening to stop work?

20 A. No.

21 Q. Was there a cessation of executing any  
22 future change orders until that \$1.5 million was  
23 paid, or 1.4?

24 A. No.

25 Q. Can you look to Exhibit 14, I believe it

1 Mosaic in before we can actually execute any further  
2 change orders?

3 A. By that time, we weren't going anywhere  
4 unless we got the refinance from Mosaic.

5 Q. How about in September 2015, were you  
6 going anywhere if you didn't get the refinance from  
7 Mosaic?

8 A. No.

9 Q. You believed you had enough funds to  
10 continue on the project after September 15th?

11 A. Yes, because we had a refinance that was  
12 ready to go.

13 Q. That's the Mosaic?

14 A. Correct.

15 Q. That Mr. Yount was never told about, by  
16 you?

17 A. Not by me.

18 Q. Mr. Marriner was fully aware of the --

19 A. Yes.

20 Q. -- Mosaic negotiations?

21 A. Certainly.

22 Q. Can you look at Exhibit 39?

23 A. I do not have a 39. It goes to 35.

24 Q. It might have been in the supplemental.

25 MR. LITTLE: He can look at mine. We can

1 share books.

2 BY MR. CAMPBELL:

3 Q. Exhibit 39 must have been marked in  
4 Mr. Coleman's deposition, so you wouldn't have had  
5 copies.

6 Anyway, if you look at the second page of  
7 Exhibit 39, this is an e-mail string that starts  
8 back in January. There is a redaction on the first  
9 part of it and then it goes down with the Mr. Yount  
10 e-mail to Mr. Marriner.

11 On the second page, you'll see an e-mail  
12 where Dave Marriner says, "Below is an e-mail I sent  
13 to the ECF last week to help bring transparency to  
14 the Yount transaction."

15 If you go to the third paragraph down, it  
16 says, "An extended delay in the Younts' ability to  
17 set up a self-directed IRA and transfer funds in  
18 August or September caused Robert to seek funding  
19 from Les Busick in late September to meet the  
20 immediate needs of the project to keep Penta on the  
21 job."

22 So in September of 2015, was Penta  
23 threatening to walk off the job?

24 MR. LITTLE: Asked and answered.

25 MR. RADOVAN: They weren't threatening.

1 They were owed \$1.4 million, the current draw.

2 BY MR. CAMPBELL:

3 Q. Do you know why Mr. Marriner sent this  
4 e-mail that said, "The immediate needs to keep Penta  
5 on the job"?

6 A. I'm assuming because they were requiring  
7 \$1.4 million.

8 Q. What would happen if the 1.4 wasn't paid?

9 A. At some point, they would have stopped.

10 Q. Had they threatened to stop?

11 A. No, not at that time.

12 Q. How long in arrears was that amount?

13 A. That is one draw.

14 Q. A month?

15 A. One month.

16 Q. Was Mr. Yount ever told that potentially  
17 his one million was going to go to that  
18 out-of-balance issue?

19 A. I don't know.

20 Q. You didn't tell him?

21 A. I didn't.

22 Q. And you don't know if Mr. Marriner told  
23 him?

24 A. I do not know.

25 Q. Did Mr. Marriner know?



1 A. Yes.

2 Q. How much is Penta owed as we sit here  
3 today?

4 A. Their balance that was owed was 7.1. I  
5 believe that is three draws. Their bankruptcy claim  
6 is nine something.

7 Q. 9.8 sound right? Those three draws would  
8 have been after the Busick money came in?

9 A. Correct.

10 Q. So in --

11 A. Hall funded at least one, potentially two  
12 draws thereafter.

13 Q. So when did Penta -- the three draws that  
14 they were unpaid for, what was the timeframe of  
15 those draws?

16 A. That would have been October, November,  
17 December.

18 Q. Do you know if those, that work was  
19 pursuant to the original contract, or were they part  
20 of the change orders?

21 A. I'm sure it was both. I don't know what  
22 level of the change orders. I would have to go and  
23 check.

24 Q. So there were change orders executed --

25 A. Definitely.

1     **subscription agreement?**

2             A.     Yes.

3             Q.     Now, if Mr. Busick filled out the \$1.5  
4     million available under the private placement  
5     memorandum, why were the subscription agreements  
6     sent to Mr. Yount for him to be part of the private  
7     placement memorandum?

8             A.     Honestly, that is what I thought was  
9     required, in that he was getting a founder unit.  
10    Ours were the first ones too. We had always held  
11    out that we're selling one of our units. It's in  
12    many documents.

13            Everything was filled out, and that is  
14    what I thought was required to complete the  
15    transaction.

16            Q.     Did you tell Mr. Yount that instead of  
17    being part of the \$1.5 million left under the  
18    subscription agreement, that he was going to be, in  
19    fact, buying half of the CR two million?

20            A.     I did not.

21            Q.     Did somebody?

22            A.     I assume Dave did. He knew 100 percent  
23    that that was the case.

24            Q.     Did you later take the position that it  
25    was a mistake that Mr. Yount was sent these

1 The first thing that he tried to do was  
2 to foreclose us out of the project, which was  
3 stopped.

4 What had happened is we had lined up a  
5 sale. We bought the property for 8.75 and had a  
6 sale at 15.1. He agreed to the sale, then wouldn't  
7 sign the contracts, and they were waiting -- tried  
8 to wait for a note to come due that he could  
9 foreclose us out and take our piece of it as well,  
10 but in California, you're not allowed to foreclose  
11 your partners out.

12 So that went into litigation and  
13 cross-complaints, and he settled and bought us out.

14 **Q. How was -- the amount that CR used**  
15 **Mr. Yount's money to invest in the project, how was**  
16 **that handled on the books? Was that waived or**  
17 **something?**

18 **A. I don't know.**

19 **Q. I'll go back just a little bit here in**  
20 **time.**

21 **When Mr. Busick was involved in, I'll say**  
22 **his due diligence prior to making his \$1.5 million**  
23 **investment, Mr. Marriner was aware of that?**

24 **A. Yes.**

25 **Q. Did you ever tell Mr. Marriner that --**



1 strike that.

2 If Busick invested, then Mr. Yount could  
3 not invest under the private placement memorandum,  
4 right?

5 A. That's not how I understood it, but.

6 Q. But it was totally allocated once  
7 Mr. Busick came in, right?

8 A. Correct.

9 Q. Is that why instead of being under the  
10 PPM, you were going to -- it was your intention, you  
11 testified, to sell Mr. Yount half of the CR share or  
12 one of the CR shares?

13 A. Correct.

14 Q. Was Mr. Marriner aware that that is how  
15 Mr. Yount's money was going to be handled?

16 A. Yes.

17 Q. Mr. Marriner made a commission off that  
18 Yount \$1 million also, right?

19 A. Yes.

20 Q. Did you tell Mr. Marriner that you were  
21 going to tell Mr. Yount about the Busick investment  
22 and that now he was going to be buying half of the  
23 CR share?

24 A. Did I tell Mr. Busick that?

25 Q. No. Mr. Marriner.

1           A.    That Mr. Yount was buying one of our  
2    shares?

3           Q.    Let me -- bad question.

4                   Did you tell Mr. Marriner that you would  
5    inform Mr. Yount of the Busick investment closing  
6    out the PPM, and instead, he would be buying one  
7    half of the CR share?

8           A.    I don't recall how that was discussed,  
9    but he was fully aware of all the numbers.

10          Q.    Did you tell Mr. Marriner not to discuss  
11   the handling of Mr. Yount's investment?

12          A.    I have never told Mr. Marriner to not  
13   discuss anything.

14          Q.    So in your opinion, Mr. Marriner was free  
15   to tell Mr. Yount that his \$1 million was going to  
16   go not into the private placement memorandum, but  
17   instead, buying half of the CR share?

18          A.    Of course.

19          Q.    Is Heather Hill still working for you?

20          A.    Yes.

21          Q.    Let's go back to Exhibit 47. This is an  
22   e-mail that you were copied on the first one, and it  
23   says on the second paragraph, "He," we have already  
24   established was Mr. Yount, "is prepared to fund next  
25   week, and we would like to use your trust account to

ROBERT RADOVAN - 05/26/2017

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1 STATE OF NEVADA )  
2 COUNTY OF WASHOE ) ss.  
3

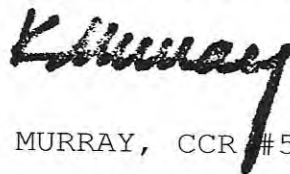
4 I, KATE MURRAY, a duly commissioned and  
5 licensed court reporter, Washoe County, State of  
6 Nevada, do hereby certify:

7 That I reported the taking of the  
8 deposition of ROBERT RADOVAN, commencing on Friday,  
9 May 26th, 2017, at 10:01 a.m.

10 That prior to being examined, the witness  
11 was duly sworn to testify to the truth. That I  
12 thereafter transcribed my said shorthand notes into  
13 typewriting and that the typewritten transcript of  
14 said deposition is a complete, true and accurate  
15 transcription of said shorthand notes.

16 I further certify that I am not a  
17 relative or employee of an attorney or counsel of  
18 any of the parties, nor a relative or employee of an  
19 attorney or counsel involved in said action, nor a  
20 person financially interested in the action.

21  
22 DATED: At Reno, Nevada this 15th day of  
23 June, 2017.

24   
25

KATE MURRAY, CCR #599

31

31

**CODE: 3795**

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Attorneys for Defendants DAVID MARRINER and  
MARRINER REAL ESTATE, LLC

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,

CASE NO. CV16-00767

DEPT NO. B7

Plaintiff,

v.

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 1-10,

Defendants.

**DEFENDANTS DAVID MARRINER and MARRINER REAL ESTATE, LLC's REPLY  
TO YOUNT'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**

1 Summary judgment proceedings focus on whether there is evidence to establish all  
2 elements of claims and defenses. Yount has the burden of proving fraud by clear and convincing  
3 evidence. That burden applies at the summary judgment stage. This does not require the court to  
4 weigh the evidence, it simply requires the court to view the evidence submitted in relation to the  
5 substantive burden of proof and whether a reasonable factfinder could find in the nonmoving  
6 party's favor. The Nevada Supreme Court has repeatedly stated that a party opposing summary  
7 judgment may not rely on "gossamer threads of whimsy and speculation." From a dictionary,  
8 "Gossamer" means a "fine, filmy substance consisting of cobwebs spun by small spiders ..." and  
9 is "used to refer to something very light, thin, and insubstantial or delicate. Such is the evidence  
10 of misrepresentation, reliance and causation in the case against Marriner.

11 There are two substantive claims against Marriner: fraud and securities fraud under NRS  
12 90.570. The fraud claim requires proof of a false representation made by Marriner and Marriner's  
13 knowledge that it was false. Yount fails to identify a false statement by Marriner, much less a  
14 false statement knowingly made. Instead, Yount consistently identifies information obtained  
15 through communications with Radovan.

16 Civil liability (i.e., a private cause of action) for state law securities fraud is established by  
17 NRS 90.660. None of the parts of 90.660 is applicable except possibly 90.660(1)(d) which creates  
18 *civil liability* for a violation of subsection 2 of NRS 90.570. Subsection 2 of 90.570 identifies the  
19 following conduct: "make an untrue statement of a material fact or omit to state a material fact  
20 necessary in order to make the statements made, not misleading in the light of the circumstances  
21 under which they are made." There is no other basis for civil state law securities fraud, other than  
22 this one sentence. The statutory structure does not provide civil liability for the acts described in  
23 NRS 90.570 (1) or (3). Yount attempts to rely on the inapplicable parts of 90.570. Yount has not  
24 identified an untrue statement made by Marriner, nor has he identified the omission of a material  
25 fact necessary to make any previous statements not misleading.

26 Based on Marriner's Undisputed Material Facts ("UMF") K, L and M, and the absence of  
27 any contradictory evidence from Yount, it is undisputed that from August 3, 2015, until the date  
28 of his investment in October 2015, Yount did not seek or obtain any information from Marriner.  
Marriner's UMF "A" through "G" further establish Yount's multi-faceted independent

1 investigation and, accordingly, that he was not relying on Marriner. Yount did not seek or obtain  
 2 information from Marriner in any of his due diligence inquiries. (UMF "L".) The record clearly  
 3 reflects that Yount was not relying on Marriner in any fashion whatsoever, and that he was  
 4 instead seeking project and investment information directly from the LLC manager/developer,  
 5 Radovan, from his own CPA, Tratner, and from the project architect, Grove (who Yount  
 6 happened to know because he is Yount's personal architect, UMF "D"). Grove was responsible  
 7 for approving all of the contractor's periodic applications for payment and had superior  
 8 knowledge compared to everyone else regarding project costs, schedules, delays, etc. Yount  
 9 discussed the project with Grove and was satisfied with the information he received in this regard.  
 10 (UMF "D".) Based on the above, Yount has not established reliance vis-à-vis Marriner, and all  
 11 the evidence indicates he did not rely on Marriner as a source of information relative to the  
 12 project or any aspect of his investment.

13 Yount has not contradicted UMF "I" that he knew the project was \$10 million over budget  
 14 before he invested. Yet he quibbles about his understanding of the basis of the cost overruns and  
 15 the amount of the change orders.<sup>1</sup> In essence, Yount admits that he knew the project was \$10  
 16 Million over budget when he invested, but that he was unaware that there were about \$9 Million  
 17 in change orders. The source of Yount's alleged misunderstanding (alleged fraud): Yount's

---

18 <sup>1</sup> The evidence cited in UMF "I" shows that prior to his investment, Yount knew the project was \$10  
 19 million over budget. (MVE 1 (Yount Depo 149:11-25).) In his investment notes to his CPA, Marriner MSJ  
 20 Exhibit 7) Yount wrote that "they are refinancing the [\$6 million] mezzanine piece with a less costly \$15  
 21 million mezzanine. This is to cover the added costs of regulatory and code requirements which changed or  
 22 were added by the two counties and TRPA which we deal with. We have also added some costs for design  
 23 upgrades within the project..." (*These comments by Yount to his CPA repeat verbatim the text of an  
 email by Radovan to Yount, dated 7/25/2015, Marriner MSJ Exhibit 15.*) While it is apparent that from  
 simple arithmetic that Mr. Yount knew CNL already anticipated \$9 million in project changes (\$15MM  
 minus \$6MM equals \$9MM), he also testified specifically that he knew the project was \$10 million over  
 budget when he invested. (The \$6MM mezzanine was described to Yount by Radovan, in Marriner MSJ  
 Exhibit 8.)

24 Marriner MSJ Exhibit 3 is Yount Deposition Exhibit 51, where Yount stated on July 19, 2015, three  
 25 months before his investment: "As I understand it, you're over budget by more than \$5 million so far.  
 26 Where will that and likely more funding needs come from?" These questions were referred to Robert  
 27 Radovan for answers, after which Radovan and Yount had a conversations and emails. All of Mr. Yount's  
 28 complaints about what was disclosed to him about project budgets, cost overruns, etc., stems from his  
 communications with Radovan, not Marriner. A careful examination of Yount's evidence reveals that there  
 is not one representation made by Marriner to Yount that is at issue. Apparently, Yount is complaining that  
 Marriner didn't correct statements made by Radovan, including unidentified statements made in  
 conversations between Yount and Marriner, to which Marriner was not a party.

1 conversations with Radovan, not Marriner.<sup>2</sup> Keep in mind, Yount was in direct contact with the  
2 project architect reviewing the contractor's invoices and budgets. (UMF "D".)

3 Similarly, Yount has not contradicted UMF "H" that as of the date he invested, he knew  
4 the project opening would be delayed for about six months from December 2015 to June 2016.  
5 Again, he quibbles that he was told there was a delay in the opening but that the stated reason for  
6 the delay was based on sales and marketing considerations (he claims that he was told in  
7 September or October 2015 that CNL would delay its opening due to a poor snow season -- that  
8 had not even started). Yount asserts the real reason for the delay (of which he was allegedly  
9 unaware) was either the additional work needed to be done per the \$9MM change orders and/or  
10 the need for more funding to carry out the added work. Again, the source of Yount's alleged  
11 misunderstanding (alleged fraud): Yount's conversations with Radovan, not Marriner. Of course,  
12 Yount was in direct contact with the architect reviewing the contractor's schedules. (UMF "D".)

13 Yount points to Marriner's awareness that another investor (Busick) was considering  
14 investment at the same time as Yount, and failed to disclose this to Yount. Yount also cites  
15 Marriner's failure to notify Yount that the other person had ultimately invested. It is undisputed  
16 that one of the developer's original founders' membership shares was still available for transfer to  
17 Yount. However, Yount refused to approve the transfer. Thereafter, Yount's money was not  
18 returned back to him. The proposed delivery of a founders unit by CR to Yount instead of an  
19 unissued membership unit was not improper, was within the 20 million founder's private  
20 placement and Marriner's actions in this regard cannot be considered fraudulent. Any damages  
21 allegedly suffered by Yount from Marriner's failure to disclose the other investor's investment  
22 was not a legal cause of damage to Yount. Yount's damage, if any, arises from the escrow agent  
23 closing escrow without Yount's express approval of the change in the transaction mechanics-- i.e.,  
24 the escrow agent's delivery of Yount's funds to CR in exchange for the transfer of one of CR's  
25 founder's units, instead of delivery of the funds to Cal Neva LLC in exchange for a newly issued  
26 founder's membership unit. Marriner's alleged failure to inform Yount of Busick's interest in

26 <sup>2</sup> Yount consistently hinges his fraud claims against Marriner upon information allegedly imparted to  
27 Yount by Radovan. E.g., Yount Opposition at 2:15-18: "In July 2015, Yount had several conversations  
28 with Mr. Radovan, set up by Mr. Marriner, and in one of these conversations Mr. Radovan told Mr. Yount  
that the project was approximately 5 million over budget and that Mr. Radovan was seeking 15 million to  
refinance 6 million mezzanine loan, to cover change orders to the project that total approximate 5 million."



1 making an investment and his later failure to advise Yount that Busick had invested are not legal,  
2 proximate causes of the escrow agent's allegedly unauthorized delivery of Yount's money to the  
3 wrong entity without Yount's knowledge.

4 Yount excoriates Marriner for not advising Yount that the other investor was considering  
5 investing while Yount was sorting out his IRA's mechanical details to facilitate his investment.  
6 Yount assumes without any support that Marriner was obligated to disclose to Yount the activities  
7 and interest of another potentially competing investor. Yount makes this assertion with no  
8 evidentiary support of the standard of care, which in this case would require the testimony of an  
9 expert witness. The argument that Marriner was required to instigate competition between two  
10 prospective investors by informing them of each other's interest in the investment to generate a  
11 race between them, is unsupported and raises issues of a professional standard of care, for which  
12 expert testimony is required, and none is offered by Yount. One can easily imagine that if  
13 Marriner had in fact induced Yount to invest by informing him of Busick's competing interest and  
14 creating a sense of urgency, that additional fact would be alleged now in support of Yount's case  
15 against Marriner.

16 The final component of Yount's allegations against Marriner is that Marriner eventually  
17 learned that Busick had funded but failed to inform Yount. Marriner's testimony is that in this  
18 regard is that Radovan had told him that CR had an additional founder's share of equity to issue  
19 to Yount. Indeed, the capitalization table up to this point showed that was the case. Yount offers  
20 no expert witness testimony that Marriner was under a duty to inform Yount that the founder's  
21 interest might come the developer instead of CNL. Yount claims this difference was,  
22 subjectively, material to Yount. However, Yount offers no expert witness testimony that the  
23 values of the unit he expected to receive (an unissued unit) versus the one he was offered (a unit  
24 transferred from CR) were in fact materially different from an objective, economic point of view.

