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

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DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
ADRIENNE BRANTLEY-LOMELI (SBN 14,486)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200
DPolsenberg@LRRC.com

RICHARD G. CAMPBELL, JR. (SBN 1832)
KAEMPFER CROWELL
50 W. Liberty Street, Suite 700
Reno, Nevada 89501
RCampbell@KCNVLaw.com

Attorneys for Appellant

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Daniel F. Polsenberg
Nevada Bar No. 2376
Joel D. Henriod
Nevada Bar No. 8492
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
Phone (702) 949-8200
Fax (702) 949-8398
DPolsenberg@LRRC.com
JHenriod@LRRC.com

Richard G. Campbell, Jr.
Nevada Bar No. 1832
THE LAW OFFICE OF RICHARD G. CAMPBELL, JR. INC.
333 Flint Street
Reno, Nevada 89501
Phone (775) 384-1123
Fax (775) 686-2401
RCampbell@RGCLawOffice.com

Attorneys for Plaintiff
George Stuart Yount

003001

DISTRICT COURT

WASHOE COUNTY, NEVADA

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

003001

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

INTRODUCTION

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

003002

STANDARD OF REVIEW

A. Standard for Amending Findings

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

B. Standard for Altering and Amending the Judgment

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

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

003002

C. Standard for Relief from Judgment

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

D. Standard for a Motion for a New Trial

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

II.

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

A. Defendants Failed to Prove Unclean Hands

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

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

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

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

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

2. Unclean Hands Does Not Apply to Legal Claims

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

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

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

003005

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

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

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

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

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

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

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

THE COURT: Unclean hands.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. RADOVAN: No.

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

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

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

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

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

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III.

MR. YOUNT IS ENTITLED TO A NEW TRIAL

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

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

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

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

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

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

1. Defendants' Evidence of Damages was Speculative

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

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

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

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

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

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

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

2. The Court Awarded Unsupported and Capricious Damages

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

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

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

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

CONCLUSION

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

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

Dated this 30th day of March, 2018.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/Daniel F. Polsenberg*
DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

RICHARD G. CAMPBELL, JR. (SBN 1832)
THE LAW OFFICE OF RICHARD G. CAMPBELL, JR.
333 Flint Street
Reno, Nevada 89501
Phone (775) 384-1123

Attorneys for Plaintiff

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

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CERTIFICATE OF SERVICE

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

MARTIN A. LITTLE
ALEXANDER VILLAMAR
HOWARD & HOWARD
3800 Howard Hughes Parkway, Suite 1000
Las Vegas, Nevada 89169

ANDREW N. WOLF
INCLINE LAW GROUP, LLC
264 Village Boulevard, Suite 104
Incline Village, Nevada 89451

/s/Adam Crawford
An Employee of Lewis Roca Rothgerber Christie LLP

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Clerk of the Court
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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.

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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.

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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.

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

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.

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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;

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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

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.

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

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.

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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.

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.

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.

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.**

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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.

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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

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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.

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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:

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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

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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;

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12.5.5 the occasional accommodation transfer by a Member; or

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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

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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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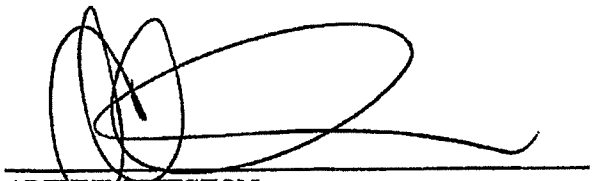

ARTHUR PRIESTON

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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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Daniel F. Polsenberg
Nevada Bar No. 2376
Joel D. Henriod
Nevada Bar No. 8492
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
Phone (702) 949-8200
Fax (702) 949-8398
DPolsenberg@LRRC.com
JHenriod@LRRC.com

Richard G. Campbell, Jr.
Nevada Bar No. 1832
THE LAW OFFICE OF RICHARD G. CAMPBELL, JR. INC.
333 Flint Street
Reno, Nevada 89501
Phone (775) 384-1123
Fax (775) 997-7417
RCampbell@RGCLawOffice.com

Attorneys for Plaintiff
George Stuart Yount

003083

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 OPPOSITION TO "DEFENDANTS' MOTION TO AMEND JUDGMENT"**

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Not only do defendants fail to substantiate an awardable specific amount of any lost future management fees, but Judge Flanagan's last-minute award of them as an element of damages at all highlights the impulsive nature of his resolution overall. The result is unmoored from the law and the record.

The Court cannot grant defendants' motion for several reasons. First, the record and applicable law precludes any finding of liability on which to base damages. Even construing the facts in a light most favorable to defendants, Mr. Yount's conduct was not tortious as a matter of law. Defendants never even raised a claim on which to award damages. Secondly, there is no evidentiary support for defendants' wildly speculative lost fees. Indeed, the theory even defies common sense.

I.

THE ALLEGED DAMAGES CANNOT BE AWARDED BECAUSE THE RECORD AND APPLICABLE LAW PRECLUDE ANY FINDING OF LIABILITY FOR DAMAGES

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The Court cannot award the development fees and lost future management fees now alleged in defendants' motion for the same reason that it cannot uphold *any* judgment for damages against Mr. Yount. Mr. Yount's conduct simply was not tortious as a matter of law. Defendants never raised or tried affirmative claims against Mr. Yount. Lost development or management fees were not even questions of fact at issue during the trial. And defendants cannot amend their pleading to add claims now.

A. Even Construing the Evidence Favorably to Defendants, Mr. Yount's Conduct Simply Was Not Tortious as a Matter of Law

Putting aside the fatal procedural bar to awarding damages against Mr. Yount (that defendants did not raise any claims against him), the record cannot support imposing liability on any claim. There is good reason why defendants never pleaded any counterclaims against Mr. Yount; any counterclaims would have been baseless.

1. Mr. Yount Is Not Even Accused of Interfering in the Mosaic Loan

The record is clear that Mr. Yount did not interfere with the Mosaic loan. The defendants do not claim otherwise. Rather, they criticize Mr. Yount for not doing enough to prevent the meeting between members of Cal Neva Lodge LLC's Executive Committee ("EC") and Mosaic after he became aware of the EC's intentions to attend the meeting without Criswell Radovan. Put simply, they do not accuse Mr. Yount of having any discussions with Mosaic or even of suggesting it. Defendants fault him because he was aware of others' "intentions" and did not do anything to stop it (as if he could have). In fact, quite the opposite is true. When the EC told Mr. Yount that Mosaic asked to meet with the EC but without Criswell and Radovan, Mr. Yount questioned the legitimacy of the EC attending such a meeting. Clearly, Mr. Yount was not supportive or encouraging such a meeting.

Thus, there was no action by Mr. Yount that could substantiate a claim for intentional interference. The heart of an intentional interference with contractual relations action is the intentional act that was designed to disrupt a contractual relationship. *J.J. Indus., LLC v. Bennett*, 119 Nev. 269, 275, 71 P.3d 1264, 1268 (2003).

Here, Mr. Yount was not a member of the EC,[1] he did not attend the meeting between the EC and Mosaic, and he never communicated directly with Mosaic. While defendants vaguely accuse Mr. Yount of being "in bed"[2] with the EC and IMC and "drinking the IMC's Kool-Aid,"[3] they allege at most that Mr. Yount "didn't do anything" to stop the meeting between the EC and Mosaic.[4] As

[1] Operating Agreement Schedule 8.4.

[2] Hr'g Tr. 9/08/2017, at 1053: 3–4, Ex. 6.

[3] Hr'g Tr. 9/08/2017, at 1024:19–20, Ex. 6.

[4] Hr'g Tr. 9/08/2017, at 1052:15–23, Ex. 6.

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Mr. Little stated in his closing arguments, Mr. Yount "knew that those people… the IMC people, weren't proponents of Mosaic."[5]

Further, there is no evidence that Mr. Yount intended to interfere with the loan to cause harm. *J.J. Indus., LLC*, 119 Nev. at 276, 71 P.3d at 1269 (rejecting liability where the plaintiff failed to prove that the defendant had a specific motive or purpose to injure by his interference). Defense counsel for Marriner noted that Mr. Yount did not intend to interfere with the Mosaic loan.[6] Indeed, common sense dictates that Mr. Yount would desire the Mosaic loan to come through.[7] The Mosaic loan would have provided the necessary funding for Criswell Radovan to buy back the share they unilaterally sold to Mr. Yount.[8] It was Mr. Yount's only opportunity to receive his $1 million back. Intentionally interfering with the Cal Neva's only prospect for success makes little sense. That is probably why defendants never accused Mr. Yount of directly interfering with the Mosaic loan.

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2. Mr. Yount Cannot Be Liable Even for Civil Conspiracy or Civil Aiding and Abetting

Defendants fault Mr. Yount because he allegedly "didn't do anything" to stop the meeting between the EC and Mosaic.[9] Yet even construing the record in the light most favorable to defendants, defendants never discussed nor proved that simply communicating with the EC or IMC was tortious conduct.

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[5] Hr'g Tr. 9/08/2017, at 1052:15–23, Ex.6.

[6] MR. WOLF: I don't believe Mr. Yount conspired to interfere with that loan, however he had an opportunity, he knew the meeting that was about to happen was probably not legit, in his words, and he had an opportunity to head off the CR people [IMC People] at the pass and maybe avoid what happened.

Hr'g Tr. 9/08/2017, at 1073: 20–24, Ex. 6.

[7] Hr'g Tr. 8/31/2017, at 587:6–9, Ex. 3.

[8] Hr'g Tr. 8/31/2017, at 606:9–11, Ex. 3; Hr'g Tr. 9/06/2017, at 726: 22–23, Ex. 4.

[9] Hr'g Tr. 9/08/2017, at 1052:15–23, Ex. 6.

Knowledge that a tort was going to be committed and the "failure" to prevent it cannot support even conspiracy or civil aiding and abetting. Mere association and communication with the EC or IMC does not give rise to actionable conduct. *See LVRC Holdings, LLC v. Brekk*a, 128 Nev. 915, n.5 , 381 P.3d 636 (2012) (affirming district court's dismissal of civil aiding and abetting claim because the court reasoned receipt of e-mails from was not evidence of substantial assistance, encouragement, or contribution"); *Casella v. SouthWest Dealer Services, Inc.*, 157 Cal.App.4th 1127, 1140-1141 (2007); *Wetherton v. Growers Farm Labor Assn.*, 275 Cal.App.2d 168, 176 (1969), *disapproved on another ground in Applied Equip. Corp. v. Litton Saudi Arabia Ltd.,* 7 Cal. 4th 503, 521 fn.10, 869 P.2d 454, 487 (1994) ("mere knowledge, acquiescence, or even approval of an act without an agreement to cooperate is not enough."). It is not enough that the accused knew of an intended wrongful act, they had to agree to achieve it. *Choate v. County of Orange*, 86 Cal.App.4th 312, 333, 103 Cal.Rptr.2d 339, 353 (2000). Liability for conspiracy and civil aiding and abetting depends on proof that the party intentionally participated with knowledge of the object to be attained. *Casey v. U.S. Bank Nat. Assn*, 127 Cal.App.4th 1138, 1145–1146, 26 Cal.Rptr.3d 401, 405–406 (2005)

The only evidence of Mr. Yount's allegedly wrongful conduct presented at trial shows that he discouraged the meeting (although he had no legal duty to do so). Mr. Yount questioned the legitimacy of the EC attending a meeting without Criswell Radovan and without their approval:

> MR. CAMPBELL: And did you have some concerns about that? [the meeting]
>
> MR. YOUNT: I did. As I said in there, my number one is, the meeting without CR, is that legit without CR and without their advanced permission?

(Hr'g Tr. 8/31/2017, at 599:11–14, Ex. 3.)

However, when Mr. Yount questioned the legitimacy of the meeting, Mr.

Yount was told they were authorized to have such discussions.

> PAUL JAMESON: Yes it is approved. They may not be pleased about it, but they authorized such discussions.

(Email from Paul Jameson to Stuart Yount, 01/30/2016; Defendants' trial Exhibit 122, Ex. 8.) Mr. Jameson also communicated to Mr. Yount that it was none of his business, that it was a matter for the EC to decide:

> PAUL JAMESON: But to be clear they do not know this particular meeting is happening. The EC can decide if it wants to share… Only the EC is going to be in attendance.

(Email from Paul Jameson to Stuart Yount, 01/31/2016; Defendants' trial Exhibit 122, Ex. 8.) Mr. Yount was not a member of the EC and therefore left the matter to the committee. This conduct simply cannot give rise to liability.

Further, the evidence presented at trial demonstrates it was Criswell and Radovan's own actions that caused Mosaic to question the deal. Mosaic had called for the meeting with the EC.[10] Mosaic indicated that Criswell Radovan had been unresponsive during their due diligence.[11] As Mosaic's Sterling Johnson later reported the meeting to Criswell and Radovan:

> STERLING JOHNSON: …We also told them [members of the EC] that for the better part of three months we have not heard much from you or your team…

(Email from Sterling Johnson, VP of Mosaic, to Robert Radovan 02/01/2017; Defendants trial exhibit 124, Ex. 9.)

Mosaic then indicated that "there seems to be a little bit of a mess right now[,]" but once the ownership "figure[d] things out" they could

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[10] MR. CAMPBELL: Did Mosaic ask you for the meeting?

MR. CHANEY: Mosaic asked for the meeting with the EC, yes.

Hr'g Tr. 9/06/2017, at 839:1–4, Ex. 4.

[11] Hr'g Tr. 9/06/2017, at 781–782: 22-7, Ex. 4.

reintroduce the deal to Mosaic.[12] Defendants' mismanagement of the project and failure to communicate with Mosaic led Mosaic to "take a step back."[13] In other words, assuming arguendo that the actions of the EC members (that Mr. Yount had nothing to do with) were tortious, even those did not cause the Mosaic loan to not materialize.

B. Defendants Brought No Claims Against Mr. Yount, Have Not Moved to Amend their Pleading Since the Trial, and Cannot Amend the Pleading Now

As set out more fully in Mr. Yount's "Motion for Judgment as a Matter of Law, for Relief from Judgment, to Alter and Amend the Judgment, to Amend the Finding and for New Trial," defendants' affirmative defense of unclean hands cannot justify an award of damages. The defendants did not ask for and still have not asked for leave to amend to plead a counterclaim. Even if they had, this Court could not grant leave to amend.

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1. Defendants Pleaded Only a Defense of "Unclean Hands," Which Cannot Sustain Any Award of Damages

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In the absence of a counterclaim, a court cannot award affirmative relief to a defendant. *Westfield Sav. Bank v. Leahey*, 291 Mass. 473, 476, 197 N.E. 160, 162 (1935). "The doctrine of unclean hands is a basis only for the denial of equitable relief and cannot support a grant of affirmative relief against the party who acted with unclean hands." *N. Chester Cnty. Sportsmen's Club v. Muller*, 174 A.3d 701, 707 n.3 (Pa. Commw. Ct. 2017); *Keystone Commercial Props., Inc. v. City of Pittsburgh*, 347 A.2d 707, 709 (Pa. 1975).

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[12] Email from Sterling Johnson, VP of Mosaic, to Robert Radovan 02/01/2017; Defendants trial exhibit 124, Ex. 9.

[13] Email from Sterling Johnson, VP of Mosaic, to Robert Radovan 02/01/2017; Defendants trial exhibit 124, Ex. 9.

Here, defendants never pleaded a counterclaim or asked for affirmative relief.[14] Defendants' answer asserted only affirmative defenses and, throughout the trial, defendants never indicated that they were pursuing a counterclaim.[15]

2. Defendants Have Not Moved for Leave to Amend their Pleading

Defendants have not moved for leave to amend their pleading under Rule 15 to include any claims that could possibly provide a platform for awarding damages in their favor, such as tortious interference with a prospective agreement. They make no request to do so in this motion to alter or amend, nor in any other motion.

3. Defendants Are Ineligible to Amend their Pleading to Raise Affirmative Claims Post-Trial

The deadline to move for leave to amend the judgment to include any new claims has passed. Any such motion would have to have been filed by March 27, 2018—ten judicial days after notice of entry of the judgment was served. NRCP 52(b); NRCP 59(e).

Nevertheless, the Court could not have granted defendants leave to amend their pleading to include a counterclaim even if they had requested it. When a party seeks leave to amend a pleading after the expiration of the

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[14] 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.
(Hr'g Tr. 9/08/2017, at 1054:16–19, Ex. 6); Defendants' Proposed Findings of Fact and Conclusions of Law, 8/25/2017, pg. 11 (contending that Mr. Yount's interference with the Mosaic loan harmed the defendants, which "offset" any damages owed to Mr. Yount).

[15] 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, Ex. 3.)

deadline for doing so, they must first demonstrate "good cause" under NRCP 16(b) for extending the deadline. *Nutton v. Sunset Station, Inc.*, 357 P.3d 966, 131 Nev. Adv. Op. 34 (Nev. Ct. App. 2015). 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.*

Even under the liberal standard of Rule 15, however, the district court still cannot grant leave to amend. 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). 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).

The defendants could not show good cause in deviating from the scheduling order. The scheduling order required that all amendments to pleadings be filed by April 15, 2017.[16] Defendants acted dilatorily in failing to seek to file the amendment months earlier. Further, defendants could not establish that Mr. Yount impliedly consented to a counterclaim. While some evidence may have come in that might have been relevant to a counterclaim,

[16] Scheduling Order pg. 2, lns. 4–5.

that introduction cannot justify amendment because it was relevant to the affirmative defense that had been raised. During trial, moreover, Mr. Yount's counsel always objected when the inquiry deviated toward any counterclaim of Mr. Yount interfering.[17] And each time that occurred, defense counsel expressly conceded that there was no counterclaim.

C. Lost Development or Management Fees Were Not Even Questions of Fact at Issue During the Trial

A motion to amend judgment may only be granted where the issues have been litigated. *Chiara v. Belaustegui*, 86 Nev. 856, 859, 477 P.2d 857, 859 (1970). It may not be used to introduce new disputes. NRCP 52(b); NRCP 59(e). *Stevo Design, Inc. v. SBR Marketing Ltd.,* 919 F.Supp.2d 1112, 1117 (Nev. 2013).

Here, neither Criswell nor Radovan alleged they were entitled to lost future management fees and Criswell Radovan never alleged it was entitled to a development fee. Criswell Radovan receives a development fee pursuant to the Development Services Agreement.[18] The Development Services Agreement was a separate contract[19] between Criswell Radovan and Cal Neva Lodge.[20] Notably, the Development Services Contract was never even introduced as evidence at trial.[21] Trial testimony indicated the development fee was paid out of Cal Neva's account.[22] Criswell Radovan never argued at trial that Mr. Yount should be liable for the development fee under a separate contract. Further, Judge Flanagan's amended order does not contain any analysis as to how or

[17] Hr'g Tr. 9/08/2017, at 1016:9–13, Ex. 6.

[18] Operating Agreement pg. 21, Section 7.4.

[19] Hr'g Tr. 08/29/2017, at187:17–23, Ex. 1.

[20] Hr'g Tr. 08/29/2017, at187:17–23, Ex. 1.

[21] *See* Non-jury Trial List of Exhibits, Ex. 7.

[22] Hr'g Tr. 8/30/2017, at 210–213, Ex. 2.

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why Mr. Yount owes Criswell Radovan development fees. *See Robison v. Robison*, 100 Nev. 668, 673, 691 P.2d 451, 455 (1984) (*citing Bing Constr. v. Vasey-Scott Eng'r*, 100 Nev. 72, 674 P.2d 1107 (1984)) (findings in a bench trial "must be sufficient to indicate the factual basis for the court's ultimate conclusions.").

Additionally, the failure to litigate the issue of management fees is clear in Judge Flanagan's amended order that awarded management fees to Criswell and Radovan "if applicable."[23] The only discussion of any damages during the seven-day trial occurred when Mr. Little asked Radovan if he could quantify how he had been damaged. Radovan speculated that his operating company would have made over a million dollars, but never mentioned lost management fees.[24] Defendants cannot use their motion to amend to claim for the first time, that they are entitled to development fees and management fees.

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II.

THE RECORD CANNOT JUSTIFY THE DAMAGES THE DEFENDANTS NOW ALLEGE

Defendants fail to provide sufficient proof to substantiate any award of lost fees.

A. Defendants Rely on an Exhibit That Is Not Admissible For Their New Purpose

It is well established that evidence must be relevant and admissible to support a party's claim. NRS 48.015; *Burton v. State,* 84 Nev. 191, 194, 437 P.2d 861, 863 (1968). Here, the only evidence defendants rely on to justify their damages is the financial pro forma.[25] At trial, the financial pro forma was relevant and admissible only to the question of what Mr. Yount reviewed prior

[23] Amended Order pg. 2, lns.5–9.

[24] Hr'g Tr. 8/31/2017, at 493:11–16, Ex. 3.

[25] Defendants' Motion to Amend Judgment pg. 5.

to investing. In other words, it came in only to show that Mr. Yount received what purports to be an analysis of future performance, *regardless of whether its contents were accurate*.

Defendants now contend, however, that the financial pro forma substantively proves the actual value of the future lost management fees. ***For this purpose***, the ***chart is hearsay***, an out of court statement purporting to prove the truth of the matter asserted on the document. NRS 51.035. Further, this document does not meet any of the hearsay exceptions. NRS 51.135 (requiring that proof that a document is a business record requires proper foundation including that it was made "at or near the time… by a person with knowledge in the course of a regularly conducted activity.")

Defendants cannot use inadmissible hearsay to substantiate the lost future management fees. The document was probative, for what it was worth, only to whether Mr. Yount received documents that might enable due diligence. It is squarely within the record that Mr. Tratner assessed the entire pro forma (of which this chart was a small part) to determine whether the investment was reasonable overall, not whether Cal Neva's estimated management fee was reasonable.[26] Whether an investment is reasonable is unrelated to whether future lost management fees and future profits have been calculated at trial with reasonable certainty. Accordingly, this motion must be denied if only because the key "evidence" is no evidence at all.

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B. The Alleged Management Fees Are Too Speculative to be Awardable

[26] MR. CAMPBELL: When you say overall reasonableness, what were you understanding that to be?
MR. TRATNER: Looking at the financial reports that were in the documentation for the investment opportunity and whether the number made sense… It was an overall sort of a, do the numbers make sense from an investment opportunity perspective.
(Hr'g Tr. 09/07/2017 at 849–850:21–12, Ex. 5.)

