Case No. 74275

In the Supreme Court of Nevada

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

Appellant,

vs.

CRISWELL RADOVAN, LLC, 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.

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

APPELLANT'S APPENDIX
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Mr. Radovan needed more money and he attempted to help by engaging the Wittenbergs and Boulder Bay as potential investors. Mr. Marriner testified that there was no false information provided to Mr. Yount and he had sent all the executive committee reports to Mr. Yount and that he had no reason to doubt the veracity of the information contained therein. Exhibit 10, the construction summary was given to Mr. Yount before he invested and Mr. Yount was fully advised as to the status of the project.

Mr. Marriner testified as to Mr. Busick's site visit, and at that time, the tower was finished or approximately 95 percent done. Mr. Busick was on the executive committee. He was one of the original, if not the original investor in this project. He had a background in construction.

Mr. Marriner testified that there was a lot of activity on that site. That Mr. Busick appeared pleased with the progress with construction. That Mr. Busick felt they could make the opening. Lee Mason, a representative of Penta Construction, also appeared to be excited, as was Mr. Marriner. It looked as if the project was close to being finished. It appeared to be a very good job.

On September 30th, Mr. Marriner testified that there was no adverse information to be shared with Mr. Yount.

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That there was no indication of a problem at that time.

As to the CR share, Mr. Marriner testified that he was pleased to have a share available for Mr. Yount. That there was no indication that CR was, quote, bailing out, close quote, of the project. That the CR shares were part of the original 20 founding shares and there were no differences between the CR shares and the other shares.

Mr. Marriner testified he was very excited about this project. He labeled it as, quote, sensational, close quote, project. And he was devastated professionally and personally over the loss of this project, this lawsuit, his reputation, and his friends.

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On cross examination by Mr. Little, he pointed out in Exhibit 3 that Exhibit 3 contained a disclosure that this was not a security and explained the risk of such a speculative investment.

Mr. Marriner pointed out his background in construction and testified that renovating old properties raise common problems, that this was a fluid project, and the monthly status reports, which is Exhibit 10, were prepared by third parties. And on page 16 of Exhibit 10 identifies the adverse impact some of these changes had, particularly the sewer, on the project's progress and that the information contained therein was accurate.

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Exhibit 14 was identified as an e-mail, which demonstrated that Mr. Yount knew of the debt. Exhibit 13 was an e-mail from Mr. Yount's architect, Peter Grove, who termed the project to be very good. Mr. Yount's CPA reviewed the investment. The testimony is Mr. Yount never asked for any additional information.

Exhibit 27 is an e-mail from the -- from Mr. Yount to his CPA, which demonstrates that Mr. Yount knew that the opening was being pushed back to March. Exhibit 36 is an e-mail three days before Mr. Yount's investment, which demonstrates he knew the opening was for Father's Day.

Mr. Yount took a site visit with Mr. Lee Mason and questioned whether or not the change orders were necessary. There did not appear to be any red flags and Mr. Marriner felt optimistic about the project. Exhibit 37 is an e-mail dated October 10th, which introduced the new general manager and the chef to the investors.

Mr. Marriner testified to the deal with Starwood in which the Cal Neva Lodge would be added to the Starwood's luxury collection. And he testified that it certainly did not look like the project was about to fail.

Mr. Marriner found no improprieties by Criswell Radovan and that in fact Criswell Radovan was still in charge of this project. Mr. Marriner testified that there was no

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involvement by Mr. Criswell in Mr. Yount's investment.

Mr. Marriner testified that selling of the CR founders share was not taking money out of the company and the transfer was specifically authorized by Exhibit 5, section 12.1, 12.3, 12.4, and 12.6.2.

On redirect, Mr. Marriner again walked through the financials, Exhibit 4 and Exhibit 60, which was an e-mail by Mr. Marriner to all the investors.

Mr. Criswell testified, testified that he was a partner in CR LLC, which was a limited liability company used as conduit to move money into and out of a particular project. That he had a separate LLC for each project when the project was funded. And that CR Cal Neva LLC was the manager of an SPE.

He testified that they purchased the Cal Neva for $13 million in a joint venture with Canyon and walked through that transaction. He testified that CR had $2 million into the project.

He testified that the construction budget was prepared by third parties, Hal Thannisch, Penta Construction, and perhaps the architect. Nevertheless, it was outside sources.

Mr. Criswell testified that his daughter invested $220,000 to cover short-term debts. That CR was to receive a

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development fee of $60,000 a month with a cap of 2.2 million.

Mr. Criswell testified to a July 2015 executive committee meeting wherein the parties discussed the budget shortfall of 2.5 to 5 million. They discussed financing options. They discussed the Ladera loan. And in order to meet future and present needs, they discussed the mezzanine loan. And in August and September, the parties discussed a total refinance of the project.

Mr. Criswell testified on October 10th he became aware of the Busick investment and that Mr. Yount funded several days later. Mr. Criswell testified that Mr. Radovan asked for his consent to sell a CR founders share to Yount. Everyone, apparently, everybody wanted to have Mr. Yount participate in the Cal Neva project.

Exhibit 33 is from Heather Hill, an employee of CR, to Bruce Coleman, who is the general counsel for Criswell Development Corporation in the past. Mr. Criswell testified that he believed he never needed prior approval for the Yount transaction and that he had in fact prior approval for that transfer and that there was no discussion of securities fraud.

Mr. Criswell testified to the 12/12 executive committee meeting before the party, which meeting was expanded to include all the investors, who were told that the

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project was over budget due to cost overruns. Mr. Criswell wanted the executive committee's approval for the Mosaic loan with changes to at least get a conditional commitment.

The executive committee did not approve the Mosaic loan at that time. They asked Mr. Radovan to hold off to see if they couldn't explore other options.

Mr. Criswell testified that the cost overruns were discussed in July and the discussions in the December meeting centered on Mosaic's loan. Mr. Criswell testified that the IMC, Incline Men's Club, the largest investor at $6 million in this project disagreed with his approach. However, Mr. Criswell testified that those were the only dissidents and the rest of the investors -- the rest of the investors approved of their approach to Mosaic.

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At that party, Mr. Criswell reached out to Mr. Yount and Mr. Criswell testified that Mr. Yount told him that he didn't know about all of these cost overruns and extra expenses and the financial condition of the project. Mr. Criswell testified that they probably could have done a better job reporting to investors about the financing and the status of the construction.

Mr. Criswell testified that the EC was provided monthly budget reports and they were prepared by Thannisch and Penta. Mr. Criswell testified he saw the cost overruns

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in the September report, which was before Mr. Yount invested in the project.

Mr. Criswell testified that they were looking at a December 12th substantial completion date. That they still had $9 million from Hall to complete or that they had the option to raise additional capital from the investors.

Exhibit 46 is an e-mail from Mr. Yount requesting the return of his $1 million investment. Ms. Clerk, can I have Exhibit 43?

Mr. Criswell testified that he told Mr. Yount that he would try and find someone to buy his share and that he felt this was going to be very easy to find other investors. However, Mr. Criswell testified that Mr. Yount had already been provided all of this information beforehand.

Mr. Criswell testified that CR had advanced $900,000 over time reflected in journal entries. And that Mr. Yount's money was spent paying past due bills on the Cal Neva, as well as other Criswell Radovan projects.

Exhibit 49 is an e-mail packet with material dated 12/17/15. It shows in big black bold title page, 35 million in debt, 20 million in equity, $55 million project. This is important, because throughout these proceedings there's been an allegation that these numbers were not shared and were misleading. The Court finds that these numbers provided by

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the defendants were remarkably accurate and it's spot on.

Mr. Criswell testified that afterwards he found out that Mr. Yount wanted a preferred share. However, he testified that is what he got, because the Criswell -- the CR share was a founders share.

On cross examination by Mr. Little, Mr. Criswell testified that Mr. Radovan told the executive committee of the cost overruns and a number of 9.3 million and that they needed financing. There was a number of 10.5 million discussed as well.

Mr. Criswell testified that there's no difference between a CR share, founders share, and the share Mr. Busick purchased.

Mr. Criswell testified to his professional background in construction and hotel development, which is impressive. He had developed the Four Seasons Hotel in Dublin, wineries in Napa, other resorts that are award winning.

He testified to meeting Mr. Radovan while Mr. Criswell was serving in the Navy as a supervisor for the Navy Special Operations and Mr. Radovan was a United States Navy Seal. Impressive credentials for any individual.

Mr. Criswell testified he never met Mr. Yount before his investment and that the information provided to

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Mr. Yount was truthful and accurate. That CR was authorized to sell the two founders shares. And on redirect, when shown Exhibit 4 on page nine, demonstrated that there was an interest reserve for the loan and that the CR share was the same founders share as that bought by Mr. Busick.

That the information was given to the plaintiff was accurate and consistent with the information that Mr. Radovan gave to the executive committee and Mr. Yount, which included monthly reports, financial documents, and that the numbers were consistent.

Mr. Criswell testified that the Ladera agreement required CR to keep $1 million in the project. Exhibit 150, page three, section five, showed that there was no prepayment penalty on the Ladera loan.

Mr. Criswell testified that Mr. Yount was not prevented from asking for any documents or information. And that Mr. Busick's $1.5 million investment went into the project and indeed was more advantageous than the investment by Mr. Yount, because it infused an additional half million dollars into the project.

Mr. Wolf cross-examined Mr. Criswell and demonstrated that the pro forma had projected a $51 million project, that the change orders were anticipated, and that the added scope included a new kitchen and the condo

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development.

Mr. Radovan testified as to Exhibit 5, Exhibit 4, the guaranteed maximum price contract, Exhibit 1, and stated that he was aware of Mr. Yount's interest in this project in July and he was aware that Mr. Yount had been given Exhibits 3, 4 and 5.

Mr. Radovan testified he knew the Hall loan was out of balance in July of 2015 and that he knew the opening would have to be pushed back because of the sewer pipe and other change orders and the requirements imposed by Starwood.

He testified that he told Mr. Yount's CPA that the opening was pushed back because of the construction issues and he told Mr. Yount about the scheduled pushback. Exhibit 36, which is the e-mail of October 10th to Mr. Yount's architect, Peter Grove, and to his CPA regarding pushing back the dates of the opening. This was two days before Mr. Yount's investment.

Mr. Radovan testified he told Mr. Yount that they were raising $9 million because they knew more change orders were coming. Mr. Radovan testified to a conversation he had with Mr. Yount's CPA in August. That he doesn't know if Mr. Marriner knew of the pushback dates. In deposition, he did correct that testimony and stated that Mr. Marriner did know of the pushback dates.

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Mr. Radovan testified to the Mosaic loan that was in the works as of -- in September of 2015. That they were looking at a high 40 million of dollars. The project was looking for different options for financing, including a capital call, which was discussed in April.

Mr. Radovan testified that the issues relating to the tower were 95 percent complete and the restaurant was 85 percent complete.

Mr. Radovan testified that the executive committee agreed to take the loan up in early November seeking an additional $16 million in debt.

Throughout this time, Mr. Radovan testified he was vaguely aware of Mr. Yount's interest in the project. Exhibit 29 is an e-mail between Mr. Yount and Mr. Marriner and there was no indication that the plaintiff would invest in the project. It had been three to four months of inactivity by Mr. Yount.

Mr. Yount was in the process of trying to extricate the money out of his 401K, but as everybody testified, there was radio silence between the parties during this time.

Mr. Radovan testified that he spoke to Mr. Busick after Labor Day, who expressed some interest in investing in the $1.5 million tranche, as well as, and this is important,

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three to four other potential investors. They had a meeting in Napa at the defendant's office in Napa with Mr. Busick's son. And, subsequently, on the 29th, the Busicks invested.

Mr. Radovan testified that the CR Cal Neva had as available a founders share under the PPM. That it was the same as the founders share Busick purchased.

In Exhibit 33, the assistant, which I believe is Ms. Hill, discussed a swap agreement, and Mr. Radovan wanted to know if there was anything required to properly effectuate the transfer of the CR founders share to Mr. Yount who was seeking to purchase a founders share.

It required under Exhibit 5, the operating agreement, which is article 12.2 and 12.3, one, that Mr. Yount sign the PPM; two, that the transfer be approved at the next meeting or annual meeting, or in writing; and, three, even if it was not approved, the buyer would keep the beneficial interest.

Mr. Coleman testified that he was counsel for Mr. Criswell back in 1982 and he had met Mr. Radovan in 2000. They had formed CR and worked on 20 projects. There were only two projects in litigation and two in bankruptcy back in the '80s. But most importantly, those were not CR projects.

Mr. Coleman testified that he was contacted regarding the Cal Neva project and with Brandon Iverson

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formed several LLCs and the operating agreement.

Exhibit 3, Exhibit 5 were discussed. Section 7.4 of Exhibit 5, demonstrates that CR put in $2 million into the project for two shares and there was a journal error of $480,000, which was subsequently reconciled.

Mr. Coleman testified that the subscription agreement advises the investors that this is not a security. It is a private placement memorandum. And that they must be a qualified investor. Mr. Coleman testified that there were no written escrow instructions.

Exhibit 33 is an e-mail from Ms. Hill to Mr. Coleman discussing the transfer. Exhibit 33 is an e-mail dated October 2nd and he had said that -- excuse me -- Mr. Coleman had heard that Mr. Busick was interested in increasing his investment and that CR was selling one of their two shares.

Exhibit 42 is the e-mail regarding Mr. Yount's investment. Money came into Mr. Coleman's escrow account and went out the next day.

Mr. Coleman was questioned as to whether this was a swap, was this an assignment of the CR per the operating agreement? Mr. Coleman was emphatic, it was neither. It was simply CR selling their share. It was simply Mr. Yount buying a member's share and stepping into the shoes of CR and

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becoming a member.

The effective date was backdated so as to give Mr. Yount every day of interest he was due under the agreement.

On cross examination by Mr. Little, Mr. Coleman testified he was instructed to wire Mr. Yount's money to CR. He says this was simply a common transaction of one owner selling a share to a buyer. He testified under -- as to Exhibit 5, section 12.3, that the approval was at, quote, the next member meeting, close quote. 12.4 required approval, quote, after the transferee executes the documents, close quote. That there was no preapproval needed and that CR share is a founders share. And under 12.6.2, even if the transfer is not approved, that Mr. Yount would still have the economic benefit of the $1 million investment. That this was simply a personal, private transaction.

On redirect, Mr. Radovan was called back to the stand. He testified that he told Mr. Yount about the $9 million in change orders in July. He had a conversation with Mr. Yount regarding the change orders and Exhibit 18. He had a conversation regarding the transfer and sent documents to Mr. Yount. In October and November, the company was not out of money. The company was paying the contractors.

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There was some testimony on cross examination -- excuse me -- direct examination that the general manager hadn't been paid, Thannisch hadn't been paid $90,000, Paul Dosick hadn't been paid $90,000, North Star Demo had a claim for asbestos removal of $96,000. However, Mr. Radovan explained that those changes came in after November. And up until that time, the company was paying its contractors. That this was not a failing operation.

Mr. Radovan testified the debt was disclosed to the members in the November meeting. The members were aware of the 9 to $10 million in cost overruns, the July report numbers were updated and the members were told of the $51 million Mosaic loan.

The members discussed financing for months. Mr. Radovan asked the EC for approval of the Mosaic loan. Mr. Radovan met with Mosaic in December. And, finally, the executive committee approved the Mosaic loan in December. They set up a meeting between Mosaic and CR.

Mr. Radovan testified that this was not a troubled project, that they had money, that it was staffed, that they had Starwood on aboard. That this should have been opened but for the interference of certain members of the executive committee with the loan with Mosaic.

Mr. Little cross-examined Mr. Radovan regarding

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Exhibit 3, stating that it was not updated because upon advice of securities counsel must have been the same document provided to all investors, and, again, the disclaimers were discussed.

Mr. Radovan testified that the answers and information given to Mr. Yount were truthful. That the opening was moved before Mr. Yount invested. That the project was not failing. They had 100 people on site. They had a chef, they had a general manager. And, in fact, Mr. Busick walked the project and invested more money.

Mr. Radovan testified that everyone wanted Mr. Yount as a member. He was a neighbor, he was a community leader, a pillar of the community in one person. And there's nothing in the record that would contradict that description of Mr. Yount. Mr. Radovan was excited about the project and that the CR shares were no different than the founders shares.

Mr. Yount took the stand and he testified to his background, the fact that he had lived in Lake Tahoe for 20 years, attended UNR. He had worked with Peter Grove, the architect, for some 40 years.

He testified that in the spring of 2014, he spoke with Mr. Marriner regarding the Cal Neva project, but he was not interested at that time in investing. However, he

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testified in June of 2015, he became interested and reached out to Mr. Marriner because his 401K fund was available for investment.

Mr. Yount testified that he was in, quote, constant communication, close quote, with Mr. Marriner up until the time of the investment. That he walked the site with Mr. Marriner, who according to Mr. Yount appeared to be very knowledgeable about the project.

He received the e-mail, which is Exhibit 8 after the tour and was told that 1.5 million equity was still available under the PPM, which entitled him to certain priorities and to purchase a cabin. Mr. Yount testified he reviewed the PPM, which is Exhibit 3, reviewed the confidential offer memorandum, Exhibit 4, and signed the amended and restated operating agreement, which he read, which is Exhibit 5.

Exhibit 11 was the financial material e-mail from Mr. Marriner. Exhibit 12 was the e-mail from Mr. Marriner regarding questions. Mr. Yount testified that he thought that Mr. Marriner was trying to sell a founders share under the PPM and that he had questions about the project.

Exhibit 13 is an e-mail from Mr. Peter Groves rating the project's chances of success as very good. That he, being Peter Grove, was very impressed with the management

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team. In that e-mail, he was advised of cost overruns, which the parties were trying to -- which the developers were trying to get their arms around. Exhibit 15 is an e-mail stating that the cost overruns were $9 million in cost overruns. There was no information on the change of schedule and Exhibit 34 is an e-mail string regarding the 401K.

On October 3rd, Mr. Yount decided to make the investment. He testified in July, he did not know of the refinance and would not have invested had he did.

Mr. Marriner wanted Mr. Yount to reach out to Roger Wittenberg for refinance or investment. Mr. Wittenberg is not an investor, operated an investment vehicle called North Light. Mr. Yount testified that he was never told that the loan was out of balance.

Most importantly, Mr. Yount testified that had he been told the loan was out of balance he, quote, would have been concerned and would have inquired more, close quote. Not that he would pull the investment, not that he would refuse to invest, but that he would have inquired more and he would have been concerned.

A series of e-mails, Exhibits 35, 36, 38 recount the investment documents. Importantly was an e-mail sent by Mr. Yount's CFO. Ms. Clerk. I sent the wire instructions to both of you and Premier. They were very close -- excuse

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me -- they were very clear and they are attached again. I'm concerned with this round-about e-mail string about wire instructions, a great opportunity to send $1 million to the wrong person. Okay. Kreskin couldn't have called it better.

Exhibit 40 is Mr. Radovan's acceptance of Mr. Yount's $1 million for the founders shares. Mr. Yount testified that he would not have invested because the sale of this one share by CR was a clear indication, quote, that the project was going to die and the developer was trying to get out, close quote.

Again, Mr. Yount testified about the 12/12 party. But I circle back to that comment Mr. Yount testified to about not willing to invest because of the sale of CR's share. It contradicts his e-mail to Mr. Radovan on December 13th when he demanded his $1 million investment to be returned. However, he said that once there was financial stability and faith in the management, that they, he and his wife, would reconsider investing again. There was some argument made that Mr. Yount was straddling the fence, wanted in, wanted out. I think this e-mail by Mr. Yount could support that characterization.

Mr. Yount testified that it would have been insane to undermine the Mosaic loan and that the Exhibits 47 -- excuse me -- the e-mail exhibits were simply to try to calm

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down the IMC. Mr. Yount testified he never spoke to Mosaic. That he wanted to get paid and he testified he still does. He still wants to get paid as do everybody.

Exhibit 50 is an e-mail from Mr. Criswell dated 12/16. Mr. Yount testified that he thought the Mosaic loan was imminent and he wanted the project to succeed. He described the executive committee meeting on December 12th as rousing. But there was a discussion about trying to get his money paid back or at least reflect his investment through a note, which never occurred, or at least this Court has no evidence of that.

Exhibit 58 is an e-mail from Mr. Yount to Molly Kingston regarding the bus going off the road or in the ditch and how they couldn't continue with the project with CR as developers.

59 is an e-mail dated January 25th to Paul Jamieson and he was aware of the CR share and the PPM share and called it a bait and switch. Exhibit 122 is an e-mail regarding the IMC meeting with the Mosaic in which Mr. Yount expressed some concern.

Exhibit 62 an e-mail from Mr. Yount to Mr. Marriner stating that he was not, quote, fully informed, close quote, about the financials. Mr. Yount testified to a meeting with Mr. Criswell in the Hyatt lobby on December

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27th, where they discussed memorializing his investment with the note. Mr. Criswell testified that he assured Mr. Yount that they would buy his note back, buy his share back, once they had been made whole from the Cal Neva.

Mr. Yount testified that he never wanted to participate in the Cal Neva Lodge going forward. He just wanted to get his money back, and that's memorialized in Exhibit 69.

On cross examination by Mr. Little, Mr. Yount testified that he is the CEO of two corporations that are involved in acquisition and development, that he has built two homes and he has considerable experience with cost overruns and delays. That Mr. Yount considers himself to be a sophisticated investor. That he sits on several boards. He sits on the board of the TRPA. That he appreciates the risks in all investments and that he utilized a CFO and a CPA in evaluating this investment.

He was shown Exhibit 3 wherein the disclaimers clearly stated this was not a security, that there was a risk of insufficient funding, and there was a risk of losing the entire investment.

Exhibit 13 was the e-mail from his architect, Peter Grove, wherein they discuss the cost overruns, fundraising and the management and likelihood of success,

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which the e-mail -- which the architect indicated was pretty good. He was aware of the information given to the CPA who gave Mr. Yount a green light to invest.

He was aware of the compensation of the manager. On page 11 of the Exhibit 4, forward looking statements. Page three, subsection iii, he read and understood those provisions. Page 14 of the subscription agreement contained the documents, he was aware of those. He was and is an accredited investor. Under Exhibit 42, section B, he was aware that the founders share was not registered. He read and understood that. Section G, he read and understood that. Page three, he read and understood that section.

We move to the escrow instructions, and in Exhibit 4 and 5, he read and understood that, particularly the schedule 4.3. Exhibit 4, which is page eight, he realized that the time line for opening was off at the time of his investment.

He was in possession of Exhibit 10, the July construction status report. He saw other construction status reports. And he realized that Exhibit 10 was prepared by a third party.

He testified it was reasonable to rely upon the construction manager's reports. He testified he knew the budget was being adversely impacted at the time of his

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investment. He testified he never had any contact with William Criswell, just Mr. Radovan.

He testified that Mr. Radovan spoke to him regarding the delays. And there was an e-mail after Mr. Yount had toured the site. Mr. Yount testified that Mr. Marriner offered on a number of occasions to take him on another site tour and spoke to him about the delays, but Mr. Yount did not take up that offer.

Mr. Yount testified that he didn't have any questions of the defendants and that he never asked for anything that the defendants didn't give him.

He testified to Exhibit 13, which is the e-mail from Peter Grove, the architect, regarding the cost overruns and their attempts to get their arms around them. That Mr. Yount testified that he was open to get more information. And Exhibit 28 demonstrates Mr. Yount was aware of the change in opening, also demonstrated by his deposition on page 160.

Mr. Yount testified that the CPA gave him no pause or cause for not investing in the project. Mr. Yount testified that Les Busick is a friend, knew he was an investor, and he knew he sat on the executive committee. Mr. Yount received a list of the other investors and that the delay in funding his investment was because of the 401K.

Mr. Yount admitted that from September 1st to the

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date of his investment, there was only one e-mail between him and the developers. Exhibit 14, which is a July 19th, 2015 e-mail demonstrates that the parties were aware of at least $5 million in cost overruns. Exhibit 15, which is a July 22nd e-mail, again, restated the fact that there would be $5 million or more in overruns.

Exhibits 18 and 21 are Mr. Radovan's responses to Mr. Yount's questions and Mr. Yount's notes, which is Exhibit 21, which demonstrated that the developers had $2 million in founders shares and that the developers wanted to raise 10.5 million between the debt and equity. He admitted that it was told there was 5 to $6 million in cost overruns and maybe others, up to $3 million in contingency funds needed.

Exhibit 153, which is an e-mail dated July 27th, 2015, is a summary of the cost overruns. Exhibit 27 is an e-mail between the CPA and the Mr. Yount advising him that the opening had been pushed back. And Exhibit 21 was Mr. Yount's notes confirming that.

Mr. Yount testified after the break that the sale by Criswell Radovan of that founders share signals the project in trouble. But he admitted he was not a commercial developer. He never had any money in commercial developments. He was unaware that hotels often run two years

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in the red.

Exhibit 33 is an e-mail dated October 7th, 2015. When contrasted with Mr. Yount's deposition at page 93 and 105, he was asked, what about the difference in the shares? He couldn't point to any.

On page 222 of his deposition, Mr. Yount testified that the defendants never obstructed the plaintiffs due diligence. They provided the documents and information whenever asked. And that Mr. Yount admitted that he was not the only potential investigator for the $1.5 million share that was opened.

Exhibit Number 54, which is the second amended complaint served by Brandon Chaney during the course of some mediation. Mr. Yount testified that nobody told him to serve -- he did not tell Mr. Chaney to serve the complaint.

However, if you look at the complaint, page four, paragraph 15, contradiction, the evidence shows that the contractors were paid. Paragraph 18, the evidence shows that the project was over budget. Paragraph 20, there was a mistake in the -- it was a typographical mistake. In paragraph 21, Penta had been paid. And as to the scheduled opening, defendant knew it had been pushed back.

Mr. Yount testified he never wanted to participate in the Cal Neva project after the December meeting. And he

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had discussed replacing Criswell Radovan, but he was not part of the IMC or IMC's efforts to replace Criswell Radovan.

However, Exhibit 50, the e-mail with Paul Jamieson discussing our team. Exhibit 55 is an e-mail with Mr. Radovan regarding the IMC. Exhibit 58 is an e-mail from Molly Kingston from the IMC declaring a divorce. Exhibit 59 is an e-mail to Paul Jamieson for approval, asking Mr. Jamison's approval to send an e-mail to get Criswell Radovan out.

Exhibit 109 is an e-mail regarding a drop box for your eyes only. Exhibit 110 is an e-mail to Paul Jamieson specifically instructing it not to be shared with CR, discussing our team to which Mr. Radovan had never disavowed. Exhibit 114 is an e-mail demanding a meeting. Exhibit 115 is an e-mail discussing this with Robert -- regarding a discussion with Robert.

118 is an e-mail with Paul Jamieson regarding the infamous meeting with Mosaic. 119 is an e-mail to Busick with Paul Jamieson's meeting with -- with Paul Jamieson regarding a meeting with IMC. 120, 121, 122, all of these e-mails involve Mr. Yount and members of the IMC.

Mr. Yount testified that he didn't hold himself out as a member, that he distanced himself from the IMC, but, however, he attended executive committee meetings. He was

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considered by all to be a member, and certainly by the e-mail string was cahoots with this cabal involving certain members of the IMC, and that he testified he was not opposed to the removal of CR as manager of this project.

Exhibit 119 talks about talking points and using Mr. Yount's letter as leverage encouraging everybody to be a cohesive group and using Mr. Yount as the IMC's spokesperson, quote, unquote.

This is demonstrated as well on Exhibits 121, 125, 126, 127, 130, 131, 132, 133 in which members of the IMC -- strike that -- in which I believe Ms. Molly Kingston is referred to as our hero by Mr. Yount and to keep it up.

Mr. Wolf cross-examined and talked about trust and verify, President Reagan's admonition with the Russians, I think it was the Salt Treaty. But in cross examination by Mr. Wolf, Mr. Yount testified that he has no evidence that CR doesn't have hotel experience. I'm going to resist -- strike that.

And despite the e-mail of 12/13 about the wheels were coming off the bus, there were a number of investors, that they were looking at a refinance of the mezzanine and a refinance of the entire project. And that the Mosaic loan was the only exit strategy, and this is Mr. Yount's testimony, was the only exit strategy to get their money back

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and that he was in favor of it.

However, Mr. Yount testified that he didn't mean to undermine the Mosaic loan, but that he was not interested -- strike that -- but simply monitoring it. He under cross examination of Mr. Wolf, he acknowledged the risk factors, the answers given by Mr. Radovan to the questions, and under Exhibit 153, the payment application and the numbers were close to what Mr. Radovan had told Mr. Yount. And he knew that other investors were looking at the investment in the Cal Neva.

On cross examination by Mr. Little, Mr. Yount testified that CR Cal Neva had executed a term sheet of $47 million in late October, which was to close in 30 days, and that was true. And that Mr. Radovan's testimony regarding the executive committee and Mosaic was true. And Mr. Yount testified that those loans would cover all the debt and that the project would have been completed.

Mr. Yount testified he didn't torpedo the loan. He didn't want Mosaic, however, he never tried to resurrect the Mosaic loan.

Brandon Chaney testified. He was a member of the Incline Men's Club and met Mr. Marriner in 2014 regarding the Cal Neva. The Incline Men's Club is the largest investor in the project with $6 million collectively invested. His role

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was to represent the investors -- excuse me -- he testified that Mr. Marriner's role was to represent the investment, he vouched for the developers and told everyone the construction budget was on schedule. He assured the Incline Men's Club that this wouldn't go over budget.

He testified that Mr. Yount was on the executive committee -- excuse me -- the witness, Mr. Chaney, was on the executive committee, because it was the largest investor and the duties of the executive committee was to represent the members to guide the project.

However, he also testified he did not regularly attend meetings of the executive committee. He testified to the July Fairwinds meeting where Mr. Radovan gave an overview to the EC.

There were several problematic aspects of Mr. Chaney's testimony. Mr. Chaney testified that the PPM was disorganized and it was clear that the managers were not knowledgeable about the money. He testified that Mr. Radovan had oversubscribed the PPM. Well, that was wrong. And he testified that Mr. Radovan had taken money from Busick and Mr. Yount. Well, the evidence shows that was wrong, too.

Mr. Chaney testified that he was concerned with the sale of the Radovan -- the CR share, because he wanted to have the defendants to have some skin in the game. Well, the

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evidence shows that they did. And they were concerned about the defendant's using the money to pay other debts. Well, the evidence shows that the money was sent to CR, who used it to pay not just other CR debts, but close to $300,000 in debts owed to the project.

He testified that he had heard of Mosaic from Mr. Radovan in October of 2015 and they were going to refinance the entire project. That Mr. Radovan had provided a term sheet, but that Mr. Chaney didn't know Mosaic.

In November of 2015, Mr. Chaney testified that Mosaic pushed back. Well, that's belied by the voicemail of Mr. Penner, CEO of Mosaic, which indicated in the end of November they were very anxious and enthusiastic about the loan.

Mr. Chaney testified that the entire executive committee met with Mosaic, who had asked for the meeting with Mr. Chaney and Mr. Busick and Mr. Jamieson and without CR. This was curious, because why would Mosaic reach out to Mr. Chaney, who claimed he didn't know anybody at Mosaic?

When asked who called him for this important meeting, Mr. Chaney could only remember the first name, didn't know the last name. Again, why would Mosaic, who had been involved with both Mr. Criswell and Mr. Radovan since September of 2014 in trying to get this loan in the works

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reach out to somebody who admittedly didn't know him to have a meeting without Mr. Criswell or Mr. Radovan present? I believe there was some testimony that there may have been a family connection or familiarity between Mr. Criswell and the Halls. It just did not make sense.

Mr. Tratner testified out of order, but he testified he looked at the investment on behalf of Mr. Yount. He was sent the updated financial projections, the profit and loss. He spoke to Mr. Radovan regarding forecasting prospective, the profit and loss.

On cross examination from Mr. Little, he was shown Exhibit 19, and he testified that this was 1 million of a $60 million project, testified to the PPM, Mr. Yount's notes with the updated information. And that Mr. Radovan said, quote, please let me know if you need any more info, close quote. Mr. Little cross-examined him and said that the defendants answered all of his questions.

Mr. Chaney resumed the stand and testified about Exhibit 122. And despite the fact, this is another curious fact about Mr. Chaney's testimony, despite the fact that he realized that the Mosaic loan was the best chance for this project to go to completion and get everybody paid, they never pursued it. He claimed on his testimony that CR never pursued Mosaic. Well, that's wrong. And that's demonstrated

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by Mr. Penner's voicemail indicating that in November that Mosaic was still interested. As a matter of fact, Ms. Clerk, number two.

THE CLERK: Yes, your Honor.

THE COURT: Last paragraph, we also told them that for the better part of three months, we have not heard much from the team. They went on to explain a little of the history of the deal from their perspective, and to tell you the truth, there seems to be a little bit of a mess right now. Let's underline, underline these last two words. We are going to take a step back, tear up the executed term sheet, tear up the executed term sheet, the deal, the loan that would have saved this project. It had been executed. Give you and the ownership time to figure things out on your own, and at the right moment, if you desire, reintroduce the deal to Mosaic. That's all. Thank you, Ms. Clerk.

When confronted with the audit, Mr. Chaney testified, although the records appeared to be a mess, the auditor did not find any improprieties, although he did testify that this was phase one of the audit. However, most tellingly, he didn't want to do phase two, because it cost money. He could have, perhaps should have, but it cost money to do an audit on a deal worth almost $60 million.

He also testified that there were other options,

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Colombia Pacific, Langham. That they hired a broker to pitch the project, but there was a lack of confidence in CR.

They talked about the winery litigation between Mr. Radovan and himself, and it's clear he was bitter and it's clear he was prejudiced and it's clear he's biased against Mr. Radovan, and as Mr. Campbell rightly pointed out, perhaps he had every right to be. But that bias is there. That bitterness is there.

He has been found personally liable for tortious interference with a contract, with a verdict in the form of $6.4 million. He wasn't subpoenaed. He volunteered to testify here, because as he said, quote, I have a story to tell, close quote.

He testified that he did call David Marriner up, doesn't recall the exact words, but he told him to give back the commission or bad things would happen. And this was before his testimony at trial. Mr. Chaney testified he told Mr. Marriner to do the right thing, get on the right side. And as far as other members of the IMC calling Mr. Marriner, he testified that, quote, it could have happened, close quote. But all he wanted Mr. Marriner to do was open your eyes.

Mr. Chaney admitted that two years later, CR is still the manager of the Cal Neva. That although there were

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procedures and a process in place that could have removed them, no such move has been made to date. And that CR is still trying to finance the Cal Neva.

As far as Mr. Chaney and Mr. Radovan go back, Mr. Chaney testified that he had to buy out Mr. Radovan and he settled the lawsuit by paying Mr. Radovan for his share.

Also troubling in Mr. Chaney's testimony is the fact that he claims he was kept in the dark. He wasn't aware of these cost overruns and financials were kept from him. That the third parties Penta and Thannisch, their conclusions or reports were tarnished because they were paid by the defendant, which is not true.

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However, he admitted that he used the CR offices in the summer of the 2015 and he was there about once every other week for two or three days and he had talked to Mr. Radovan all the time. But despite that, he was clueless as to the cost overruns and that Mr. Radovan never provided him with any answers to his questions.

Once again, he testified to the Mosaic telephone call by a Howard and he called Mr. Chaney for the first time and told him, are you aware that -- this is Howard, are you aware of the $1 million break-up fee? Why would somebody from Mosaic call, why would this Howard call Mr. Chaney to discuss a term of an agreement which was shared by

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Mr. Radovan sometime before in the term sheet? Mr. Chaney testified he didn't know Mosaic, he didn't know Howard. This is troubling.

Also, Exhibit 129, which is an e-mail, which outlines the reasons why Mosaic is backing away, curiously, they are identical to Mr. Chaney's issues with Criswell Radovan and this Court cannot find that is coincidental.

On cross examination by Mr. Wolf, Mr. Chaney admitted to calling Mr. Marriner up in late July to do the right thing. Mr. Marriner hung up on him. The telephone call with Mr. Radovan -- in his telephone call with Mr. Marriner, Mr. Chaney called the bankruptcy a disaster, demanded that Mr. Marriner give back all of his commissions.

Mr. Little took Mr. Chaney on cross examination, talked about the Straight Shot suit, spoliation of evidence, and to some extent this Court understands that Mr. Summer was perhaps a rogue employee left over from the prior company acquired by Teleconnex and he worked out of his home.

But he also testified that Mosaic called the executive committee, because Mr. Radovan had not called back. However, that's contradicted by the voicemail in November. Mr. Chaney testified that the break-up fee was news to him, although he had been provided the term sheet prior to this.

Also, Mr. Chaney made what can only be described

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as disturbing comment regarding the Washoe County Sheriff's Office. He testified that the Ladera loan was in default and that the IMC members were only aware of a sheriffs sale of their membership interest the day before the sheriff was to execute on the membership interest. However, the sheriff held off executing on that judgment, because the Incline Village people were very important people in this community. This Court finds that testimony incredible.

Finally, Mr. Radovan took the stand in rebuttal and talked about the $480,000 in development fees. He never told Bruce Chaney that he took $480,000 in fees and that he never took $480,000 until development fees, that that was a double entry, which was subsequently corrected.

That any disbursement had to be approved by Hall and that Hall paid 90 percent of the disbursements and that they needed Hall's approval for any disbursement, significant disbursement. Mr. Radovan testified that he pursued funding until the bankruptcy and that Criswell -- that under any of these circumstances, any of these scenarios, Criswell Radovan would not be involved in the project, but that no one has come up with an option. The entire reason for the refinancing was the cost overruns.

He played and this is Exhibit 217, the e-mail -- excuse me -- the voicemail of Ethan Penner dated

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November 19th at 2:55 p.m., in which he stated there's a lot of enthusiasm regarding the deal and please get back to me, close quote. That Mr. Radovan was not an impediment to the Mosaic deal. That Mr. Chaney had offices in or had an office in Mr. Radovan's and Mr. Criswell's office in Napa. That they are the debtor in possession and they have audited financials and all the members received audited financials and Paul Jamison and Busick has changed sides. This Court finds that really has no bearing on this case, this Court's decision.

That Mosaic would have closed by year end and that all the parties would have been paid. The project would be up, operational, and a spectacular success.

All right. The Court adopts the findings of facts as set forth in the defendants' statements of Mr. Little and Mr. Wolf.

As to the first cause of action, breach of contract, Cal Neva LLC is in bankruptcy and under the protection of the bankruptcy court, therefore, the claim against Cal Neva Lodge LLC is dismissed.

Basic contracts principles on the breach of contract require for an enforceable contract, an offer and acceptance and a consideration. However, CR Cal Neva LLC and Criswell Radovan LLC are not parties to the contract of the

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subscription parties and you cannot enforce a contract or find a breach of a contract by a nonparty. First cause of action is dismissed.

Second cause of action, Powell, Coleman, Arnold, breach of fiduciary duty. Under the restatement second of torts, if a fiduciary duty exists between two persons when one of them is under a duty to act for or to give advice to or for the benefit of another upon matters within the scope of the relation.

The Nevada Supreme Court has stated that a breach of fiduciary duty claim seeks damages for injuries that result from the tortious conduct of one who owes a duty to another by virtue of the tortious -- seeks damages that result from a tortious conduct of one who has a duty to another by virtue of the fiduciary duty. In order to prevail on a claim for breach of fiduciary duty, the plaintiff must show the existence of a fiduciary duty, a breach of that duty, and that the breach proximately caused damages.

In this particular case, there may have been a mistake, but that certainly doesn't arise to fraud or a breach of the contract. In this case, this was a simple transaction, the purchase sale agreement, and most importantly, Mr. Yount got what he wanted, which was a founders share.

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Now, it has been argued hypothetically that it may not have been Mr. Yount's desire to buy the founders shares from CR, but from some other party, but it is no different than getting a Cadillac from Jones West Ford or a Cadillac from Don Weir. Mr. Yount ended up with a Cadillac. Therefore, he has not been able to prove damages in this case and the second cause of action is dismissed.

Third cause of action, fraud, all defendants with the exception of Powell, Coleman. This requires a high standard to prove, clear and convincing evidence. It is asserted against Mr. Criswell, Mr. Radovan, CR Cal Neva LLC, Criswell Radovan LLC, Cal Neva Lodge LLC, David Marriner Real Estate LLC, and New Cal Neva Lodge. The elements of fraud are a false representation. There has been no evidence presented here that any of the material facts were proven to be false or known to be false by any of the parties. In fact, the testimony is completely opposite.

Second claim is made with the knowledge or belief that it is false or without a sufficient basis of information. There's no evidence that anybody knew that this was false. He had the information provided by third parties, they were verified again by CPAs, by members on site, the architect, the construction manager. The third element is there's an intent to induce reliance on those false

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statements.

In this case, the defendant had ample opportunities to inspect this and didn't have to rely on, indeed, didn't rely solely on the information provided by the defendants in this case. He gave the information to his CFO. He gave the information to his CPA. He asked his CPA if this was a good investment, whether to proceed, and the CPA gave him a green light he could.

And as far as damages is concerned, well, we go back to the fact that Mr. Yount owns a founders shares in the Cal Neva LLC and has not proven that he has suffered any damages. And the Nevada Supreme Court has also said that the false representation must have played a material and substantial part in leading the defendant to adopt his particular course.

Now, in this case, the allegations are that some of those false statements was the opening date moved back from December 12th to the spring. Well, that was known several days before Mr. Yount invested in it.

Also, that Mr. Yount was buying a founders share under the PPM. Well, the evidence shows that Mr. Yount holds a founders shares that was distributed under the $20 million PPM and constitutes a founders shares.

And that it played a material and substantial part

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in leading the defendant to adopt his present course. Well, it appears that Mr. Yount, a sophisticated investor, reached out, conducted due diligence, independent investigation, and decided to invest knowing full well under Exhibits 3, 4 and 5 that there were risks associated, which included losing his entire investment.

Now, the Blanchard case, I think this is dicta, because it really doesn't square with the facts of this case, states that if a defendant was unaware of the complaint of making an independent investigation will be charged with knowledge of facts, which reasonable diligence would have disclosed, such a plaintiff is deemed to have relied upon his own judgment and not on the defendant's representation.

That doesn't really apply in this particular case. I know the defense relies upon this. Because in that case, it was a husband and wife arguing over the dissolution of a marriage and the dissolution of the marital estate and the property settlement agreement.

The Court in that case denied the wife's motion -- actually, dismissed the lawsuit, Judge Lee Gates dismissed the lawsuit, finding that the wife couldn't prove that there was a misrepresentation, a false misrepresentation as to where the assets were.

The Nevada Supreme Court stated that the

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appellate's actions for intentional misrepresentation imposes a burden on the plaintiff to show the following elements, that the defendant made a false representation to him with knowledge and belief that the representations were false without a sufficient basis for making the representation. Further, the plaintiff must establish that the defendant intended to induce the plaintiff to act or refrain from acting on the representation and that the plaintiff justifiably relied on the representation. Finally, the plaintiff must establish that he was damaged as a result.