25 For the sake of argument, if it is assumed that Marriner had a duty to inform Yount that  
26 Busick had purchased the last \$1.5 million of the \$20 million founder's memberships under the  
27 PPM, there is no legal, proximate cause, connecting Marriner's alleged failure to provide this  
28 information to the damage allegedly suffered by Yount. Marriner had the right to assume the  
regularity and legality of the conduct of others, including Cal Neva, Radovan, and Coleman. It is

1 undisputed by Yount that Marriner handled neither his funds nor his documents. (UMF "N".) If  
2 Cal Neva, Coleman, or Radovan or any other defendant utilized Yount's \$1 million for something  
3 other than that which was authorized by the placement private placement memorandum and  
4 related documents signed by Yount, for example, by allegedly converting or misappropriating  
5 those funds as alleged by Yount, Marriner is not legally responsible for the alleged diversion of  
6 funds. Stated another way, the alleged diversion of funds by Coleman or CR, which Yount  
7 characterizes as a theft, is not the proximate result of anything Marriner did, didn't do, said or  
8 didn't say. If the court determines that Yount's funds should have been returned based on the PPM  
9 being sold out, Marriner cannot be held responsible for the delivery of Yount's funds to someone  
10 other than Yount without Yount's express authorization. Again, Marriner did not touch Yount's  
11 funds or his documents. There is no legally viable causal connection between Marriner's alleged  
12 failure to inform Yount that the PPM was sold out and the later alleged misappropriation of  
13 Yount's money.

14 Summary judgment in Marriner's favor is appropriate because Yount fails to show a  
15 misrepresentation or concealment by Marriner, on which Yount actually relied, and which was the  
16 direct legal cause of damages to Yount. Yount fixates on information provided by Radovan.  
17 Yount relied on Radovan, Tratner (CPA) and Grove (architect), not on Marriner. Yount explicitly  
18 told Marriner he was getting his information from others. Marriner did not cause the alleged  
19 diversion of Yount's money by Coleman without Yount's express authority. There is no separate  
20 claim for punitive damages (just like there is no claim for relief for attorney's fees or costs) – it is  
21 a remedy based on a substantive law claim. Therefore, summary judgment is appropriate.

22 **Affirmation:** The undersigned hereby affirms that the foregoing document does not  
23 contain the social security number of any person.

24 Dated: August 3, 2017.

25 INCLINE LAW GROUP, LLP

26 By: s/Andrew N. Wolf

27 ANDREW N. WOLF, Bar No. 4424

28 Attorneys for Defendants DAVID MARRINER and MARRINER REAL ESTATE, LLC

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Incline Law Group, LLP, and that on this day, I caused to be served, a true and correct copy of:

**MARRINER's REPLY TO YOUNT'S OPPOSITION TO  
MOTION FOR SUMMARY JUDGMENT**

UPON:

|   |  |
|---|--|
| Richard G. Campbell, Jr.<br>DOWNEY BRAND LLC<br>100 West Liberty, Suite 900<br>Reno, NV 89501<br>Telephone: 775-329-5900<br>Facsimile: 775-997-7417                       | Attorney for Plaintiff George<br>Stuart Yount, Individually and in his<br>capacity as Owner of George Stuart<br>Yount IRA  |
| Martin A. Little<br>HOWARD & HOWARD ATTORNEYS PLLC<br>3800 Howard Hughes Parkway, Suite 1000<br>Las Vegas, NV 86169<br>Telephone: 702-257-1483<br>Facsimile: 702-567-1568 | Attorney for Defendants Criswell<br>Radovan, LLC, CR CAL NEVA LLC,<br>Robert Radovan, William Criswell, Cal<br>Neva Lodge, LLC, Powell, Coleman and<br>Arnold, LLP |

**VIA: Washoe County Eflex e-filing system:** A true and correct copy of the foregoing document(s) was (were) electronically served via the court's electronic filing system to the above named attorneys associated with this case. If the any of the above named attorneys (and all of their listed co-counsel within the same firm) are not registered with the court's e-filing system, then a true and correct paper copy of the above-named document(s) was(were) served on the attorney via U.S.P.S. first class mail with first-class postage prepaid, to the attorney's address listed above, on this date.

Date: August 3, 2017.

/s/ Crystal Lyle

Crystal Lyle

32

32

**CODE 3790**

THE LAW OFFICE OF RICHARD G.  
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Attorneys for Plaintiff

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,

v.

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 1-10,

Defendants.

CASE NO. CV16-00767

DEPT. NO. B7

**REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

Plaintiff GEORGE STUART YOUNT ("Mr. Yount"), by and through his undersigned  
counsel, The Law Office of Richard G. Campbell, Jr. Inc., hereby files his *Reply to Defendants'*  
*Opposition to Plaintiff's Motion for Partial Summary Judgment.*

1 Defendants Opposition to Plaintiff's instant Motion for Partial Summary Judgment sets  
2 forth three basic arguments on why Summary Judgment is not appropriate in this matter.

3 First, Defendants primary argument is that even if Mr. Yount thought he was purchasing  
4 the last share of a \$20 million raise of capital under a Private Placement Memorandum ("PPM")  
5 for the Cal Neva Lodge LLC, but instead purchased one of Criswell Radovan's ("CR") share in the  
6 LLC, he still has a share in the LLC and thus has not been damaged. Despite the undisputed fact  
7 that Mr. Yount would have never purchased a CR share for reasons outlined in his Motion, he does  
8 not have a share in the LLC. That is because under the Operating Agreement governing the  
9 members of the LLC any transfer of a share requires a vote by the members of the LLC, and that  
10 vote never took place. See Plaintiff's Motion for Summary Judgment at pp 4-5 and Exhibit 1. Now  
11 for the first time in their Opposition Brief, Defendants raise the novel argument that Criswell and  
12 Radovan did not need approval from the other members because a transfer of one of their two shares  
13 had already been approved. As set forth below that argument has no support under the terms of the  
14 Operating Agreement. Defendants' argument at pp 7 and 8 of their Opposition alleges that the  
15 terms of the PPM and other documents prove that it was well known that CR Cal Neva had the  
16 authority and planned on selling of their shares. First and foremost, whether it was well known or  
17 not, the Operating Agreement governed the relationship of the members of the LLC and CR Cal  
18 Neva LLC was such a member and was governed by the Agreement. Defendants' reliance on  
19 Section 7.4 of the Agreement is not persuasive. This section deals with the Development Services  
20 Agreement that allowed CR Cal Neva to act as the developer of the project and only sets forth that  
21 CR had made a \$2 million capital contribution to the project, it does not have any verbiage that  
22 could be interpreted to imply that there was pre approval of the other members to sell one of their  
23 shares. Section 7.4 spells out specifically that the CR share "shall be treated in the same manner  
24 as the capital contributions of all other preferred Members..." Section 4.7 of the Agreement  
25 provides that no member will have the right to withdraw his/its capital contribution except as  
26 provided in the Agreement. Section 12.2 specifically provides that no member may sell or transfer  
27 any of its interest in the LLC unless approved in writing by Members holding at least 67% of the  
28 percentage interest in the Company. Section 11.1.2 provides that if a Member has received the

1 return of any part of its capital contribution in violation of the Agreement it is liable to the Company  
2 for the amount of the capital contribution wrongfully returned. A footnote to the PPM, which notes  
3 the breakdown of the CR investment into the project, and a promissory note spelling out the  
4 minimum investment that CR had to make in the project in no way, shape or form obviates the  
5 language of the Agreement. Further, as noted in Plaintiff's instant Motion, CR's counsel  
6 specifically told CR that it needed written approval of the other LLC members before they could  
7 sell their share to Mr. Yount. See Plaintiff's Motion and attached exhibits 7, 8 and 9 thereto. There  
8 was never written approval of the transfer of the CR share to Mr. Yount and he does not currently  
9 have a share in the LLC.

10 Defendants' second argument on why Summary Judgment is not appropriate as to Criswell  
11 and Radovan is that the theory of conversion does not apply primarily because Mr. Yount still has  
12 a share of the LLC and thus is not damaged. As set forth above that is not true. The other leg of  
13 defendants' argument about conversion is that conversion is essentially a tortious act which is either  
14 unlawful or which cannot be justified or excused in law. As set forth in Plaintiff's motion, Mr.  
15 Yount never agreed to purchase one of the CR shares, he was never informed that he was purchasing  
16 a CR share instead of a share under the PPM, and when he found out about the ruse Defendants'  
17 attempted to paper the transaction and have him retroactively agree to purchase one of the CR  
18 shares in the LLC, which he vehemently refused to do so. As spelled out in detail in Plaintiff's  
19 motion, Defendants acts of taking and keeping Mr. Yount's money could not be more intentional  
20 and without any legal support, especially since their counsel specifically instructed them that other  
21 members needed to first approve the transfer. Even assuming arguendo that Mr. Yount had agreed  
22 to purchase one of the CR shares, when there was no approval by the other members of the LLC,  
23 keeping Mr. Yount's money at that point was intentional and without any legal support. Defendants  
24 footnote on page 8 of their opposition implies that it was all right for Defendants to keep Mr.  
25 Yount's \$1million until a formal vote took place in April of 2016. It was not all right, Mr. Yount

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1 was never informed that he was buying a CR share, he never agreed to buy a CR share, he refused  
2 to sign the documents to paper an agreement to purchase a CR share, and the other members of the  
3 Cal Neva Lodge LLC never approved the transfer of a CR share.

4 DATED: August 4, 2017.

THE LAW OFFICE OF RICHARD G.  
CAMPBELL, JR. INC.

6 By: /s/ Richard G. Campbell, Jr.  
7 RICHARD G. CAMPBELL, JR.  
8 Attorney for Plaintiff  
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**SECOND JUDICIAL DISTRICT COURT****COUNTY OF WASHOE, STATE OF NEVADA****AFFIRMATION****Pursuant to NRS 239B.030**

The undersigned does hereby affirm that the preceding document, filed in this case: **REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT;**

☒ 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

Dated: August 4, 2017.

THE LAW OFFICE OF RICHARD G.  
CAMPBELL, JR. INC.

By: /s/ Richard G. Campbell, Jr.

**PROOF OF SERVICE**

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is The Law Office of Richard G. Campbell, Jr. Inc., 200 S. Virginia Street, 8<sup>th</sup> Floor, Reno, NV 89501. On August 4, 2017, I served the following document(s):

**REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

- ☐ **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- ☐ **BY HAND:** by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- ☐ **BY MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Reno, Nevada addressed as set forth below.
- ☐ **BY EMAIL:** by causing the document(s) to be electronically served.
- ☐ **BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.
- ☐ **BY PERSONAL DELIVERY:** by causing personal delivery by Reno Carson Messenger Service of the document(s) listed above to the person(s) at the address(es) set forth below.
- ☒ **BY E-MAIL/ELECTRONIC FILING SYSTEM:** by causing the document(s) to be electronically served via the court's electronic filing system to the following attorneys associated with this case.

Martin A. Little  
Howard and Howard  
3800 Howard Hughes Parkway, Ste 1000  
Las Vegas, Nevada 89169

Andrew N. Wolf  
Incline Law Group, LLC  
264 Village Blvd, Suite 104  
Incline Village, NV 89451

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on August 4, 2017, at Reno, Nevada.

/s/ Danielle Bleecker

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1 **3795**

2 Martin A. Little, Esq., NV Bar No. 7067  
3 Alexander Villamar, Esq., NV Bar No. 9927

4 **Howard & Howard Attorneys PLLC**

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10 Attorneys for Criswell Radovan, LLC, CR Cal Neva, LLC,

11 Robert Radovan, William Criswell, Cal Neva Lodge, LLC,

12 and Powell, Coleman and Arnold LLP

13 **IN THE SECOND JUDICIAL DISTRICT COURT OF**

14 **THE STATE OF NEVADA IN AND FOR THE**

15 **COUNTY OF WASHOE**

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

19 Plaintiff,

20 vs.

21 CRISWELL RADOVAN, LLC, a Nevada  
22 limited liability company; CR Cal Neva, LLC,  
23 a Nevada limited liability company; ROBERT  
24 RADOVAN; WILLIAM CRISWELL; CAL  
25 NEVA LODGE, LLC, a Nevada limited  
26 liability company; POWELL, COLEMAN and  
27 ARNOLD LLP; DAVID MARRINER;  
28 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 CRISWELL RADOVAN,  
LLC, CR CAL NEVA, LLC,  
ROBERT RADOVAN, WILLIAM  
CRISWELL, CAL NEVA LODGE, LLC,  
AND POWELL, COLEMAN AND  
ARNOLD LLP's REPLY IN SUPPORT  
OF THEIR MOTION FOR SUMMARY  
JUDGMENT**

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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, file this Reply in Support of their Motion for Summary Judgment ("Reply"), pursuant to NRCPC 56, on the grounds there are no genuine issues of material fact and Defendants are entitled to judgment as a matter of law. These claims must be dismissed as a matter of law.

DATED this 7 day of August 2017.

HOWARD & HOWARD ATTORNEYS PLLC

By: 

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Alexander Villamar, Esq.  
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Telephone No. (702) 257-1483  
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*Attorneys for Criswell Radovan, LLC,  
CR Cal Neva, LLC, Robert Radovan,  
William Criswell, Cal Neva Lodge, LLC,  
Powell, Coleman and Arnold LLP*

## MEMORANDUM OF POINTS AND AUTHORITIES

### I.

#### PLAINTIFF HAS NOT PROVEN HIS FRAUD-BASED CLAIMS BY CLEAR AND CONVINCING EVIDENCE

Plaintiff has the burden of proving each and every element of his fraud claim by clear and convincing evidence. *Bart Mettler v. Reno Air, Inc.*, 114 Nev. 441, 446, 956 P.2d 1382, 1386 (1998). Where an essential element is absent, summary judgment is proper. *Bulbman Inc. v. Nevada Bell*, 108 Nev. 105, 110–11, 825 P.2d 588, 592 (1992) Here, Plaintiff has not sustained this heavy burden.

First, as a threshold matter, Plaintiff tacitly admits that his fraud claims against Criswell fail as a matter of law. Indeed, in their motion, Defendants pointed out that Plaintiff never met, spoke to or communicated with Criswell prior to making his investment, and that the absence of

1 such was fatal to his fraud claim against Criswell. Plaintiff has offered no evidence, much less  
2 clear and convincing evidence, to rebut this fundamental fact. Plaintiff also does not dispute  
3 having no evidence that Criswell Radovan sold Plaintiff one of their shares because they knew  
4 the Project was in trouble. *See*, Plaintiff's Depo., 93:18-21; 105: 8-18. Thus, these claims must  
5 be dismissed as a matter of law.

6 Second, Plaintiff also tacitly admits that his contention that the Project was more  
7 overbudget than represented by Marriner and Radovan is not supported by any evidence, much  
8 less clear and convincing evidence. Defendants demonstrated through Plaintiff's own testimony  
9 that he has no evidence the Project was more overbudget than represented when he made his  
10 investment, or that when Radovan made representations to him about Project costs that Radovan  
11 knew they exceeded the amount represented. *See*, Defendants' Motion, p. 12. Plaintiff does not  
12 dispute either fact, which is fatal to his claim.

13 Third, Plaintiff contends in his opposition he was defrauded because he was not told he  
14 was purchasing one of CR Cal-Neva's shares. *See*, Opposition, p. 6. His claim fails, however,  
15 since Radovan believed the Project's broker, Defendant David Marriner, had informed Plaintiff  
16 of this fact, and Plaintiff has no evidence to the contrary. *See*, Depo. of Radovan, pp. 75:12-23;  
17 91:9-19; 92:14-18; Plaintiff Depo., 14:21-15:18.

18 Fourth, Plaintiff contends he was defrauded because he was "never told that the Hall loan  
19 was out of balance and that if equity was not put into the LLC, that Hall would quit funding."  
20 Opposition, p. 6. Essentially, Plaintiff contends he was defrauded about the Project's financing.  
21 Plaintiff has no evidence to back this up:

22 Q. Do you have any information that as of the date that you made  
23 your investment, that a refinancing that a refinancing of the six  
24 million mezz with a 15 Million dollar loan wasn't in place or  
imminent?

25 A. At the time of my investment, no, I did not know that.

26 Q. No, do you have any information that it was not in place or  
27 imminent?

28 A. No.

*Id.* at 110:15-23; 202:14-20.

....

Q. Do you have any evidence that Criswell Radovan sold you one of their shares because they knew the Project was in trouble?

A. No. It just seems obvious to me.

*Id.* at 93:18-21; 105:8-18.

Finally, Plaintiff claims he was defrauded because Radovan allegedly misrepresented the schedule. This contention, however, is belied by the evidence. Indeed, a few days before Plaintiff invested, Radovan told him by e-mail the soft opening was in spring and grand opening Father's Day, 2016. Plaintiff Depo. at 207-208. This e-mail says nothing about tourism or weather. *Id.* at 232:17-21. Plaintiff admittedly has no evidence to believe this statement was false when made. *Id.* at 169:16-170:16; 207:5-208:16.

For these reasons, and those set forth in Defendants' Motion, Plaintiff cannot meet his heavy burden of proving every element of his fraud claim by clear and convincing evidence.

## II.

### **PLAINTIFF DOES NOT DISPUTE THE FACT THAT HE HAS SUFFERED NO DAMAGES.**

The premise for Plaintiff's lawsuit is that he thought he was purchasing one of the last of the Founders' Shares, but got duped into buying one of CR Cal-Neva's shares. The fundamental flaw in this argument, however, is that CR Cal-Neva's Founders' Share has the identical rights, obligations and value as the Founders' Share Plaintiff says he was purchasing. *See* Declaration of Robert Radovan. Moreover, from the moment, Plaintiff bought his interest, he clearly considered himself as, and was treated by the Executive Committee as, a full-founding investor. He even requested a note he made to acknowledge his investment which was done but he refused to sign. Plaintiff has not even attempted to dispute the fundamental fact that he got the identical interest he thought he was purchasing. Thus, Plaintiff is in the identical position he would have been had he purchased the last Founders' Share before Les Busick and he has no damages.

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III.

PLAINTIFF DOES NOT DISPUTE THAT HIS REMAINING  
CAUSES OF ACTION FAIL

In his opposition, Plaintiff does not dispute that he understood his contract to be with Cal-Neva Lodge, LLC, and that his contract claims against the other defendants must fail as a matter of law. The failure to address this is a tacit admission to its validity.

Plaintiff also does not address the evidence that PCA followed the only instructions it had, which was to send his money to Criswell Radovan for a purchase of its shares, and that this fact is fatal to his second and fourth causes of action. The failure to address these claims is also fatal to his claim.

IV.

CONCLUSION

For these reasons, as set forth more fully in Defendants' motion, Plaintiff's claims fail as a matter of law.

DATED this 4 day of August 2017.

HOWARD & HOWARD ATTORNEYS PLLC

By: 

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1 **SECOND JUDICIAL DISTRICT COURT**  
 2 **COUNTY OF WASHOE, STAT OF NEVADA**

3 **AFFIRMATION**

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

6 **- OR -**

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

9 \_\_\_\_\_ A specific state or federal law, to wit:

10 \_\_\_\_\_  
 11 (State specific state or federal law)

12 **- OR -**

13 For the administration of a public program

14 **- OR -**

15 \_\_\_\_\_ For an application for a federal or state grant

16 **- OR -**

17 \_\_\_\_\_ Confidential Family Court Information Sheet  
 18 (NRS 125.130, NRS 125.230, and NRS 125B.055)

19 Date: August 4 2017.

HOWARD & HOWARD ATTORNEYS, PLLC

20 By: 

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 22 Alexander Villamar, Esq.  
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 27 Attorneys for Criswell Radovan, LLC,  
 28 CR Cal Neva, LLC, Robert Radovan,  
 William Criswell, Cal Neva Lodge, LLC,  
 and Powell, Coleman and Arnold LLP

Howard & Howard Attorneys PLLC  
 3800 Howard Hughes Pkwy., Ste. 1000  
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**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.