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Criswell and Radovan also failed to prove the amount of management fees with reasonable certainty. Indeed, defendants even admit they did not prove the amount of these fees, noting in their motion to amend that "only the amount of lost management fees [needs] to be quantified."[27] The one piece of evidence defendants rely on, the financial pro forma, is speculative. Criswell and Radovan had the burden of proving with reasonable certainty the amount of management fees. They have failed to do so. This Court should not amend the judgment to reflect damages that have neither been quantified or proven.

1. Lost Earnings Must be Well Substantiated

Lost profits and lost future management fees by their very nature are speculative and, therefore, to be awardable, they must be well substantiated. *Anglo-Iberia Underwriting Mgmt. Co. v. Lodderhose*, 282 F. Supp. 2d 126, 129 (S.D.N.Y. 2003), *as amended* (Oct. 8, 2003). This is particularly true where the damaged party claims lost profits or management fees of a new business. *McDevitt & St. Co. v. Marriott Corp.*, 713 F. Supp. 906, 932 (E.D. Va. 1989), *aff'd in part, rev'd in part on other grounds,* 911 F.2d 723 (4th Cir. 1990) (holding the calculations upon which the projected management fee claim is based—the new hotel's projected revenues and operating profits—are simply too speculative to permit recovery); *Mullen v. Brantley*, 213 Va. 765, 768, 195 S.E.2d 696, 700 (1973) (noting that where a new business or enterprise is involved "such a business is a speculative venture, the successful operation of which depends upon future bargains, the status of the market, and too many other contingencies to furnish a safeguard in fixing the measure of damages.").

Lost future management fee calculations are inextricably linked to anticipated profits and gross revenues. *McDevitt*, 713 F. Supp. at 932. The Nevada Supreme Court has already articulated how lost profits must be proven.

[27] Defendants' Motion to Amend Judgment pg. 3, lns. 27–28.

Knier v. Azores Const. Co., 78 Nev. 20, 24, 368 P.2d 673, 675 (1962). "Where the loss of anticipated profits is claimed as an element of damages, the business claimed to have been interrupted must be an established one and it must be shown that it has been successfully conducted for such a length of time and has such a trade established that the profits therefrom are reasonably ascertainable." *Id.*; *Eaton v. J. H., Inc.*, 94 Nev. 446, 450, 581 P.2d 14, 17 (1978) (noting that evidence must provide a basis for determining lost profits with reasonable certainty and a record of past profits of an established enterprise provides a valid basis for determining such future profits with reasonable certainty).

Here, Criswell and Radovan failed to substantiate with reasonable certainty they would have earned over $4 million dollars of management fees each. Criswell and Radovan's management fees would have been 3% of the Cal Neva's revenue and 10 % of the Cal Neva's net operating income before reserves and debt service.[28] Calculating revenue and net operating income of a hotel that never opened is entirely speculative. The successful operation of the Cal Neva would depend on market conditions, average room rates, the hotel's occupancy during certain periods, the hotel's expenses, and several other contingencies. To calculate Criswell and Radovan's management fees, the defendants would have to prove anticipated profits. Nevada law is clear that a business proving anticipated profits with reasonable certainty must show it had established itself in the market and had been successfully conducted. Criswell and Radovan have failed to do that.

The timing of the financial pro forma further demonstrates its speculative nature. The pro forma that defendants rely on was drafted in 2014, long before the Mosaic loan was considered. It does not include the additional $20 million

[28] Defendants' Motion to Amend Judgment pg. 4, lns. 26–28.

in debt that Criswell and Radovan needed to cover cost overruns or the Mosaic loan's huge fees and rates. It also projected the hotel would open in 2015 and includes partial revenue for 2015. However, by October 2015, it was evident the hotel would not be open by the end of the year.

2. Defendants' Projections Rely Entirely On Unsubstantiated Assumptions and Extrapolations

Defendants failed to provide any evidence that is of the type to prove lost future management fees. Defendants did not produce any expert witnesses and never established their projections were reasonably calculated. *See Houston Expl. Inc. v. Meredith*, 102 Nev. 510, 728 P.2d 437 (1986) (admitting expert testimony concerning profits lost by new venture); *Mid Continent Lift & Equip., LLC v. J. McNeill Pilot Car Serv.*, 537 S.W.3d 660 (Tex. App. 2017) ("Proof of lost profits must be made with competent evidence, and, as a minimum, opinions or estimates of lost profits must be based on objective facts, figures, or data from which the amount of lost profits can be ascertained."); *Atkins v. Robbins, Salomon & Patt, Ltd.*, -- N.E.3d --, Ill.App 1 Dist. (2018) ("The law requires only that the plaintiff seeking recovery for lost profits approximate the claimed lost profits by competent evidence.").

Defendants argue the management fees were "vetted by several experts" because Mr. Yount's accountant, Mr. Tratner, reviewed the whole pro forma for overall "reasonableness" of the investment. As discussed above, defendants not only mischaracterize this testimony, but this testimony also fails to demonstrate the projections were reliably calculated. Defendants argue an outside consultant in the hospitality industry prepared the updated 2015 pro forma.[29] This does not overcome the speculative nature of the pro forma. Defendants never demonstrated how these projections were calculated. Courts

[29] Defendants' Motion to Amend Judgment pg. 6, lns. 8–9.

have held lost future management fees as speculative, even where a hotel chain bases its calculations on average revenues and operating profits from its own hotels across the country. *McDevitt*, 713 F. Supp. at 933 ("The fact that this particular hotel was one of a nationwide chain of similar hotels with proven track records does not change the result. Too many variables prevent confident reliance on the results of other hotels in other locations under other economic conditions."). Here, the evidence presented is even weaker than the evidence in *McDevitt*.

3. Defendants' Rosy Projections Defy Even Common Sense, Considering that Poor Planning, Mismanagement, and Excessive Risk Taking Had Left Them at the Mercy and Whim of Potential Lenders

Defendants managed the business venture so poorly that the venture was severely over budget and on the brink of failure. Bear in mind, the Mosaic loan would have been a lifeline to an enterprise that was drowning. The record is clear that by December the project was flailing.[30] Indeed, defendants' contention that the failure to secure even one loan led to the demise of the Cal Neva demonstrates how quickly defendants were drowning. And yet, defendants project that in the first year of operations they would have earned close to $200,000[31] each in management fees.

Defendants further predict that over a ten-year period, Criswell and Radovan would have earned at least $4 million each. Defendants failed to

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[30] For example, Radovan knew in September that they needed to refinance the entire project and that if they did not refinance they were not going to finish the project. (Hr'g Tr. 9/08/17, at 1003:4–17, Ex. 6). Further, Criswell and Marriner continually represented 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, Ex. 3); (Hr'g Tr. 8/29/2017, at 28:15–24, Ex. 1). The realistic projection was closer to $9 million over budget. (Hr'g Tr. 8/31/2017, at 579: 20–22, Ex. 3).

[31] Defendants' Motion to Amend Judgment pg. 5.

properly manage the Cal Neva during its preconstruction and construction phases. Given defendants' poor management of this project in its initial stages, it defies common sense to conclude the project would have not only survived for ten years, but that it would have been so successful that all of Criswell and Radovan's optimistic projections would have occurred.

III.

DEFENDANTS' RELIANCE ON JUDGE FLANAGAN'S FINDINGS AND CONCLUSIONS ONLY HIGHLIGHTS HOW UNDESERVING OF DEFERENCE THOSE ARE

Judge Flanagan's award of development fees and management fees was capricious and unsupported. His award made one investor solely responsible for development fees[32] and management fees. The Cal Neva project was so ill-planned and mismanaged that it was about to go under. Yet, Judge Flanagan leapt to the unsupported conclusion that the Cal Neva would have been so successful that the defendants were entitled to damages and fees.

In a bench trial, the court must justify an award of damages with factual findings that support the amount. *Goldie v. Yaker*, 432 P.2d 841, 844 (N.M. 1967). Permitting the award of significant damages in the absence of evidence authorizes capricious damage awards. *See Avina v. Spurlock*, 28 Cal. App.3d 1086, 1089, 105 Cal.Rptr. 198, 200 (Ct. App. 1972); *Adams v. Kaplan*, No. A136602, 2013 WL 3757021, at *4 (Cal. Ct. App. July 16, 2013) (noting same in a bench trial).

Here, Judge Flanagan never provided any analysis in his award of damages. There should have never been an award of *any* damages. Defendants' reliance on Judge Flanagan's amended order simply highlights the

[32] Judge Flanagan failed to award Criswell Radovan development fees in his oral judgment and then unilaterally inserted an award for development fees in his amended order. Hr'g Tr. 09/07/2017, at 1140–1141: 21-4, Ex. 6; Amended Order pg. 2, lns. 14–15.

infirmity of Judge Flanagan's overall resolution of this case.

The award of unproven and unspecified management or development fees only exacerbated the findings of fact and conclusions that were already contrary to evidence and law. Judge Flanagan believed Mr. Yount got exactly what he wanted—a Founder's Share in the Cal Neva. However, Judge Flanagan disregarded the express terms of the Operating Agreement and the Private Placement Memorandum. The share Mr. Yount received was not the same as an original Founder's Share under the Private Placement Memorandum. Firstly, Criswell Radovan unilaterally resold one of their shares, which is expressly prohibited in the Operating Agreement, to Mr. Yount.[33] Mr. Yount was not informed of and never agreed to purchase one of Criswell Radovan's shares. Further, the share Mr. Yount received had diminished rights and privileges compared to the original Founder's Share investors.[34]

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Criswell Radovan never received, or even sought, the permission of investors necessary to sell a portion of their stake to Mr. Yount.[35] Criswell Radovan's unauthorized sale of its share meant that Mr. Yount did not even have a vote as a regular shareholder. To cover up the unauthorized and ineffectual sale to Mr. Yount, 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.[36] To "paper their trail," they sent

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[33] Hr'g Tr. 8/30/2017, at 374:5–16, Ex. 2; Hr'g Tr. 8/29/2017, at 175–176:17–9, Ex. 1.

[34] Operating Agreement Section 12, pg. 32 (voting rights did not attach to the share and the shareholder was only entitled to receive the economic benefits, if any, from the share. The shareholder was not vested with any of the rights and powers of the other members. The shareholder did not have the right to participate in the management of the business and affairs of the Company).

[35] Hr'g Tr. 8/29/2017, at 84–85:22–9, Ex. 1.

[36] Hr'g Tr. 8/30/2017, at 268:8–18, Ex. 2.

Mr. Yount proposed documents with effective dates reaching back to October 2015 to make it appear that he had agreed to buy shares from Criswell Radovan all along.[37] Mr. Yount refused to sign these erroneous documents.[38]

Judge Flanagan's findings are unsupported. While the Court should deny defendants' motion to amend judgment to include management fees and development fees, the Court should not use this opportunity to make Judge Flanagan's outlandish award of damages seem reasonable. Judge Flanagan failed to provide any basis for his award of damages. Thus, the defendants' motion to amend the judgment to include development and management fees should be denied.

CONCLUSION

This Court should not amend the judgment to include unsupported development fees or management fees. That Judge Flanagan even left the door open to such an award by amendment after the trial must undermine confidence in his resolution all together. Therefore, defendants' motion to amend the judgment must be denied.

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

Dated this 8th day of May, 2018.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Daniel F. Polsenberg*
DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

RICHARD G. CAMPBELL, JR. (SBN 1832)
THE LAW OFFICE OF RICHARD G. CAMPBELL, JR.

[37] Hr'g Tr. 8/31/2017, at 604:7–14, Ex. 3.

[38] Hr'g Tr. 8/31/2017, at 605:4–17, Ex. 3.

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333 Flint Street
Reno, Nevada 89501
Phone (775) 384-1123

Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of May, 2018, I served the foregoing "Plaintiff's Opposition to Defendants' Motion to Amend" on counsel by the Court's electronic filing system to the persons and addresses listed below:

MARTIN A. LITTLE
ALEXANDER VILLAMAR
HOWARD & HOWARD
3800 Howard Hughes Pkwy., # 1000
Las Vegas, NV 89169

MARK G. SIMONS
SIMONS LAW, PC
6490 South McCarran Blvd., # 104
Reno, NV 89509

/s/ Adam Crawford
An Employee of Lewis Roca Rothgerber Christie LLP

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EXHIBIT 1

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EXHIBIT 1

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STEPHANIE KOETTING

CCR #207

75 COURT STREET

RENO, NEVADA

IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE PATRICK FLANAGAN, DISTRICT JUDGE

--oOo--

GEORGE S. YOUNT, et al., Plaintiffs,	)	
vs.	)	Case No. CV16-00767
CRISWELL RADOVAN, et al., Defendants.	)	Department 7

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TRANSCRIPT OF PROCEEDINGS

TRIAL VOLUME I

August 29, 2017

9:00 a.m.

Reno, Nevada

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

003106

APPEARANCES:

For the Plaintiff:

RICHARD G. CAMPBELL, ESQ.
Attorney at Law
100 W. Liberty
Reno, Nevada

For the Defendant:

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

ANDREW WOLF, ESQ.
Attorney at Law
264 Village Blvd.
Incline Village, Nevada

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

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

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

A. Yes.

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

A. Right.

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

A. Correct.

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MR. CAMPBELL: May I approach, your Honor?

THE COURT: Certainly.

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

BY MR. CAMPBELL:

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

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

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

A. You mean as a founding member?

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

A. I believe so.

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

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Mr. Yount?

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

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

A. I do not recall.

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

BY MR. CAMPBELL:

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

A. Yes.

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

A. Okay. The lower one, yes.

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

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purchasing as part of the PPM?

A. No.

Q. Isn't that what your testimony in your deposition said, that Mr. Yount told you not to tell him?

A. He said, I'll deal with it. He never said, don't do anything. He said, if Mr. Yount's money funds, I will deal with it.

Q. Going back over your deposition.

MR. WOLF: I would object to rereading. It was asked and answered if he's asking him about the same deposition testimony.

THE COURT: Just a minute. Overruled.

MR. WOLF: Asked and answered and argumentative.

THE COURT: Thank you. It's overruled. Go ahead, Mr. Campbell.

BY MR. CAMPBELL:

Q. Mr. Marriner, remember when I showed you your deposition and we looked at page 67, I asked you, did you ever tell Mr. Yount, by the way, Mr. Busick is looking like he may invest and that's going to close out the private placement? You answered, I called Robert, because I report directly to Robert. I said we could have a perfect storm if Busick and Yount fund on the same day?

THE COURT: Slow down for Ms. Koetting.

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BY MR. CAMPBELL:

Q. Because it was feeling like two people were sending their money in at the same time. And Robert said, don't worry, stay out of it. Didn't Mr. Radovan tell you that?

A. I thought I had said, don't worry, I'll deal with it. But clearly it's a very complicated situation and he didn't want two stories. You know, all of the investment conversations were to be handled by Robert.

Q. And I think your testimony earlier was that somehow you felt that the nondisclosure agreement that you signed prevented you from telling Mr. Yount about this?

A. Well, the NDA clearly states that, and I might have a copy of it, but it clearly states that there is a chain of command that the developer has certain information, the executive committee has certain information, and I'm not supposed to have private conversations about the investment PPM discussion, because I'm not an attorney, I'm not a securities broker. So just refer anything related to the PPM to me.

So it was not don't. It was more of, you know, don't worry about it. And I was telling you that was when I was going out of town with my family and Robert just saying, don't worry about it. If the funds materialize, I'll deal

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Q. Page 21, it would be section 7.4.
A. Okay.
Q. And in the middle of that page, you'll see it starts CR has advanced approximately $1.667 million in costs and has received and recontributed to the company $480,000 of development fees. Do you see that?
A. Okay.
Q. And it goes on, that makes up 2 million. Does that refresh your recollection?
A. It does. Thank you, sir.
Q. So this is where your 2 million is represented as being giving you the equity?
A. Yes, sir. I believe that's right.
Q. And that's the 2 million under the private placement memorandum?
A. Correct.
Q. Tell us about the development services agreement. You also entered into an agreement with the Cal Neva Lodge through CR Cal Neva to act as kind of the developer?
A. Correct.
Q. And there was a separate contract entered into for that?
A. I believe so, yes.
Q. And under that contract, you were to be paid

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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 August 29, 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, Plaintiff, vs. CRISWELL RADOVAN, et al., Defendant, 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 203, 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 25th day of September 2017.

S/s Stephanie Koetting
STEPHANIE KOETTING, CCR #207

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EXHIBIT 2

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EXHIBIT 2

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STEPHANIE KOETTING

CCR #207

75 COURT STREET

RENO, NEVADA

IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE PATRICK FLANAGAN, DISTRICT JUDGE

--oOo--

GEORGE S. YOUNT, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. CV16-00767
	)	
CRISWELL RADOVAN, et al.,	)	Department 7
	)	
Defendants.	)	
_____	)	

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TRANSCRIPT OF PROCEEDINGS

TRIAL VOLUME II

August 30, 2017

9:00 a.m.

Reno, Nevada

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

003116

APPEARANCES:

For the Plaintiff:

RICHARD G. CAMPBELL, ESQ.
Attorney at Law
100 W. Liberty
Reno, Nevada

For the Defendant:

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

ANDREW WOLF, ESQ.
Attorney at Law
264 Village Blvd.
Incline Village, Nevada

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about Mr. Marriner's relationship. And I say, I just ask a question, how do you know that? And your answer is, I don't know how we know it, but I assume since he was our broker and he was a primary communicator with Stuart Yount and he talked to Robert. So did you understand -- was it your understanding that he was the primary --

A. Sure, but for example --

Q. Let me finish. He was the primary communicator and your broker for the sales of the -- at least the sales of the shares?

A. I came to know that, but I never even saw this consulting agreement until after the lawsuit was filed.

Q. As we sit here today, you understand that to be his role?

A. I believe that is correct.

Q. Now, it's my understanding, and I think we talked about it a little bit yesterday, Mr. Radovan was really the person on site at Criswell Radovan or CR that was in charge of most of the day-to-day operations and the development of the hotel, at least from Criswell Radovan's perspective?

A. I think that's fair. I wouldn't say just day-to-day. He was the man within our relationship, he and I, that he was responsible for that project.

Q. Okay. You were off working on some other

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projects?
A. Correct.
Q. But did Mr. Radovan keep you informed of what was going on with the Cal Neva development?
A. Occasionally.
Q. And attended executive committee meetings for the organization?
A. I believe I conducted either on the phone or in person all of the executive committee meetings.
Q. We talked a little bit yesterday about the development fee that CR Cal Neva was getting to help develop this project, correct?
A. I think so.
Q. I think we talked yesterday in the document we looked at was about $60,000 a month?
A. Yes. That's right.
Q. Did that contract extend through the entirety of the project or was that predevelopment services?
A. Well, it wasn't the entirety of the project. It was the entirety of the construction period, which would have included the predevelopment period.
Q. And I think when we looked at Exhibit Number 5 yesterday, we had a previous discussion on as of, I think -- if you look with me, maybe you can follow along, Exhibit

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Number 5 at page 21.

A. Okay.

Q. And remember we talked yesterday as of a certain date CR has received about $480,000 in development fees, as of June 1, 2014?

A. Yes, I see it.

Q. And albeit that may have been just a book entry, not an actual cash receipt?

A. No. I believe it was an actual cash receipt.

Q. And then after June 1 of 2014, did CR continue to receive development fees?

A. Yes, we did.

Q. Was that every month thereafter until a certain time frame?

A. Yeah. There was a cap on the amount of money that we could be paid as development fees of 1,200,000, and I believe that that cap, counting the money that we had already been paid, was reached somewhere in June or July of 2015.

Q. Was it all paid by that time?

A. I believe so.

Q. Can you look at Exhibit Number 44? The cover sheet is just an e-mail and there's some attached financial documents on the back?

A. Okay.

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Q. I'm interested in the balance sheet that is attached to this that has the columns going out until September 30th, 2015, and then the second page of that balance sheet, which would be page three of the balance sheet.

A. Page two?

Q. Page three.

A. Page three. Sorry.

Q. It's under the other current liabilities.

A. Okay.

Q. And I just had some questions with you. It looks like on the third entry down, it says due to CNL accrued development fees, and it look like they were on the books on the quarter ending March 31st, 2015. Am I reading that right?

A. I see it, yes.

Q. And still on the books on June 20th, 2015?

A. Yes.

Q. And then it looks like there was a zero balance as of September 30th, 2015. So were the remaining development fees actually paid to Criswell Radovan in that quarter, June 30th to September 15th?

A. You know, I don't know. I assume they had been paid before that, so maybe they were correcting an entry.

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Q. And did you and Mr. Radovan and Ms. Hill review these documents when you got ahold of Mr. Coleman on or about February 1st?

A. I was under the impression this is what needed to be signed.

Q. Did you review these documents?

A. I think so.

Q. Let's go through that. The first one at Bates 214 is called an assignment of interest in limited liability company.

A. Okay.

Q. And if you go down into the third whereas, it says, assignor and assignee have erroneously executed a subscription agreement dated October 13th, indicating the assignee was purchasing an interest as a preferred member from the company when actually the intent of the parties that assignee purchase such interest from assignee rather than the company.

So a couple there. Where did you get the information -- or where did Mr. Coleman get the information that somehow the two of you had erroneously signed the subscription agreement?

THE COURT: How would he know where Mr. Coleman got the information?

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A. I did not know that until I was informed of that, I don't know, a couple of days later.

Q. Informed by who?

A. I don't remember if it was Mr. Yount or Dave.

Q. Do you remember a conversation with Mr. Marriner where he said, we've got a perfect storm brewing. If Mr. Yount and Mr. Busick fund at the same time, what are we going to do?

A. It wasn't the same time, that was impossible, but I remember them talking about, it looked like they both could fund. I think Les had already funded.

Q. And did you tell Mr. Marriner what you were going to do if they, you know, contemporaneous funding like that?

A. It wouldn't be contemporaneous. But if later Mr. Yount wanted to fund, there's an available share under the PPM under the CR Cal Neva's founders share.

Q. So you would have to know whether or not Mr. Yount wanted to still continue to buy a CR share?

A. Whether he wanted to buy a founders share.

Q. Yes. But he couldn't buy a PPM share anymore, right?

A. Sure, he can. There's one available, the CR Cal Neva. It was preapproved in the PPM that every single investor signed.

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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 August 30, 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, 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 389, 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 26th day of September 2017.

S/s Stephanie Koetting
STEPHANIE KOETTING, CCR #207

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EXHIBIT 3

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EXHIBIT 3

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STEPHANIE KOETTING

CCR #207

75 COURT STREET

RENO, NEVADA

IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE PATRICK FLANAGAN, DISTRICT JUDGE

--oOo--

GEORGE S. YOUNT, et al., Plaintiffs, vs. CRISWELL RADOVAN, et al., Defendants.	Case No. CV16-00767 Department 7

TRANSCRIPT OF PROCEEDINGS

TRIAL VOLUME III

August 31, 2017

9:00 a.m.