In this case, the Nevada Supreme Court found that the husband had superior knowledge of the location of the assets and that the wife did not possess. That there were many assets, there were complex transactions, and that the wife should not bear the loss of the opportunity to prove that representation, because the husband had superior knowledge.

In this particular case, the defendant was just as knowledgeable as everybody else. He was a sophisticated investor, he was a contractor, well-aware of cost overruns, well-aware of the problems in rehabing an old development. Indeed, the testimony is that Mr. Yount has spent almost ten years in building a home on the shores of Lake Tahoe, which is an outstanding addition to the community. That he was

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operating from the same facts and circumstances everybody else was.

That he didn't just rely on the defendants, he relied on his CPA, he relied on his CFO, he relied on the architect, Mr. Grove. He took a tour. He had possession of the reports.

So the Court finds that Blanchard doesn't absolve -- doesn't provide a shield to the defendants, but that the plaintiff has not proven false statements or unjustifiable reliance. And, finally, as stated before, received just what he wanted, which was a founders share, and therefore has not proven damages.

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The fourth cause of action, which was negligence against PCA contains the following elements, that the plaintiff must show that the defendant owed a duty of care to the plaintiff and that the breach of duty has caused plaintiff to suffer damages.

Now, in Nevada, the issues of negligence are factual issues decided by the trier of fact. But synthesized, it's simply that there's a duty, there's a breach, there's causation, there's legal causation, there's actual causation and there's damages.

In this case, negligence against PCA was a mistake and does not rise to the level of negligence. Also, once

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again, Mr. Yount received what he asked for, a founders share, which there is no damages shown. The fourth cause of action is dismissed.

Fifth cause of action, conversion. The Nevada Supreme Court has defined conversion as a distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his title rights therein or in derogation, exclusion or defiance of such title or rights. Conversion is not an act of general intent. The determination of whether a conversion has occurred is a question of fact. In this particular case, the documents show the money went into the project to pay off the debts. Because of that, the fifth of the cause of action is dismissed.

The sixth cause of action, which is punitive damages. Well, punitive damages require a finding that the conduct of the party is outrageous and beyond the pale. The evidence must be convincing by clear and convincing evidence that the defendants have been engaged in oppression, fraud, malice, express or implied, and that the plaintiff in addition to compensatory damages may seek to recover damages as -- for the sake of an example in punishing the defendants.

There's no evidence whatsoever that the conduct of the defendants in this case was outrageous, beyond the pale,

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or fraudulent, and, therefore, the sixth cause of action is dismissed.

The seventh cause of action, securities fraud. First, under Exhibit 3, there's a disclaimer. Second, pursuant to NRS 90.530, this is not a security. Third, under Rule 4 A of the Securities and Exchange Act of 1933, this is a private placement agreement and not a security. And, therefore, the seventh cause of action is dismissed.

Because those actions have been dismissed against the defendant, the counterclaim by the defendant, David Marriner, against the other defendants must be dismissed as moot.

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The defendants' counterclaim is unclean hands. In determining whether a party's improper conduct bars relief, the Nevada Supreme Court applies a two-factor test. One, the egregiousness of the misconduct at issue; and, two, the seriousness of the harm caused by the misconduct against the granting of the requested relief. And that the District Court has broad discretion in awarding damages.

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In this case, but for the intentional interference with the contractual relations between Mosaic and Cal Neva LLC, this project would have succeeded. That is undisputed. Mr. Chaney agrees, Mr. Yount agrees, everybody agrees that money would have covered all the costs and the debts.

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This Court has documented dozens of e-mail exchanges between Mr. Yount and the IMC and their efforts to undermine the Mosaic loan and there is no more solid evidence of that than in Exhibit 124. That deal was done. That deal had been executed. That deal was in place. Mosaic had evidenced its enthusiasm to close this deal. And yet the day that individuals from the IMC went to the Mosaic offices without the knowledge of CR, that deal was dead. And the testimony is unequivocal, there was never an attempt by the IMC to resurrect it, despite the open invitation by Mosaic to reintroduce the loan.

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

Indeed, if you look at the e-mails from Molly Kingston afterwards, she's reaching out saying, who is going to manage this? What's plan B? We need CR in there until such time as we find some substitutes. They had no foresight in this. It's tragic. So the counterclaim from the defendants is granted.

It will be the order of the Court, Ms. Clerk, that judgment is in favor of all defendants. Damages awarded against the plaintiff on behalf of Mr. Radovan, Mr. Criswell

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of $1.5 million each, two years' salary, management fees, lost wages, and pursuant to the contract, the operating agreement, all attorney's fees and costs. Mr. Little, Mr. Wolf, prepare the order. This Court's in recess.

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STATE OF NEVADA)
) ss.
County of Washoe)

I, STEPHANIE KOETTING, a Certified Court Reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify;

That I was present in Department No. 7 of the above-entitled Court on September 8, 2017, at the hour of 9:00 a.m., and took verbatim stenotype notes of the proceedings had upon the trial in the matter of GEORGE S. YOUNT, et al., Plaintiffs, vs. CRISWELL RADOVAN, et al., Defendants, Case No. CV16-00767, and thereafter, by means of computer-aided transcription, transcribed them into typewriting as herein appears;

That the foregoing transcript, consisting of pages 1 through 1142, both inclusive, contains a full, true and complete transcript of my said stenotype notes, and is a full, true and correct record of the proceedings had at said time and place.

DATED: At Reno, Nevada, this 13th day of October 2017.

S/s Stephanie Koetting
STEPHANIE KOETTING, CCR #207

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Jacqueline Bryant
Clerk of the Court
Transaction # 6301767

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 YOUNT IRA,

Plaintiff,

vs.

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

Defendants.
_____/

Case No.: CV16-00767

Dept. No.: 7

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AMENDED ORDER

On September 8, 2017, after hearing testimony and taking evidence in a seven-day bench trial, this Court dismissed Plaintiff's Second Amended Complaint, dismissed the crossclaims by Defendants David Marriner and Marriner Real Estate, LLC as moot and entered judgment against Plaintiff and in favor of Defendants. In its oral ruling, the Court awarded damages on Defendants' counterclaim.

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Upon further consideration, the Court is concerned that its oral recitation of damages maybe subject to misinterpretation and thus hereby amends its previous *Order* as follows:

1. WILLIAM CRISWELL ("Criswell"), is awarded $1.5 million in compensatory damages, two years' salary, management fees (if applicable), attorney's fees and costs of suit;
2. ROBERT RADOVAN ("Radovan"), is awarded $1.5 million in compensatory damages, two years' salary, management fees (if applicable), attorney's fees and costs of suit;
3. DAVID MARRINER; is awarded $1.5 million in compensatory damages[1], attorney's fees and costs of suit;
4. POWELL, COLEMAN AND ARNOLD, LLP ("PCA"), is awarded its attorney's fees and costs of suit;[2]
5. CRISWELL RADOVAN, LLC (Criswell Radovan), is awarded its lost Development Fees,[3] attorney's fees and costs of suit;
6. CR CAL NEVA, LLC ("CR Cal Neva"), is awarded its lost Development Fees,[4] attorney's fees, and costs of suit;
7. CAL NEVA LODGE, LLC, is awarded its attorney's fees and costs of suit; [5]
8. MARRINER REAL ESTATE, LLC, is awarded its attorney's fees, and costs.[6]

IT IS SO ORDERED this 15 day of September, 2017.

Patrick Flanagan
PATRICK FLANAGAN
District Judge

[1] These damages include both lost commissions (Ex. 1) and loss of business good will.
[2] There was no testimony or evidence of damages to PCA produced at trial.
[3] Less that which has been earned and paid up to $1.2 million in the aggregate. (Ex. 3, p. 8)
[4] Less that which has been earned and paid up to $1.2 million in the aggregate. (Ex. 3, p.8)
[5] There were no damages sought on behalf of this project development entity.
[6] Only to the extent that they are not duplicative of any award or fees to David Marriner individually.

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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 day of September, 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:

Richard G. Campbell, Jr., Esq., attorney for Plaintiff George Stuart Yount;

Andrew N. Wolf, Esq., Attorney for Defendants David Marriner and Marriner Real Estate, LLC; and

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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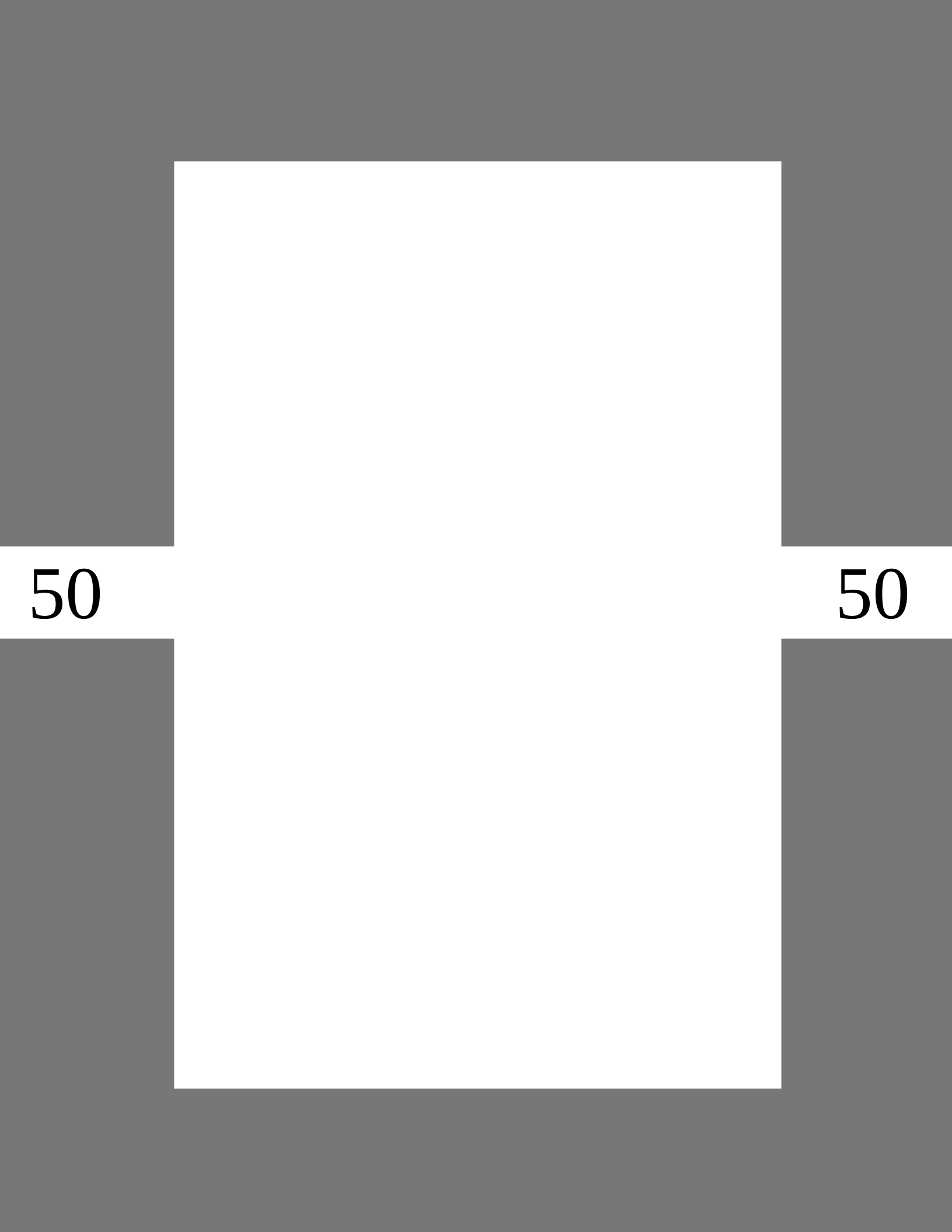
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Attorneys for Plaintiff
George Stuart Yount

DISTRICT COURT
WASHOE COUNTY, NEVADA

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

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NOTICE OF APPEAL

Please take notice that plaintiff George Stuart Yount, individually and in his capacity as owner of George Yount IRA, hereby appeals to the Supreme Court of Nevada from:

1. All judgments and orders in this case;

2. "Amended Order," entered on September 15, 2017 (Exhibit 1); and

3. All rulings and interlocutory orders made appealable by any of the foregoing.

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

Dated this 16th day of October, 2017.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Joel D. Henriod*
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Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of October, 2017, I served the foregoing "Notice of Appeal" on counsel by the Court's electronic filing system to the persons and addresses listed below:

MARTIN A. LITTLE
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3800 Howard Hughes Parkway, Suite 1000
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/s/ Adam Crawford
An Employee of Lewis Roca Rothgerber Christie LLP

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INDEX OF EXHIBITS

EXHIBIT NO.	DESCRIPTION	NUMBER OF PAGES
1	Amended Order	3

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EXHIBIT 1

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EXHIBIT 1

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Clerk of the Court
Transaction # 6301767

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 YOUNT IRA,

Plaintiff,

vs.

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

Defendants.
_____/

Case No.: CV16-00767

Dept. No.: 7

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AMENDED ORDER

On September 8, 2017, after hearing testimony and taking evidence in a seven-day bench trial, this Court dismissed Plaintiff's Second Amended Complaint, dismissed the crossclaims by Defendants David Marriner and Marriner Real Estate, LLC as moot and entered judgment against Plaintiff and in favor of Defendants. In its oral ruling, the Court awarded damages on Defendants' counterclaim.

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Upon further consideration, the Court is concerned that its oral recitation of damages maybe subject to misinterpretation and thus hereby amends its previous *Order* as follows:

1. WILLIAM CRISWELL ("Criswell"), is awarded $1.5 million in compensatory damages, two years' salary, management fees (if applicable), attorney's fees and costs of suit;
2. ROBERT RADOVAN ("Radovan"), is awarded $1.5 million in compensatory damages, two years' salary, management fees (if applicable), attorney's fees and costs of suit;
3. DAVID MARRINER; is awarded $1.5 million in compensatory damages[1], attorney's fees and costs of suit;
4. POWELL, COLEMAN AND ARNOLD, LLP ("PCA"), is awarded its attorney's fees and costs of suit;[2]
5. CRISWELL RADOVAN, LLC (Criswell Radovan), is awarded its lost Development Fees,[3] attorney's fees and costs of suit;
6. CR CAL NEVA, LLC ("CR Cal Neva"), is awarded its lost Development Fees,[4] attorney's fees, and costs of suit;
7. CAL NEVA LODGE, LLC, is awarded its attorney's fees and costs of suit; [5]
8. MARRINER REAL ESTATE, LLC, is awarded its attorney's fees, and costs.[6]

IT IS SO ORDERED this 15 day of September, 2017.

Patrick Flanagan
PATRICK FLANAGAN
District Judge

[1] These damages include both lost commissions (Ex. 1) and loss of business good will.
[2] There was no testimony or evidence of damages to PCA produced at trial.
[3] Less that which has been earned and paid up to $1.2 million in the aggregate. (Ex. 3, p. 8)
[4] Less that which has been earned and paid up to $1.2 million in the aggregate. (Ex. 3, p.8)
[5] There were no damages sought on behalf of this project development entity.
[6] Only to the extent that they are not duplicative of any award or fees to David Marriner individually.

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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 day of September, 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:

Richard G. Campbell, Jr., Esq., attorney for Plaintiff George Stuart Yount;

Andrew N. Wolf, Esq., Attorney for Defendants David Marriner and Marriner Real Estate, LLC; and

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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Transaction # 6348860 : yviloria

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Attorneys for Plaintiff
George Stuart Yount

DISTRICT COURT
WASHOE COUNTY, NEVADA

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

CASE APPEAL STATEMENT

1. Name of appellants filing this case appeal statement:

Plaintiff George Stuart Yount, individually and in his capacity as owner of George Yount IRA

2. Identify the judge issuing the decision, judgment, or order appealed from:

The Honorable Patrick Flanagan

3. Identify each appellant and the name and address of counsel for each appellant:

Attorneys for Appellant George Stuart Yount, individually and in his capacity as owner of George Yount IRA

DANIEL F. POLSENBERG
JOEL D. HENRIOD
LEWIS ROCA ROTHGERBER CHRISTIE LLP
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(702) 949-8200

RICHARD G. CAMPBELL, JR.
THE LAW OFFICE OF RICHARD G. CAMPBELL, JR. INC.
200 South Virginia Street, 8th Floor
Reno, Nevada 89501
(775) 686-2446

4. Identify each respondent and the name and address of appellate counsel, if known, for each respondent (if the name of a respondent's appellate counsel is unknown, indicate as much and provide the name and address of that respondent's trial counsel):

Attorneys for Respondents Criswell Radovan, LLC; CR Cal Neva, LLC; Robert Radovan; William Criswell; Cal Neva Lodge, LLC; and Powell, Coleman and Arnold LLP

MARTIN A. LITTLE
ALEXANDER VILLAMAR
HOWARD & HOWARD
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(702) 257-1483

Attorney for Respondents David Marriner and Marriner Real Estate,LLC

ANDREW N. WOLF
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Incline Village, Nevada 89451
(775) 831-3666

5. Indicate whether any attorney identified above in response to question 3 or 4 is not licensed practice law in Nevada and, if so, whether the district court granted that attorney permission to appear under SCR 42 (attach a copy of any district court order granting such permission):

None

6. Indicate whether appellant was represented by appointed or retained counsel in the district court:

Retained counsel

7. Indicate whether appellant is represented by appointed or retained counsel on appeal:

Retained counsel

8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave:

N/A

9. Indicate the date the proceedings commenced in the district court, *e.g.*, date complaint, indictment, information, or petition was filed:

"Complaint," filed April 4, 2016

10. Provide a brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:

This action arises from a dispute over shares in a real estate development project. Plaintiff-appellant sued the Defendant-respondent developers for fraud and conversion (among other claims) to obtain a refund of his $1 million investment, upon learning that Defendants did not give him the type of shares that they had promised to give him.

The Court dismissed Plaintiff's second amended complaint and entered judgment in favor of the defendants. The Court then awarded monetary damages to the Defendants based on their affirmative defense of unclean hands. (*See* "Amended Order," entered September 15, 2017.)

11. Indicate whether the case has previously been the subject of an appeal or an original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of the prior proceeding.

N/A

12. Indicate whether this appeal involves child custody or visitation:

This case does not involve child custody or visitation.

13. If this is a civil case, indicate whether this appeal involves the possibility of settlement:

There are no circumstances that make settlement impossible.

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

Dated this 16th day of October, 2017.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Joel D. Henriod*

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JOEL D. HENRIOD (SBN 8492)
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Attorneys for Plaintiff

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002313

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of October, 2017, I served the foregoing "Case Appeal Statement" on counsel by the Court's electronic filing system to the persons and addresses listed below:

MARTIN A. LITTLE
ALEXANDER VILLAMAR
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3800 Howard Hughes Parkway, Suite 1000
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/s/ Adam Crawford
An Employee of Lewis Roca Rothgerber Christie LLP

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Code No. 4185

IN THE SECOND JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE JEROME M. POLAHA, DISTRICT JUDGE

-oOo-

GEORGE YOUNT, Plaintiff,	)	
vs.	)	Case No. CV16-00767
CRISWELL RADOVAN, Defendant.	)	Dept. No. 3

TRANSCRIPT OF PROCEEDINGS

IN CHAMBERS STATUS CONFERENCE

MONDAY, NOVEMBER 13TH, 2017; 2:00 P.M.

RENO, NEVADA

Joan Dotson, NV CSR #102

002315 002315

A P P E A R A N C E S

MARTIN LITTLE
Attorney at Law

RICHARD CAMPBELL
Attorney at Law

DAN POLSENBERG
Attorney at Law

JOEL HENRIOD
Attorney at Law

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MONDAY, NOVEMBER 13TH, 2017; RENO, NEVADA

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MR. LITTLE: Martin Little with Howard and Howard.

MR. WOLF: Andrew Wolf.

MR. CAMPBELL: Rick Campbell.

MR. POLSENBERG: From Lewis & Rocca we have Dan Polsenberg and Joel Henriod.

THE COURT: I inherited this case. Let me ask you. Are there any post-trial motions in the works?

MR. POLSENBERG: We are actually starting a motion on what we think you need to do. I don't know if it is a motion so much as just a brief. We were going to suggest to you that -- you set a briefing schedule so both sides can express what they think you need to do at that point.

THE COURT: All right. That's one of the reasons why we had a conference today.

Because there is a couple of ways I could go.

I read some of the transcripts and the pleadings. So -- I wanted to find out what your thinking was. So that's good. Where are you as far as getting ready to file that?

MR. POLSENBERG: I think we need several

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weeks.

THE COURT: Several weeks?

MR. POLSENBERG: Yes.

THE COURT: Who is talking?

MR. POLSENBERG: Dan Polsenberg. You know from experience, judge, I don't file short summaries.

THE COURT: All right. Because it is an interesting situation.

MR. POLSENBERG: Yes.

MR. WOLF: Andrew Wolf. Hi, your Honor. What is the court's inclination before having heard of counsel's plan to have a briefing schedule? What's the court's impression of its options? I would like to discuss that today.

THE COURT: Well, like I said, I read his -- the transcript of his oral pronouncement. I read the proposed findings of fact and conclusions. And then I started reading the pleadings, the Second Amended Complaint and the Answers to see what was listed in the Answers as far as affirmative defenses because there was no counterclaim. I didn't get to the point of reviewing the -- there are seven volumes of transcripts. And I started with the seventh to see if there is any oral motions for amendments to the pleadings. So I didn't get

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to that point yet. So in looking at some of the cases, depending on how the parties feel, I could do a review of the entire transcript. That's one way of doing it. I can give a motion for a new trial. That's the bottom option.

Anyway that's why I wanted to hear what your ideas were.

MR. LITTLE: Marty Little. I represent all of the defendants except for Mr. Marriner. A couple of things here. First of all, the plaintiff has filed an appeal based on the timing of Judge Flanagan's oral decision from the bench. We have been -- we've been placed in a settlement program.

THE COURT: You have?

MR. LITTLE: We have a settlement -- so we have a settlement conference set on December 5th.

THE COURT: How did that happen? I mean, there is no order.

MR. POLSENBERG: Judge, I'll tell you how because we file premature notices of appeal all the time, the notice of appeal, which is just cautionary, just in case the appeal time is running. And Marty knows that Joel and I do not think it is a valid notice of appeal.

THE COURT: I agree with that.

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MR. POLSENBERG: When the Supreme Court gets a notice of appeal, they don't do a jurisdictional review. They just assign it to a settlement conference. Because that way the settlement conference is held earlier. And, if it settles, nobody has to do anything. And, if it doesn't settle, when we file the valid notice of appeal, at least we have the settlement conference done.

THE COURT: Okay. So they do act on a settlement conference even though the jurisdictional aspect isn't considered?

MR. POLSENBERG: Right.

MR. LITTLE: Right.

THE COURT: I didn't know that. All right.

MR. LITTLE: So this is Marty again. My thoughts would be three fold. One, we do have a settlement conference set on December 15th. The parties agreed to that date. One thing the court could do is wait and see what happens. Let's not waste judicial resources and the parties' resources. Let's see if we can settle. We are sophisticated parties. Everybody understands what the issues are. We are going to settle the case or we're not. The two other approaches: One, we submitted findings of fact and conclusions of law in accordance with Judge Flanagan's oral pronouncement from

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the bench, his request that we do so. Mr. Campbell submitted very narrow objections to those proposed findings.

Another alternative for this court would be to look at the objections that have been lodged by Mr. Campbell, review those and make decisions based on the findings based on that.

In other words, you don't have to spend your time going through the entire transcript of the proceedings and justifying every finding of fact and conclusion of law because he set forth certain objections that he has chosen.

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MR. POLSENBERG: Let me say two things about that second course. First I think that it would be reversible error on its face and second our objections are a lot more than that expressed by Rick.

THE COURT: I agree with you as far as reversible error. I was unable to observe the witnesses, make the decisions on the credibility or things like that. And there are cases that say, "Hey, you can't do that."

MR. LITTLE: Now that third approach, your Honor, is we have -- Judge Flanagan ruled -- after his evidence was closed, the parties had closing arguments.

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He ruled for two-and-a-half hours from the bench. He thought about the case over the weekend, came back and issued an amended order. So clearly he set forth findings of fact and conclusions of law. The Court can simply fashion the judgment based on his findings and we can do the -- I understand they are going to file motions, motions to alter, amend, a new trial. I don't know what they are planning. I presume we are going to get the kitchen sink. That's just a thought. This is not a case where Judge Flanagan didn't rule. He ruled for two-and-a-half hours and he Amended his order on the damages after thinking about it for the weekend. So we have details. The Court can simply reiterate judgment based on those findings. We can brief the validity of oral pronouncements as ordered and we can also brief -- your Honor, you have already noticed the amendment issue which is --

THE COURT: Yes.

MR. POLSENBERG: -- which is glaring. If you were to enter all these and require me to be -- do post-judgment motions as opposed to post-trial prejudgment motions, I think that's just cause and a real sticky wicket.

THE COURT: Yes. I'm inclined to go with that

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first suggestion. Wait until after the 15th and see what happens down there. You all know what -- you all know where the case is. And you could -- attempt to handle it from that aspect which would be better than starting over, me coming into the middle of it.

MR. LITTLE: Jumping in. This is Marty. In that regard, maybe we stay things pending that? And, if we don't, Mr. Polsenberg will file his motion at that point to establish what he thinks we need to do and we can all weigh in on that.

THE COURT: All right.

MR. POLSENBERG: Very good.

MR. WOLF: Andrew Wolf. Do we want to set that deadline now and it can be some point in time after our settlement conference?

THE COURT: Yes. And you can have the --

MR. WOLF: My thought is that we just have a deadline for briefing. Everybody can submit a brief, if we are going to proceed this way. Rather than entering a judgment, everybody submits a brief of what they think should happen and one responding brief to what other issues everybody else raised.

THE COURT: How about January 15th and January 25th? Because the holidays are there.

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MR. LITTLE: Mr. Polsenberg can file his brief and tell us what he thinks should happen.

MR. POLSENBERG: Well, I was suggesting that we do simultaneous briefs.

MR. LITTLE: That's fine.

MR. POLSENBERG: And then we all reply at the same time. Since there is not a pending -- we are not making motions. We are trying to advise the court of our view on how it should proceed.

MR. LITTLE: I'm willing to go first. But we can do it simultaneously.

THE COURT: That's good for me. So then the 15th and the 25th.

MR. POLSENBERG: The 15th might be a holiday.

THE COURT: The 16th and the 26th. That's a Tuesday and a Friday.

MR. POLSENBERG: All right.

THE COURT: All right?

MR. LITTLE: Thank you, your Honor.

THE COURT: Okay. The next phone call: It settled, right? Okay, counsel, thank you.

(At this time the foregoing proceedings concluded.)

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STATE OF NEVADA)
)
COUNTY OF WASHOE)

I, Joan Marie Dotson, Certified Shorthand Reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify:

That I was present in Department No. 3 of the above-entitled Court and took stenotype notes of the proceedings entitled herein, and thereafter transcribed the same into typewriting as herein appears;

That the foregoing transcript is a full, true and correct transcription of my stenotype notes of said proceedings.

DATED: At Reno, Nevada, this 15th of February, 2019.

/s/ Joan Marie Dotson

Joan Marie Dotson, CSR No. 102

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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, 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

MARRINER'S OPENING BRIEF RE POST-TRIAL PROCEEDINGS BY SUCCESSOR DISTRICT JUDGE

TO THE HON. JERRY POLAHA, DISTRICT JUDGE:

Defendants DAVID MARRINER and MARRINER REAL ESTATE, LLC (collectively

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"Marriner"), respectfully submit the following opening brief re post-trial proceedings by the successor District Judge assigned to this matter after the untimely passing of Hon. Patrick Flanagan. This brief is submitted per the court's status conference order made during the telephonic status conference held on November 13, 2017.

1. Introduction

This is an action for alleged fraud and other misconduct in the sale of an LLC membership interest. On September 8, 2017, at the conclusion of the seven day bench trial in this matter, Judge Flanagan ruled from the bench. Flipping through his stack of yellow legal pads containing his copious notes diligently written throughout the trial, Judge Flanagan took nearly **2.5 hours** (and 51 pages of transcript) summarizing the testimony of every witness on direct, cross and re-direct examination, his impressions of each witness, the importance of various exhibits, and then detailing his findings of fact, conclusions of law and his decision on the merits of all claims and defenses. The detail and diligence of Judge Flanagan was overwhelming. Judge Flanagan's conclusions are also interspersed in his periodic colloquy with Mr. Yount's trial attorney, Richard Campbell, during Mr. Campbell's closing argument and rebuttal argument. One week later, on September 15, 2017, a partial trial transcript became available, and Judge Flanagan *sua sponte* filed an *AMENDED ORDER* clarifying and detailing his award of damages, costs and attorney's fees to each defendant.

Thereafter, Judge Flanagan suddenly fell ill and passed away, before a form judgment had been submitted to him for signature.

The matter was tried to completion. Judge Flanagan left rulings on all substantive issues in this lawsuit. The successor District Judge must now follow two pertinent rules of civil procedure and enter judgment pursuant to Judge Flanagan's clear and unambiguous rulings. The two applicable rules discussed below are NRCP 52 (findings by the court; judgment on partial findings) and NRCP 63 (inability of a judge to proceed). This brief will describe the next steps this court needs to follow to properly conclude the matter under the two rules cited.

2. Parties/Counsel

Plaintiff George Stuart Yount, represented at trial by Richard G. Campbell; represented

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on appeal by Richard G. Campbell, Daniel Polsenberg and Joel Henriod.

Defendants Criswell Radovan, LLC; CR Cal Neva, LLC; Robert Radovan; William Criswell; and Powell Coleman and Arnold, LLP, represented by Martin A Little.

Defendants David Marriner and Marriner Real Estate LLC, represented by Andrew N. Wolf.

3. Statement of the Case & Factual Summary

Yount sued the defendants alleging fraud and other misconduct in the sale of an LLC membership interest in Cal Neva Lodge, LLC. The LLC was formed to finance a renovation and other development of the Cal Neva Lodge in Crystal Bay, Nevada, on Lake Tahoe's North Shore. Yount alleged that the Defendants misrepresented and concealed material information regarding the project, its budget, its costs, and its expected completion date, as well as the Defendants' experience. Yount testified that several important facts were allegedly concealed from him, including significant cost-overruns, the need for a refinance to assure the project's viability, and that the real reason for a delay in the project's hotel opening date was due the inability to complete construction on time and on budget rather than a purported marketing strategy. Yount also alleged that he was swindled because he was sold a founder's unit which had been initially issued to CR Cal Neva, instead of a newly issued founder's unit. In this regard, he claimed that the developers Criswell, Radovan and their related companies were bailing out of the project due to its allegedly imminent failure, and did so by unloading one of their shares on Yount after another investor named Busick purchased the remaining unsold share that Yount was intending to purchase.

Judge Flanagan ruled that there was no evidence to support ***any elements*** of Yount's fraud claims – there were no false statements, no reliance by Mr. Yount and no damages, because Yount received exactly what he bargained for – a Founder's membership unit in the LLC. Trial Transcript at 1133:8 to 1137:12. (All references herein are to the Trial Transcript and the Trial Exhibits.)

The facts are exhaustively detailed in Judge Flanagan's ruling from the bench found at pages 1090:14 to 1141:4 of the trial transcript (the final 51 pages), the numerous comments and

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colloquies by Judge Flanagan during closing arguments,[1] and in the proposed findings of fact, conclusions of law and judgment (FFCLJ) submitted by defendants to the court after trial (after Judge Flanagan's sudden passing), a copy of which is submitted herewith as **Exhibit 1.** For sake of efficiency, the detailed facts are not repeated here, and we encourage the court to closely examine the proposed FFCLJ and Judge Flanagan's ruling from the bench and assorted colloquies in the transcript referenced above.

4. Summary of Claims versus Marriner

The three claims asserted against Marriner were for common law fraud, state law securities fraud, and punitive damages. As mentioned, Judge Flanagan's ruling from the bench and the Amended Order found no evidence of fraud, no misinformation, no fraudulent intent, no damages, and no evidence to support any elements of fraud. Judge Flanagan's factual findings and repeated colloquy during closing arguments were emphatic that Mr. Yount received exactly what he thought he was purchasing – a Founders Share in the Cal Neva Lodge LLC. As Judge Flanagan described it, Mr. Yount wanted to buy "a Cadillac," and he received a Cadillac.

In fact, on questioning by Judge Flanagan during closing argument, Mr. Yount's trial counsel, Richard Campbell, agreed with Judge Flanagan that if you put the two shares side-by-side -- the original issue Founder's share sold to Mr. Busick (the one that Yount claims he intended to purchase) and the CR Cal Nevada Founder's share re-sold to Mr. Yount -- "Functionally, there is no difference." (Trial Transcript 996:8-19.) [2] On this basis, as well as uncontroverted testimony of Mr. Radovan cited by Judge Flanagan at 1106:4-6,[3] and 1110:15-17,[4] and a mountain of other testimony an exhibits cited by Judge Flanagan during his ruling

[1] Judge Flanagan's comments and colloquies that underscore his decision-making, in addition to his 51 pages of rulings from the bench, appear in the Trial Transcript, Vol. 7, at 980:9 to 982:16; 992:21 to 997:20; 997:22 to 998:4; 1009:18 to 1010:24; 1016:20 to 1017:5; 1066:17-20; 1078:12-20 (Yount's willingness to reinvest once his confidence in management is restored); and 1087:23 to 1088:18.

[2] THE COURT: "… tell me if I laid that founders share from Mr. Criswell and Mr. Radovan right next to the founders share of Mr. Busick, what difference is there? MR. CAMPBELL: Well, there's a big difference with it if there's no shareholder approval as we saw in the document. THE COURT: I'm not talking about the process, the shareholder approval set out in the operating agreement. What's the difference between those two shares? MR. CAMPBELL: Functionally, there is no difference." (Trial Transcript 996:8-19.)

[3] "Mr. Radovan testified that the CR Cal Neva had as available a founders share under the PPM. That it was the same as the founders share Busick purchased."

[4] "…the CR shares were no different than the founders shares."

from the bench, Judge Flanagan concluded there was no damage, no fraud and no conversion, among other things.

5. Defense Judgment

Judge Flanagan's ruling from the bench awarded judgment to all defendants on all claims by Yount: "It will be the order of the Court, Ms. Clerk, that judgment is in favor of all defendants." (Transcript at 1140:22-23.) This complete defense award was made following a series of prior rulings that each claim was without merit. [5] Judge Flanagan found no false statements, no reliance and no damages. Under any analysis, the two fraud claims against Marriner were completely unsupported.

6. Damages Award to Marriner

The court's Amended Order, filed one week after Judge Flanagan ruled from the bench, awarded the following damages to Marriner:

> "3. DAVID MARRINER is awarded $1.5 million in compensatory damages (fn1), attorney's fees and costs of suit… (fn1: "1 These damages include both lost commissions (Ex. 1) and loss of business good will.")
>
> ***
>
> "8. MARRINER REAL ESTATE, LLC, is awarded its attorney's fees, and costs. (fn6) (fn6: "6 Only to the extent that they are not duplicative of any award or fees to David Marriner individually.")

Marriner did not file a counterclaim. The parties, however, actively tried the issue of whether Yount was complicit in efforts by certain members of the LLC members' leadership group (the Incline Men's Club a/k/a "the IMC") and others to interfere with Criswell Radovan's management of the project and their efforts to procure a necessary refinancing of the project with a lender named Mosaic due to increased project costs made known to Yount when he invested. Loads of testimony and numerous exhibits focused on Yount's involvement with the saboteurs. Yount agreed that the Mozaic loan was the project's only hope of survival. Yount suggested to the saboteurs that contacting the lender might be improper. Yount could

[5] Transcript at 980:13-19, 1131:20 and 1132:3 (first cause of action for breach of contract); 1133:7 (second cause of action for breach of fiduciary duty); 1133:8 to 1137:12 (third cause of action for fraud – no false statements, no reliance and no damages); 1138:3 (fourth cause of action for negligence); 1138:14 (fifth cause of action for conversion); 1139:1-2 (sixth cause of action for punitive damages); 1139:3-8 (state securities fraud).

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not adequately explain why he did not inform Robert Radovan that certain members were planning to go around Radovan's back and interfere with the loan. There was strong testimonial and documentary evidence that the Mosaic loan was halted and the project failed due to this interference, about which Yount had advance notice. (See ruling at 1139:13 to 1140:21; Yount testimony Vol 5 at 764:22 to 770:9.)

The $1,500,000 damages awarded to Marriner ties almost exactly to the exhibits supporting Marriner's damages. See FFCLJ **Exhibit 1** hereto at Para. 13. Trial Exhibit 1 cited by Judge Flanagan's Amended Order shows Marriner's real estate broker's commission rate for the 28 condos to be constructed as part of the Cal Neva Lodge redevelopment. Specifically, Page 2 of Trial Exhibit 1 provides "Marriner Real Estate will be paid a listing portion of the sales commission at 3% of the total sales price for any fully executed condominium or founding membership investment or funding arranged by Marriner Real Estate LLC."

Trial Exhibit 4, Confidential Offering Memorandum, at page 22, contains a page entitled "CAL NEVA HOTEL Phase II -- 28 Managed Residences For Sale," which shows projected gross sales income from sales of the 28 condos to be constructed at $43,288,000 total. The table includes notes explaining the basis for the projections, including comparable prices per square foot. Pursuant to the terms of Exhibit 1, Marriner would have earned 3% of that gross revenue, or $1.3 million. ($43,288,000 X 0.03 = $1,298,640.) This information is specific and quantifiable from the documents admitted into evidence without objection.

Marriner testified at Vol 1 (8/29/2017) at 122:13 to 123:13 that the project/condo sales were going to be his next five years of work, and provided other testimony regarding the impact to Marriner caused by of the failure of the project.

As a result of the failure of the project, Marriner also lost his equity stake shown in the Cal Neva Lodge Capital Tables to be $187,500. See Trial Exhibit 5, Cal Neva Lodge, LLC, Amended and Restated Operating Agreement, Schedule 4.2, showing capital contributions of preferred members as of November 24, 2014, including: "Marriner Real Estate, LLC $187,500." This information is likewise specific and quantifiable from the documents admitted into evidence without objection.

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Marriner also lost his right to an Honorary Founding Membership, as set forth in Trial Exhibit 1, Page 2, last line, and potential compensation for other consulting work shown on Trial Exhibit 1, Page 3, "Additional Work." The perks of a Founding Membership include a $400,000 discount on a condo purchase when they were offered for sale.

Thus, the court's award of $1.5 million to Marriner ties almost exactly to the two substantial figures identified above: $1,298,640 in lost sales commissions, plus $187,500 in lost equity. The lost perks of a founding membership are not included. The value of lost goodwill, if quantified, would increase to total even further.

7. NRCP 54(c)

> **(c) Demand for Judgment.** A judgment ***by default*** shall not be different in kind from or exceed in amount that prayed for in the demand for judgment, except that where the prayer is for damages in excess of $10,000 the judgment shall be in such amount as the court shall determine. ***Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.***

Thus, when a case is tried, the court may enter judgment for the relief to which each party is entitled. The pleadings do not restrict the court, except when the judgment is by default. Judge Flanagan found that Mr. Yount participated in the IMC's interference with the Mosaic loan, which lead to the project's financial failure, and awarded damages accordingly, as authorized by NRCP 54(c).

8. Next Steps

The next part of this brief will discuss the procedural requirements when the trial judge cannot continue. It is important to reiterate the posture of this case at the time of Judge Flanagan's untimely passing, which was as follows:

1. Evidence closed
2. Closing Arguments completed
3. Deliberation by the judge in chambers
4. The Judge ruled from the bench (2.5 hours, 51 pages).
5. The ruling contains a discussion of all the evidence, findings of fact, conclusions of law

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and the outcome on all issues tried to the court.

6. The ruling also expressly adopts the proposed findings of fact submitted by the defendants before the trial. (Transcript 1131:14-17.) See the separate proposed FFCL by Marriner and Criswell Radovan, both filed on 8/25/2017 (Eflex Transaction #6268465 and #6268725).
7. The ruling re damages was clarified in the Amended Order.
8. The only thing left for the court to do was to sign a final form of Judgment per NRCP 52(a) and then receive and decide motions for attorney's fees under NRCP 54(d)(2).

It is arguable, if not clear, that no further FFCLJ are even necessary due to the completeness of the ruling from the bench and the subsequent Amended Order. Only a simple form of judgment is required at this juncture, per the requirements of NRCP 52(a), quoted below. Alternatively, an all-inclusive FFCL&J could be entered.

RULE 52. FINDINGS BY THE COURT; JUDGMENT ON PARTIAL FINDINGS

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. ***It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence*** or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in subdivision (c) of this rule. But an order granting summary judgment shall set forth the undisputed material facts and legal determinations on which the court granted summary judgment.

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The next question, then, is: What must a successor District Judge do before entering a judgment, now that he has "inherited" the case in this stage of the proceedings? The analysis starts with NRCP 63.

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> **NRCP 63 – INABILITY OF A JUDGE TO PROCEED**
> If a trial or hearing has been commenced and the judge is unable to proceed, ***any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties***. In a hearing or trial without a jury, the successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness. But if such successor judge cannot perform those duties because the successor judge did not preside at the trial or for any other reason, the successor judge may, in that judge's discretion, grant a new trial.

It is important to reiterate what this case is NOT: This is not a case where evidence was presented and the trial judge was replaced before he made any findings. The court should not allow itself to be confused by any cases which Yount might present which involve the trial judge not making any oral or written findings before becoming unavailable to finalize his rulings. This case is at the extreme end of the spectrum of the original judge leaving a complete, indeed exhaustive, record of his findings of fact and conclusions of law following the close of evidence, per NRCP 52(a).

9. Cases under NRCP 63 and FRCP 63

Smith's Food King v. Hornwood, 108 Nev. 666, 836 P. 2d 1241 (1992) (Under NRCP 63, a successor judge is required to *rehear disputed evidence when the original judge has not issued competent findings of fact and conclusions of law*). This appears to be the most complete statement by the Nevada Supreme Court regarding NRCP 63. *Smith's* is based on the prior version of the rule, which was amended in 2005.