On this day I served the foregoing **DEFENDANTS CRISWELL RADOVAN, LLC, CR CAL NEVA, LLC, ROBERT RADOVAN, WILLIAM CRISWELL, CAL NEVA LODGE, LLC, AND POWELL, COLEMAN AND ARNOLD LLP's REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY 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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The Law Office of  
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Telephone: (775) 831-3666  
*Attorneys for Defendants*  
*David Marriner and*  
*Marriner Real Estate, LLC*

I certify under penalty of perjury that the foregoing is true and correct, and that this Certificate of Service was executed by me on August 4, 2017 at Las Vegas, Nevada.

  
An Employee of HOWARD & HOWARD ATTORNEYS PLLC

4851-7773-6268, v. 1

Howard & Howard Attorneys PLLC  
3800 Howard Hughes Pkwy., Ste. 1000  
Las Vegas, NV 89169  
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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
7 IN AND FOR THE COUNTY OF WASHOE  
8

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

Case No.: CV16-00767

Dept. No.: 7

12 Plaintiff,

13 vs.

14 CRISWELL RADOVAN, LLC, a  
15 Nevada limited liability company; CR  
16 CAL NEVA, LLC, a Nevada limited  
17 liability company; ROBERT  
18 RADOVAN; WILLIMA CRISWELL;  
19 CAL NEVA LODGE, LLC, a Nevada  
20 limited liability company; POWELL,  
21 COLEMAN and ARNOLD, LLP;  
22 DAVID MARRINER; MARRINER  
23 REAL ESTATE, LLC, a Nevada  
24 limited liability company; and DOES  
25 1-10,

26 Defendants.  
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ORDER

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Currently before the Court is Defendants DAVID MARRINER and MARRINER REAL ESTATE LLC, (hereinafter "Defendants") *Motion for Summary Judgment*, filed on June 28, 2017. On July 28, 2017, Plaintiff GEORGE STUART YOUNT (hereinafter "Plaintiff") filed *Plaintiff's Opposition to Defendants' Motion for Summary Judgment or, in the Alternative Partial Summary Judgment*. On August 3, 2017, Defendants filed *Reply to Plaintiff's Opposition to Motion for Summary Judgment* and submitted the matter to the Court for decision.

1                   **Factual Background**

2                   This matter arose from a failed investment deal for the redevelopment of the  
3 Cal Neva Lodge, located in Crystal Bay, Lake Tahoe. Defendants William Criswell  
4 ("Criswell") and Robert Radovan ("Radovan") are two developers from California who  
5 purchased the Cal Neva Lodge in 2013 with the intent to renovate and reopen the  
6 property. In order to raise \$20,000,000 in capital for the development of the property,  
7 Criswell and Radovan began to sell "Founders Units" through a private placement  
8 offering. Per the Private Placement Memorandum ("PPM"), each unit was set at  
9 \$1,000,000 and would give an investor a 3.5% ownership in the Cal Neva Lodge.  
10 Several Nevada limited liability companies were created by Criswell and Radovan to  
11 act as the vehicles to redevelop the Cal Neva Lodge, including: Defendant Criswell  
12 Radovan, LLC whose managers are Sharon Criswell, William Criswell, and Robert  
13 Radovan; and Defendant CR Cal Neva, LLC, whose managers are William Criswell  
14 and Robert Radovan.

15                   In February 2014, Plaintiff was approached by Defendant DAVID MARRINER  
16 ("Marriner"), to discuss the proposed plans of Radovan and Criswell to remodel and  
17 reopen the Cal Neva Lodge. Marriner represented to Plaintiff that he was the acting  
18 agent and broker for Radovan and Criswell and the related legal entities operated  
19 therewith in connection with the development of the Cal Neva Lodge. During the next  
20 several months, Marriner provided Plaintiff information concerning the Cal Neva  
21 Lodge redevelopment project ("Project"), including marketing and promotional  
22 materials, tours of the Cal Neva Lodge, and made representations about Radovan  
23 and Criswell's previous project development history.

24                   In July 2015, Defendant Radovan sent Plaintiff an email that included  
25 documents and other information regarding the financial information about the  
26 Project with the intent to solicit Plaintiff into purchasing a "Founders Unit" in the  
27 Cal Neva Lodge. This included the PPM, a Confidential Offering Memorandum and  
28 an Amended and Restated Operating Agreement. The Operating Agreement outlines

1 and controls the contractual relationship of the Members of the Cal Neva Lodge LLC.  
2 Plaintiff was later provided the "Subscription Booklet" that included: subscription  
3 instructions, a member signature page, a certificate of non-foreign status, investor  
4 escrow and wire transfer information, and an IRS form W-9. Plaintiff was informed  
5 that there was \$1,500,000 of Founders Units still available for purchase as authorized  
6 under the PPM. Thereafter, Plaintiff decided to make an investment into the  
7 renovation of the Cal Neva Lodge by purchasing a \$1,000,000 Founders Unit. In order  
8 to fund his investment, Plaintiff was to pull money out of his IRA account. This took  
9 a significant amount of time due to the paperwork to reallocate the funds to the Cal  
10 Neva Lodge, LLC.

11 During this period, however, it appears that the project began to run into  
12 financing issues and over-budgetary concerns. Additionally, the loan with Hall CA-  
13 NV LLC ("Hall"), the primary lender on the property, began to fall out of balance,  
14 leaving the debt to equity ratio under the loan too high. As a result, Hall was likely  
15 to stop funding the project, causing the general contractor on the project Penta to not  
16 get paid and Penta ultimately ceasing work on the project. In order to put the loan in  
17 balance, a payment of \$1,400,000 had to be put into equity of Cal Neva Lodge for Hall  
18 to continue funding the loan. It was at this time that Radovan approached Mr. Les  
19 Busick ("Busick"), an investor who had already purchased a \$1,000,000 Founders  
20 Unit in the Cal Neva Lodge, about purchasing the remaining \$1,500,000 under the  
21 PPM. In September 2015, Busick made a second investment, representing the  
22 remaining \$1,500,000 under the PPM and effectively closing the allotted \$20,000,000.

23 Although the \$20,000,000 cap had been reached as a result of Busick's  
24 investment, Radovan continued to move forward with Plaintiff's investment under  
25 the PPM. Radovan sent over the Subscription Agreement and other required  
26 documents under the PPM to become an investor. Plaintiff thereafter completed the  
27 Subscription Agreement and instructed his trust company handling his IRA to  
28 transfer \$1,000,000 to PCA, the Escrow Agent assigned to collect the funds under the

1 Subscription Agreement. On October 13, 2015, Radovan, on behalf of CR Cal Neva,  
2 signed off on the Acceptance of Subscription and PCA transferred Plaintiff's funds to  
3 CR Cal Neva.

4 During a meeting of members and investors held on December 12, 2015,  
5 Plaintiff was informed of several issues that he asserts in his *Complaint* were not  
6 disclosed to him prior to his purchase of the Founders Units. Specifically, Plaintiff  
7 was informed that the Project was significantly over-budget and that the Cal Neva  
8 Lodge would not be opening as originally scheduled. Furthermore, Plaintiff was  
9 informed that his \$1,000,000 purchase of Founders Units were not the shares  
10 initially offered under the PPM, but rather shares that were originally purchased by  
11 Radovan and Criswell through CR Cal Neva LLC. Plaintiff's investment was now to  
12 represent \$1,000,000 of the initial \$2,000,000 that CR Cal Neva originally purchased.  
13 Ultimately, the Project fell into bankruptcy and construction ceased.

14 On April 4, 2016, Plaintiff filed suit in this Court, asserting claims for Breach  
15 of Contract, Breach of Duty, Fraud, Negligence, Conversion, Punitive Damages, and  
16 Fraud under NRS 90.570. Specifically, Plaintiff alleges in his *Complaint* that the  
17 Defendants made material misrepresentations regarding the Project, the  
18 development of the Project, and the successful track record of Radovan and Criswell  
19 in development of hotel properties. Plaintiff asserts that the failure to disclose that  
20 the Project was over-budget, that the Cal Neva Lodge would not be opening as  
21 scheduled, and that Busick had been approached to purchase the \$1,500,000  
22 remaining Founders Units, amounted to fraudulent misrepresentations.

### 23 Standard of Review

24 Summary judgment is appropriate under Rule 56 of the Nevada Rules of Civil  
25 Procedure when the pleadings, depositions, answers to interrogatories, admissions,  
26 and affidavits, if any, that are properly before the court demonstrate that no genuine  
27 issue of material fact exists, and the moving party is entitled to judgment as a matter  
28

1 of law.<sup>1</sup> A factual dispute will be considered genuine if the evidence is as such that a  
2 rational trier of fact could return a verdict in favor of the non-moving party.<sup>2</sup> When  
3 evaluating the pleadings and other evidence on file in a motion for summary  
4 judgment, the court should view it in a light most favorable to the non-moving party.<sup>3</sup>  
5 “When a motion for summary judgment is made and supported as required by NRCP  
6 56, the non-moving party may not rest upon general allegations and conclusions, but  
7 must, by affidavit or otherwise, set forth specific facts demonstrating the existence of  
8 a genuine factual issue.”<sup>4</sup> The substantive law controls which factual disputes are  
9 material and will preclude summary judgment; other factual disputes are irrelevant.<sup>5</sup>  
10 Having fully reviewed the pleadings and papers filed herein and the evidence before  
11 the Court, the Court finds that there exist genuine issues of material fact and  
12 therefore, summary judgment is not appropriate.

### 13 Discussion

14 In the present *Motion*, Defendants move for summary judgment on Plaintiff’s  
15 claims against Defendants for Fraud, Fraud under NRS 90.570, and Punitive  
16 Damages. The Court will address each claim in turn.

#### 17 **I. Fraud**

18 First, Defendants move for judgment on Plaintiff’s claim for fraud arguing that  
19 because Plaintiff had conducted an independent investigation, had the advice of  
20 counsel, a CPA, and the architect on the Project, that Plaintiff cannot establish the  
21 requisite elements of a common law fraud claim. Defendants also argue that they are  
22 entitled to judgment as a matter of law due to the disclaimers of reliance located  
23 within the PPM and Subscription Agreement. Lastly, Defendants argue that Plaintiff  
24 cannot establish that Defendants were the proximate cause of damages, if any, that  
25 Plaintiff suffered. Plaintiff counters that he only conducted limited due diligence and

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26 <sup>1</sup> NRCP 56(C).

27 <sup>2</sup> *Turner v. Mandalay Sports Entm’t, LLC*, 124 Nev. 213, 216, 180 P.3d 1172, 1174 (2008).

28 <sup>3</sup> *Id.* at 216.

<sup>4</sup> *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 713, 57 P.3d 82, 87 (2002) (emphasis added).

<sup>5</sup> *Id.* at 731.



1 it was limited to his accountant reviewing the financial projections of the property.  
2 Further, Plaintiff argues that although some due diligence was conducted,  
3 Defendants continually failed to disclose vital pieces of information regarding the  
4 financing of the project, project delays, and the involvement of other investors.

5 In Nevada, the elements of a fraud claim are: (1) a false representation; (2)  
6 made with knowledge or belief that it is false or without a sufficient basis of  
7 information; (3) intent to induce reliance; and (4) damage resulting from the reliance.<sup>6</sup>  
8 The burden is on the plaintiff to establish the elements of fraud by clear and  
9 convincing proof.<sup>7</sup> Further, the Nevada Supreme Court has held that a "false  
10 representation must have played a material and substantial part in leading the  
11 plaintiff to adopt his particular course."<sup>8</sup> However, if a plaintiff "was unaware of it at  
12 the time that he acted, or it is clear that he was not in any way influenced by it, and  
13 would have done the same thing without it for other reasons, his loss is not attributed  
14 to the defendant."<sup>9</sup>

15 After considerable review, the Court finds that there exists a genuine issue of  
16 material fact as it pertains to whether the representations made by Defendants  
17 constituted a misrepresentation and whether Plaintiff was justified on relying on  
18 such representations. There is clearly a dispute as to what knowledge Plaintiff had  
19 when he made the decision to purchase a \$1,000,000 Founders Unit and whether his  
20 due diligence would have or should have discovered the inconsistencies and falsities,  
21 if any, regarding the financing of the project, possible delays in the opening, and the  
22 potential for new investors. Furthermore, the Court does not find that the PPM and  
23 Subscription Agreement effectively disclaim reliance rather, the notice is limited to  
24 disclosure of the risks associated with the investment. As such, the Court finds that  
25 summary judgment is not appropriate.

26 <sup>6</sup> *Collins v. Burns*, 103 Nev. 394, 397, 741 P.2d 819, 821 (1987).

27 <sup>7</sup> *Lubbe v. Barba*, 91 Nev. 596, 598, 540 P.2d 115, 117 (1975).

28 <sup>8</sup> *Id.* at 598.

<sup>9</sup> *Id.*

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3 **II. Fraud under NRS § 90.570**

4 Next, Defendants argue that summary judgment is appropriate on Plaintiff's  
5 claim for fraud pursuant to NRS § 90.570 due to Plaintiff's lack of standing to assert  
6 the claim. For the purposes of Plaintiff's claim, NRS § 90.570 provides that in  
7 connection with the offer to sell, sale, offer to purchase or purchase of a security, a  
8 person shall not, directly or indirectly:

- 9 1. Employ any device, scheme or artifice to defraud;  
10 2. Make an untrue statement of a material fact or omit to state a  
11 material fact necessary in order to make the statements made not  
12 misleading in the light of the circumstances under which they are made;  
13 or  
14 3. Engage in an act, practice or course of business which operates or  
15 would operate as a fraud or deceit upon a person.

16 Furthermore, under NRS § 90.660 a person who offer of sells a security in violation  
17 of subsection 2 of NRS § 90.570, is liable to the person purchasing the security.  
18 Defendants argue that because Plaintiff refused to accept assignment of the  
19 membership interest under the \$1,000,000 Founders Unit from CR Cal Neva that he  
20 has no standing to assert a claim against the Defendants. The Court does not agree.  
21 At the time Plaintiff signed the Subscription Agreement, it would appear that  
22 Plaintiff had agreed to purchase the \$1,000,000 Founders Unit by both  
23 acknowledging the terms of the agreement by signing the Subscription Agreement  
24 and tendering the \$1,000,000. Therefore, the Court finds that Plaintiff has standing  
25 to assert a claim under NRS § 90.570. However, as stated above, there exists a  
26 genuine issue of material fact as to whether Defendants' representations to Plaintiff  
27 constitute material misrepresentations. Therefore, the Court finds that summary  
28 judgment is not appropriate.

29 **III. Punitive Damages**

30 Lastly, Defendants move for summary judgment on Plaintiff's claim for  
31 punitive damages under NRS Chapter 42. Defendants argue that punitive damages

1 is not a separate claim for relief, and therefore Plaintiff should be precluded from  
2 raising it. Under NRS Chapter 42, punitive damages are available:

3 [I]n an action for the breach of an obligation not arising from contract,  
4 where it is proven by clear and convincing evidence that the defendant  
5 has been guilty of oppression, fraud or malice, express or implied, the  
6 plaintiff, in addition to the compensatory damages, may recover  
7 damages for the sake of example and by way of punishing the defendant.

8 In *Shoen v. Amerco, Inc.*, 111 Nev. 735, 748, 896 P.2d 469, 477 (1995), the  
9 Nevada Supreme Court found that when a plaintiff raises allegations of fraud or  
10 malice, the plaintiff is entitled to seek punitive damages at trial. There, the Supreme  
11 Court reversed the trial court's grant of summary judgment on the claim for punitive  
12 damages due to the Court finding that the trial court's concurrent grant of summary  
13 judgment on the plaintiff's tort claims, that allow punitive damages, was improper.<sup>10</sup>  
14 Thus, the plaintiff was permitted to assert a claim for punitive damages. Following  
15 the Court's reasoning in *Shoen*, this Court finds that the Plaintiff is entitled to assert  
16 a claim for punitive damages based on his allegations of fraud. Therefore, the Court  
17 finds that summary judgment is not appropriate.

18 **Conclusion**

19 After careful consideration of the pleadings and papers filed herein and the  
20 evidence presented by the parties, the Court finds that there exists several genuine  
21 issues of material fact, thereby precluding an order of summary judgment.  
22 Accordingly, and good cause appearing, Defendants *Motion for Summary Judgment*  
23 is **DENIED**.

24 **IT IS SO ORDERED.**

25 **DATED** this 15<sup>TH</sup> day of August, 2017.

26   
27 PATRICK FLANAGAN  
28 District Judge

10 *Shoen v. Amerco, Inc.*, 111 Nev. 735, 748, 896 P.2d 469, 477 (1995).

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Andrew N. Wolf, Esq., Attorney for Defendants David Marriner and Marriner Real Estate, LLC;

Richard G. Campbell, Jr., Esq., attorney for Plaintiff George Stuart Yount;

Martin A. Little, Esq., attorney for Defendants Criswell Radovan, LLC; CR Cal Neva, LLC; Robert Radovan; William Criswell; Cal Neva Lodge, LLC; Powell, Coleman, and Arnold, LLP.

  
Judicial Assistant

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
7 IN AND FOR THE COUNTY OF WASHOE  
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9 GEORGE STUART YOUNT,  
10 Individually and in his Capacity as  
Owner of GEORGE YOUNT IRA,

Case No.: CV16-00767

Dept. No.: 7

11 Plaintiff,

12 vs.

13 CRISWELL RADOVAN, LLC, a  
14 Nevada limited liability company; CR  
CAL NEVA, LLC, a Nevada limited  
15 liability company; ROBERT  
RADOVAN; WILLIMA CRISWELL;  
16 CAL NEVA LODGE, LLC, a Nevada  
limited liability company; POWELL,  
17 COLEMAN and ARNOLD, LLP;  
DAVID MARRINER; MARRINER  
18 REAL ESTATE, LLC, a Nevada  
limited liability company; and DOES  
1-10,

19 Defendants.  
20 \_\_\_\_\_/

21 **ORDER**

22 Currently before the Court is Plaintiff GEORGE STUART YOUNT's  
23 (hereinafter "Plaintiff") *Motion for Partial Summary Judgment*, filed on June 27,  
24 2017. On July 18, 2017, Defendants CRISWELL RADOVAN, LLC (Criswell  
25 Radovan), CR CAL NEVA, LLC ("CR Cal Neva"), ROBERT RADOVAN ("Radovan"),  
26 WILLIAM CRISWELL ("Criswell"), and POWELL, COLEMAN AND ARNOLD, LLP  
27 ("PCA") (hereinafter collectively "Defendants") filed *Opposition to Plaintiff's Motion*  
28

1 *for Partial Summary Judgment.* On August 4, 2017, Plaintiff filed his *Reply to*  
2 *Opposition to Plaintiff's Motion for Partial Summary Judgment* and submitted the  
3 matter to the Court for decision.