Reno, Nevada

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

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APPEARANCES:

For the Plaintiff:

RICHARD G. CAMPBELL, ESQ.
Attorney at Law
100 W. Liberty
Reno, Nevada

For the Defendant:

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

ANDREW WOLF, ESQ.
Attorney at Law
264 Village Blvd.
Incline Village, Nevada

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with the appraisals, everything with them. Then they decided, this is like 4:00 in the afternoon, we're not going to give you the other extension. Do what you need to do. We filed Chapter 11 then on that date to avoid foreclosure.

BY MR. LITTLE:

Q. Sir, can you qualify how CR Cal Neva has been damaged by Mr. Yount and IMC's interference?

MR. CAMPBELL: Objection, lack of foundation.

THE COURT: Sustained. I'm sorry. Overruled. Go ahead.

THE WITNESS: I can tell you personally, you know, this thing is going to cost Bill and I at least 1.6 million, revenues that would have come to our operating company, a million dollars a year, roughly. Bill nor I have not been paid one penny in the last two years, which has dramatically cost us.

And the entire time, you know, me and my staff and Bill, we have worked tirelessly without getting paid, despite all of the, sorry, crap, worked to protect everyone's interests. And it's been a huge, huge toll on myself, my family. As Dave talked about it the other day, it's been unbelievably difficult, not just the capital side of it is devastating, and this never should have happened. This came from a couple of people trying to steal a project.

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A. Yes.
Q. -- chatter back and forth?
A. Yes.
Q. With the Incline Men's Group?
A. Yes.
Q. Mr. Yount, Ms. Kingston?
A. Yes.
Q. That's where you're getting the impression that somehow Mr. Yount interfered with the Mosaic loan?
A. That he's part of the group doing it, yes.
Q. And you're claiming that somehow Mr. Yount and the IMC are responsible for you and Mr. Criswell losing millions of dollars, correct?
A. Given that loan being tanked, that is -- I'm just talking about what it's cost us. The rest of the investor group, that could -- you know, we'll see where that ends up, but it's a substantial, substantial amount.
Q. Did you file a compulsory counterclaim against Mr. Yount from his lawsuit?
A. No.
Q. Did you file any lawsuit against the IMC or any of the other investors for interfering with that loan?
A. No. The outcome is not yet determined.
Q. You said the winery sale with Brandon Chaney, and

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Q. Was it kind of your habit at that time to communicate with parties via e-mail?
A. Yes. Most of it.
Q. I see you carry an IPad around with you.
A. I do.
Q. Is that pretty much how you communicate with people?
A. Yes.
Q. At this point, he says, I understand that you and Robert had a chance to talk yesterday in the first e-mail at the bottom of the string?
A. Yes.
Q. Do you remember that conversation with Robert?
A. I mentioned it happened. I don't remember the details of it.
Q. Let's go back to Exhibit Number 14. At the bottom of Exhibit Number 14, that first page, it says, as I understand it, you're over budget by more than 5 million so far. What will that and likely more funding needs come from?
A. Correct.
Q. As you understood it, where did your understanding come from? Had someone told you about the budget was $5 million over?
A. Robert Radovan had told me it was over 5 something

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million or perhaps more over budget at that point.
Q. And that would have been in the conversation?
A. Possibly the day before.
Q. Or that day of, right around that same time frame?
A. Yes.
Q. That's where you got the $5 million number?
A. Yes.
Q. Did Mr. Radovan at that time tell you that the 5 million and more might even total 9 or 10 million?
A. I believe he told me at the time that he was mentioning about the possibility of a refinancing the mezzanine loan. Should I not get into that?
Q. I'm talking about this meeting. When you would this discussion with Mr. Radovan --
A. He told me that it was a time about 5 million, maybe six, and that he was looking to create a cushion of some $3 million, making a total of nine.
Q. Okay. But he didn't tell you that the change orders he estimated, what the amount of the change orders he estimated to be at the time?
A. He expected more change orders, but he did not tell me there was any anticipated directly specifically over 5, 5 to 6.
Q. And he didn't ascribe a number to the amount of

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A. He explained the project was substantially over budget and it had to be totally refinanced or, basically, I believe it wasn't going to continue.

Q. Did he --

A. Refinanced or other capital put in somehow some way.

Q. Did he mention a number to your recollection?

A. He probably did, but I was kind of stunned at the moment. So, no, I don't recall.

Q. Prior to that time, I think your testimony was you didn't know about a total refinance at all?

A. No.

Q. And did Mr. Radovan or Mr. Criswell talk about the number ascribed to the change orders?

A. The number of change orders?

Q. The number ascribed to the change orders?

A. They may have. I don't recall what it was.

Q. You don't remember any discussion of how much the change orders amounted to?

A. I was under the impression from their discussion that it was substantially more than the 5 or 6 million, let alone the 9 million that was discussed previously.

Q. Okay.

A. And the project was not ready to be opened.

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Q. And did you attend the meeting with Mosaic?
A. No, not at all. I've never spoken to anyone in person or on the phone or any e-mail directly with Mosaic.
Q. And you never took any actions whatsoever with any of the other members to somehow undermine the Mosaic loan?
A. Not a chance. It would be to my detriment. Why would I do that? I didn't care who funded, as long as somebody funded it so they would get their money and I would get mine.
Q. Was that your position pretty consistently?
A. Very consistently.
Q. And that would be since December?
A. Yes, since December 12th.
Q. And that was your position in January?
A. Yes.
Q. And how about February?
A. Yes. How about today? Yes.
Q. Let's look at Exhibit Number 50.
A. All right. You want me to start at the back again?
Q. Sure.
A. Okay.
Q. And on the very first, go all the way to the back, the 2677 document?

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A. I believe so, $6 million, as I understood it.
Q. Hold on a second. Let's go to 122 now, Mr. Yount.
A. All right.
Q. This centers around the meeting of the Incline Men's Club with Mosaic, correct?
A. Yes.
Q. And what was your understanding of that meeting? Let me ask you this, how did you find out that the Incline Men's Club was going --
A. I believe Paul Jamieson told me.
Q. And did you have some concerns about that?
A. I did. As I said in there, my number one is, the meeting without CR, is that legit without CR and without their advanced permission?
Q. And then you wrote that you heard that Mosaic are sharks. Where had you heard that?
A. I don't remember for sure, but I believe it was Molly might have said that. But that's only a vague recollection.
Q. And then you go on, on number three, he said there's no way the redone appraisal will come with needed to get the 71 million funding. We'll still be unfunded. What are you talking about there?
A. I believe the condition under the Mosaic loan was

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Mr. Criswell was talking about?

A. Yes. Not the documents I expected.

Q. You got some documents?

A. I got documents.

Q. And did you review those documents?

A. Within, I believe an hour and a half I responded.

Q. And when you look at the first document, the assignment of interest in the limited liability company.

A. It was dating it back to October 13th and here we are in, what is it, February? February 2nd.

Q. Let me ask you this, under the whereas, did you believe you had erroneously executed a subscription agreement back in October?

A. No. I never erroneously did anything that I know of.

Q. That was the only document you were ever sent to sign, right?

A. Yes. There was no other documents to choose from.

Q. And Mr. Radovan had actually accepted that document we saw on the record?

A. In writing, yes.

Q. And it goes on to say, it was the intent of the parties that the assignee purchase such interest from the assignor. Was it ever your intent to purchase a CR share?

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A. I never knew of the concept until speaking with Mr. Criswell in January and Mr. Radovan. How could that have been my intent back in October?

Q. If you look at Exhibit Number 66, you responded fairly promptly to Mr. Coleman?

A. Yes. Quickly and strongly.

Q. And those are your comments to Mr. Coleman. We don't need to read those into the record. That's how you felt when you got the documents?

A. Yes. Absolutely.

Q. And you weren't going to sign these documents, right?

A. I did what?

Q. You weren't going to sign these documents?

A. Not a chance. They were total lies. They were nothing I ever agreed to or signed. Why would I sign something that was a total falsehood?

Q. Okay.

A. I took it that they were trying to cover their ass for mistakes they had made.

Q. Mistakes they made, you mean back in October?

A. Back in October, either illegally over selling the subscription of the 20 million, or not telling me and trying to cover it with a sale of one of their shares. Which if it

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was so darn valuable, why would they do that? Because I've got a great name in the community? I'm sorry, I don't buy that. They don't give up money for great names in the community unless they have to.

Q. Mr. Yount, you've heard testimony from, I think, Mr. Radovan, maybe Mr. Criswell, I can't remember, but something along the lines that you were trying to play both sides of the fence to get your money back and participate?

A. I did never wanted to participate. Ever since December 13th when I said I wanted my money back, I never changed from that one moment.

Q. But you did participate as far as talking with the other members of the group about potentially getting a refinance, right?

A. Yes. But that wasn't to my benefit except to get them paid off so they would pay me. I was never looking for a profit from them from that standpoint.

Q. Did you ever evidence an intent to anyone that you were going to stay in, leave your money in the project?

A. No chance. I lost all faith in the developers and therefore wanted out. I don't like doing business with people I don't trust.

Q. So it was never your intent to play both sides of the fence, so to speak?

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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 August 31, 2017, at the hour of TIME, and took verbatim stenotype notes of the proceedings had upon the trial in the matter of GEORGE S. YOUNT, Plaintiff, vs. CRISWELL RADOVAN, et al, Defendant, 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 619, 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 28th day of September 2017.

S/s Stephanie Koetting
STEPHANIE KOETTING, CCR #207

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EXHIBIT 4

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EXHIBIT 4

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STEPHANIE KOETTING

CCR #207

75 COURT STREET

RENO, NEVADA

IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE PATRICK FLANAGAN, DISTRICT JUDGE

--oOo--

GEORGE S. YOUNT, et al., Plaintiffs,	)	
vs.	)	Case No. CV16-00767
CRISWELL RADOVAN, et al., Defendants.	)	Department 7

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TRANSCRIPT OF PROCEEDINGS

TRIAL VOLUME V

September 6, 2017

1:30 p.m.

Reno, Nevada

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

003140

APPEARANCES:

For the Plaintiff:

RICHARD G. CAMPBELL, ESQ.
Attorney at Law
100 W. Liberty
Reno, Nevada

For the Defendant:

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

ANDREW WOLF, ESQ.
Attorney at Law
264 Village Blvd.
Incline Village, Nevada

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learned at the December meeting?
A. Correct.
Q. And that's the same meeting we talked about where the IMC folks were stationed around the room?
A. I never saw that.
Q. They were there making accusations against --
A. I recall them making accusations, yes.
Q. They led that charge, right?
A. I don't know if they led it.
Q. Let's circle back to where we left off last week. Before we do that, I want to summarize for everyone's benefit what I understood to be your testimony. First, I understood you to testify that since the end of January when you learned that CR Cal Neva had sold you one of its shares, you haven't held yourself out as an investor in the project, is that correct?
A. Well, I was told I wasn't an investor in the project.
Q. From that point forward, you didn't hold yourself out as an investor?
A. I attended meetings until I filed lawsuit, and at that point, I had given up on them buying out my share and I no longer attended any meetings.
Q. Do you have your deposition in front of you?

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Q. I believe one of your answers was you're trying to put words in my mouth, correct?

A. Yes.

Q. Was your understanding of what transpired at this Mosaic meeting pretty much garnered from this Exhibit Number 124?

A. Yes.

Q. So if you look at the first in the string of e-mails, which is at the back of the exhibit, it looks like the first e-mail was actually from Mosaic, correct?

A. Yes.

Q. So these are Mosaic's words, not yours, not members of the EC or anybody else?

A. Correct.

Q. And it starts out, they're interested in hearing about the history of the Mosaic involvement in Cal Neva with you and we explained our deal with them. We told them how we met you. We told them that we issued a term sheet. And we told them the day you executed. And he's sending this to Robert Radovan, right?

A. Yes.

Q. Then he also goes on and says, we also told them for better part of three months, we have not heard much from you or your team. They went on a little bit to explain the

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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. We're going to take a step back, tear up the executive term sheet, 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. This was Mosaic speaking right now?

A. Yes.

Q. Would you agree with Mosaic that as of February 1st, 2016, that there was a little bit of a mess with the project?

A. That would be an understatement. It was grand magnitude.

Q. And then you were on the next e-mail string, which looks like was sent from -- I think this was Paul Jamieson in the middle of the second page. Your representatives on the executive committee had an informative, constructive and very positive meeting with Mosaic?

A. Yes.

Q. And who do you understand Phil Busick was?

A. Phil Busick is Les Busick's son and they work together on their investment, their family investment in the project.

Q. And the Busicks had how much money into this

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Were there conversations in the EC in that November meeting about either go, no go with the Mosaic loan?

A. We told Robert we thought it was in the best interests of the project to try to see what kind of terms we could get out of Mosaic. And at that point, Troy Gillespie had stepped off of the EC, he was so disgusted with Robert and Bill managing it. So Paul Jamieson was added on to the board.

Paul was kind of a whiz when it comes to analyzing financial matters. We were very interested to see what terms we could get and how it would affect the overall, you know, performance of the project. We didn't want to go from the frying pan into the fire, but we needed to figure out this problem, because Robert and Bill couldn't do it on their own.

Q. So did you get some kind of follow-up on that from Mr. Radovan and Mr. Criswell that outlined those?

A. In November, December and January, we really could not get any information about it. It was like they kind of pushed Mosaic to the side. We kept asking about it.

Q. Okay. And did there come a time when you met with Mosaic?

A. Yes. The entire EC, other than Robert and Bill, met with Mosaic I think in the beginning of February in Sacramento.

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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 6, 2017, at the hour of 1:30 p.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 845, 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 10th day of October 2017.

S/s Stephanie Koetting
STEPHANIE KOETTING, CCR #207

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EXHIBIT 5

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EXHIBIT 5

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STEPHANIE KOETTING

CCR #207

75 COURT STREET

RENO, NEVADA

IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE PATRICK FLANAGAN, DISTRICT JUDGE

--oOo--

GEORGE S. YOUNT, et al., Plaintiffs, vs. CRISWELL RADOVAN, et al., Defendants.	Case No. CV16-00767 Department 7

TRANSCRIPT OF PROCEEDINGS

TRIAL VOLUME VI

September 7, 2017

9:00 a.m.

Reno, Nevada

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

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APPEARANCES:

For the Plaintiff:

RICHARD G. CAMPBELL, ESQ.
Attorney at Law
100 W. Liberty
Reno, Nevada

For the Defendant:

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

ANDREW WOLF, ESQ.
Attorney at Law
264 Village Blvd.
Incline Village, Nevada

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your last name?

A. Kenneth Tratner, T-r-a-t-n-e-r.

THE COURT: Thank you.

BY MR. CAMPBELL:

Q. You're Mr. Yount's accountant?

A. That's correct.

Q. And how long have you been his accountant?

A. For over 25 years.

Q. In July or August of 2015, did Mr. Yount contact you about an investment he was contemplating?

A. Yes, he did.

Q. And what investment did he say he was looking at?

A. A project that related to the Cal Neva Hotel.

Q. And did he ask you to do some investigation on that project?

A. Yes.

Q. What did he ask you to do?

A. He forwarded some of the offering documentation and asked that I take a look at it for overall reasonableness.

Q. When you say overall reasonableness, what were you understanding that to be?

A. Looking at the financial reports that were in the documentation for the investment opportunity and whether the

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numbers made sense.

Q. And the numbers, are you talking about budget numbers or revenue numbers?

A. It was a combination of the project costs and profit and loss forecast for a period of time.

Q. And was specifically Mr. Yount asking for some conclusion as to some aspect of the project?

A. It was an overall sort of a, do the numbers make sense from an investment opportunity perspective.

Q. Investment opportunity, meaning return on investment?

A. Yes.

Q. Were you provided with -- strike that. At some point, did you have either a telephone conversation or an e-mail exchange with a Mr. Robert Radovan?

A. I believe I spoke to him.

Q. And did Mr. Radovan or one of his employees or associates send you certain documents?

A. They did. They sent some updated financial projections on the project.

Q. And when you say, updated financial projections, what did that entail?

A. It was basically a profit and loss for a ten-year time horizon.

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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 7, 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 977, 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 12th day of October 2017.

S/s Stephanie Koetting
STEPHANIE KOETTING, CCR #207

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EXHIBIT 6

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EXHIBIT 6

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STEPHANIE KOETTING

CCR #207

75 COURT STREET

RENO, NEVADA

IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE PATRICK FLANAGAN, DISTRICT JUDGE

--oOo--

GEORGE S. YOUNT, et al., Plaintiffs,	)	
vs.	)	Case No. CV16-00767
CRISWELL RADOVAN, et al., Defendants.	)	Department 7

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TRANSCRIPT OF PROCEEDINGS

TRIAL VII

September 8, 2017

9:00 a.m.

Reno, Nevada

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

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APPEARANCES:

For the Plaintiff:

DOWNY BRAND
By: RICHARD CAMPBELL, ESQ.
100 W. Liberty
Reno, Nevada

For the Defendant:

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

ANDREW WOLF, ESQ.
Attorney at law
264 Village Blvd.
Incline Village, Nevada

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And, in addition, that refinance of the mezzanine loan, that was the only time that anybody told Mr. Yount about a refinance, those terms that we were going to get a better terms. But we know Mr. Radovan testified here and, again, in deposition that he knew in September, maybe even as early as August, that they needed to refinance the entire project. And if they didn't refinance that entire project, they were not going to finish this deal.

And he never told Mr. Yount that. Telling Mr. Yount that we're going to do a 15 million mezz refinance, which, six plus will go to payoff, and going to a total refinance of the project with substantial additional funds, somewhere between 16 million more than the budget, that's a material fact. I mean, if I was an investor, anybody who was an investor, they would want to know that the project was now going to have to be refinanced and it's not going to go forward.

THE COURT: But wasn't this discussed amongst the EC for months? I mean, they had been in negotiations with Mosaic in November. Those individuals were clearly aware that that was one of the options, the total refi was one of the options, the mezz was another, a capital call was a third. Would you argue that having all of those options on the table is a dereliction of the duty of the management,

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Criswell and Mr. Radovan are individually liable in this case.

I'm going to move to the Mosaic loan issue.

THE COURT: We want to make sure that we give the other side sometime as well.

MR. CAMPBELL: I can wrap this up pretty quick, your Honor.

THE COURT: Go ahead.

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. Obviously, all the investors were concerned. We've got the e-mails. They're trying to work out a strategy. Mr. Yount has no -- what incentive would he have to undermine the Mosaic loan? Mr. Criswell tells him in exhibit --

THE COURT: Clearly none.

MR. CAMPBELL: 51.

THE COURT: I think everybody testified that Mosaic was the best option. Mr. Chaney said it as well. It was the best option to rescue the project.

MR. CAMPBELL: We have the best evidence in this case as to what happened with Mosaic, their own words in the

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testifying that he was mislead, duped, kept in the dark.

More importantly, where was Mr. Busick or any of the investors to support Mr. Yount's supposition that this project was failing when he made his investment? After all, your Honor, this supposition, this belief by Mr. Yount that the project was tanking is the one fact that is necessarily holding up his causes of action. If you take away that fact, they crumble.

You should also be asking yourself not only where was Mr. Busick and the other investors, where was Penta, where was Peter Grove the project architect? If this project was truly crumbling when he invested, where was the Penta or the architect here saying they weren't being paid, they were threatening to walk off the job, or they lacked confidence in the project.

Your Honor, none of those people were here and that should sound a massive red flag to this Court that the things in this case were not as Mr. Yount believed them to be with the benefit of hindsight and after drinking IMC's Kool-Aid.

Now, Mr. Campbell may come back in his redirect and say, why didn't you call these people? The answer is simple, your Honor, we did not need to. This is their case, not ours. It's their burden of proof, not ours. We knew

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And they argue that based on Mr. Chaney's evidence that there's no way that the members would have approved Mr. Yount. Common sense, your Honor, that is a ridiculous, preposterous argument. We've seen the e-mails. He is designated as the co -- what was the word they used -- co-spokesperson. He was welcomed into this group of investors. There's absolutely no evidence that they wouldn't have approved Mr. Yount. And, regardless, Mr. Coleman told you the operating agreement is clear that even if he didn't get approval, he still holds all the economic benefits of the investment.

The reality and the other point is, your Honor, which I think is a significant point, Mr. Yount chose to rescind this transaction on a false assumption before -- in fact long before he even claims he knew that he bought a different founders share. He was trying to get out before then. So he's now coming to Court using this situation as an excuse to try to get out. But, your Honor, it's a red herring, because the sale wasn't wrongful and it certainly isn't something that is excused by law. And, again, he suffered no damages.

Which brings me back to my last point, which is at the beginning I said we need to talk about what the case isn't before we talk about what it is. We're at that point

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now and this is a case where Mr. Yount got exactly what he bargained for. He wanted a founders share, he got a founders share. And if he has any damages, which we don't believe he has, he's caused the damages by getting in bed with the Mosaic people and --

THE COURT: The IMC.

MR. LITTLE: IMC. Thank you. It's nonsense. I'm not going to go through the e-mails. It's all in our defendant's exhibits. It's nonsense to believe he distanced himself from that and he didn't want any part of it. There's e-mails about a cohesive unit. He's acknowledging, not them, he's acknowledging that they're going to be good cop, bad cop. He's having one-on-one conversations with the IMC group in the days leading up to their secret meeting.

And they clearly know that about that secret meeting. There's alarm bells going off in his mind that doesn't seem like something that is probably good, it might be interference with a contract. It is interference with a contract and he didn't do anything to stop it. And that's because he testified and he knew that those people who he was listening to, the IMC people, weren't proponents of Mosaic. They wanted their own financing. They were looking at their own financing.

And that's why they stalled Mosaic and they went

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to them. And they want to have you believe that it's lack of faith in Criswell Radovan. You heard the phone message. Does that sound like they had lack of faith in us? Absolutely not. Is it a mere coincidence that the very day that IMC meets with Mosaic, that they send a letter terminating the term sheet and completely backing out?

And if you want to believe their story that we love Mosaic, of course, why would we try to sink it? If Mosaic invited those people that they met with at IMC, let's go back and let's have more discussions. You heard the evidence. They didn't do that. They didn't want Mosaic. They wanted their own financing and they're responsible for where this project is, your Honor. And Mr. Yount was part of that. And to sit here and say he wasn't is disingenuous. It's in the documents.