Canseco v. United States, 97 F.3d 1224, 1227 (9th Cir. 1996), arose from a bench trial of a wrongful death action, after which the trial judge delayed issuing her FFCLJ in favor of the defendant until two years after the trial, whereupon the judge retired. The plaintiff moved for a new trial, contending that the trial judge clearly erred in her factual findings, and committed legal error in interpreting and applying the law. The successor judge denied the motion. The Plaintiff then appealed and the Ninth Circuit reversed and remanded the case for further proceeding on the motion for new trial. The Ninth Circuit concluded as follows:

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> The 1991 amendment added the requirement, however, that before deciding an issue related to the case, a successor judge must "certify[] familiarity with the record and determin[e] that the proceedings in the case may be completed without prejudice to the parties." Fed.R.Civ.P. 63. This requirement was added "to avoid the injustice that may result if the substitute judge proceeds despite unfamiliarity with the action." Advisory Committee Notes to 1991 Amendment to Fed.R.Civ.P. 63. The plain language of the amended rule indicates that the certification of familiarity requirement applies to all cases in which a successor judge replaces another judge unable to proceed with a trial or hearing that has commenced.
>
> We conclude the successor district judge in this case must comply with Rule 63. Before ruling on Canseco's motion for a new trial, the successor judge must certify her familiarity with the record. To certify her familiarity with the record, the successor district judge will have to read and consider all relevant portions of the record. If, by reviewing the record, the judge determines there is sufficient evidence to support the findings actually made, or to support other necessary findings, and such evidence does not depend upon the testimony of a witness whose credibility is in question, she may conclude that the findings are supported by the evidence, or make the necessary findings, and deny the motion for a new trial, insofar as the motion challenges the sufficiency of the evidence.[2] In the event the sufficiency of the evidence depends upon the credibility of a witness whose credibility is in question, and that credibility cannot be determined from the record, the successor judge will have to recall the witness, if the witness is available without undue burden, and make her own credibility determination. Fed.R.Civ.P. 63. And, in her discretion, the successor judge may grant or deny the new trial motion. See Rose Hall, 576 F.Supp. at 125; Golf City, Inc. v. Wilson Sporting Goods Co., Inc., 555 F.2d 426, 438 n. 20 (5th Cir.1977); see also Advisory Committee Notes to the 1991 Amendment to Rule 63.
>
> 97 F. 3d at 1226-1227.

In *Canseco*, like this case, the successor judge needed to only review the prior judge's findings, not make new finding on a blank slate. Conversely, *Mergentime Corporation v. Washington Metropolitan Area Transit Authority*, 166 F.3d 1257 (DC Cir. 1999), distinguished *Canseco* (and by extension this case) because the successor judge picked up the case after evidence was closed but before the findings of fact were completed. This required the successor judge to make original findings not already determined by the prior judge. The DC Circuit held, "We find no error here, however, because the procedure the successor judge ordered together with the language he used demonstrate that he complied with Rule 63's basic requirement: <u>that a successor judge become familiar with relevant portions of the record</u>. 166 F.3d at 1265, emphasis added.

Analogous to this situation is *Leiserson v. City of San Diego*, 184 Cal.App.3d 41, 229

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Cal.Rptr. 22, (1986), where the successor judge's judgment based on the deceased trial judge's intended decision following a bench trial was held to be proper.

It would be foolish to argue that NRCP 63 requires a retrial where Judge Flanagan left so little for his successor judge to do in this case. The rule balances a party's need for a fair trial with the need for efficiency to allow a new judge to take over a case in mid-trial or after close of evidence. Each case arising under NRCP 63 will be unique and will present the successor judge with a unique set of circumstances in regard to what portions of the record must be reviewed based on the judicial actions required of the successor judge.

In this case, Judge Flanagan left virtually nothing for the successor judge to do, other than entry of the judgment. There is no basis for recalling witnesses on matters on which Judge Flanagan made explicit findings. There is no need to have a new trial. The trial was not round one, or the first inning, it was the *trial*.

The following briefly explains the basis for an award of attorney's fees which Marriner will seek immediately after the judgment is entered.

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10. Attorney's Fees.

Judge Flanagan awarded defendants their costs and attorney's fees, without determining amounts. The proper procedure is for the court to entertain defendants' motions for attorney's fees after entry of the judgment. See NRCP 54(d)(2). This brief, therefore, is not intended as a motion for attorney's fees.

Attorney's Fees per Contract. Paragraph 16.9 of the Operating Agreement, Trial Exhibit 5, contains an attorney's fee clause, which provides that if any member or manager commences an action against the other members and/or manager to interpret or enforce any of the terms of this agreement or as the result of a breach by the other members or managers of any terms hereof, the losing [party] will pay to the prevailing [party] reasonable attorney's fees, costs and expenses incurred…

Trial Exhibit 42 contains a copy of the "Member Signature Page and Power of Attorney", wherein Yount "hereby agrees to all of the terms and conditions of the Amended and Restated Operating Agreement of the Company…"

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Attorney's Fees as Sanctions. NRS 18.010(2)(b) permits a district court to award attorney fees to a prevailing party as a sanction when the district court determines a claim of the opposing party was brought or maintained without reasonable grounds or to harass the prevailing party. [6]

For purposes of NRS 18.010(2)(b), a claim is frivolous or groundless if there is no credible evidence to support it. *See, Rodriguez v. Primadonna Co.*, 125 Nev. 578, 588, 216 P.3d 793, 800 (2009). NRS 18.010(2)(b) provides that courts should liberally construe the statute in favor of awarding attorney's fees in all appropriate situations. The legislature expressed its intent that the court award attorney's fees and impose sanctions in all appropriate situations in order to punish and deter frivolous or vexatious claims and defenses due to the burden such claims and defenses place on judicial resources. *See* T*rustees, etc. v. Developers Surety & Indem. Co.*, 120 Nev. 56, 84 P.3d 59, 63 (2004) (discussing the evolution of NRS 18.010(2)(b)).

Initially, Yount's fraud complaint was a shotgun "everyone did everything" complaint. The court granted Marriner's motion for more definite statement and ordered Yount to specify exactly what he was alleging Marriner misrepresented, concealed, etc. The amended complaint alleged a litany of wrongdoing by Marriner. At trial, Yount was unable to prove a single instance of fraud, reliance or damages. The case was groundless, and it was brought and maintained without a reasonable basis. Judge Flanagan's rulings from the bench were emphatic that Yount had no grounds for his lawsuit.

In light of the above, Marriner intends to file a motion for attorney's fees as soon as the judgment is entered.

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[6] NRS 18.010(2)(b) was amended in 2003, after *Barozzi v. Benna*, 112 Nev. 635, 639, 918 P.2d 301, 303 (1996), to include as justification for attorney fees "maintain[ing]" a claim without reasonable ground. 2003 Nev. Stat., ch. 508, § 153, at 3478. Accordingly, since the 2003 amendment, continuing or maintaining an action which a litigant learns is groundless after initiating it is a proper basis for an award of sanctions under the statute.

NRS 7.085(1) separately allows a district court to require an attorney to personally pay expenses and attorney fees relating to a case when the attorney filed or maintained an action that was not well-grounded in fact or existing law, did not provide a good faith argument for a change to existing law, or unreasonably extended the proceedings. *Stubbs v. Strickland,* 297 P.3d 326, 330, 129 Nev. Adv. Op. 15 (2013).

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11. Conclusion

The only thing left for the successor judge to do in this case is to sign a final form of Judgment per NRCP 52(a) and then receive and decide motions for attorney's fees under NRCP 54(d)(2). Per NRCP 52(a) the final form of judgment may either (A) specify only the bottom-line results in a concise manner and rely solely upon the previous rulings from the bench and the Amended Order by Judge Flanagan, or alternatively, (B) may recite the complete findings of fact, conclusions of law and the bottom-line results. Either approach would satisfy NRCP 52(a).

Date: January 16, 2018.

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

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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 OPENING BRIEF RE POST-TRIAL PROCEEDINGS BY SUCCESSOR DISTRICT JUDGE

UPON:

Richard G. Campbell, Jr. THE LAW OFFICE OF RICHARD G. CAMPBELL, JR. INC. 333 Flint Street Reno, NV 89501 Telephone: (775) 384-1123 Fax: (775) 686-2401 rcampbell@rgclawoffice.com	Attorney for Plaintiff George Stuart Yount, Individually and in his capacity as Owner of George Stuart Yount IRA
Martin A. Little HOWARD & HOWARD ATTORNEYS PLLC 3800 Howard Hughes Parkway, Suite 1000 Las Vegas, NV 86169 Telephone: 702-257-1483 Fax: 702-567-1568	Attorney for Defendants Criswell Radovan, LLC, CR CAL NEVA LLC, Robert Radovan, William Criswell, Cal Neva Lodge, LLC, Powell, Coleman and Arnold, LLP
Daniel F. Polsenberg Joel D. Henriod LEWIS ROCA ROTHGERBER CHRISTIE LLP 3993 Howard Hughes Parkway, Suite 600 Las Vegas, Nevada 89169 Telephone: (702) 949-8200 Fax: (702) 949-8398	Attorneys for Plaintiff George Stuart Yount, etc.

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: January 16, 2018. ___/s/ Andrew N. Wolf_____
Andrew N. Wolf

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Exhibits

Exhibit 1: FFCL&J Submitted by Defendants to the Court, after Trial, on October 30, 2017, with related correspondence — 44 Pages

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EXHIBIT 1

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EXHIBIT 1

Howard & Howard
law for business

Ann Arbor | Chicago | Detroit | Las Vegas | Peoria

October 30, 2017

Via E-Mail: Kathryn.Sims@washoecourts.us

Kathryn Sims
Judicial Assistant, Second Judicial District Court
Department 7
Washoe County Courthouse
75 Court St.
Reno, NV 89501

Re: George Stuart Yount v. Criswell Radovan, LLC; et al.
Case No. CV16-00767

Dear Ms. Sims:

Pursuant to WDCR 9, we are submitting our proposed Findings of Fact, Conclusions of Law and Judgment that the Honorable Patrick Flanagan asked us to prepare in his decision from the bench. We are submitting this in both Word format and PDF in case the Court desires to make any changes. We are also including a copy of a letter that we received from Richard Campbell, Esq. on October 24, 2017, which we do not agree with, as well as my response to his letter of today's date. Andrew Wolf and I collaborated on the response, per your suggestion.

Should you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,

Howard & Howard Attorneys PLLC

Martin A. Little, Esq.

MAL:krg
Enclosures
cc: Richard Campbell, Jr., Esq.
Andrew N. Wolf, Esq.

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Howard & Howard
law for business·

Ann Arbor | Chicago | Detroit | Las Vegas | Peoria

October 30, 2017

Via E-Mail: rcampbell@rgclawoffice.com
Richard C. Campbell, Jr., Esq.
200 South Virginia Street, 8th Floor
Reno, NV 89501

Re: ***Criswell Radovan, LLC adv. George Yount***
Proposed Findings of Fact

Dear Rick:

We are in receipt of your October 24, 2017 letter, and have reviewed your comments against the transcripts of the testimony and Judge Flanagan's oral ruling from the bench. For the reasons stated below, we don't believe your comments and objections are supported by either. We will, therefore, be submitting the Findings of Fact, Conclusions of Law and Judgment to the Court today, with a copy of your October 24 letter and this response.

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I. Findings of Fact

***Paragraph 59:** There was evidence that Radovan told Marriner not to tell Mr. Yount that he was purchasing one of the CR shares instead of a share under the Private Placement memo.

Response: This is your argument that the Court did not agree with. And it is contrary to Marriner's testimony at trial. *See, e.g.,* pages 174-175 of the trial transcripts.

***Paragraph 60**: Under the Operating Agreement if the other shareholders did not approve the transfer of the share from CR to Mr. Yount, then the founders share was materially different in that voting rights did not attach to the share and a shareholder was only entitled to receive the economic benefits, if any, from the share.

Response: The share itself is identical in terms to all other shares and the Court found as such. Yount offered no expert witness opinion testimony indicating that the value of the transferred share that Yount received was different from the original issued share that he thought he was going to receive. Judge Flanagan's conclusions and colloquy with counsel in this regard could not have been more emphatic. Not even Yount's own CPA, Ken Tratner (who gave business valuation advice to Yount in conjunction with the subject membership purchase, and who testified at trial),

ventured to offer such an opinion. Whether Yount was or was not approved is a separate issue. The fact that the transfer to him had not yet been formally approved is about its transfer, not about the terms of the share. He certainly could (and would) have been approved and had voting rights if he had not immediately tried to avoid that happening.

***Paragraph 74**: The recorded voice mail from Pender to Radovan did not clearly evidence that both Cal Neva and Mosaic had been working hard on the loan and that mosaic was enthusiastic about getting it closed before the end of the year.

Response: This is a matter of your opinion. The judge heard the message, could weigh its seriousness and enthusiasm and decided that it did. This was the Court's interpretation.

***Paragraph 83**. There was no evidence that at the December 12, 2015 meeting that CR was seeking executive committee approval for the Mosaic loan.

Response: There was evidence of this in Robert and Bill's testimony. *See, e.g.*, Transcript p. 232:17-24.

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***Paragraph 89**. There was no testimony at trial that the Executive Committee approved the Mosaic loan in a January 27, 2016 meeting.

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Response: There was evidence in Robert and Bill's testimony. *See, e.g.*, Transcript p. 264:16-19.

***Paragraph 92**. Every witness at trial did not testify that the Mosaic loan would have covered the Project's debt and expenses to completion.

Response: I took this from the Court's ruling. (Transcript, p. 52) Many witnesses so testified and the judge found them credible and accepted their testimony. However, I deleted the second sentence as it is unnecessary.

***Paragraph 95:** Exhibit 3 does not support that CR Cal Neva was only paid a portion of the development fees it was due under the operating agreement.

Response: There was supporting testimony from Bill and/or Robert. The Court heard the evidence and found CR Cal Neva was still owed development fees. *See, e.g.*, Transcript pp. 186, 188.

* **Paragraph 96**. There was no evidence presented that proved the Marriner suffered significant compensatory damage.

Response: Trial Exhibit 4, at page 22, contains a page entitled "CAL NEVA HOTEL Phase II -- 28 Managed Residences For Sale," which shows projected gross sales income from sales of the 28 condos to be constructed at $43,288,000 total. The table includes notes explaining the basis for the projections, including comparable prices per square foot. Pursuant to the terms of Exhibit 1, Marriner would have earned 3% of that gross revenue, or $1.3 million. ($43,288,000 X 0.03 = $1,298,640.) This information is specific and quantifiable from the documents admitted into evidence without objection.

Marriner testified at Vol 1 (8/29/2017) at 122:13 to 123:13 that the project/condo sales was going to be his next five years of work, and provided other testimony regarding the impact to Marriner caused by of the failure of the project. As a result of the failure of the project, Marriner lost his equity stake shown in the Cal Neva Lodge Capital Tables to be $187,500. See Trial Exhibit 5, Cal Neva Lodge, LLC, Amended and Restated Operating Agreement, Schedule 4.2, showing capital contributions of preferred members as of November 24, 2014, including: "Marriner Real Estate, LLC $187,500." This information is likewise specific and quantifiable from the documents admitted into evidence without objection. Marriner also lost his right to an Honorary Founding Membership, as set forth in Trial Exhibit 1, Page 2, last line, and potential compensation for other consulting work shown on Trial Exhibit 1, Page 3, "Additional Work." Thus, the court's award of $1.5 million to Marriner ties to the substantial figures identified above: $1,298,640 in lost sales commissions, plus $187,500 in lost equity.

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II. Conclusions of Law

* **Paragraph 3.** Since the other shareholders did not approve the transfer of the CR share to Mr. Yount, he does not have the same share as other shareholders.

Response: See FOF #60 response.

* **Paragraph 4.** There is a difference between what Mr. Yount agreed to buy, as set forth above, regarding Mr. Yount's being in the same position as if he had bought a share under the PPM.

Response: See FOF #60 response above.

III. Counterclaim

*** Paragraph 4**: The Court never found or ever discussed that by consent of the parties that the trial centered around Plaintiff's collusion with IMC and Molly Kingston to interfere with the Mosaic loan.

Response: There is no question that a significant part of the trial centered around Yount's collusion with IMC/Kingston to interfere with the Mosaic loan and the resulting damages to my clients. This issue was exhaustively addressed during the testimony of every witness other than Coleman and Tratner. Judge Flanagan was thoroughly familiar with all the pre-trial filings and was not mislead about the fact we had not plead counterclaim. His decision to award the defendants damages to conform to proof at trial couldn't be clearer.

*** Paragraph 6.** There was no evidence that defendants mistakenly plead a counterclaim as affirmative defenses, nor was there a finding by the Court that the affirmative defenses should have been treated as a counterclaim.

Response: See #4 above.

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*** Paragraphs 9, 10, and 11.** There was no evidence quantifying any specific dollar amounts to either Mr. Criswell or Mr. Radovan as to any type of damages accruing to them individually or as to them being entitled to a salary, nor was there evidence that CR Cal Neva was entitled to $480,000 of development fees.

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Response: The Court found that these defendants suffered damages stemming from Yount's interference, which was supported by substantial evidence. The Court clarified its damage award in the Amended Order filed 3 days after ruling from the bench. As stated above, there was evidence that the $480k development fee was earned and unpaid. The court found lost salary to be a resultant damage and the amount will be quantified in an affidavit, to be filed after judgment is entered (no different than how attorney fees awarded at trial are proven up by affidavit). There was substantial evidence to support the resultant $1.5 mm award, including the loss of their investment, expected returns, loss of advances made to the company and the damage to their professional reputations. The loss of development fees was also in evidence through Robert and Bill's testimony and Trial Ex. 4. The amount of this loss will be quantified by affidavit just like lost salary and attorney fees. Attorney fees are supported by paragraph 16.9 of the Operating Agreement (Trial Ex 5/42) and NRS 18.010 and NRS 7.085.

*** Paragraph 13.** There was no evidence at trial that quantified any damages sustained to Marriner Real Estate or Mr. Marriner.

Response: see response to #96 above

***Paragraphs 14 and 15:** There is no statutory or contractual basis to award Marriner or Powell Coleman its attorneys' fees and costs.

Response: Wrong. See NRS 18.010 and NRS 7.085. See also Paragraph 16.9 of the Operating Agreement

We will be submitting the Findings of Fact to the Court, along with a copy of your letter. I will copy you on the letter.

Very truly yours,

HOWARD & HOWARD ATTORNEYS, PLLC

Martin A. Little, Esq.

MAL/krg
Enclosures
cc: Andrew Wolf, Esq.

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

October 24, 2017

VIA E-MAIL;MAL@H2LAW.COM; ANWOLF@INCLINELAW.COM

Martin Little
Howard and Howard
3800 Howard Hughes Parkway Suite 1000
Las Vegas, NV 89169

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

002348

RE: Objections to Proposed Findings of Fact

002348

Dear Mr. Little and Mr. Wolf,

The following are my comments and objections to your proposed findings of fact, conclusions of law and judgment.

I. FINDINGS OF FACTS

Paragraph 59. There was evidence that Radovan told Marriner not to tell Mr. Yount that he was purchasing one of the CR shares instead of a share under the Private Placement memo.

Paragraph 60. Under the Operating Agreement if the other shareholders did not approve the transfer of the share from CR to Mr. Yount, then the founders share was materially different in that voting rights did not attach to the share and a shareholder was only entitled to receive the economic benefits, if any, from the share.

Paragraph 74. The recorded voice mail from Pender to Radovan did not clearly evidence that both Cal Neva and Mosaic had been working hard on the loan and that mosaic was enthusiastic about getting it closed before the end of the year.

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Paragraph 83. There was no evidence that at the December 12, 2015 meeting that CR was seeking executive committee approval for the Mosaic loan.

Paragraph 89. There was no testimony at trial that the Executive Committee approved the Mosaic loan in a January 27, 2016 meeting

Paragraph 92. Every witness at trial did not testify that the Mosaic loan would have covered the Project's debt and expenses to completion

Paragraph 95. Exhibit 3 does not support that CR Cal Neva was only paid a portion of the development fees it was due under the operating agreement.

Paragraph 96. There was no evidence presented that proved that Marriner suffered significant compensatory damages.

II. CONCLUSIONS OF LAW

Paragraph 3. Since the other shareholders did not approve the transfer of the CR share to Mr. Yount he does not have the same share as other shareholders.

Paragraph 4. There is a difference between what Mr. Yount agreed to buy, as set forth above, regarding Mr. Yount's being in the same position as if he had bought a share under the PPM

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III. COUNTERCLAIM

Paragraph 4. The Court never found or ever discussed that by consent of the parties that the trial centered around Plaintiff's collusion with IMC and Molly Kingston to interfere with the Mosaic loan.

Paragraph 6. There was no evidence that defendants mistakenly plead a counterclaim as affirmative defenses, nor was there ever a finding by the Court that the affirmative defenses should have been treated as a counterclaim.

Paragraphs 9, 10 and 11. There was no evidence quantifying any specific dollar amounts to either Mr. Criswell or Mr. Radovan as to any type of damages accruing to them individually or as to them being entitled to a salary, nor was there evidence that CR Cal Neva was entitled to $480,000 of development fees.

Paragraph 13. There was no evidence at trial that quantified any damages sustained to Marriner Real Estate or Mr. Marriner.

Paragraphs 14 and 15. There is no statutory or contractual basis to aware Marriner or Powell Coleman its attorney fees and costs.

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Very truly yours,

The Law Office of Richard G. Campbell, Jr. Inc.

Richard G. Campbell, Jr.

RGC/dlb

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Attorneys for Criswell Radovan, LLC, CR Cal Neva, LLC, Robert Radovan, William Criswell, and Powell, Coleman and Arnold LLP

IN THE SECOND JUDICIAL DISTRICT COURT OF

THE STATE OF NEVADA IN AND FOR THE

COUNTY OF WASHOE

GEORGE STUART YOUNT, Individually and in his Capacity as Owner of GEORGE STUART YOUNT IRA, Plaintiff, vs. CRISWELL RADOVAN, LLC, a Nevada limited liability company; CR Cal Neva, LLC, a Nevada limited liability company; ROBERT RADOVAN; WILLIAM CRISWELL; CAL NEVA LODGE, LLC, a Nevada limited liability company; POWELL, COLEMAN and ARNOLD LLP; DAVID MARRINER; MARRINER REAL ESTATE, LLC, a Nevada limited liability company; NEW CAL-NEVA LODGE, LLC, a Nevada limited liability company; and DOES 1 through 10, Inclusive, Defendants.	CASE NO.: CV16-00767 DEPT NO.: B7

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

This matter came before the Court for a bench trial on August 29, 2017 through September 8, 2017, the Honorable Patrick Flanagan presiding. Plaintiff George Stuart Yount, individually and in his capacity as owner of George Stuart Yount IRA, appeared by and through his counsel of record, Richard G. Campbell, Jr., Esq. Defendants Criswell Radovan,

LLC, CR Cal Neva, LLC, Robert Radovan, William Criswell, and Powell, Coleman and Arnold, LLP, appeared by and through their counsel Martin A. Little, Esq., of Howard & Howard Attorneys PLLC. Defendants David Marriner and Marriner Real Estate, LLC, appeared by and through their counsel of record, Andrew N. Wolf, Esq., of Incline Law Group, LLP.

On September 8, 2017, at the conclusion of the trial, the Court, ruling from the bench, issued its decision on the record in open court.

On September 15, 2017, a partial transcript of the trial was filed, containing the Court's ruling from the bench. On September 15, 2017, the same day, the Court issued its *AMENDED ORDER* clarifying its award of damages to the Defendants.

The Court, having reviewed the trial statements and other pleadings on file herein, having heard and reviewed all of the evidence presented, as well as arguments of counsel, being fully advised in the premises, and good cause appearing, sets forth its Findings of Fact, Conclusions of Law and Judgment of the Court as follows:

I.

FINDINGS OF FACT

1. Criswell Radovan, LLC ("Criswell Radovan") is a real estate development firm with decades of experience developing large commercial projects, such as the Four Seasons Hotel in Dublin, the Ritz Carlton in San Francisco, the Calistoga Ranch in Napa Valley, and other award winning commercial properties. Criswell Radovan is managed by Defendants William Criswell ("Criswell") and Robert Radovan ("Radovan").

2. Criswell Radovan acquired the legendary Cal Neva Hotel in Lake Tahoe (the "Cal Neva Hotel") in April 2013 with the intent of reopening it after a multi-million dollar renovation (hereinafter the "Project").

3. Criswell Radovan formed Cal Neva Lodge, LLC ("Cal Neva Lodge") to own and reposition the Cal Neva Hotel and act as the investment entity for the Project's investors,

and New Cal Neva Lodge, LLC ("New Cal Neva") to hold title to all of the real and personal property of the Cal Neva Hotel. Cal Neva Lodge and New Cal Neva were named in this lawsuit as Defendants by Plaintiff Stuart Yount, individually and in his capacity as owner of George Stuart Yount IRA ("Plaintiff"); however, both entities filed for Chapter 11 Bankruptcy protection in the Federal Bankruptcy Court in Nevada, and, therefore, are subject to the automatic stay. Plaintiff did not seek relief from stay to pursue either entity in this litigation. On October 7, 2016, Plaintiff filed a notice of the two bankruptcy cases and therein notified the Court of his intent to proceed against the other (non-debtor) Defendants notwithstanding the pendency of the two bankruptcies.

4. Criswell Radovan also formed CR Cal Neva, LLC ("CR Cal Neva") to manage the Cal Neva Lodge and acquire and own its equity membership interest therein.

5. The Cal Neva Hotel, founded in 1926, is the oldest licensed casino in the United States and saw its hey day in the 1960's when it was owned by Frank Sinatra and became a popular destination among the Hollywood and political elite.

6. The Project was to be funded through commercial construction loan financing and $20 Million of equity (the "Founders' Shares").

7. The initial budget for the Project was developed with the assistance of the Project's general contractor, Penta Building Group ("Penta"), third party project managers Case Development Services and Thannisch Development Services, the Project's Architect, Peter Grove of Collaborative Design Studio, and Starwood Hotels ("Starwood").

8. Based on the initial budget, in 2014, Cal Neva Lodge acquired a $29.5 Million construction loan with Hall Financial ("Hall"), and a $6,000,000.00 mezzanine loan with Ladera Development, LLC ("Ladera"). CR Cal Neva also began offering Founder's Shares to prospective equity investors.

9. On February 13, 2014, David Marriner ("Marriner"), on behalf of Marriner Real Estate, LLC ("Marriner Real Estate"), entered into a Real Estate Consulting Agreement

with Cal Neva Lodge to, among other things, "manage all aspects of the sales of five 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. *See* Trial Exhibit 1. Marriner also personally invested in the Project by waiving his commission, although his investment was not part of the Founders' Shares. This agreement extended to selling additional Founder's Shares.

10. On or about February 18, 2014, Marriner first contacted Plaintiff about investing in the Project, but Plaintiff advised Marriner that he had no interest in investing at that time.

11. Between February 18, 2014 and June 17, 2015, there were no communications between Marriner and Plaintiff regarding the Project.

12. Construction began on the Project in 2014 and substantial completion was initially targeted for December 2015 -- to be timed with an opening celebration on Frank Sinatra's 100th birthday.

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

14. Around this time, the construction budget and schedule were being adversely impacted by scope changes, some of which were a result of value engineering exercises, as well as unforeseen construction issues, like code upgrades that became apparent after construction conditions were exposed during construction. Additionally, Starwood -- which had a contract with Cal Neva Lodge to join its Luxury Collection of hotels -- also required some changes be made to the Project in order to be included in Starwood's Luxury Collection.

15. Because of the cost impacts to the budget, it became necessary to sell the remaining $1.5 Million in Founders' Shares to help balance the Project's loan with Hall.

16. This offering was put out to a number of prospective investors with the assistance of Marriner beginning in June 2015.

17. One of the prospective investors was Plaintiff.

18. On June 17, 2015, 16 months after the initial contact, Plaintiff contacted Marriner by email expressing possible interest in the Project. *See* Trial Exhibit 7.

19. On July 12, 2015, Marriner invited Plaintiff to attend a tour of the Project. *Id.*

20. Plaintiff considers himself a sophisticated and "accredited investor" within the meaning of Regulation D promulgated under the Securities Act of 1933, as amended. In fact, he has been qualified as such for other investments.

21. Plaintiff is the CEO of Fortifiber Corporation, a company that manufactures and supplies construction black paper that goes behind stucco walls. He is also the CEO of Stanwall, which is a real estate company that has built and owns factories for Fortifiber. Those companies do sales well into the eight figures (meaning $10,000,000 or more per year).

22. Over his career, Plaintiff has been involved in the acquisition and development of a number of factories and large residential projects. He has experience and is familiar with cost overruns and schedule impacts on construction projects.

23. Plaintiff understands how to review and analyze financial statements and to assess risk when it comes to making an investment in a company or real estate.

24. Plaintiff surrounds himself with a team of advisors when he is doing due diligence and considering whether to make an investment, including seeking guidance from his company's Chief Financial Officer, his Los Angeles-based CPA, and sometimes his attorney.

25. On July 14, 2015, Plaintiff toured the Project with Marriner and a representative of Penta. *See* Trial Exhibit 8. The tour lasted approximately two hours.

26. Following the tour, on July 14, 2015, Marriner forwarded Plaintiff the Confidential Private Placement Memorandum (the "PPM," Trial Exhibit 3) and the Confidential Offering Memorandum (the "COM," Trial exhibit 4). *See* Trial Exhibit 8. These documents were prepared by expert securities law counsel for Cal Neva Lodge.

27. Plaintiff was also provided the Amended and Restated Operating Agreement of Cal Neva Lodge (the "Operating Agreement," Trial Exhibit 5), and a copy of the Subscription Agreement (Trial Exhibit 42). These documents were likewise prepared by expert securities law counsel for Cal Neva Lodge. Hereinafter, the PPM, the COM, the Operating Agreement, the Subscription Agreement, and the various attachments and schedules thereto are collectively called "the Investment Documents."

28. Plaintiff read and understood the Investment Documents before investing and had the opportunity to have his attorney and accountant review the same. Yount was specific in his testimony that he had read and understood all of the fine print in the Investment Documents before investing.

29. Under the PPM, Plaintiff read and understood the opportunity being offered to invest in the Project was being sold in reliance on exemptions from registration requirements of federal and state securities laws.

30. Plaintiff also read and understood that this investment was speculative and contained certain risks, including all risks inherent in the creation of a new business.

31. Plaintiff also read and understood that the Project could be delayed or impeded by budgetary and costs overruns which may require additional capital. In fact, this was the state of the Project when he was considering investing during the time period of July to October, 2015.

32. Plaintiff understood that if Cal Neva Lodge was unable to raise sufficient funding or equity for the Project, he could lose his entire investment.

33. In addition to these offering documents, Plaintiff was provided other financial statements, Executive Committee reports and construction progress reports.

34. One of these construction progress reports, dated July 2015 (Trial Exhibit 10) was provided to Plaintiff on July 22, 2015. *See* Trial Exhibit 15. The July 2015 Construction Progress Report was prepared by third parties, Case Development Services and Thannisch

Development Services. *Id.*

35. Page 16 of this report contains a "Construction Summary" which listed 16 separate items that were adversely impacting the original budget. The July 2015 Monthly Status Report was the most up-to-date information available to share with Plaintiff regarding the Project's construction.

36. During his due diligence, Plaintiff spoke with the Project's Architect, Peter Grove, who was also the architect for a lakefront cottage added to Plaintiff's lakefront estate at Lake Tahoe.

37. On July 15, 2015, Plaintiff asked Peter Grove "[w]hat do you rate the Project's chances of success?" *See* Trial Exhibit 13.

38. Peter Grove responded as follows:

> I'm going to say pretty good . . .
>
> Short term they are in a fund raising 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 food service in 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 from an investment standpoint. I'll continue to keep you guys posted with pics as things progress.

See Trial Exhibit 13.

39. Plaintiff believed Peter Grove was always honest with him and would not misrepresent facts about the Project's costs or schedule.

40. On July 15, 2015, Plaintiff submitted a list of questions to Marriner, which Marriner forwarded to Radovan for response. *See* Trial Exhibit 12.

41. On July 19, 2015, before Plaintiff first spoke to Radovan about the Project, he asked some additional questions of Marriner, including:

> As I understand it, you're over-budget by more than $5m so far. Where will that, and likely more, funding needs come from?

See Trial Exhibit 13.

42. On July 25, 2015, Radovan followed up on a telephone conference he had with Plaintiff by further answering the questions that Plaintiff had raised in Trial Exhibit 12. *See* Trial Exhibit 18.

43. Among other things, Radovan informed Plaintiff via e-mail that an additional $1.5 million of Founders' Shares was being offered and that Cal Neva was seeking to replace its existing $6 million mezzanine loan with a larger but less costly $15 million mezzanine loan. Radovan further explained that of the $15 million, $6 million was to be used to refinance the existing $6 million mezzanine loan and the $9 million in new additional funding would be used to cover the added cost of regulatory and code requirements which changed or were added by the two counties and TRPA, plus costs for design upgrades within the project and pre-development of the condo units. *Id.* Radovan, also explained to Plaintiff some of the financial terms of each of the loans. *Id.*; Trial Exhibit 20.

44. Plaintiff took extensive notes of his due diligence. *See* Trial Exhibit 21. These notes confirm, among other things, his understanding that CR Cal Neva owned $2 Million of Founders' Shares. *Id.*

45. His notes also confirmed that he understood CR Cal Neva was raising an additional $1.5 Million of equity, and seeking to refinance the mezzanine loan to obtain an additional $9 Million in lender financing (i.e., a total of $10.5 Million in additional debt and equity), to cover the anticipated cost impacts to the construction budget. *Id.* Plaintiff also understood, as of late July, 2015, that the Project intended to have a soft opening by December 12, 2015, for Frank Sinatra's 100th birthday party, but that the full opening was pushed back

until April, 2016. *Id.*

46. Plaintiff not only knew and understood the Project was seeking additional financing to cover cost overruns, but he attempted to help by engaging Roger Wittenburg and Boulder Bay as potential financing sources.

47. Plaintiff sent his notes, and all of the investment-related material he had received from Radovan and Marriner, to his Los Angeles-based CPA, Ken Tratner, for advice and counsel. *See* Trial Exhibit 19. He also had his CFO evaluating this investment on his behalf. *See* Trial Exhibits 23 - 25.

48. Mr. Tratner spoke directly with Radovan and acknowledged that Radovan answered all of his questions and provided all of the information he was seeking to evaluate the investment for Plaintiff.

49. In addition to seeking advice and counsel from Ken Tratner, Peter Grove and his CFO, Plaintiff had a collegial relationship with one of the Project's investors, Les Busick. Plaintiff was impressed by the fact that Mr. Busick was an investor and member of the Project's Executive Committee. Although Plaintiff claims that he never spoke with Mr. Busick (or any of the other investors) during his due diligence, he admitted nothing prevented him from doing so.

50. Plaintiff conducted most of his due diligence in July and the beginning of August, 2015. Thereafter, he largely went "radio silent" during which time he was seeking to fund his potential investment through his 401(k), which admittedly took several months to process. During this time, Defendants did not know whether Plaintiff was going to invest or not.

51. During this time, in August 2015, Plaintiff was told by Radovan that the soft opening was being pushed back even further, to March 1, 2016, with a Grand Opening on Father's Day weekend, June 17, 2016. *See* Trial Exhibit 27. After this conversation, Plaintiff asked Peter Grove whether the Project could "REALLY be ready for a full opening in December on Sinatra's 100th." *See* Trial Exhibit 28. Plaintiff does not recall what Peter Grove

told him, but admits Peter Grove did not tell him anything during any of these communications to dissuade him from investing.

52. In August, September, and even on October 10, 2015 -- just a few days before Plaintiff invested, Marriner offered to take Plaintiff on additional tours to show him the progress of the Project. *See* Trial Exhibits 22, 29, 30, 37 and 105. Plaintiff did not take Marriner up on any of these offers.

53. Additionally, during the same time period, Marriner and Radovan asked Plaintiff if he had any additional questions or required additional information or documents. *See* Trial Exhibits 22, 25, 29, 30, 35, 37 and 104. The only additional information Plaintiff asked for came by e-mail on October 10, 2015, where he asked Radovan how the Project's schedule was holding up, to which Radovan responded: "Looking good. Soft opening in spring, with Grand Opening on Father's Day. Just brought in our General Manager and Chef." *See* Trial Exhibit 36.

54. Plaintiff admitted there was nothing he asked for that he was not provided. And nothing prevented Plaintiff from asking more questions of Defendants or their construction team.

55. Given the demands of the Project, and the fact Plaintiff could not commit to investing, CR Cal Neva continued to hold discussions with several other potential investors. One of these was Les Busick, who had been on the Executive Committee from its inception and was familiar with the Project's construction and financing status. Knowing those facts, Mr. Bucsick decided to purchase the last $1.5 million Founders Share at the end of September, 2015, just two weeks before Plaintiff's purchase of his interest. Notably, Mr. Busick made this significant additional investment after walking the Project with Marriner and Penta's superintendent, Lee Mason, and going over all of the actual and anticipated cost over-runs.

56. Mr. Busick's $1.5 Million investment went directly into the Project and indeed was more advantageous to the Project than an investment by Plaintiff, because it infused an

additional $500,000 into the Project ($1.5 Million versus $1 Million).

57. Shortly before Mr. Busick closed out the $20 Million subscription, and as Marriner was readying himself to leave town, Marriner asked Radovan what they would do if Plaintiff and Mr. Busick both wanted to invest at the same time. Radovan informed Marriner that CR Cal Neva could sell one of its two Founders' Shares if this hypothetical came to fruition.

58. In fact, it is undisputed that CR Cal Neva always had the authority and planned to sell one of its two Founders' Shares. *See,* e.g. Trial Exhibits 3, p. 8, fn 1, 101 and 150, § 22.

59. By the time Plaintiff expressed a willingness and ability to close, Mr. Busick had already purchased the last $1.5 Million in Founders' Shares under the PPM. At this time, CR Cal Neva decided to sell Plaintiff one of its $1 Million Founders' Shares since he was a pillar of the local community and it was expected that he would be a tremendous asset to the Project. Radovan believed Marriner informed Plaintiff of this fact, but Marriner believed that Radovan informed Plaintiff of this fact. The Court finds that Radovan and Marriner did not collude to conceal this fact from Plaintiff.

60. Indeed, the evidence was unequivocal that CR Cal Neva's Founders' Share has the identical rights, obligations and value as the Founders' Share Plaintiff says he thought he was purchasing. Plaintiff could not point to any material difference between the CR Cal Neva Founders' Share and the Founders' Share ultimately purchased by Mr. Busick. Plaintiff offered no expert witness opinion testimony to show that the CR Cal Neva Founders' Share purchased by Plaintiff and the Founders' Shares purchased by Mr. Busick and the other investors were materially different in value or other attributes.

61. On October 1, 2015, Plaintiff sent an e-mail to Radovan saying he was "getting very close" and asked Radovan to "send instructions as to how Premier is to make the $1 Million check and where to mail it." *See* Trial Exhibit 32.

62. Marriner responded the same day by saying: "I believe Robert will want you to use the following address: Criswell Radovan, LLC, 1336 Oak Street, Suite D, St. Helena, CA 94574." *See* Trial Exhibit 32. Plaintiff was sent wiring instructions for Criswell Radovan, LLC's bank account. *See* Trial Exhibit 107.

63. On October 2, 2015, Radovan's assistant, Heather Hill, sent an e-mail to CR Cal Neva's attorney, Bruce Coleman ("Coleman") of Powell, Coleman and Arnold, LLP ("PCA"), indicating that they had identified an investor (Plaintiff) to purchase one of CR Cal Neva's Founders' Shares. *See* Trial Exhibit 33. Ms. Hill asked whether Plaintiff would need to sign any other documentation "above and beyond the typical documentation."

64. On October 3, 2015, Plaintiff sent an e-mail to Radovan asking him to confirm that his check was to be mailed to the Criswell Radovan address Marriner had suggested. *See* Trial Exhibit 34. Radovan responded that the funds should be wired to their attorneys' Trust account, and that Heather Hill would send the wire instructions. *Id.*

65. On October 5, 2015, Plaintiff's CFO, Doug Driver, sent an e-mail to Plaintiff expressing concern "with this roundabout e-mail string about wiring instructions -- a great opportunity to send $1 Million to the wrong person." *See* Trial Exhibit 34.

66. On October 6, 2015, Coleman responded to Ms. Hill advising her that "Section 12.2 [of the Operating Agreement] provides that no Member may sell all or any part of its Interest unless approved in writing by Members holding at least 67% of the Percentage Interests in the Company." *See* Trial Exhibit 33. However, Coleman testified, and Sections 12.3 and 12.6 of the Operating Agreement confirmed, that approval can be obtained after the sale at the Company's next annual meeting. *See* Trial Exhibit 5. In fact, Section 12.6.1 says a proposed transfer requiring Member approval will be submitted to the Members after "the transferee has executed [the Operating Agreement] and any other documents and instruments as the Company may require." *Id.* Section 12.6 of the Operating Agreement provides that, "Even if the sale is not approved at the annual meeting, the buyer would still keep the

economic benefits of the interest.

67. Coleman was only told that Plaintiff was going to purchase one of the CR Cal Neva's Founders' Shares, and that CR Cal Neva wanted to use his firm's trust account to process the transaction, a service that he had been asked to do for other clients in third party purchase and sell transactions. *See* Trial Exhibit 33.

68. Coleman was never provided a copy of the Subscription Agreement or Escrow Instructions filled out and executed by Plaintiff (*See* Trial Exhibit 42).

69. On October 12, 2015, Ms. Hill sent an e-mail to Cheri Montgomery with Premier Trust, who was acting as Plaintiff' agent for this transaction. Among other things, she sent "wire instructions to our Corp. Account for Criswell-Radovan, LLC." *See* Trial Exhibit 38.

70. On October 13, 2015, Cheri Montgomery sent an e-mail to Ms. Hill attaching the signed documents on behalf of Plaintiff. *See* Trial Exhibit 42.

71. On October 13, 2015, Radovan signed the Acceptance of Subscription representing Plaintiff's purchase of one Founders' Share in Cal Neva Lodge. *See* Trial Exhibit 40.

72. Thereafter, Coleman followed the only instructions he had been given and sent the funds to Criswell Radovan, to repay a loan that Criswell Radovan had advanced to CR Cal Neva.

73. There was no evidence presented that, as of the date Plaintiff invested, Defendants knew the "financial wheels were coming off the bus" or that CR Cal Neva was attempting to bail out by selling Plaintiff one of its Founders' Shares. To the contrary, the evidence showed that:

- Mr. Busick had recently decided to invest another $1.5 Million after walking the Project with Marriner and Penta's Lee Mason to discuss the actual and proposed changes affecting the Project's budget and schedule;

- Penta and its subcontractors were working and being paid;
- There was an additional $9 Million left for construction costs under Hall's loan;
- Cal Neva Lodge had just hired and brought its General Manager and his family over from the Bahamas, and had also hired its Executive Chef;
- The cost impacts to the budget were in line with what Radovan had represented to Plaintiff that he and the construction team believed they would be (*See* Trial Exhibits 43 and 153);
- Three days before Plaintiff invested, Marriner was still inviting Plaintiff to tour the Project to see the progress with his own eyes and ears, which belies the argument by Plaintiff that Defendants believed the Project was tanking;
- Criswell Radovan, despite having no obligation to do so, made hundreds of thousands of dollars in cash advances of its own funds directly to Cal Neva and/or to its creditors in situations where there was insufficient cash on hand to pay Cal Neva's obligations or opportunities (such as the Mosaic loan term sheet) when due. This also belies the argument that Defendants believed the Project was tanking;
- Although they wanted to try to avoid having to do so, Cal Neva Lodge still had the option to raise additional capital from the investors through a capital call; and
- Perhaps most importantly, CR Cal Neva had been negotiating extensively, and was optimistic about securing a complete loan refinancing with a lender named Mosaic, which loan would have taken out Hall and Ladera in the time frame represented to Plaintiff and the other investors.

