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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Clerk of the Court
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Daniel F. Polsenberg
Nevada Bar No. 2376
Joel D. Henriod
Nevada Bar No. 8492
Adrienne R. Brantley-Lomeli
Nevada Bar No. 14,486
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

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DISTRICT COURT

WASHOE COUNTY, NEVADA

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

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Plaintiff Stuart Yount ("Mr. Yount") moves for post-trial discovery, limited in scope to circumstances surrounding the withdrawal of Mosaic's preliminary loan offer.

INTRODUCTION

Judge Flanagan awarded substantial damages when defendants never pleaded or proved a counterclaim. He based his oral ruling and award of damages on an email exchange between a member of Mosaic and Robert Radovan. Judge Flanagan's entire theory of liability rested on the motivation behind the withdrawal of the Mosaic loan. Supporting evidence from the Mosaic members would bear significantly on the validity of Judge Flanagan's ruling. Accordingly, it is essential that Mr. Yount be permitted to conduct limited post judgment discovery and depose three Mosaic members. This Court should authorize limited post-trial discovery into the facts surrounding the withdrawal of the Mosaic loan.

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I.

STATEMENT OF FACTS

A. Defendants Contend in all Pre-trial Court Filings and Discovery that Mr. Yount had Unclean Hands

Following a failed investment project in the Cal Neva, Mr. Yount filed a complaint alleging numerous causes of actions against the defendants including breach of contract, breach of duty, fraud, negligence, conversion, punitive damages, and securities fraud claims.[1] Defendants answered and asserted

[1] Second Amended Complaint ¶¶ 28-50.

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unclean hands.[2] Defendants alleged that Mr. Yount conspired with other investors to interfere with the Project's refinancing loan.

Discovery focused on the subscription agreement and other pre-investment documents, communications between Mr. Yount and defendants, and communications between Mr. Yount and the investors that allegedly conspired to interfere with the Mosaic loan.

B. The Suit Proceeds to Trial without Discovery on Any Members of Mosaic

The focus of the trial centered on the alleged fraudulent misrepresentations that defendants made to induce Mr. Yount to invest in the Cal Neva. To prove defendants' affirmative defense of unclean hands, defendants introduced a series of email communications between Mr. Yount and members of the Incline Men's club ("IMC") and an email from Sterling Johnson, the VP of investments at Mosaic, that withdrew the preliminary loan offer. To prove their affirmative defense of unclean hands, defendants only needed to prove that misconduct occurred they did not need to prove that actual interference occurred.

To demonstrate that investors conspired to interfere with the loan, defendants introduced an email that evidenced a meeting with members of the Executive Committee and members of Mosaic. The email explained that Mosaic had not heard from Criswell Radovan in months.

> 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… We also told them that for the better part of three months we have not heard much from you or your team.

[2] Marriner's Answer to Second Amended Complaint and Cross-Claim pgs. 9-10; Criswell Answer to Plaintiff's Complaint pg.8; Defendants' Proposed Findings of Fact and Conclusions of Law, 8/25/2017, 11:4-7.

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(Email from Sterling Johnson, VP of Mosaic, to Robert Radovan 02/01/2017; Defendants trial exhibit 124.) The email then stated that Mosaic has decided to withdraw the offer.

> We are going to take a step back, tear up the executed 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.

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

Additionally, defendants introduced evidence of a voicemail from another member of Mosaic, Ethan Penner. The voicemail was admitted last minute and Mr. Yount's counsel, Mr. Campbell objected.

> MR. CAMPBELL: This is totally unverified. If they wanted to have Mr. Penner here to testify, they should have had him testify. I never seen a voice message off a phone. It's so hard to authenticate something like that. I don't think it's right to allow him to do that.

(Hr'g. Tr. 9/07/17 961:13-17, Ex. 1.) Mr. Little argued that the voicemail was impeachment evidence because he "didn't know that Mr. Chaney was going to come in here and say that Mosaic wasn't going to close."[3] The voicemail also contained a similar message regarding Criswell and Radovan's lack of due diligence.

> Hey, Robert, Ethan Penner. I'm calling because I heard that we haven't connected with you in more like than a week and I know that a lot of work has been expended on both sides and a lot of enthusiasm exists on our side to get this deal done for you….We also need to kind of budget our resources, not just capital, but time, so because there are other deals that also are aiming for a year-end close.