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. He put himself in the position he is now. He not only caused himself to lose potentially this $1 million, he's cost CR Cal Neva over

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That's exactly what he was doing here. He was talking to people he trusted, Peter Grove, his own CPA. He wasn't relying on Mr. Marriner for project information. He was going to Mr. Radovan. He was going to his own CFO to evaluate that information. So we believe all the elements to either negate reliance or to carry the defense under Blanchard are established through the facts of this case.

And I appreciate that the Court was familiar with that August 3rd e-mail. Mr. Marriner, I'm talking to Radovan directly now, I'm really not looking to you for information, thanks for calling me, in so many words.

So with that, there's been a lot of talk of the Mosaic deal and how it was torpedoed. I share the same view as Mr. Little that if there were damages from this investment, it's not from -- he got a Cadillac. He got a new Cadillac. There's no evidence of a difference in value. If it's because the project failed, the project failed in the aftermath, after the investment, after the Mosaic loan was interfered with.

I don't believe Mr. Yount conspired to interfere with that loan, however, he had an opportunity, he knew the meeting that was about to happen was probably not legit, in his words, and he had an opportunity to head off the CR people at the pass and maybe avoid what happened, which is

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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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EXHIBIT 7

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EXHIBIT 7

Non-Jury Trial Exhibits

PLTF: **George S. Yount et al.** PATY: **Richard G. Campbell, Jr., Esq.**
DEFT: **Criswell Radovan et al.** DATY: **Martin Little, Esq. & Andrew Wolf, Esq.**

Case No: CV16-00767 Dept. No: 7 Clerk: Kim Oates Date: August 29, 2017

Exhibit No.	Party	Description	Marked	Offered	Admitted
1	Plaintiff	Real Estate Consulting Agreement Cal NevaLodge Development			
2	Plaintiff	Email from Yount to Dave Marriner re: Cal Neva Lodge Business Plan			
3	Plaintiff	Private Placement Memorandum			
4	Plaintiff	CalNeva Resort & Casino Confidential Offering Memorandum			
5	Plaintiff	Cal Neva Lodge, LLC Amended and Restated Operation Agreement			
6	Plaintiff	Email from Marriner to Yount re: Cal Neva Progress Pictures and Video			
7	Plaintiff	Email from Yount to Marriner re: Cal Neva			
8	Plaintiff	Email from Marriner to Yount re: Cal Neva			
9	Plaintiff	Email from Marriner to Yount re: "Confidential" Cal Neva Founders Equity			
10	Plaintiff	CalNeva Renovation Monthly Status Report			
11	Plaintiff	Email from Marriner to Yount re: Cal Neva			
12	Plaintiff	Email from Marriner to Yount re: Cal Neva			
13	Plaintiff	Email from Peter Grove to Yount re: Cal Neva			
14	Plaintiff	Email from Marriner to Yount re: Cal Neva			

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Exhibit No.	Party	Description	Marked	Offered	Admitted
15	Plaintiff	Email from Yount to Marriner re: Cal-Neva/Progress Report (Confidential)			
16	Plaintiff	Email from Marriner to Younts re: Cal-Neva/Progress Report (Confidential)			
17	Plaintiff	Email from Yount to Robert Radovan re: Cal Neva			
18	Plaintiff	Email from Robert Radovan to Yount re: Cal Neva			
19	Plaintiff	Email from Yount to Ken Tratner re: Potential 401k Investment for Stu			
20	Plaintiff	Email from Robert Radovan to Yount re: Debt			
21	Plaintiff	Cal Neva Lodge Investment Notes			
22	Plaintiff	Email from Marriner to Yount re: Cal Neva			
23	Plaintiff	Email from Yount to Ken Tratner re: Cal Neva			
24	Plaintiff	Email from Robert Radovan to Yount re: Questions			
25	Plaintiff	Email from Pete Dordick to Yount, et al re: Calneva			
26	Plaintiff	Email from Yount to Pete Dordick, et al re: Calneva			
27	Plaintiff	Email from Yount to Ken Tratner re: Cal Neva			
28	Plaintiff	Email from Yount to Peter Grove re: Cal Neva			
29	Plaintiff	Email from Yount to Marriner re: Cal Neva Founder's Membership			
30	Plaintiff	Email from Marriner to Yount re: Application forms for your self-directed IRA			

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Exhibit No.	Party	Description	Marked	Offered	Admitted
31	Plaintiff	Email from Doug Driver to Yount re: Cal Neva			
32	Plaintiff	Email from Marriner to Yount re: Cal Neva			
33	Plaintiff	Email from Heather Hill to Bruce Coleman re: Cal Neva Equity			
34	Plaintiff	Email from Yount to Doug Driver re: Cal Neva			
35	Plaintiff	Email from Heather Hill to Yount & Radovan re: Cal Neva			
36	Plaintiff	Email from Robert Radovan to Yount re: (no subject)			
37	Plaintiff	Email from Yount to Marriner re: Cal Neva			
38	Plaintiff	Email from Heather Hill to Cheri Montgomery re: Cal Neva Investment – Mr. Yount			
39	Plaintiff	Email from Marriner to Younts re: Cal Neva Founder's Ownership			
40	Plaintiff	Acceptance of Subscription			
41	Plaintiff	Email from Yount to Marriner re: Cal Neva			
42	Plaintiff	Email from Cheri Montgomeryto Doug Driver re:Signed documents for – Cal Neva investment – Mr. Yount			
43	Plaintiff	140784.00 Cal Neva Tower Renovation Contract Change Orders - 8 -14			
44	Plaintiff	Email from Heather Hill to Anthony Zabit, et al re: Financials by quarter through Q3			
45	Plaintiff	Email from Marriner to Robert Radovan & William Criswell re: Questions from Financial Mtg			
46	Plaintiff	Email from Yount to Bill Criswell re: FW:			

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Exhibit No.	Party	Description	Marked	Offered	Admitted
47	Plaintiff	Email from Yount to Marriner re: Cal Neva Progress Report (Confidential)			
48	Plaintiff	Email from Yount to Paul Jameson re: Cal Neva Progress Report (Confidential)			
49	Plaintiff	Email from Heather Hill to jasperreddog@gmail.com, et al re: Executive Committee Meeting/Call Dec 18, 2015			
50	Plaintiff	Email from Paul Jameson to Yount re: Cal-Neva Investment			
51	Plaintiff	Email from William Criswell to Yount re: Cal Neva-Investment			
52	Plaintiff	Email from Paul Jameson to Anthony Zabit, et al re: Agenda and materials – missing items			
53	Plaintiff	Email from Bruce Coleman to William Criswell and Robert Radovan re: Proposed Amendment to Operating Agreement			
54	Plaintiff	Email from Heather Hill to Anthony Zabit, et al re: Additional items for the call today			
55	Plaintiff	Email from Paul Jameson to Yount, Heather Bacon and Geri Yount re: Follow up			
56	Plaintiff	Email from Yount to Heather Hill, et al re: Meeting Minutes Jan 8, 2016			
57	Plaintiff	Email from Heather Hill to Marriner, Robert Radovan and William Criswell re: January 19th 11am (PT) Executive Committee & Member call			
58	Plaintiff	Email from Yount to Molly Kingston re: Cal Neva			
59	Plaintiff	Email from Paul Jameson to Yount re: January 27th Cal Neva Monthly Meeting			
60	Plaintiff	Email from Marriner to Jeremy Page re: January 27th Cal Neva Monthly Meeting			

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Exhibit No.	Party	Description	Marked	Offered	Admitted
61	Plaintiff	Email from Robert Radovan to Bruce Coleman re: January 27th Cal Neva Monthly Meeting			
62	Plaintiff	Email from Yount to Marriner re: January 27th Cal Neva Monthly Meeting			
63	Plaintiff	Email from William Criswell to Yount re: Assignment of Interest in Cal Neva Lodge, LLC			
64	Plaintiff	Email from William Criswell to Heather Hill re: Stewart Yount Documents			
65	Plaintiff	Email from Bruce Coleman to Yount re: Assignment of Interest in Cal Neva Lodge, LLC			
66	Plaintiff	Email from Yount to Bruce Coleman re: Assignment of Interest in Cal Neva Lodge, LLC			
67	Plaintiff	Email from Yount to Coleman re: Assignment of Interest in Cal Neva Lodge, LLC			
68	Plaintiff	Email from Radovan to Paul Jameson re: Savage & Sons			
69	Plaintiff	Email from Yount to Robert Radovan and Bill Criswell re: Yount Cal Neva Investment			
70	Plaintiff	Email from Bruce Coleman to William Criswell re: Yount IRA Investment			
71	Plaintiff	Email from Bruce Coleman to Yount re: Yount IRA Investment			
72	Plaintiff	Email from Yount to Bruce Coleman re: January 27 Cal Neva Monthly Meetings			
73	Plaintiff	Email from Radovan to Criswell re: Stuart Yount Complaint			
74	Plaintiff	Email from Robert Radovan to William Criswell re: Yount v. Criswell Radovan, LLC, et al.			

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Exhibit No.	Party	Description	Marked	Offered	Admitted
75	Plaintiff	Email from Heather Hill to Criswell & Radovan re: Yount/Marriner			
76	Plaintiff	Email from Ali P. Hamidi to Marriner re: Yount law suit			

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Non-Jury Trial Exhibits

PLTF: GEORGE S. YOUNT, et al. PATY: Rick Campbell, Esq.
DEFT: CRISWELL RADOVAN, et al. DATY: Martin Little, Esq. & Andrew Wolf, Esq.

Case No. : **CV16-00767** Dept. No. **7** Clerk: **Kim Oates** Date: **August 29, 2017**

Exhibit No.	Party	Description	Marked	Offered	Admitted
100	Defendant	Email string Yount to Driver (2/21/14) re Cal Neva NDA (Yount, Exhibit 49) GSY002644-2646			
101	Defendant	Cal Neva Funding Status (4/23/14) chart (Marriner, Exhibit 21)			
102	Defendant	Email string Yount to Radovan (7/29/15) (Yount, Exhibit 59)			
103	Defendant	Email string Yount to Tratner (8/8/15) re potential 401k investment for Stu (GSY004677-4679)			
104	Defendant	Email string Yount to Tratner (8/17/15) re Calneva (GSY000856-857)			
105	Defendant	Email string Marriner to Yount (9/16/15) chart (Marriner, Exhibit 30)			
106	Defendant	Email string Marriner to Yount (10/1/15) chart (Marriner, Exhibit 31)			
107	Defendant	Wiring Instructions Criswell Radovan, LLC (Yount, Exhibit 71)			
108	Defendant	Email transmittal from Montgomery/Premier Trust to Driver (10/14/15) re signed documents for Cal Neva investment – Mr. Yount (Coleman, Exhibit 36)			
109	Defendant	Email Chaney to investors Racich, et al. (12/17/15) re Cal Neva information on Drop Box (GSY000350)			
110	Defendant	Email Jameson to Busick, et al (12/22/15) re Investor Action List (GSY000296-298)			
111	Defendant	Correspondence from Cannito/PENTA to Cal-Neva Lodge and TDS, Inc. (12/31/15) re Demand for Evidence of Adequate Financial Arrangements and Notice of Right to Stop Work Pursuant to NRS 624.610(1) (GSY001815-1816)			
112	Defendant	Email Young to Jameson (1/7/16) re PENTA letter (GSY001817)			
113	Defendant	Email string Jameson to Hill, et al., (1/7/16) re Agenda and materials-missing items, and equity table (GSY002068-2069)			
114	Defendant	Email Jameson to Criswell, et al (1/22/16) re CR and preferred majority discussion pre-EC meeting 1/27 at IMC			

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Non-Jury Trial Exhibits

PLTF: GEORGE S. YOUNT, et al. PATY: Rick Campbell, Esq.
DEFT: CRISWELL RADOVAN, et al. DATY: Martin Little, Esq. & Andrew Wolf, Esq.

Case No. : **CV16-00767** Dept. No. **7** Clerk: **Kim Oates** Date: **August 29, 2017**

115	Defendant	Email Chaney to Young (1/24/16) re discussion about Robert (Yount, Exhibit 79)			
116	Defendant	Email string Jameson to Yount (1/25/16) re "My Notes" (GSY004648)			
117	Defendant	Email string Gibson to Marriner, et al. (1/26/16) re Cal Neva Monthly Meeting (GSY 004548-4557)			
118	Defendant	Email Jameson to Yount (1/26/16) re CR (Yount, Exhibit 81) (GSY002999)			
119	Defendant	Email Jameson to Busick (1/27/16) re Cal Neva Meeting next week (Yount, Exhibit 82) (GSY002584-2587)			
120	Defendant	Email Jameson to Yount (1/28/16) re Rogert – North Light (Yount, Exhibit 83) (GSY004721)			
121	Defendant	Email Yount to Jameson (1/30/16) re talk with Jeremy (GSY005040)			
122	Defendant	Email string Jameson to Yount (1/31/16) re talk with Jeremy (Yount, Exhibit 84) (GSY004797-4798)			
123	Defendant	Email string Criswell to Hill re Assignment of Interest in LLC with attached documents (Coleman, Exhibit 40) (CR000212-219)			
124	Defendant	Email string Jameson to Radovan, et al. (2/2/16) re Interim EC report re 2/1 Mosaic loan meeting (page 76-80)			
125	Defendant	Email from Yount to Kingston (2/2/16) re "utterly confused" re meeting with Mosaic 2/1 (GSY004841)			
126	Defendant	Email from Kingston to Yount (2/2/16) re "novel approach" [Confidential] re CR (GSY001805)			
127	Defendant	Email string Jameson to Yount (2/2/16) re assignment of interest in Cal Neva Lodge, LLC (Yount, Exhibit 86) (GSY002172-2175)			
128	Defendant	Email string Yount to Kingston (2/2/16) re "novel approach" [Confidential] re letter to shareholders re CR (Yount, Exhibit 85) (GSY004654-4655)			
129	Defendant	Email string S Yount to G Yount(2/3/16) re Interim EC report re 2/1 Mosaic loan meeting (Yount, Exhibit 87) (GSY000903-908)			

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Non-Jury Trial Exhibits

PLTF: GEORGE S. YOUNT, et al. PATY: Rick Campbell, Esq.
DEFT: CRISWELL RADOVAN, et al. DATY: Martin Little, Esq. & Andrew Wolf, Esq.

Case No. : **CV16-00767** Dept. No. **7** Clerk: **Kim Oates** Date: **August 29, 2017**

130	Defendant	Email string Jameson to Yount (2/5/16) re Sharing Roger info – perhaps Boulder Bay summary (GSY004947)			
131	Defendant	Email string Yount to Jameson (2/5/16) re potential new developers (Yount, Exhibit 88) (GSY004690-4691)			
132	Defendant	Email string Jameson to Yount (2/14/16) re Paramount-inv (GSY004668-4669)			
133	Defendant	Email string Jameson to Yount (2/26/16) re "another day!?!?!?!?" re 5M agreement (Yount, Exhibit 89) (GSY002072-2073)			
134	Defendant	Email string Jameson to Chaney et al. (2/28/16) re Cal Neva EC Report on Financing (GSY00161-162)			
135	Defendant	Purchase and Sale Agreement Feb __, 2016, Global Bancorp and New Cal Neva (GSY002446-2473)			
136	Defendant	Email string (3/8/16) Kingston to Yount re EC voting members excluding CR (GSY04154-4158)			
137	Defendant	Correspondence Chaney to Radovan and Criswell (3/11/16) re Formal Notice of Breach of Cal Nev Lodge Operating Agreement (GSY001820-1822)			
138	Defendant	Email G Yount to Hill et al (3/14/16) re Cal Neva March 15, 2016 monthly reporting			
139	Defendant	Email Kingston to Yount (3/14/16) re lack of progress (GSY004619-4621)			
140	Defendant	Email string Yount to Kingston (3/14/16) re lack of progress (accidental response to confidential email instead of EC email) (Yount, Exhibit 90)(GSY0004602-4605)			
141	Defendant	Email string Yount to Busick (3/14/16) re lack of progress, re Paul's commission (GSY0004626-4631)			
142	Defendant	Email string Yount to Jameson (3/15/16) re Important Disclosure to Cal Neva Lodge, LLC Membership (Yount, Exhibit 91) (GSY002044-2047)			
143	Defendant	Email string Jameson to G Yount (3/16/16) re meeting 3/17/16 (GSY005050)			

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Non-Jury Trial Exhibits

PLTF: GEORGE S. YOUNT, et al. PATY: Rick Campbell, Esq.
DEFT: CRISWELL RADOVAN, et al. DATY: Martin Little, Esq. & Andrew Wolf, Esq.

Case No. : **CV16-00767** Dept. No. **7** Clerk: **Kim Oates** Date: **August 29, 2017**

144	Defendant	Email string S Yount to G Yount (3/18/16) re notice as discussed (GSY004650)			
145	Defendant	Email string Yount to Kingston (3/23/16) re Len Savage – reach out (GSY004638)			
146	Defendant	Email string Jameson to Yount (3/25/16) re Cal Neva (GSY002276-2279)			
147	Defendant	Executive Summary re CalNeva Hotel & Casino – Phase 2 (GSY000124)			
148	Defendant	CalNeva Resort – Forecast spreadsheet 2015-2024 (GSY000301-302)			
149	Defendant	Marx/Okubo Monthly Progress Report No. 14 re Cal-Neva Resort and Spa dated 1/26/16 (GSY00419-439)			
150	Defendant	Exhibit 2 to Defendant's Opposition to Motion for Summary Judgment – Promissory Note from New Cal-Neva Lodge, LLC to Ladera Development, LLC dated 9/30/14 in the amount of $6,000,000 (10 pages)			
151	Defendant	Color charge code spreadsheet/summary for Cal-Neva Hotel (2/1/16) (5 pages)			
152	Defendant	Unconditional Waiver and Release Upon Progress Payment (12/24/14) re Cal Neva Tower Renovation by PENTA Building Group (CR 000351-360)			
153	Defendant	Applications and Certificates for Payment (CR00361-628)			
154	Defendant	Second Amended Complaint filed 9/27/16 (18 pages)			
155	Defendant	Exhibit 6 to Plaintiff's Opposition to Defendant's Motion for Summary Judgment (Affidavit of George Stuart Yount)			
156	Defendant	Schedule of Cal Neva Unsecured Claims			

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EXHIBIT 8

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EXHIBIT 8

From: Paul Jameson <pjameson@elevateig.com>
Sent: Sunday, January 31, 2016 1:56 PM
To: Stuart Yount
Cc: Geri Yount
Subject: Re: Talk w/Jeremy

But to be clear they do not know this particular meeting is happening. The EC can decide if it wants to share... Only the EC is going to be in attendance

—
Paul Jameson
Elevate Investment Group
pjameson@elevateig.com
775-200-7547

On Sat, Jan 30, 2016 at 7:06 PM, Paul Jameson <pjameson@elevateig.com> wrote:

> Yes it is approved. They may not be pleased about it, but they authorized such discussions. What makes it imperative is what we have heard from mosaic about their opinion of CR... this meeting is critical for our benefit, and frankly, for CR's benefit as well if they want us to consider such an expensive loan.
>
> I've heard the shark reputation elsewhere too. That said, if we get the terms we want, then it doesn't matter how shark-like a lender is. That only applies to inexperienced borrowers from my perspective.
>
> Agreed on appraisal most likely, but let's just get the appraisal before making commitments to any financing party. I'm pressing for the revision to be complete next week.
>
> Correct on the cost for construction increasing, but I believe much of the soft cost is fluff that can be cut out entirely.
>
> Lastly, we should be getting an LOI from an equity party before Wednesday. This is one who would be friendly and favorable, and I believe Hall and Penta would stay in if this party were to enter. I also had a great call with Roger yesterday and can fill you in when you are back.
>
> —
> Paul Jameson
> Elevate Investment Group
> pjameson@elevateig.com
> 775-200-7547
>
> On Sat, Jan 30, 2016 at 4:56 PM, Stuart Yount <syount@fortifiber.com> wrote:
>
> > 1. He said 3 of the EC is having a mtg w/Mosaic in Sac on Mon, without CR. Is that legit without CR without their advance permission?
> > 2. He said he's been told that Mosaic are "sharks" & will want the project to go broke, flush us investors out &

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take it for themselves.
3. He said there's no way the redone appraisal will come up to what's needed to get the needed $71m funding, we'll still be underfunded.
4. If we miss summer, as now expected, $71m won't be adequate either.

Stuart Yount
Chairman & CEO
Fortifiber Corporation
300 State Route 28
Box 308
Crystal Bay, NV 80402
(775) 843-0486

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EXHIBIT 9

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EXHIBIT 9

From: Paul Jameson <paul.g.jameson@gmail.com>
Sent: Tuesday, February 2, 2016 9:55 AM
To: Robert Radovan; Heather Hill
Cc: Anthony Zabit; Arthur Prieston; Brandon Chaney; CEA Ventures, LP; Chris Gibson; Dave & Carol; Dave Marriner; Geri Yount; Jeremy Page; Jim Davis; Joan Davis; John Paye; Les Busick; Michael Dixon; Molly Kingston; Munnerlyn Revocable Trust; Oakdale Ave. Partners, LP; Phil Busick; Sharon Dixon; Sinatra Family; Steve Kegel; Steve Mariucci; The Erickson Family Trust; Thorpe Investments, LP; Tim Racich; William Criswell; William Gibson; Stuart Yount; jeff@connorgp.com; James Pickett; Lisa Pacey-Willis; Troy Gillespie; judy.munnerlyn@gmail.com; Pete Dordick
Subject: Re: Interim EC report regarding 2/1 Mosaic loan meeting

Thank you Robert,

The email from Heather forced the hand to provide a report as a duty to the members.

Let's talk about this tomorrow so we follow through on our commitment to the members to not volley emails back and forth.

I called you earlier, I'd suggest we send out an agenda to all attendees today for tomorrow's call.

Regards,

Paul

On Tue, Feb 2, 2016 at 09:35 Robert Radovan <robert@criswellradovan.com> wrote:

Paul,

At the direction of the Executive Committee (EC) and the members, CR scheduled a meeting with Mosaic for 5pm Monday and all EC members confirmed their attendance in person or by phone. The earlier meeting you had was not an EC meeting with Mosaic.

As I have noted numerous times, Mosaic has been irritated by our sluggishness over the past few months, which CR was directed to do by the EC on several different occasions, as referenced by meeting minutes.

Their concerns regarding budget are to understand "cost to complete". The entire purpose of their loan was to bring added capital into the project.

Mosaic had already agreed to the higher loan at $51 million and a 2.5 year term. PKF was revising the appraisal for the added value. They had not subscribed any value to Fairwinds or the condo/TAU conversion or added keys.