74. Indeed, a phone message left for Radovan by Ethan Penner -- the CEO of Mosaic -- on November 19, 2015, replayed in the courtroom on record, clearly evidences

that both CR Cal Neva and Mosaic had been working hard on the loan and Mosaic was enthusiastic about getting it closed before the end of the year. *See* Trial Ex 217.

75. In an email exchange with Marriner on August 3, 2015, in response to Marriner asking Yount if he had any further questions or needed more information, Plaintiff advised Marriner that he was getting his information directly from Robert Radovan and that his CPA, Ken Tratner, would be getting more information directly from Radovan. (Trial Exhibit 200.) Thereafter, from August 3, 2015, until the date of his investment on October 13, 2015, Plaintiff did not request any further information from Marriner. Moreover, Marriner had no involvement in Plaintiff's execution or delivery of his investment documents. Nor did he have any involvement in Plaintiff's delivery of funds to or from PCA. None of the Investment Documents or Project Monthly Status Reports were prepared by Marriner.

76. Defendants did not object or interfere with Plaintiff's due diligence. Plaintiff and his CPA, Ken Tratner, both admitted being provided everything they asked for. Neither had evidence that any of the information provided by Defendants was knowingly false when provided. Plaintiff testified Ken Tratner gave him no pause or concern about investing in the Project.

77. Plaintiff had no communications whatsoever with Criswell prior to investing, and had only had a few phone calls and e-mails with Radovan before investing.

78. After making his investment, Plaintiff was treated by Cal Neva Lodge as a full founding member with the identical rights as every other investor holding a Founders' Share. Plaintiff could not point to any difference between his Founders' Share that came from CR Cal Neva and the Founders' shares held by any of other founding members.

79. Plaintiff attended membership meetings and involved himself actively in those meetings.

80. On October 23, 2015, ten days after making his investment, Plaintiff toured

the Project with Marriner. *See* Trial Exhibit 41. Plaintiff understood that CR Cal Neva had executed a term sheet with Mosaic for a $47 Million loan in late October.

81. By November 19, 2015, CR Cal Neva and Mosaic had both already expended a lot of time putting together a loan to pay off Hall and Ladera and secure the additional financing needed to pay Penta and the other contractors to timely complete the Project. The evidence shows that CR Cal Neva had an executed term sheet for a $47 Million loan to Cal Neva Lodge, that it had paid approximately $50,000.00 on behalf of Cal Neva Lodge for costs associated with this loan, and that both parties were enthusiastic about closing that loan before year's end. *See* Trial Exhibit 217.

82. At the Executive Committee meeting held on November 19 2015, certain members expressed reservations about the Mosaic loan and instructed Radovan to try to renegotiate those terms while they looked at other financing options. The Executive Committee refused to approve the Mosaic loan at this time, the biggest opponent being the Incline Men's Club ("IMC"), a group of investors who had collectively invested as a unit through IMC Group CNR Cal Neva, LLC, acting through their representative Brandon Cheney.

83. At a December 12, 2015 investor meeting, investors in attendance were told about the current budgetary issues and that CR Cal Neva was seeking the Executive Committee's approval for the Mosaic loan.

84. By the end of December, 2015, the Executive Committee had still not authorized CR Cal Neva to close the Mosaic loan, and Hall was refusing to fund additional construction draws. Consequently, Penta was not being paid and threatened to stop work on the Project. *See* Trial Exhibit 111.

85. On December 13, 2015, Plaintiff sent Criswell an e-mail demanding that his $1 Million investment be returned based on his **mistaken** belief that the "financial wheels were coming off the Cal Neva bus" at the time he invested. *See* Trial Exhibit 46. Notably,

Plaintiff stated that if his "faith in the management, financial stability and future profitability of the Project is restored, we will consider reinvesting." *Id.*

86. Plaintiff claimed in this e-mail he had been told by other Founding members that they had been admonished "by Criswell Radovan just before they toured the Project with Plaintiff in October not to say anything about the alleged financial fiasco that was about to burst open." *Id.* This allegation came from members of the IMC, whose largest investor is Brandon Cheney, a witness called by Plaintiff at trial. As the largest investor of IMC, Mr. Cheney was a member of the Executive Committee. The Court finds no evidence that such a conversation occurred or that such an instruction was given by Criswell Radovan. In fact, for the reasons articulated by this Court on the record on September 8, 2017, the Court finds much of Mr. Cheney's testimony at trial to be highly suspect, biased and not credible.

87. The Court finds the source of Plaintiff's misinformation about the financial status of the Project to have come from Brandon Cheney and other members of IMC, who the evidence shows intended to torpedo the Mosaic loan and remove CR Cal Neva as Manager of Cal Neva Lodge, divest it of its shares (including its 20% Sponsor Shares in Cal Neva Lodge) and turn over to IMC the Management Agreement for the property – all of this under threat of civil and criminal actions for IMC's own benefit and not for the benefit of the Project. Contrary to Mr. Cheney's testimony, the Court finds Radovan and CR Cal Neva were not an impediment to the Mosaic loan closing.

88. In late 2015 and 2016, Mr. Cheney and IMC accused Defendants of all sorts of financial improprieties. Mr. Cheney even called Marriner a few weeks before this trial demanding Marriner get on the "right side" and return his commission or "bad things" would happen to him. Despite these allegations of financial impropriety, the financial audit that IMC solicited through its representation on the Cal Neva Lodge Executive Committee did not find any financial improprieties by CR Cal Neva, and IMC chose not to spend any additional money on a further audit. Notably, although there are procedures in the Operating Agreement

to remove CR Cal Neva as Manager with or without cause, CR Cal Neva remains the Manager of Cal Neva Lodge as of the conclusion of this trial.

89. The testimony at trial is undisputed that the Executive Committee finally approved moving forward with the Mosaic loan at its January 27, 2016 meeting, after which Radovan set up a meeting with Mosaic for February 1, 2016 to finalize the loan. Before that meeting took place, however, certain members of the Executive Committee, led by IMC, secretly went to Mosaic's offices without the knowledge or consent of CR Cal Neva and killed that loan.

90. There is no more solid evidence of this interference than in Trial Exhibit 124, which is an e-mail sent to Radovan by Mosaic on February 1, 2016 -- the very day IMC secretly met with Mosaic without CR Cal Neva's knowledge or consent. In that e-mail, Mosaic explains that as a result of its meeting, it was tearing up the executed term sheet for the loan, and indicated there was no reason to meet with CR Cal Neva later that day as previously scheduled by Mosaic and Radovan. Not coincidentally, the reasons Mosaic gave for backing out (Trial Ex. 129) were verbatim the issues IMC had with CR Cal Neva.

91. The Court finds that Plaintiff got exactly what he bargained for -- a Founders' Share in Cal Neva Lodge --but then caused damage to himself, Defendants and every other investor in the Project by colluding with IMC and Molly Kingston (another Project investor) to undermine the Mosaic loan, remove CR Cal Neva as manager, and divest it of its interest in Cal Neva Lodge. *See* Trial Exhibits 50, 55, 58-59, 109, 110, 112, 115 – 116, 118 – 122, 124 – 133, 136, 139 – 142, 145 – 146.

92. But for IMC, Plaintiff, and Molly Kingston's intentional interference with the contractual relations between Mosaic and Cal Neva Lodge, the Court finds the Mosaic loan would have closed and funded the Project to successful and timely completion.

93. Although Plaintiff and Mr. Cheney claimed to be supportive of the Mosaic loan, the testimony was unequivocal that there was never an attempt by IMC or Plaintiff to

try to resurrect the Mosaic loan, despite the open invitation by Mosaic to do so.

94. Because of the intentional interference by IMC, Plaintiff and Kingston, the Project tragically fell into Bankruptcy, and Criswell, Radovan and their entities have suffered significant compensatory damages, including loss of their investment and projected investment returns, loss of management fees, and loss of development fees.

95. In terms of development fees, CR Cal Neva was paid $720,000.00 of the $1.2 Million aggregate to which it was entitled (*See* Ex. 3, p. 8). The remainder, $480,000.00, was accrued and not yet paid.

96. Similarly, Marriner and his entity suffered significant compensatory damages, including loss of his investment and projected returns, lost commissions on the 28 planned condominiums under his Real Estate Consulting Agreement, and loss of business good will.

97. After his wrongful interference, and the resulting demise of the Project, Plaintiff attempted to distance himself from IMC and his investment, including filing of the instant lawsuit seeking the return of his investment before approval of his sale could be obtained at the next annual meeting.

98. The Court also finds that Plaintiff straddled the fence when it came to his investment -- wanting to keep it when he thought it benefitted him -- then wanting out when he thought it did not.

II.

CONCLUSIONS OF LAW

A.

DAMAGES

1. The thrust of Plaintiff's lawsuit is that he thought he was buying $1 Million of the last $1.5 Million in Founders' Shares available under the PPM, but instead was allegedly

duped by Defendants into buying one of CR Cal Neva's two Founders' Shares.

2. In his Second Amended Complaint, Plaintiff asserted causes of action for breach of contract, breach of fiduciary duty, fraud, negligence, conversion, punitive damages and securities fraud. Fundamental to each of these causes of action is causation and damages; namely, that some conduct on the part of Defendants caused Plaintiff to suffer damages.

3. Plaintiff cannot prove that he suffered damages by Defendants' conduct since he got exactly what he bargained for -- a Founders' Share in Cal Neva Lodge. Indeed, the testimony was unequivocal that the Founders' Share he purchased from CR Cal Neva has the identical rights, obligations and value as the Founders' Share he claims he thought he was purchasing. They are both Founders' Shares.

4. This is no different than getting a Cadillac from Jones West instead of from Don Weir. Plaintiff ended up with a Cadillac. Indeed, Plaintiff is in the same position now than he would have been had he beat Les Busick to purchase $1 Million of the remaining $1.5 Million in Founders' Shares.

5. Thus, Plaintiff is not able to prove damages in this case, which is fatal to each of his seven causes of action.

6. Furthermore, even assuming for the sake of argument that Plaintiff suffered any damages, for the reasons stated above, such damages were caused by his intentional interference with the Mosaic loan, which caused the demise of the Project.

7. For these reasons, each of Plaintiff's seven causes of action are dismissed.

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B.

PLAINTIFF'S FIRST CAUSE OF ACTION (FOR BREACH OF CONTRACT)

8. Plaintiff claims that Criswell Radovan, CR Cal Neva, Cal Neva Lodge, and New Cal Neva Lodge breached the Subscription Agreement because his $1 Million was not deposited into the account of Cal Neva Lodge or returned to him.

9. Cal Neva Lodge and New Cal Neva Lodge are in bankruptcy and the automatic stay applies to them. Plaintiff did not seek relief from stay to pursue either entity in this litigation. On October 7, 2016, Plaintiff filed a notice of the two bankruptcy cases and notified the Court of his intent to proceed against the other (non-debtor) Defendants notwithstanding the pendency of the two bankruptcy cases.

10. In Nevada, a breach of contract requires that plaintiff and defendant enter into a valid and existing contract; plaintiff performed or was excused from performance; defendant breached the contract; and plaintiff sustained damages as a result of the breach. *Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000).

11. In addition to his inability to prove damages, Plaintiff's breach of contract action fails against CR Cal Neva and Criswell Radovan because they are not parties to the Subscription Agreement, and, therefore, cannot be said to have legally breached said contract. Indeed, Plaintiff has admitted, and the Subscription Agreement demonstrates, that his contract was with Cal Neva Lodge – an entity that is currently subject to Chapter 11 protections.

12. Plaintiff has failed to carry his burden of proof under the first cause of action. For this additional reason, Plaintiff's first cause of action is without merit and is accordingly dismissed.

C.

PLAINTIFF'S SECOND CAUSE OF ACTION (FOR BREACH OF DUTY)

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

14. Specifically, Plaintiff claims that PCA had a fiduciary duty to comply with all provisions of the Subscription Agreement and ensure that his $1 Million was wired to Cal Neva Lodge only upon specific instructions from him.

15. Under the Restatement of the Law (Second) of Torts, § 874, "One standing in a fiduciary relation with another is subject to liability for harm resulting from a breach of duty

imposed by the relation." Thus, in order to prevail on a claim for breach of fiduciary duty, the plaintiff must show the existence of a fiduciary duty, a breach of that duty, and that the breach proximately caused damages.

16. Aside from Plaintiff's inability to prove damages, this claim fails because PCA owed no duty to Plaintiff. In fact, it is undisputed that PCA did not have the escrow instructions that Plaintiff claims were breached, and did not consider itself to be an escrow holder. Instead, PCA reasonably believed that its client, CR Cal Neva, was selling one of its Founders' Shares to a third party, and PCA followed the only instructions it had, which was to send the money to Criswell Radovan for the purchase of one of CR Cal Neva's Founders' Shares.

17. Plaintiff has failed to carry his burden of proof under the second cause of action. For these reasons, Plaintiff's second cause of action is without merit and is accordingly dismissed.

D.

PLAINTIFF'S THIRD CAUSE OF ACTION (FOR FRAUD)

18. Plaintiff's third cause of action for fraud is plead against all of the Defendants except PCA.

19. As stated above, Cal Neva Lodge and New Cal Neva Lodge are subject to Chapter 11 Bankruptcy protection.

20. In Nevada, fraud requires that a plaintiff prove that the defendant made a false representation of material fact; that the defendant knew or believed that his or her representation was false, or defendant had an insufficient basis or information for making the representation; defendant intended to induce plaintiff to act or refrain from acting upon the misrepresentation; plaintiff justifiably relied upon defendant's representation; and plaintiff sustained damages as a result. *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 956 P.2d 1382 (1998); *Blanchard v. Blanchard*, 108 Nev. 908, 839 P.2d, 1320 (1992). The suppression or

omission of a material fact which a party is bound in good faith to disclose is equivalent to a false representation, since that constitutes an indirect representation that such fact does not exist. *Nelson v. Heer*, 123 Nev. 26, 163 P.3d 420 (2007). Plaintiff has the burden of proving each and every element of the fraud claim by clear and convincing evidence.

21. As stated above, Plaintiff has failed to prove that he sustained damages as a result of any of Defendants' conduct. Therefore, his fraud claim fails for this reason alone.

22. Plaintiff's fraud claim fails against Criswell for the additional reason that Plaintiff admitted that he never met, spoke to or communicated with Criswell prior to making his investment. Thus, Criswell did not make any false representations to Plaintiff upon which he justifiably relied.

23. Plaintiff's fraud claim against Defendants fails for the additional reason that he has not proven any of these fraud elements by the heightened clear and convincing evidence standard. Indeed, when asked what evidence or proof he had to support his fraud claims, Plaintiff stated only his own personal supposition and belief, which falls far short of meeting his burden of proof.

24. Plaintiff's fraud claim against Defendants fails for the additional reason that he has not met his burden of proving that Defendants intended to induce his reliance or that he justifiably relied upon any representations made by Defendants. As stated above, Plaintiff is a sophisticated investor who performed his own due diligence and relied upon the advice and counsel of his CFO, CPA Ken Tratner and the Project's Architect (Peter Grove) in deciding to invest. Plaintiff and his team of advisors were admittedly given everything they asked for and he was repeatedly asked if he needed additional information or wanted to tour the Project to see its progress, including three days before investing. Nothing prevented Plaintiff or his advisors from touring the Project and seeing the progress with their own eyes or asking more questions of Defendants or their construction team. In fact, Plaintiff was encouraged to do so yet refused. Plaintiff also read and understood all of the operative legal

documents and disclaimers and decided to invest knowing the Project was over budget, delayed and in need of financing. He invested knowing this was a speculative, risky investment and that he could lose his entire investment if funding was not secured for the cost overruns.

25. Plaintiff's fraud claim against Defendants fails for the additional reason that there has been no evidence presented that Defendants misrepresented or omitted to disclose any material facts that were known to be false by the Defendants. In fact, the testimony was completely opposite.

26. Plaintiff claims he was misled about the date the Project would open. Yet, two days before he invested, Radovan told him by e-mail the soft opening was in spring and the Grand Opening Father's Day, 2016. Plaintiff admittedly has no evidence to believe this statement was false when made.

27. Plaintiff also contends he was defrauded because the Project was allegedly more over-budget than represented by Marriner and Radovan. Specifically, Plaintiff testified he was led to believe the Project was only $5 Million - $6 Million over-budget. Plaintiff's own testimony and notes, however, show he knew the Project was anticipated to be over-budget by $10 Million, which is entirely consistent with the status of cost overruns when he invested. Plaintiff has no evidence the Project was more over-budget than this when he made his investment, or that when these representations were made to him that Defendants knew or believed that information to be false.

28. Moreover, there is no evidence Defendants intended to conceal any information about the cost overruns from him. In fact, he was repeatedly being asked if he had additional questions or wanted to visit the site to see the status of construction himself.

29. Plaintiff also contends Defendants knew and misrepresented the financial health of the Project when he invested. The evidence presented at trial does not support this contention. In fact, the evidence shows Plaintiff knew from multiple sources the Project was

in fundraising mode -- meaning he knew financing was not in place for the additional cost impacts. Although prompted to ask if he needed additional information, Plaintiff never asked for any updates on the status of the Project's financing before he invested. Had he done so, he would have discovered that CR Cal Neva and Mosaic had been working hard on a loan and were enthusiastic about closing it.

30. Moreover, the evidence does not support that Defendants knew the Project was failing when Plaintiff invested. To the contrary, Mr. Busick had only recently walked the Project with Penta and Marriner and decided to invest an additional $1.5 Million after being satisfied with the status of construction. The evidence also shows that: (1) CR Cal Neva was enthusiastic about its ability to close a loan with Mosaic that would have insured the successful completion of the Project; (2) Penta and the other contractors were being paid; (3) there was $9 Million left on the Hall loan to pay Penta and its subcontractors; (4) Cal Neva Lodge had just hired its General Manager and Executive Chef, and was moving forward making the Project a Starwood Luxury brand; and (5) Criswell Radovan was putting money back into the Project when Plaintiff invested. All of this evidence points to the fact that the Project was reasonably believed by Defendants to be on track when Plaintiff invested. There simply is no evidence the Project was failing, or that CR Cal Neva sold Plaintiff one of its Founders' Shares because it believed the Project was failing. In fact, the evidence was undisputed that CR Cal Neva had the right and always planned sell one of its two shares, and there is nothing fraudulent about its intent to sell one of its Founders' Shares to a highly influential member of the Lake Tahoe community.

31. Plaintiff has failed to carry his burden of proof under the third cause of action. For all of these reasons, Plaintiff's third cause is without merit and is accordingly dismissed.

E.

PLAINTIFF'S FOURTH CAUSE OF ACTION (FOR NEGLIGENCE)

32. Plaintiff's fourth cause of action for negligence is plead against PCA.

33. Like his Second Cause of Action, this claim requires proof of a duty, breach, causation and damages.

34. This cause of action fails for the same reasons stated above with respect to his second cause of action, namely PCA did not owe or breach any duty to Plaintiff. Additionally, at most, this was a mistake situation which does not rise to the level of negligence.

35. Plaintiff has failed to carry his burden of proof under the fourth cause of action. Accordingly, Plaintiff's fourth cause of action is without merit and is accordingly dismissed.

F.

PLAINTIFF'S FIFTH CAUSE OF ACTION (FOR CONVERSION)

36. Plaintiff has asserted a conversion claim against CR Cal Neva, Criswell, Radovan, Criswell Radovan and New Cal Neva.

37. As stated above, New Cal Neva is subject to Chapter 11 Bankruptcy protection.

38. A claim for conversion requires a showing that Defendant committed a distinct act of dominion wrongfully exerted over Plaintiff's property; that the act was in denial of, or inconsistent with, Plaintiff's title or rights therein; or the act was in derogation, exclusion or defiance of Plaintiff's title or rights in the personal property. *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, P.3d 1043 (2000); *Ferreira v. P.C. Age, Inc.*, 105 Nev. 305, 775 P.2d 1041 (1989). Conversion is generally limited to those severe, major, and important interferences with the right to control personal property that justify requiring the actor to pay the property's full value. *Edward v. Emperor's Garden Restaurant*, 122 Nev. 317, 130 P.3d 1280 (2006).

39. As stated above, Plaintiff desired to purchase a Founders Share in Cal Neva Lodge. When the last authorized but unsold Founders Shares in Cal Neva Lodge were purchased by Les Busick, and therefore were no longer available for sale to Plaintiff, CR Cal Neva agreed to sell one of the two Founders Shares it owned to Plaintiff, and it so advised Marriner. There was no difference in value or otherwise between a Founders Share in Cal Neva Lodge purchased from Cal Neva Lodge and a Founders Share in Cal Neva Lodge

purchased from CR Cal Neva. And because of the preceding sale to Les Busick of all of the remaining authorized shares which could be sold by Cal Neva Lodge itself, Cal Neva Lodge had already received its full authorized capitalization. Plaintiff voluntarily wired the $1,000,000 purchase price for a Founder Share in Cal Neva Lodge to PCA, as requested by CR Cal Neva, the seller of the share, and in exchange he became the owner of the Founder Share in Cal Neva Lodge that he wished to purchase. This transaction was a sale, not conversion.

40. Moreover, Plaintiff got exactly what he bargained for, a Founders' Share in Cal Neva Lodge. Although Plaintiff may have been mistaken as to the source of that Founders' share, he still received a Founders' Share in Cal Neva Lodge, which does not rise to the level of an intentional tort of conversion.

41. Plaintiff has failed to carry his burden of proof under the fifth cause of action. For these reasons, as well as the fact that Plaintiff has not suffered damages, Plaintiff's fifth cause of action is without merit and is accordingly dismissed.

G.

PLAINTIFF'S SIXTH CAUSE OF ACTION (FOR PUNITIVE DAMAGES)

42. Plaintiff's seeks punitive damages against all Defendants.

43. This cause of action fails for the same reasons his fraud claim fails.

44. In Nevada, "in an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied, the Plaintiff, in addition to the compensatory damages, may recover damages for the sake of example and by way of punishing the defendant." *See* NRS 42.005. Pursuant to NRS 42.001, "fraud" means an intentional misrepresentation, deception or concealment of a material fact known to the person with intent to deprive another person of his or her rights or property or to otherwise injure another person. "Malice, express or implied," means conduct which is intended to injure a

person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others. "Oppression" means despicable conduct that subjects a person to cruel and unusual hardship with conscious disregard of the rights of the person.

45. Plaintiff has failed to carry his burden of proof under the sixth cause of action. There is no evidence whatsoever that the conduct of any of the Defendants in this case was fraudulent, malicious or oppressive, and, therefore the sixth cause of action for punitive damages is without merit and accordingly, is dismissed.

H.

PLAINTIFF'S SEVENTH CAUSE OF ACTION (FOR FRAUD UNDER NRS 90.570)

46. Lastly, Plaintiff has asserted a claim for securities fraud under NRS 90.570.

47. As a result of the interplay between NRS 90.660 and NRS 90.570, to prevail on a private cause of action for securities fraud under NRS 90.570, Plaintiff must establish "Either: (a) an untrue statement of a material fact or (b) the 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.

48. The Court finds this is not a securities fraud case, and NRS 90.570 has no applicability.

49. NRS 90.530 provides a list of transaction that are exempt from the registration requirements of Nevada's Uniform Securities Act.

50. Section 90.530.10 provides that "An offer to sell or the sale of a security to a financial or "institutional investor" is an exempt transaction.

51. The regulations further specify that an institutional investor includes an "accredited investor" as defined under Rule 501 of Regulation D.

52. In this case, the PPM and Subscription Agreement are clear this was a private offering open only to accredited investors, which are exempt from federal and state securities laws.

53. Aside from the fact this sale is not subject to the provisions of NRS 90.570, this fraud claim would fail for the same reasons Plaintiff's third cause of action for fraud fails. Specifically, Plaintiff has failed to establish "either: (a) an untrue statement of a material fact or (b) the 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..."

54. In light of the above, Plaintiff has failed to carry his burden of proof under the seventh cause of action. For these reasons, as well as the fact that Plaintiff has not suffered damages, Plaintiff's seventh cause of action is without merit and is accordingly dismissed.

I.

CROSS-CLAIM BY MARRINER AND MARRINER REAL ESTATE

Marriner and Marriner Real Estate's Cross-claim for indemnity/contribution against the other Defendants is dismissed as moot.

J.

COUNTERCLAIM

1. In this case, the Court finds that Plaintiff wrongfully colluded with IMC's principals and Molly Kingston to intentionally interfere with the contractual relations between Mosaic and Cal Neva Lodge, which interference caused Mosaic to rescind ("tear up") its executed term sheet. But for the intentional interference, this Project would have succeeded.

2. This Court has documented dozens of e-mail exchanges between Plaintiff and IMC and their efforts to undermine the Mosaic loan and there is no more solid evidence of that than in Trial Exhibit 124. That proposed loan was done and in place. Mosaic had evidenced its enthusiasm to close the loan. And yet the day the individuals from lMC went to Mosaic's offices without the knowledge of CR Cal Neva, that loan was dead. And the testimony is unequivocal that there was never an attempt by Plaintiff or IMC to resurrect it, despite the open invitation by Mosaic to reintroduce the loan.

3. This Court finds that it was the intent of Plaintiff, IMC, and Molly Kingston

to kill this loan, and divest CR Cal Neva from its equity interest under the threat of civil and criminal actions for their own benefit and not the benefit of the Project. It is tragic.

4. Although Defendants did not formally plead a counterclaim against Plaintiff, the Court finds that, by consent of all parties, including Plaintiff, a significant portion of this trial centered around Plaintiff's collusion with IMC and Molly Kingston to interfere with the Mosaic loan, which caused the demise of the Project and significant damages to Defendants and the other investors.

5. Pursuant to NRCP 15(b), "[w]hen issues not raised by pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause to them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues." Amendments to conform to proof are perfectly proper and courts should be liberal in allowing such amendments. *See Brean v. Nevada Motor Co.*, 269 P. 606, 606 (Nev. 1928) (citing *Miller v. Thompson*, 40 Nev. 35, 160 P. 775; *Ramezzano v. Avansino*, 44 Nev. 72, 189 P. 681).

6. Pursuant to NRCP 8(c), "[w]hen a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation." Here, Defendants plead, among other things, Plaintiff's unclean hands, estoppel, waiver, and Plaintiff's own fault as affirmative defenses and put on considerable evidence at trial of Plaintiff's involvement in the interference with the Mosaic loan, as well as Defendants' resulting damages.

7. Furthermore, pursuant to NRCP 54(c), "[e]very other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." "The Nevada Supreme Court recognized the liberal nature of NRCP 54(c) by confirming 'Under the liberalized rules of pleading,' a final judgment must grant the relief

a party is entitled to, even where the prayer for relief did not ask for such relief." *Magill v. Lewis*, 74 Nev. 381, 387-88, 333 P.2d 717, 720 (1958). *Magill* recognized that Rule 54(c) "implements the general principle of Rule 15(c), that in a contested case a judgment is to be based on what has been proved rather than what has been pleaded." *Magill*, 74 Nev. at 388.

8. In this case, justice requires that judgment be entered in favor of Defendants and against Plaintiff for his intentional interference with the contractual relations between Mosaic and Cal Neva Lodge, which interference caused Mosaic to tear up its executed term sheet and led to the demise of the Project without privilege or justification and for his own interest and not in the interest of the Project or its other investors. Plaintiff knew a prospective contractual relationship existed between Cal Neva Lodge and Mosaic. Along with IMC and Molly Kingston, he intended to harm and disrupt this relationship without privilege or justification. And his conduct resulted in significant harm to Defendants and to the other investors.

9. As a result of Plaintiff's intentional interference, Criswell has been damaged and is awarded $1.5 Million in compensatory damages, plus two years' salary, and management fees (if applicable). Criswell is also awarded his attorneys' fees and costs of suit.

10. As a result of Plaintiff's intentional interference, Radovan has been damaged and is awarded $1.5 Million in compensatory damages, plus two years' salary, and management fees (if applicable). Criswell Radovan and CR Cal Neva are also awarded their attorneys' fees and costs of suit.

11. As a result of Plaintiff's intentional interference, CR Cal Neva has been damaged and is awarded its lost development fees $480,000.00. CR Cal Neva is also awarded its attorneys' fees and costs of suit.

12. As a result of Plaintiff's intentional interference, Criswell Radovan is awarded its attorneys' fees and cost of suit.

13. As a result of Plaintiff's intentional interference, Marriner has been damaged and is awarded $1.5 Million in compensatory damages. These damages include both lost commissions (Trial Exhibit 1) and loss of business goodwill.

14. Marriner Real Estate is awarded its attorneys' fees and costs of suit.

15. PCA is awarded its attorneys' fees and costs of suit.

III.

JUDGMENT

Based upon the foregoing Findings of Fact and Conclusions of Law, and good cause appearing:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Second Amended Complaint, and each of the causes of action stated therein, are dismissed with prejudice as to all Defendants.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that Marriner's and Marriner Real Estate's crossclaim is moot and is dismissed with prejudice.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff GEORGE STUART YOUNT, Individually and in his Capacity as Owner of GEORGE STUART YOUNT IRA, shall pay William Criswell the sum of $1.5 Million in compensatory damages, plus two years' salary, management fees (if applicable), attorneys' fees and costs of suit.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff GEORGE STUART YOUNT, Individually and in his Capacity as Owner of GEORGE STUART YOUNT IRA, shall pay Robert Radovan the sum of $1.5 Million in compensatory damages, plus two years' salary, management fees (if applicable), attorneys' fees and costs of suit.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff GEORGE STUART YOUNT, Individually and in his Capacity as Owner of GEORGE STUART YOUNT IRA, shall pay CR Cal Neva, LLC its lost development fee of $480,000.00, attorneys' fees and costs of suit.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff GEORGE STUART YOUNT, Individually and in his Capacity as Owner of GEORGE STUART YOUNT IRA, shall pay Criswell Radovan, LLC its attorneys' fees and costs of suit.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff GEORGE STUART YOUNT, Individually and in his Capacity as Owner of GEORGE STUART YOUNT IRA, shall pay DAVID MARRINER the sum of $1.5 Million in compensatory damages, attorneys' fees and costs of suit.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff GEORGE STUART YOUNT, Individually and in his Capacity as Owner of GEORGE STUART YOUNT IRA, shall pay Marriner Real Estate its attorneys' fees and costs of suit.

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IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff GEORGE STUART YOUNT, Individually and in his Capacity as Owner of GEORGE STUART YOUNT IRA, shall pay Powell Coleman Arnold, LLP its attorneys' fees and costs of suit.

DATED this ____ day of _____ 2017.

_____
DISTRICT COURT JUDGE

Jointly Submitted by:

HOWARD & HOWARD ATTORNEYS PLLC

_____

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DISTRICT COURT

WASHOE COUNTY, NEVADA

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

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Pursuant to the Court's ruling on November 13, 2017, plaintiff GEORGE STUART YOUNT advises the Court as to the status of this case and appropriate next steps following the passing of Judge Flanagan.

INTRODUCTION

On September 8, 2017, Judge Flanagan issued an oral ruling following a bench trial. He never considered, adopted or entered findings of fact or conclusions of law or a judgment, however.

The Court cannot enter the findings and fact and conclusions of law proposed by defendants for several reasons. First, the law requires this Court to exercise its own sound judgment, not simply defer to Judge Flanagan's erroneous course. Here, this Court cannot reduce to a formal order even what is ascertainable from Judge Flanagan's preliminary oral rulings because those rulings are unjustifiable. Moreover, defendants' proposed findings also include material that is neither covered by Judge Flanagan's preliminary oral pronouncement nor substantiated by uncontested evidence in the record. Second, defendants' conclusions assume that they may amend their answer post-trial to assert affirmative claims—leave which defendants never sought and Judge Flanagan never considered. Third, the only conclusion that the objective trial record could substantiate as a matter of law would be judgment in favor of plaintiff. Thus, the Court must either enter findings of conclusions that result in judgment in favor of Mr. Yount or hold a new trial.

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RELEVANT FACTS

A. Facts Regarding the Underlying Dispute

Defendants WILLIAM CRISWELL and ROBERT RADOVAN are developers who undertook to purchase, renovate and manage the famed Cal Neva Lodge. (Hr'g Tr. 8/29/2017, at 5:13-15.)

Criswell and Radovan Form Various LLCs

Criswell and Radovan formed CAL NEVA LODGE LLC to hold title to the property and take on investors. (Hr'g Tr. 8/29/2017, at 6:6-23, Operating Agreement 3.1, Ex. 1.) Investors received membership interests in Cal Neva Lodge LLC—and, therefore, the property—in exchange for their investments. (Hr'g Tr. 8/29/2017, at 13:12-20).

Criswell and Radovan also formed two other limited liability companies in which *no other investors took part*. (Hr'g Tr. 8/29/2017, at 180:15-21 Hr'g Tr. 8/29/2017, at 182:1-8.) CRISWELL RADOVAN, LLC is managed by Sharon Criswell, William Criswell and Robert Radovan. (Hr'g Tr. 8/29/2017, at 180:1-8.) CR CAL NEVA, LLC ("CR") is the management company for the Cal Neva Lodge. (Hr'g Tr. 8/29/2017, at 182:6-8, Operating Agreement 8.1, Ex. 1.)

Shares in Cal Neva Lodge Sold to Raise Capital

Criswell and Radovan assembled a private placement offering seeking to raise $20 million in capital for the project. (Hr'g Tr. 8/29/2017, at 189:10-24, Hr'g Tr. 8/29/2017, at 192:13-16.) The units available under the Private Placement Memorandum ("PPM") were set at $1,000,000 each, which would give an investor under the PPM a percentage ownership in the Cal Neva Lodge. (Operating Agreement 4.3, Ex. 1.)

To ensure transparency and investor oversight, the Operating Agreement of Cal Neva Lodge LLC mandated that no member could sell any of their interest without express approval from other members holding at least 67% of the total interest:

> No member may sell, transfer, assign or otherwise dispose of or mortgage, hypothecate or otherwise encumber or per or suffer any encumbrance of all of any part of its interest unless approved in writing by members holding at least 67% of the percentage interest in the company...

(Hr'g Tr. 8/31/2017, at 413:6-13, Operating Agreement 12.2, Ex. 1.) Any attempt to transfer any such interest without such approval would be null and void. (Hr'g Tr. 8/31/2017, at 440-441:18-1, Operating Agreement 12.2, Ex. 1.) (This provided important protections, including to ensure that Criswell and Radovan did not diminish their investment, their skin in the game.)

1. Defendants Defrauded Yount and Converted his Investment Money

Criswell and Radovan, along with their realtor DAVID MARRINER, solicited Mr. Yount to invest $1 million in the Cal Neva Lodge. (Hr'g Tr. 8/31/2017, at 529:5-22, Hr'g Tr. 8/29/2017, at 28:3-11.) Specifically, they offered to sell him the last 3.5% interest that was offered as part of the authorized, $20 million private placement offering. (Hr'g Tr. 8/29/2017, at 30:18-24, Hr'g Tr. 8/31/2017, at 529:5-22.) They sent Mr. Yount information on the project, including financial disclosures associated with the redevelopment costs. (Hr'g Tr. 8/29/2017, at 31-32:19-1, Hr'g Tr. 8/31/2017, at 530:4-16.)

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Mr. Yount agreed to make the $1 million investment. To complete the transaction, defendants sent Mr. Yount a subscription agreement to effectuate the 3.5% ownership in the Cal Neva Lodge. (Hr'g Tr. 8/31/2017, at 531:8-20.) In October 2015, Mr. Yount signed the agreement and wired $1 million to the trust account of Criswell and Radovan's attorney, Bruce Coleman of POWELL COLEMAN AND ARNOLD LLP. (Hr'g Tr. 8/31/2017, at 417:3-10.)

Defendants' Misrepresentations

Unbeknownst to Mr. Yount, Criswell and Radovan had sold the remaining interest to another investor before Mr. Yount's $1 million arrived. (Hr'g Tr. 8/31/2017, at 407:15-24.) They nonetheless sent a subscription agreement to Mr. Yount as if his $1 million was covered under the private placement memorandum. (Hr'g Tr. 8/30/2017, at 220:6-23, Hr'g Tr. 8/31/2017, at 604:11-18.)

In January 2016, months after Mr. Yount had signed his agreement and sent $1 million, he learned that he never received an interest from the private placement offering (which was controlled by the PPM). (Hr'g Tr. 8/31/2017, at 597:1-11.) Rather, to keep Mr. Yount's $1 million, Radovan and Criswell unilaterally decided to "sell" him of one of CR's shares in the Cal Neva Lodge. (Hr'g Tr. 8/30/2017, at 374:5-16, Hr'g Tr. 8/29/2017, at 175-176:17-9.) This meant that the agreement that Mr. Yount had signed under the PPM was ineffective, because the $20 million private placement offering was already subscribed. (Hr'g Tr. 8/29/2017, at 14:11-22.) Radovan and Criswell never received, or even sought, the permission of investors necessary to sell a portion of their stake to Mr. Yount. (Hr'g Tr. 8/29/2017, at 84-85:22-9.) Worse still, Radovan and Criswell did not tell Mr. Yount where his money—which was supposed to be directed to capital improvements under the PPM—had gone. (Hr'g Tr. 8/30/2017, at 257:18-20, Hr'g Tr. 8/31/2017, at 610:2-19.)

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To cover up the unauthorized and ineffectual sale to Mr. Yount under the PPM, Criswell and Radovan worked with their attorney Bruce Coleman to complete documents that would transfer a portion of their interest in the Cal Neva Lodge to Mr. Yount, and tried to arrange for the retrospective permission from the investors. (Hr'g Tr. 8/30/2017, at 268:8-18.) They even sent Mr. Yount proposed documents with effective dates reaching back to October 2015 to make it appear that he had agreed to buy shares from CR all along. (Hr'g Tr. 8/31/2017, at 604:7-14.)

Mr. Yount refused to sign the misleading documents and demanded his money back. (Hr'g Tr. 8/31/2017, at 605:4-17.) Criswell and Radovan refused to return the funds. (Hr'g Tr. 8/31/2017, at 608:2-15.) Further, Criswell and Radovan told Mr. Yount that *Mr. Yount* had erroneously executed a subscription agreement in October. (Hr'g Tr. 8/30/2017, at 268:8-18.) However,

the subscription agreement was the only document Mr. Yount was ever sent to sign. (Hr'g Tr. 8/31/2017, at 604:16-17.)

Undisclosed Cost Overruns

Before Mr. Yount agreed to invest, Criswell and Marriner continually represented that the project would be substantially complete by December of 2015 and that the project was only $5-to-6 million over budget because of construction and regulatory issues. (Hr'g Tr. 8/31/2017, at 542-543:21-1, Hr'g Tr. 8/29/2017, at 28:15-24.) Yet, even at that time, the realistic projection was closer to $9 million. (Hr'g Tr. 8/31/2017, at 579:20-22.)

2. Defendants' Vacuous Allegation of Unclean Hands

Criswell and Radovan have accused Mr. Yount of interfering with their effort to procure additional loans from the Mosaic investment group. In fact, Mr. Yount was merely in the communication loop with larger investors, known as the Incline Men's Club ("IMC"). (Hr'g Tr. 8/31/2017, at 586:9-15.) The IMC was an investment club that had five or six members. (Hr'g Tr. 8/31/2017, at 457:14-18.) And Mr. Yount was not even a member of the IMC. (Hr'g Tr. 8/29/2017, at 153-154:12-3.) Mr. Yount had no direct contact with Mosaic. (Hr'g Tr. 8/31/2017, at 587:1-10.) Mosaic was displeased with Criswell and Radovan and concerned with the lack of communication. (Hr'g Tr. 9/06/2017, at 768:2-9.) Mosaic reached out to the executive committee to inform them of their displeasure with, and lack of confidence in, Criswell and Radovan. (Hr'g Tr. 9/06/2017, at 781-782:22-7.) Mr. Yount was not a member of the Executive Committee and was therefore not involved in any meeting between Mosaic and the Executive Committee (Hr'g Tr. 8/31/2017, at 575:17-22, Hr'g Tr. 8/31/2017, at 587:1-7.)

B. <u>Procedural History</u>

On April 4, 2016, Mr. Yount filed his complaint, asserting breach of contract, breach of duty, fraud, negligence, conversion, punitive damages, and

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securities fraud claims. (Second Amended Complaint, Filed September 27, 2016 at ¶¶ 28-50.)

Defendants answered and asserted several affirmative defenses, including unclean hands. (Defendants David Marriner's and Marriner Real Estate, LLC's Answer to Second Amended Complaint and CrossClaim for Indemnity, Contribution and Declaratory Relief RE Apportionment of Fault, filed October 24, 2016 at pgs. 9-10, (Answer of Defendants Criswell Radovan, LLC, CR Cal Neva LLC, Robert Radovan, William Criswell, Cal Neva Lodge LLC, Powell, Coleman and Arnold LLP to Plaintiff's Complaint, filed June 07, 2016 at pg.8.) They raised no counterclaims.

1. The Defendants Proceed through Trial Without Ever Asserting Counterclaims

Almost a year before trial, on October 11, 2016, Judge Flanagan entered the scheduling order, which required the parties to file any motions to amend pleadings by April 15, 2017. (Scheduling Order filed October 11, 2016 at pg.2.) Defendants never filed any motion to amend.

On the eve of trial, defendants submitted "Proposed Findings of Facts"—effectively a trial brief—contending that Mr. Yount's interference with the Mosaic loan harmed the Defendants, which "offset" any damages owed to Mr. Yount. (Defendants' Proposed Findings of Fact and Conclusions of Law, filed August 25, 2017, pg.11). They did not seek any award of damages in their favor.

Throughout the trial, defendants never asked for damages or indicated they were pursuing a counterclaim. (Hr'g Tr. 9/08/2017, at 1054:16-19.) On the third day of trial, Mr. Yount's counsel expressly asked if defendants intended to pursue a counterclaim.

> MR. CAMPBELL: Did you file a compulsory counterclaim against Mr. Yount from his lawsuit?
>
> MR. RADOVAN: No.

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

Defense counsel clarified with Radovan that he was not pursuing any counterclaims.

> MR. LITTLE: Sir, counsel asked you if you had filed a compulsory counterclaim against Mr. Yount in this litigation. You have through me in the pleading filed an affirmative defense for unclean hands, have you not?
>
> MR. RADOVAN: Yes.

(Hr'g Tr. 8/31/2017, at 515:17-21.)

Mr. Yount objected when evidence of alleged interference with the loan was introduced. (Hr'g Tr. 8/31/2017, at 493:8.) Further, Mr. Yount indicated his unwillingness to try the issue.