(Hr'g. Tr. 9/07/17 962:22-24, 963:1-2, Ex. 1.)

Mr. Little argued that the voicemail evidenced Mosaic's interest in the deal. However, Mr. Campbell argued that "Mr. Penner didn't say that your deal

[3] Hr'g. Tr. 9/07/17 961:21-24, Ex. 1.

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was going to close. He actually said that he has other deals that were going to close towards of end of the year."[4] No one from Mosaic was deposed or testified.

C. Judge Flanagan Awards Each Defendant 1.5 Million Based on Interference with the Mosaic Loan

After a seven-day bench trial, Judge Flanagan issued an oral decision from the bench and found against Mr. Yount on all claims.[5] Judge Flanagan then awarded millions in damages to defendants based on their "claim" of unclean hands.[6] He concluded that "but for intentional interference with the contractual relations between Mosaic and Cal Neva, LLC the project would have succeeded."[7] Judge Flanagan stated that the "deal was done" and Mosaic had evidenced its enthusiasm to close this deal."[8] Judge Flanagan further concluded that the "solid evidence" of Mr. Yount and the IMC's efforts to undermine the Mosaic loan was the email from Sterling Johnson.[9]

Judge Flanagan based his entire theory of liability on the motivations of Mosaic in withdrawing its initial offer to Criswell Radovan. However, no individuals from Mosaic were ever deposed. The email and the voicemail both contain concerns regarding Criswell Radovan's diligence. The Court should have been presented evidence of their actual intent and motivations. Because defendants never plead any counterclaims and Mr. Yount was not on notice that he could be liable for money damages this evidence was outside the scope of the issues presented at trial. Where a finding is based on new theory of liability a party could not have reasonably discovered evidence to rebut that theory.

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[4] Hr'g. Tr. 9/07/17 968:21-24, Ex. 1.

[5] Hr'g Tr. 9/08/2017, at 1139:13, Ex. 2.

[6] Hr'g Tr. 9/08/2017, at 1140:19-24, Ex. 2.

[7] Hr'g Tr. 9/08/2017, at 1139:20-22. Ex. 2.

[8] Hr'g Tr. 9/08/2017, at 1140:4-6, Ex. 2.

[9] Hr'g Tr. 9/08/2017, at 1140:1-4, Ex. 2.

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Accordingly, it is essential that Mr. Yount be permitted to confirm the motivations behind the withdrawal of the Mosaic loan.

II.

THIS COURT SHOULD AUTHORIZE LIMITED DISCOVERY

Mr. Yount seeks leave to depose Mr. Sterling Johnson, Mr. Ethan Penner, and Mr. Howard Karawan to discover facts that would corroborate prejudice. Defendants never pleaded a counterclaim that would have put Mr. Yount on notice that he could be liable for money damages rather than just dismissal of his claims. Further, unclean hands only required defendants to demonstrate misconduct not successful interference with the loan. Thus, because Judge Flanagan's finding was based on new theory of liability, Mr. Yount could not have reasonably discovered evidence to rebut that theory. Accordingly, Mr. Yount should be permitted to conduct limited post judgment discovery to verify the reasons behind the Mosaic loan withdrawal.

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A. Judge Flanagan Found in Favor of Defendants Based on a New Theory of Liability

Where a finding is based on new theory of liability a party could not have reasonably discovered or introduced evidence to rebut that theory. *See Stofer v. Montgomery Ward & Co.*, 249 F.2d 285, 288 (8th Cir. 1957) (holding trial court did not abuse its discretion in granting defendant new trial, on ground that defendant had been prejudiced by submission of case to jury on theory not justified by complaint, without complaint having been amended, and without defendants having had opportunity of preparing to meet new theory for recovery); *Ferrell v. Trailmobile, Inc.*, 223 F.2d 697, 698 (5th Cir. 1955) (the ends of justice may require granting a new trial on grounds of newly discovered evidence, even where proper diligence was not used to secure such evidence for use at the trial).