Why was the meeting held when the EC had already scheduled and confirmed the Mosaic meeting.

Robert

From: Paul Jameson <paul.g.jameson@gmail.com>
Date: Tue, 2 Feb 2016 07:53:26 -0800

To: Heather Hill <Heather@criswellradovan.com>
Cc: Anthony Zabit <azabit@dimension4.com>, Arthur Prieston <aprieston@priestongroup.com>, Brandon Chaney <brandon1536@gmail.com>, "CEA Ventures, LP" <dmgibson5@gmail.com>, Chris Gibson <chris.gibson@twainfinancial.com>, Dave Martin <daveandcarol1@cox.net>, Dave Marriner <marrinertahoe@gmail.com>, Geri Yount <geriattahoe@fortifiber.com>, Jeremy Page <jpage@elevateig.com>, Jim Davis <jcddx1@gmail.com>, Joan Davis <Joandavisartstudios@gmail.com>, John Paye <jasperreddog@gmail.com>, Les Busick <lpbusick@gmail.com>, Michael Dixon <miked@dfsinc.com>, Molly Kingston <mkingston@arrowinvest.com>, Munnerlyn Revocable Trust <charlesrm@comcast.net>, "Oakdale Ave. Partners, LP" <Tectajohn@comcast.net>, Phil Busick <philbusick@gmail.com>, Robert Radovan <robert@criswellradovan.com>, Sharon Dixon <sdixon875@gmail.com>, Robert Finkelstein <rfinkelstein@raf-ltd.com>, Steve & Vicki Kegel <skegel@tahoemountainresorts.com>, Steve Mariucci <smariucci@comcast.net>, The Erickson Family Trust <phil@inclineholding.com>, "Thorpe Investments, LP" <athorpe@hf.com>, Tim Racich <Tim@calpacproperties.com>, Bill Criswell <bill@criswellradovan.com>, William Gibson <wgibson@cfmlogistics.com>, Yount <Syount@fortifiber.com>, Jeff Pickett <jeff@connorgp.com>, James Pickett <jpickett@laderaventures.com>, Lisa Pacey-Willis <LisaP@criswellradovan.com>, Troy Gillespie <troygillespie10@yahoo.com>, "judy.munnerlyn@gmail.com" <judy.munnerlyn@gmail.com>, Pete Dordick <pete@criswellradovan.com>
Subject: Interim EC report regarding 2/1 Mosaic loan meeting

All,

Your representatives on the Executive Committee ("EC") had an informative, constructive and very positive meeting with Mosaic. Only members of the EC and representatives for Mosaic were in attendance. More details will be provided on the EC call tomorrow, and we encourage everyone to attend.

Overall, yesterday's meeting was a step towards, rather than away from, a near-term deal with Mosaic. Interim report from EC:

- The 'mess' they reference is primarily CR's unresponsiveness over last few months
- Other concerns they raised were cost overruns, delays, and lack of CR transparency
- As the EC has suggested previously, Mosaic would be interested in a new term sheet
- Mosaic seemed refreshed by the transparent, focused and productive discussion
- The 'ripped up' term sheet waives the 1MM fee Mosaic says it is currently owed

As Arthur pointed out in the last EC meeting, the current appraisal does not allow for a large enough loan from Mosaic to complete the project. Given that fact and Hall's default letter they submitted yesterday, these talks that accelerate a refinancing are the linchpin to saving the project.

This Wednesday the EC, being led by CR, will provide more details to all who attend the call.

Signed,

Your EC representatives

On Mon, Feb 1, 2016 at 4:31 PM, Heather Hill <Heather@criswellradovan.com> wrote:

Sent on behalf of Robert as he is currently traveling:

Please see the email below from the Mosaic team. Per the Executive Committee and Member meeting on Jan 27th Robert scheduled a meeting and call for today at 5pm with Mosaic and the Executive Committee to which all members agreed they would be available. In light of the below email the meeting at 5pm is canceled.

Heather

Begin forwarded message:

From: Sterling Johnson <sj@mosaicrei.com>
Date: February 1, 2016 at 2:36:54 PM PST
To: "Robert@CRISWELLRADOVAN.COM" <Robert@CRISWELLRADOVAN.COM>
Cc: Ethan Penner <ep@mosaicrei.com>, Vicky Schiff <vs@mosaicrei.com>
Subject: CalNeva Meeting

Dear Robert,

As you know, Ethan and I were in Sacramento this morning to visit with a group who represented themselves as investors with you in CalNeva. They were interested in hearing about the history of Mosaic's involvement in CalNeva with you and we explained our deal with you. We told them how we met you, we told them that we issued a term sheet, and we told them that you executed it and the day you executed it.

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We also told them that for the better part of three months we have not heard much from you or your 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. We are going to take a step back, tear up the executed term sheet, give the 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.

Given this, it really doesn't make sense to meet today.

All the best,

Sterling Johnson

VP | Investments

Mosaic Real Estate Investors, LLC

MREC Management, LLC

1880 Century Park East | Suite 300

Los Angeles, California 90067

W | 310-929-4604

M | 213-840-0664

E | sj@mosaicrei.com

Los Angeles | New York

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Paul Jameson
775.298.5988

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Paul Jameson
775.298.5988

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Paul Jameson
202-236-0290

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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 Defendants, 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

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW, FOR RELIEF FROM JUDGMENT, TO ALTER AND AMEND THE JUDGMENT, TO AMEND THE FINDINGS, AND FOR NEW TRIAL

Defendants Criswell Radovan, LLC (Criswell Radovan), CR Cal Neva, LLC ("CR Cal Neva"), Robert Radovan ("Radovan"), William Criswell ("Criswell"), and Powell, Coleman and Arnold LLP ("PCA") (collectively "Defendants"), by and through their undersigned counsel, submit their Opposition to Plaintiff's Motion for Judgment as a Matter of Law, for Relief from Judgment, to Alter and Amend the Judgment, to Amend the Findings, and for New Trial ("Opposition").

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

DATED this 21st day of May, 2018.

HOWARD & HOWARD ATTORNEYS PLLC

By: */s/ Martin A. Little, Esq.*

Martin A. Little, Esq.
Alexander Villamar, Esq.
3800 Howard Hughes Pkwy, Suite 1000
Las Vegas, Nevada 89169
Telephone No. (702) 257-1483
Facsimile No. (702) 567-1568
Attorneys for Criswell Radovan, LLC, CR Cal Neva, LLC, Robert Radovan, William Criswell, Cal Neva Lodge, LLC, Powell, Coleman and Arnold LLP,

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

This matter came on before the late Chief Judge Patrick Flanagan for a bench trial on August 29 through September 8, 2017. After assessing the evidence and credibility of all witnesses, Judge Flanagan issued an oral decision on the record on September 8, 2017.[1] Judge Flanagan entered a sweeping verdict in favor of Defendants, and dismissed Plaintiff George Yount's ("Plaintiff") claims against Defendants with prejudice. Significantly, Judge Flanagan also found that Plaintiff conspired with another investor, IMC Investment Group ("IMC"), to intentionally interfere with and sabotage the loan Defendants had lined up with Mosaic (the "Mosaic Loan") to fund the completion of the legendary Cal Neva Hotel in Lake Tahoe (the "Project").

Judge Flanagan specifically found that Defendants were damaged by Plaintiff's interference with the Mosaic Loan, which ultimately led to the demise of the Project. The Court ruled:

> 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.
>
> 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.[2]
>
> . . .
>
> This Court has documented dozens of e-mail exchanges between Mr. Yount and the IMC and their efforts to undermine the Mosaic loan . . . . So the counterclaim from the defendants is granted.

Ex. 1, p. 1139:13-22 and p. 1140:20-21.

---

[1] A copy of the trial transcript of the issued decision (Volume 7) is attached hereto as **Exhibit 1**.

[2] Judge Flanagan expressly found "[t]hat [the] Mosaic [Loan] would have closed by year end and that all parties would have been paid. The project would be up, operational, and a spectacular success." *See* Ex. 1, p. 1131:11-13.

Judge Flanagan then awarded Defendants Radovan and Criswell $1.5 million each in compensatory damages, two year's salary, management fees, attorneys' fees and costs. *Id.* at 1140:13-22, 1140:1-3, and p. 1140:20 – 1141:1-3. A week later, on September 15, 2017, Judge Flanagan issued a separate Amended Order clarifying his damage award and including lost development fees to Criswell Radovan. *See* Amended Order, dated September 15, 2017, **Exhibit 2** hereto.

Although Plaintiff purports to act shocked and surprised by the damage award – no doubt hoping to play on the fact this matter is before a new judge – the reality is his interference with the Mosaic Loan and Defendants' resultant damages were a major focus of the trial. Indeed, even before trial, Defendants' Proposed Findings of Fact and Conclusions of Law clearly stated:

> "The evidence shows that Plaintiff conspired with certain other investors to not only interfere with, but ultimately sink the Project's major refinancing loan with Mosaic, which would have bailed this Project out. This intentional interference has damaged the Defendants' far in excess of Plaintiff's initial $1,000,000.00 investment."

See Defendants' August 25, 2017 Proposed Findings of Facts and Conclusions of Law, **Exhibit 3** hereto. During trial, not only did Plaintiff's counsel stipulate into evidence fifty-six (56) defense exhibits (most of which were emails that dealt directly with Plaintiff's interference), but Plaintiff's counsel put on considerable evidence in his own case-in-chief to try to refute Plaintiff's interference with the Mosaic Loan. Critically, Plaintiff's counsel even called Brandon Cheney -- a member of the IMC Group – to try to downplay Plaintiff's interference with the Mosaic Loan. *See*, Testimony of Brandon Cheney, Trial Vol. V., pp. 837-843; Trial Vol. VI., pp. 860-863. Critically, when Defendants' counsel put on evidence of damages, Plaintiff's counsel's only objection was "lack of foundation" – not that somehow they were being bamboozled by an unpled counterclaim. Any suggestion that Plaintiff or his counsel had the wool pulled over their eyes by Judge Flanagan is misleading and flat out contradicted by the evidence presented at trial with Plaintiff's counsel's **express** consent.

Plaintiff misinterprets Judge Flanagan's decision in order to circumvent the fact that neither the law, nor the facts, support the relief requested in his Motion. Plaintiff attempts to

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reframe Judge Flanagan's verdict as an award of "damages to defendants – not on a counterclaim that they pleaded and proved, but on an affirmative of [*sic*] defense of unclean hands . . . that defendants did not prove." Plaintiff's Motion ("Mtn."), p. 2:5-7. In fact, Judge Flanagan ruled against Plaintiff and awarded damages to Defendants based on a counterclaim that was tried by the parties' consent. There is ample justification in the civil rules for Judge Flanagan's decision. *See* NRCP 54(c) ("every 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.").

II.

FROM JUDGMENT PLAINTIFF CANNOT SUSTAIN HIS BURDEN FOR RELIEF, AMENDING THE COURT'S FINDINGS OR JUDGMENT, OR FOR A NEW TRIAL

Plaintiff's "Motion" is in fact five motions. Indeed, Plaintiff seeks: (1) judgment as a matter of law based on NRCP 50(b); (2) relief from judgment pursuant to NRCP 60(b); (3) to alter and amend the judgment based on NRCP 59(e); (4) to amend the Court's findings pursuant to NRCP 52(b); and (5) a new trial pursuant to NRCP 59(a).

A. Plaintiff is Not Entitled to Judgment as a Matter of Law

Although Plaintiff claims that the Motion "moves for judgment as a matter of law" pursuant to Nevada Rule of Civil Procedure ("NRCP") 50(b), Plaintiff completely abandons this theory of relief. Mtn, p. 2:1-3. The Motion does not include any discussion of this ground for relief, let alone a citation to the standard of review, which would have confirmed Plaintiff's admission in a footnote that NRCP 50(b) applies to jury trials.[3] Accordingly, the Court should not consider this ground for relief. *See* Rules of the District Court of the State of Nevada ("DCR"), Rule 13(2) (stating that the absence of a memorandum of points and authorities in support of each ground for relief in a motion is "cause for its denial or as a waiver of all grounds not so supported.") and Washoe District Court Rules ("WDCR"), Rule 12(1).

[3] Under NRCP 50(b), a party must first move for judgment as a matter of law before the jury renders its verdict, in order to be allowed to renew the motion after the verdict. *See Ren Yu Zhang v. Barnes*, 382 P.3d 878 (Nev.2016) (stating that "A party must make the same arguments in its pre-verdict NRCP 50(a) motion as it does in its post-verdict NRCP 50(b) motion."); *see also Price v. Sinnott*, 85 Nev. 600, 607, 460 P.2d 837, 841 (1969) ("It is solidly established that when there is no request for a directed verdict, the question of the sufficiency of the evidence to sustain the verdict is not reviewable.").

B. Plaintiff's Claim for Relief from Judgment Must be Denied

Plaintiff's Motion is also missing the requisite points and authorities in support of Plaintiff's requested relief from the Judgment for reasons of "mistake, inadvertence, surprise, or excusable neglect" under NRCP 60(b). Mtn, p.3:1-4. Other than one sentence on page three of the Motion, which cites to NRCP 60(b), there is no discussion of the alleged basis for relief on this ground, or any legal authority in support thereof. Accordingly, the Court should treat this claim for relief as abandoned and deny Plaintiff's request for relief from the Court's Judgment pursuant to NRCP 60(b)(1). DCR, Rule 13(2) and WDCR Rule 12(1).

Even if the Court does not deny this ground for relief as abandoned in light of its procedural defects, Plaintiff cannot meet his burden of proving "mistake, inadvertence, surprise, or excusable neglect" by a preponderance of the evidence. *Britz v. Consolidated Casinos Corp.*, 87 Nev. 441, 445, 488 P.2d 911, 915 (1971). Plaintiff's Motion is void of any discussion of the purported "mistake, inadvertence, surprise, or excusable neglect" that warrants relief from the Court's Judgment.

Further, as discussed below, an examination of the trial transcript and the exhibits the parties stipulated to demonstrates that the Court's Judgment against Plaintiff came as no surprise to Plaintiff and his counsel.

C. The Court's Actions Concerning Defendants' Counterclaim Do Not Warrant Altering the Judgment

A motion to alter or amend judgment under NRCP 59(e) is "'an extraordinary remedy which should be used sparingly.'" *Stevo Design, Inc. v. SBR Mktg. Ltd.*, 919 F.Supp. 2d 1112, 1117 (D.Nev.2013) (*citing McDowell v. Calderon*, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999)). Such relief is available in four scenarios: "(1) where the motion is necessary to correct 'manifest errors of law or fact upon which the judgment rests;' (2) where the motion is necessary to present newly discovered or previously unavailable evidence; (3) where the motion is necessary to 'prevent manifest injustice;' and (4) where the amendment is justified by an intervening change in controlling law." *Id.* (*citing Allstate Insurance Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011)).

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Here, Plaintiff's Motion should be denied, as Plaintiff cannot establish that the Judgment requires alteration to correct any errors of law or fact, to present new evidence, to prevent injustice, or to conform to a change in the law.[4] Plaintiff points to three alleged errors by the Court that pertain to Defendants' counterclaim. Specifically, Plaintiff contends that the Court erred (1) in allowing Defendants' to cite Plaintiff's unclean hands defense in a case involving solely legal claims (Mtn, p. 4:34-35); (2) in finding that Defendants proved Plaintiff was acting with unclean hands (Mtn, p. 3:21-23); and (3) in awarding damages based on unclean hands (Mtn, p. 5:21-23).

Plaintiff's first contention does not rise to the level of a manifest error of law. First, Plaintiff fails to provide any points and authorities for his contention that the concept of unclean hands may not apply to legal claims and is not a basis for seeking affirmative relief. Mtn, p. 3:25-26. Plaintiff was apparently unable to cite authority for this proposition in Nevada, as there do not appear to be any Nevada cases on point.[5] However, other states in the Ninth Circuit, such as California, have recognized the doctrine may also apply to remedies at law. *See, e.g., Camp v. Jeffer, Mangels, Butler & Marmaro,* 35 Cal. App. 4th 620, 638, 41 Cal. Rptr. 2d 329 (Cal. Ct. App. 1995) ("In California, the doctrine of unclean hands may apply to legal as well as equitable claims and to both tort and contract remedies."); *see also Maldonado v. Ford Motor Co.,* 476 Mich. 372, 719 N.W.2d 809, 818 (2006) ("The authority to dismiss a lawsuit for litigant misconduct is a creature of the 'clean hands doctrine' and, despite its origins, is applicable to both equitable and legal damage claims.").

Plaintiff relies almost entirely on his unsupported opinions that Defendants cannot use their unclean hands defense because Plaintiff's alleged misconduct does not sufficiently relate

[4] "Since NRCP 59(e) does not itself provide standards for granting or denying a motion to alter or amend, 'the district court enjoys considerable discretion in granting or denying the motion.'" *Stevo Design, Inc.*, 919 F.Supp. 2d at 1117 (*citing Allstate Insurance Co.*, 634 F.3d at 1111).

[5] In *USF Ins. Co. v. Smith's Food & Drug Ctrl, Inc.*, 921 F.Supp 2d 1082, 1098 n.5 (D.Nev.2013), the Court stated, "[w]hile it may be likely that an unclean hands defense can be invoked even when only a remedy at law is sought despite the doctrine's historical roots in courts of equity, the Court's review of Nevada law did not reveal any decision addressing this issue."

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to Plaintiff's affirmative claims, and also because it supposedly cannot be converted to a counterclaim.[6]

However, Plaintiff's unclean hands in interfering with the Mosaic Loan prevented completion of the Project, which caused all the financial loss for which Plaintiff initially sought damages from Defendants. Moreover, statutory and case law within Nevada and the Ninth Circuit clearly allow an affirmative defense to be converted to a counterclaim. *See* NRCP 8(c) ("When 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."); *Las Vegas Dev. Grp., LLC v. SRMOF II 2012-1 Tr.*, No. 2:13-cv-02194, 2018 BL 65566 at *4 (D. Nev. Feb. 26, 2018) (The Court, relying on Fed. R. Civ. P. 8(c)(2), construed an affirmative defense as a counterclaim in the interest of justice and judicial efficiency.); *see also Schettler v. Ralron Capital Corp.*, 128 Nev. 209, 223 n.7 (2012) (Nevada Supreme Court finds that "NRCP 8(c) requires the court to treat [Plaintiff's] counterclaims as affirmative defenses…").

Plaintiff also – seemingly as an afterthought and in mere conclusory fashion – alleges there is no record evidence to support an interference counterclaim. As demonstrated below, a substantial amount of documentary and testimonial evidence adduced at trial concerned Plaintiff's willful interference with the Mosaic Loan.

Simply put, Plaintiff cannot sustain his burden of demonstrating that the Court's judgment rests on manifest errors of law or fact, or should be amended in view of newly discovered or previously unavailable evidence, an intervening change in controlling law warrants amendment of the judgment, or to prevent manifest injustice.

[6] The doctrine of unclean hands applies when a party seeks affirmative relief, but is itself guilty of conduct involving fraud, deceit, unconscionability, or bad faith; and the misconduct directly relates to the matter at issue, injures the other party, and affects the balance of equities between the litigants. *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814-15 (1945)

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III.

PLAINTIFF'S MOTION FOR A NEW TRIAL SHOULD BE DENIED AS INTERFERENCE WAS EXTENSIVELY TRIED BY THE PARTIES AND THE TRIAL EVIDENCE SUPPORTS DEFENDANTS' DAMAGE AWARD

A. Regardless of the Formality of the Initial Pleadings, the Parties Heavily Litigated and Tried the Issue of Plaintiff's Interference by Express and/or Implied Consent

The evidence overwhelmingly demonstrates that the issue of Plaintiff's interference with the Mosaic Loan was tried by consent and was a major focus of the trial.

Starting well before trial, Defendants made it clear this issue was part of their case, starting with their Motion for Summary Judgment:

> Unfortunately, [Plaintiff] also involved himself with a select group of investors who actively meddled in the financing efforts to try to supplant their own financing. In the spring of 2016, these investors (with Plaintiff's involvement) went behind Criswell Radovan's back and sabotaged the loan Criswell Radovan had lined up with Mosaic to fund the remaining construction.

See Defendants' Motion for Summary Judgment, ¶ 28 of the Statement of Undisputed Facts.

Just before trial, Defendants submitted their proposed Findings of Fact and Conclusions of Law, which contained a similar finding. *See* Defendants' Proposed Findings of Fact and Conclusions of Law, ¶¶ 45-46, **Exhibit 3**. Importantly, Defendants' Proposed Conclusion of Law number 68 stated:

> The evidence shows that Plaintiff conspired with certain other investors to not only interfere with, but ultimately sink the Project's major refinancing loan with Mosaic, which would have bailed this Project out. This intentional interference has damaged the Defendants far in excess of Plaintiff's One Million Dollar investment.

Id.

During trial, Plaintiff's interference with the Mosaic Loan was a central theme for nearly every witness who testified. Indeed, the extent to which the Mosaic Loan was an issue at trial is evidenced from a simple word search of the number of times the word "Mosaic" appears in the transcript—**over 300.** Importantly, the Mosaic Loan testimony and trial exhibits were specifically presented for Defendants' Counterclaim for Interference. For Plaintiff and his counsel to claim surprise by this issue after being mentioned over 300 times during the trial is ridiculous and grossly misrepresents what this trial was about.

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Importantly, a review of the trial transcript plainly shows that Defendants' Counterclaim for Plaintiff's Interference was tried by **express** consent. Indeed, Plaintiff's consent to try this issue began when Plaintiff stipulated into evidence all of Defendants' trial exhibits—the vast majority of which were emails that Judge Flanagan correctly documented as "email exchanges between Mr. Yount and the IMC and their efforts to undermine the Mosaic loan." *See* Transcript, September 8, 2017, p. 1140:1-3.

Among many others, these emails included:

- **Trial Exhibit 109:** Email exchange between IMC and Plaintiff before the secret meeting with Mosaic sharing information "for our eyes only".
- **Trial Exhibit 110:** Email exchange between IMC and Plaintiff—referring to themselves as "Team" and discussing their "divide and conquer approach".
- **Trial Exhibit 115:** Email exchange between IMC's Brandon Cheney and Plaintiff shortly before the secret Mosaic meeting wanting to talk about Robert Radovan of Criswell Radovan.
- **Trial Exhibit 118:** Plaintiff's email to IMC discussing the ousting of Criswell Radovan and that "we must be extra careful not to underestimate these two tomorrow".
- **Trial Exhibit 119:** Email exchange between Plaintiff and IMC where they are proposing to use Plaintiff's claim and threat of lawsuit as a coercive means to get Criswell Radovan to leave the Project.
- **Trial Exhibit 121:** Email exchange between Plaintiff and IMC referencing the fact IMC was planning to secretly meet with Mosaic that Monday without Criswell Radovan's knowledge or consent.
- **Trial Exhibit 122:** Email exchange between IMC and Plaintiff making it clear that Criswell Radovan did not know of the Mosaic meeting and referencing the fact IMC was getting a letter of intent from another equity party (*i.e.*, someone other than Mosaic).