4 **Factual Background**

5 This matter arose from a failed investment deal for the redevelopment of the  
6 Cal Neva Lodge, located in Crystal Bay, Lake Tahoe. Criswell and Radovan are two  
7 developers from California who purchased the Cal Neva Lodge in 2013 with the intent  
8 to renovate and reopen the property. In order to raise \$20,000,000 in capital for the  
9 development of the property, Criswell and Radovan began to sell "Founders Units"  
10 through a private placement offering. Per the Private Placement Memorandum  
11 ("PPM"), each unit was set at \$1,000,000 and would give an investor a 3.5% ownership  
12 in the Cal Neva Lodge. Several Nevada limited liability companies were created by  
13 Criswell and Radovan to act as the vehicles to redevelop the Cal Neva Lodge,  
14 including: Defendants Criswell Radovan, LLC whose managers are Sharon Criswell,  
15 William Criswell, and Robert Radovan; and Defendant CR Cal Neva, LLC, whose  
16 managers are William Criswell and Robert Radovan.

17 In February 2014, Plaintiff was approached by Defendant DAVID MARRINER  
18 ("Marriner"), to discuss the proposed plans of Radovan and Criswell to remodel and  
19 reopen the Cal Neva Lodge. Marriner represented to Plaintiff that he was the acting  
20 agent and broker for Radovan and Criswell and the related legal entities operated  
21 therewith in connection with the development of the Cal Neva Lodge. During the next  
22 several months, Marriner provided Plaintiff information concerning the Cal Neva  
23 Lodge redevelopment project ("Project"), including marketing and promotional  
24 materials, tours of the Cal Neva Lodge, and representations about Radovan and  
25 Criswell's previous project development history.

26 In July 2015, Defendant Radovan sent Plaintiff an email that included  
27 documents and other information regarding the financial information about the  
28 Project with the intent to solicit Plaintiff into purchasing a "Founders Unit" in the

1 Cal Neva Lodge. This included the PPM, a Confidential Offering Memorandum and  
2 an Amended and Restated Operating Agreement. The Operating Agreement outlines  
3 and controls the contractual relationship of the Members of the Cal Neva Lodge LLC.  
4 Plaintiff was later provided the "Subscription Booklet" that included: subscription  
5 instructions, a member signature page, a certificate of non-foreign status, investor  
6 escrow and wire transfer information, and an IRS form W-9. Plaintiff was informed  
7 that there was \$1,500,000 of Founders Units still available for purchase as authorized  
8 under the PPM. Thereafter, Plaintiff decided to make an investment into the  
9 renovation of the Cal Neva Lodge by purchasing a \$1,000,000 Founders Unit. In order  
10 to fund his investment, Plaintiff was to pull money out of his IRA account. This took  
11 a significant amount of time due to the paperwork to reallocate the funds to the Cal  
12 Neva Lodge, LLC.

13 During this period, however, it appears that the project began to run into  
14 financing issues and over-budgetary concerns. Additionally, the loan with Hall CA-  
15 NV LLC ("Hall"), the primary lender on the property, began to fall out of balance,  
16 leaving the debt to equity ratio under the loan too high. As a result, Hall was likely  
17 to stop funding the project, causing the general contractor on the project Penta to not  
18 get paid and Penta ultimately ceasing work on the project. In order to put the loan in  
19 balance, a payment of \$1,400,000 had to be put into equity of Cal Neva Lodge for Hall  
20 to continue funding the loan. It was at this time that Radovan approached Mr. Les  
21 Busick ("Busick"), an investor who had already purchased a \$1,000,000 Founders  
22 Unit in the Cal Neva Lodge, about purchasing the remaining \$1,500,000 under the  
23 PPM. In September 2015, Busick made a second investment, representing the  
24 remaining \$1,500,000 under the PPM and effectively closing the allotted \$20,000,000.

25 Although the \$20,000,000 cap had been reached as a result of Busick's  
26 investment, Radovan continued to move forward with Plaintiff's investment under  
27 the PPM. Radovan sent over the Subscription Agreement and other required  
28 documents under the PPM to become an investor. Plaintiff thereafter completed the



1 Subscription Agreement and instructed his trust company handling his IRA to  
2 transfer \$1,000,000 to PCA, the Escrow Agent assigned to collect the funds under the  
3 Subscription Agreement. On October 13, 2015, Radovan, on behalf of CR Cal Neva,  
4 signed off on the Acceptance of Subscription and PCA transferred Plaintiff's funds to  
5 CR Cal Neva. Thereafter, Plaintiff was informed that his \$1,000,000 purchase of  
6 Founders Units were not the shares initially offered under the PPM, but rather  
7 shares that were originally purchased by Radovan and Criswell through CR Cal Neva  
8 LLC. Plaintiff's investment was now to represent \$1,000,000 of the initial \$2,000,000  
9 that CR Cal Neva originally purchased. Additionally, it came to light that the Project  
10 was having significant financial issues and extensive construction delays. Ultimately,  
11 the Project fell into bankruptcy and construction ceased. On April 4, 2016, Plaintiff  
12 filed suit in this Court, asserting claims for Breach of Contract, Breach of Duty,  
13 Fraud, Negligence, Conversion, Punitive Damages, and Fraud under NRS 90.570.

14 In his *Motion*, Plaintiff moves for summary judgment on his claims for Breach  
15 of Duty against PCA, Negligence against PCA, and Conversion against CR Cal Neva  
16 LLC, William Criswell, Robert Radovan, and Criswell Radovan LLC. Plaintiff argues  
17 that after extensive discovery, there remains no genuine issues of material fact and  
18 as such, summary judgment should be entered in favor of Plaintiff.

### 19 Standard of Review

20 Summary judgment is appropriate under Rule 56 of the Nevada Rules of Civil  
21 Procedure when the pleadings, depositions, answers to interrogatories, admissions,  
22 and affidavits, if any, that are properly before the court demonstrate that no genuine  
23 issue of material fact exists, and the moving party is entitled to judgment as a matter  
24 of law.<sup>1</sup> A factual dispute will be considered genuine if the evidence is as such that a  
25 rational trier of fact could return a verdict in favor of the non-moving party.<sup>2</sup> When  
26 evaluating the pleadings and other evidence on file in a motion for summary

27 <sup>1</sup> NRCP 56(C).

28 <sup>2</sup> *Turner v. Mandalay Sports Entm't, LLC*, 124 Nev. 213, 216, 180 P.3d 1172, 1174 (2008).

1 judgment, the court should view it in a light most favorable to the non-moving party.<sup>3</sup>  
2 “When a motion for summary judgment is made and supported as required by NRC  
3 56, the non-moving party may not rest upon general allegations and conclusions, but  
4 must, by affidavit or otherwise, set forth specific facts demonstrating the existence of  
5 a genuine factual issue.”<sup>4</sup> The substantive law controls which factual disputes are  
6 material and will preclude summary judgment; other factual disputes are irrelevant.<sup>5</sup>  
7 After considerable review of the pleading and papers filed herein and the evidence  
8 before the Court, the Court finds there exists genuine issues of material facts and  
9 thus Plaintiff is not entitled to judgment as a matter of law.

### 10 Discussion

11 Plaintiff moves for summary judgment on three of his seven claims asserted  
12 against the Defendants collectively and individually. The Court will address each  
13 claim in turn.

#### 14 **I. Conversion**

15 First, Plaintiff argues that he is entitled to judgment as a matter of law on his  
16 claim for conversion against CR Cal Neva LLC, William Criswell, Robert Radovan,  
17 and Criswell Radovan LLC. The Nevada Supreme Court has defined conversion as “a  
18 distinct act of dominion wrongfully exerted over another’s personal property in denial  
19 of, or inconsistent with his title or rights therein or in derogation, exclusion, or  
20 defiance of such title or rights.”<sup>6</sup> Conversion is not an act of general intent, therefore  
21 it does not require wrongful intention and “will not be excused by care, good faith, or  
22 lack of knowledge.”<sup>7</sup> The determination of “whether a conversion has occurred is a  
23 question of fact for the jury.”<sup>8</sup>

24 <sup>3</sup> *Id.* at 216.

25 <sup>4</sup> *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 713, 57 P.3d 82, 87 (2002) (emphasis added).

26 <sup>5</sup> *Id.* at 731.

27 <sup>6</sup> *M.C. Multi-Family Dev., L.L.C. v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 910–11, 193 P.3d 536,  
542–43 (2008)

28 <sup>7</sup> *Id.* at 910–11.

<sup>8</sup> *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 606, 5 P.3d 1043, 1048 (2000)

1 Plaintiff argues that collectively, CR Cal Neva, Criswell Radovan LLC,  
2 Radovan, and Criswell converted his \$1,000,000 investment in Founders Unit shares  
3 by failing to get authorization from Plaintiff to transfer the funds to CR Cal Neva and  
4 that the transfer was in contradiction to the terms of the Subscription Agreement.  
5 Plaintiff asserts that he never gave the authorization to transfer the \$1,000,000  
6 investment to CR Cal Neva and this was done without his knowledge or permission.  
7 Further, Plaintiff argues that the sale of CR Cal Neva's Founders Unit was improper  
8 because Defendants had failed to get the majority vote of the other members of Cal  
9 Neva Lodge LLC to authorize the sale, pursuant to the operating agreement.  
10 Defendants argue that Plaintiff's claim for Conversion fails for three reasons: (1)  
11 there is no evidence to support the notion that Defendants intentionally took his  
12 investment with knowledge that the Project would likely fail and with the intent to  
13 convert his investment; (2) Plaintiff had not been damaged due to the fact that he  
14 received the same interest in a Founders Unit as he intended; and (3) whether a  
15 conversion has occurred is generally a question of fact for the jury.

16 After review, the Court finds that there remains a genuine issue of material  
17 fact as to the elements necessary to establish a claim for conversion. Additionally, the  
18 Nevada Supreme Court has clearly held that the determination of whether a  
19 conversion has occurred is a question of fact for the jury.<sup>9</sup> Following the guidance of  
20 the Nevada Supreme Court, the question of whether CR Cal Neva, Criswell Radovan  
21 LLC, Radovan, and Criswell converted Plaintiff's \$1,000,000 investment in a  
22 Founders Unit is a question to be determined at trial.

## 23 II. Breach of Duty

24 Next, Plaintiff argues that he is entitled to judgment as a matter of law on his  
25 claim for breach of (fiduciary) duty asserted against PCA, acting in their role as  
26 Escrow Agent under the Subscription Agreement. Under the Restatement (Second)  
27 of Torts, a "fiduciary relationship exists between two persons when one of them is

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28 <sup>9</sup> *Id.* at 606.

1 under a duty to act for or to give advice for the benefit of another upon matters within  
2 the scope of the relation.”<sup>10</sup> Further, the Nevada Supreme Court has stated that a  
3 “breach of fiduciary duty claim seeks damages for injuries that result from the  
4 tortious conduct of one who owes a duty to another by virtue of the fiduciary  
5 relationship.”<sup>11</sup> In order to prevail on a claim for breach of fiduciary duty, the plaintiff  
6 “must show the existence of a fiduciary duty, the breach of that duty, and that the  
7 breach proximately caused the damages.”<sup>12</sup> The basis for Plaintiff’s claim against  
8 PCA stems from their action of releasing the funds of his \$1,000,000 Founders Unit  
9 investment to CR Cal Neva. Again, Plaintiff states that he never authorized, nor  
10 would have authorized, the transfer of the funds and further, that the transfer was  
11 in violation of the Operating Agreement. Therefore, Plaintiff argues that PCA  
12 breached its duty owed to Plaintiff as the Escrow Agent under the Subscription  
13 Agreement by releasing the funds to CR Cal Neva without authorization and failure  
14 to properly follow the Escrow Transfer Instructions.

15 Defendants argue that Plaintiff is not entitled to judgment as a matter of law  
16 because Plaintiff has failed to establish that he suffered damages as a result of the  
17 transfer of the funds and that there is no evidence to support a finding that PCA’s  
18 actions were made in bad faith or were contrary to the instructions given to PCA. In  
19 reviewing Plaintiff’s claim, the Court finds that there is a genuine issue of material  
20 fact as it pertains to PCA’s transfer of Plaintiff’s \$1,000,000 to CR Cal Neva. There is  
21 a dispute as to whether PCA followed the proper instructions in implementing the  
22 transfer of funds to CR Cal Neva, as PCA claims that it properly followed the  
23 instructions given to it and Plaintiff obviously claims to the contrary. The Court finds  
24 that this issue is to be determined at the time of trial and as such, summary judgment  
25 is not appropriate.

26  
27 <sup>10</sup> Restatement (Second) of Torts § 874.

<sup>11</sup> *Stalk v. Mushkin*, 125 Nev. 21, 28, 199 P.3d 838, 843 (2009).

28 <sup>12</sup> *Brown v. Kinross Gold U.S.A., Inc.*, 531 F. Supp. 2d 1234, 1245 (D. Nev. 2008).

### III. Negligence

Lastly, Plaintiff argues that judgment should be entered in his favor on his claim for negligence against PCA for their actions as the Escrow Agent under the Subscription Agreement. In order to prevail on a claim for negligence, "a plaintiff must generally show that: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty; (3) the breach was the legal cause of the plaintiff's injury; and (4) the plaintiff suffered damages."<sup>13</sup> "In Nevada, issues of negligence and proximate cause are usually factual issues to be determined by the trier of fact."<sup>14</sup> In order for a negligence claim to survive summary judgment "there must be factual disputes as to: (1) duty; (2) breach; (3) actual causation; (4) legal causation; and (5) damages."<sup>15</sup> In reviewing the submitted briefing and evidence before the Court, the Court finds that there are genuine issues of material fact as it concerns the elements of causation and damages.

Plaintiff argues that PCA's actions as the Escrow Agent in transferring his \$1,000,000 investment in a Founders Unit to CR Cal Neva without Plaintiff's authorization and allegedly in violation of the Operating Agreement establishes the required elements for a negligence claim. Plaintiff claims that PCA's knowledge that a majority vote of Cal Neva Lodge LLC was required before a sale to a third party, demonstrates that PCA acted negligently in transferring the funds. However, PCA asserts that they were acting within the scope directed to it and that the actions were not in violation in of the Operating Agreement. Since there exists a genuine issue of material fact as to whether PCA's actions in transferring Plaintiff's \$1,000,000 investment constitutes negligence, the Court finds that summary judgment is not appropriate.

<sup>13</sup> *Scialabba v. Brandise Const. Co.*, 112 Nev. 965, 968, 921 P.2d 928, 930 (1996).

<sup>14</sup> *Frances v. Plaza Pac. Equities, Inc.*, 109 Nev. 91, 94, 847 P.2d 722, 724 (1993).

<sup>15</sup> *Sims v. Gen. Tel. & Elecs.*, 107 Nev. 516, 521, 815 P.2d 151, 154 (1991) *overruled on other grounds by, Tucker v. Action Equip. & Scaffold Co.*, 113 Nev. 1349, 951 P.2d 1027 (1997).

1  
2       **Conclusion**

3       Having fully reviewed the pleadings and papers filed herein and the evidence  
4 presented to the Court, the Court finds that there exists genuine issues of material  
5 fact, thus precluding summary judgment in favor of the Plaintiff. Accordingly, and  
6 good cause appearing, Plaintiff's *Motion for Partial Summary Judgment* is **DENIED**.

7       **IT IS SO ORDERED.**

8       **DATED** this 15<sup>TH</sup> day of August, 2017.

9  
10                                 
11                               PATRICK FLANAGAN  
12                               District Judge

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 15<sup>TH</sup> day of August, 2017, I electronically filed the following with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Andrew N. Wolf, Esq., Attorney for Defendants David Marriner and Marriner Real Estate, LLC;

Richard G. Campbell, Jr., Esq., attorney for Plaintiff George Stuart Yount;  
Martin A. Little, Esq., attorney for Defendants Criswell Radovan, LLC; CR Cal Neva, LLC; Robert Radovan; William Criswell; Cal Neva Lodge, LLC;  
Powell, Coleman, and Arnold, LLP.

  
Judicial Assistant

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
7 IN AND FOR THE COUNTY OF WASHOE  
8

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

Case No.: CV16-00767

Dept. No.: 7

12 Plaintiff,

13 vs.

14 CRISWELL RADOVAN, LLC, a  
15 Nevada limited liability company; CR  
16 CAL NEVA, LLC, a Nevada limited  
17 liability company; ROBERT  
18 RADOVAN; WILLIMA CRISWELL;  
19 CAL NEVA LODGE, LLC, a Nevada  
20 limited liability company; POWELL,  
21 COLEMAN and ARNOLD, LLP;  
22 DAVID MARRINER; MARRINER  
23 REAL ESTATE, LLC, a Nevada  
24 limited liability company; and DOES  
25 1-10,

26 Defendants.  
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**ORDER**

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1 *Summary Judgment*. On August 7, 2017, Defendants filed their *Reply in Support of*  
2 *their Motion for Summary Judgment* and submitted the matter to the Court for  
3 decision.

4 **Factual Background**

5 This matter arose from a failed investment deal for the redevelopment of the  
6 Cal Neva Lodge, located in Crystal Bay, Lake Tahoe. Defendants Criswell and  
7 Radovan are two developers from California who purchased the Cal Neva Lodge in  
8 2013 with the intent to renovate and reopen the property. In order to raise  
9 \$20,000,000 in capital for the development of the property, Criswell and Radovan  
10 began to sell "Founders Units" through a private placement offering. Per the Private  
11 Placement Memorandum ("PPM"), each unit was set at \$1,000,000 and would give an  
12 investor a 3.5% ownership in the Cal Neva Lodge. Several Nevada limited liability  
13 companies were created by Criswell and Radovan to act as the vehicles to redevelop  
14 the Cal Neva Lodge, including: Defendant Criswell Radovan, LLC whose managers  
15 are Sharon Criswell, William Criswell, and Robert Radovan; and Defendant CR Cal  
16 Neva, LLC, whose managers are William Criswell and Robert Radovan.

17 In February 2014, Plaintiff was approached by Defendant DAVID MARRINER  
18 ("Marriner"), to discuss the proposed plans of Radovan and Criswell to remodel and  
19 reopen the Cal Neva Lodge. Marriner represented to Plaintiff that he was the acting  
20 agent and broker for Radovan and Criswell and the related legal entities operated  
21 therewith in connection with the development of the Cal Neva Lodge. During the next  
22 several months, Marriner provided Plaintiff information concerning the Cal Neva  
23 Lodge redevelopment project ("Project"), including marketing and promotional  
24 materials, tours of the Cal Neva Lodge, and made representations about Radovan  
25 and Criswell's previous project development history.

26 In July 2015, Defendant Radovan sent Plaintiff an email that included  
27 documents and other information regarding the financial information about the  
28 Project with the intent to solicit Plaintiff into purchasing a "Founders Unit" in the

1 Cal Neva Lodge. This included the PPM, a Confidential Offering Memorandum and  
2 an Amended and Restated Operating Agreement. The Operating Agreement outlines  
3 and controls the contractual relationship of the Members of the Cal Neva Lodge LLC.  
4 Plaintiff was later provided the "Subscription Booklet" that included: subscription  
5 instructions, a Member signature page, a certificate of non-foreign status, investor  
6 escrow and wire transfer information, and an IRS form W-9. Plaintiff was informed  
7 that there was \$1,500,000 of Founders Units still available for purchase as authorized  
8 under the PPM. Thereafter, Plaintiff decided to make an investment into the  
9 renovation of the Cal Neva Lodge by purchasing a \$1,000,000 Founders Unit. In order  
10 to fund his investment, Plaintiff was to pull money out of his IRA account. This took  
11 a significant amount of time due to the paperwork to reallocate the funds to the Cal  
12 Neva Lodge, LLC.