Here, defendants pleaded unclean hands, however Judge Flanagan awarded substantial damages under an intentional interference with contractual relations theory. Mr. Yount could not have reasonably discovered[10] or introduced evidence that related to a theory of liability that was raised for the first time in Judge Flanagan's oral ruling. Justice requires post trial discovery so Mr. Yount can corroborate the prejudice that occurred at trial. Depositions of Mr. Sterling , Mr. Penner, and Mr. Karawan should be permitted.

B. NRCP 27(b) Expressly Permits Post-Judgment Depositions

Under NRCP 27(b), while a case is pending appeal or while the time to take an appeal has not yet expired the District Court

> May allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court… The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony of persons to be examined and the substance of the testimony which the party expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken…

NRCP 27(b). Pursuant to Rule 27(b), Mr. Yount seeks to depose Sterling Johnson, the VP of Investments at Mosaic Real Estate Investors, LLC whose address is 1880 Century Park East, Suite 300 Los Angeles, California, 90067. Mr. Yount also seeks to depose Ethan Penner, the Managing Partner of Mosaic Real Estate Investors, LLC whose address is 1880 Century Park East, Suite 300 Los Angeles, California, 90067. Mr. Yount seeks to depose Mr. Howard Karawan, the advisor for Mosiac Real Estate Investors LLC, whose address is 720 Pearl Street, Suite 3B, Boulder, Colorado 80302. Mr. Johnson, Mr. Penner, and Mr. Karawan

[10] Due diligence does not require omniscience or doing everything possible, but rather doing everything reasonable. *Smigelski v. Dubois*, 153 Conn. App. 186, 200, 100 A.3d 954, 963 (2014).

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attended the meeting where a group of Cal Neva investors allegedly interfered with the Mosaic loan. As discussed herein, Mr. Yount seeks to depose Mr. Johnson, Mr. Penner, and Mr. Karawan to verify the reason why Mosaic withdrew its preliminary offer.

Judge Flanagan found that "but for the intentional interference with the contractual relations between Mosaic and Cal Neva LLC, this project would have succeeded."[11] He found that the "solid evidence" of the alleged interference was Exhibit 124, an email from Mr. Johnson to Robert Radovan. Judge Flanagan believed that "the deal was in place… and yet the day that individuals from the IMC went to the Mosaic office without the knowledge of CR, that deal was dead."[12]

Mr. Little also heavily relied on a voicemail from Mr. Penner. The voicemail stated that Mr. Penner was calling because he had not "connected with [Mr. Radovan] in more like than a week" and "a lot of enthusiasm" existed to complete the Mosaic deal.[13] Mr. Campbell objected to the voicemail, noting that "if they wanted to have Mr. Penner here to testify, they should have had him testify."[14]

It is crucial for Mr. Yount to depose Mr. Johnson, Mr. Penner, and Mr. Karawan. Judge Flanagan's theory of liability was entirely based on the motivations behind the withdrawal of the loan. Mr. Yount seeks to confirm the reasons for Mosaic's withdrawal of the loan. In both the email and the voicemail Mosaic indicates that it had concerns regarding

[11] Hr'g Tr. 9/08/17 1139:20-22, Ex. 2.

[12] Hr'g Tr. 9/08/17 1140:5-8, Ex. 2.

[13] Hr'g. Tr. 9/07/17 963:23-24, 963:1, Ex. 1.

[14] Hr'g. Tr. 9/07/17 961:13-15, Ex. 1.

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Criswell Radovan's due diligence. Thus, it is necessary for Mr. Yount to verify the reasons why Mosaic decided to withdraw its preliminary offer.

Limited discovery is warranted to obtain evidence, which would corroborate prejudice. If Mr. Johnson, Mr. Penner, or Mr. Karawan testify that their motivation behind withdrawing the loan was their lack of confidence in Criswell Radovan, rather than any actions of the investors, such information would warrant a new trial.