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- **Trial Exhibit 124:** Email from Mosaic to Radovan the very day IMC secretly met with Mosaic saying they are backing out of the loan and tearing up the term sheet.
- **Trial Exhibit 126:** Email exchange with Plaintiff referencing the secret Mosaic meeting as a "good meeting", and discussing that Criswell Radovan must immediately resign and cede their 20% interest or "face swift civil and criminal action".
- **Trial Exhibit 127:** Email from Plaintiff to IMC asking for input on his legal strategy against Criswell Radovan.
- **Trial Exhibit 130:** Less than a week after the Mosaic loan was torpedoed, Plaintiff and IMC are discussing another potential investor.
- **Trial Exhibit 131:** Less than a week after the Mosaic loan was torpedoed, IMC and Plaintiff are discussing a replacement developer to replace Criswell Radovan and making sure "not [to] discuss with others outside this email list".
- **Trial Exhibit 132:** Email exchange between Plaintiff and IMC shortly after the Mosaic loan was torpedoed asking about another investment group.
- **Trial Exhibit 133:** Plaintiff email to IMC—after the Mosaic loan was torpedoed—describing one of the IMC members as "our hero!".
- **Trial Exhibit 142:** Email exchange between Plaintiff and IMC—approximately 1.5 months after the Mosaic loan was torpedoed—agreeing to a "good cop/bad cop routine" against Criswell Radovan.

Plaintiff also presented three (3) of his own trial exhibits – Exhibits 55, 58 and 59 – which were emails with IMC dealing with the interference claim:

- **Trial Exhibit 55:** Email between Plaintiff and IMC two weeks before the Mosaic Loan was torpedoed talking about other refinancing options.
- **Trial Exhibit 58:** Email from Plaintiff to Molly Kingston the week before Mosaic Loan was torpedoed saying "there is no way to the finish line with these developers."

- **Trial Exhibit 59:** Email exchange between Plaintiff and IMC a few days before the Mosaic Loan was torpedoed stating "we need to get more investors on board with their removal."

Plaintiff's stipulation to the admissibility of these emails not only refutes his claim that he did not "acquiesce to a trial regarding intentional inference", but these very emails and the testimony regarding them were thoroughly weighed by Judge Flanagan and supported his damage award:

> "**This Court has documented dozens of email exchanges between Mr. Yount and the IMC in their efforts to undermine the Mosaic loan and there is no more solid evidence of that then 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."

See Transcript of Proceedings, September 8, 2016, pp. 52-53, (emphasis added).

The fact Plaintiff tried the interference claim by consent is perhaps best demonstrated by his counsel's questioning of Plaintiff and Plaintiff's star witness, Brandon Cheney from the IMC Group, on this key defense topic. For example, on page 585 of Volume III of the Trial Transcript, Plaintiff's counsel asks Plaintiff: "Did you ever conspire to somehow undermine the Mosaic loan?" Plaintiff and his counsel then began a colloquy lasting 16 pages trying to downplay and explain away the damning emails showing his active involvement. *See* Transcript, pp. 585-601.

Opening the Counterclaim door even further, Plaintiff then called Brandon Cheney from IMC as a witness and questioned him extensively on the Mosaic Loan—all in an effort to try to undermine Defendants' allegation that IMC and Plaintiff conspired to torpedo that Project refinancing. *See* Transcript, Volumes V and VI, pp. 837-843 and 857-865. For example, on p. 842 of the Transcript, Plaintiff's counsel asks Mr. Cheney if he and his partners went into the secret meeting with Mosaic "to somehow torpedo the Mosaic loan?" Plaintiff's counsel then asked Mr. Cheney if Plaintiff did anything to interfere with the Mosaic Loan. *See* Transcript, pp. 862:24-863:7. Importantly, on p. 860 of the Transcript, Plaintiff's counsel

introduced a brand-new Exhibit as "impeachment evidence" to rebut Robert Radovan's testimony from the prior day about sabotaging the Mosaic loan:

> Q. Did you receive a letter through the course of your dealings with Mr. Radovan that was sent from Mosaic to Mr. Radovan about terminating the loan going forward?
>
> A. Yes.
>
> MR. CAMPBELL: Your Honor, I have a new exhibit. I believe it's an impeachment exhibit. It goes directly to the heart of the evidence that we've heard today from Mr. Radovan as to the -- as to what happened with the Mosaic loan. Mr. Chaney provided it to me. I did not get it in discovery. It was not provided in the CR discovery. But I think it goes to the heart of the matter and it should be admitted as an impeachment witness.
>
> THE COURT: Show it to counsel. You can provide it to the clerk.
>
> THE CLERK: Exhibit 77 marked for identification.
>
> THE COURT: Mr. Little.
>
> MR. LITTLE: My response is the door is going to swing both ways on that. The rules of evidence are clear that you can bring in impeachment evidence if it's truly to impeach a witness. I guess I'd ask your Honor, you can separate the wheat from the chaff, we know that. I'm not going to object to this, but by the same token when I have impeachment evidence, I'll going to be relying on the same argument.
>
> THE COURT: Mr. Wolf, anything to add?
>
> MR. WOLF: I have no further comment on it.
>
> THE COURT: All right. Thank you. 77 is admitted.

See, Transcript, pp. 860:22-861:21. Tellingly, Plaintiff completely ignores the following extensive findings that Judge Flanagan made about Mr. Cheney's lack of credibility:

> **… and it's clear he was bitter and it's clear he was prejudiced and it's clear he's biased against Mr. Radovan. … 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, "I have a story to tell,".**

See, Transcript of Proceedings, September 8, 2017, pp. 39-40, **Exhibit 1** (emphasis added). In fact, Judge Flanagan spent four pages of this Transcript explaining why Mr. Cheney's testimony was not credible.

Plaintiff's conspiracy with IMC to interfere with the Mosaic Loan was also addressed thoroughly by Defendants' counsel on cross examination of nearly every witness, most notably with Plaintiff, Robert Radovan and Brandon Cheney. Even a cursory review of this trial testimony shows how big of an issue this was at trial. Importantly, Plaintiff's counsel did not object to this line of questioning, and, instead, stipulated into evidence dozens of emails that pertain solely to this issue. The final nail in the coffin on Plaintiff's claim that he did not "acquiesce to a trial regarding alleged intentional interference" came when Defendants' counsel examined Robert Radovan about how Defendants had been damaged by Plaintiff and IMC's interference:

> Q. [By Defendants' counsel]. Sir, can you quantify how CR Cal Neva has been damaged by Mr. Yount and IMC's interference?
>
> Mr. Campbell: Objection, lack of foundation.
>
> THE COURT: Sustained. I'm sorry, overruled. Go ahead.

See Transcript of Proceedings, Volume III, p. 493:6-24. Importantly, Plaintiff's counsel's only objection to this line of questioning was one of "foundation"—not that Plaintiff was somehow being blindsided or ambushed by a trial on the issue of his interference with the Mosaic Loan and the resultant damages to Defendants.

In short, it is clear that the issue of the Mosaic Loan and the financial consequences of Plaintiff's interference with that loan was a key issue in the trial. Plaintiff not only failed to object to the presentation of significant testimony and evidence in this regard, but his counsel stipulated to the admissibility of dozens of emails dealing solely with this issue and then questioned Plaintiff's own witnesses on the subject. Judge Flanagan then weighed all the evidence presented and found for Defendants in a well-reasoned opinion. For Plaintiff to claim any sort of prejudice or suggest this was trial by ambush is nothing short of disingenuous.

B. Defendants Proved Every Element of Plaintiff's Interference

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As explained hereinabove, while the pleadings did not formally include a counterclaim, there was substantial evidence presented at trial by consent of both sides to support Judge Flanagan's finding that Plaintiff had intentionally interfered with the Mosaic Loan.[7] As stated herein, there is ample justification in the civil rules for Judge Flanagan's decision to award damages on an interference claim.

Under well-settled Nevada law, "[l]iability for the tort of intentional interference with prospective economic advantage requires proof of the following elements: (1) a prospective contractual relationship between the plaintiff and a third party; (2) knowledge by the defendant of the prospective relationship; (3) intent to harm the plaintiff by preventing the relationship; (4) the absence of privilege or justification by the defendant; and (5) actual harm to the plaintiff as a result of the defendant's conduct." *Wichinsky v. Mosa*, 109 Nev. 84, 87-88, 847 P.2d 727, 729-30 (1993).

Here, there is substantial evidence to support the Court's ruling and award of damages as a result of Plaintiff's intentional interference with Defendants' prospective contractual relationship with Mosaic. The record evidence overwhelmingly supports Judge Flanagan's judgment. Among other things, Judge Flanagan found as follows:

> 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. *See* Transcript of Proceedings, Trial Volume III, August 31, 2017, 462/9-22. 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.
>
> 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.

[7] Incredibly, Plaintiff's contend that Judge Flanagan never found that Plaintiff "intended to undermine the loan". To the contrary, on page 52 of his oral decision, Judge Flanagan plainly states: "This court has documented dozens of email exchanges between Mr. Yount and the IMC and their efforts to undermine the Mosaic loan and there is no more solid evidence of that in Exhibit 124."

> 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.
>
> 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. *See*, Testimony of Robert Radovan, pp. 493: 6-25.
>
> 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. *See* Transcript of Proceedings, Trial Volume III, August 31, 2017, 511:4 – 512:17; Trial Volume at pp:812:17-815:2; Volume VI at pp. 961:2-962:12 and trial exhibits referenced above. But for Plaintiff's intentional interference, this Project would have succeeded.

Plaintiff's attack on this evidence on the basis that Defendants did not file an interference counterclaim is a misplaced effort to elevate form over substance. Although Defendants did not formally plead a counterclaim against Plaintiff, by consent of all parties, including Plaintiff, a significant portion of the trial centered around Plaintiff's collusion with IMC to interfere with the Mosaic Loan, which caused the demise of the Project and significant damages to Defendants.

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 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).

In Plaintiff's Motion, *Nutton v. Sunset Station, Inc.* is cited for the proposition that NRCP 16(b) governs amendment of pleadings after a scheduling order deadline has expired.

Mtn, p. 8:1-12. While this proposition is true, *Nutton* deals with a case where an amendment to the pleadings was sought long before trial took place and where one party objected. In the instant case, the amendment comes after completion of a five-day trial with a large body of testimony and evidence on the very issue of interference – without objection from Plaintiff – and with the clear consent of both parties. *See Nutton v. Sunset Station, Inc.*, 357 P.3d 966, 978 n.3 (Nev. Ct. App. 2015) ("[Amendments under NRCP 15(b)] are permitted when a matter has been tried by 'consent,'… because this motion was resolved before trial, that question is not before us in this appeal.").

When a party is moving to amend its pleadings to conform to the evidence presented at trial under NRCP 15(b), the liberal policy to amend when "justice so requires" is the proper standard. *See State, University & Community College Sys. v. Sutton*, 120 Nev. 972, 987-88, 103 P.3d 8, 18-19 (2004) (A party moved to amend their pleadings under NRCP 15(b) and the court analyzed their motion under the liberal policy of NRCP 15(a), with no mention whatsoever of NRCP 16(b)).

Since Plaintiff's interference with the Mosaic Loan was extensively tried, Judge Flanagan's resulting decision on this very issue is sound. The record evidence is abundantly clear that the matter of Plaintiff's interference with Defendants' prospective economic advantage was raised and tried, as evidenced by Judge Flanagan's findings, which included the following:

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

Exh.1, p. 1140:1-11.

Even more compelling than NRCP 15(b**), NRCP 54(c) provides: "[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

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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; *see also Grouse Creek Ranches v. Budget Fin. Corp.*, 87 Nev. 419, 427, 488 P.2d 917, 923 (1971) (NRCP 54(c) authorized the district court to amend the pleadings to grant a primary lien where the objecting party joined issue on the matter and suffered no prejudice); *Rental Dev. Corp. of Am. v. Lavery*, 304 F.2d 839, 842 (9th Cir. 1962) (Finding no prejudice to defendant lessor as a result of plaintiff lessee's failure to include a request for cancellation of the lease in plaintiff's complaint since it was permissible for the Court to order cancellation of the lease based on the issues framed by the pleadings and trial proceedings).

In this case, justice requires that judgment be entered in favor of Defendants and against Plaintiff, as provided by Judge Flanagan after hearing all evidence for Plaintiff's intentional interference with Defendants' prospective economic advantage, which interference caused Mosaic to terminate 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. Plaintiff intended to harm and disrupt this relationship without privilege or justification, and his conduct resulted in significant harm to Defendants.

IV.

DEFENDANTS' UNCLEAN HANDS DEFENSE, AS ALSO TRIED BEFORE JUDGE FLANAGAN, MAY BE CONVERTED TO A COUNTERCLAIM AND ASSERTED AGAINST PLAINTIFFS

Plaintiff's omnibus motion is almost entirely directed to issues regarding Plaintiff's unclean hands in his interactions with Defendants and Cal Neva – whether that behavior sufficiently relates to Plaintiff's underlying claims, whether it can be applied to defeat Plaintiff's legal claims, and whether it can be converted to a counterclaim.

First, Plaintiff's unclean hands, as demonstrated by his willful interference in sabotaging the Mosaic Loan is precisely what prevented completion of the Project causing all

of the financial damage upon which Plaintiff's claims are based. As stated in the Court's Judgment, Judge Flanagan adopted Defendants' Proposed Findings of Fact, dated August 25, 2017, which specifically state:

> "The evidence shows that Plaintiff conspired with certain other investors to not only interfere with, but ultimately sink the Project's major refinancing loan with Mosaic which would have bailed this Project out. This intentional interference has damaged the Defendants far in excess of Plaintiff's $1 Million Investment. Thus, any alleged damages are offset by the significantly greater damages his conduct has caused Defendants."

Exh. 2, p. 11, ¶ 68.

Second, case law within the Ninth Circuit supports the application of equitable defenses to defeat legal claims. *See Camp,* 35 Cal. App. 4th 620 (Cal. Ct. App. 1995).

Third, under Fed. R. Civ. P. 8(c)(2), "[i]f a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so." Similarly, under 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."[8]

In any event, all of the issues now raised by Plaintiff regarding Judge Flanagan's award of damages to Defendants because of Plaintiff's unclean hands are red herrings. Judge

[8] "[W]hile Chase has not explicitly asserted a counterclaim for quiet title or declaratory relief, Chase's Amended Answer, (ECF No. 44), provides an affirmative defense that states 'LVDG takes title, if any, to the Property subordinate in time and right to [Chase's] interests, rights, liens, and claims in the Property.' (*Id.* 13:17-19). Chase's Amended Answer additionally contains a prayer for relief seeking a 'judicial determination that [Chase's] ownership interest . . . is superior to [LVDG's] claim of title,' and that '[Chase's] DOT survived the HOA sale,' and '[LVDG] took title subject to [Chase's] ownership interest' and DOT. (Am. Answer 15:9-16). **While Chase's affirmative defense and prayer for relief were neither designated as a counterclaim for quiet title, the Court will construe them as such in the interest of justice and judicial efficiency**. *See* Fed. R. Civ. P. 8(c)(2) ('If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.')." *Las Vegas Dev. Grp., LLC v. SRMOF II 2012-1 Tr.*, No. 2:13-cv-02194, 2018 BL 65566 at *4 (D. Nev. Feb. 26, 2018) (emphasis added); *see also Schettler v. Ralron Capital Corp.*, 128 Nev. 209, 223 n.7 (Nev. 2012) (even where recoupment is not expressly pleaded as an affirmative defense, fair notice was provided by including the issue on reconsideration and hence as part of the appeal).

Flanagan's findings and conclusions demonstrate that Plaintiff's unclean hands arose out of the same facts and circumstances that amply support Defendants' interference counterclaim that was litigated through discovery and tried at length. Regardless of what term to use for Plaintiff's behavior, Defendants proved every element necessary to establish Plaintiff's willful interference with the Mosaic Loan. While such proof also necessarily establishes Plaintiff's unclean hands, the Court's well-supported judgment of willful interference—in practical terms—renders moot all of these issues concerning whether an unclean hands defense relates sufficiently to the underlying claims, or can be applied to defeat legal claims, or can be converted to a counterclaim.

V.

PLAINTIFF IS NOT ENTITLED TO A NEW TRIAL

Plaintiff's request for a new trial is nothing more than a lament of his dissatisfaction with the Court's decision. Plaintiff cannot satisfy the hefty burdens set forth in NRCP 59(a). Notwithstanding, in an attempt to escape the Judgment, Plaintiff makes three last-ditch arguments in support of his motion for a new trial: (1) that he "did not have adequate notice of an intentional interference counterclaim and was unaware he could be held liable for damages" [Mtn, p. 11: 20-22]; (2) that "legal error" occurred because Defendants' evidence of damages was speculative [Mtn, p.12:23-26]; and (3) that "legal error" occurred based on the Court's "unsupportable awards of damages to defendants" [Mtn, p. 14:6-7 and 14:18-20.]

Plaintiff's Motion does not even reference which of the seven grounds set out in NRCP 59(a) he is relying on for his request for a new trial. This is because he cannot satisfy the hefty burdens set forth in NRCP 59(a), which include "any of the following causes or grounds materially affecting the substantial rights of an aggrieved party: (1) Irregularity in the proceedings of the court, jury, master, or adverse party, or any order of the court, or master, or abuse of discretion by which either party was prevented from having a fair trial; (2) Misconduct of the jury or prevailing party; (3) Accident or surprise which ordinary prudence could not

have guarded against; (4) Newly discovered evidence material for the party making the motion which the party could not, with reasonable diligence, have discovered and produced at the trial; (5) Manifest disregard by the jury of the instructions of the court; (6) Excessive damages appearing to have been given under the influence of passion or prejudice; or, (7) Error in law occurring at the trial and objected to by the party making the motion."

The decision to grant or deny a motion for a new trial rests within the sound discretion of the trial court. *Edwards Industries, Inc. v. D.T.E./B.T.E. Inc.*, 112 Nev. 1025, 923 P.2d 569 (1996). Moreover, the standard of review on appeal for the granting or denial of a motion for a new trial is abuse of discretion. *Dow Chemical Co. v. Mahlum*, 114 Nev. 1468, 970 P.2d 98 (1998).

As explained herein, and in Defendants' March 27, 2018 Motion to Amend Judgment, incorporated herein by reference, Plaintiff simply has not overcome the heavy burden of NRCP 59, and his Motion should thus be denied in its entirety.

A. This Court already certified its familiarity with the record and it awarded damages to Defendants.

In the Judgment, this Court already considered many of the arguments Plaintiff is now raising and specifically found no need or reason to recall witnesses.

Specifically, on page 3 of the Judgment, the Court held as follows:

> "The Court has reviewed the trial transcript in its entirety and the exhibits referenced in the transcript and in Judge Flanagan's ruling. Pursuant to NRCP 63, the court here certifies its familiarity with the record. Moreover, given the status of the case at the time of Judge Flanagan's passing (evidence closed, closing argument completed and a ruling from the bench on the merits, following by his written Amended Order), and the detailed extent of Judge Flanagan's ruling from the bench and his subsequent Amended Order dated September 8, 2017, the court has determined pursuant to NRCP 63, that the proceedings in this case may be completed as set forth herein without prejudice to the parties."
>
> Under NRCP 63, the Court has the discretion to recall witnesses. The court finds no reason or need to recall witnesses."

B. Plaintiff was not denied due process.

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Plaintiff argues he is entitled to a new trial because he did not have adequate notice of the intentional interference Counterclaim against him. As shown extensively above, this is simply untrue. Neither can Plaintiff meet his burden under NRCP 59(a)(7) to prove the Court's ruling on Defendants' interference claim was an error of law, as Plaintiff failed to object to such evidence at trial. As the Court stated in *Padilla v. Ghuman*, 183 P.3d 653 (Colo. App. 2007), "a trial court has the duty to consider an issue raised by the evidence even though the matter was not pled and no formal application was made to amend." *Padilla*, 183 P.3d at 658. In *Padilla*, the plaintiff claimed that the trial court erred in awarding defendants a refund of overpaid interest because the court's damage award was a form of "special damages" that defendants failed to request in their pleadings prior to trial. In affirming the trial court's decision awarding such damages, the Court stated:

> Here, plaintiffs failed to object when [defendant] testified that defendants were overcharged due to plaintiffs' wrongful use of default interest in their calculation of the cure amount. If they had objected, the court could have granted defendants leave to amend their pleadings or a continuance to enable plaintiffs to meet the evidence. Because plaintiffs failed to give the trial court an opportunity to address their contention that the evidence of overpaid interest was at variance with the pleadings, they cannot complain on appeal of defendants' failure to amend their pleadings.

Id. In the instant case, except for an after-the-fact objection during closing arguments, Plaintiff failed to object to both the presentation of evidence of the interference claim and damages for Plaintiff's interference.

More fundamentally, as the Nevada Supreme Court held in *Magill, supra*, 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. 388 (emphasis added); *see also Charles Schmitt & Co. v. Barrett*, 670 F.2d 802 (8th Cir. 1982). In *Barrett*, the Court affirmed the trial court's ruling rescinding the parties' contract even though the plaintiff had not sought the remedy of rescission in his prayer for relief. The Eight Circuit

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Court noted that both parties had presented evidence of rescission during the bench trial. *Id.* at 806. In affirming the trial judge's ruling, the Court stated:

> "While [defendant] now claims that he did not consent to try that issue, Rule 54(c) nonetheless provides that the trial court may grant the relief to which the prevailing party is entitled, regardless of whether such relief was prayed for in the complaint. Where the defendant appears and the parties are at issue, we have held that the final judgment shall grant the relief to which the prevailing party is entitled."

Id. Here, there is ample evidence in the record and justification in the civil rules to support Judge Flanagan's award of damages to Defendants.

This case was fully tried and Judge Flanagan issued extremely detailed Findings of Fact and Conclusions of Law from the bench, along with an Amended Order clarifying his damages award. As shown above, both in Defendants' Motion for Summary Judgment and in their Proposed Findings of Fact and Conclusion of Law – **both filed before trial** – Plaintiff was on notice that Defendants were alleging he conspired with IMC to interfere with the Mosaic Loan, and that "[t] his intentional interference has damaged the Defendants far in excess of Plaintiff's $1 Million Dollar investment." *See, supra*.