13 During this period, however, it appears that the project began to run into  
14 financing issues and over-budgetary concerns. Additionally, the loan with Hall CA-  
15 NV LLC ("Hall"), the primary lender on the property, began to fall out of balance,  
16 leaving the debt to equity ratio under the loan too high. As a result, Hall was likely  
17 to stop funding the project, causing the general contractor on the project Penta to not  
18 get paid and Penta ultimately ceasing work on the project. In order to put the loan in  
19 balance, a payment of \$1,400,000 had to be put into equity of Cal Neva Lodge for Hall  
20 to continue funding the loan. It was at this time that Radovan approached Mr. Les  
21 Busick ("Busick"), an investor who had already purchased a \$1,000,000 Founders  
22 Unit share in the Cal Neva Lodge, about purchasing the remaining \$1,500,000 under  
23 the PPM. In September 2015, Busick made a second investment, representing the  
24 remaining \$1,500,000 under the PPM and effectively closing the allotted \$20,000,000.

25 Although the \$20,000,000 cap had been reached as a result of Busick's  
26 investment, Radovan continued to move forward with Plaintiff's investment under  
27 the PPM. Radovan sent over the Subscription Agreement and other required  
28 documents under the PPM to become an investor. Plaintiff thereafter completed the

1 Subscription Agreement and instructed his trust company handling his IRA to  
2 transfer \$1,000,000 to PCA, the Escrow Agent assigned to collect the funds under the  
3 Subscription Agreement. On October 13, 2015, Radovan, on behalf of CR Cal Neva,  
4 signed off on the Acceptance of Subscription and PCA transferred Plaintiff's funds to  
5 CR Cal Neva.

6 During a meeting of Members held on December 12, 2015, Plaintiff was  
7 informed of several issues that he asserts in his *Complaint* were not disclosed to him  
8 prior to his purchase of the Founders Unit. Specifically, Plaintiff was informed that  
9 the Project was significantly over-budget and that the Cal Neva Lodge would not be  
10 opening as originally scheduled. Furthermore, Plaintiff was informed that his  
11 \$1,000,000 purchase of a Founders Unit were not the shares initially offered under  
12 the PPM, but rather shares that were originally purchased by Radovan and Criswell  
13 through CR Cal Neva LLC. Plaintiff's investment was now to represent \$1,000,000 of  
14 the initial \$2,000,000 that CR Cal Neva originally purchased. Ultimately, the Project  
15 fell into bankruptcy and construction ceased.

16 On April 4, 2016, Plaintiff filed suit in this Court, asserting claims for Breach  
17 of Contract, Breach of Duty, Fraud, Negligence, Conversion, Punitive Damages, and  
18 Fraud under NRS 90.570. Plaintiff alleges that the material misrepresentations  
19 regarding the development of the project amounted to actionable fraud. Further,  
20 Plaintiff alleges that the Defendants sale of CR Cal Neva Founders Unit instead of  
21 the Founders Unit originally offered gave rise to the tort claims stated above.

### 22 Standard of Review

23 Summary judgment is appropriate under Rule 56 of the Nevada Rules of Civil  
24 Procedure when the pleadings, depositions, answers to interrogatories, admissions,  
25 and affidavits, if any, that are properly before the court demonstrate that no genuine  
26 issue of material fact exists, and the moving party is entitled to judgment as a matter  
27 of law.<sup>1</sup> A factual dispute will be considered genuine if the evidence is as such that a

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28 <sup>1</sup> NRCP 56(C).

1 rational trier of fact could return a verdict in favor of the non-moving party.<sup>2</sup> When  
2 evaluating the pleadings and other evidence on file in a motion for summary  
3 judgment, the court should view it in a light most favorable to the non-moving party.<sup>3</sup>  
4 “When a motion for summary judgment is made and supported as required by NRCP  
5 56, the non-moving party may not rest upon general allegations and conclusions, but  
6 must, by affidavit or otherwise, set forth specific facts demonstrating the existence of  
7 a genuine factual issue.”<sup>4</sup> The substantive law controls which factual disputes are  
8 material and will preclude summary judgment; other factual disputes are irrelevant.<sup>5</sup>  
9 Having fully reviewed the pleadings and papers filed herein and the evidence before  
10 the Court, the Court finds that there exists genuine issues of material fact and thus,  
11 summary judgment is not appropriate.

### 12 Discussion

13 In their *Motion*, Defendants move for summary judgment on all of Plaintiff’s  
14 claims arguing that: (1) Plaintiff cannot establish that he suffered any damages as a  
15 result of his purchase of CR Cal Neva’s Founders Unit shares instead of those  
16 originally offered under the PPM; (2) Plaintiff has failed to establish the elements  
17 necessary to prevail on his fraud claims; (3) there is no evidence to support Plaintiff’s  
18 contention that PCA breached its fiduciary duty owed to Plaintiff; and (4) Plaintiff’s  
19 breach of contract claim against Cal Neva Lodge fails due to Cal Neva Lodge being in  
20 bankruptcy. The Court will address each argument in turn.

### 21 **I. Damages**

22 First, Defendants argue that they are entitled to judgment on Plaintiff’s claims  
23 because Plaintiff is unable to establish that he suffered damages as a result of  
24 purchasing CR Cal Neva’s Founders Unit shares instead of those originally offered  
25 under the PPM. Thus, Defendants assert that Plaintiff is in the same position as he

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26 <sup>2</sup> *Turner v. Mandalay Sports Entm’t, LLC*, 124 Nev. 213, 216, 180 P.3d 1172, 1174 (2008).

27 <sup>3</sup> *Id.* at 216.

28 <sup>4</sup> *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 713, 57 P.3d 82, 87 (2002) (emphasis added).

<sup>5</sup> *Id.* at 731.

1 would have been had he purchased the remaining \$1,500,000 Founders Unit shares  
2 instead of those originally purchased by CR Cal Neva. Defendants argue that Plaintiff  
3 had the same rights, obligations and value under the Founders Unit purchased  
4 through CR Cal Neva. Therefore, Defendants argue that Plaintiff cannot establish  
5 that he suffered any damages. Plaintiff counters that he does not have the same  
6 rights, obligations, and value under the CR Cal Neva Founders Unit shares because  
7 the sale of the shares was in violation of the Operating Agreement. Plaintiff asserts  
8 that Defendants failed to get the requisite Member approval to sell CR Cal Neva's  
9 Founder Units, as required by the Operating Agreement. Therefore, Plaintiff argues  
10 that the sale is void. Further, Plaintiff argues that had he known that he was not  
11 purchasing the Founders Unit shares that were initially offered, but rather Founder's  
12 Unit shares owed by CR Cal Neva, that he would not have gone through with the  
13 sale.

14 While Defendants are correct that Plaintiff must prove damages in order to  
15 prevail on his claims asserted in the *Complaint*,<sup>6</sup> the Court does not find that Plaintiff  
16 has unequivocally failed to do so at this point in litigation. Although Plaintiff would,  
17 in theory, receive the same investment in the Cal Neva Lodge through the purchase  
18 of CR Cal Neva's Founders Unit shares, it appears that this was not what was  
19 bargained for and there is dispute as to whether Defendants were even permitted to  
20 sell those shares. Therefore, there exists genuine issues of material fact relating the  
21 prospect of damages suffered by Plaintiff. Accordingly, the Court finds it extremely  
22 imprudent to grant summary judgment on Plaintiff's claims under this basis. The  
23 Court finds that this determination is to be resolved at the time of trial.

24 <sup>6</sup> See, *Brown v. Kinross Gold U.S.A., Inc.*, 531 F. Supp. 2d 1234, 1245 (D. Nev. 2008)(Damages is a  
25 required element for a claim of breach of fiduciary duty); *Sims v. Gen. Tel. & Elecs.*, 107 Nev. 516, 521,  
26 815 P.2d 151, 154 (1991) *overruled on other grounds by*, *Tucker v. Action Equip. & Scaffold Co.*, 113  
27 Nev. 1349, 951 P.2d 1027 (1997)(In order to prevail on a claim for negligence, damages must be  
28 proven); *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 606, 5 P.3d 1043, 1048 (2000)(A claim for  
conversion requires the plaintiff to establish damages; *Collins v. Burns*, 103 Nev. 394, 397, 741 P.2d  
819, 821 (1987)(Damages must be proven in order to prevail on a claim for fraud); NRS 90.570; NRS  
42.001.

## II. Fraud

Next, Defendants argue that Plaintiff has failed to establish the requisite elements of fraud, and thus summary judgment should be entered in favor of Defendants. Specifically, Defendants argue that: (1) the fraud claims against Criswell individually must fail as Plaintiff never spoke, met, or in any way communicated with Criswell, (2) Plaintiff was aware that the Project was over budget, (3) Plaintiff cannot establish that Defendants misrepresented the construction delays and the delay in the opening of the Cal Neva Lodge, (4) Plaintiff cannot establish that Defendants misrepresented the financial health of the Project, and (5) Plaintiff cannot establish that Defendants misrepresented Defendants' development experience. Plaintiff counters that under the summary judgment standard that requires evidence to be viewed in the light most favorable to the non-movant, that there is sufficient evidence to support a finding of a material misrepresentation. Therefore, Plaintiff argues that summary judgment is inappropriate.

In Nevada, the elements of a fraud claim are: (1) a false representation; (2) made with knowledge or belief that it is false or without a sufficient basis of information; (3) intent to induce reliance; and (4) damage resulting from the reliance.<sup>7</sup> The burden is on the plaintiff to establish the elements of fraud by clear and convincing proof.<sup>8</sup> Further, the Nevada Supreme Court has held that a "false representation must have played a material and substantial part in leading the plaintiff to adopt his particular course."<sup>9</sup> However, if a plaintiff "was unaware of it at the time that he acted, or it is clear that he was not in any way influenced by it, and would have done the same thing without it for other reasons, his loss is not attributed to the defendant."<sup>10</sup> Furthermore, it is considered a misrepresentation when there is "suppression or omission of a material fact which a party is bound in good faith to

<sup>7</sup> *Collins v. Burns*, 103 Nev. 394, 397, 741 P.2d 819, 821 (1987).

<sup>8</sup> *Lubbe v. Barba*, 91 Nev. 596, 598, 540 P.2d 115, 117 (1975).

<sup>9</sup> *Id.* at 598.

<sup>10</sup> *Id.*

1 disclose is equivalent to a false representation, since it constitutes an indirect  
2 representation that such fact does not exist.”<sup>11</sup>

3 Having fully reviewed the evidence and briefing submitted to the Court, the  
4 Court finds that there exist genuine issues of material fact as to whether the actions  
5 or inactions by the Defendants constitute material misrepresentations. Viewing the  
6 evidence in a light most favorable to the Plaintiff, it appears that Plaintiff could  
7 establish that there were omissions by the Defendants that could be the basis for  
8 actionable fraud. Further, there is some dispute as to the knowledge that Plaintiff  
9 had regarding the project delays and the financial stability of the Project and whether  
10 the Defendants had concealed these facts. Lastly, there is some evidence to support  
11 Plaintiff’s contention that actions to conceal the fact that the Founders Unit shares  
12 he purchased were actually shares purchased by CR Cal Neva, amounts to actionable  
13 fraud. Therefore, the Court finds that summary judgment is not appropriate and that  
14 this determination should be reserved for trial.

### 15 III. Breach of Duty

16 Next, Defendants argue that they are entitled to judgment on Plaintiff’s claim  
17 for breach of fiduciary duty against PCA because there is no evidence that PCA did  
18 anything other than follow the directions given to it by Radovan. Defendants claim  
19 that PCA understood and believed that Plaintiff was buying CR Cal Neva’s Founders  
20 Unit shares and merely acted accordingly. Under the Restatement (Second) of Torts,  
21 a “fiduciary relationship exists between two persons when one of them is under a duty  
22 to act for or to give advice for the benefit of another upon matters within the scope of  
23 the relation.”<sup>12</sup> Further, the Nevada Supreme Court has stated that a “breach of  
24 fiduciary duty claim seeks damages for injuries that result from the tortious conduct  
25 of one who owes a duty to another by virtue of the fiduciary relationship.”<sup>13</sup> In order  
26 to prevail on a claim for breach of fiduciary duty, the plaintiff “must show the

27 <sup>11</sup> *Nelson v. Heer*, 123 Nev. 217, 225, 163 P.3d 420, 426 (2007).

28 <sup>12</sup> Restatement (Second) of Torts § 874.

<sup>13</sup> *Stalk v. Mushkin*, 125 Nev. 21, 28, 199 P.3d 838, 843 (2009).



1 existence of a fiduciary duty, the breach of that duty, and that the breach proximately  
2 caused the damages.”<sup>14</sup>

3 The basis for Plaintiff’s claim against PCA stems from their action of releasing  
4 the funds of his \$1,000,000 Founders Unit investment to CR Cal Neva. Plaintiff states  
5 that he never authorized, nor would have authorized, the transfer of the funds and  
6 further, that the transfer was in violation of the Operating Agreement. Therefore,  
7 Plaintiff argues that PCA breached its duty owed to Plaintiff as the Escrow Agent  
8 under the Subscription Agreement by releasing the funds to CR Cal Neva without  
9 authorization and failure to properly follow the Escrow Transfer Instructions. After  
10 review, the Court finds that are genuine issues of material fact that preclude  
11 summary judgment on Plaintiff’s claim against PCA for breach of fiduciary duty.  
12 There is a dispute as to whether PCA correctly and justifiably transferred the funds  
13 to CR Cal Neva and whether PCA should have known, as the Escrow Agent, that  
14 Plaintiff had intended to purchase the Founders Unit shares outright and not from  
15 CR Cal Neva. Therefore, the Court finds that summary judgment in not appropriate.

#### 16 IV. Breach of Contract

17 Lastly, Defendants argue that they are entitled to judgment on Plaintiff’s  
18 breach of contract claim against Cal Neva Lodge, LLC based on Plaintiff’s belief that  
19 his contract to purchase the Founder Unit shares was with Cal Neva Lodge LLC, a  
20 company currently in bankruptcy proceedings. After review, the Court does not find  
21 that summary judgment is appropriate. Although Cal Neva Lodge, LLC is in  
22 bankruptcy proceedings, the Court does not find that is sufficient cause to dismiss a  
23 claim on summary judgment. Further, there is some dispute as to whether Plaintiff  
24 was intending to contract with Cal Neva Lodge, LLC or CR Cal Neva. Rather, it  
25 appears that Plaintiff ultimately contracted with CR Cal Neva to purchase their  
26 Founders Unit shares on account of the actions of Defendants. Since there exists a

27  
28 <sup>14</sup> *Brown v. Kinross Gold U.S.A., Inc.*, 531 F. Supp. 2d 1234, 1245 (D. Nev. 2008).

1 genuine issue of material fact, the Court finds that summary judgment is not  
2 appropriate.

3 **Conclusion**

4 Having fully reviewed the pleadings and papers filed herein and the evidence  
5 presented to the Court, the Court finds that there exists genuine issues of material  
6 fact, thus precluding summary judgment in favor of the Defendants. Accordingly, and  
7 good cause appearing, Defendants' *Motion for Summary Judgment* is **DENIED**

8 **IT IS SO ORDERED.**

9 **DATED** this 15<sup>TH</sup> day of August, 2017.

10   
11 PATRICK FLANAGAN  
12 District Judge  
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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 15<sup>TH</sup> day of August, 2017, I electronically filed the following with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Andrew N. Wolf, Esq., Attorney for Defendants David Marriner and Marriner Real Estate, LLC;  
Richard G. Campbell, Jr., Esq., attorney for Plaintiff George Stuart Yount;  
Martin A. Little, Esq., attorney for Defendants Criswell Radovan, LLC; CR Cal Neva, LLC; Robert Radovan; William Criswell; Cal Neva Lodge, LLC;  
Powell, Coleman, and Arnold, LLP.

  
Judicial Assistant

*37*

*37*

**CODE: 4210**

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Attorneys for Defendants DAVID MARRINER and  
MARRINER REAL ESTATE, LLC

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,

CASE NO. CV16-00767

DEPT NO. B7

Plaintiff,

v.

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 1-10,

Defendants.

**MARRINER'S TRIAL STATEMENT**

TO THE HON. PATRICK FLANAGAN, DISTRICT JUDGE:

Defendants DAVID MARRINER and MARRINER REAL ESTATE, LLC (collectively  
"Marriner"), respectfully submit the following trial statement per WDCR 5.

**CONTENTS/OUTLINE.**

1. Statement of facts and essential elements of the claims or defenses.
  - a. Yount's fraud claim against Marriner.
    - i. Elements of the fraud claim.
    - ii. Facts
  - b. Yount's statutory securities fraud claim against Marriner.
    - i. Elements of the statutory securities fraud claim.
    - ii. Facts
  - c. Yount's punitive damages claim against Marriner.
    - i. Elements of the punitive damages claim.
    - ii. Facts
  - d. Marriner's defense based on Yount's independent investigation.
    - i. Elements of the independent investigation defense.
    - ii. Facts
2. Statement of admitted or undisputed facts.
3. Issues of law and memorandum of authorities.
4. List of summaries, schedules, etc.
  - a. Cal-Neva project change orders.
5. Witness list.
6. Other comments, suggestions, or information for the assistance of the court.
7. Certification of counsel re settlement communications.

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1       **1. Statement of facts and essential elements of the claims or defenses.**

2           Only three of Yount's seven claims for relief are asserted against Marriner: the Third  
3 Claim for Relief for fraud, the Sixth Claim for Relief for punitive damages, and the Seventh  
4 Claim for Relief for state-law securities fraud. Only these three claims are discussed below,  
5 along with Marriner's affirmative defense based on Yount's independent investigation.

6           **A. Yount's fraud claim against Marriner. (Third Claim for Relief.)**

7           **i. Elements of the fraud claim:**

- 8           a. A false representation of a past or present fact made by the defendant;<sup>1</sup>  
9           b. Defendant's knowledge or belief that the representation of fact is false (or insufficient  
10           basis for making the representation);  
11           c. Defendant's intention to induce the plaintiff to act or to refrain from acting in reliance  
12           upon the misrepresentation;  
13           d. Plaintiff's justifiable reliance upon the misrepresentation; and,  
14           e. Damage to the plaintiff resulting from such reliance.<sup>2</sup>

15           

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<sup>1</sup> The Ninth Circuit has made it clear that in cases where conditions have deteriorated, "it is  
16 clearly insufficient for plaintiffs to say that the later, sobering revelations make the earlier,  
17 cheerier statement a falsehood." *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548-49 (9th  
18 Cir.1994) (overruled on other grounds). In order to properly plead fraud, plaintiffs must set forth  
19 an "explanation as to why the disputed statement was untrue or misleading when made. The Ninth  
20 Circuit has also held that an actionable misrepresentation must relate to fact and cannot be based  
21 "on an expression of opinion or a prediction." *Bulgo v. Munoz*, 853 F.2d 710, 716 (9th Cir.  
22 1988)); see also *Clark Sanitation, Inc. v. Sun Valley Disposal Co.*, 87 Nev. 338, 341-42, 487 P.2d  
23 337, 339 (1971) ("Nevada has recognized that expressions of opinion as distinguished from  
24 representations of fact, may not be the predicate for a charge of fraud.").