> MR. CAMPBELL: It is a total sideshow that I don't think is relevant to this case.

(Hr'g Tr. 9/08/2017, at 1017:21-22.)

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Even during closing arguments, defendants neither asked for damages nor moved the court to amend the pleadings. (Hr'g Tr. 9/08/2017, at 1054:20-24.) Defense counsel expressly conceded that defendants had not asserted any counterclaims for damages, but only pleaded affirmative defenses.

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> MR. LITTLE: And, your Honor, importantly we pled - - we haven't sued him for a counterclaim, but we have pled affirmative defenses and whether you call it - -
>
> THE COURT: Unclean hands.
>
> MR. LITTLE: Unclean hands, estoppel, waiver, contributory fault, it's all the same failure to mitigate damages, all roads lead to the same path.

(Hr'g Tr. 9/08/2017, at 1054:16-19.)

Put simply, Mr. Yount made it perfectly clear during the trial that he would not consent to trial of a counterclaim. And defendants never asked for leave to try a counterclaim.

2. Judge Flanagan Awards Defendants Millions in Damages Based on the Affirmative Defense of Unclean Hands

When Judge Flanagan issued an oral decision from the bench, he found against Mr. Yount on all claims. (Hr'g Tr. 9/08/2017, at 1139:13.) He reasoned that the interest that Criswell and Radovan had intended to give Mr. Yount from their share was effectively as good as one under the PPM. (Hr'g Tr. 9/08/2017, at 1133:1-5.) None of the irregularities, misrepresentations, or the fact that Mr. Yount never purchased a share under the PPM mattered.

To everyone's surprise, Judge Flanagan then awarded millions in damages to defendants based on their "claim" of unclean hands. (Hr'g Tr. 9/08/2017, at 1140:19-24.) He never mentioned the tort of intentional interference with contractual relations. (Hr'g Tr. 9/08/2017, at 1139:20-24.) Nor did he discuss any of the six elements of a claim for intentional interference with contractual relations. (Amended Order filed September 15, 2017, at page 2:1-3, Hr'g Tr. 9/08/2017, at 1139:13.) And there was never any discussion of amendments to pleadings.

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3. Judge Flanagan Passes Away Before Entering FF&CL, and the New Judge Requests Briefing on Next Steps

Judge Flanagan passed away only a few weeks after the trial. Defendants submitted proposed findings of fact and conclusions of law that inserted a counterclaim for tortious interference that they never pleaded—likely because defense counsel knows that an affirmative defense of unclean hands cannot support an affirmative award of damages. In other words, their proposed findings and conclusions simply presumed the grant a motion for leave to amend, even though they never moved to amend, and Judge Flanagan neither heard arguments to entertain whether amendment would appropriate nor stated that he was granting such relief.

LEGAL ARGUMENT

I.
LEGAL FRAMEWORK: THE COURT CANNOT SIMPLY CONTINUE ON AN ERRONEOUS COURSE

Under NRCP 63, if a trial has commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings may be completed without prejudice to the parties. If the successor judge cannot proceed, the successor judge may, in that judge's discretion, grant a new trial. Where a prior judge issues erroneous findings, the successor judge must rehear disputed evidence before rendering a decision. Further, the district court is empowered to correct erroneous rulings at any time prior to the entry of final judgment. Here, Judge Flanagan erroneously awarded money to Criswell and Radovan based on an affirmative defense.

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A. This Court Must Exercise Its Own Judgment

The district court must exercise its own judgment and must not enter an order based on Judge Flanagan's oral statements or defendants' proposed justification for that ruling out of misplaced deference to Judge Flanagan.

1. Oral Rulings are Not Binding

Prior to the entry of a final judgment the district court remains free to reconsider and issue a written judgment different from its oral pronouncement. *Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987). Oral announcements do not become effective for any purpose or binding upon the judge who made it. *Id.*; NRCP 58(c); *State v. Kay*, 4 P.2d 498, 500 (Wash. 1931) (noting that oral announcement was not binding where a trial judge announced he would find for the plaintiff but died before findings of fact and conclusions of law were presented to him for signature). Notwithstanding an

oral announcement, upon further reflection the judge may change his conclusions in any respect. *Id.*

Here, Judge Flanagan erroneously awarded damages based on an affirmative defense. That was clear error. (See below.) Indeed entering an order on Judge Flanagan's oral pronouncement would constitute a violation of due process and an abuse of discretion. As the oral findings are not binding the district court should avoid the error before it is memorialized enter the preliminary findings of Judge Flanagan.

2. A New Judge Cannot Proceed in Clear Error Out of Deference to a Prior Judge

The district court is empowered to correct erroneous rulings at any time prior to the entry of final judgment. *Ins. Co. of the W. v. Gibson Tile Co.*, 122 Nev. 455, 466 n.4, 134 P.3d 698, 705 n.4 (2006) (Maupin, J., concurring). Furthermore, where a prior judge issued erroneous findings, the successor judge must rehear disputed evidence before rendering a decision. *Smith's Food King No. 1 v. Hornwood*, 108 Nev. 666, 668–69, 836 P.2d 1241, 1242 (1992).

The Nevada Supreme Court has articulated the correct procedure for a successor judge to enter judgment where no relevant findings have been made. *Smith's Food King*, 836 P.2d 1241 at 1242. In *Smith's Food King*, plaintiffs requested damages for the diminished value of their shopping center. *Id.* at 1241. At trial, experts for both parties presented evidence regarding the diminished value. *Id.* Judge White found the damages were not foreseeable and made no definitive findings regarding the amount of damages. *Id.* On appeal, the Supreme Court reversed the trial court's judgment, holding that damages for the diminished value of the shopping center were foreseeable and remanded the case. *Id.* On remand, Judge White applied the wrong damage formula and, as a result, he issued erroneous findings regarding the damages. *Id.* at 1242.

Thus, Judge White made no relevant findings of fact indicating the amount of damages suffered by the plaintiffs. *Id.*

Consequently, the plaintiffs appealed again. *Id.* The Nevada Supreme Court remanded the case to the trial court with explicit instructions regarding the applicable damage formula. *Id.* Prior to the remand, Judge White lost his re-election bid and was replaced by Judge Bongiovanni. *Id.* Although Judge Bongiovanni did not preside at trial, he entered judgment for the plaintiffs, using plaintiff's expert to calculate the damages, without holding an evidentiary hearing. *Id.* The Court noted Judge Bongiovanni passed judgment on the credibility of the expert witnesses. *Id.* The Court held that if evidence is disputed and the original judge has not made sufficient findings of fact and conclusions of law, the successor judge must rehear disputed evidence. *Id.*

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3. The Court Cannot Adopt Purposed Findings Where There is No Basis in the Judge's Oral Statements or Evidence

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A successor judge should not enter judgment where the original judge's findings do not support the basis for the findings. *See Smith's Food King*, 108 Nev. at 668 nn.1-2. For instance, in *Smith's Food King*, Judge White's findings merely noted there was "testimony from two expert witnesses" that placed the damages at more than $1 million. *Id.* Judge White later found the defendants had offered no evidence according to the damage formula that the judge erroneously applied. *Id.* Judge White made no relevant findings indicating the amount of damages suffered and thus, the court held Judge White's findings could not support an award of $1,425,000. *Id.* at 669.

Here, defendants proposed findings have materially exceeded Judge Flanagan's findings and lack foundation in the evidence presented at trial.

II.
DEFENDANT'S PROPOSED FINDINGS AND CONCLUSIONS ARE CLEARLY ERRONEOUS

The defendants' proposed findings are plagued by several layers of erroneous presumptions and impropriety. The findings stray from Judge Flanagan's ruling and create nonsensical results. If entered, the proposed order would be a gross violation of due process and an abuse of discretion.

A. The Court Cannot Enter Any Judgment Awarding Damages to the Defendants

It would be an abuse of discretion for the court to enter judgment awarding damages to the defendants.

1. Unclean Hands is Not a Basis for Affirmative Relief

Judge Flanagan's stated basis for awarding damages was defendant's affirmative defense of unclean hands. This was error as a matter of law.

An affirmative defense is not a cause of action and, therefore, cannot support an award of damages. *Premiere Digital Access, Inc. v. Cent. Tel. Co.*, 360 F. Supp. 2d 1161, 1168 (D. Nev. 2005) (finding "no case under Nevada law" where a plaintiff has raised the affirmative defense of unconscionability as a cause of action). Purely defensive answers limit a defendant's remedy to resistance to the plaintiffs' claim. *See* Nev. R. of Civ. Pro. 8(c); BLACK'S LAW DICTIONARY 60 (6th ed. 1990) (noting an affirmative defense is "a response to a plaintiff's claim which attacks the plaintiff's legal right to bring an action, as opposed to attacking the truth of claim"), *quoted in Jafbros, Inc. v. American Family Mut. Ins. Co.*, 128 Nev. 908, 381 P.3d 627 (2012) (unpublished order); *Sullivan v. Compton*, 143 P.2d 357, 359 (Cal. Ct. App. 1943); *State Farm Mut. Auto. Ins. Co. v. Curran*, 135 So. 3d 1071, 1079 (Fla. 2014); *See also Barrowman Coal Corp. v. Kentland Coal & Coke Co.,* 196 S.W.2d 428, 433 (Ky. 1946) ("Where both parties have been guilty of inequitable conduct in relation to a transaction, the court will leave them in the position in which they have placed

themselves and will grant relief to neither by refusing all affirmative aid.") And courts have reversed judgments in similar circumstances. *See, e.g., Moore v. Univ. Med. Ctr. of S. Nev.*, No. 69367, 2017 WL 253079, at *1 (Nev. App. Jan. 13, 2017); *Sullivan*, 143 P.2d at 358.

The defense of unclean hands is no different, it merely bars relief to a party who has engaged in improper conduct directly connected to the underlying claim. *See generally Truck Ins. Exch. v. Palmer J. Swanson, Inc.*, 124 Nev. 629, 637–38, 189 P.3d 656, 662 (2008); *Talley v. Talley*, 566 N.W.2d 846, 852 (S.D. 1997). Thus, this Court cannot proceed to award damages to defendants based on the reasons Judge Flanagan provided.

2. Judge Flanagan Did Not and Could Not Grant Defendants Leave to Amend

This Court also cannot award damages to the defendants based on the new counterclaims defendants presumptuously insert into their proposed findings of fact and conclusions of law. When a party seeks leave to amend a pleading after the expiration of the deadline for doing so, they must first demonstrate "good cause" under NRCP 16(b) for extending the deadline. *Nutton v. Sunset Station, Inc.*, 131 Nev., Adv. Op. 34, 357 P.3d 966 (Ct. App. 2015). In general, Rule 15(a) governs amendment of pleadings; however Rule 16(b) governs amendment of pleadings after a scheduling order deadline as expired. *Id.* In determining whether "good cause" exists under Rule 16(b) the basic inquiry is the diligence of the party seeking the amendment. *Id.* Disregard of the scheduling order disrupts the agreed-upon course of the litigation and rewards the indolent and the cavalier. *Id.* at 971.

Here, Criswell and Radovan fail to show good cause in deviating from the scheduling order. The scheduling order required that all amendments to pleadings be filed by April 15, 2017. Defendants have not been diligent in

seeking the amendment. They had until March 15, 2017 to complete discovery and if Criswell and Radovan believed they had a viable intentional interference with contractual relations claim they had a considerable amount of time to amend the pleadings. Defendants acted dilatorily in failing to seek to file the amendment months earlier. Good cause cannot exist when the proposed amendment rests on information the defendants knew, or should have known in advance of the deadline.

Even under the liberal standard of Rule 15, however, the district court still cannot grant leave to amend. A trial court abuses its discretion when an amendment of the pleadings violates a party's due process. *Deere & Co. v. Johnson*, 271 F.3d 613, 622 (5th Cir. 2001). A defendant fails to give a plaintiff adequate notice of an implied claim when evidence relevant to the new claim is also relevant to the claim originally pled. *See Addie v. Kjaer*, 737 F.3d 854, 867 (3d Cir. 2013). Implied consent is not established merely because evidence bearing directly on an unpleaded issue was introduced without objection; it must appear that the parties understood the evidence was aimed at the unpleaded issue. *Viox v. Weinberg*, 861 N.E.2d 909, 917 (Ohio Ct. App. 2006). Therefore, the introduction of evidence arguably relevant to pleaded issues cannot serve to give a party fair notice that new issues entered the case. *In re Acequia, Inc.,* 34 F.3d 800, 814 (9th Cir. 1994) (quoting *Wesco Mfg. v. Tropical Attractions*, 833 F.2d 1484, 1487 (11th Cir. 1987).

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

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(Ohio Ct. App. Jan. 18, 1996) (holding it was an abuse of discretion for the trial court to award summary judgment without giving the opposing party notice or an opportunity to present evidence). Every one of these doctrines (above) preclude amendment here.

Allowing amendment at this point would constitute a gross abuse of discretion. Especially because Mr. Yount's counsel never acquiesced to a trial regarding alleged tortious interference. Rather, he expressly objected to the evidence of the Mosaic loan:

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

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

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While some evidence may have come in that might have also been relevant to an unpleaded interference counterclaim, that introduction cannot justify amendment because it was relevant to the affirmative defense that had been raised. *Addie*, 737 F.3d at 867.

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B. <u>The Evidence Does Not Substantiate Defendant's Theory</u>

Defendants have not provided any evidence to prove either intentional interference with contractual relations or the amount of damages allegedly suffered. Accordingly, Judge Flanagan's outrageous awards of damages, which defendants did not even ask for, cannot stand even if defendants were granted leave to amend.

1. Defendants Did Not Prove Intentional Interference

Intentional interference with contractual relations requires proof of 1) the existence of a valid contract 2) the party was aware of the contract 3) intentional acts intended to disrupt the contractual relationship 4) actual disruption of the contract and 5) resulting damage. *Sutherland v. Gross*, 105

Nev. 192, 196, 772 P.2d 1287, 1290 (1989). At the heart of an intentional interference action is proof of intentional acts by the defendant intended or designed to disrupt the plaintiff's contractual relations. *J.J. Indus., LLC v. Bennett*, 119 Nev. 269, 275, 71 P.3d 1264, 1268 (2003).

Here, defendants never presented a claim and Judge Flanagan never discussed the tort of intentional interference with contractual relations. Not a single element was mentioned at the hearing or in Judge Flanagan's amended order. Further, defendants failed to present any evidence of intentional acts intended to disrupt the contractual relationship. To the contrary, Mr. Yount testified he hoped the contract between Mosaic and Cal Neva went through. It would have been to Mr. Yount's detriment to interfere with the Mosaic loan. Mr. Yount never attended a meeting with Mosaic and never spoke to anyone with Mosaic in person, on the phone or through email. Furthermore, Judge Flanagan never found Mr. Yount intended to undermine the loan.

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

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

Judge Flanagan did not make findings that would be necessary to meet all of the elements of an intentional interference claim, and defendants never presented any evidence to support liability or damages against Mr. Yount. The holes in defendants' evidence cannot support an award of over six million dollars in damages.

2. Defendants Did Not Prove the Amount of Damages

The party seeking damages has the burden of proving the fact that he was damaged and the amount thereof. *Gibellini v. Klindt*, 110 Nev. 1201, 1206, 885 P.2d 540, 543 (1994). Testimony on the amount may not be speculative. *Clark*

Cty. Sch. Dist. v. Richardson Const., Inc., 123 Nev. 382, 397, 168 P.3d 87, 97 (2007). The injured party is required to establish a reasonable basis for ascertaining their damages. *Cent. Bit Supply, Inc. v. Waldrop Drilling & Pump, Inc.,* 102 Nev. 139, 142, 717 P.2d 35, 37 (1986). The court cannot assume the role of an expert and thereby relieve the injured party of the need to present evidence in support of their claim. *Mort Wallin of Lake Tahoe, Inc. v. Commercial Cabinet Co.*, 105 Nev. 855, 857, 784 P.2d 954, 956 (1989). Evidence essential to sustain a damages award must be in the record and available for meaningful appellate review. *Id.*

Here, there was no evidence quantifying any specific dollar amounts to Criswell, Marriner, or Radovan of any type of damages accruing against them individually or of their entitlement to two years' salary, nor was there evidence that CR Cal Neva was entitled to development fees. Radovan wildly guesses that his operating company would have made over a million dollars in revenue and yet presents no evidence for such a figure.[1] Aside from Radovan's speculation as to his potential revenue, there is no other discussion of the any of the defendant's damages or the amount thereof. Thus, defendants fail to meet their burden in proving the amount of damages.

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3. Prejudice: Mr. Yount Would Have Introduced Evidence to Refute an Allegation of Intentional Interference if He had Fair Notice

Mr. Yount did not have sufficient notice of an intentional interference with contractual relations claim against him. Mr. Yount did not have an opportunity to present witnesses who could corroborate his testimony and did not have an adequate opportunity to prepare his case. The court is not permitted to abandon the due process requirement of advance notice. *See Ivory*

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

Ranch, Inc. v. Quinn River Ranch, Inc., 101 Nev. 471, 473, 705 P.2d 673, 675 (1985) (reformation of contract based on unpleaded mutual-mistake theory would be deprivation of procedural due process and right to a fair trial).

C. Defendants' Proposed Findings and Conclusions are Either Contrary to the Evidence or Rely on Testimony Where Credibility Was at issue

Judges may not pass judgment on the credibility of witnesses they have not seen. *Smith's Food King No. 1 v. Hornwood*, 108 Nev. 666, 668, 836 P.2d 1241, 1242 (1992).Here, defendants' proposed findings contradict or exceed several portions of Judge Flanagan's oral order and rely on testimony where credibility is at issue. For instance, defendants contend in their findings of fact that there was no evidence that Radovan told Marriner to conceal the source of Mr. Yount's shares. (Proposed Findings of Fact, Conclusions of Law, And Judgment at pg.11 ¶59, Ex. 2.) Yet, Marriner testified he notified Radovan that Busick (the other investor who funded soon before Yount) and Yount could fund at the same time, and, offered to call Mr. Yount, but Radovan told Marriner to stay out of it.[2] Neither Radovan or Marriner told Mr. Yount.[3]

As another example, defendants contend in their findings of fact that the evidence was unequivocal that CR Cal Neva's share has identical rights as the Founders' share. (Proposed Findings of Fact, Conclusions of Law, And Judgment at pg.11 ¶60, Ex. 2.) However, under the Operating Agreement, if the other shareholders did not approve the transfer of the share from CR to Mr. Yount, then the founders share would be materially different: voting rights

[2] Hr'g Tr. 8/29/2017, at 77:3-13.

[3] Hr'g Tr. 9/08/2017, at 1009:18-19.

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would not attach to the share, and a shareholder would be entitled only to the economic benefits, if any, from the share.[4]

Further, defendants' proposed findings claim assert that, Judge Flanagan found that, , the issue of Mr. Yount's collusion to interfere with the Mosaic loan was tried by consent. (Proposed Findings of Fact, Conclusions of Law, And Judgment at pg.28 ¶4, Ex. 2.) That is inconsistent with Judge Flanagan's finding that defendants pleaded only a counterclaim of unclean hands.[5] Judge Flanagan never made a finding for intentional interference with contractual relations. Further, Judge Flanagan never found that Mr. Yount consented to a counterclaim. Indeed, it would be a substantial abuse of discretion to amend the pleadings to include a counterclaim after defendants mislead the Court and Mr. Yount, by expressly stating they did not plead a counterclaim.

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III.

REVIEW OF THE OBJECTIVE EVIDENCE IN THE TRIAL RECORD COULD JUSTIFY ONLY ONE CONCLUSION AS A MATTER OF LAW – A JUDGMENT FOR MR. YOUNT

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A party is entitled to judgment as a matter of law on any claim that cannot under controlling law be defeated. Here, the evidence at trial

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[4] Hr'g Tr. 8/30/2017, at 304:10-24, Hr'g Tr. 8/31/2017, at 443:12-23, *See* Operating Agreement (stating that if transfer that were never approved by the members, the purchaser will not have the right to participate in the business)

[5] Hr'g Tr. 9/08/2017, at 1139:13. While Judge Flanagan referred to unclean hands as a counterclaim rather than an affirmative defense, the Judge articulated the two factor test of unclean hands. *See Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.*, 124 Nev. 272, 276, 182 P.3d 764, 767 (Nev. 2008) (In evaluating the affirmative defense of unclean hands a court must also consider the egregiousness of the misconduct and the seriousness of the harm caused by the misconduct. *Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.*, 124 Nev. 272, 276, 182 P.3d 764, 767 (Nev. 2008). Thus, Defendant cannot argue Judge Flanagan converted the affirmative defense into a counterclaim of intentional interference with contractual relations.

demonstrates that Mr. Yount is entitled to judgment as a matter of law on his claims.

A. The Unrefuted Evidence Demonstrates that Mr. Yount is Entitled to Judgment

A judge may proceed in a case only where the previous trial judge has not made findings of fact and conclusions of law if it is unnecessary to make credibility determinations and the judge has confidence in the record. NRCP 63 ("any other judge may proceed with it [a trial or hearing] upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties"); *Smith's Food King No. 1 v. Hornwood*, 108 Nev. 666, 668–69, 836 P.2d 1241, 1242 (1992); *Landa v. CampusEAI, Inc.*, 2016-Ohio-298, 34, 58 N.E.3d 462, 469 (Ohio Ct. App. 2016) (holding successor judge had evidence to make findings of fact and conclusions of law necessary to enter judgment in employee's favor on his wrongful termination claim; findings that employee's termination was not in compliance with the terms of the parties' employment agreement and that employer did not have reasonable cause to terminate plaintiff were based on transcripts, exhibits, and evidence during trial, and no crucial credibility determinations were necessary). Here, undisputed evidence supports an award in favor of Mr. Yount.

1. Criswell and Radovan Converted Mr. Yount's $1 Million

Under Nevada law the elements for the claim of conversion are (1) a distinct and intentional act of dominion by one which is wrongfully exerted over the property of another; (2) an act committed in denial of, or inconsistent with the rightful owner's use and enjoyment of the property; (3) an act committed in derogation, exclusion, or defiance of the owner' rights or title to the property; and (4) causation and damages. *M.C. Multi-Family Development, L.L.C. v. Crestdale Assocs.*, 124 Nev. 901, 193 P.3d 536 (2008).

Additionally, conversion is an act of general intent and is not excused by good faith, care, or lack of knowledge. *Id.* at 911.

Here, taking Mr. Yount's money and converting to Criswell and Radovan's own use without paying him back fulfills the factual elements necessary to substantiate a claim for conversion. Criswell and Radovan (working through their LLC's) intentionally took Mr. Yount's $1 million and converted it to their own use. Criswell indicated in his testimony that the "money was coming to us" and that Criswell and Radovan believe they "were entitled to spend that money on whatever we wanted to spend it on." [6] Mr. Yount never agreed to purchase, and did not agree to accept, one of their CR shares and defendants have not produced one scintilla of evidence that Mr. Yount agreed to such a purchase. Criswell acknowledged that he did not even tell Mr. Yount that he was selling him a CR share instead of purchasing a share under the PPM.[7] Even assuming that Mr. Yount and Radovan had agreed to having Criswell Radovan sell one of its $1 million shares to Mr. Yount, without the Member consent as required under the Operating Agreement, that transaction could not be consummated.

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2. Radovan, Signing on Behalf of CR Cal Neva Lodge, Breached the Contract By Failing To Follow The Subscription Agreement

The elements of a breach of contract claim in Nevada are (1) the existence of a valid contract, (2) a breach by the defendant, and (3) damage as a result of the breach. *Contreras v. Am. Family Mut. Ins. Co.*, 135 F. Supp. 3d 1208, 1224 (D. Nev. 2015). Here, Mr. Yount entered into a contract with Cal Neva Lodge LLC to purchase a membership interest in the LLC under the terms of the PPM.

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[6] Hr'g Tr. 8/30/2017,at 257-258:22-3.

[7] Hr'g Tr. 8/30/2017, at 380:6-24; Hr'g Tr. 8/29/2017, at 76-77:21-13

Radovan, signing on behalf of CR Cal Neva Lodge who was the manager of the entity, is a party to that contract. By failing to follow the Subscription Agreement which Mr. Yount was agreeing to enter into and by failing to provide him a share under that Subscription Agreement, CR violated the terms of the Subscription Agreement.

Furthermore, the affirmative defense of unclean hands is inapplicable to Mr. Yount's breach of contract claim. Firstly, unclean hands is an equitable defense that does not even apply to legal claims such as breach of contract. *See Ligon v. E. F. Hutton & Co.*, 428 S.W.2d 434, 437 (Tex. Civ. App. 1968) ("Appellants argue, however, that Hutton must suffer the consequence of its own mistake and is not entitled to recover because it did not come into court with clean hands. This reference to a time-honored equitable maxim has no proper application here and presents no defense to this common-law action.")

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Secondly, the alleged misconduct which constitutes unclean hands must directly relate to the transaction underlying the complaint. *Barr v. Petzhold*, 273 P.2d 161, 163 (Ariz. 1954). It is not sufficient that the wrongdoing is remotely or indirectly connected with the matter in controversy. *Powell v. Mobile Cab & Baggage Co.*, 83 So. 2d 191, 194 (Ala. 1955).

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Here, the alleged wrongs are collateral and indirectly connected to Mr. Yount's breach of contract claim. Criswell and Radovan claim Mr. Yount interfered with a potential contract between Mosaic and Cal Neva. The contractual relationship between Mosaic and Cal Neva has absolutely nothing to do with the breach of the membership interest agreement Mr. Yount signed. Criswell and Radovan do not provide any evidence that Mr. Yount engaged in wrongful conduct with regard to the membership interest. Accordingly, the affirmative defense of unclean hands is not applicable.

The Arizona Supreme Court explained the concept in and analogous case.The unclean hands doctrine does not apply to wrongs that are collateral to

the complainant's cause of action. *Barr*, 273 P.2d at 163. The defendant, a corporation, gave the plaintiff an option to purchase shares of capital stock. *Id.* The plaintiff expressly reserved the right to cancel the option at any time and demand return of the amounts paid to the defendant for the stock. *Id.* The company deteriorated and the plaintiff exercised his right to cancel the option contract. *Id.* The plaintiff then sought an equitable lien upon the defendant's property and the defendant raised the unclean hands defense. *Id.* The defendant claimed the financial losses were incurred as a result of decisions and actions taken by him and the plaintiff together, and the latter was in no position equitably to restore himself at the expense of the former. *Id.* The Court denied the defendants affirmative defense and held the defendant never claimed the plaintiff engaged in any such wrongful conduct with regard to the execution of the option contract, which was the foundation of his claim. *Id.* at 166.

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3. Criswell and Radovan Committed Fraud by Actively Omitting Material Facts

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

Mr. Yount has a plethora of grounds for his fraud claim based on material misrepresentations and material omissions, most of which Defendants admitted. First, Mr. Yount was never told that it was too late to legally invest under the PPM, and instead would be buying one of the CR shares. Had Mr.

Yount been so informed he would not have invested.[8] Mr. Yount indicated that when a developer sells his own share it is a clear indication that the project is going to fail. Such information is therefore material.

Second, he was never told that the Hall loan was out of balance and that if equity was not put into the LLC that Hall would quit funding.[9] Had Mr. Yount been informed about the Hall loan he would have been concerned and would have inquired further. Third, Mr. Yount was told by Radovan that the project was on track, and that the only reason it would not open in December 2015 was because a continued drought and lack of snow would impact revenues. Mr. Yount was never told the actual reason for the delay, that construction was behind schedule. Fourth, Mr. Yount was never told that Radovan was seeking a total refinance of both the previous loans and an additional $20 million to finish the project, and that without a refinance the project could not go forward.[10] Radovan knew as early as September that they needed to refinance the entire project and that if they didn't refinance they were not going to finish the project.[11]

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Any investor would want to know that a project is at the point of refinancing to avoid collapse. Mr. Yount would not have invested in the project if that fact had been disclosed to him. These important facts were not disclosed to Mr. Yount by either Criswell, Radovan or Marriner. And Defendants concealed all of these facts to insure that Mr. Yount would make his investment into the project and send his $1 million to Powell Coleman.

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[8] Hr'g Tr. 8/31/2017, at 574:5-10.

[9] Hr'g Tr. 8/31/2017, at 566:12-22.

[10] Hr'g Tr. 8/30/2017, at 361:10-13.

[11] Hr'g Tr. 9/08/17, at 1003:4-17 .

(Which Powell Coleman then sent directly to Criswell and Radovan in violation of the escrow instructions in the PPM).

Put simply, the only conclusion that this court could actually gather from the trial record would be that Mr. Yount is entitled to receive his money back.

CONCLUSION

The Court cannot enter the findings of fact and conclusions of law proposed by defendants. If the Court does not grant judgment in favor of Mr. Yount, it must hold a new trial.

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

Dated this 16th day of January, 2018.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/Daniel F. Polsenberg*

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of January, 2018, I served the foregoing "Plaintiff's Brief Regarding Status of Case and Appropriate Procedure Going Forward" on counsel by the Court's electronic filing system to the persons and addresses listed below:

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/s/ Jessie M. Helm
An Employee of Lewis Roca Rothgerber Christie LLP

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EXHIBIT 1

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EXHIBIT 1

CAL NEVA LODGE, LLC

AMENDED AND RESTATED OPERATING AGREEMENT

Dated: May 1, 2014

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CAL NEVA LODGE, LLC

AMENDED AND RESTATED OPERATING AGREEMENT

This Amended and Restated Operating Agreement (this "Agreement") is made and entered into as of the 1st day of May, 2014 (the "Effective Date"), by and among the parties on the signature pages of this Agreement. Such parties and their respective permitted assignees are herein sometimes referred to individually as a "Member" and collectively as the "Members". All references to the Members will also include their successors and assigns pursuant to Article 12.

BACKGROUND FACTS:

A. On March 13, 2013, CR Cal Neva, LLC, a Nevada limited liability company ("CR"), formed a limited liability company named Cal Neva Lodge, LLC (the "Company") by filing certain Articles of Organization with the Secretary of State of the State of Nevada pursuant to the limited liability company laws of the State of Nevada and entering into an Operating Agreement for the Company.

B. The Members desire to amend and restate the existing Operating Agreement of the Company and admit new Members on the terms set forth herein.

C. Each Member represents that it has sufficient right and authority, without violating or breaching any provisions of law or contract, to execute this Agreement and is not acting on behalf of any undisclosed or partially disclosed principal by such action.

NOW, THEREFORE, in consideration of agreements and obligations set forth herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Members hereby agree as follows:

ARTICLE 1
DEFINITIONS

As used in this Agreement and the attached Exhibits, the following capitalized terms have the meanings stated below and include the plural as well as the singular number.

1.1 "**Accountants**" means the independent certified public accountants selected by the Company.

1.2 "**Act**" means the limited liability company law of the State of Nevada, and all amendments to the Act.

1.3 "**Act of Insolvency**" will be deemed to have occurred if (a) a Member files in any court, in accordance with any statute of the United States or of any state, a petition in bankruptcy or insolvency, or files for the appointment of a receiver or trustee of all or a portion of the Member's property, or makes an assignment for the benefit of creditors or admits in writing its/his/her inability to pay its/his/her debts generally as they become due; or (b) there is filed

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against a Member in any court in accordance with any statute of the United States or of any state, a petition in bankruptcy or insolvency, or for reorganization, or for appointment of a receiver or a trustee of all or a portion of the Member's property, and any order or decree is not vacated, or such appointment is not revoked or terminated and such receiver or trustee discharged, within ninety (90) days after entry or appointment, as the case may be.

1.4 "**Additional Capital Contribution**" means, with respect to the Members, any amounts the Members mutually agree to contribute to the Company as capital contributions pursuant to Section 4.4.

1.5 "**Additional Member**" means any person or entity who acquires an Interest in the Company after the date hereof.

1.6 "**Adjusted Capital Account**" means, with respect to any Member as of the end of any fiscal year, such Member's Capital Account reduced by those anticipated allocations, adjustments and distributions described in Section 1.704-1(b)(2)(ii)(d)(4)-(6) of the Treasury Regulations and increased by an amount that such Member would be obligated to restore pursuant to this Agreement or would be deemed obligated to restore pursuant to the penultimate sentences of Sections 1.704-2(g)(1) and 1.704-2(i)(5) of the Treasury Regulations.

1.7 "**Affiliate**" means, with respect to any Person, (i) any Person directly or indirectly controlling, controlled by or under common control with such Person, (ii) any Person owning or controlling ten percent (10%) or more of the outstanding voting securities of such Person, (iii) any officer, director or general partner of such Person, or (iv) any Person who is an officer, director, general partner, trustee or holder of ten percent (10%) or more of the voting securities of any Person described in clauses (i) through (iii) of this sentence.

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1.8 "**Agreement**" means this Amended and Restated Operating Agreement as originally executed and as subsequently amended or supplemented in accordance with the terms herein.

1.9 "**Allocation Regulations**" means Section 1.704-1 and 1.704-2 of the Treasury Regulations as such regulations may be amended and in effect from time to time (whether Temporary or Final form) and any corresponding provisions of succeeding Treasury Regulations.

1.10 "**Articles**" means the Articles of Organization of the Company as properly adopted and amended from time to time by the Members and filed with the Secretary of State of the State of Nevada.

1.11 "**Business Day**" means any day that the national banks in Reno, Nevada, are open for business.

1.12 "**Capital Account**" means, with respect to any Member, the Capital Account maintained for such Person in accordance with the following provisions:

1.12.1 To each Member's Capital Account there will be credited such Member's Capital Contributions and Additional Capital Contributions (if any), such Member's distributive

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share of Profits and the amount of Company liabilities that are assumed by such Member or that are secured by any Company Assets distributed to such Member.

1.12.2 To each Member's Capital Account there will be debited the amount of cash and the Gross Asset Value of any Company Assets distributed to such Member pursuant to any provision of this Agreement, such Member's distributive share of Losses and the amount of any liabilities of such Member that are assumed by the Company or that are secured by any property contributed by such Member to the Company.

In the event any Interest in the Company is transferred in accordance with the terms of this Agreement, the transferee will succeed to the Capital Account of the transferor to the extent it relates to the transferred Interest.

In the event the Gross Asset Values of Company Assets are adjusted pursuant to subsection 1.25.2 hereof, the Capital Accounts of all Members will be adjusted simultaneously to reflect the aggregate net adjustment as if the Company recognized gain or loss equal to the amount of such aggregate net adjustment.

The foregoing provisions and the other provisions of this Agreement relating to the maintenance of Capital Accounts are intended to comply with the Allocation Regulations and will be interpreted and applied in a manner consistent with such Allocation Regulations. In the event the Manager determines that it is prudent to modify the manner in which the Capital Accounts, or any debits or credits thereto, are computed in order to comply with the Allocation Regulations, the Manager may make such modification, provided that it is not likely to have a material effect on the amounts distributable to any Member pursuant to Section 13.4 hereof upon the dissolution of the Company. The Manager will adjust the amounts debited or credited to Capital Accounts with respect to any property contributed to the Company by or distributed to a Member and any liabilities that are secured by such contributed or distributed property or that are assumed by the Company or the Member, in the event the Manager determines such adjustments are necessary or appropriate pursuant to the Allocation Regulations. The Manager also will make any appropriate modifications in the event unanticipated events might otherwise cause this Agreement not to comply with Allocation Regulations.

1.13 **"Capital Contribution"** means the total amount of cash or other property contributed to the Company by a Member as capital in accordance with this Agreement; such term includes the Capital Contributions described in Sections 4.2, 4.3 and 4.4. The total amount of Capital Contributions made by the Preferred Members is sometimes referred to herein as the "Preferred Equity."

1.14 **"Code"** means the Internal Revenue Code of 1986, as it may be amended, or any subsequent federal law concerning income tax that is enacted in substitution for, or that corresponds with, such Code.

1.15 **"Company"** means Cal Neva Lodge, LLC.

1.16 **"Company Assets"** means any and all property contributed to or acquired by the Company in accordance with this Agreement, including but not limited to the Property or an interest in Seller, and both tangible and intangible property.

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1.17 "**Company Minimum Gain**" has the meaning set forth in Section 1.704-2(d) of the Treasury Regulations for Partnership minimum gain.

1.18 "**Construction Contract**" means the contract with the Contractor to construct the Project on the Property, as approved by the Executive Committee.

1.19 "**Construction Lender**" means the lender who makes a construction loan/mini-permanent loan for construction of the Project.

1.20 "**Construction Loan**" means the construction loan/mini-permanent loan made by the Construction Lender to construct the Project on terms approved by the Executive Committee.

1.21 "**Contractor**" means the general contractor reasonably approved by the Executive Committee engaged by the Company for construction of the Project.

1.22 "**Depreciation**" means, for each fiscal year or other period, an amount equal to the depreciation, amortization or other cost recovery deduction allowable with respect to an asset for such year or other period, except that if the Gross Asset Value of an asset differs from its adjusted basis for federal income tax purposes at the beginning of such year or other period, Depreciation will be an amount which bears the same ratio to such beginning Gross Asset Value as the federal income tax depreciation, amortization, or other cost recovery deduction for such year or other period bears to such beginning adjusted tax basis; provided, however, if the federal income tax depreciation, amortization, or other cost recovery deduction for such year is zero, Depreciation will be determined with reference to such beginning Gross Asset Value using any reasonable method selected by the Manager.

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1.23 "**Fiscal Year**" or "**Year**" means a calendar year (or portion thereof) ending on December 31 of such year.

1.24 "**Governmental Authorities**" means any federal, state, county, municipal or other governmental department or entity, or any authority, commission, board, bureau, court or agency having jurisdiction over the Company Assets, or any portion thereof, and whose approval is necessary for the development of the Property.

1.25 "**Gross Asset Value**" means, with respect to any asset, the asset's adjusted basis for federal income tax purposes, except as follows:

1.25.1 The initial Gross Asset Value of any asset contributed by a Member to the Company will be the gross fair market value of such asset, as determined by the contributing Member and the Manager;

1.25.2 The Gross Asset Values of all Company assets will be adjusted to equal their respective gross fair market values, as determined by the Manager, as of the following times: (i) the acquisition of an additional interest in the Company by any new or existing Member in exchange for more than a "de minimis" Capital Contribution; (ii) the distribution by the Company to a Member of more than a "de minimis" amount of Company Assets other than money as consideration for an interest in the Company; and (iii) the liquidation of the Company

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within the meaning of the Allocation Regulations; provided, however, that adjustments pursuant to clauses (i) and (ii) above will be made only if the Manager reasonably determine that such adjustments are necessary and appropriate to reflect the relative economic interests of the Members in the Company; and

1.25.3 If the Gross Asset Value of an asset has been determined or adjusted pursuant to subsection 1.25.1 or 1.25.2, such Gross Asset Value will thereafter be adjusted by the Depreciation taken into account with respect to such asset for purposes of computing Profits and Losses.

1.26 "**Initial Capital Contributions**" shall have the meaning given in Section 4.2 hereof.

1.27 "**Interest**" shall mean a member's entire ownership interest in the Company, including without limitation, its right to distributions of Net Cash from Operations and Net Cash from Sales or Refinancings.

1.28 "**Lender**" means the Construction Lender, and any third party lender(s) subsequently refinancing such indebtedness.

1.29 "**Manager**" means the one (1) Person, who need not be a Member, to whom all or part of the management duties of the Company's business is delegated as provided in Article 9. The initial Manager shall be CR.

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1.30 "**Member**" means each of the parties who has executed this Agreement and each of the parties who may hereafter become Additional or Substitute Members as provided in the Articles and in this Agreement.

1.31 "**Member Minimum Gain**" means an amount with respect to each Member Nonrecourse Debt, equal to the Company Minimum Gain that would result if such Member Nonrecourse Debt was treated as Nonrecourse Liability, determined in accordance with Section 1.704-2(g)(3) of the Treasury Regulations.

1.32 "**Member Nonrecourse Debt**" has the meaning set forth in Section 1.704-2(b)(4) of the Treasury Regulations for partner nonrecourse debt.

1.33 "**Member Nonrecourse Deductions**" has the meaning set forth in Section 1.7042(i)(2) of the Treasury Regulations for partner nonrecourse deductions. The amount of Member Nonrecourse Deductions with respect to a Member Nonrecourse Debt for a Fiscal Year of the Company equals the excess, if any, of the net increase, if any, in the amount of Member Minimum Gain attributable to such Member Nonrecourse Debt during such Fiscal Year over the aggregate amount of any distributions during such Fiscal Year to the Member that bears the economic risk of loss for such Member Nonrecourse Debt to the extent such distributions are from the proceeds of such Member Nonrecourse Debt and are allocable to an increase in Member Minimum Gain attributable to such Member Nonrecourse Debt determined in accordance with Section 1.704-2(i)(2) of the Treasury Regulations.

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1.34 "**Net Cash From Operations**" means the gross cash proceeds from the Company operations less the portion thereof used to pay or establish reserves for all Company expenses in an amount set forth in the Operating Budget, reserves for property taxes and insurance, interest and principal payments on third party indebtedness, Lender required reserves (including interest and operating expenses), capital improvements, replacements, contingencies, working capital, and other cash requirements, all as set out in the Operating Budget or the Project Budget or as may otherwise be determined by the Manager. "Net Cash From Operations" will not be reduced by depreciation, amortization, cost recovery deductions or similar allowances.

1.35 "**Net Cash From Sales or Financings**" means the net cash proceeds from all sales and other dispositions (other than sales and dispositions of personal property in the ordinary course of business), and all financings of the Property after the repayment of third party indebtedness required in connection with such sale, disposition or financing, less any portion thereof used to pay established reserves for Company obligations and expenses in an amount to be determined by the Manager, but, which shall include reserves for property taxes and insurance, interest and principal payments on third party indebtedness, Lender required reserves for property taxes and insurance, interest and principal payments on third party indebtedness, Lender required reserves (including interest and operating expenses), capital improvements, replacements, contingencies, working capital, and other cash requirements, all as set out in the Operating Budget or Project Budget. "Net Cash From Sales or Financings" will include all principal and interest payments with respect to any note or other obligation received by the Company in connection with sales and other dispositions (other than in the ordinary course of business) of the Property.

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1.36 "**Nonrecourse Deductions**" has the meaning set forth in Section 1.704-2(b)(1) of the Treasury Regulations. The amount of Nonrecourse Deductions for a Fiscal Year equals the net increase, if any, in the amount of Company Minimum Gain during that Fiscal Year, determined according to the provisions of Section 1.704-2(b)(1) of the Treasury Regulations.

1.37 "**Nonrecourse Liability**" has the meaning set forth in Section 1.704-2(b)(3) of the Treasury Regulations.

1.38 "**Operating Budget**" means the annual operating budget for the Property prepared by the Manager and reasonably approved by the Executive Committee. The Operating Budget for each fiscal year shall be prepared by the Manager and submitted to the Executive Committee for approval no later than November 1 of the preceding fiscal year. In the event that the Executive Committee fails to timely approve an Operating Budget for any given year, the Operating Budget for the preceding year shall remain in effect until the new Operating Budget is approved.