At the outset of trial, Plaintiff stipulated to the admissibility of dozens of emails pertaining solely to the intentional interference claim, including three (3) exhibits of his own (Trial Exhibits 55, 58, and 59). Not only did Plaintiff consent to Defendants' presentation of testimony on the intentional interference claim through nearly every witness, but he failed to object to the presentation of damages for the interference. Plaintiff would have this Court believe that this was Judge Flanagan's first rodeo and that he did not know what he was doing. **Chief** Judge Flanagan was a sophisticated trial lawyer and judge, and his nearly 2.5 hour oral decision from the bench shows precisely the level of detail and care he took when analyzing the evidence and weighing the credibility of witnesses who came before him. It would be one thing for Plaintiff to claim a due process violation if this claim came out of left field, but this

is a situation where Plaintiff even called witnesses of his own to try to refute the interference claim. Plaintiff cannot be allowed to claim he was denied due process when he stipulated to the admissibility of dozens of emails that show his conspiracy to interfere with the Mosaic Loan, then consented to Defendants putting on evidence of that interference and their damages, and then presented evidence of his own on the subject. The Mosaic Loan issue was a major part of this case and Plaintiff is not entitled to a new trial over it.

///

C. Defendants' evidence of damages was not speculative.

In his oral decision, Judge Flanagan awarded Radovan and Criswell $1.5 Million Dollars each in compensatory damages, 2-year's salary, lost management fees, attorney's fees and costs. A week later, on September 15, 2017, he issued a separate Amended Order clarifying his damage award and including lost development fees to Criswell Radovan. *See* Amended Order. As stated below, and in Defendants' Motion to Amend Judgment, there was substantial evidence to support Judge Flanagan's damage award.

First, in terms of the compensatory damage award, Robert Radovan testified that the interference cost him and Criswell at least $1.6 Million each in terms of lost revenues they would have received. *See*, Testimony of Robert Radovan, Trial Vl. III, p. 493. He also testified they worked two years on the Project without salary. Id. These damages do not include evidence that had been presented of the loss of their investment in the Project nor the expected gains on that investment. Specifically, they held a $2 Million investment (see, Trial Ex. 101), but sold half of that interest to Plaintiff. Nor do these damages include their general loss of business reputation and goodwill from this Project failing under their leadership and from Plaintiff's denigration of their performance and history. Accordingly, there was more than sufficient evidence to support the $1.5 Million award to each of Criswell and Radovan.

Second, in terms of lost Development Fees, the evidence at trial showed that Criswell Radovan was the developer of the subject Project, entitled to a $1.2 Million Development Fee, payable in monthly installments of $60,000.00 *See,* Confidential Private Placement Memorandum, Trial Ex. 3, p. 8. Criswell Radovan earned all of its Development Fee, but "recontributed to the Company $480,000.00 of its Development Fee as of 6/01/14." *See* Section 7.4 of the Amended and Restated Operating Agreement, Trial Ex. 5; *see also,* the Trial Testimony of William Criswell, Trial Vol. I, pp. 186-188. Importantly, Criswell Radovan was not repaid its Development Fee before the Project failed. See, Trial Testimony of Robert Radovan, Trial Vol. IV., pp. 953-956. Accordingly, pursuant to the Amended Order, and as argued in Defendants' Motion to Amend Judgment, the Judgment should be amended to include and award of $480,000.00 to Criswell Radovan. The basis and amount of this damage award was clearly in the record.

Finally, the basis for a lost Management Fee award was also clearly substantiated by the record – leaving only the amount to be calculated. Indeed, the Financial Pro Forma which forms the basis for these damages was not only thoroughly vetted by several experts in the hotel industry, including Starwood Hotel and Resorts, but according to testimony at trial, by Plaintiff's own accountant, Ken Tratner, who looked at the Pro Forma for reasonableness, and then gave the Pro Forma to a hospitality expert to review, who told him it was reasonable; and then accountant Tratner gave Plaintiff the go ahead to invest. See, Trial Testimony of Ken Tratner, Trial Vol VI., pp 849-850, 855. As articulated in Defendants' Motion to Amend Judgment, the evidence at trial showed that Criswell and Radovan had a binding agreement with Cal-Neva Lodge that they would manage the operations of the property once it was completed and opened. This fact is reflected in the Confidential Private Placement Memorandum, Trial Ex. 3, (recognizing that Cal-Neva Lodge will enter to a hotel management agreement with Criswell Radovan or its affiliate) and the Amended and Restated Operating

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Agreement, Trial Ex. 5, ("Day-to-day management of the Project will be performed by an Affiliate of CR").

So, once again, the basis for the damage award was clearly substantiated in the record below, leaving only the amount to be determined (no different than an attorney's fee award). Accordingly, Plaintiff is not entitled to a new trial.

D. At most, Plaintiff would only be entitled to a new trial on the amount of Defendants' damages.

Although the entirety of Plaintiff's Motion addresses only the propriety of the counterclaim, he makes the blanket statement that he is entitled a "new trial". Of course, Plaintiff has not alleged – and he is not entitled -- to a new trial on the merits of his underlying affirmative claim, which was thoroughly vetted and decided by Judge Flanagan based on significant exhibit and witness evidence that was presented over many days of trial. Nor is Plaintiff entitled to a new trial on the merits of Defendants' intentional interference counterclaim, as that issue too was thoroughly tried by consent of both parties (as discussed above). Although Defendants believe there is more than enough evidence in the record to substantiate Judge Flanagan's damage award, the most Plaintiff could possibly claim is entitlement to a trial on the amount of the lost development and management fees, which are the subject of Defendants' Motion to Amend Judgment. However, for the reasons stated above, and articulated in Defendants' Motion to Amend Judgment, the underlying basis for those awards was clearly established by record evidence, and the amount is simply a calculation that can and should be handled through Defendants' Post-Trial Motion to Amend Judgment.

CONCLUSION

For the foregoing reasons, Plaintiff has not met his burden with respect to the requested relief. Plaintiff's claim are the subject of a pending appeal and that is where they should be heard.

Date: May 21, 2018. HOWARD & HOWARD ATTORNEYS, PLLC

By: */s/ Martin A. Little, Esq.*

Martin A. Little, Esq.
Alexander Villamar, Esq.
3800 Howard Hughes Pkwy., Ste. 1000
Las Vegas, NV 89169
Telephone: (702) 257-1483
Facsimile: (702) 567-1568
Attorneys for Criswell Radovan, LLC, CR Cal Neva, LLC, Robert Radovan, William Criswell, Cal Neva Lodge, LLC, and Powell, Coleman and Arnold LLP

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SECOND JUDICIAL DISTRICT COURT
COUNTY OF WASHOE, STATE OF NEVADA

AFFIRMATION

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

- OR -

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

_____ A specific state or federal law, to wit:

_____
(State specific state or federal law)

- OR -

For the administration of a public program

- OR -

_____ For an application for a federal or state grant

- OR -

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

Date: May 21, 2018.

HOWARD & HOWARD ATTORNEYS, PLLC

By: */s Martin A. Little, Esq.*
Martin A. Little, Esq.
Alexander Villamar, Esq.
3800 Howard Hughes Pkwy., Ste. 1000
Las Vegas, NV 89169
Telephone: (702) 257-1483
Facsimile: (702) 567-1568
Attorneys for Criswell Radovan, LLC, CR Cal Neva, LLC, Robert Radovan, William Criswell, Cal Neva Lodge, LLC, and Powell, Coleman and Arnold LLP

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HOWARD & HOWARD ATTORNEYS PLLC

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CERTIFICATE OF SERVICE

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

On this day I served the foregoing **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW, FOR RELIEF FROM JUDGMENT, TO ALTER AND AMEND THE JUDGMENT, TO AMEND THE FINDINGS, AND FOR NEW TRIAL** in this action or proceeding electronically with the Clerk of the Court via the E-File and Serve system, which will cause this document to be served upon the following counsel of record:

Richard G. Campbell, Esq.
The Law Office of
Richard G. Campbell, Jr., Inc.
333 Flint Street
Reno, NV 89501
Telephone: (775)-384-1123
Facsimile: (775) 997-7417
Attorneys for Plaintiff

Andrew N. Wolf, Esq.
Incline Law Group, LLP
264 Village Boulevard, Suite 104
Incline Village, NV 89451
Telephone: (775) 831-3666
Attorneys for Defendants
David Marriner and
Marriner Real Estate, LLC

Daniel F. Polsenberg, Esq.
Joel D. Henriod, Esq.
Lewis Roca Rothberger Christie LLP
3993 Howard Hughes Parkway #600
Las Vegas, NV 89169
Telephone: (702) 949-8200
Facsimile: (702) 949-8398
Attorneys for Plaintiff

I certify under penalty of perjury that the foregoing is true and correct, and that this Certificate of Service was executed by me on May 21, 2018 at Las Vegas, Nevada.

/s/ Karen R. Gomez
An Employee of HOWARD & HOWARD ATTORNEYS PLLC
4823-8647-2806, v. 2

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HOWARD & HOWARD ATTORNEYS PLLC

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Clerk of the Court
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Mark G. Simons, Esq., NSB No. 5132
SIMONS LAW, PC
6490 S. McCarran Blvd., #20
Reno, Nevada, 89509
Telephone: (775) 785-0088
Facsimile: (775) 785-0087
Email: mark@mgsimonslaw.com

Attorneys for David Marriner and Marriner Real Estate, LLC

IN THE SECOND JUDICIAL DISRICT COURT OFTHE 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 RANDOVAN, LLC, a Nevada Limited liability company; CR CAL NEVA, 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

OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW, FOR RELIEF FROM JUDGMENT, TO ALTER AND AMEND THE JUDGMENT, TO AMEND THE FINDINGS, AND FOR NEW TRIAL

Defendants David Marriner and Marriner Real Estate, LLC (hereinafter collectively referred to as "Marriner"), by and through their attorney Mark G. Simons of Simons Law, PC, hereby submit the following Opposition to the Plaintiff's Motion for

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Judgment as a Matter of Law, for Relief from Judgment, to Alter and Amend the Judgment, to Amend the Findings, and for New Trial (the "Motion") filed by George Stuart Yount, individually and in his capacity as owner of the George Yount, IRA ("Yount").

I. JUDGE FLANAGAN ANALYZED EACH OF PLAINTIFF'S CLAIMS AND HELD NONE WERE SUPPORTED BY ANY CREDIBLE EVIDENCE.

It is hornbook law that when a plaintiff fails in its burden to prove each element of its claims, then judgment in a defendant's favor is warranted. *See e.g.*, Alam v. Reno Hilton Corp., 819 F.Supp. 905, 909 (D. Nev. 1993) ("Where there is a complete failure of proof concerning an essential element of the nonmoving party's case, all other facts are rendered immaterial, and the moving party is entitled to judgment as a matter of law.").

In the present case, after a seven (7) day bench trial Judge Flanagan thoroughly examined the evidence presented and found that each of Yount's claims failed for lack of evidentiary support as follows:

1st Claim:	Breach of contract. Claims against CR Cal Neva LLC and Criswall Radovan, LLC dismissed as not parties to any of the contracts. See **Exhibit 1**, excerpt of Trial Transcript ("TT"), pp. 1131-1132.[1]
2nd Claim:	Breach of fiduciary duties. Dismissed because no wrongful conduct and Yount failed to prove any damages supporting such claim. Id., pp. 1132-1133.
3rd Claim:	Fraud. Dismissed because no evidence presented of any material facts that were false. On the contrary, all the evidence established that the information provided was true; Yount had access to all relevant information at all relevant times; Yount never relied upon any representations of others and Yount did not sustain any damages. Id., pp., 1133-1137.

[1] See **Exhibit 2**, Affidavit of Mark G. Simons ("Simons' Aff.") at ¶4.

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4th Claim: Negligence. Dismissed because no evidence of any breach, causation or damages. Id., pp., 1137-1138.

5th Claim: Conversion. Dismissed because there was no evidence of any conversion of any assets. Id., pp., 1139

6th Claim: Punitive damages. Dismissed because Yount provided "no evidence whatsoever" supporting such claim. Id., pp., 1138-1139.[2]

7th Claim: Securities fraud. Dismissed because of a disclaimer, no security at issue and the interest was not a security. Id., p. 1139.

Of the foregoing claims, Yount's claims against Marriner were only for fraud, securities fraud and punitive damages. In dismissing those claims, Judge Flanagan specifically found that there was no evidence supporting any claim alleged against Marriner. Accordingly, contrary to Yount's contentions, Judge Flanagan did not apply the affirmative defense of "unclean hands" as a bar to Yount's claims. Since the evidence is overwhelming that Yount's claims failed for lack of evidentiary support, the Motion must be denied in its entirety.

Thereafter, this Court "reviewed the trial transcript in its entirety and the exhibits referenced in the transcript." See **Exhibit 3**, Judgment, dated March 12, 2018, p. 3:1-2.[3] This Court's independent analysis of the transcript as well as the detailed analysis,

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[2] Technically, there is no legal claim for punitive damages. Punitive damages are a remedy. Grieves v. Superior Court, 157 Cal.App.3d 159, 163-164, 203 Cal.Rptr. 556, 558 (Cal. Ct. App. 1984) ("There is no cause of action for punitive damages. Punitive or exemplary damages are remedies available to a party . . . . 'Punitive damages are merely incident to a cause of action, and can never constitute the basis thereof.'"); Brown v. Adidas Int'l, 938 F. Supp. 628, 635 (S.D. Cal. 1996) (dismissing plaintiffs punitive damages claim under Fed. R. Civ. P. 12(b)(6); South Port Marine v. Gulf Oil Ltd. P'ship, 234 F.3d 58, 64 (1st Cir. 2000) (holding that plaintiffs punitive damages count did not constitute a separate cause of action without allegations of legal basis for recovery). However, the Court analyzed the relief sought and rejected the application of such relief.

[3] Simons' Aff., at ¶5.

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factual findings and conclusions of law also determined that Yount's claims failed for lack of evidentiary support. Exh. 3, at p.3:16-18. Again the affirmative defense of unclean hands was inapplicable to this Court's Judgment and this Court's affirmation of Judge Flanagan's findings. Accordingly, there is no evidentiary or legal basis supporting Yount's Motion and it must be denied in its entirety.

II. THE COURT'S AUTHORITY IS TO RENDER ALL APPROPRIATE RELIEF A PARTY IS ENTITLED TO REGARDLESS OF THE ALLEGATIONS CONTAINED IN THE FORMAL PLEADINGS.

Judge Flanagan's oral findings, his Amended Order along with this Court's Judgment imposed liability upon Yount for Marriner's damages in the amount of $1.5 million. While Marriner did not formally plead a counterclaim for intentional interference, civil aiding and abetting and/or civil conspiracy, the evidence elicited at trial established the evidentiary and legal basis for the relief granted to Marriner. Yount seeks to avoid the impact of his wrongful and deceitful conduct on a purely technical issue, *i.e.*, because a counterclaim was not formally plead, Yount is immune from liability for his wrongful and harmful conduct. Judge Flanagan rejected Yount's claims and instead found that Yount's conduct was "tragic" and judgment against him was warranted. Exh. 1, p. 1140:20.

Thereafter, Judge Flanagan revisited his analysis and decision and entered an Amended Order affirming his judgment in favor Marriner and all the other defendants. **Exhibit 4**, Amended Order. Subsequently, this Court also rendered Judgment in the Marriner's favor based upon this Court's own independent analysis of the facts, law and legal issues presented at trial. Exh. 3. Both Judge Flanagan and this Court were fully impowered to render affirmative relief for Marriner and the other defendants even though no such affirmative relief was formally pled.

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A. COURT'S AUTHORITY PURSUANT TO NRCP 15(b).

NRCP 15(b) provides: "[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**." (emphasis added). NRCP 15(a) expressly provides that when the parties try issues expressly and/or impliedly, then those issues are to be treated by the Court "in all respects" as if fully set forth in the pleadings. In the present case, Judge Flanagan expressly stated that Yount's conduct "for the intentional interference with the contractually relations between Mosiac and Cal Neva LLC" established liability for Yount. Exh. 1, TT, p. 1139:20-22.

The application of this rule is an extremely powerful tool to be use by the Court when evidence is presented to the Court establishing legal rights and remedies that exist, but for whatever reason, were not technically plead in an action. "The purpose of Rule 15(b) is to align the pleadings to conform to the issues actually tried." Cole v. Layrite Prod. Co., 439 F.2d 958, 961 (9th Cir. 1971).

Judge Flanagan's decision as well as this Court's decision to grant relief to Marriner based upon the evidence presented at trial and the issues established by the evidence at trial rests in the sound discretion of the Court. Cole v. Layrite Prod. Co., 439 F.2d 958, 961 (9th Cir. 1971) ("It is well settled that the amendment of pleadings to conform to proof under Rule 15(b) of the Federal Rules of Civil Procedure rests in the sound discretion of the trial court. Sackett v. Beaman, 399 F.2d 884 (9th Cir. 1968); Caddy-Imler Creations, Inc. Caddy, 299 F.2d 79 (9th Cir. 1962).").[4] Amendments to

[4] Executive Mgmt. v. Ticor Title Ins. Co., 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (recognizing that federal decisions involving the federal civil procedure rules are persuasive authority when this court examines its equivalent rules).

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conform to proof are perfectly proper and courts are to be liberal in allowing such amendments. *See* Brean v. Nevada Motor Co., 269 P. 606, 606 (Nev. 1928) ("courts should be liberal in allowing such amendments . . . .").

Yount's Motion must be denied because it is premised on the contention that the entry of judgment against Yount on an unpled counterclaim was improper. However, pursuant to NRCP 15(b), Judge Flanagan was fully authorized and empowered to grant judgment in the defendants' favor based upon the issues tried during the seven (7) day bench trial. Merely because Yount disagrees with Judge Flanagan's decision does not make Judge Flanagan's decision wrong or subject to being set aside, revisited and/or vacated.

Judge Flanagan properly exercised his discretion and granted relief to the defendants as allowed by NRCP 15(b).[5] Judge Flanagan's decision was not arbitrary or capricious and clearly did not exceed the bounds of law or reason. Skender v. Brunsonbuilt Constr. & Dev. Co., 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006) ("An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason."). Instead, Judge Flanagan engaged in a thoughtful, well-reasoned and well-supported analysis of the facts and issues that were presented at trial. This Court also exercised its authority in also rendering the same findings and conclusions as Judge Flanagan. As such, the Motion is without merit and must be denied.

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5 Magill v. Lewis, 74 Nev. 381, 388, 333 P.2d 717, 720 (1958) ("the general principle of Rule 15[b], [is] that in a contested case the judgment is to be based on what has been proved rather than what has been pleaded.").

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B. COURT'S AUTHORITY PURSUANT TO NRCP 54(c).

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.**" (Emphasis added). "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." Magille v. Lewis, 74 Nev. 381, 387-88, 333 P.2d 717, 720 (1958).

In Magill, the Nevada Supreme Court analyzed the breadth and power of Rule 54(c) in relation to claims and relief that had not been pled by a party. The Nevada Supreme Court stated the NRCP 54(c) grants the Court the authority and power to supersede any "particular legal theory of counsel" and that the legal theories of counsel are subordinate to the power of the Court to grant relief in favor of a party "whether demanded or not" as follows:

> "'**Particular legal theories of counsel then are subordinated to the court's right and duty to grant the relief to which the prevailing party is entitled whether demanded or not. If a party has proved a claim for relief the court will grant him that relief to which he is entitled on the evidence regardless of the designation of the claim or the prayer for relief. The prayer for relief may be of help as indicating the relief to which the plaintiff may be entitled, but it is not controlling, and the question is not whether the plaintiff has asked for the proper remedy but whether he is entitled to any remedy.**'"

Id. at 388, 333 P.2d at 720 (emphasis added).

Accordingly, NRCP 54(c) is another powerful rule that allows a judge, as a trier of fact, to grant relief to a party even if the party did not affirmatively seek such relief in its pleadings. NRCP 54(c) therefore vests the Court with broad authority and discretion to render relief "whether demanded or not". The law is absolutely clear that Judge

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Flanagan, as well as this Court, is not constrained, limited or restricted by the pleadings or even the "legal theories of counsel."

Instead, it is the purpose and function of the Court to "grant the relief to which the prevailing party is entitled whether demanded or not." Therefore, it is entirely irrelevant whether or not any particular counterclaim for relief was asserted in the pleading and/or whether or not the defendants even affirmatively asked the Court for relief.

At trial, Yount's counsel admitted that the defendants tried their claims of wrongdoing against Yount for his participation, collusion and secret conduct to cause the Mosaic Loan to collapse. On the last day of trial, Yount's counsel conceded to Judge Flanagan the following:

> MR. CAMPBELL: Thank you, your Honor. **During the course of this trial, the defendants have really attempted to shift the focus of this case on what happened after October 13th of 2015. I think they've done that in an attempt to not have this Court focus on what happened to Mr. Yount.**
>
> What I see are the inexcusable acts of the defendants prior to or about the time that he made his investment. The real focus on this, your Honor, should be what happened prior to October 13th or at about that same time frame.
>
> THE COURT: Just a minute here. Go ahead.
>
> MR. CAMPBELL: **They shifted that focus.** What I believe the facts have shown in this case, I think, let's go back and focus on what really happened on the October 13th time frame.

Exh. 1, TT, p. 983:2-17 (emphasis added). Simply stated, the defendants tried the factual issues of Yount's wrongful participation, collusion and agreement with the IMC to destroy the LLC's funding of the Mosaic Loan. That wrongful conduct was clear, unmistakable and formed the basis of Judge Flanagan's judgment against Yount.

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III. YOUNT'S WRONGFUL CONDUCT.

As this Court is aware, Yount brought baseless claims against all the defendants claiming fraud and misconduct in the transfer of a limited liability membership interest to in Cal Neva Lodge, LLC (the "LLC"). However, during trial, the defendants introduced extensive evidence demonstrating that Yount's claims were baseless because he received exactly what he paid for and as Judge Flanagan stated:

> **In this case, it was a simple transaction . . . and most importantly, Mr. Yount got what he wanted, which was a founders share.**

Exh. 1, p. 1132:21-24 (emphasis added).[6]

However, once Yount received exactly what he wanted and paid for, he embarked on destroying the LLC loan relationship with Mosaic. As a result of Yount's participation with the Incline Mens Club ("IMC") in destroying Mosaic's loan to the LLC (the "Mosaic Loan"), the LLC collapsed and had to declare bankruptcy. The Mosaic Loan would have fully funded all of the LLC's business needs and Marriner and the other defendants would have received full payment of their investment and/or payments from the LLC. See Exh. 1, TT 1139:22-24 (with the loan from Mosaic "this project would have succeeded. That is undisputed. Mr. Chaney agrees, Mr. Yount agrees, everyone agrees that money would have covered all the costs and the debts.").