25           <sup>2</sup> *Bulbman, Inc. v. Nevada Bell*, 825 P.2d 588, 592 (1992). See, also, *Barmettler v. Reno Air, Inc.*,  
26 114 Nev. 441, 956 P.2d 1382 (1998), and *Collins v. Burns*, 103 Nev. 394, 741 P.2d 819 (1987)  
27 (noting that one liable for intentional (or fraudulent) misrepresentation generally must have  
28 communicated information knowing its falsity). The element of resulting damage requires proof  
of causation between the misrepresentation and the alleged harm. The plaintiff has the burden of  
proving each element of the fraud claim by clear and convincing evidence. *Lubbe v. Barba*, 91  
Nev. 596, 540 P.2d 115, 117 (1975). "Clear and convincing evidence is a higher standard than  
proof by the preponderance of the evidence and requires evidence establishing every factual  
element to be highly probable." *Ferguson v. LVMPD*, 131 Nev. Adv. Op. 94, 364 P. 3d 592, 596  
(2015). ***This burden of proof applies to every element of every claim asserted in this lawsuit by  
Yount against Marriner.***

**ii. Facts**

1. On February 13, 2014, Marriner and Cal Neva Lodge, LLC (“CNL”), signed a Real Estate Consulting Agreement – Cal Neva Lodge Development. (DM000367) The consulting agreement provides that “Marriner will manage all aspects of the sales of 5 Founding Memberships and 28 condominiums approved on the site plan.” The majority of the agreement relates to Marriner’s anticipated role in planning, pricing, marketing and sales of the 28 condos.
2. On February 18, 2014, Marriner first contacted Yount in to ask if he was interested in investing in the Cal-Neva project.
3. Sometime later in February, 2014, Yount advised Marriner that he had no interest in investing in the project.
4. From February, 2014, to June 17, 2015 (16 months), there were no communications between Marriner and Yount regarding the Cal-Neva project.
5. On June 17, 2015, sixteen (16) months after the initial contact, Yount contacted Marriner by email expressing possible interest in the project. “Long time, no hear. How’s your project going, Dave?”
6. On July 12, 2015, Marriner invited Yount to attend a tour of the Cal-Neva project construction site.
7. On July 14, 2015, Marriner conducted a tour of the project with Yount.
8. On July 14, 2015, Marriner provided Yount the July 2015 Monthly Status Report created by Criswell Radovan.
9. Page 16 of the July 2015 Monthly Status Report provided by Marriner to Yount on July 14, 2015 (DM000326), contains the following Construction Summary, which described the anticipated project cost overruns as follows:
  - The original budget has been adversely impacted due to items such as:
    - o Fire Marshall requirements to bring the building to current codes as well as significant electrical system upgrades for life safety such as new generator, new switchgear, etc. required by NV Energy
    - o Smoke removal system required by Fire Marshall
    - o Floor to floor fire dampers added by Fire Marshall
    - o Stairwell pressurization system installation required by Fire Marshall
    - o Terrace Units fire sprinkler system added by Fire Marshall
    - o Structural repairs due to unforeseen deterioration and lack of substantial footings.



- o Structural repairs due to rot and failure of significant beams and flooring beneath Circle Bar
- o Specialty Restaurant scope changes and upgrades
- o Casino Floor scope changes and upgrades
- o Three Meal Restaurant Kitchen Equipment and Grease Duct/Air Make Up Air upgrades added as required by code.
- o Replace Sprinkler System in the low rise due to massive rust in the lines.
- o Sewer Line Replacement due to cracking and failing lines.
- o Mandatory {code required} elevator hoistway upgrade requirements
- o Starwood brand quality standards requirements - upgrades in materials and scope
- o Fan coil unit replacement in all tower rooms
- o Civil/ Underground BMP additions required by code

10. Marriner was not on the CNL members' executive committee and the July 2015 Monthly Status Report was the most up-to-date information Marriner had to share with Yount at the time regarding the project's construction.

11. On July 14, 2015, following the project tour earlier that same day, Yount immediately began his independent investigation of the project. Yount contacted the project architect, Peter Grove (who was Yount's own architect) asking his opinions about the project.

(GSY002034, SY Depo #50), with added emphasis:

Yount: What do you rate the project's chance of success?

Grove: I'm going to say pretty good ...

Short term they are in a fundraising mode. ***Construction costs are exceeding the budget and they/we are trying to get our arms around it. .. and keep it in check.***

Long range, I'm a believer in the Cal Neva, the vision and direction the design is going .... and simply the name recognition. The rooms will be very nice, I like the idea of bringing up the level of the food service and restaurants. The north shore is so lacking in quality food. They are putting an emphasis on the entertainment also which I like. I really [like] the ownership team. Quality guys.

Glad you guys got the tour ... and I'm sure the full court press on jumping on board from an investment standpoint. I'll continue to keep you posted with pics as things progress.

Have a good one!

- 1       **12.** Following the tour on July 14, 2015, Yount was in direct contact with Robert Radovan,  
2       from whom Yount directly obtained answers to questions and other project information.
- 3       **13.** On July 25, 2015, Radovan informed Yount via email, “We are refinancing the [\$6  
4       Million] mezzanine piece with a less costly \$15,000,000 mezzanine. This is to cover the  
5       added costs of regulatory and code requirements which changed or were added by the two  
6       counties and TRPA which we deal with. We have also added some costs for design  
7       upgrades within the project.” (The added cost items were detailed in the foregoing  
8       Construction Progress report previously given to Yount, quoted above.)
- 9       **14.** On August 3, 2015, in response to Marriner asking Yount if he had any further questions,  
10      Yount advised Marriner that he was getting his information directly from Robert Radovan  
11      and that his CPA, Ken Tratner, would be getting more information directly from Radovan.
- 12      **15.** Thereafter, from August 3, 2015, until the date of his investment on October 13, 2015,  
13      Yount did not request any further information from Marriner.
- 14      **16.** Prior to investment, Yount learned that the project opening would be delayed to a soft  
15      opening in Spring, 2016, with a grand opening on Father's Day weekend 2016.
- 16      **17.** Prior to investment, Yount concluded that the project was **\$10 Million over budget** and  
17      so informed his CPA, Tratner, who was assisting Yount's investigation.
- 18      **18.** Yount is unaware of any financial improprieties in the project and hasn't identified any.
- 19      **19.** All project information provided to Yount came from CR or Radovan or the project  
20      architect, Peter Grove.
- 21      **20.** Any information provided by Marriner to Yount came from CR or Radovan.
- 22      **21.** Accordingly, there is no false statement made by Marriner to Yount.
- 23      **22.** There is no information provided by Marriner to Yount which Marriner knew or believed  
24      to be false.
- 25      **23.** All of Yount's assertions about inaccurate information are based on information he  
26      received from Radovan or people other than Marriner.
- 27      **24.** There is no false information provided by Marriner to Yount, upon which Yount actually  
28      relied.

- 1       **25.** Yount has not identified any information provided by Marriner to Yount, on which he  
2       relied in making his investment.
- 3       **26.** In September, 2015, Radovan began discussing with Les Busick Mr. Busick's possible  
4       acquisition of the remaining membership interests available under the private placement  
5       memorandum (PPM).
- 6       **27.** At the same time, Radovan was concerned about whether Yount would actually invest  
7       and, if so, when.
- 8       **28.** On or about October 1, 2015, Marriner stated to Radovan that it seemed like two  
9       investors, Yount and Busick, were about to send in their money at the same time,  
10      attempting to purchase the same membership interest.
- 11      **29.** Radovan replied that the developer CR had an additional membership unit to sell to  
12      Yount. Marriner offered to call Yount if Busick funded first. Marriner recalls that  
13      Radovan asked Marriner to stay out of it, stating that CR would be able to provide the  
14      appropriate founder's membership unit to Yount.
- 15      **30.** Radovan, however, assumed later that Marriner had told Yount that Busick had invested  
16      and that Yount would be purchasing one of CR's developer shares.
- 17      **31.** Radovan's statements to Marriner that CR had an original \$1 Million founder's unit which  
18      could be sold to Yount was consistent with various notes in the Cal-Neva capital tables.
- 19      **32.** Marriner was not privy to exactly when Busick funded his additional investment.  
20      Marriner later learned it occurred in early October, 2015.
- 21      **33.** In light of the foregoing conversations with Radovan, Marriner did not tell Yount that  
22      Busick had invested prior to Yount funding his investment.
- 23      **34.** There is no evidence that Marriner's duties required him to disclose to Yount the further  
24      interest and investment by Busick.
- 25      **35.** Marriner had no involvement in Yount's execution or delivery of his investment  
26      documents.
- 27      **36.** Marriner had no involvement in Yount's delivery of funds to Coleman.
- 28      **37.** Mariner did not handle the receipt or delivery of Yount's investment documents or  
    Yount's money.

- 1       **38.** Marriner had no knowledge or reason to anticipate that Coleman would release Yount's  
2       invested money to CR without first notifying Yount and without transfer documents  
3       approved by Yount for that purpose.
- 4       **39.** Yount's damages, if any, arise from the delivery of his invested funds by the escrow  
5       agent, Coleman to CR without Yount's consent and execution of corresponding transfer  
6       documents.
- 7       **40.** There is no causal connection between any act or omission by Marriner in regard to the  
8       alleged failure by Marriner to inform Yount that Busick was making a further investment  
9       in the project and the delivery of Yount's investment funds by Coleman, the escrow agent,  
10      to CR without documents approved by Yount for that purpose.
- 11      **41.** There is no evidence that the membership interest Yount received is materially different  
12      from the one he thought he was purchasing. Any assertion to this effect is speculative and  
13      not supported by competent evidence.
- 14      **42.** Certain members of Cal Neva interfered in the Mosaic refinancing expected by Radovan.
- 15      **43.** Yount was aware of the interference when it occurred.
- 16      **44.** Yount's alleged damages result in whole or in part from the interference in the Mosaic  
17      loan.
- 18      **45.** Yount confirmed that he read, understood, and agreed to the provisions in the Private  
19      Placement Memorandum ("PPM").

20                   **A. Yount's statutory securities fraud claim against Marriner. (Seventh Claim**  
21                   **for Relief.)**

22                   **i. Elements of the statutory securities fraud claim.**

23           As a result of the interplay between NRS 90.660 and NRS 90.570, the only private right of  
24           action under NRS 90.570 is under Subsection 2. Synthesizing the two related statutes and the  
25           case law, the elements of a private claim under NRS 90.570 are, therefore, the following:

- 26                   1. Either: (a) an untrue statement of a material fact or (b) the failure to state a  
27                   material fact necessary to make other statements made not misleading in the  
28                   light of the circumstances under which they are made;

2. Scienter (defendant's knowledge of the alleged falsity);<sup>3</sup>
3. Reliance;
4. The plaintiff's purchase of the security;
5. Plaintiff's tender of the security back to the issuer, unless it was sold by the purchaser.

**Note:** Punitive Damages are not authorized by NRS 90.660, through which Yount's civil liability claim under NRS 90.570(2) is asserted. <sup>4</sup>

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<sup>3</sup> Plaintiff must establish that the alleged misrepresentations and omissions were made intentionally, recklessly or knowingly. Scienter, in this context, refers to a mental state embracing intent to deceive, manipulate or defraud. *Newton v. Uniwest Financial Corp.*, 802 F. Supp. 361, 367, FN 42 ( D. Nevada 1990), defining scienter under Rule 10b-5.

<sup>4</sup> NRS 90.660 Civil liability.

1. A person who offers or sells a security in violation of any of the following provisions: \*\*\* (d) Subsection 2 of NRS 90.570; \*\*\*

=> is liable to the person purchasing the security. Upon tender of the security, the purchaser may recover the consideration paid for the security and interest at the legal rate of this State from the date of payment, costs and reasonable attorney's fees, less the amount of income received on the security. A purchaser who no longer owns the security may recover damages. ...

NRS 90.570 Offer, sale and purchase. In connection with the offer to sell, sale, offer to purchase or purchase of a security, a person shall not, directly or indirectly: \*\*\*

2. Make an untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made not misleading in the light of the circumstances under which they are made;...

\*\*\*

Although reliance and scienter are not required elements of securities fraud in state enforcement actions initiated under NRS 90.570(2) and (3), *Secretary of State v. Tretiak*, 117 Nev. 299, 22 P. 3d 1134 (2001), by implication they remain as elements of a private claim for relief under NRS 90.570. The clear and repeated differentiation of state enforcement actions in *Tretiak* can only mean that that scienter and reliance are still necessary elements of a private claim under the statute. Moreover, the requirement of a purchase in NRS 90.660 necessarily implies that reliance must also be an element. See *Paracor Finance v. General Elec. Capital Corp.*, 96 F.3d 1151, 1157 (9th Cir.1996) (stating that "[t]he elements of a Rule 10b-5 claim are: (1) a misrepresentation or omission of a material fact, (2) reliance, (3) scienter, and (4) resulting damages"); see also *Shivers v. Amerco*, 670 F.2d 826, 831 (9th Cir.1982) (stating that "[t]he blue sky laws of ... Nevada ... parallel Rule 10b-5.... Since ... Nevada ... chose to enact laws paralleling

1                   **ii. Facts**

2           The same facts underlying Yount's common law fraud claim against Marriner apply to  
3 the state securities fraud claim. See facts numbered 1 through 45 listed above. The burden of  
4 proof is, again, clear and convincing evidence. See, *Lubbe v. Barba*, supra, 91 Nev. 596, 540  
5 P.2d 115, 117 (1975). There is no viable securities fraud claim.

6                   **B. Yount's punitive damages claim against Marriner. (Sixth Claim for Relief.)**

7                   **i. Elements of the punitive damages claim:**

- 8                   1. Breach of an obligation not arising from contract;
- 9                   2. Proof by clear and convincing evidence that the defendant is guilty of  
10                   oppression, fraud or malice...." (NRS 42.005)
- 11                   3. "'Fraud' means an intentional misrepresentation, deception or concealment of  
12                   a material fact known to the person with the intent to deprive another person of  
13                   his or her rights or property or to otherwise injure another person." (NRS  
14                   42.001(2).)
- 15                   4. Liability for punitive damages must be individually assessed vis a vis each  
16                   defendant in accordance with NRS Chapter 42. (NRS 42.005.)

17                   **i. Facts**

18           The same facts underlying Yount's fraud claims against Marriner apply to the Punitive  
19 damages claim. See facts numbered 1 through 45 listed above. The burden of proof is, again,  
20 clear and convincing evidence. NRS 42.005. There is no viable punitive damages claim.

21                   **C. Marriner's defense based on Yount's independent investigation. (Marriner's**  
22                   **Second Affirmative Defense, Answer at 9:20)**

23                   **i. Elements of the independent investigation defense:**

- 24                   1. Plaintiff made an independent investigation of the subject matter of the transaction;
- 25                   2. Defendant did not interfere with plaintiff's investigation.<sup>5</sup>

26           Rule 10b-5, we think it only logical that [Nevada] intended the statutes to be interpreted  
27 consistently with the federal rule").

28           <sup>5</sup> *Blanchard v. Blanchard*, 108 Nev. 908, 839 P.2d 1320, 1323 (1992) (generally, "a plaintiff making an independent investigation will be charged with knowledge of facts which reasonable

1                   **ii. Facts**

2       **46.** Prior to investment, Yount conducted an independent investigation of the project with his  
3           CPA, Ken Tratner.

4       **47.** As part of his independent investigation, Yount synthesized the material he received  
5           regarding the project from various sources and shared it with his CPA, Ken Tratner.

6       **48.** Prior to investment, Yount and his CPA asked numerous questions of Robert Radovan by  
7           email and telephone, including about budgets, vacancy rates, capital requirements,  
8           construction cost overruns, project vision, and other financial matters.

9       **49.** Prior to investment, Yount contacted the project architect, Peter Grove (who happened to  
10          be Yount's own architect), to obtain his advice and impressions about the project.

11       **50.** Yount cannot identify any question, request for information or other follow-up  
12          information that was not provided to Yount or to his CPA during their investigation.

13       **51.** No one interfered in Yount's or his CPA's investigation.

14       **52.** Yount's CPA reviewed the project information with Yount and advised him that it was a  
15          reasonable investment.

16       **53.** The project architect advised Yount regarding the project design and construction issues,  
17          including the need to contain the cost overruns, and advised him that it was a good  
18          project.

19       **2.       Statement of admitted or undisputed facts.**

20           Most of the facts stated above (No 1 – 53) are undisputed or are without any legitimate  
21          controversy. Only the following facts listed and numbered above are subject to any significant  
22          evidentiary dispute: 26-30, and 38-44.

23           \_\_\_\_\_  
24          diligence would have disclosed [because] such a plaintiff is deemed to have relied on his own  
25          judgment and not on the defendant's representations") See, also, *Bartlett v. Schmidt*, 33 SW 3d 35,  
26          38 (Tex. App. 2000) [alleged fraud and concealment by sellers regarding use restrictions on real  
27          property) ("[R]egardless of the result of his investigation, ***the buyer's decision to undertake such***  
28          ***an investigation indicates that he or she is not relying on the seller's representations about the***  
                ***property.***"). From the case law, the buyer's independent investigation negates the fraud element of  
                reliance, by showing an absence of reliance.

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2       **3.       Issues of law and memorandum of authorities.**

3           The most significant issues of law in this matter pertain to the elements of the claims  
4 and defenses, and the parties' respective burdens of proof, all of which are addressed above in  
5 the form of footnotes to the listing of claim and defense elements, and are not repeated here.

6       **4.       List of summaries, schedules, etc.**

- 7           a. Cal-Neva project change orders/applications for payment. Contained in CR's  
8           Exhibits and/or Trial Statement.

9       **5.       Marriner's Witness List.**

- 10          a. David Marriner  
11          b. Stuart Yount  
12          c. Robert Radovan  
13          d. William Criswell  
14          e. Bruce Coleman  
15          f. Les Busick.

16       **6.       Other comments, suggestions, or information for the assistance of the court.**

17           While Marriner believes that there is no fraud and, therefore, no basis for punitive  
18 damages, any proceedings regarding punitive damages must comply with the procedures  
19 mandated by NRS Chapter 42.

20       **7.       Certification of counsel re settlement communications.**

21           Undersigned counsel for Marriner and counsel for Yount recently engaged in settlement  
22 discussions, without reaching a settlement. Marriner made an offer. As of this writing, Yount  
23 has not made a demand.

24       ///

25  
26       ///



1       **Affirmation:** The undersigned hereby affirms that the foregoing document does not  
2 contain the social security number of any person.

3       Dated: August 25, 2017.

4       INCLINE LAW GROUP, LLP

5       By: s/Andrew N. Wolf  
6       ANDREW N. WOLF  
7       Nevada State Bar No. 4424  
8       Attorneys for Defendants DAVID MARRINER  
9       and MARRINER REAL ESTATE, LLC

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## CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Incline Law Group, LLP, and that on this day, I caused to be served, a true and correct copy of:

### MARRINER's TRIAL STATEMENT

UPON:

|   |  |
|---|--|
| Richard G. Campbell, Jr.<br>DOWNEY BRAND LLC<br>100 West Liberty, Suite 900<br>Reno, NV 89501<br>Telephone: 775-329-5900<br>Facsimile: 775-997-7417                       | Attorney for Plaintiff George<br>Stuart Yount, Individually and in his<br>capacity as Owner of George Stuart<br>Yount IRA  |
| Martin A. Little<br>HOWARD & HOWARD ATTORNEYS PLLC<br>3800 Howard Hughes Parkway, Suite 1000<br>Las Vegas, NV 86169<br>Telephone: 702-257-1483<br>Facsimile: 702-567-1568 | Attorney for Defendants Criswell<br>Radovan, LLC, CR CAL NEVA LLC,<br>Robert Radovan, William Criswell, Cal<br>Neva Lodge, LLC, Powell, Coleman and<br>Arnold, LLP |

**VIA: Washoe County Eflex e-filing system:** A true and correct copy of the foregoing document(s) was (were) electronically served via the court's electronic filing system to the above named attorneys associated with this case. If the any of the above named attorneys (and all of their listed co-counsel within the same firm) are not registered with the court's e-filing system, then a true and correct paper copy of the above-named document(s) was(were) served on the attorney via U.S.P.S. first class mail with first-class postage prepaid, to the attorney's address listed above, on this date.

Date: August 25, 2017.