1.39 "**Percentage Interest**" means the percentage of the Company owned by each Member as set forth in Schedule 4.1 attached hereto. The Manager shall cause Schedule 4.1 to be amended and updated to reflect the aggregate Percentage Interests of the Members whenever there are transfers of Interests, Capital Contributions or other events that cause the Percentage Interests to Change.

1.40 "**Person**" means a natural person, corporation, trust, partnership, joint venture, association or other business or other legal entity.

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1.41 **"Preferred Members"** means those Members labeled as such on Schedule 4.1 attached hereto.

1.42 **"Preferred Return"** means a simple annual return on the amount invested by the Preferred Members at the rate of ten percent (10%) per annum from the date the Company receives such investment from a Preferred Member. The Preferred Return shall be cumulative and non-compounded and shall be paid quarterly as available out of Net Cash from Operations and Net Cash from Sales or Financings.

1.43 **"Profits"** and **"Losses"** means, for each Fiscal Year or other period, an amount equal to the Company's taxable income or loss for such year or period, determined in accordance with Code Section 703(a) (for this purpose, all items of income, gain, loss or deduction required to be stated separately pursuant to Code Section 703(a)(1) will be included in taxable income or loss), with the following adjustments:

1.43.1 any income of the Company that is exempt from federal income tax and not otherwise taken into account in computing Profits or Losses pursuant to this Section 1.43 will be added to such taxable income or loss;

1.43.2 any expenditures of the Company described in Code Section 705(a)(2)(B) or treated as Code Section 705 (a)(2)(B) expenditures pursuant to Section 1. 704- 1 (b)(2)(iv)(i) of the Treasury Regulations, and not otherwise taken into account in computing Profits or Losses pursuant to this subsection 1.44 will be subtracted from such taxable income or loss;

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1.43.3 any gain or loss resulting from any disposition of Company assets with respect to which gain or loss is recognized for federal income tax purposes will be computed by reference to the Gross Asset Value of the property disposed of, notwithstanding that the adjusted tax basis of such property differs from its Gross Asset Value;

1.43.4 in lieu of the depreciation, amortization and other cost recovery deductions taken in computing such taxable income or loss, there will be taken into account Depreciation for such Fiscal Year or other period, computed in accordance with Section 1.22; and

1.43.5 any items of income, gain, loss or deduction specifically allocated pursuant to Sections 5.2 and 5.3 will not be taken into account in determining Profits or Losses.

1.44 **"Project"** has the meaning set forth in Section 3.1.

1.45 **"Project Budget"** means the budget to be prepared by the Manager and approved by the Executive Committee for the development and construction of the Project. Such budget shall be developed in collaboration with the design and construction team selected to work on the Project.

1.46 **"Property"** means the Cal Neva Resort & Spa located at 2 Stateline Road, Crystal Bay, Nevada 89402, together with any and all land and improvements owned in connection therewith.

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1.47 "**Seller**" means Canpartners Realty Holding Company IV Cal-Neva LLC.

1.48 "**Sponsor Member**" means CR.

1.49 "**Substitute Member**" means any transferee of a Member's Interest who is admitted as a Member in the Company pursuant to Article 12.

1.50 "**Treasury Regulations**" means the Income Tax Regulations promulgated under the Code, as such regulations may be amended from time to time (including corresponding provisions of succeeding regulations).

ARTICLE 2
ORGANIZATION AND TERM

2.1 **Formation.** The Members formed the Company under and pursuant to the provisions of the Act by filing the Articles on March 13, 2013. The rights and liabilities of the Members will be as provided under the Act, the Articles and this Agreement. The fact that the Articles are on file in the office of the Secretary of State, State of Nevada, will constitute notice that the Company is a limited liability company.

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In order to maintain the Company as a limited liability company under the laws of the State of Nevada, the Company will from time to time take appropriate action, including the preparation and filing of such amendments to the Articles and such other fictitious name certificates, documents, instruments and publications as may be required by law, including, without limitation, action to reflect:

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2.1.1 a change in the Company name;

2.1.2 a correction of false or erroneous statements in the Articles or the desire of the Members to make a change in any statement therein in order that it will accurately represent the agreement among the Members; or

2.1.3 a change in the time for dissolution of the Company as stated in the Articles and in this Agreement.

2.2 **Name.** The business and affairs of the Company will be conducted solely under the name of "Cal Neva Lodge, LLC". The Company will execute and file all assumed or fictitious name certificates required to be filed in the applicable public records of the county in which the Property is located or in any other county in which the Company is doing business.

2.3 **Term.** The term of the Company commenced on March 13, 2013, and will continue in full force and effect until the earliest of the following:

2.3.1 December 31, 2063;

2.3.2 dissolution of the Company approved as a Major Decision pursuant to Section 8.3.2; or

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2.3.3. entry of a decree of judicial dissolution.

2.4 **Registered Agent and Office.** The Company's registered agent and office in Nevada will be Capitol Corporate Services, Inc., 202 S. Minnesota Street, Carson City, Nevada 89703. At any time, the Company may designate another registered agent and/or office.

2.5 **Principal Place of Business.** The principal place of business of the Company will be 2 Stateline Road, Crystal Bay, Nevada 89703. At any time, the Company may establish additional offices. The following items will at all times be maintained at the Company's principal office:

2.5.1 a current list of the full name and last known business, residence or mailing address of each Member and each Manager, both past and present;

2.5.2 a copy of the Articles and all amendments thereto, together with executed copies of any powers of attorney pursuant to which any amendment has been executed;

2.5.3 copies of the Company's federal, state and local income tax returns and reports, if any, for the three most recent years;

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2.5.4 copies of this Agreement with all amendments and copies of any writings permitted or required under the Act regarding the obligation of a Member to perform any enforceable promise to contribute cash or property or to perform services as consideration for such Member's Capital Contribution;

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2.5.5 minutes of every annual and special meeting and any meeting ordered pursuant to Section 10.4;

2.5.6 unless contained in this Agreement, a statement prepared and certified as accurate by the Manager of the Company which describes:

(a) the amount of cash and a description and statement of the agreed value of the other property or services contributed by each Member and which each Member has agreed to contribute in the future;

(b) the times at which or events on the happening of which any additional contributions agreed to be made by each Member are to be made;

(c) if agreed upon, the time at which or the events on the happening of which a Member may terminate his membership in the Company and the amount of, or the method of determining, the distribution to which he may be entitled respecting his membership interests and the terms and conditions of the termination and distribution;

(d) any right of a Member to receive distributions which include a return of all or any part of a Member's contribution;

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2.5.7 any written consents obtained from Members pursuant to the Act regarding action taken by Members without a meeting.

Such records are subject to inspection and copying at the reasonable request and at the expense of any Member during ordinary business hours.

2.6 **Other Instruments**. Each Member hereby agrees to execute and deliver to the Company within five (5) days after receipt of a written request therefor, such other and further documents and instruments, statements of interest and holdings, designations, powers of attorney and other instruments and to take such other action as the Company deems necessary, useful or appropriate to comply with any laws, rules or regulations as may be necessary to enable the Company to fulfill its responsibilities under this Agreement.

ARTICLE 3
PURPOSES AND POWERS OF THE COMPANY

3.1 **Purposes**. The overall business, purpose and scope of the Company is to acquire all membership interests of Seller in New Cal-Neva Lodge, LLC, a Nevada limited liability company ("New Cal Neva"). The Company shall purchase the interest of Seller in New Cal Neva with a portion of the Capital Contributions to be raised by the Company. New Cal Neva owns the Property, and it intends to rehabilitate and redevelop the Cal Neva Resort & Spa (the "Project"), and thereafter hold, mortgage, manage, maintain, lease, sell and otherwise use the Project for the production of income and profit. The Company shall serve as the managing member of New Cal Neva.

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3.2 **Authority of Company**. In furtherance of its purpose, but consistent with and subject to the provisions of this Agreement and all applicable laws, the Company is empowered and authorized to do any and all acts and things incidental to, or necessary, appropriate, proper, advisable, or convenient for, the furtherance and accomplishment of the purposes described in Section 3.1 and for the protection and benefit of the Company, including, without limitation:

3.2.1 acquiring fee and leasehold estates in real and personal property and the rights therein or appurtenant thereto, necessary, appropriate or incidental to the ownership, management and maintenance of the Property, including real property adjacent to the Property;

3.2.2 entering into, performing and carrying out contracts and agreements of any kind, and entering into any kind of activity, in connection with, or incidental to, the accomplishment of the purposes of the Company;

3.2.3 securing approvals, permits and consents necessary, appropriate or incidental to the accomplishment of the purposes of the Company, including operating a casino on the Property;

3.2.4 developing and constructing improvements to the Property and dedicating or otherwise conveying portions of the Company Assets as may further the purposes of the Company;

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3.2.5 borrowing money and issuing evidences of indebtedness in furtherance of the Company business and securing any Company indebtedness by mortgage, pledge, security interest or other lien, and otherwise financing or refinancing (defined for purposes of this Agreement to include recast, modified, extended or increased) the Project;

3.2.6 leasing, mortgaging, selling or otherwise disposing of all or any part of the Property for cash, stock, other securities or other property, or any combination thereof;

3.2.7 entering into partnerships, ventures and other business arrangements, and contributing all or any portion of the Company Assets as consideration for same;

3.2.8 to sue and be sued, complain and defend, and participate in administrative or other proceedings, in its name;

3.2.9 to appoint agents of the Company, and define their duties and fix their compensation, if any;

3.2.10 to indemnify a Member or Manager or former Member or Manager, and to make any other indemnification that is authorized by the Articles or by this Agreement in accordance with the Act;

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3.2.11 at the end of the term hereof as provided in Section 2.3, to cease its activities and surrender its certificate of organization;

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3.2.12 to have and exercise all powers necessary or convenient to effect any or all of the purposes for which the Company is organized;

3.2.13 to become a member of a general partnership, limited partnership, joint venture or similar association or any other limited liability company; and

3.2.14 doing and performing all other acts and things which may be necessary, appropriate or incidental to the carrying out of the business and purposes of the Company.

3.3 **Certain Transactions**. The Company is expressly permitted in the normal course of its business to enter into transactions with any or all Members or with any Affiliate of any or all Members provided that the Member seeking such a related party transaction receives the prior written approval of the price and other terms of such transaction by all members of the Executive Committee who are not involved in the proposed transaction. Any executory contracts between the Company and Affiliates must be approved by the unanimous vote of the Executive Committee. All Members hereby acknowledge their approval of the Development Services Agreement described in Section 7.4 herein.

3.4 **Adjacent Property**. No Member and no Affiliate of any Member may acquire real property adjacent to the Property unless the Company has been offered the opportunity to acquire such Property and has elected in writing not to do so.

3.5 **Future Phases**. The Members agree that the current definition of the "Project" herein refers to the initial phase involving the repair and rehabilitation of the existing main hotel

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building, tower and several ancillary buildings, including the spa, terrace units and chalet units. It is anticipated that the Company may wish to convert the cabin units on the Property into condo hotel units as part of phase two work ("Phase Two"), if the necessary entitlements for such work can be obtained. If Phase Two is pursued by the Company, the existing Members shall have the right of first offer to provide the necessary equity for Phase Two in the same proportions as the Capital Contributions made by each Member for the phase one work on the Property. Any equity requested of the Members for Phase Two would not be considered to be requested pursuant to a capital call in accordance with Section 4.4. If the Members do not wish to make equity contributions required for Phase Two, they agree to cooperate in the search to find new sources of equity required for such work, as well as new lender financing. Any Capital Contributions that the existing Members elect to make for Phase Two, if any, shall be treated the same as the existing Capital Contributions pursuant to Section 6.2 herein. If it is necessary to bring in new Members to make such Capital Contributions for Phase Two, such admission of new Members shall be in accordance with an amendment to this Agreement approved as a Major Decision pursuant to Section 8.3.12. Development Fees shall be payable to Developer with respect to Phase Two in accordance with Section 7.4 hereof and the Development Services Agreement referenced therein.

ARTICLE 4
MEMBERS, DUTIES, CAPITAL CONTRIBUTIONS AND LOANS

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4.1 **Members; Obligation to Update.** All Members of the Company, past and present, their last known business, residence or mailing address, and their Percentage Interests in the Company will be listed on the attached Schedule 4.1. The Manager will be required to update Schedule 4.1 from time to time as necessary to accurately reflect the information therein.

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4.2 **Initial Capital Contributions.** The Initial Capital Contributions of the Members are set forth on the attached Schedule 4.2, and the Company acknowledges receipt of such Initial Capital Contributions for the purposes set forth on such Schedule.

4.3 **Future Targeted Capital Contributions.** The Company has raised $8,500,000.00 in Initial Capital Contributions as of the date hereof. The Company desires to raise a total of $20,000,000.00 from current Members and Additional Members, meaning that it will attempt to raise $11,500,000.00 over and above the Initial Capital Contributions (such amount being referred to as the "Future Targeted Capital Contributions"). The Company shall attempt to raise the Future Targeted Capital Contributions by the date specified in the Private Placement Memorandum for the Company dated March 11, 2014, as it may be amended from time to time (the "Future Funding Deadline"). Notwithstanding the foregoing, the minimum amount of Capital Contributions to be raised shall be $8,500,000.00, and the Company shall begin accepting Future Targeted Capital Contributions at such time as total Capital Contributions to the Company would be $8,500,000.00 or more. The Executive Committee further reserves the right to accept mezzanine debt in the approximate amount of $6,000,000.00 plus interest (the "Mezzanine Loan") from a lender (the "Mezzanine Lender") in addition to the Future Targeted Capital Contributions. The terms of any such Mezzanine Loan must be approved by at least four of the five members of the Executive Committee. The Executive Committee may at its discretion elect to raise an amount equal to the Mezzanine Loan through Capital Contributions from Additional Members in lieu of obtaining the Mezzanine Loan. Each new investor who provides any portion of the Future Targeted Capital Contributions shall become a Preferred

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Member of the Company upon making such Capital Contributions, and each such new Member shall execute an amendment to this Agreement to reflect its Interest in this Company. At such time, the Manager shall revise and update Schedules 4.1 and 4.2 to reflect all Interests in the Company. The Executive Committee may extend the Future Funding Deadline in its sole discretion. The proposed uses of the Capital Contributions raised by the Company pursuant to Sections 4.2 and 4.3 are set forth in Schedule 4.3 attached hereto and made a part hereof, and the Members hereby approve such uses.

4.4 **Additional Capital Contributions.** Subject to Section 8.3.5 below, at such time or times as the Manager reasonably determines that capital contributions in addition to the Initial Capital Contributions and the Future Targeted Capital Contributions are necessary or desirable in order to fulfill the contemplated objectives of the Company, the Manager shall notify the Members, which notice shall set forth the aggregate amount of the requested contributions, and the Members may, but shall not be obligated to, deposit such amount with the Company within the time period specified in such notice, which shall be based on the reasonably anticipated timing of the capital requirement, in proportion to their respective Capital Account balances. Each such contribution shall be treated the same as any other Capital Contribution to the Company. No Member shall be required to make any Additional Capital Contributions, but if any Member elects not to make its full share of such Additional Capital Contributions, the other Members shall have the option to make the Additional Capital Contribution that such non-funding Member was entitled to make, in proportion to their respective Capital Account balances.

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4.5 **Liability of Member.** Upon the payment by a Member of the Capital Contributions required of it hereunder, such Member will have no further liability or responsibility to the Company or any creditor except to the extent specifically set forth herein.

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4.6 **Duties and Obligations of the Members with Respect to Equity and Loans.** The following will be the general rights, duties and obligations applicable to the Members with respect to equity and loans for the Company:

4.6.1 CR will use its diligent efforts to obtain the Construction Loan.

4.6.2 Any and all documents relating to the Construction Loan and to be executed by the Company will be subject to the prior approval of the Executive Committee.

4.7 **Withdrawals and Interest.** No Member will have the right to:

4.7.1 withdraw his/its Capital Contribution;

4.7.2 receive any return or interest on any portion of his/its Capital Contribution except as otherwise provided herein; or

4.7.3 withdraw from the Company except by transfer of his/its Interest to another party in accordance with Article 13, by resignation in accordance with Section 8.7, or upon the dissolution of the Company.

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4.8 **Return.** No Member will be entitled to the return of all or any part of its Capital Contribution unless and until there remains Company Assets after:

4.8.1 all current liabilities of the Company (except liabilities to Members on account of their Capital Contributions) have been paid;

4.8.2 all amounts due to Members in respect of their share of profits and other gains have been paid; and

4.8.3 the Company has been dissolved without reformation in accordance with Article 13 and Articles of Dissolution have been filed with the Nevada Secretary of State.

For purposes of Section 4.8.1, permanent financing on the Property shall not be deemed a "current liability" of the Company, and the return of all or part of a Member's Capital Contributions pursuant to other provisions of this Agreement may be made prior to full repayment of the permanent financing, as long as such permanent financing is not in default.

ARTICLE 5
ALLOCATIONS OF PROFITS AND LOSSES

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5.1 **Profits and Losses.** Profits and Losses for any Fiscal Year will be allocated among the Members so that the Capital Account of each Member, increased by his/its share of Company Minimum Gain and his/its share of Member Minimum Gain is, as nearly as possible, positive in an amount equal to the cash that the Company would distribute to such Member, or negative in an amount equal to the cash that such Member would contribute to the Company, as the case may be, if (i) the Company liquidated by selling all of its assets for their respective Gross Asset Values, (ii) the proceeds of such sales, and any other cash of the Company, were used to satisfy the Company's debts in accordance with, and to the extent required by, their terms and in the order of priority prescribed by the applicable laws governing creditors' rights, and (iii) either (A) the Company distributed any remaining cash to the Members pursuant to Section 6.2 hereof or (B) the Members contributed to the Company cash in the amount of any remaining Recourse Liabilities of the Company; provided, however, that no Losses will be allocated to any Member for any Fiscal Year to the extent that such Losses would create or increase a deficit in such Member's Adjusted Capital Account.

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5.2 **Special Gross Allocation.** If, after giving effect to the allocations set forth in Section 5.3 hereof, an allocation of Profits or Losses pursuant to Section 5.1 (determined as though no items were allocable pursuant to this Section 5.2) for any Fiscal Year would leave the Capital Account(s), increased by the share(s) of Company Minimum Gain and share(s) of Member Minimum Gain, of any Member(s) short of (less than) the aggregate amount that would be distributed to such Member(s) under the hypothetical circumstances described in Section 5.1 while leaving the Capital Account(s), increased by the share(s) of Company Minimum Gain and share(s) of Member Minimum Gain, of any other Member(s) above (more than) the aggregate amount that would be distributed to such other Member(s) under such circumstances, then items of income or gain will be allocated to the former Member(s), and items of loss or expense will be allocated to the latter Member(s), until either (i) Profits or Losses (determined pursuant to Section 1.43, without regard to the items of income, gain, expense or loss allocated pursuant to this Section 5.2) can be allocated so as to cause each Member's Capital Account, increased by

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such Member's share of Company Minimum Gain and share of Member Minimum Gain to equal the amount that would be distributed to such Member under the hypothetical circumstances described in Section 5.1 or (ii) there are no more items to allocate.

5.3 **Special Allocations**. The following special allocations will be made in the following order:

5.3.1 Items of gross income and gain will be allocated to each Member in an amount and manner sufficient to eliminate, as quickly as possible, any deficit in such Member's Adjusted Capital Account to the extent that such deficit is created or increased by any unexpected adjustments, allocations or distributions described in Section 1.704-1(b)(2)(ii)(d)(4)-(6) of the Treasury Regulations. This subsection 5.3.1 and the proviso of Section 5.1 are intended to comply with the "alternative test for economic effect" provisions of Section 1. 704-1 (b)(2)(ii)(d) of the Treasury Regulations and will be interpreted consistently therewith;

5.3.2 If, for a Fiscal Year, there is a net decrease in Member Minimum Gain, then each Member will be allocated items of gross income or gain equal to such Member's share of such net decrease, determined under Section 1.704-2(i) of the Treasury Regulations. However, in accordance with Section 1.704-2(i)(4) of the Treasury Regulations, the preceding sentence will not apply to the extent that the net decrease in Member Minimum Gain results from (i) a capital contribution from such Member which is used to repay a liability of the Company or (ii) a refinancing or lapse of a guarantee of, or any other change in, a liability of the Company that causes such liability to become partially or wholly a Nonrecourse Liability. This subsection 5.3.2 is intended to comply with the minimum gain chargeback requirement of Section 1.704-2(i)(4) of the Treasury Regulations and will be interpreted consistently therewith;

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5.3.3 If, for a Fiscal Year, there is a net decrease in Company Minimum Gain, then each Member will be allocated items of income and gain equal to such Member's share of such net decrease, determined in accordance with Sections 1.704-2(f) and 1.704-2(g) of the Treasury Regulations. However, in accordance with Section 1.704-2(f)(2) of the Treasury Regulations, the preceding sentence will not apply to the extent that the net decrease in Company Minimum Gain results from (i) a Capital Contribution from such Member which is used to pay a liability of the Company or (ii) a refinancing or guarantee of, or any other change in, a liability of the Company that causes such liability to become partially or wholly a Member Nonrecourse Liability for which such Member bears the economic risk of loss. This subsection 5.3.3 is intended to comply with the minimum gain chargeback requirement of Section 1.704-2(f) of the Treasury Regulations and will be interpreted consistently therewith;

5.3.4 Nonrecourse Deductions for any Fiscal Year will be allocated among the Members pro rata, in accordance with their Percentage Interests;

5.3.5 Member Nonrecourse Deductions for any Fiscal Year will be allocated to the Members who bear the economic risk of loss with respect to the Member Nonrecourse Liability to which such Member Nonrecourse Deductions are attributable in accordance with Section 1.704-2(i)(1) of the Treasury Regulations;

5.3.6 The proviso at the end of Section 5.1, and the allocations set forth in this Section 5.3, other than subsection 5.3.7 (the "Regulatory Allocations") are intended to comply

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with certain requirements of the Treasury Regulations. It is the intent of the Members that, to the extent possible, all Regulatory Allocations will be offset either with other Regulatory Allocations or with special allocations of other items of Company income, gain, loss or deduction pursuant to this Article V. Therefore, notwithstanding any other provision of this Article 5 (other than the Regulatory Allocations), the Manager will make such offsetting special allocations of Company income, gain, loss or deduction in whatever manner they determine appropriate so that, after such offsetting allocations are made, each Member's Capital Account balance, to the extent possible, is equal to the Capital Account balance such Member would have had if the Regulatory Allocations were not part of the Agreement and all Company items were allocated pursuant to Sections 5.1 (other than the proviso at the end thereof), 5.2, and subsection 5.3.7. In exercising his discretion under this subsection 5.3.6, the Manager will take into account future Regulatory Allocations under subsections 5.3.2 and 5.3.3 that, although not yet made, are likely to offset other Regulatory Allocations previously made under subsections 5.3.4 and 5.3.5;

5.3.7 It is intended that the amount to be distributed to a Member pursuant to subsection 13.4.3 of this Agreement will equal the amount such Member would receive if liquidation proceeds were instead distributed in accordance with Section 6.2 of this Agreement. This intended distribution amount for a Member is referred to as such Member's "Targeted Distribution Amount". Notwithstanding any preceding provision to the contrary in this Article 5, if upon a termination and liquidation of the Company, any Member's Capital Account balance immediately prior to the distributions to be made pursuant to subsection 13.4.3 of this Agreement (determined tentatively after allocations made for such Fiscal Year under this Article V without regard to this subsection 5.3.7) would be less than such Member's "Targeted Distribution Amount", then, for the current Fiscal Year and, if necessary and to the extent amended tax returns can be filed, for prior Fiscal Years of the Company, such Member will be specially allocated items of income or gain for such years, and items of loss or deduction for such years will be allocated away from such Member to the other Members, until Profits or Losses for the year(s) of termination and liquidation of the Company can be allocated so as to cause each Member's actual Capital Account balance to equal the Targeted Distribution Amount for such Member (and such Profits or Losses will be so allocated pursuant to Sections 5.1 and 5.2). In the event that liquidation distributions are to be made over two (2) or more Fiscal Years, the Manager will exercise their reasonable discretion to determine (i) the aggregate liquidation proceeds likely to be available for distribution pursuant to subsection 13.4.3, and accordingly, each Member's estimated Targeted Distribution Amount and (ii) the appropriate allocations to be made pursuant to this subsection 5.3.7 taking into account allocations of items of income, gain, deduction and loss likely to be made in subsequent years prior to final liquidation and dissolution of the Company. Amended returns will be prepared pursuant to this subsection 5.3.7 to the extent necessary and possible to ensure that the distributions made pursuant to subsection 13.4.3 to each Member equal, as nearly as possible, such Member's Targeted Distribution Amount.

5.4 **Varying Interests of the Members.** Anything contained in this Article V to the contrary notwithstanding, the allocation of Profits, Losses and items of income, gain, expense or loss for any Fiscal Year of the Company during which a Person acquires a Percentage Interest will take into account the Members' varying interests in the Company for such Fiscal Year pursuant to any method permissible under Section 706 of the Code that is selected by the Manager.

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5.5 **Tax Allocations: Code Section 704(c).** In accordance with Code Section 704(c) and the Treasury Regulations thereunder, income, gain, loss and deduction with respect to any property contributed to the capital of the Company, solely for tax purposes, will be allocated among the Members so as to take account of any variation between the adjusted basis of such property to the Company for federal income tax purposes and its initial Gross Asset Value (computed in accordance with subsection 1.25.1. In the event the Gross Asset Value of any Company Assets is adjusted pursuant to subsection 1.25.2 hereof, subsequent allocations of income, gain, loss and deduction with respect to such Company Assets will take account of any variation between the adjusted basis of such asset for federal income tax purposes and its Gross Asset Value in the same manner as under Code Section 704(c) and the Treasury Regulations thereunder. Any elections or other decisions relating to such allocations will be made by the Manager in any manner that reasonably reflects the purpose and intention of this Agreement. Allocations pursuant to this Section 5.5 are solely for purposes of federal, state and local taxes and will not affect, or in any way be taken into account in computing, any Capital Account or share of Profits, Losses, other items or distributions pursuant to any provision of this Agreement.

5.6 **Tax Matters Partner**

5.6.1 CR is designated a tax matters partner (the "TMP") as defined in Section 6231(a)(7) of the Code, and the Members will take such actions as may be necessary, appropriate, or convenient to effect the designation of CR as TMP. The TMP and the other Members will use their best efforts to comply with the responsibilities outlined in this section and in Sections 6222 through 6232 of the Code (including any Treasury Regulations promulgated thereunder).

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5.6.2 The Members will furnish the TMP with such information as the TMP may reasonably request to permit it to provide the Internal Revenue Service with sufficient information to allow proper notice to the parties in accordance with Section 6223 of the Code.

5.6.3 These provisions will survive the termination of the Company or the termination of any Member's interest in the Company and will remain binding on the Members for a period of time necessary to resolve with the Internal Revenue Service or the Department of the Treasury any and all matters regarding the Federal income taxation of the Company and each of the Members with respect to Company matters.

5.6.4 Notwithstanding the foregoing, the TMP will not litigate or enter into any agreement concerning or settle any tax issue that will be binding on either Member without such Member's prior written consent.

5.7 **Elections**. Company tax elections will be made by CR as the Tax Matters Partner, subject to the prior approval of the Executive Committee. Unless the Members agree otherwise, elections will be made to maximize tax benefits under the regular income tax without regard to the alternative minimum tax under Section 55 of the Code. Notwithstanding anything contained herein to the contrary, the Members agree that no elections will be made by any Member, including the TMP, that could jeopardize the characterization of distributions pursuant to Section 6.2 as other than long term capital gains without the prior approval of all of the Members.

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ARTICLE 6
DISTRIBUTIONS; BOOKS AND RECORDS; AUDITS

6.1 **Frequency of Distributions.** The Company will distribute any Net Cash From Operations not less frequently than quarterly, and will distribute Net Cash From Sales or Financings as promptly as possible.

6.2 **Order and Priority of Distributions of Net Cash From Operations and Net Cash from Sales or Financings.** Net Cash From Operations and Net Cash From Sales or Financings will be distributed in the following order and priority:

6.2.1 To the Preferred Members pro rata based upon the relative share that each Preferred Member contributed to the total of the Preferred Equity, until each such Preferred Member has received its Preferred Return on its Capital Contribution, including amounts accrued from prior periods.

6.2.2 Next, to all Preferred Members pro rata based upon the Percentage Interest owned by each such Preferred Member, until the Preferred Members have received cumulative distributions pursuant to this Section 6.2.2 equal to the Capital Contributions made by each such Preferred Member.

6.2.3 Thereafter, to all Members pro rata based upon the Percentage Interest owned by each such Member.

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6.2.4 Notwithstanding the foregoing, if at the time that all accrued Preferred Returns have been paid to the Preferred Members the total amount of Preferred Returns paid to any of the Preferred Members is less than forty percent (40%) of the Capital Contributions made by such Preferred Members, each Preferred Member with such a shortfall shall be entitled to receive additional distributions of Preferred Returns, prior to any distributions pursuant to Section 6.2.2 above, in an amount equal to (i) 40% of the Capital Contributions made by such Preferred Member minus (ii) the total Preferred Returns previously received by such Preferred Member. After such additional distributions have been paid to the Preferred Members, distributions pursuant to Section 6.2.2 shall then be made. Preferred Returns to each Preferred Member shall thereafter once again begin to accrue on a quarterly basis on any unreturned Capital Contributions of the Preferred Members and be paid as a first priority to each Preferred Member until such time as all Preferred Members have received the full return of their Capital Contributions.

6.2.5 As set forth on Schedule 4.1, the Sponsor Member shall have a Percentage Interest in the Company equal to twenty percent (20%) for its role as sponsor and for its contributions to the asset value of the Project since the purchase of the Property. A 10% Percentage Interest shall be reserved for the Mezzanine Lender, as set forth on Schedule 4.1.

6.2.6 In lieu of the distribution of the Preferred Return as set forth in Section 6.2.1 above, each Preferred Member shall have the option, to be exercised prior to the receipt of any of its Preferred Return, to elect to purchase one Condominium Unit (as described below) for each $1,000,000 of Capital Contributions made by a Preferred Member, at a discount of $500,000 below the list price of each such Condominium Unit (the "Condo Purchase Option").

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For purposes hereof, the Condominium Units are the 28 currently entitled hotel lodge units that are to be converted into for-sale managed residences as part of Phase Two. To exercise a Condo Purchase Option, a Preferred Member must deliver written notice to the Manager specifying which Condominium Unit it wishes to purchase prior to accepting any Preferred Returns. At such time the Company shall enter into a purchase agreement with such Preferred Member for the purchase of the designated Condominium Unit. If a Preferred Member does not exercise a Condo Purchase Option as set forth above, it will be deemed to have elected to receive Preferred Returns with respect to all of its Capital Contribution as set forth in Section 6.2.1 above. If a Preferred Member has made Capital Contributions in excess of $1,000,000 (each $1,000,000 Capital Contribution being referred to herein as an "Preferred Unit"), and such Preferred Member has exercised a Condo Purchase Option with respect to less than all of its Preferred Units, such Preferred Member shall receive a Preferred Return on any of its Preferred Units for which it has not exercised a Condo Purchase Option.

6.3 **Special Distributions to Pay Taxes.** Notwithstanding anything to the contrary set forth herein, the Manager shall distribute to each Member in January of each year as a "Tax Distribution" an amount equal to the sum of the following: (a) the product obtained by multiplying (i) the amount of Profits allocated to such Member in the preceding year times (ii) the greater of (A) the highest marginal federal income tax rate for individuals, or (B) the highest marginal federal income tax rate for taxable corporations, plus (b) any carryover amount from the preceding year as described below, reduced by (c) the amount of all distributions made to such Member with respect to such calendar year; provided that Profits of the Company for any year shall be net of (so as to be reduced by) all Losses of the Company for that year and all Losses of the Company for any prior years which have not then been fully set off against Profits for purposes of determining Tax Distributions under this Section 6.3. After the Company's Profits for each calendar year have been determined, if total distributions to a Member to date with respect to such year do not equal or exceed the federal income tax liability that would be accrued by that Member (assuming that such income is taxed at the greater of (A) the highest marginal federal income tax rate for individuals, or (B) the highest marginal federal income tax rate for taxable corporations) with respect to the Company's Profits for such year (determined as provided above), plus any carryover amount from the preceding year as described below (such total amount, the "Tax Distribution Amount"), then the Manager shall cause the Company to distribute any additional amounts necessary to cause the total distributions to a Member for such year to equal the Tax Distribution Amount, provided that the Company has cash available to make the distributions. If the total distributions to a Member with respect to any year do not equal or exceed the Tax Distribution Amount, the amount of the excess of the Tax Distribution Amount over the total amount of distributions to a Member for such year shall carry forward to, and add to the Tax Distribution Amount for the succeeding taxable year. Any distribution made to a Member under this Section 6.3 shall constitute an advance on distributions required to be made to such Member under Section 6.2, and distributions to a Member under Section 6.2 shall accordingly be suspended until the amount of such advance has been recouped. Notwithstanding the foregoing, no Tax Distributions shall be payable under this Section 6.3 with respect to the year in which the Company is terminated. If upon the termination of the Company, the sum of the distributions received by a Member under Section 6.2 and the Tax Distributions received under this Section 6.3 exceed the amount of the distributions a Member would have been entitled to receive under Section 6.2, the Member receiving such excess distributions shall contribute to the Company the amount of such excess. The preceding sentence is for the exclusive benefit of

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the Members and their permitted assigns and no third party shall be entitled to enforce or rely on such sentence.

6.4 **Books and Records.** At the expense of the Company, the Manager will maintain or cause to be maintained, in accordance with generally accepted accounting principles applied in a consistent manner, and more specifically in accordance with Section 1.704-1(b)(2)(iv) of the Treasury Regulations, adequate and accurate books and records of account in which will be entered all matters relating to the Company, including all income, expenditures, assets and liabilities. The books and records will be maintained at the Company's principal office or at such other location designated by the Manager. The books and records together with all supporting vouchers and data will be open to examination and copying by any Member or its/his duly constituted representative during normal business hours at the Company's principal office. Any Member may at any time request that a firm of independent certified public accountants audit the books and records of the Company, provided that the cost of such audit, if separate from the annual audit described in Section 6.5, will be borne by the Member requesting such audit except that, if the new audit discloses any substantial discrepancy from any regular Company audit, the cost of the audit will be paid by the Company.

6.5 **Audits.** At the expense of the Company, the Manager will cause the Accountants to perform an annual audit of the Company's books and records. Each Member will be furnished with a copy of the audit report on the financial statements of the Company. The financial statements will be prepared on a generally accepted accounting principles basis and will include a balance sheet, a statement of Capital Accounts of the Members, a statement of operations and a statement of changes in financial position. The audit and financial statements will be completed as soon as reasonably practical after the close of the Company's Fiscal Year.

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6.6 **Fiscal Year.** The Fiscal Year of the Company for both reporting and federal income tax purposes will be the Fiscal Year ending on the last day of December.

ARTICLE 7
DEVELOPMENT AND MANAGEMENT OF THE PROPERTY

7.1 **Title to Property.** Unless all of the Members agree otherwise, title to all real and personal property acquired in accordance with this Agreement will be held in the Company's name or in the name of its wholly owned subsidiary, New Cal Neva, as appropriate. All contracts with third parties will be executed in the name of the Company.

7.2 **Construction Contract.** The Construction Contract with the Contractor to perform construction on the Project shall have a guaranteed maximum price with respect to the cost of all structures and other improvements and the fees associated therewith, with all cost savings going to reduce the amount drawn on the Construction Loan. The Contractor will provide the Company with a comprehensive construction guarantee that all work performed will be free from construction defects for a period of one (1) year commencing with the issuance of the certificates of occupancy for each improvement. Additionally, the Contractor will warrant that the construction will be completed substantially in accordance with plans and specifications approved by the Manager and the Construction Lender and in compliance with all construction, environmental and land use requirements of all appropriate Governmental Authorities.

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7.3 **Management of the Project.** Day-to-day management of the Project will be performed by an Affiliate of CR approved by the Executive Committee (the "Management Company"). The management agreement (the "Management Agreement") between the Company and the Management Company will be subject to the reasonable approval of the Executive Committee and will not be subject to change without the reasonable consent of the Executive Committee. The Executive Committee shall use reasonable efforts to complete the negotiation and execution of the Management Agreement within thirty (30) days after the date hereof. The Management Agreement shall contain industry standard provisions for a hotel management agreement and shall be for a term of twenty (20) years, terminable only for cause. All Project employees will be selected and supervised by the Management Company.

7.4 **Development Services Agreement.** Seller shall enter into a "Development Services Agreement" with CR or its Affiliate ("Developer") pursuant to which Developer shall agree to coordinate and oversee the development of the Project. The form of such Development Services Agreement shall be substantially the same as the form that has been provided to each Member as of the date hereof. Pursuant to the Development Services Agreement, Developer shall receive a fee (the "Development Fee") in an amount equal to $60,000.00 per month. Such fees commenced in May, 2013 and shall continue until the grand reopening date of the hotel, subject to the cap on the Development Fee set forth therein, at which time the Management Agreement shall become applicable. CR has advanced approximately $1,667,236.18 in costs related to the Project beginning in early 2013, and CR has received and recontributed to the Company $480,000.00 of its Development Fee as of June 1, 2014. A total of $2,000,000.00 out of such costs and recontributed Development Fees shall serve as the Capital Contribution of CR and shall be part of the Initial Capital Contributions described in Section 4.2 hereof. Such Capital Contribution shall be treated in the same manner as the Capital Contributions of all other Preferred Members hereunder. Any amounts in excess of such $2,000,000.00 that have been or will be advanced to the Company by CR, or that represent Development Fees that are deferred following the June, 2014 Development Fee, shall be paid directly to CR by the Company in the future as set forth in the Development Services Agreement.

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7.5 **Monthly Reports.** CR shall prepare and deliver to the other Members on a monthly basis an executive summary discussing all Project progress and material developments relating to the Company, and it shall also include an unaudited monthly financial statement (including a cash spending summary). CR shall schedule quarterly meetings (which may be by telephone) for the Members to discuss the Project.

ARTICLE 8
MANAGEMENT OF THE COMPANY

8.1 **Management.** The Members have established the Company as a manager-managed limited liability company under the Act. The Members hereby designate CR as the Manager of the Company. CR may not be removed as Manager without the unanimous consent of all Members. Except as stated below with respect to "Major Decisions," Manager may exercise all powers of the Company and may do all such lawful acts and things as are not specifically required by the Act to be exercised or done by the Members. Any Person dealing with the Company may rely on the authority of the Manager in taking any action in the name of the Company without inquiry into the provisions or compliance herewith, regardless of whether that action is actually taken in accordance with the provisions of this Agreement.

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8.2 **Executive Committee.** The Members and Manager have agreed to designate a committee (the "Executive Committee") to make Major Decisions. The Executive Committee's power is limited to making Major Decisions, which the Executive Committee shall do in accordance with this Agreement. Notwithstanding the foregoing, Manager shall have the right to place before the Executive Committee for consideration any significant matter which is not a Major Decision but which Manager would like the Executive Committee to consider. In such cases, the majority vote of the Members of the Executive Committee present or voting by proxy at any such meeting shall decide such matter.

8.3 **Major Decisions.** The following constitute "Major Decisions" as such term is used herein, requiring the approval of four (4) of the five (5) members of the Executive Committee (subject to Section 8.7):

8.3.1 subject to subsections 9.1.2 and 9.4.1, removal of the Manager or election of a new Manager;

8.3.2 the dissolution of the Company;

8.3.3 acquisition of any interest in real property, other than the Company Assets, and any decision to market, sell, transfer, assign or place a lien on all or any part of the Company Assets (except as specifically provided to the contrary in this Agreement);

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8.3.4 any material modification to any developmental approvals obtained from any Governmental Authorities for development of the Property or any portion thereof;

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8.3.5 approving the amount, terms, conditions and provisions of the Construction Loan or any other financing of the Property or additional equity contributions to the Company, including the terms of any guarantees or recourse provisions of any kind with respect to such loans, provided that the terms of the binding letter of intent dated June 26, 2013 with Hall Structured Finance are deemed approved by the Company, and a closing of the Construction Loan pursuant thereto is hereby permitted;

8.3.6 the formation of a partnership or other venture between the Company and a third party;

8.3.7 entering into any and all third party contracts or leases, and, except as described in Sections 7.3 and 7.4, entering into any contract between the Company and a third party that is an Affiliate of a Member;

8.3.8 approval of the Operating Budget and any amendments thereto;

8.3.9 any capital expenditures in excess of One Hundred Thousand Dollars ($100,000) per expenditure or in excess of Two Hundred Fifty Thousand Dollars ($250,000) in the aggregate per annum, unless provided for in the Project Budget or the Operating Budget;

8.3.10 any decision concerning reconstruction or repair in the event of a casualty in excess of Two Hundred Thousand Dollars ($200,000), or any condemnation;

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8.3.11 any decision to pay a Manager, a Member or any other person a salary or other compensation and the amount of such salary or other compensation and other benefits, except as otherwise provided in Sections 7.3 or 7.4 or this Article 8, or pursuant to the Operating Budget or the Project Budget;

8.3.12 the amendment of the Articles or this Agreement. However, if any proposed amendment to the Articles or this Agreement would adversely affect the rights of any class of Member in a manner that is different from the effect on the rights of other classes of Members, then such amendment must also be approved by the Member Representative (as hereinafter defined) of the Executive Committee that was appointed by the Member of the class that will be adversely affected by such amendment; or

8.3.13 any decision to change the status of the Sponsor Member or the Mezzanine Lender into that of a Preferred Member.

8.4 **Designation of Executive Committee**. The Executive Committee shall initially consist of five (5) members. CR shall have the right to designate two (2) members of the Executive Committee, the Preferred Member who has made the largest Capital Contribution of the Preferred Members shall have the right to designate one member of the Executive Committee, and the other two members of the Executive Committee shall be "at large" members and shall be selected by unanimous consent of the other members of the Executive Committee (such members of the Executive Committee being each a "Member Representative" and collectively the "Member Representatives"). The selection of the "at large" members must be approved by at least 67% of the Percentage Interests of the Members of the Company. Any Member Representative may vote by a written proxy delivered to another Member Representative in attendance at a meeting of the Executive Committee. If a member of the Executive Committee dies, resigns or is removed, the person or persons who designated such member shall have the right to designate his or her successor. If the member who dies, resigns or is removed is an "at large" member, his or her replacement shall be selected by unanimous consent of the other members of the Executive Committee, and such selection must be approved by at least 67% of the Percentage Interests of the Members of the Company. Member Representatives need not be residents of the State of Nevada or Members of the Company. Each Member may change its designated Member Representatives effective upon written notice from such Member to the other Members. The initial Member Representatives designated by the Members are set forth in Schedule 8.4 attached hereto. The Manager shall update Schedule 8.4 from time to time to reflect the current Member Representatives of the Executive Committee.