As demonstrated below, the evidence was overwhelming that Yount himself participated with the IMC in destroying the LLC loan relationship with Mosaic. Yount

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[6] Yount's counsel conceded at the close of trial that Yount contracted for and did in fact receive a founders share even though the share received was from a different source than originally contemplated. Exh. 1, TT, p. 996:8-19 ("THE COURT: Tell me, and nobody has explained it to me, 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: Functionally, there is no difference.").

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also colluded with other third-parties to destroy the Mosaic Loan, causing the defendants, and each of them, significant financial harm.

A. MARRINER'S CONTRACTUAL RELATIONSHIP WITH THE LLC AND YOUNT'S PARTICIPATION AND AGREEMENT IN DESTROYING THE MOSAIC LOAN.

At trial, Marriner testified he was hired as a consultant to raise money for the development of the LLC. Exh. 1, TT, p. 1090:23-1091:1. See also Trial Exhibit 1 (Real Estate Consulting Agreement Cal Neva Lodge Development between LLC and Marriner). Marriner also testified that the LLC's project was "sensational" and he was "devastated professionally and personally over the loss of this project, this lawsuit, his reputation and his friends." Exh. 1, TT, 1096:8-12.

Marriner also testified that the project was going to be his next five years of work and provided other testimony regarding the harm he sustained by the failure of the project. Exh. 1, TT, p:122:13. Marriner described the harm that Yount's false accusations had caused to him and said it "ruined my life." Id., p.122:15. Marriner also described the loss of the project caused by Yount as "a nightmare." Id., p. 123:2.

Pursuant to the terms of Trial Exhibit 1, Marriner was entitled to be paid 3% of the gross revenue of the project equating to $1.3 million. (Total value of projects at $43,288,000 X 0.03 = $1,298,640.) As a result of the failure of the Mosaic Loan to fund, the project collapsed and, in addition to the lost income above, Marriner lost his equity stake shown in the Cal Neva Lodge Capital Tables to be $187,500. Trial Exhibit 5, Cal Neva Lodge, LLC Amended and Restated Operating Agreement, Schedule 4.2 (showing capital contributions "Marriner Real Estate, LLC $187,500."). In addition, Marriner also lost his right to an Honorary Founding Membership, as set forth in Trial

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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 exactly to the harm Marriner testified he sustained as a result of Yount's wrongful conduct: $1,298,640 in lost sales commissions, $187,500 in lost capital and lost founding membership. Marriner's contractual relationships with the project were admitted at trial, discussed in extensive detail at trial along with the harm Marriner sustained by the loss of the Mosaic Loan.

Yount admitted he was fully aware of Marriner's business and financial relationship with the LLC and was in "constant communications" with Marriner about the project. Exh. 1, TT, 1111:4-8.

Yount was fully aware that the IMC and Mr. Chaney intended to interfere with the LLC's contractual relationship to obtain the Mosiac Loan. Yount attended IMC meetings and "was considered by all to be a member" of the IMC. Exh. 1, TT, p.1120:24-1121:1. Yount was fully aware of the IMC's intention to block the Mosaic Loan from funding so the project would collapse and that Yount even acknowledged that such conduct by IMC was not appropriate. TT, 1114:18-20; see also Trial Exhibit 122 (Yount concerned that the IMC's meeting with Mosaic to derail the LLC's funding was secret and not "legit").

Judge Flanagan found that the facts were undisputed that Yount's correspondence regarding the project would be used by the IMC "as leverage encouraging everyone to be a cohesive group and using Mr. Yount as the IMC's spokesperson." TT, 1121:5-8. Trial Exhibit 119 also discusses the "plan" to confront

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the defendant Criswell Radovan, LLC and it won't voluntarily agree to give up control of the LLC, then Yount will step in and "urge" them to reconsider.

Judge Flanagan cited to Trial Exhibits 121,[7] 125,[8] 126,[9] 127,[10] 130,[11] 131,[12] 132, [13] and 133,[14] to demonstrate that the members of the IMC were communicating extensively regarding the Mosaic Loan and the intention to cause the Mosaic Loan to not fund. Exh. 1, TT, p. 1121:9-10.

Judge Flanagan found that the evidence was overwhelming that Yount "was [in] cahoots with this cabal involving certain members of the IMC, and that he testified he was not opposed to the removal of" the managers of the project. Id. 1121:1-4. Yount also knew that the Mosaic Loan was the only exit strategy for the LLC and without it, the

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[7] **Exhibit 5**, Yount communicating with member of IMC and Molly Kingston about the IMC's conduct in disrupting the funding of the Mosaic loan. See also Simons' Aff., at ¶7.

[8] **Exhibit 6**, Yount communicating with Molly Kingston about the IMC's conduct in disrupting the funding of the Mosaic loan. See also Simons' Aff., at ¶8.

[9] **Exhibit 7**, Yount communicating with Molly Kingston about the interference with the funding of the Mosaic loan and best option is to "sell the project". See also Simons' Aff., at ¶9.

[10] **Exhibit 8**, Yount communicating with IMC about his investment into the LLC. See also Simons' Aff., at ¶10.

[11] **Exhibit 9**, Yount communicating with IMC about his investment into the LLC. See also Simons' Aff., at ¶11.

[12] **Exhibit 10**, Yount communicating with IMC about replacement financing to take the place of the Mosaic Loan. See also Simons' Aff., at ¶12.

[13] **Exhibit 11**, Yount communicating with IMC about replacement financing to take the place of the Mosaic Loan. See also Simons' Aff., at ¶3.

[14] **Exhibit 12**, Yount communicating with IMC about replacement financing to take the place of the Mosaic Loan calling a member of the IMC "our hero". See also Simons' Aff., at ¶14.

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project was certain to fail and all the defendants would loose millions of dollars. Id., 1121:23-24.

The Court recounted the "dozens of e-mail exchanges between Mr. Yount and the IMC **and their efforts to undermine the Mosaic loan.**" Id., 1140:1-3. Judge Flanagan cited to Trial Exhibit 124, which was the concluding email that it had been successful in destroying the LLC's funding solution with the Mosaic Loan. **Exhibit 13.**[15] As a result of Yount's and the IMC's secretive and wrongful conduct, Mosaic stated that it was going to "tear up the executed term sheet" to fund the loan to the LLC. Exh. 1, TT, p. 1126:11-12.

Judge Flanagan, and this Court, found that it was Yount's and the IMC's intent "to kill this [Mosaic Loan]." Id. p. 1140:12-13. The IMC and Yount "had no foresight" and the result of their harmful conduct was "tragic". Id. p. 1140:19-20. On the otherhand, if the Mosaic Loan would have funded, the evidence is undisputable that the Mosaic Loan would have funded all of the LLC's contractual obligations. Id. p. 1139:22-24.

B. THE VARIOUS GROUNDS FOR AFFIRMATIVE RELIEF IN FAVOR OF THE DEFENDANTS.

The Court's oral rulings clearly discussed that all the defendants had contractual relationships that hinged on the funding of the Mosaic Loan. These contractual relationships and right to payment were known to everyone, and were admitted and examined at trial. It the Mosaic Loan would have funded as it was scheduled to do, but for the interference of Yount and the IMC, all the defendants would have been paid in full. Judge Flanagan and this Court found that the evidence was undisputed that Yount

[15] See also Simons' Aff., at ¶15.

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was "in cahoots" with the IMC, was treated as a "member" and a "spokesperson" for that organization, and was included in all the secret emails communicating the IMC's malicious intent and plan to destroy the Mosaic Loan funding.

1. Intentional Interference Claim.

Under the authority vested in the Court pursuant to NRCP 15(a) and NRCP 54(c) Judge Flanagan was authorized to render judgment in favor of Marriner for Yount's intentional interference with the Mosaic Loan. The tort of intentional interference with contract has been generally defined by the Nevada Supreme Court in the case of Sutherland v. Gross, 105 Nev. 192, 196, 772 P.2d 1287 (Nev. 1989) as follows:

> To establish intentional interference with contractual relations, the plaintiff must show: (1) a valid and existing contract; (2) the defendant's knowledge of the contract; (3) intentional acts intended or designed to disrupt the contractual relationship; (4) actual disruption of the contract; and (5) resulting damage.

Id. at 1290.

In the present case, Judge Flanagan found that Yount did in fact intentionally interfere with the Mosaic Loan for the purpose of disrupting that loan. Actual disruption occurred and Marriner sustained quantifiable damages which Judge Flanagan awarded. Judge Flanagan specifically found that the elements of a claim for intentional interference were established at trial. Exh. 1, TT, p. 1139:20-22 ("but for the intentional interference with the contractual relations between Mosaic and Cal Neva LLC . . . .").

This Court also thoroughly examined the trial transcript and the exhibits admitted at trial and examined the trial transcript to determine if the issues were tried by express and/or implied consent. This Court has also found that pursuant to NRCP 15(a) and NRCP 54(c) that the claim of intentional interference was in fact tried and the

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appropriate relief granted to Marriner even though such relief had not been articulated in any pleading. Based upon the foregoing, the Motion must be denied.

2. Civil Conspiracy Claim and Aiding and Abetting Claim.

In addition to the claim of intentional interference, the elements of a civil conspiracy and a claim for civil aiding and abetting was also established since the elements of an intentional interference claim are almost identical to these claims under the factual context of this case. In Tai Si Kim v. Kearney, 838 F.Supp.2d 1077 (D. Nev. 2012) the United States District Court of Nevada examined the elements necessary for both a civil conspiracy and a claim for civil aiding and abetting. In detailing the claim for civil conspiracy, the court stated the following elements:

> the plaintiff must show "a combination of two or more persons who, by some concerted action, intend to accomplish some unlawful objective for the purpose of harming another which results in damage." Collins v. Union Fed. Sav. & Loan Ass'n, 99 Nev. 284, 662 P.2d 610, 622 (1983). The agreement may be either explicit or tacit. . . . . The plaintiff may use circumstantial evidence to prove his case, such as demonstrating that the conspirators "committed acts that are unlikely to have been undertaken without an agreement." Mendocino Envtl. Ctr. v. Mendocino Cnty., 192 F.3d 1283, 1301 (9th Cir.1999) (quotation omitted).

Id. at 1093 (D. Nev. 2012). The Court also articulated the elements necessary to establish a claim for abetting in the civil context as follows:

> a plaintiff must allege: (1) the primary violator breached a duty that injured the plaintiff; (2) the alleged aider and abettor "was aware of its role in promoting [the breach] at the time it provided assistance," and (3) the alleged aider and abetter "knowingly and substantially assisted" the primary violator in committing the breach. "The second and third elements should be weighed together, that is, greater evidence supporting the second element requires less evidence of the third element, and vice versa."

Id. at 1093.

While Judge Flanagan discussed the application of intentional interference with a contract and also referred to unclean hands, the relief afforded under both a claim for

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civil conspiracy and civil aiding and abetting are also present. Merely because these claims were not specifically articulated as viable grounds for relief, their applicability remains and may be applied by this Court.

The undisputed facts are as follows. Marriner was in a contractual relationship with the LLC. Mariner would have received full payment of over $1.5 million from the LLC if the Mosaic Loan funded. Yount knew of Marriner's contractual relationship with the LLC. Yount knew of the LLC's loan relationship with Mosaic. Yount knew that if the Mosaic Loan funded, Marriner would be paid in full. Marriner was actively involved with the IMC as an informal member. The IMC considered Yount a spokesman and Yount agreed to work with the IMC to interfere with the Mosaic Loan. Yount actively participated with the IMC to scheme, plot and implement the meeting between the IMC and Mosaic. Yount knew that the IMC's objective was to cause Mosaic to "tear up" the funding commitment to the LLC. Mosaic did in fact tear up the Mosaic Loan commitment causing the LLC to collapse and declare bankruptcy.

Yount knew that Mosaic terminated the Mosaic Loan commitment and did nothing to reinstitute the loan. Instead, Yount moved forward with attempting to find replacement financing knowing full well that the Mosaic Loan had been ready, willing and able to fund the loan to the LLC. Yount also knew that Marriner would not get paid once Mosaic cancelled its funding commitment. Yount also knew that Marriner would have received over $1.5 million if the Mosaic Loan funded.

Given the foregoing undisputed facts contained in the record, both a claim for civil conspiracy to interfere with the Mosaic Loan and a civil claim for aiding and abetting a claim for interference with the Mosaic Loan are established. In fact, Judge

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Flanagan established the foundational predicate for both of these claims when he found:

> This Court has documented dozens of e-mail exchanges between Mr. Yount and the IMC and their efforts to undermine the Mosaic Loan. That deal was done. That deal had been executed. Mosaic had evidenced its enthusiasm to close this deal. And yet, the day that individuals from the IMC went to Mosaic's 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.

Exh. 1, p.1140:1-12. Based upon the foregoing, the Motion must be denied as the record is abundantly clear that Yount individually and "in cahoots" with the IMC, actively participated in "killing" the Mosaic Loan. Judge Flanagan found that Yount's conduct was both egregious and tragic imposing liability on Yount for his wrongful and harmful actions.

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C. THIS COURT MAY CONSIDER THE EVIDENCE SUPPORTING ANY APPLICABLE CLAIMS IN AFFIRMING THE RELIEF AFFORDED TO MARRINER.

This Court is also not bound or limited to any labels or theories articulated by Judge Flanagan for the granting of the relief afforded to Marriner. This is because it is undisputed that a reviewing court will affirm relief granted by a trial court on **any** theory that was supported in the record, even if the theory was never stated. As stated by the United States Supreme Court in Jaffke v. Dunham, 352 U.S. 280, 281, 77 S. Ct. 307, 308, 1 L. Ed. 2d 314 (1957): "A successful party in the District Court may sustain its judgment on any ground that finds support in the record."

The decisions of a trial court are always sustained when there is evidence in the record supporting the relief granted even if the trial judge did not specifically apply the

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correct label supporting the relief requested and even if a wrong label for the claim was articulated by the trial court. Applying this rule of law, it is stated:

> "In reviewing decisions of the district court, we may affirm on any ground finding support in the record. If the decision below is correct, it must be affirmed, even if the district court relied on the wrong grounds or wrong reasoning."

Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 367 (9th Cir.1992) (quoting Jackson v. Southern Cal. Gas Co., 881 F.2d 638, 643 (9th Cir.1989)).

This substantive rule of law is also followed and applied by the Nevada Supreme Court. Cockrell v. Cockrell, 84 Nev. 537, 539, 445 P.2d 30, 31 (1968) (affirming judgment based upon both unpled and pled claims because "[u]nder either theory the record supports the judgment of the trial court."). In the present case, substantial evidence supports the claims for civil conspiracy and civil aiding and abetting and judgment must be affirmed on those two (2) theories in addition to the theory of intentional interference with the contract that Judge Flanagan did rely upon in rendering his judgment. *See e.g.*, Martinez v. Maruszczak, 123 Nev. 433, 438–39, 168 P.3d 720, 724 (2007) ("Substantial evidence supports the district court's findings of fact at issue in this matter; thus, we will not disturb them on appeal.").

IV. CONCLUSION.

Yount was found liable for Marriner's damages. There is substantial evidence in the record supporting liability on Yount for Marriner's damages. Accordingly, the Motion must be denied in total.

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SIMONS LAW
6490 So. McCarran Blvd., #20
Reno, Nevada, 89509
(775) 785-0088

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AFFIRMATION: This document does not contain the social security number of any person.

DATED this 21st day of May, 2018.

SIMONS LAW, PC
A Professional Corporation
6490 S. McCarran Blvd., #20
Reno, Nevada, 89509

MARK G. SIMONS
Attorneys for David Marriner and Marriner Real Estate, LLC

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SIMONS LAW
6490 So. McCarran
Blvd., #20
Reno, Nevada, 89509
(775) 785-0088

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of SIMONS LAW, PC and that on this date I caused to be served a true copy of **OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW, FOR RELIEF FROM JUDGMENT, TO ALTER AND AMEND THE JUDGMENT, TO AMEND THE FINDINGS, AND FOR NEW TRIAL** on all parties to this action by the method(s) indicated below:

☐ by placing an original or true copy thereof in a sealed envelope, with sufficient postage affixed thereto, in the United States mail at Reno, Nevada, addressed to:

☑ I hereby certify that on the date below, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which served the following parties electronically:

Martin Little, Esq.
Attorneys for Criswell Radovan, LLC, William Criswell, CR Cal Neva LLC, Powell, Coleman and Arnold LLP, Robert Radovan, Cal Neva Lodge, LLC

Richard G. Campbell, Jr.
Attorneys for George Stuart Yount IRA et al.

Daniel Polsenberg
Joel Henriod
Attorneys for George Stuart Yount

☐ by personal delivery/hand delivery addressed to:

☐ by facsimile (fax) addressed to:

☐ by Federal Express/UPS or other overnight delivery addressed to:

DATED this 21st day of May, 2018.

Employee of Simons Law, PC

SIMONS LAW
6490 So. McCarran Blvd., #20
Reno, Nevada, 89509
(775) 785-0088

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EXHBIIT LIST

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Blvd., #20
Reno, Nevada, 89509
(775) 785-0088

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Clerk of the Court
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EXHIBIT 1

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EXHIBIT 1

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STEPHANIE KOETTING

CCR #207

75 COURT STREET

RENO, NEVADA

IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE PATRICK FLANAGAN, DISTRICT JUDGE

--oOo--

GEORGE S. YOUNT, et al., Plaintiffs, vs. CRISWELL RADOVAN, et al., Defendants.	Case No. CV16-00767 Department 7

TRANSCRIPT OF PROCEEDINGS

TRIAL VOLUME I

August 29, 2017

9:00 a.m.

Reno, Nevada

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

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APPEARANCES:

For the Plaintiff:

RICHARD G. CAMPBELL, ESQ.
Attorney at Law
100 W. Liberty
Reno, Nevada

For the Defendant:

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

ANDREW WOLF, ESQ.
Attorney at Law
264 Village Blvd.
Incline Village, Nevada

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So being involved, I still think it is one of the best real estate opportunities in North Lake Tahoe and probably in Nevada. When it is -- when it's finally finished, it's going to be sensational. It's a unique location that cannot be duplicated with those views and that location. You know, I'm just sorry that it fell into problems.

Q. I'd like you to tell the Court what it's like to be charged with fraud such as in this case?

THE COURT: I don't think that's necessary.

MR. CAMPBELL: I'll object to that.

BY MR. WOLF:

Q. How have these allegations affected you?

A. I can't even put it into words. It's ruined my life, made it very difficult. I've never in 39 years as a broker, developer, I've been a broker for over 2500 homes, I've never been accused of fraud or lying or cheating. And to have it come from a friend, kind of friend, and I thought we were friendly, but it has ruined my life since the day that lawsuit was filed.

It hurt me that the project failed or was thrown into bankruptcy, because that was my next five years. I had already laid out that I was going to help bring the most -- the dream of bringing the Cal Neva back to life was something

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that I -- in my career, it can't be topped, and it turned into an nightmare.

And my wife and I have to -- we have not slept since this became a problem. It just -- and I spent the last year trying to find another capital partner to help save the existing founding members. If there's anything I can do to finish this hotel and have it be a benefit to the people that invested, I'd feel like -- you know, I'd feel better.

But to not be in a controlling position, I was always -- I had some responsibility, but no control. And my hands are tied to be involved in the success of the hotel. But it's been very difficult for me at this time in my life to be accused of fraud.

THE COURT: All right. Next question.

MR. WOLF: That's all I have, your Honor. I wish to reserve further questions on rebuttal.

THE COURT: All right. Mr. Little.

MR. LITTLE: Thank you, your Honor.

CROSS EXAMINATION

BY MR. LITTLE:

Q. Good afternoon, sir. I want to start off by talking about one of the first questions that Mr. Campbell asked you?

THE COURT: Hang on a second.

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committee, right?

A. Yes.

Q. And it's been more than a year and a half since this letter, right?

A. That's correct.

Q. And isn't it true that there were audited financial statements completed for 2015?

A. I believe so, yes.

Q. And have you seen those?

A. I have.

Q. Did you send them to Darcy to review?

A. No. Because if you read that report, it says that they disclaim that the information -- they're representing the information that was given to them by Criswell Radovan is true information.

Q. Well, it's a third party audited report, correct?

A. I don't know the scope of their audit, no.

Q. And you didn't send it to Darcy to look at it, correct?

A. No. Because it was going to cost money and that is not detail information, that's a summary report.

Q. Sir, isn't it true after receiving the audited financials, that Paul Jamieson and Phil Busick switched sides and started supporting Mr. Radovan and Mr. Criswell and your

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two brand-new Cadillacs. There's 18 brand-new Cadillacs out there. Mr. Yount says, I can only drive one at a time and I'll sell mine to Mr. Criswell. Doesn't Mr. Criswell get a brand-new Cadillac?

MR. CAMPBELL: Not if he wasn't delivered a brand-new Cadillac, not if he was delivered a ten-year-old Cadillac.

THE COURT: Tell me, and nobody has explained it to me, 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.

THE COURT: So didn't Mr. Yount get what he wanted, which was a founders share?

MR. CAMPBELL: No. He wanted a founders share under the PPM, and that's the difference, and that's the material difference.

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members of the LLC, including Mr. Yount if he was going to buy in.

THE COURT: All right.

MR. CAMPBELL: Again, your Honor --

THE COURT: I understand.

MR. CAMPBELL: -- I think it's their breach. Thank you.

THE COURT: Thank you, Mr. Campbell. All right. I'd like to take a few minutes to gather my thoughts and look at Blanchard again and go through a couple of the e-mails. So I'll do my best to get back here at quarter after. All right. Court's in recess.

(A break was taken.)

THE COURT: I apologize. Good lawyers give judges a lot to think about. This is an important case to all sides. So I wanted to make sure I viewed everything and pulled the Blanchard case, reviewed the cases cited by counsel, had an opportunity to listen to very good arguments by very good lawyers and the Court has listened to the testimony in this case.

Mr. Marriner testified first. He's a realtor and he met Mr. Radovan at the Fairwinds Estates sometime in February of 2014. He was hired on as a consultant to raise approximately $5 million to fund the development of the Cal

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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.

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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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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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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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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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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