\_\_\_\_\_/s/ Andrew N. Wolf\_\_\_\_\_  
Andrew N. Wolf

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**CODE: 1750**

ANDREW N. WOLF (#4424)  
JEREMY L. KRENEK (#13361)  
Incline Law Group, LLP  
264 Village Blvd., Suite 104  
Incline Village, Nevada 89451  
(775) 831-3666

Attorneys for Defendants DAVID MARRINER and  
MARRINER REAL ESTATE, LLC

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,

CASE NO. CV16-00767

DEPT NO. B7

Plaintiff,

v.

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 1-10,

Defendants.

**MARRINER'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

TO THE HON. PATRICK FLANAGAN, DISTRICT JUDGE:

Defendants DAVID MARRINER and MARRINER REAL ESTATE, LLC (collectively  
"Marriner"), respectfully submit the following proposed findings of fact and conclusion of law,

per the court's request and per NRCP 52.

**I.**

**PROPOSED FINDINGS OF FACT.**

1. On February 13, 2014, Marriner and Cal Neva Lodge, LLC ("CNL"), signed a Real Estate Consulting Agreement – Cal Neva Lodge Development. (DM000367) The consulting agreement provides that "Marriner will manage all aspects of the sales of 5 Founding Memberships and 28 condominiums approved on the site plan." The majority of the agreement relates to Marriner's anticipated role in planning, pricing, marketing and sales of the 28 condos.
2. On February 18, 2014, Marriner first contacted Yount in to ask if he was interested in investing in the Cal-Neva project.
3. Sometime later in February, 2014, Yount advised Marriner that he had no interest in investing in the project.
4. From February, 2014, to June 17, 2015 (16 months), there were no communications between Marriner and Yount regarding the Cal-Neva project.
5. On June 17, 2015, sixteen (16) months after the initial contact, Yount contacted Marriner by email expressing possible interest in the project. "Long time, no hear. How's your project going, Dave?"
6. On July 12, 2015, Marriner invited Yount to attend a tour of the Cal-Neva project construction site.
7. On July 14, 2015, Marriner conducted a tour of the project with Yount.
8. On July 14, 2015, Marriner provided Yount the July 2015 Monthly Status Report created by Criswell Radovan.
9. Page 16 of the July 2015 Monthly Status Report provided by Marriner to Yount on July 14, 2015 (DM000326), contains the following Construction Summary, which described the anticipated project cost overruns as follows:
  - The original budget has been adversely impacted due to items such as:
    - o Fire Marshall requirements to bring the building to current codes as well as significant electrical system upgrades for life safety such as new generator, new switchgear, etc. required by NV Energy
    - o Smoke removal system required by Fire Marshall

- o Floor to floor fire dampers added by Fire Marshall
- o Stairwell pressurization system installation required by Fire Marshall
- o Terrace Units fire sprinkler system added by Fire Marshall
- o Structural repairs due to unforeseen deterioration and lack of substantial footings.
- o Structural repairs due to rot and failure of significant beams and flooring beneath Circle Bar
- o Specialty Restaurant scope changes and upgrades
- o Casino Floor scope changes and upgrades
- o Three Meal Restaurant Kitchen Equipment and Grease Duct/Air Make Up Air upgrades added as required by code.
- o Replace Sprinkler System in the low rise due to massive rust in the lines.
- o Sewer Line Replacement due to cracking and failing lines.
- o Mandatory {code required} elevator hoistway upgrade requirements
- o Starwood brand quality standards requirements - upgrades in materials and scope
- o Fan coil unit replacement in all tower rooms
- o Civil/ Underground BMP additions required by code

**10. Marriner was not on the CNL members' executive committee and the July 2015**

Monthly Status Report was the most up-to-date information Marriner had to share with Yount at the time regarding the project's construction.

**11. On July 14, 2015, following the project tour earlier that same day, Yount immediately began his independent investigation of the project. Yount contacted the project architect, Peter Grove (who was Yount's own architect) asking his opinions about the project. (GSY002034, SY Depo #50), with added emphasis:**

Yount: What do you rate the project's chance of success?

Grove: I'm going to say pretty good ...

Short term they are in a fundraising mode. ***Construction costs are exceeding the budget and they/we are trying to get our arms around it. .. and keep it in check.***

Long range, I'm a believer in the Cal Neva, the vision and direction the design is going .... and simply the name recognition. The rooms will be very nice, I like the idea of bringing up the level of the food service and restaurants. The north shore is so lacking in quality food. They are putting an emphasis on the entertainment also which I like. I really [like] the ownership team. Quality guys.

Glad you guys got the tour ... and I'm sure the full court press on jumping on board from an investment standpoint. I'll continue to keep you posted with pics as things progress.

1 Have a good one!

2 **12.** Following the tour on July 14, 2015, Yount was in direct contact with Robert  
3 Radovan, from whom Yount directly obtained answers to questions and other project  
4 information.

5 **13.** On July 25, 2015, Radovan informed Yount via email, "We are refinancing the [\$6  
6 Million] mezzanine piece with a less costly \$15,000,000 mezzanine. This is to cover  
7 the added costs of regulatory and code requirements which changed or were added by  
8 the two counties and TRPA which we deal with. We have also added some costs for  
9 design upgrades within the project." (The added cost items were detailed in the  
10 foregoing Construction Progress report previously given to Yount, quoted above.)

11 **14.** On August 3, 2015, in response to Marriner asking Yount if he had any further  
12 questions, Yount advised Marriner that he was getting his information directly from  
13 Robert Radovan and that his CPA, Ken Tratner, would be getting more information  
14 directly from Radovan.

15 **15.** Thereafter, from August 3, 2015, until the date of his investment on October 13, 2015,  
16 Yount did not request any further information from Marriner.

17 **16.** Prior to investment, Yount learned that the project opening would be delayed to a soft  
18 opening in Spring, 2016, with a grand opening on Father's Day weekend 2016.

19 **17.** Prior to investment, Yount concluded that the project was **\$10 Million over budget**  
20 and so informed his CPA, Tratner, who was assisting Yount's investigation.

21 **18.** Yount is unaware of any financial improprieties in the project and hasn't identified  
22 any.

23 **19.** All project information provided to Yount came from CR or Radovan or the project  
24 architect, Peter Grove.

25 **20.** Any information provided by Marriner to Yount came from CR or Radovan.

26 **21.** Accordingly, there is no false statement made by Marriner to Yount.

27 **22.** There is no information provided by Marriner to Yount which Marriner knew or  
28 believed to be false.

- 1       **23.** All of Yount's assertions about inaccurate information are based on information he  
2       received from Radovan or people other than Marriner.
- 3       **24.** There is no false information provided by Marriner to Yount, upon which Yount  
4       actually relied.
- 5       **25.** Yount has not identified any information provided by Marriner to Yount, on which he  
6       relied in making his investment.
- 7       **26.** In September, 2015, Radovan began discussing with Les Busick Mr. Busick's possible  
8       acquisition of the remaining membership interests available under the private  
9       placement memorandum (PPM).
- 10      **27.** At the same time, Radovan was concerned about whether Yount would actually invest  
11      and, if so, when.
- 12      **28.** On or about October 1, 2015, Marriner stated to Radovan that it seemed like two  
13      investors, Yount and Busick, were about to send in their money at the same time,  
14      attempting to purchase the same membership interest.
- 15      **29.** Radovan replied that the developer CR had an additional membership unit to sell to  
16      Yount. Marriner offered to call Yount if Busick funded first. Marriner recalls that  
17      Radovan asked Marriner to stay out of it, stating that CR would be able to provide the  
18      appropriate founder's membership unit to Yount.
- 19      **30.** Radovan, however, assumed later that Marriner had told Yount that Busick had  
20      invested and that Yount would be purchasing one of CR's developer shares.
- 21      **31.** Radovan's statements to Marriner that CR had an original \$1 Million founder's unit  
22      which could be sold to Yount was consistent with various notes in the Cal-Neva  
23      capital tables.
- 24      **32.** Marriner was not privy to exactly when Busick funded his additional investment.  
25      Marriner later learned it occurred in early October, 2015.
- 26      **33.** In light of the foregoing conversations with Radovan, Marriner did not tell Yount that  
27      Busick had invested prior to Yount funding his investment.
- 28      **34.** There is no evidence that Marriner's duties required him to disclose to Yount the  
      further interest and investment by Busick.



- 1       **35.** Marriner had no involvement in Yount’s execution or delivery of his investment  
2       documents.
- 3       **36.** Marriner had no involvement in Yount’s delivery of funds to Coleman.
- 4       **37.** Mariner did not handle the receipt or delivery of Yount’s investment documents or  
5       Yount’s money.
- 6       **38.** Marriner had no knowledge or reason to anticipate that Coleman would release  
7       Yount’s invested money to CR without first notifying Yount and without transfer  
8       documents approved by Yount for that purpose.
- 9       **39.** Yount’s damages, if any, arise from the delivery of his invested funds by the escrow  
10      agent, Coleman to CR without Yount’s consent and execution of corresponding  
11      transfer documents.
- 12      **40.** There is no causal connection between any act or omission by Marriner in regard to  
13      the alleged failure by Marriner to inform Yount that Busick was making a further  
14      investment in the project and the delivery of Yount’s investment funds by Coleman,  
15      the escrow agent, to CR without documents approved by Yount for that purpose.
- 16      **41.** There is no evidence that the membership interest Yount received is materially  
17      different from the one he thought he was purchasing. Any assertion to this effect is  
18      speculative and not supported by competent evidence.
- 19      **42.** Certain members of Cal Neva interfered in the Mosaic refinancing expected by  
20      Radovan.
- 21      **43.** Yount was aware of the interference when it occurred.
- 22      **44.** Yount’s alleged damages result in whole or in part from the interference in the Mosaic  
23      loan.
- 24      **45.** Yount confirmed that he read, understood, and agreed to the provisions in the Private  
25      Placement Memorandum (“PPM”).
- 26      **46.** Prior to investment, Yount conducted an independent investigation of the project with  
27      his CPA, Ken Tratner.
- 28      **47.** As part of his independent investigation, Yount synthesized the material he received  
    regarding the project from various sources and shared it with his CPA, Ken Tratner.

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- e. Plaintiff has failed to establish damages to the plaintiff resulting from such reliance.<sup>2</sup>

**B. Yount's statutory securities fraud claim against Marriner. (Seventh Claim for Relief.)**

1. Plaintiff has failed to establish either: (a) an untrue statement of a material fact by Defendant Marriner or (b) Defendant Marriner's failure to state a material fact necessary to make other statements made not misleading in the light of the circumstances under which they are made;
2. Plaintiff has failed to establish Defendant Marriner's Scienter (defendant's knowledge of the alleged falsity);<sup>3</sup>
3. Plaintiff has failed to establish Reliance upon either: (a) an untrue statement of a material fact by Defendant Marriner or (b) Defendant Marriner's failure to state a material fact necessary to make other statements made not misleading;

**C. Yount's punitive damages claim against Marriner. (Sixth Claim for Relief.)**

1. Plaintiff has failed to establish by clear and convincing evidence that defendant Marriner is guilty of oppression, fraud or malice....” (NRS 42.005)

---

<sup>2</sup> *Bulbman, Inc. v. Nevada Bell*, 825 P.2d 588, 592 (1992). See, also, *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 956 P.2d 1382 (1998), and *Collins v. Burns*, 103 Nev. 394, 741 P.2d 819 (1987) (noting that one liable for intentional (or fraudulent) misrepresentation generally must have communicated information knowing its falsity). The element of resulting damage requires proof of causation between the misrepresentation and the alleged harm. The plaintiff has the burden of proving each element of the fraud claim by clear and convincing evidence. *Lubbe v. Barba*, 91 Nev. 596, 540 P.2d 115, 117 (1975). “Clear and convincing evidence is a higher standard than proof by the preponderance of the evidence and requires evidence establishing every factual element to be highly probable.” *Ferguson v. LVMPD*, 131 Nev. Adv. Op. 94, 364 P. 3d 592, 596 (2015). This burden of proof applies to every element of every claim asserted in this lawsuit by Yount against Marriner.

<sup>3</sup> Plaintiff must establish that the alleged misrepresentations and omissions were made intentionally, recklessly or knowingly. Scienter, in this context, refers to a mental state embracing intent to deceive, manipulate or defraud. *Newton v. Uniwest Financial Corp.*, 802 F. Supp. 361, 367, FN 42 (D. Nevada 1990), defining scienter under Rule 10b-5.

**D. Marriner's defense based on Yount's independent investigation. (Marriner's Second Affirmative Defense, Answer at 9:20)**

1. Plaintiff, with the support of his CPA, made an independent investigation of the subject matter of the transaction;
2. Defendants did not interfere with Plaintiff's investigation.
3. Plaintiff did not rely on any material information created or provided by Marriner. He relied on the information gathered through his independent investigation of the facts surrounding the transaction.

**Affirmation:** The undersigned hereby affirms that the foregoing document does not contain the social security number of any person.

Dated: August 25, 2017.

INCLINE LAW GROUP, LLP

By: s/Andrew N. Wolf  
ANDREW N. WOLF  
Nevada State Bar No. 4424  
Attorneys for Defendants DAVID MARRINER  
and MARRINER REAL ESTATE, LLC

## CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Incline Law Group, LLP, and that on this day, I caused to be served, a true and correct copy of:

### MARRINER'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

UPON:

|   |  |
|---|--|
| Richard G. Campbell, Jr.<br>DOWNEY BRAND LLC<br>100 West Liberty, Suite 900<br>Reno, NV 89501<br>Telephone: 775-329-5900<br>Facsimile: 775-997-7417                       | Attorney for Plaintiff George<br>Stuart Yount, Individually and in his<br>capacity as Owner of George Stuart<br>Yount IRA  |
| Martin A. Little<br>HOWARD & HOWARD ATTORNEYS PLLC<br>3800 Howard Hughes Parkway, Suite 1000<br>Las Vegas, NV 86169<br>Telephone: 702-257-1483<br>Facsimile: 702-567-1568 | Attorney for Defendants Criswell<br>Radovan, LLC, CR CAL NEVA LLC,<br>Robert Radovan, William Criswell, Cal<br>Neva Lodge, LLC, Powell, Coleman and<br>Arnold, LLP |

**VIA: Washoe County Eflex e-filing system:** A true and correct copy of the foregoing document(s) was (were) electronically served via the court's electronic filing system to the above named attorneys associated with this case. If the any of the above named attorneys (and all of their listed co-counsel within the same firm) are not registered with the court's e-filing system, then a true and correct paper copy of the above-named document(s) was(were) served on the attorney via U.S.P.S. first class mail with first-class postage prepaid, to the attorney's address listed above, on this date.

Date: August 25, 2017.

\_\_\_\_\_/s/ Andrew N. Wolf\_\_\_\_\_  
Andrew N. Wolf

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1 **4210**

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10 *Attorneys for Criswell Radovan, LLC, CR Cal Neva, LLC,*

11 *Robert Radovan, William Criswell, Cal Neva Lodge, LLC,*

12 *and Powell, Coleman and Arnold LLP*

13 **IN THE SECOND JUDICIAL DISTRICT COURT OF**  
14 **THE STATE OF NEVADA IN AND FOR THE**  
15 **COUNTY OF WASHOE**

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

19 Plaintiff,

20 vs.

21 CRISWELL RADOVAN, LLC, a Nevada  
22 limited liability company; CR Cal Neva, LLC,  
23 a Nevada limited liability company; ROBERT  
24 RADOVAN; WILLIAM CRISWELL; CAL  
25 NEVA LODGE, LLC, a Nevada limited  
26 liability company; POWELL, COLEMAN and  
27 ARNOLD LLP; DAVID MARRINER;  
28 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' TRIAL STATEMENT**

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, file the following Pretrial Statement pursuant to Rule 5 of the Second Judicial Court Rules.

**A.**

**CONCISE STATEMENT OF CLAIMED FACTS SUPPORTING  
DEFENDANTS' DEFENSES**

**1. Each of Plaintiff's Claims Suffer From a Lack of Causation and Damages.**

The thrust of Plaintiff's lawsuit is that he thought he was buying part of the last \$1.5 million Founder's Share that Les Busick ultimately took before Plaintiff could get his funding in place. See, Plaintiff Depo., at 43:13-18. Fundamental to each of Plaintiff's causes of action is causation and damages -- neither of which Plaintiff can prove since CR Cal Neva's Founder's Share has the identical rights, obligations and value as the Founder's Share Plaintiff thought he was purchasing. The bottom line is Plaintiff got exactly what he bargained for-- a Founder's Share in the Project. Moreover, Criswell and Radovan did not "pocket" the money. Plaintiff's investment was largely put right back into the Project to satisfy debts that the Project owed. Plaintiff would be in the exact position he is now had he beat Les Busick to purchase the remaining \$1.5 million Founder's Share. Accordingly, Plaintiff has not been damaged and his claims should be dismissed.

**2. Fraud and Punitive Damages**

Plaintiff cannot meet his heavy burden of proving fraud and punitive damages by clear and convincing evidence.

**i. Fraud and Punitive Damage Claims Against Criswell.**

Plaintiff's fraud-based claims must fail against Criswell as Plaintiff admitted that he never met, spoke to or communicated with Criswell prior to making his investment. See Plaintiff depo., at 58:13-59:1; 80:17-22. Criswell had little involvement in this Project before Plaintiff invested, and Plaintiff's first dealings with Criswell was several months after he made his investment. It is fundamental that any alleged misrepresentation made by Marriner or Radovan (which never occurred) cannot be imputed to Criswell.



1                   ii.       **Plaintiff's Claim that the Project Was More Overbudget Than**  
2                   **Represented.**

3           Plaintiff contends he was defrauded because the Project was more over-budget than  
4 represented by Marriner and Radovan. Plaintiff Depo., pp. 71-72; 84-85. Specifically, Plaintiff  
5 testified he was led to believe the Project was only \$5-6 Million over budget prior to investing.  
6 *Id.*, at 72. Plaintiff's own testimony, however, shows that, through his extensive due diligence  
7 (including speaking to the Project's architects), he really knew the Project was about \$10 million  
8 over budget. *Id.*, at 149:17-25. The evidence will show that Radovan gave Plaintiff truthful  
9 projections about time and cost overruns. In fact, even though Plaintiff went radio silent for  
10 nearly two months after Radovan and the Project's architect first advised him of Project  
11 overruns, these overruns were less than this \$10 Million when Plaintiff invested. Importantly,  
12 Plaintiff has no evidence the Project was more overbudget than this when he made his  
13 investment:

14  
15           Q.   Do you have any information how much more overbudget the  
16               Project was when you made your investment than was  
17               represented to you?

18           A.   No..

19           Q.   Have you attempted to ascertain that number?

20           A.   No

21           Q.   Do you have a ballpark?

22           A.   No. It would strictly be a guess.

23 *Id.* at 72:11-19. Thus, Plaintiff cannot prove by clear and convincing evidence that  
24 Defendants misrepresented the budget.

25           Moreover, Plaintiff admittedly cannot prove intent to induce reliance.

26           Q.   Do you have any information at the time Mr. Radovan made  
27               these representations to you that he knew the costs on the  
28               project would exceed this Nine Million Dollars?

          A.   No.

*Id.* at 76:1-5; *See also* p. 89:4-8 and 100:5-10.

1                   **iii. Plaintiff's Claim Regarding Schedule Delays**

2                   Plaintiff also claims he was misled about the date the Project would open. Specifically,  
3 he says he knew it was not going to open by December, 2015, but says this was because of  
4 concerns over lack of tourism in the winter -- not because of construction delays. Id. at 84-85.  
5 This claim must also fail.