Executive Committee meetings shall be held at least monthly until the reopening of the hotel on the Property and at least quarterly thereafter. Preparatory information necessary for such meetings shall be supplied to the Member Representatives by Manager in advance of the scheduled meeting dates. In addition, all Members will receive (i) reasonable advance notice of each Executive Committee meeting (date, time and place) and (ii) copies of all written information and documentation made available to the Member Representatives of the Executive Committee as provided above. Members will be entitled to attend meetings of the Executive Committee, but only the Member Representatives of the Executive Committee shall be permitted to vote on any matters considered at such meetings by the Executive Committee.

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8.5 **Transactions Between a Member or Manager and the Company.** Except as otherwise provided by applicable law or this Agreement, any Member or Manager may, but will not be obligated to, lend money to the Company, act as surety for the Company and transact other business with the Company and has the same rights and obligations when transacting business with the Company as a person or entity who is not a Member or a Manager.

8.6 **Member Activities.** Any of the Members, their Affiliates and any shareholder, officer, director, partner, employee or other Person holding a legal or beneficial interest in an entity which is a Member or an Affiliate thereof, may engage in or possess an interest in other business ventures of every nature and description, independently or with others, including but not limited to the ownership, development, construction, operation and management of residential and commercial property similar to the Property provided that no such other venture shall compete with the Project within the Lake Tahoe area.

8.7 **Affiliates and Conflicts of Interest.** The fact that a Member, an Affiliate, or a shareholder or partner of a Member or Affiliate is directly or indirectly interested in, owned, employed or connected with any Person employed by the Company or the Manager, to render or perform a service for the Company or from which the Company or the Manager may buy merchandise, material, services or other property, will not prohibit the Company or the Manager from employing such Person or from purchasing merchandise, material, services or other property therefrom or from otherwise dealing with the Person under reasonable terms and conditions such as would be reflected in an arms-length transaction, provided, all such dealings are communicated to the Members in writing prior to implementation. A Member shall be obligated to disclose to the other Members any potential Conflicts of Interest and must recuse himself or herself with respect to any action of the Members and from any vote on, related to or in connection with any Conflicts of Interest. A "Conflict of Interest" shall mean, with respect to any Member, any conflict of interest involving any such Member and the matter being considered by the Members, including, without limitation, any matter in which a Member or any affiliate thereof or a spouse or immediate family member of such Member (each of the foregoing being hereinafter referred to as a "Restricted Person") would (i) receive any type of compensation, whether in cash or in kind, from the Company or any affiliate of the Company, or any person with which the Company or any affiliate of the Company enters into a transaction, or (ii) acquire property from, sell property to, or enter into transactions with (A) the Company or any affiliate of the Company, or (B) any entity in which any Restricted Person has a voting interest of either ten percent (10%) or more of the total equity of such entity or ten percent (10%) or more of a class of voting equity of such entity. If a Member Representative on the Executive Committee has a Conflict of Interest, that Member Representative shall be recused from voting on the matter being considered by the Executive Committee. In such event, the vote of at least 100% of the remaining non-conflicted Member Representatives on the Executive Committee shall be required to pass any item that is being voted upon by the Executive Committee.

8.8 **Reimbursements.** The Company will reimburse the Members and the Manager for reasonable expenses incurred and paid by any of them in the organization of the Company and as authorized by the Company in the conduct of the Company's business, including, but not limited to, expenses of maintaining an office, telephones, travel, office equipment and secretarial and other personnel as may reasonably be attributable to the Company and any other predevelopment expenses set forth in the Project Budget. Such expenses will not include any expenses incurred in connection with a Member's or a Manager's exercise of its rights as a

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Member or a Manager apart from the authorized conduct of the Company's business. Such reimbursements will be treated as expenses of the Company and will not be deemed to constitute distributions to any Member of profit, loss or capital of the Company.

8.9 **Partition.** While this Agreement remains in effect or is continued, each Member agrees and waives its rights to have any Company Assets partitioned, or to file a complaint or to institute any suit, action or proceeding at law or in equity to have any Company Assets partitioned, and each Member, on behalf of itself, its successors and its assigns hereby waives any such right.

8.10 **Resignations; Retirement.** A Member may not resign from the Company unless (i) he has contributed the full amount of money or other consideration which constitutes his Capital Contribution as required herein; and (ii) following his resignation there will be at least two (2) remaining Members of the Company. The Company may recover damages for breach of this Section 8.10 if any Member violates this Section 8.10 and may offset the Company's damages against any amount owed to a resigning Member for distributions.

ARTICLE 9
MANAGER

9.1 **Manager.**

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9.1.1 The management of the Company's business will be vested in the Manager. The Manager will have the authority to sign agreements and other instruments on behalf of the Company.

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9.1.2 CR shall serve as the initial Manager. Such entity will serve until such time as it resigns or is removed. The Manager may be removed with or without cause by a vote of 80% of the Percentage Interests of the Members other than the Manager. Upon the resignation or removal of the Manager, CR will designate the replacement Manager, subject to the approval of four of the five members of the Executive Committee.

9.1.3 The Manager may engage in other business activities as permitted by Section 8.5 and will be obliged to devote only as much of his time to the Company's business as may be reasonably required in light of the Company's business and objectives. The Manager will perform its duties as a Manager in good faith, in a manner it reasonably believes to be in the best interests of the Company, and with such care as an ordinarily prudent person in a like position would use under similar circumstances. A person or entity who so performs its duties will not have any liability by reason of being or having been a Manager of the Company.

9.1.4 The number of Managers will be one (1), who may be an entity or a natural person eighteen (18) years of age or older but who need not be a Member of the Company or a resident of Nevada .

9.1.5 In performing its duties, the Manager will be entitled to rely on information, opinions, reports or statements of the following persons or groups unless it has knowledge concerning the matter in question that would cause such reliance to be unwarranted:

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(a) one or more employees or other agents of the Company whom the Manager reasonably believes to be reliable and competent in the matters presented;

(b) any attorney, public accountant or other person as to matters which the Manager reasonably believes to be within such person's professional or expert competence; or

(c) a committee upon which it does not serve, duly designated in accordance with a provision of this Agreement, as to matters within its designated authority, which committee the Manager reasonably believes to merit competence.

9.1.6 The Manager is an agent of the Company for the purpose of its business, and the act of the Manager, including the execution in the Company name of any instrument for apparently carrying on in the usual way the business of the Company, binds the Company, unless such act is in contravention of the Articles or this Agreement or unless the Manager so acting otherwise lacks the authority to act for the Company and the person with whom it is dealing has knowledge of the fact that it has no such authority.

9.2 **Powers of the Manager.** Subject to the limitations set forth elsewhere in this Agreement, the Manager will have the right and authority to take all actions which the Manager deems necessary, useful or appropriate for the day-to-day management and conduct of the Company's business.

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Subject to Section 8.1, the Manager may exercise all powers of the Company and do all such lawful acts and things as are not by statute, the Act, the Articles or this Agreement directed or required to be exercised or done by a majority in interest of the Members, except that no debt will be contracted or liability incurred by or on behalf of the Company by the Manager except as set forth in the Project Budget or the Operating Budget. All instruments, contracts, agreements and documents providing for the acquisition, mortgage or disposition of the Company Assets will be valid and binding on the Company if executed by the Manager. All instruments, contracts, agreements and documents of whatsoever type executed on behalf of the Company may be executed in the name of the Company by the Manager.

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9.3 **Salaries.** Subject to subsection 8.3.11, the Company may not pay to any Manager, Member or other person a salary as compensation for their services rendered to the Company.

9.4 **Removal of a Manager.**

9.4.1 Subject to the provisions of the Act and subject to the satisfaction of the conditions specified in this Article 9, a vote of 80% of the Percentage Interests of the Members may remove the Manager with or without cause.

9.4.2 The removal of a Manager will become effective on such date as may be specified by CR.

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9.5 **Resignation of a Manager.** A Manager may resign from his position as a Manager at any time by notice to the Members. Such resignation will become effective as set forth in such notice.

9.6 **Vacancies.** Any vacancy occurring in the position of Manager will be filled as set forth in Section 9.1.2.

9.7 **Duties of the Manager.** The Manager will have the following primary duties and responsibilities, with such limitations on their powers as set forth below and elsewhere in this Agreement:

9.7.1 The preparation of the Project Budget and the Operating Budget and expending the capital and revenues of the Company in accordance with such approved budgets;

9.7.2 Negotiating and arranging for all third party equity requirements, the Construction Loan and other loans, and preparing all projections, financial reports and other information or material to be furnished to the lender, in consultation with and subject to the approval of the Executive Committee;

9.7.3 Supervising construction, alterations and improvements with respect to the Project; retaining, terminating and/or hiring the services of engineers, surveyors, appraisers, accountants, attorneys, mortgage brokers, corporate fiduciaries, escrow agents, depositories, custodians, agents for collection, insurers, insurance agents, and such other technical or administrative advisors as reasonably deemed necessary by the Manager to further the purposes of the Company; retaining agents and employees for the Company, including property managers for the Property, and to delegate any of their powers (but not their obligations) to such agents or employees and direct such agents or employees with respect to the implementation of the Manager's decisions and the conduct of day-to-day operations of the Company;

9.7.4 The negotiation, administration, review and coordination of contracts on behalf of the Company for the development of the Project, and the administration and coordination of on-site and offsite improvements, warranty claims and corrective work;

9.7.5 Entering into and executing (i) agreements and any and all documents and instruments customarily employed in the real estate industry in connection with the development and operations of Property; and (ii) all other instruments deemed to be necessary or appropriate to the proper operation of the Property or to perform effectively and properly their duties or exercise their powers hereunder;

9.7.6 Placing or investing Company assets in bank savings and checking accounts, savings and loan associations, commercial paper, government securities, certificates of deposit, bankers' acceptances and other short-term interest-bearing obligations; provided, however, that the Manager will use best efforts to cause uninvested cash reserves of the Company to be placed in interest-bearing accounts or instruments. To the extent funds of the Company are sufficient therefor, the Manager may maintain reserves for operating or other expenses to the extent contemplated in the Operating Budget;

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9.7.7 The performance of other customary development functions, including seeking to obtain all local, state and federal permits, approvals and land use consents and acting as a liaison with all Governmental Authorities having jurisdiction over the development of the Property, and processing all governmental permits and approvals; and authorizing such research reports, economic and statistical data, evaluations, analysis, opinions and recommendations as may be necessary to further the purposes of the Company;

9.7.8 Subject to the other provisions of this Article 9, supervising the marketing and sales of portions of the Property and negotiating and executing contracts, or authorizing others to negotiate and execute contracts for sales of portions of the Property, in consultation with and subject to the approval of the Executive Committee;

9.7.9 Procuring and maintaining insurance policies with such coverage and in such amounts as required by this Agreement or the Loan;

9.7.10 File protests regarding property tax assessments and commence, defend, and settle litigation arising from such protests;

9.7.11 Prepare and deliver to each of the Members periodic reports not less than quarterly of the state of the business and the affairs of the Company as well as quarterly financial statements, and maintain, or cause to be maintained, the books and records;

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9.7.12 Within seventy-five (75) days after the end of each Fiscal Year, or as soon as reasonably practical after the end thereof, cause the Accountants to conduct the audit required herein, and prepare and deliver to each Member a report setting forth in sufficient detail all such information and data with respect to business transactions affected by or involving the Company during such Fiscal Year as will enable the Company and Members to prepare their Federal, state and local income tax returns in accordance with the laws, rules and regulations then prevailing. The Manager will also cause such Accountants to prepare Federal, state or local tax returns required of the Company and file the same; provided, however, that the Manager shall provide all Members with a copy of the proposed tax returns at least fifteen (15) days prior to the filing date or the extended filing date, as applicable. The Manager will also furnish to each Member such other reports on the Company's operations and conditions as may be reasonably requested by any Member;

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9.7.13 Collecting all revenues payable to the Company and depositing all sums collected in the Company's account or accounts in a bank or financial institution selected by the Manager;

9.7.14 Making, or causing to be made, distributions of Net Cash From Operations and Net Cash From Sales and Financings pursuant to Section 6.2; and

9.7.15 Developing, operating, managing and supervising the hotel operations which are developed as part of the Project in accordance with this Agreement.

9.8 **Expenses of Company.** Expenses to carry out the purposes and business of the Company will constitute Company expenditures and, when appropriate, will be paid by the Company from its accounts. Members will be reimbursed for reasonable expenditures made in

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furtherance of Company business, including travel related costs for attending Company meetings.

ARTICLE 10
MEETINGS AND VOTES OF MEMBERS

10.1 **Meetings.** Meetings of the Members will be held each year at the business office of the Company or at such other place as specified from time to time by the Manager. If the Manager specifies another location such change in location will be recorded on the notice calling such meeting. Meetings of the Members may be held in person, by telephone or by video conference.

10.2 **Annual Meetings.** In the absence of a notice from the Manager providing otherwise, the annual meeting of Members of the Company for the transaction of such business as may properly come before the meeting, will be held on the first Wednesday in April at 4:00 p.m. in each fiscal year, if the same be not a legal holiday, and if a legal holiday, then on the next succeeding business day. Failure to hold the annual meeting at the designated time will not work a forfeiture or dissolution of the Company.

10.3 **Special Meetings.** Special meetings of the Members will be scheduled and presided over by the Manager. Special meetings may be called by the Manager or upon the request of Members who hold not less than ten percent (10%) of the voting rights entitled to vote at the meeting provided that requests to approve the admission of Substitute Members may be postponed until the annual meeting of the Members.

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10.4 **Court Ordered Meeting.**

10.4.1 Any court of competent jurisdiction in the State of Nevada may summarily order a meeting to be held:

(a) on application of any Member if an annual meeting was not held within six (6) months after the end of the Company's fiscal year or fifteen (15) months after its last annual meeting, whichever is earlier; or

(b) on application of a Member who participated in a proper call for a special meeting if (i) notice of the special meeting was not given within thirty (30) days after the date the demand was delivered to the Manager; or (ii) the special meeting was not held in accordance with the notice.

10.4.2 The court may fix the time and place of the meeting, specify a record date for determining Members entitled to notice of and to vote at the meeting, prescribe the form and content of the meeting notice, fix the quorum required for the meeting or direct that the interests represented at the meeting constitute a quorum for the meeting, and enter other orders necessary to permit the meeting to be held.

10.5 **Notice.**

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10.5.1 Written notice stating the place, day and hour of the meeting and, in the case of a special meeting, the purpose or purposes for which the meeting is called, will be delivered unless otherwise prescribed by the Act, not less than ten (10) days nor more than fifty (50) days before the date of the meeting, either personally or by mail, by or at the direction of the Manager or person calling the meeting to each Member of record entitled to vote at such meeting.

10.5.2 Notice to Members of record, if mailed, will be deemed delivered as to any Member when deposited in the United States mail, addressed to the Member with postage prepaid, but, if three (3) successive letters mailed to the last-known address of any Member are returned as undeliverable, no further notices to such Member will be necessary until another address for such Member is made known to the Company.

10.5.3 When a meeting is adjourned to another time or place, notice need not be given of the adjourned meeting if the time and place thereof are announced at the meeting at which the adjournment is taken. At the adjourned meeting the Company may transact any business which might have been transacted at the original meeting. If the adjournment is for more than thirty (30) days, a notice of the adjourned meeting will be given to each Member entitled to vote at the meeting.

10.6 **Waiver of Notice.**

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10.6.1 When any notice is required to be given to any Member under the provisions of the Act or under the provisions of the Articles or this Agreement, a waiver thereof in writing signed by the person entitled to such notice, whether before, at or after the time stated herein, will be equivalent to the giving of such notice.

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10.6.2 By attending a meeting, a Member:

(a) waives objection to lack of notice or defective notice of such meeting unless the Member, at the beginning of the meeting, objects to the holding of the meeting or the transacting of business at the meeting;

(b) waives objection to consideration at such meeting of a particular matter not within the purpose or purposes described in the meeting notice unless the Member objects to considering the matter when it is presented.

10.7 **Proxies.** Each Member may designate up to three individuals as proxies, and any proxy designated by a Member shall be authorized to sign approvals, vote or otherwise act on behalf of that Member. Such proxies may be changed at any time upon the discretion of the Member who has named such proxies, provided any such changes shall be specified in a written notice from such Member to all other Members.

10.8 **Voting Procedures.**

10.8.1 The costs of calling and holding the annual meeting of the Members and special meetings called by the Manager will be paid by the Company. Such costs for all other

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meetings called by the Members will be paid by the Members calling the meeting. Each Member will be responsible for its own costs associated with attending and participating in a meeting.

10.8.2 Matters not described in a meeting notice maybe discussed at a meeting if all Members or their authorized representatives are present at the meeting and may be voted upon if the Members or their authorized representatives possessing at least the required percentage of the votes to approve such matter are present at the meeting.

10.9 **Action by Members Without a Meeting.** Unless the Articles, the Act or this Agreement provide otherwise, action required or permitted by the Act to be taken at a Members' meeting, including but not limited to the annual meeting, may be taken without a meeting if the action is evidenced by one or more written consents describing the action taken, signed by each Member entitled to vote. Action taken under this Section 10.9 is effective when all Members entitled to vote have signed the consent, unless the consent specifies a different effective date.

Written consent of all of the Members entitled to vote on any matter has the same force and effect as a unanimous vote of such Members and may be stated as such in any document.

ARTICLE 11
MEMBERS' LIABILITY AND INDEMNITY

11.1 **Members.**

11.1.1 No Member will be liable under a judgment, decree or order of a court, or in any other manner, for the debts, liabilities or obligations of the Company. A Member will have no liability to any other Member and/or the Company when acting pursuant to its authority granted pursuant to the Articles and/or this Agreement except to the extent such Member's acts or omissions constituted willful misconduct or gross negligence of such Member, or violation of Federal, state or local laws. Additionally, a Member will be liable to the Company for any difference between its Capital Contribution actually paid in and the amount promised by any Member as stated in this Agreement or any writing signed by the Member.

11.1.2 If a Member has received the return of any part of its Capital Contribution in violation of this Agreement or the Act, it is liable to the Company for a period of six (6) years thereafter for the amount of the Capital Contribution wrongfully returned.

11.1.3 If a Member has received the return in whole or in part of its Capital Contribution without violation of this Agreement or the Act, that Member is liable to the Company for a period of six (6) years thereafter for the amount of the returned Capital Contribution, but only to the extent necessary to discharge the liabilities of the Company to those creditors who extended credit to the Company during the period the Capital Contribution was held by the Company.

11.2 **Manager.** The Manager does not in any way guarantee the return of any Members' Capital Contribution or a profit for the Members from the Company's business. The Manager will incur no liability to the Company or to any of the Members as a result of engaging in any other business or venture regardless of whether such other business or venture competes with the Company or whether the Manager is active in the management or business of such other

business or venture, provided that the Manager's involvement in such other business or venture is permitted under this Agreement and is not within 50 miles of the Project. Neither the Company nor any of the Members will have any rights by virtue of the Articles, this Agreement or any applicable law in or to the other business ventures of the Manager or to the income, gains, losses, deductions and credits derived therefrom by the Manager unless Manager is in violation of this Article 11.2.

11.3 **Company's Indemnification of Members, Manager, Employees or Agents.** The Company agrees to indemnify its Members, Manager, employees and agents to the fullest extent permitted by law and specifically in the Act, and may purchase insurance to protect the Company's directors, officers, employees and agents.

11.4 **Force Majeure.** Notwithstanding anything in this Agreement to the contrary, a Member or the Manager will not be liable (except for such Member's obligation to contribute or return its Capital Contributions under the Act or this Agreement) for any loss or damage to the Company Assets or operations caused by its failure to carry out any of the provisions of the Articles and/or this Agreement as a result of foreseeable or unforeseeable acts of God or incidents resulting from outside forces, beyond the control of such Member or Manager, such as strikes, labor troubles, riots, fires, weather, floods, acts of a public enemy, insurrections, breakdown or failure of machinery, acts, omissions or delays of governmental authorities and governmental laws, rules, regulations or orders.

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11.5 **Remedies.** The remedies of the Members hereunder are cumulative and will not exclude any other remedies to which a Member may be lawfully entitled. The Members acknowledge that all legal remedies for any breach of this Agreement may be inadequate, and therefore they consent to any appropriate equitable remedy; provided, that any failure of a Member to abide by the terms of this Agreement, including without limitation any vote or consent that should bind a Member, or any other failure to adhere to the terms of this Agreement which cost the Company legal and court costs to enforce same will render the breaching Member liable to the Company for any such fees and costs.

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11.6 **Waiver.** The failure of any Member to insist upon strict performance of a covenant or condition hereunder will not be a waiver of its right to demand strict compliance therewith in the future.

ARTICLE 12
TRANSFERS

12.1 **Transfer Restrictions.** Each Member hereby agrees that its Interests and any economic benefit therein are not transferable except as provided in this Article 12. "Economic benefit" or "benefit" of an Interest will mean an Interest share of the Company's profits or other compensation by way of income and return of contributions but will not include the Company's losses, deductions and credits.

12.2 **Prohibited Transfer.** Except as provided in this Article 12, no Member may sell, transfer, assign or otherwise dispose of or mortgage, hypothecate, or otherwise encumber or permit or suffer any encumbrance of all or any part of its Interests unless approved in writing by Members holding at least 67% of the Percentage Interests in the Company, acting in their

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reasonable discretion, and any attempt to so transfer or encumber any such interest without such approval will be null and void and will not bind the Company or the other Members.

12.3 **Requirements for Transfer.** Transfers of Interests and/or economic benefits therein during any year will become effective as of the date of any required approval by all of the other Members, provided that the transferee and transferor have satisfied all of the requirements of this Article 12. Subject to satisfying the requirements of this Article 12, any such transfer requiring approval of the Members pursuant to this Article 12 will be considered by the Members at the Members' next annual or special meeting. Unless and until the transferee of a Member's Interests is accepted by a Substitute Member pursuant to this Article 12, the transferor Member will remain a Member in the Company and will retain all rights and obligations incident to such status, except to the extent that the transferor agrees to transfer the economic benefits of its Interests as permitted by this Article 12 for transfers of economic benefits without the consent of the other Members. Notwithstanding anything in this Article 12 to the contrary, any transfer by any Member of all or any portion of his or its Interests, from time to time, (i) by operation of law (for instance in the case of a merger) or (ii) to any Affiliate may be accomplished without restriction, right of first offer or consent of the Manager or the other Members. The Interests of the transferring Member will be deemed transferred when the Manager and the other Members have received written notice of such transfer along with the name and address of the transferee and number of Interests transferred.

Notwithstanding anything to the contrary, any attempted or purported transfer of any Interest or economic benefit therein (including, but not limited to, an adjustment of the right to receive profits or the return of contributions) in violation of the following restrictions will be void ab initio and of no effect:

12.3.1 No transfer may be made within the meaning of the Code or the regulations thereunder, if such transfer would result in the termination of the Company under the Code;

12.3.2 No transfer may be made except in compliance with or pursuant to an exemption from the registration provisions of the Securities Act of 1933, as amended, and in compliance with or pursuant to an exemption from applicable state securities laws and rules and regulations promulgated thereunder;

12.3.3 No transfer may be made which would cause the Company to become an "investment company" under the Investment Company Act of 1940, as amended;

12.3.4 No transfer may be made which would cause the Company to be deemed to be a "publicly traded partnership" under the Code or would otherwise cause the Company to be treated as an association or corporation for tax purposes under the Code; and

12.3.5 No direct transfer may be made to a minor or incompetent in any respect unless made for their benefit to their guardian, trustee or other legal representative.

12.4 **Company Review.** Prior to the vote of the Members for their approval of the admission of a transferee of Interests as a Substitute Member the transferor may submit a written or oral report of the proposed transfer to the Company for its review. Subject to obtaining an

opinion of counsel that the restrictions provided in this Article 12 will not be violated by the transfer, the Company will notify the transferor within sixty (60) days after receipt whether or not the proposed transfer violates any of the restrictions contained in this Article 12 and whether or not the transfer consequently may be effected. Any opinion of counsel will be provided at the option of the Company by the transferring parties at their sole expense, will be satisfactory in form and substance to the Company and will be from counsel satisfactory to the Company.

12.5 **Transfers of Economic Benefits Without Members' Approval.** Subject to Sections 12.1 and 12.2, economic benefits in Interests may be transferred in whole or in part without the consent of the Members in the following events:

12.5.1 the transfer as a result of the death of a Member;

12.5.2 the transfer in connection with the entry of a divorce decree for or against a Member;

12.5.3 the transfer as a gift and for no consideration;

12.5.4 the sale or other transfer to related parties after which the ownership of the economic benefits will be effectively unchanged, i.e., intra-family transfers or transfers within an affiliated group;

12.5.5 the occasional accommodation transfer by a Member; or

12.5.6 the pledge to a Lender in connection with any Project financing or, after Substantial Completion, any other financing.

12.6 **Transfers with Members' Approval.**

12.6.1 Following satisfaction of the requirements of Sections 12.3 and 12.4, a proposed transfer of Interests requiring the Members' approval will be submitted to the Members for their approval after:

(a) the transferee has executed this Agreement and any other documents and instruments as the Company may require; and

(b) the transferring parties have paid and have agreed to pay, as the Company will determine, all reasonable expenses connected with such request and admission, including, but not limited to, any required opinion of counsel, the legal fees and costs associated with the preparation and filing of all other documents necessary to continue the Company's right to do business in the jurisdictions in which it is then doing business. The Company will not be obligated to justify such expenses and for its convenience in lieu of itemizing such expenses, may select a reasonable amount to cover such expenses.

12.6.2 Upon satisfaction of Sections 12.3, 12.4 and for Interests, 12.6.1, the request for transfer of Interests will be submitted to the Members at the Company's next annual or special meeting. The Members will vote whether or not to approve a proposed transfer of Interests and whether or not a proposed transferee of Interests should be admitted as a Substitute

Member for the transferor Member to the extent of the Interests proposed to be transferred. If a proposed transferee of Interests is not approved to be a Substitute Member, then subject to the provisions of the proposed transfer, such transferee may nevertheless receive the "economic benefits" of such Interests pursuant to the definition of "economic benefits" set forth in Section 12.1 hereof.

12.6.3 If a proposed transfer of Interests is approved by all of the Members, the transferee will be admitted as a Member and will be vested with all the rights and powers, and be subject to all the restrictions and liabilities of the transferor to the extent of the Interests transferred. Admission of a transferee as a Substitute Member will not relieve the transferor from any obligation or liability that existed on or before the effective date of admission; provided that the transferor will be relieved from obligations and liabilities arising thereafter and arising under existing agreements to the extent that such obligations are to be performed after the effective date of admission or that such liabilities arise thereafter.

12.6.4 If a proposed transfer of Interests is refused by or on behalf of any Member, the proposed transferee of the Member's Interests will not be admitted as a Member and will not have the right to participate in the management of the business and affairs of the Company, provided that such transferring parties may again apply to have the transferee admitted as a Substitute Member.

12.7 **Death of Member; Other Termination of Membership.**

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12.7.1 In the event of the death of a Member who is an individual or if a court of competent jurisdiction adjudges a Member to be incompetent to manage his person or his property, followed by a decision by or on behalf of all of the remaining Members to continue the Company rather than allowing it to dissolve, the Member's executor, administrator, guardian, conservator or other legal representative may exercise all of the Member's rights for the purpose of settling his estate or administering his property. If a Member is a corporation, trust or other entity and is dissolved or terminated, the powers of that Member may be exercised by its legal representative or successor.

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12.7.2 In the event of bankruptcy or dissolution of a Member, followed by the continuation of the Company rather than a vote of the Members to dissolve the Company, any successor to the Interests of the affected Member as a result thereof will be deemed to be the transferee of the entire interest of the affected Member and may be admitted at the next annual meeting as a Substitute Member upon satisfaction of the requirements of this Article 12.

12.7.3 The provisions of Article 2 and this Section 12.7 will not cause or require the dissolution of the Company should any of the events described in such Article or Section occur to a person or entity who is not a Member but only possesses economic benefits associated with any Interests.

12.8 **Successors and Assigns.** This Agreement will be binding upon and inure to the benefit of the heirs, executors, administrators, successors and permitted assigns of the parties hereto.

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ARTICLE 13
TERMINATION AND DISSOLUTION

13.1 **Events Requiring Termination and Dissolution.** The Company will be dissolved and terminated upon the happening of any of the following events:

13.1.1 Expiration of the term of the Company, as set forth in Section 2.3, unless extended by mutual consent all of the Members;

13.1.2 Any event as otherwise specified in this Agreement or in accordance with law;

13.1.3 By the written consent of four of the five members of the Executive Committee pursuant to Section 8.3.2; or

13.1.4 The sale or other disposition of substantially all assets of the Company such that the sole asset of the Company is cash.

13.2 **Management During Liquidation.** In the event of a termination, the rights and obligations of the Members with respect to management of the Company will be continued by the Manager during the period of winding up. The Company Assets will be liquidated as promptly as is consistent with obtaining the fair market value of the assets, and the liquidation will be conducted in compliance with law and sound business practice. The Manager may maintain reasonable reserves to provide for the payment of contingent claims and liabilities. The Manager will be entitled to reimbursement for out-of-pocket expenses incurred in connection with the winding-up and liquidation of the Company. Such reimbursement will be paid as an expense of the Company after all debts to all third parties have been repaid but before any repayment of loans or advances by the Members.

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13.3 **Members' Right to Bid for Assets.** Upon the dissolution and liquidation of the Company, any Member may make a bid or tender on any of the Company Assets. Those assets as are bid upon by a Member will not be sold to a third party unless the bid made by such third party is upon more favorable terms and conditions than the highest and best bid of a Member.

13.4 **Distribution of Liquidation Proceeds.** Liquidation proceeds, to the extent sufficient therefor, will be applied and distributed in the following order:

13.4.1 To the expenses of such liquidation;

13.4.2 To the payment and discharge of all other Company debts and liabilities (other than those to Members), including the establishment of any necessary reserves;

13.4.3 All remaining assets of the Company will be distributed to the Members in the manner set forth in Section 6.2 hereof.

13.5 **Distribution of Company Assets.** The Company shall not distribute any Company Assets to its Members upon the liquidation of the Company other than cash unless all of the Members agree to the distribution by the Company of assets other than cash and the value

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to be assigned to such assets. To the extent assets other than cash are distributed to the Members, such distributions shall be based on the fair market value of the assets distributed.

ARTICLE 14
DISPUTE RESOLUTION

14.1 **Application of Section.** Whenever either the Manager or the Members cannot mutually agree on the resolution of a matter or dispute, the provisions of this Article will apply. The rights and obligations of the Manager with respect to the management of the Company will continue until the dispute is resolved pursuant to this Article 14.

14.2 **Mediation.** In the event of a dispute, any dissatisfied Member will provide notice of the dispute to all of the other Members. The Members will then arrange a meeting to discuss the dispute within ten (10) days of receipt of notice of the dispute. If the dispute cannot be resolved among the Members within thirty (30) days of the meeting to discuss the dispute, then any Member may submit the dispute to mediation by notice to all of the other Members (the "Mediation Notice"). The Member sending such notice shall then have ten (10) days to make a request to a reputable and nationally recognized agency in the State of California which specializes in mediation to select a mediator to assist in resolving the dispute. The costs of the mediator will be shared equally by the Members and all decisions as to date, time and location of mediation meetings shall be made by the mediator. If the dispute cannot be resolved through mediation within ninety (90) days of the Mediation Notice, then, and only then, will the provisions of Section 14.3 apply.

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14.3 **Other Remedies.** If the dispute cannot be resolved pursuant to Section 14.2, then either party may seek whatever remedies are available at law or in equity, subject to any limitations set forth in this Agreement, in state or Federal court situated in Washoe County, Nevada.

ARTICLE 15
AMENDMENTS

15.1 **Proposal of Amendments.** Any amendments to the Articles and this Agreement must be approved by four (4) of the five (5) members of the Executive Committee, subject to the terms of Section 8.3.12.

15.2 **Amendments by TMP.** Notwithstanding any provision of this Agreement, amendments to this Agreement which, in the opinion of counsel to the Company, are necessary to maintain the status of the Company as a tax partnership under federal or state law or for other tax purposes may be made by the TMP without the necessity of the approval of the Executive Committee or the Members.

ARTICLE 16
MISCELLANEOUS

16.1 **Notice.** All notices, requests, consents and other communications required or permitted under this Agreement must be in writing and must be (as elected by the Person giving

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such notice) hand delivered by messenger or courier service, telecommunicated, or mailed by registered or certified mail (postage prepaid), return receipt requested, addressed to:

If to CR:	CR Cal Neva, LLC c/o Criswell Radovan, L.L.C. 1336-D Oak Street St. Helena, California 94574 Attn: Robert Radovan Facsimile: 707/963-0513
With copy to:	Powell Coleman & Arnold LLP 8080 North Central Expressway, Suite 1380 Dallas, Texas 75206 Attn: Bruce Coleman, Esq. Facsimile: 214/373-8768
If to other Members:	At the addresses set forth on Schedule 4.1

16.1.1 Each such notice will be deemed delivered (a) on the date delivered if by personal delivery, (b) on the date of a receipt of a clear copy if by telecopy, (c) on the date upon which the return receipt is signed or delivery is refused or the notice is designated by the carrier as not deliverable, as the case may be, if sent by overnight courier service such as Federal Express, and (d) on the date upon which the return receipt is signed or delivery is refused or the notice is designated by the postal authorities as not deliverable, as the case may be, if mailed.

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16.1.2 By giving to the other parties at least fifteen (15) days written notice thereof, the parties hereto and their respective successors and assigns will have the right at any time during the term of this Agreement to change their respective addresses and each will have the right to specify as its address any other address within the United States of America.

16.1.3 A transferee of an interest by any Member will be entitled to receive copies of notices hereunder, provided such transferee will have given notice to the Company and all Members of its designated address for purposes of this Section and further provided that such transferee has otherwise complied with the terms and conditions of this Agreement in acquiring its interest hereunder.

16.2 **Governing Law**. This Agreement has been executed and delivered within the State of California, is a contract made under the laws of the State of California , and will be governed by and interpreted in accordance with the laws of the State of California, without regard to conflict of law principles thereunder.

16.3 **Successors**. Except as otherwise specifically provided herein, this Agreement will be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, successors and assigns.

16.4 **Pronouns**. Wherever from the context it appears appropriate, each term stated in either the singular or the plural will include the singular and the plural, and pronouns stated in

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either the masculine, the feminine or the neuter gender will include the masculine, feminine and neuter.

16.5 **Captions.** Captions contained in this Agreement are inserted only as a matter of convenience and in no way define, limit or extend the scope or intent of this Agreement or any provision hereof.

16.6 **Severability.** If any provision of this Agreement, or the application of such provision to any Person or circumstance, is held invalid, the remainder of the Agreement, or the application of such provision to Persons or circumstances other than those to which it is held invalid, will not be affected hereby.

16.7 **Counterparts.** This Agreement may be executed in several counterparts, each of which will be deemed an original but all of which will constitute one and the same instrument. In addition, this Agreement may contain more than one counterpart of the signature page, and this Agreement may be executed by the affixing of the signatures of each of the Members to one of such counterpart signature pages, all of which will have the same force and effect as though all of the signatories had signed a single signature page.

16.8 **Entire Agreement; Amendment.** This Agreement embodies and constitutes the entire understandings of the parties with respect to the transactions contemplated herein, and all prior or contemporaneous agreements, understandings, representations and statements, oral or written, are merged into this Agreement unless specifically agreed to by the Members. Except as set forth in Article 15, neither this Agreement nor any provisions hereof may be waived, modified, amended, discharged or terminated except by an instrument in writing executed by the Members; provided, however, that if an amendment to this Agreement has been approved as a Major Decision pursuant to Section 8.3.12 above, such amendment may be executed pursuant to powers of attorney previously granted by each Member in the event any of the Members fail to execute such amendment personally.

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16.9 **Attorneys' Fees.** If any Member or Manager commences an action against the other Members and/or Manager to interpret or enforce any of the terms of this Agreement or as the result of a breach by the other Member(s) or Manager(s) of any terms hereof, the losing (or defaulting) Member(s) or Manager(s) will pay to the prevailing Member(s) or Manager(s) reasonable attorneys' fees, costs and expenses incurred in connection with the prosecution or defense of such action (including at the appellate level), whether or not the action is prosecuted to a final judgment.

16.10 **Further Assurances.** Each Member agrees to execute and deliver any and all such other and additional instruments and documents and do any and all such other acts and things as may be necessary or expedient to more fully effectuate this Agreement and to carry on the business contemplated hereunder.

16.11 **Equitable Remedies.** Each of the parties hereto acknowledges and agrees that, in the event of a breach or threatened breach of this Agreement by any Member or the failure of a Member to perform in accordance with the specific terms hereof, the other parties hereto will be irreparably damaged and that monetary damages would not provide an adequate remedy. Accordingly, it is agreed that, in addition to any and all other rights which may be available, at

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law or in equity, the non-breaching parties will be entitled to injunctive relief and/or specifically to enforce the terms and provisions hereof in any action instituted in accordance with Section 16.12.

16.12 **Indemnities.**

16.12.1 The Manager will not be liable for errors in judgment, whether or not disclosed, unless due to gross negligence, willful neglect or intentional misconduct. From and after the Effective Date, the Company will and does hereby indemnify and hold harmless the Manager from and against any and all claims, actions, suits, liabilities, judgments, obligations, losses, penalties, demands, expenses and damages (and all expenses associated therewith, including court costs and attorney's fees at all negotiations, trial and appellate levels) incurred by the Manager in respect of any act or omission to act by the Manager, whether or not such act or omission to act was negligent, including without limitation any such act or omission by them when acting in the good faith belief that they were acting or refraining from acting within the scope of their authority under this Agreement on behalf of the Company or in furtherance of their interests, provided that the foregoing will not entitle the Manager to indemnification for gross negligence, willful neglect or intentional misconduct.

16.12.2 Notwithstanding subsection 16.12.1, a Member will not be liable to the Company or any other Member arising from any act or omission to act, even if involving gross negligence, willful neglect or intentional misconduct, unless claim, action, right of action, suit, investigation, liability, judgment, obligation, loss, penalty, demand, expense or damage therefor is made or otherwise instituted before such Member ceases to be a Member of the Company or before the date of dissolution, winding up and termination of the Company.

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16.13 **Contributions.** In the event that one Member is held severally liable for the debts of the Company, and such liability did not arise out of such Member's assumption of such liability or its negligent or willful act, such Member will be entitled to contribution from the other Members.

16.14 **No Third Party Rights.** The provisions of this Agreement are for the exclusive benefit of the Company and the Members and no other party (including without limitation any creditor of the Company or any Member) will have any right or claim against the Company or any Member by reason of those provisions or be entitled to enforce any of those provisions against the Company or any Member.

16.15 **Reliance on Experts.** For purposes of this Agreement, whenever one of the Members reasonably requires or retains the use of an expert in order to discharge a duty hereunder, such Member's sole responsibility in connection with such duties will be the reasonable reliance upon the advice of the experts, and no Member will be liable on account of any duty or obligation imposed hereunder in the event of a reliance upon professional advice.

16.16 **Submission to Jurisdiction.** Subject to the provisions of Article 14 hereof, each of the Members irrevocably and unconditionally (a) agrees that any suit, action or other legal proceeding arising out of or relating to this Agreement will be brought in the courts of record of the State of California in Placer County or the courts of the United States with jurisdiction over Placer County, California; (b) consents to the jurisdiction of each such court in any such suit,

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action or proceeding; (c) waives any objection which he/she may have to the laying of venue of any such suit, action or proceeding in any of such courts; (d) consents to service of any court paper by mail, as provided in Section 16.1 hereof, or in such other manner as may be provided under applicable laws or court rules in California. Notwithstanding the provisions of this Section 16.16, the Members acknowledge that before a Member may file legal action against one or more Members, such Member must have complied with the remedies available pursuant to Article 14 of this Agreement.

16.17 **Remedies Cumulative.** The rights and remedies given in this Agreement to a non-defaulting Member or the Company are deemed cumulative, and the exercise of one of such remedies will not operate to bar the exercise of any other rights and remedies reserved to a non-defaulting Member under the provisions of this Agreement or given to a non-defaulting Member by law.

16.18 **No Waiver.** One or more waivers of a breach of any provision of this Agreement by any Member will not be construed as a waiver of a subsequent breach of the same or any other provision, nor will any delay or omission by a non-defaulting Member to seek a remedy for any breach of any provision of this Agreement by a Member be construed as a waiver by the non-defaulting Member of the right to exercise its/his/her remedies and rights with respect to such breach or any subsequent breach, whether similar or not.

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16.19 **Confidentiality.** Except as required in the normal conduct of a Member's business or as required by law, no Member, without the written approval of all Members, whether during continuance of the Company or after its termination, will divulge to any Person not a Member other than its/his/her attorneys, accountants, employees and professional advisers, any information concerning the business of the Company or the content of this Agreement or any other contract or agreement entered into by the Company. A Member may, however, disclose to third parties the existence of the Company and the names of the Members.

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16.20 **Construction.** This Agreement will be interpreted without regard to any presumption or rule requiring construction against the party causing this Agreement to be drafted.

16.21 **Accounts.** In no case will funds of the Company be commingled with funds not belonging to the Company. Withdrawals from any such account or accounts will be made upon the signature or signatures of such Persons as the Manager may designate.

16.22 **Time of the Essence.** Time is of the essence of this Agreement.

16.23 **Time Devoted to Venture.** No Member will be required to devote its/his/her entire time or attention to the business of the Venture, or more time or attention than reasonably required to carry out its/his/her obligations under this Agreement.

16.24 **Exhibits.** All Exhibits, and documents attached thereto, referred to in this Agreement are deemed incorporated herein by reference as if fully set forth in length.

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IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed effective as of the date first set forth above.