6                   Plaintiff was repeatedly told in writing that the Project would not open by year's end.  
7 In fact, two days before Plaintiff invested, Radovan told him by email the soft opening would  
8 be Spring and grand opening Father's Day, 2016. Id. at 207-08. This email says nothing about  
9 tourism or weather. Id. at 232:17-21. Plaintiff admittedly has no evidence to believe this  
10 statement was false when made. Id. at 169:16-170:16; 207:5-208:16.

11                   **iv. Plaintiff's Claim the Defendants Knew and Misrepresented the Financial**  
12 **Health of the Project When He Invested. Id. at 85.**

13                   Plaintiff also contends Defendants knew and misrepresented the financial health of the  
14 Project when he invested. Id. At 85. Although similar to his claim that the Project was more  
15 overbudget, Plaintiff adds that Defendants sold their share to him because they knew the Project  
16 was failing. When pressed, however, Plaintiff admitted he had no evidence to support this:

17                   Q. Do you have any evidence that Criswell Radovan sold you one  
18 of their shares because they knew the Project was in trouble?

19                   A. No. It just seems obvious to me.

20 Id. at 93:18-21; 105:8-18. Indeed, even the Project architect, with whom Plaintiff had a close  
21 personal relationship, believed the Project would pull through the unforeseen issues affecting  
22 the budget. This falls far short of the clear and convincing evidence standard.

23                   **v. Plaintiff's Claim That Defendants Misrepresented Financing**

24                   Plaintiff's fraud and punitive damage claims are also predicated on the allegation that  
25 Defendants made misrepresentations about the refinancing that was being pursued before he  
26 invested. See, Second Amended Complaint, ¶ 35 and 51. Plaintiff has no evidence to back this  
27 up:  
28

1 Q. Do you have any information that as of the date that you made  
2 your investment, that a refinancing that a refinancing of the six  
3 million mezz with a 15 Million dollar loan wasn't in place or  
4 imminent?

5 A. At the time of my investment, no, I did not know that.

6 Q. No, do you have any information that it was not in place or  
7 imminent?

8 A. No.

9 *Id.* at 110:15-23; 202:14-20. The fact is financing was in place until Plaintiff and some of the  
10 investors interfered and tanked the loan.

#### 11 **vi. Plaintiff's Claim About Defendants' Development Experience.**

12 Plaintiff's Complaint references misrepresentations about Defendants' track record of  
13 developing similar projects. *See*, Second Amended Comp., ¶ 51. When pressed, he admitted  
14 Marriner only mentioned one prior project, which he could not remember any details, and he  
15 did nothing to investigate this or any other prior projects. Plaintiff Depo., p. 60:25-61:25. This  
16 hardly satisfies any fraud elements. In fact, Criswell Radovan has a stellar track record of  
17 developing world class commercial projects.

18 In summary, Plaintiff cannot prove fraud and punitive damages against any of the  
19 Defendants.

#### 20 **3. Plaintiff's Second and Fourth Causes of Action Against PCA Fail As Well.**

21 Plaintiff contends PCA breached its duties to him by releasing his funds to Criswell  
22 Radovan. This claim fails because PCA understood and believed Plaintiff was buying one of  
23 CR Cal Neva's shares, and Plaintiff admitted he has no evidence to the contrary. Plaintiff  
24 Depo., 118:7-15. In fact, PCA did not have the escrow instructions that Plaintiff says were  
25 breached. Coleman Depo., pp. 34-37. PCA followed the only instructions it had, which was to  
26 send the money to Criswell Radovan for a purchase of its shares. The \$20 Million subscription  
27 was closed out by Les Busick before Plaintiff sent his money to PCA so there was no reason to  
28 question the fact he was buying one of CR Cal Neva's shares.

1           **4. Plaintiff's Breach of Contract Claim.**

2           Plaintiff testified, and the Subscription Agreement he relies upon confirms, that his  
3 contract was with Cal Neva Lodge, LLC -- a bankrupt Defendant subject to an automatic stay.  
4 *Id.*, at 102. Accordingly, contract claims against the other Defendants must fail.

5           Moreover, although Plaintiff may argue he was mistaken as to the nature of his  
6 investment, from the moment he learned he was purchasing one of CR Cal Neva's shares, he  
7 still considered himself as, and was treated by the Executive Committee, as a full equity  
8 member, with the same rights as the other equity members. That is, until the project fell into  
9 bankruptcy. The evidence will show Plaintiff has waived and is estopped to deny his interest.  
10 Moreover, contrary to Plaintiff's assertion, Defendants did have the requisite approval to sell  
11 one of their two Founders' Shares to Plaintiff. Indeed, it was well known from the operative  
12 Member documents that CR Cal Neva had the authority and planned to sell one of its two  
13 Founders' Shares.<sup>1</sup>

14           Plaintiff cannot be allowed to act like an investor when he thinks it benefits him, but  
15 when the Project suffers financially, jump to the other side of the fence and say that he is not an  
16 investor.

17           **5. Plaintiff's Conversion Claim.**

18           Conversion is an intentional tort. Defendants did not convert Plaintiff's investment.  
19 Defendants genuinely believed they were selling Plaintiff one of their Founders' Shares. The  
20 reality is Plaintiff was motivated to invest, then went radio silent while he tried to secure  
21 financing from his 401K. During this time, Defendants reached out to another investor who  
22 took the last Founders' Share. Just after this transaction closed, Plaintiff responded that he  
23 wanted to invest. Radovan thought Marriner told Plaintiff he could invest and buy one of their  
24 shares (with identical rights). Marriner thought Radovan was telling Plaintiff. This may be a  
25  
26

27 <sup>1</sup> See, e.g., Private Placement Memorandum, (demonstrating CR would reinvest \$1 Million -- not \$2 Million -- as  
28 their investment in the Project); Amended and Restated Operating Agreement, Section 7.4 (also reaffirming that  
CR would be required to maintain a \$1 Million investment in the project); Promissory Note dated 9/30/14, Section  
22, stating that the developers shall not have less than \$1 Million equity); Deposition Exhibit 21; (confirming CR  
could reduce its equity from \$2 Million to \$1 Million if someone wanted to buy one of its shares).

1 mistake scenario, but is hardly fraud. Moreover, the money did not go to line Radovan and  
2 Criswell's pockets. It largely went to pay off Project debts.

3 **6. Plaintiff's Has Unclean Hands**

4 The evidence will show that Plaintiff conspired with certain other investors to not only  
5 interfere with, but ultimately sink the Project's major refinancing loan with Mosaic which  
6 would have bailed this Project out. This intentional interference has damaged the Defendants  
7 far in excess of Plaintiff's \$1 Million investment. Thus, even if Plaintiff were to prevail on any  
8 of his claims, any alleged damages are offset by the significantly greater damages his conduct  
9 has caused Defendants.

10 **7. Marriner's Crossclaim**

11 Marriner has asserted a crossclaim for equitable indemnity and contribution against  
12 Defendants. As a practical matter, this crossclaim is moot as Plaintiff cannot establish a viable  
13 claim against any of the Defendants. Notwithstanding this fact, Marriner managed all aspects  
14 of the sale of Founders' Shares for this Project, including those sold to Busick and Yount. The  
15 evidence will show that Marriner had significant communications with Yount relative to his  
16 investment, and received a commission from both Busick and Yount's investments. Although  
17 none of the Defendants mislead Plaintiff in the slightest, Marriner knew as much about the  
18 status of construction and financing as any of the Defendants.

19 **B.**

20 **STATEMENT OF UNDISPUTED FACTS**

21  
22 1. Criswell Radovan is a real estate development firm with decades of experience  
23 developing large, significant commercial projects, such as Four Seasons hotel in Dublin, the  
24 Calistoga Ranch in Napa Valley, and other high rise commercial properties.

25 2. Criswell Radovan purchased the historic Cal Neva Hotel in Lake Tahoe in 2013  
26 with the intent of re-opening it after a multi-million dollar renovation.

27 3. The Project was to be funded through conventional financing and \$20 Million  
28 of equity, which equity shares were offered to investors beginning in 2014 (the "Founder's

1 Shares”).

2 4. On or about February 18, 2014, Marriner met with Plaintiff about investing in  
3 the Project. See Second Amended Complaint, ¶ 13. Plaintiff was not interested at that time.  
4 See, Deposition of Plaintiff (“Plaintiff depo”), p. 55: 1-12.

5 5. Nearly a year and a half later, in July 2015, Plaintiff was informed the last \$1.5  
6 million Founder’s Share had been released. Plaintiff Depo, 77:22 – 78:9.

7 6. Plaintiff understands how to review financial statements and to assess risks when  
8 it comes to making an investment. Id. at 33:22 – 34:2.

9 7. Plaintiff considers himself a sophisticated investor. Id. at 33:14 – 18.

10 8. Plaintiff is the CEO of Fortifiber Corporation, a company that supplies  
11 construction materials around the world. Id. at 28:5 – 29:15.

12 9. In July, 2015, Plaintiff was provided with numerous investment documents,  
13 including a Private Placement Memorandum, which discussed the speculative nature and risk  
14 of the investment. Id. at 221:14 – 222:21; 235:2-6. Plaintiff read and understood the risks of  
15 this type of investment and had the opportunity to have his attorney and accountant review the  
16 same. Id.

17 10. In addition to the “Private Placement” documents, Plaintiff was provided  
18 financial statements, construction progress reports and answers to all of the specific questions  
19 he had about the Project. Id. at 62-64. Importantly, the construction progress reports addressed  
20 the significant impacts that were occurring to the budget and schedule at the time due to  
21 unforeseen scope changes. See, e.g., July 2015 Monthly Progress Reported, Plaintiff depo, pp.  
22 62-63.

23 8. As part of his due diligence, in July, 2015, Plaintiff did a 2-hour walk through  
24 of the Project with Marriner and a Penta representative, where Plaintiff was told about the  
25 ongoing changes to the Project that were impacting the budget and schedule. Id. at 36:22-39:20.

26 9. Plaintiff knew the schedule was being compressed by scope changes, which were  
27 also already affecting the budget, he admittedly never asked any specifics about either prior to  
28

1 investing. *Id.* at 144.

2 10. Plaintiff did, however, speak with the Project's architect, Peter Grove, who he  
3 knew well – in fact, Peter Grove was Plaintiff's architect on one of his residence remodels. *Id.*  
4 at 47; 81.

5 11. Plaintiff asked Peter Grove how he would rate the Project's chance of success,  
6 and was told "pretty good." *Id.* at 135-136. Peter Grove told Plaintiff the Project was in fund  
7 raising mode, with construction costs exceeding budget and they were trying to get their arms  
8 around those increasing costs. *Id.* at 135-36.

9 12. Plaintiff believes Peter Grove was honest with him and would not misrepresent  
10 facts about the Project's costs or schedule. *Id.* at 201.

11 13. Prior to investing, Plaintiff admittedly did not ask for anything that he was not  
12 given. *Id.* at 155:1-3.

13 14. Importantly, Plaintiff had his CPA review all this documentation and assist him  
14 with his due diligence. *Id.* at 34:7-15; 120:20-23. Radovan also timely responded to questions  
15 from Plaintiff's CPA. *Id.* at 155:22 – 156:2. Plaintiff's CPA told him this seemed like a good  
16 project. *Id.* at 123:19-23.

17 15. In late July, 2015, Plaintiff made notes of his due diligence. *See*, Note, hereto;  
18 Plaintiff Depo. at 148-149. These notes confirm Plaintiff's understanding that the construction  
19 budget was at least \$10 million over budget from what was represented in the Private Placement  
20 Memoranda. *Id.* at 149:21-25. Plaintiff's notes also confirm his understanding that the  
21 developer, CR Cal Neva, owned \$2 million of Founder Shares. *Id.* at 150:1-6. Additionally, as  
22 of late July, Plaintiff understood the full opening was being pushed back to April 2016. *See*,  
23 Exhibit 3 and Plaintiff Depo., p. 152:16-19.

24 16. Plaintiff was seeking to fund his potential investment through his 401(k), which  
25 he admits took a lot of time. *Id.* at 230:24-231:5.

26 17. During this time, in August 2015, Plaintiff was told the soft opening was being  
27 pushed back even further, to March 2016, with a grand opening on Father's Day, 2016. *Id.* at  
28

1 159:14-25.

2 18. Les Busick, one of the original investors and a member of the Project's  
3 Executive Committee, purchased the last \$1.5 million Founder Share at the end of September  
4 2015. See, Deposition of Robert Radovan, p. 71:7-9.

5 19. Radovan spoke to Marriner and told him that if Plaintiff was still interested in  
6 investing, CR Cal Neva would sell him one of its \$1 million Founder Shares. See Radovan  
7 Dep., p. 75:12-23; 91:9-19; 92:14-18. Radovan believed Marriner informed Plaintiff of this  
8 fact. Id. at 74:16-23. Plaintiff has no evidence to the contrary. Plaintiff Dep., at 14:21-15:18.

9 20. In fact, on October 1, 2015 -- after Mr. Busick closed out the last \$1.5 million  
10 Founder Share, Marriner sent Plaintiff wiring instructions to Criswell Radovan's bank account.  
11 See, Plaintiff Depo., p. 168-69.

12 21. On October 10, 2015 -- two days before Plaintiff invested, Radovan responded  
13 by email to Plaintiff's request for a schedule update, reaffirming that a soft opening was  
14 scheduled in Spring with grand opening on Father's Day 2016. Id. 170, 207-08.

15 22. On October 12, 2015, Plaintiff signed and delivered a Subscription Agreement  
16 and wired his \$1 million to the trust account of PCA-- the developer's attorney. See, Amended  
17 Complaint, p. 20.

18 23. PCA -- believing Plaintiff was buying one of CR Cal Neva's shares -- sent the  
19 funds to CR Cal Neva. See, Deposition of Bruce Coleman, p. 35:24-36:6. In fact, PCA did not  
20 have the escrow instructions or Subscription Agreement that Plaintiff executed which forms the  
21 basis for his negligence cause of action. Id. at 34:8-21; 36:18-37:4; 37:25-38:3. PCA's only  
22 instructions were to send the money to Criswell Radovan, which made sense since everyone  
23 (except allegedly Plaintiff) believed Plaintiff was buying one of CR Cal Neva's Founder Shares.

24 24. Plaintiff claims he first learned he had purchased one of CR Cal Neva's  
25 Founding Shares in January, 2016. See, Second Amended Complaint, p. 23. Prior to investing,  
26 Plaintiff says nobody told him Mr. Busick had purchased the last \$1.5 million Founder's Share.  
27 Plaintiff depo., pp. 80, 90.  
28





1 cannot legally breach said contract. Indeed, fundamental to a breach of contract claim is a valid  
2 and existing contract between the Plaintiff and the Defendant. *See Calloway v. City of Reno*,  
3 116 Nev. 250, 993 P.2d 1259 (2000). Moreover, Plaintiff is essentially seeking a rescission of  
4 this contract, but he cannot do that against non-parties to the contract. His recourse is to request  
5 a lift of stay from the Bankruptcy Court to pursue his cause of action against Cal Neva Lodge,  
6 LLC, which is currently not subject to this Court's jurisdiction.

7  
8 2. Can PCA be found negligent, or to have breached any alleged duties to Plaintiff,  
9 for allegedly violating the terms of the Subscription Agreement when PCA never saw or had  
10 possession of the Subscription Agreement or Escrow Instructions that Plaintiff executed?

11 In Nevada, a claim for breach of fiduciary duty requires a plaintiff to show: (1) existence  
12 of a fiduciary duty; (2) breach of duty; and (3) the breach proximately caused the damages.  
13 *Donnell v. Fid. Nat. Title Agency of Nevada, Inc.* No. 2:07-CV-00001-KJD, 2012 WL 1669421,  
14 at \*4 (D. Nev. May 11, 2012), *citing Brown v. Kinross Gold U.S.A., Inc.*, 531 F. Supp.2d 1234,  
15 1245 (D.Nev.2008). "In managing monies deposited in escrow, the escrow agent is required to  
16 conduct with terms of the escrow agreement and may not use the proceeds in any manner that  
17 is not authorized by contract of deposit." *Id.*, *citing Broussard v. Hill*, 682 P.2d 1376, 1378  
18 (Nev. 1984). In an escrow transaction, the escrow instructions control the parties' rights and  
19 define the escrow agent's duties. *Id.*, *citing Mark Props., Inc. v. Nat'l Title Co.*, 117 Nev. 941,  
20 946, 34 P.3d 587, 590 (2001). Nevada has recognized a single exception to this rule: an escrow  
21 agent has a limited duty to disclose fraud to parties to the escrow transaction. *Id.* This duty  
22 only attaches if an escrow agent is "aware of facts and circumstances that a reasonable escrow  
23 agent would perceive as evidence of fraud." *Id.* The exception does not impose a duty to  
24 investigate. The exception only extends to parties to the escrow transaction and not to third  
25 parties. *Id.*

26 To prevail on a negligence theory, a plaintiff must generally show that: (1) the defendant  
27 owed a duty of care to the plaintiff; (2) the defendant breached that duty; (3) the breach was the  
28 legal cause of the plaintiff's injury; and (4) the plaintiff suffered damages. *Scialabba v.*

1 *Brandise Const. Co.*, 112 Nev. 965, 968, 921 P.2d 928, 930 (1996). Issues of negligence and  
 2 proximate cause are usually factual issues to be determined by the trier of fact. *Frances v. Plaza*  
 3 *Pacific Equities*, 109 Nev. Nev. 91, 847 P.2d 722 (1993). To satisfy actual causation element  
 4 in a negligence action, plaintiff must show that but for defendant's negligence, plaintiff's  
 5 injuries would not have occurred. The legal causation requirements means that defendant must  
 6 be able to foresee that his negligence actions may result in harm of a particular variety to certain  
 7 type of plaintiff. *Sims v. General Telephone & Electronics*, 107 Nev. 516, 815 P.2d 151 (1991).

8 Both legal theories require that PCA breached some duty to Plaintiff, which Plaintiff  
 9 cannot establish inasmuch as PCA was told and believed that Plaintiff was buying one of CR  
 10 Cal Neva's shares and to send the funds to Criswell Radovan. Moreover, PCA was told that  
 11 CR Cal Neva had the requisite approval from the necessary members to sell one of its two  
 12 Founders' Shares, and there is no requirement for PCA to question and then have to  
 13 independently verify this representation by its client. Nor were there any flags as the \$20  
 14 Million Subscription had already been closed out by Les Busick; therefore, it is not  
 15 unreasonable for PCA to have believed Plaintiff was buying one of CR Cal Neva's shares.

16  
 17 3. Can Plaintiff prove fraud and punitive damages by clear and convincing  
 18 evidence?

19 To establish a claim for fraud, a plaintiff must prove that (1) a false representation was  
 20 made by the defendant; (2) defendant's knowledge or belief that its representation was false or  
 21 that defendant had an insufficient basis of information for making the representation; (3)  
 22 defendant intended to induce plaintiff to act or refrain from acting upon the misrepresentation;  
 23 and (4) damage to the plaintiff as a result of relying on the misrepresentation. *Barmettler v.*  
 24 *Reno Air, Inc.*, 114 Nev. 441, 446–47, 956 P.2d 1382, 1386 (1998); *Bulbman Inc. v. Nevada*  
 25 *Bell*, 108 Nev. 105, 110–11, 825 P.2d 588, 592 (1992); *Lubbe v. Barba*, 91 Nev. 596, 599, 540  
 26 P.2d 115, 117 (1975).

27 The plaintiff has the burden of proving each and every element of his claim by clear and  
 28 convincing evidence. *Id.* Further, "[w]here an essential element of a claim for relief is absent,