CR CAL NEVA, LLC

By: William T. Criswell
William T. Criswell, President

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IMC INVESTMENT GROUP CNR, LLC,
a Nevada limited liability company

By: _____
Brandon Chaney, Manager

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MUNNERLYN REVOCABLE TRUST dated
September 17, 1997

By: Charles R. Munnerlyn Trustee
Charles R. Munnerlyn, Trustee

By: Judith G. Munnerlyn, Trustee
Judith G. Munnerlyn, Trustee

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PAUL AND EVY PAYE, LLC,
a California limited liability company

By: _____
John Paye, Manager

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CEA VENTURES, LP

By: CEA Holdings, LLC,
General Partner

By: _____
Donna M. Gibson, Managing Member

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OAKDALE AVENUE PARTNERS, LP

By: Oakdale Avenue Management, LLC,
General Partner

By: _____
John F. Miller, Manager

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Leslie P. Busick - TRUSTEE

LESLIE P. BUSICK, Trustee of that certain Trust Agreement dated June 11, 1974, as amended

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THE ERICKSON FAMILY TRUST dated
August 3, 2006

By: _____
Philip L. Erickson, Trustee

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DIXON FAMILY TRUST
DATED NOVEMBER 1, 1994

By: _____, Trustee
Michael A. Dixon, Trustee

By: _____
Sharon L. Dixon, Trustee

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MARTIN FAMILY TRUST
DATED APRIL 20, 2000

By: Carol J. Martin
CAROL J. MARTIN, Trustee

By: David C. Martin
DAVID C. MARTIN, Trustee

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SINATRA FAMILY CAL NEVA INVESTORS

By:_____

Robert A. Finkelstein,
Trustee/Managing Member

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THORPE INVESTMENTS, LP

By: _____
Allen R. Thorpe, General Partner

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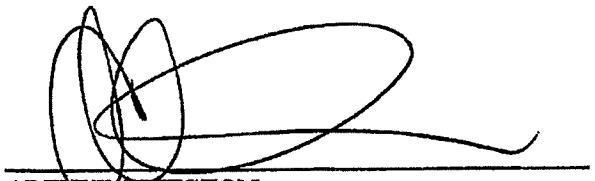

ARTHUR PRIESTON

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MOLLY KINGSTON

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MARIUCCI LIVING TRUST UNDER
AGREEMENT DATED JULY 5, 1989,
AS AMENDED

By: _____ Trustee
Stephen Ray Mariucci, Trustee

By: _____
Gayle Elaine Mariucci, Trustee
Trustee

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MARRINER REAL ESTATE, LLC,
a Nevada limited liability company

By: _____
Dave Marriner, Manager

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LADERA DEVELOPMENT, LLC

By: _____

Name: James Pickett

Title: Managing Member

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Schedule 4.1

MEMBERS AND INTERESTS

As of November 24, 2014

Members	Business, Residence or Mailing Address	Percentage Owned
1. PREFERRED MEMBERS		
(a) IMC Investment Group CNR, LLC	880 Northwood Blvd. Suite 2 Incline Village, NV 89451	20.49%
(b) CR Cal Neva, LLC	1336-D Oak Street St. Helena, CA 94574	6.83%
(c) Charles R. Munnerlyn and Judith K. Munnerlyn, Trustees of the Munnerlyn Revocable Trust dated September 17, 1997	1731 Marseilles Court San Jose, CA 95138	6.83%
(d) Paul and Evy Paye, LLC	c/o John Paye 15291 Red Dog Road Nevada City, CA 95959	6.19%
(e) CEA Ventures, LP	2000 Brookhill Manor Court Chesterfield, MO 63017	3.41%
(f) Oakdale Avenue Partners, LP	P. O. Box 945 Ross, CA 94957 (Street address: 46 Upper Road Ross, CA 94957)	3.41%
(g) Leslie P. Busick, Trustee	P. O. Box 4150 Incline Village, NV 89450	3.41%
(h) The Erickson Family Trust dated August 3, 2006	1013 Lakeshore Blvd. Incline Village, NV 89451	3.41%
(i) Dixon Family Trust dated November 1, 1994	12778 Lookout Loop Truckee, CA 96161	3.41%

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(j) Martin Family Trust dated April 20, 2000	8 Ladbrook Grove Coto de Caza, CA 92679	3.41%
(k) Sinatra Family Cal Neva Investors	8573 W. Olympic Blvd. Los Angeles, CA 90035	1.71%
(l) Thorpe Investments, LP	390 Park Avenue, 21st Floor New York, New York 10022	1.71%
(m)Arthur Prieston	4503 Great Bear Truckee, CA 96161	1.71%
(n) Molly Kingston	529 Fallen Leaf Way Incline Village, NV 89451	1.71%
(o) Mariucci Living Trust Under Agreement dated July 5, 1989, as amended	15940 Romita Court Monte Sereno, CA 95030	1.71%
(p) Marriner Real Estate, LLC	1545 Debra Lane Incline Village, NV 89450	0.65%
2. SPONSOR MEMBER		
CR Cal Neva, LLC	1336-D Oak Street St. Helena, CA 94574	20%
3. MEZZANINE LENDER		
Ladera Development, LLC	16475 Bordeaux Drive Reno, Nevada 89511	10%

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Schedule 4.2

CAPITAL CONTRIBUTIONS OF PREFERRED MEMBERS
As of November 24, 2014

IMC Investment Group CNR, LLC	$ 6,000,000
CR Cal Neva, LLC	2,000,000
Charles R. Munnerlyn and Judith K. Munnerlyn, Trustees of the Munnerlyn Revocable Trust dated September 17, 1997	2,000,000
Paul and Evy Paye, LLC	1,812,500
CEA Ventures, LP	1,000,000
Oakdale Avenue Partners, LP	1,000,000
Leslie P. Busick, Trustee	1,000,000
The Erickson Family Trust dated August 3, 2006	1,000,000
Dixon Family Trust dated November 1, 1994	1,000,000
Martin Family Trust dated April 20, 2000	1,000,000
Sinatra Family Cal Neva Investors	500,000
Thorpe Investments, LP	500,000
Arthur Prieston	500,000
Molly Kingston	500,000
Mariucci Living Trust Under Agreement dated July 5, 1989, as amended	500,000
Marriner Real Estate, LLC	187,500
TOTAL	$20,500,000

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Schedule 4.3

USES OF CAPITAL CONTRIBUTIONS

1. Repayment of bridge loan note in the amount of $6,000,000.00, plus accrued interest, due on or before April 30, 2014.

2. Payment to Seller of approximately $10,000,000.00 to redeem its equity interest in New Cal Neva.

3. Provide additional development capital for the Project.

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Schedule 8.4

EXECUTIVE COMMITTEE
As of October 7, 2014

Member	Member Representative
CR	William T. Criswell
CR	Robert Radovan
Preferred Member	Brandon Chaney
At Large	Leslie P. Busick
At Large	Troy Gillespie

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EXHIBIT 2

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EXHIBIT 2

Howard & Howard

law for business·

Ann Arbor | Chicago | Detroit | Las Vegas | Los Angeles | Peoria

October 12, 2017

Via Facsimile: (775) 997-7417

Richard G. Campbell, Esq.
The Law Office of
Richard G. Campbell, Jr., Inc.
200 South Virginia Street, 8th Floor
Reno, NV 89502

Re: George Stuart Yount v. Criswell Radovan, LLC; et al.
Case No. CV16-00767

Dear Rick:

Pursuant to WDCR 9, we are serving you with a copy of the Proposed Findings of Fact, Conclusions of Law and Judgment that we intend to submit to the Court.

Please let me know if you have any questions.

Very truly yours,

Howard & Howard Attorneys PLLC

Martin A. Little, Esq.

MAL:aw
Enclosure
cc: Andrew N. Wolf, Esq.
4845-5015-0481 v.1

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Martin A. Little, Esq., NV Bar No. 7067
Alexander Villamar, Esq., NV Bar No. 9927
Howard & Howard Attorneys PLLC
3800 Howard Hughes Pkwy., Ste. 1000
Las Vegas, NV 89169
Telephone: (702) 257-1483
Facsimile: (702) 567-1568
E-Mail: mal@h2law.com; av@h2law.com
Attorneys for Criswell Radovan, LLC, CR Cal Neva, LLC, Robert Radovan, William Criswell, Cal Neva Lodge, LLC, and Powell, Coleman and Arnold LLP

IN THE SECOND JUDICIAL DISTRICT COURT OF

THE STATE OF NEVADA IN AND FOR THE

COUNTY OF WASHOE

GEORGE STUART YOUNT, Individually and in his Capacity as Owner of GEORGE STUART YOUNT IRA, Plaintiff, vs. CRISWELL RADOVAN, LLC, a Nevada limited liability company; CR Cal Neva, LLC, a Nevada limited liability company; ROBERT RADOVAN; WILLIAM CRISWELL; CAL NEVA LODGE, LLC, a Nevada limited liability company; POWELL, COLEMAN and ARNOLD LLP; DAVID MARRINER; MARRINER REAL ESTATE, LLC, a Nevada limited liability company; NEW CAL-NEVA LODGE, LLC, a Nevada limited liability company; and DOES 1 through 10, Inclusive, Defendants.	CASE NO.: CV16-00767 DEPT NO.: B7

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

This matter came before the Court for a bench trial on August 29, 2017 through September 8, 2017, the Honorable Patrick Flanagan presiding. Plaintiff George Stuart Yount, individually and in his capacity as owner of George Stuart Yount IRA, appeared by and through his counsel of record, Richard G. Campbell, Jr., Esq. Defendants Criswell Radovan, LLC, CR Cal Neva, LLC, Robert Radovan, William Criswell, and Powell, Coleman and

Arnold, LLP, appeared by and through their counsel Martin A. Little, Esq., of Howard & Howard Attorneys PLLC. Defendants David Marriner and Marriner Real Estate, LLC, appeared by and through their counsel of record, Andrew N. Wolf, Esq., of Incline Law Group, LLP.

On September 8, 2017, at the conclusion of the trial, the Court, ruling from the bench, issued its decision on the record in open court.

On September 15, 2017, a partial transcript of the trial was filed, containing the Court's ruling from the bench. On September 15, 2017, the same day, the Court issued its *AMENDED ORDER* clarifying its award of damages to the Defendants.

The Court, having reviewed the trial statements and other pleadings on file herein, having heard and reviewed all of the evidence presented, as well as arguments of counsel, being fully advised in the premises, and good cause appearing, sets forth its Findings of Fact, Conclusions of Law and Judgment of the Court as follows:

I.

FINDINGS OF FACT

1. Criswell Radovan, LLC ("Criswell Radovan") is a real estate development firm with decades of experience developing large commercial projects, such as the Four Seasons Hotel in Dublin, the Ritz Carlton in San Francisco, the Calistoga Ranch in Napa Valley, and other award winning commercial properties. Criswell Radovan is managed by Defendants William Criswell ("Criswell") and Robert Radovan ("Radovan").

2. Criswell Radovan acquired the legendary Cal Neva Hotel in Lake Tahoe (the "Cal Neva Hotel") in April 2013 with the intent of reopening it after a multi-million dollar renovation (hereinafter the "Project").

3. Criswell Radovan formed Cal Neva Lodge, LLC ("Cal Neva Lodge") to own and reposition the Cal Neva Hotel and act as the investment entity for the Project's investors, and New Cal Neva Lodge, LLC ("New Cal Neva") to hold title to all of the real and personal property of the Cal Neva Hotel. Cal Neva Lodge and New Cal Neva were named in this

lawsuit as Defendants by Plaintiff Stuart Yount, individually and in his capacity as owner of George Stuart Yount IRA ("Plaintiff"); however, both entities filed for Chapter 11 Bankruptcy protection in the Federal Bankruptcy Court in Nevada, and, therefore, are subject to the automatic stay. Plaintiff did not seek relief from stay to pursue either entity in this litigation. On October 7, 2016, Plaintiff filed a notice of the two bankruptcy cases and therein notified the Court of his intent to proceed against the other (non-debtor) Defendants notwithstanding the pendency of the two bankruptcies.

4. Criswell Radovan also formed CR Cal Neva, LLC ("CR Cal Neva") to manage the Cal Neva Lodge and acquire and own its equity membership interest therein.

5. The Cal Neva Hotel, founded in 1926, is the oldest licensed casino in the United States and saw its hey day in the 1960's when it was owned by Frank Sinatra and became a popular destination among the Hollywood and political elite.

6. The Project was to be funded through commercial construction loan financing and $20 Million of equity (the "Founders' Shares").

7. The initial budget for the Project was developed with the assistance of the Case Development Services and Thannisch Development Services, the Project's Architect, Peter Grove of Collaborative Design Studio, and Starwood Hotels ("Starwood").

8. Based on the initial budget, in 2014, Cal Neva Lodge acquired a $29.5 Million construction loan with Hall Financial ("Hall"), and a $6,000,000.00 mezzanine loan with Ladera Development, LLC ("Ladera"). CR Cal Neva also began offering Founder's Shares to prospective equity investors.

9. On February 13, 2014, David Marriner ("Marriner"), on behalf of Marriner Real Estate, LLC ("Marriner Real Estate"), entered into a Real Estate Consulting Agreement with Cal Neva Lodge to, among other things, "manage all aspects of the sales of five 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. *See* Trial Exhibit 1. Marriner also personally invested in the Project by waiving his commission, although his investment was not part of the Founders' Shares. This agreement extended to selling additional Founder's Shares.

10. On or about February 18, 2014, Marriner first contacted Plaintiff about investing in the Project, but Plaintiff advised Marriner that he had no interest in investing at that time.

11. Between February 18, 2014 and June 17, 2015, there were no communications between Marriner and Plaintiff regarding the Project.

12. Construction began on the Project in 2014 and substantial completion was initially targeted for December 2015 -- to be timed with an opening celebration on Frank Sinatra's 100th birthday.

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

14. Around this time, the construction budget and schedule were being adversely impacted by scope changes, some of which were a result of value engineering exercises, as well as unforeseen construction issues, like code upgrades that became apparent after construction conditions were exposed during construction. Additionally, Starwood -- which had a contract with Cal Neva Lodge to join its Luxury Collection of hotels -- also required some changes be made to the Project in order to be included in Starwood's Luxury Collection.

15. Because of the cost impacts to the budget, it became necessary to sell the remaining $1.5 Million in Founders' Shares to help balance the Project's loan with Hall.

16. This offering was put out to a number of prospective investors with the assistance of Marriner beginning in June 2015.

17. One of the prospective investors was Plaintiff.

18. On June 17, 2015, 16 months after the initial contact, Plaintiff contacted Marriner by email expressing possible interest in the Project. *See* Trial Exhibit 7.

19. On July 12, 2015, Marriner invited Plaintiff to attend a tour of the Project. *Id.*

20. Plaintiff considers himself a sophisticated and "accredited investor" within the meaning of Regulation D promulgated under the Securities Act of 1933, as amended. In fact, he has been qualified as such for other investments.

21. Plaintiff is the CEO of Fortifiber Corporation, a company that manufactures and supplies construction black paper that goes behind stucco walls. He is also the CEO of Stanwall, which is a real estate company that has built and owns factories for Fortifiber. Those companies do sales well into the eight figures (meaning $10,000,000 or more per year).

22. Over his career, Plaintiff has been involved in the acquisition and development of a number of factories and large residential projects. He has experience and is familiar with cost overruns and schedule impacts on construction projects.

23. Plaintiff understands how to review and analyze financial statements and to assess risk when it comes to making an investment in a company or real estate.

24. Plaintiff surrounds himself with a team of advisors when he is doing due diligence and considering whether to make an investment, including seeking guidance from his company's Chief Financial Officer, his Los Angeles-based CPA, and sometimes his attorney.

25. On July 14, 2015, Plaintiff toured the Project with Marriner and a representative of Penta. *See* Trial Exhibit 8. The tour lasted approximately two hours.

26. Following the tour, on July 14, 2015, Marriner forwarded Plaintiff the Confidential Private Placement Memorandum (the "PPM," Trial Exhibit 3) and the Confidential Offering Memorandum (the "COM," Trial exhibit 4). *See* Trial Exhibit 8. These documents were prepared by expert securities law counsel for Cal Neva Lodge.

27. Plaintiff was also provided the Amended and Restated Operating Agreement of Cal Neva Lodge (the "Operating Agreement," Trial Exhibit 5), and a copy of the Subscription Agreement (Trial Exhibit 42). These documents were likewise prepared by expert securities law counsel for Cal Neva Lodge. Hereinafter, the PPM, the COM, the Operating Agreement, the Subscription Agreement, and the various attachments and

schedules thereto are collectively called "the Investment Documents."

28. Plaintiff read and understood the Investment Documents before investing and had the opportunity to have his attorney and accountant review the same. Yount was specific in his testimony that he had read and understood all of the fine print in the Investment Documents before investing.

29. Under the PPM, Plaintiff read and understood the opportunity being offered to invest in the Project was being sold in reliance on exemptions from registration requirements of federal and state securities laws.

30. Plaintiff also read and understood that this investment was speculative and contained certain risks, including all risks inherent in the creation of a new business.

31. Plaintiff also read and understood that the Project could be delayed or impeded by budgetary and costs overruns which may require additional capital. In fact, this was the state of the Project when he was considering investing during the time period of July to October, 2015.

32. Plaintiff understood that if Cal Neva Lodge was unable to raise sufficient funding or equity for the Project, he could lose his entire investment.

33. In addition to these offering documents, Plaintiff was provided other financial statements, Executive Committee reports and construction progress reports.

34. One of these construction progress reports, dated July 2015 (Trial Exhibit 10) was provided to Plaintiff on July 22, 2015. *See* Trial Exhibit 15. The July 2015 Construction Progress Report was prepared by third parties, Case Development Services and Thannisch Development Services. *Id.*

35. Page 16 of this report contains a "Construction Summary" which listed 16 separate items that were adversely impacting the original budget. The July 2015 Monthly Status Report was the most up-to-date information available to share with Plaintiff regarding the Project's construction.

36. During his due diligence, Plaintiff spoke with the Project's Architect, Peter

Grove, who was also the architect for a lakefront cottage added to Plaintiff's lakefront estate at Lake Tahoe.

37. On July 15, 2015, Plaintiff asked Peter Grove "[w]hat do you rate the Project's chances of success?" *See* Trial Exhibit 13.

38. Peter Grove responded as follows:

> I'm going to say pretty good . . .
>
> Short term they are in a fund raising 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 food service in 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 from an investment standpoint. I'll continue to keep you guys posted with pics as things progress.

See Trial Exhibit 13.

39. Plaintiff believed Peter Grove was always honest with him and would not misrepresent facts about the Project's costs or schedule.

40. On July 15, 2015, Plaintiff submitted a list of questions to Marriner, which Marriner forwarded to Radovan for response. *See* Trial Exhibit 12.

41. On July 19, 2015, before Plaintiff first spoke to Radovan about the Project, he asked some additional questions of Marriner, including:

> As I understand it, you're over-budget by more than $5m so far. Where will that, and likely more, funding needs come from?

See Trial Exhibit 13.

42. On July 25, 2015, Radovan followed up on a telephone conference he had with Plaintiff by further answering the questions that Plaintiff had raised in Trial Exhibit 12. *See* Trial Exhibit 18.

43. Among other things, Radovan informed Plaintiff via e-mail that an additional $1.5 million of Founders' Shares was being offered and that Cal Neva was seeking to replace its existing $6 million mezzanine loan with a larger but less costly $15 million mezzanine loan. Radovan further explained that of the $15 million, $6 million was to be used to refinance the existing $6 million mezzanine loan and the $9 million in new additional funding would be used to cover the added cost of regulatory and code requirements which changed or were added by the two counties and TRPA, plus costs for design upgrades within the project and pre-development of the condo units. *Id.* Radovan, also explained to Plaintiff some of the financial terms of each of the loans. *Id.*; Trial Exhibit 20.

44. Plaintiff took extensive notes of his due diligence. *See* Trial Exhibit 21. These notes confirm, among other things, his understanding that CR Cal Neva owned $2 Million of Founders' Shares. *Id.*

45. His notes also confirmed that he understood CR Cal Neva was raising an additional $1.5 Million of equity, and seeking to refinance the mezzanine loan to obtain an additional $9 Million in lender financing (i.e., a total of $10.5 Million in additional debt and equity), to cover the anticipated cost impacts to the construction budget. *Id.* Plaintiff also understood, as of late July, 2015, that the Project intended to have a soft opening by December 12, 2015, for Frank Sinatra's 100th birthday party, but that the full opening was pushed back until April, 2016. *Id.*

46. Plaintiff not only knew and understood the Project was seeking additional financing to cover cost overruns, but he attempted to help by engaging Roger Wittenburg and Boulder Bay as potential financing sources.

47. Plaintiff sent his notes, and all of the investment-related material he had received from Radovan and Marriner, to his Los Angeles-based CPA, Ken Tratner, for advice and counsel. *See* Trial Exhibit 19. He also had his CFO evaluating this investment on his behalf. *See* Trial Exhibits 23 - 25.

48. Mr. Tratner spoke directly with Radovan and acknowledged that Radovan

answered all of his questions and provided all of the information he was seeking to evaluate the investment for Plaintiff.

49. In addition to seeking advice and counsel from Ken Tratner, Peter Grove and his CFO, Plaintiff had a collegial relationship with one of the Project's investors, Les Busick. Plaintiff was impressed by the fact that Mr. Busick was an investor and member of the Project's Executive Committee. Although Plaintiff claims that he never spoke with Mr. Busick (or any of the other investors) during his due diligence, he admitted nothing prevented him from doing so.

50. Plaintiff conducted most of his due diligence in July and the beginning of August, 2015. Thereafter, he largely went "radio silent" during which time he was seeking to fund his potential investment through his 401(k), which admittedly took several months to process. During this time, Defendants did not know whether Plaintiff was going to invest or not.

51. During this time, in August 2015, Plaintiff was told by Radovan that the soft opening was being pushed back even further, to March 1, 2016, with a Grand Opening on Father's Day weekend, June 17, 2016. *See* Trial Exhibit 27. After this conversation, Plaintiff asked Peter Grove whether the Project could "REALLY be ready for a full opening in December on Sinatra's 100th." *See* Trial Exhibit 28. Plaintiff does not recall what Peter Grove told him, but admits Peter Grove did not tell him anything during any of these communications to dissuade him from investing.

52. In August, September, and even on October 10, 2015 -- just a few days before Plaintiff invested, Marriner offered to take Plaintiff on additional tours to show him the progress of the Project. *See* Trial Exhibits 22, 29, 30, 37 and 105. Plaintiff did not take Marriner up on any of these offers.

53. Additionally, during the same time period, Marriner and Radovan asked Plaintiff if he had any additional questions or required additional information or documents. *See* Trial Exhibits 22, 25, 29, 30, 35, 37 and 104. The only additional information Plaintiff asked for came by e-mail on October 10, 2015, where he asked Radovan how the Project's

schedule was holding up, to which Radovan responded: "Looking good. Soft opening in spring, with Grand Opening on Father's Day. Just brought in our General Manager and Chef." *See* Trial Exhibit 36.

54. Plaintiff admitted there was nothing he asked for that he was not provided. And nothing prevented Plaintiff from asking more questions of Defendants or their construction team.

55. Given the demands of the Project, and the fact Plaintiff could not commit to investing, CR Cal Neva continued to hold discussions with several other potential investors. One of these was Les Busick, who had been on the Executive Committee from its inception and was familiar with the Project's construction and financing status. Knowing those facts, Mr. Bucsick decided to purchase the last $1.5 million Founders Share at the end of September, 2015, just two weeks before Plaintiff's purchase of his interest. Notably, Mr. Busick made this significant additional investment after walking the Project with Marriner and Penta's superintendent, Lee Mason, and going over all of the actual and anticipated cost over-runs.

56. Mr. Busick's $1.5 Million investment went directly into the Project and indeed was more advantageous to the Project than an investment by Plaintiff, because it infused an additional $500,000 into the Project ($1.5 Million versus $1 Million).

57. Shortly before Mr. Busick closed out the $20 Million subscription, and as Marriner was readying himself to leave town, Marriner asked Radovan what they would do if Plaintiff and Mr. Busick both wanted to invest at the same time. Radovan informed Marriner that CR Cal Neva could sell one of its two Founders' Shares if this hypothetical came to fruition.

58. In fact, it is undisputed that CR Cal Neva always had the authority and planned to sell one of its two Founders' Shares. *See,* e.g. Trial Exhibits 3, p. 8, fn 1, 101 and 150, § 22.

59. By the time Plaintiff expressed a willingness and ability to close, Mr. Busick had already purchased the last $1.5 Million in Founders' Shares under the PPM. At this time,

CR Cal Neva decided to sell Plaintiff one of its $1 Million Founders' Shares since he was a pillar of the local community and it was expected that he would be a tremendous asset to the Project. Radovan believed Marriner informed Plaintiff of this fact, but Marriner believed that Radovan informed Plaintiff of this fact. There was no evidence presented that Radovan and Marriner colluded to conceal this fact from Plaintiff.

60. Indeed, the evidence was unequivocal that CR Cal Neva's Founders' Share has the identical rights, obligations and value as the Founders' Share Plaintiff says he thought he was purchasing. Plaintiff could not point to any material difference between the CR Cal Neva Founders' Share and the Founders' Share ultimately purchased by Mr. Busick. Plaintiff offered no expert witness opinion testimony to show that the CR Cal Neva Founders' Share purchased by Plaintiff and the Founders' Shares purchased by Mr. Busick and the other investors were materially different in value or other attributes.

61. On October 1, 2015, Plaintiff sent an e-mail to Radovan saying he was "getting very close" and asked Radovan to "send instructions as to how Premier is to make the $1 Million check and where to mail it." *See* Trial Exhibit 32.

62. Marriner responded the same day by saying: "I believe Robert will want you to use the following address: Criswell Radovan, LLC, 1336 Oak Street, Suite D, St. Helena, CA 94574." *See* Trial Exhibit 32. Plaintiff was sent wiring instructions for Criswell Radovan, LLC's bank account. *See* Trial Exhibit 107.

63. On October 2, 2015, Radovan's assistant, Heather Hill, sent an e-mail to CR Cal Neva's attorney, Bruce Coleman ("Coleman") of Powell, Coleman and Arnold, LLP ("PCA"), indicating that they had identified an investor (Plaintiff) to purchase one of CR Cal Neva's Founders' Shares. *See* Trial Exhibit 33. Ms. Hill asked whether Plaintiff would need to sign any other documentation "above and beyond the typical documentation."

64. On October 3, 2015, Plaintiff sent an e-mail to Radovan asking him to confirm that his check was to be mailed to the Criswell Radovan address Marriner had suggested. *See* Trial Exhibit 34. Radovan responded that the funds should be wired to their attorneys' Trust

account, and that Heather Hill would send the wire instructions. *Id.*

65. On October 5, 2015, Plaintiff's CFO, Doug Driver, sent an e-mail to Plaintiff expressing concern "with this roundabout e-mail string about wiring instructions -- a great opportunity to send $1 Million to the wrong person." *See* Trial Exhibit 34.

66. On October 6, 2015, Coleman responded to Ms. Hill advising her that "Section 12.2 [of the Operating Agreement] provides that no Member may sell all or any part of its Interest unless approved in writing by Members holding at least 67% of the Percentage Interests in the Company." *See* Trial Exhibit 33. However, Coleman testified, and Sections 12.3 and 12.6 of the Operating Agreement confirmed, that approval can be obtained after the sale at the Company's next annual meeting. *See* Trial Exhibit 5. In fact, Section 12.6.1 says a proposed transfer requiring Member approval will be submitted to the Members after "the transferee has executed [the Operating Agreement] and any other documents and instruments as the Company may require." *Id.* Section 12.6 of the Operating Agreement provides that, "Even if the sale is not approved at the annual meeting, the buyer would still keep the economic benefits of the interest.

67. Coleman was only told that Plaintiff was going to purchase one of the CR Cal Neva's Founders' Shares, and that CR Cal Neva wanted to use his firm's trust account to process the transaction, a service that he had been asked to do for other clients in third party purchase and sell transactions. *See* Trial Exhibit 33.

68. Coleman was never provided a copy of the Subscription Agreement or Escrow Instructions filled out and executed by Plaintiff (*See* Trial Exhibit 42).

69. On October 12, 2015, Ms. Hill sent an e-mail to Cheri Montgomery with Premier Trust, who was acting as Plaintiff' agent for this transaction. Among other things, she sent "wire instructions to our Corp. Account for Criswell-Radovan, LLC." *See* Trial Exhibit 38.

70. On October 13, 2015, Cheri Montgomery sent an e-mail to Ms. Hill attaching the signed documents on behalf of Plaintiff. *See* Trial Exhibit 42.

71. On October 13, 2015, Radovan signed the Acceptance of Subscription

representing Plaintiff's purchase of one Founders' Share in Cal Neva Lodge. *See* Trial Exhibit 40.

72. Thereafter, Coleman followed the only instructions he had been given and sent the funds to Criswell Radovan, to repay a loan that Criswell Radovan had advanced to CR Cal Neva.

73. There was no evidence presented that, as of the date Plaintiff invested, Defendants knew the "financial wheels were coming off the bus" or that CR Cal Neva was attempting to bail out by selling Plaintiff one of its Founders' Shares. To the contrary, the evidence showed that:

- Mr. Busick had recently decided to invest another $1.5 Million after walking the Project with Marriner and Penta's Lee Mason to discuss the actual and proposed changes affecting the Project's budget and schedule;
- Penta and its subcontractors were working and being paid;
- There was an additional $9 Million left for construction costs under Hall's loan;
- Cal Neva Lodge had just hired and brought its General Manager and his family over from the Bahamas, and had also hired its Executive Chef;
- The cost impacts to the budget were in line with what Radovan had represented to Plaintiff that he and the construction team believed they would be (*See* Trial Exhibits 43 and 153);
- Three days before Plaintiff invested, Marriner was still inviting Plaintiff to tour the Project to see the progress with his own eyes and ears, which belies the argument by Plaintiff that Defendants believed the Project was tanking;
- Criswell Radovan, despite having no obligation to do so, made hundreds of thousands of dollars in cash advances of its own funds directly to Cal Neva and/or to its creditors in situations where there was insufficient cash on hand to pay Cal Neva's obligations or opportunities (such as the Mosaic loan term

sheet) when due. This also belies the argument that Defendants believed the Project was tanking;

- Although they wanted to try to avoid having to do so, Cal Neva Lodge still had the option to raise additional capital from the investors through a capital call; and
- Perhaps most importantly, CR Cal Neva had been negotiating extensively, and was optimistic about securing a complete loan refinancing with a lender named Mosaic, which loan would have taken out Hall and Ladera in the time frame represented to Plaintiff and the other investors.

74. Indeed, a phone message left for Radovan by Ethan Penner -- the CEO of Mosaic -- on November 19, 2015, replayed in the courtroom on record, clearly evidences that both CR Cal Neva and Mosaic had been working hard on the loan and Mosaic was enthusiastic about getting it closed before the end of the year. *See* Trial Ex 217.

75. In an email exchange with Marriner on August 3, 2015, in response to Marriner asking Yount if he had any further questions or needed more information, Plaintiff advised Marriner that he was getting his information directly from Robert Radovan and that his CPA, Ken Tratner, would be getting more information directly from Radovan. (Trial Exhibit 200.) Thereafter, from August 3, 2015, until the date of his investment on October 13, 2015, Plaintiff did not request any further information from Marriner. Moreover, Marriner had no involvement in Plaintiff's execution or delivery of his investment documents. Nor did he have any involvement in Plaintiff's delivery of funds to or from PCA. None of the Investment Documents or Project Monthly Status Reports were prepared by Marriner.

76. Defendants did not object or interfere with Plaintiff's due diligence. Plaintiff and his CPA, Ken Tratner, both admitted being provided everything they asked for. Neither had evidence that any of the information provided by Defendants was knowingly false when provided. Plaintiff testified Ken Tratner gave him no pause or concern about investing in the

Project.

77. Plaintiff had no communications whatsoever with Criswell prior to investing.

78. After making his investment, Plaintiff was treated by Cal Neva Lodge as a full founding member with the identical rights as every other investor holding a Founders' Share. Plaintiff could not point to any difference between his Founders' Share that came from CR Cal Neva and the Founders' shares held by any of other founding members.

79. Plaintiff attended membership meetings and involved himself actively in those meetings.

80. On October 23, 2015, ten days after making his investment, Plaintiff toured the Project with Marriner. *See* Trial Exhibit 41. Plaintiff understood that CR Cal Neva had executed a term sheet with Mosaic for a $47 Million loan in late October.

81. By November 19, 2015, CR Cal Neva and Mosaic had both already expended a lot of time putting together a loan to pay off Hall and Ladera and secure the additional financing needed to pay Penta and the other contractors to timely complete the Project. The evidence shows that CR Cal Neva had an executed term sheet for a $47 Million loan to Cal Neva Lodge, that it had paid approximately $50,000.00 on behalf of Cal Neva Lodge for costs associated with this loan, and that both parties were enthusiastic about closing that loan before year's end. *See* Trial Exhibit 217.

82. At the Executive Committee meeting held on November 19 2015, certain members expressed reservations about the Mosaic loan and instructed Radovan to try to renegotiate those terms while they looked at other financing options. The Executive Committee refused to approve the Mosaic loan at this time, the biggest opponent being the Incline Men's Club ("IMC"), a group of investors who had collectively invested as a unit through IMC Group CNR Cal Neva, LLC, acting through their representative Brandon Cheney.

83. At a December 12, 2015 investor meeting, investors in attendance were told

about the current budgetary issues and that CR Cal Neva was seeking the Executive Committee's approval for the Mosaic loan.

84. By the end of December, 2015, the Executive Committee had still not authorized CR Cal Neva to close the Mosaic loan, and Hall was refusing to fund additional construction draws. Consequently, Penta was not being paid and threatened to stop work on the Project. *See* Trial Exhibit 111.

85. On December 13, 2015, Plaintiff sent Criswell an e-mail demanding that his $1 Million investment be returned based on his **mistaken** belief that the "financial wheels were coming off the Cal Neva bus" at the time he invested. *See* Trial Exhibit 46. Notably, Plaintiff stated that if his "faith in the management, financial stability and future profitability of the Project is restored, we will consider reinvesting." *Id.*

86. Plaintiff claimed in this e-mail he had been told by other Founding members that they had been admonished "by Criswell Radovan just before they toured the Project with Plaintiff in October not to say anything about the alleged financial fiasco that was about to burst open." *Id.* This allegation came from members of the IMC, whose largest investor is Brandon Cheney, a witness called by Plaintiff at trial. As the largest investor of IMC, Mr. Cheney was a member of the Executive Committee. The Court finds no evidence that such a conversation occurred or that such an instruction was given by Criswell Radovan. In fact, for the reasons articulated by this Court on the record on September 8, 2017, the Court finds much of Mr. Cheney's testimony at trial to be highly suspect, biased and not credible.

87. The Court finds the source of Plaintiff's misinformation about the financial status of the Project to have come from Brandon Cheney and other members of IMC, who the evidence shows intended to torpedo the Mosaic loan and remove CR Cal Neva as Manager of Cal Neva Lodge, divest it of its shares (including its 20% Sponsor Shares in Cal Neva Lodge) and turn over to IMC the Management Agreement for the property – all of this under threat of civil and criminal actions for IMC's own benefit and not for the benefit of the Project. Contrary to Mr. Cheney's testimony, the Court finds Radovan and CR Cal Neva were not an

impediment to the Mosaic loan closing.

88. In late 2015 and 2016, Mr. Chency and IMC accused Defendants of all sorts of financial improprieties. Mr. Cheney even called Marriner a few weeks before this trial demanding Marriner get on the "right side" and return his commission or "bad things" would happen to him. Despite these allegations of financial impropriety, the financial audit that IMC solicited through its representation on the Cal Neva Lodge Executive Committee did not find any financial improprieties by CR Cal Neva, and IMC chose not to spend any additional money on a further audit. Notably, although there are procedures in the Operating Agreement to remove CR Cal Neva as Manager with or without cause, CR Cal Neva remains the Manager of Cal Neva Lodge as of the conclusion of this trial.

89. The testimony at trial is undisputed that the Executive Committee finally approved moving forward with the Mosaic loan at its January 27, 2016 meeting, after which Radovan set up a meeting with Mosaic for February 1, 2016 to finalize the loan. Before that meeting took place, however, certain members of the Executive Committee, led by IMC, secretly went to Mosaic's offices without the knowledge or consent of CR Cal Neva and killed that loan.

90. There is no more solid evidence of this interference than in Trial Exhibit 124, which is an e-mail sent to Radovan by Mosaic on February 1, 2016 -- the very day IMC secretly met with Mosaic without CR Cal Neva's knowledge or consent. In that e-mail, Mosaic explains that as a result of its meeting, it was tearing up the executed term sheet for the loan, and indicated there was no reason to meet with CR Cal Neva later that day as previously scheduled by Mosaic and Radovan. Not coincidentally, the reasons Mosaic gave for backing out (Trial Ex. 129) were verbatim the issues IMC had with CR Cal Neva.

91. The Court finds that Plaintiff got exactly what he bargained for -- a Founders' Share in Cal Neva Lodge --but then caused damage to himself, Defendants and every other investor in the Project by colluding with IMC and Molly Kingston (another Project investor) to undermine the Mosaic loan, remove CR Cal Neva as manager, and divest it of its interest

in Cal Neva Lodge. *See* Trial Exhibits 50, 55, 58-59, 109, 110, 112, 115 – 116, 118 – 122, 124 – 133, 136, 139 – 142, 145 – 146.

92. But for IMC, Plaintiff, and Molly Kingston's intentional interference with the contractual relations between Mosaic and Cal Neva Lodge, the Court finds the Mosaic loan would have closed and funded the Project to successful and timely completion. Every witness at trial, including Mr. Cheney and Plaintiff, agreed the Mosaic loan would have covered the Project's debts and expenses to completion.

93. Although Plaintiff and Mr. Cheney claimed to be supportive of the Mosaic loan, the testimony was unequivocal that there was never an attempt by IMC or Plaintiff to try to resurrect the Mosaic loan, despite the open invitation by Mosaic to do so.

94. Because of the intentional interference by IMC, Plaintiff and Kingston, the Project tragically fell into Bankruptcy, and Criswell, Radovan and their entities have suffered significant compensatory damages, including loss of their investment and projected investment returns, loss of management fees, and loss of development fees.

95. In terms of development fees, CR Cal Neva was paid $720,000.00 of the $1.2 Million aggregate to which it was entitled (*See* Ex. 3, p. 8). The remainder, $480,000.00, was accrued and not yet paid.

96. Similarly, Marriner and his entity suffered significant compensatory damages, including loss of his investment and projected returns, lost commissions on the 28 planned condominiums under his Real Estate Consulting Agreement, and loss of business good will.

97. After his wrongful interference, and the resulting demise of the Project, Plaintiff attempted to distance himself from IMC and his investment, including filing of the instant lawsuit seeking the return of his investment before approval of his sale could be obtained at the next annual meeting.

98. The Court also finds that Plaintiff straddled the fence when it came to his investment -- wanting to keep it when he thought it benefitted him -- then wanting out when he thought it did not.

II.

CONCLUSIONS OF LAW

A.

DAMAGES

1. The thrust of Plaintiff's lawsuit is that he thought he was buying $1 Million of the last $1.5 Million in Founders' Shares available under the PPM, but instead was allegedly duped by Defendants into buying one of CR Cal Neva's two Founders' Shares.

2. In his Second Amended Complaint, Plaintiff asserted causes of action for breach of contract, breach of fiduciary duty, fraud, negligence, conversion, punitive damages and securities fraud. Fundamental to each of these causes of action is causation and damages; namely, that some conduct on the part of Defendants caused Plaintiff to suffer damages.

3. Plaintiff cannot prove that he suffered damages by Defendants' conduct since he got exactly what he bargained for -- a Founders' Share in Cal Neva Lodge. Indeed, the testimony was unequivocal that the Founders' Share he purchased from CR Cal Neva has the identical rights, obligations and value as the Founders' Share he claims he thought he was purchasing. They are both Founders' Shares.

4. This is no different than getting a Cadillac from Jones West instead of from Don Weir. Plaintiff ended up with a Cadillac. Indeed, Plaintiff is in the same position now than he would have been had he beat Les Busick to purchase $1 Million of the remaining $1.5 Million in Founders' Shares.

5. Thus, Plaintiff is not able to prove damages in this case, which is fatal to each of his seven causes of action.

6. Furthermore, even assuming for the sake of argument that Plaintiff suffered any damages, for the reasons stated above, such damages were caused by his intentional interference with the Mosaic loan, which caused the demise of the Project.

7. For these reasons, each of Plaintiff's seven causes of action are dismissed.

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B.

PLAINTIFF'S FIRST CAUSE OF ACTION (FOR BREACH OF CONTRACT)

8. Plaintiff claims that Criswell Radovan, CR Cal Neva, Cal Neva Lodge, and New Cal Neva Lodge breached the Subscription Agreement because his $1 Million was not deposited into the account of Cal Neva Lodge or returned to him.

9. Cal Neva Lodge and New Cal Neva Lodge are in bankruptcy and the automatic stay applies to them. Plaintiff did not seek relief from stay to pursue either entity in this litigation. On October 7, 2016, Plaintiff filed a notice of the two bankruptcy cases and notified the Court of his intent to proceed against the other (non-debtor) Defendants notwithstanding the pendency of the two bankruptcy cases.

10. In Nevada, a breach of contract requires that plaintiff and defendant enter into a valid and existing contract; plaintiff performed or was excused from performance; defendant breached the contract; and plaintiff sustained damages as a result of the breach. *Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000).

11. In addition to his inability to prove damages, Plaintiff's breach of contract action fails against CR Cal Neva and Criswell Radovan because they are not parties to the Subscription Agreement, and, therefore, cannot be said to have legally breached said contract. Indeed, Plaintiff has admitted, and the Subscription Agreement demonstrates, that his contract was with Cal Neva Lodge – an entity that is currently subject to Chapter 11 protections.

12. Plaintiff has failed to carry his burden of proof under the first cause of action. For this additional reason, Plaintiff's first cause of action is without merit and is accordingly dismissed.

C.

PLAINTIFF'S SECOND CAUSE OF ACTION (FOR BREACH OF DUTY)

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

14. Specifically, Plaintiff claims that PCA had a fiduciary duty to comply with all

provisions of the Subscription Agreement and ensure that his $1 Million was wired to Cal Neva Lodge only upon specific instructions from him.

15. Under the Restatement of the Law (Second) of Torts, § 874, "One standing in a fiduciary relation with another is subject to liability for harm resulting from a breach of duty imposed by the relation." Thus, in order to prevail on a claim for breach of fiduciary duty, the plaintiff must show the existence of a fiduciary duty, a breach of that duty, and that the breach proximately caused damages.

16. Aside from Plaintiff's inability to prove damages, this claim fails because PCA owed no duty to Plaintiff. In fact, it is undisputed that PCA did not have the escrow instructions that Plaintiff claims were breached, and did not consider itself to be an escrow holder. Instead, PCA reasonably believed that its client, CR Cal Neva, was selling one of its Founders' Shares to a third party, and PCA followed the only instructions it had, which was to send the money to Criswell Radovan for the purchase of one of CR Cal Neva's Founders' Shares.

17. Plaintiff has failed to carry his burden of proof under the second cause of action. For these reasons, Plaintiff's second cause of action is without merit and is accordingly dismissed.

D.

PLAINTIFF'S THIRD CAUSE OF ACTION (FOR FRAUD)

18. Plaintiff's third cause of action for fraud is plead against all of the Defendants except PCA.

19. As stated above, Cal Neva Lodge and New Cal Neva Lodge are subject to Chapter 11 Bankruptcy protection.

20. In Nevada, fraud requires that a plaintiff prove that the defendant made a false representation of material fact; that the defendant knew or believed that his or her representation was false, or defendant had an insufficient basis or information for making the representation; defendant intended to induce plaintiff to act or refrain from acting upon the