C. Limited Post-Judgment Discovery Is Permitted and Necessary to Corroborate that Prejudice Occurred

The scope of discovery is within the control and discretion of the trial court. *MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 134 Nev. Adv. Op. 31, 416 P.3d 249, 255 (2018). Courts may permit post-trial discovery to prevent prejudice. *See Hoffmann v. S.J. Hawk, Inc.,* 177 Misc. 2d 305, 308, 676 N.Y.S.2d 448, 451 (Sup. Ct. 1998), *aff'd,* 273 A.D.2d 200, 709 N.Y.S.2d 448 (2000) (permitting limited post trial discovery because defendants' will be unfairly prejudiced in post-verdict hearing); *cf. Bell Tel. Labs., Inc. v. Hughes Aircraft Co.*, 73 F.R.D. 16, 20 (D. Del. 1976) (noting in determining whether to reopen a case, prior or following entry of judgment court must consider attainment of a just resolution of a particular dispute before the court). Post trial discovery should be permitted where the evidence would prevent errors. *Cf. Caruso v. Baumle*, 880 So. 2d 540 (Fla. 2004) (Court properly permitted post-trial discovery so party could authenticate document introduced at trial); *Bangaly v. Baggiani*, 20 N.E.3d 42, 77 (Ill.Ct.App. 2014)(in a wrongful death case Court properly permitted post-trial discovery, on the descendants marital status, to prevent abusing its discretion because the Court had to determine who was legally entitled to the damages award).

And while losing parties may not engage in futile fishing expeditions, post-judgment discovery is permitted where there has been some showing that

the sought-after evidence exists. *E.g., Halliburton Energy Servs., Inc. v. NL Indus.,* 618 F. Supp. 2d 614, 654 (S.D. Tex. 2009) (stating the post-judgment discovery for evidence of fraud to support a motion for a new trial could occur 'if there has been some showing that a fraud actually has occurred).

Here, Mr. Yount seeks to depose to Mr. Johnson, Mr. Penner, and Mr. Karawan to verify the reasons behind the withdrawal of their preliminary offer. These facts go to the heart of Judge Flanagan's findings. Should the discovery show that Mr. Yount and members of the IMC did not interfere with the Mosaic loan this would be sufficient to corroborate that prejudice occurred at trial. Mosaic could have withdrawn the loan because of its lack of confidence in Criswell Radovan's management of the project. If true, the evidence would materially change the result of trial.

D. The Court May Rely on Mr. Campbell's Declaration

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An affidavit that contains hearsay maybe relied upon by the court where it "is the best evidence available under the circumstances and that there is sufficient reason to regard it as reliable." *State ex rel. Crummer v. Fourth Judicial Dist. Court In & For Elko Cty.*, 68 Nev. 527, 532, 238 P.2d 1125, 1127 (1951); *see also Reyna v. Luna*, No. 13-03-676-CV, 2005 WL 2559774, at fn.1 (Tex. App. Oct. 13, 2005)(noting that hearsay in an affidavit could be competent summary judgment evidence); *cf In re Boll's Estate*, 43 S.D. 242, 178 N.W. 880, 880 (1920)(noting that the affidavit of the attorney of the moving party alone has been held sufficient where the alleged newly discovered evidence relates not to the moving party's main case but to matters introduced at the trial by the adverse party).

Here, this Court may rely on Mr. Campbell's affidavit that contains the statements of Mr. Johnson, Mr. Penner, and Mr. Karawan. (Ex. 3.) Mr. Johnson and Mr. Karawan discussed the Mosaic meeting with Mr. Campbell after trial. They informed Mr. Campbell that Mosaic withdrew its preliminary

offer because they had not received due diligence paperwork from Radovan. But because of the litigious nature of Criswell and Radovan, Mr. Johnson, Mr. Penner, and Mr. Karawan declined to sign an affidavit. They informed Mr. Campbell that if subpoenaed for a deposition they would testify that Mosaic withdrew the loan because of the lack of due diligence. Thus, Mr. Campbell's affidavit is the best evidence available under the circumstances because Mr. Johnson, Mr. Penner, and Mr. Karawan would not sign their own affidavits. There is sufficient reason to regard it as reliable because Mr. Campbell is an attorney licensed in the State of Nevada and Mr. Johnson, Mr. Penner, and Mr. Karawan will testify to the above if subpoenaed. *See Crummer*, 68 Nev. at 532, 238 P.2d at 1127 (noting that court could not determine reliability because intervening source of information was not disclosed and no reason given why the affidavit of such person was not available). Therefore, this Court may rely on Mr. Campbell's declaration in support of this motion.

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CONCLUSION

For the forgoing reasons, this Court should authorize limited port judgment discovery relating to the withdrawal of the Mosaic loan.

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

Dated this 15th day of June, 2018.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Daniel F. Polsenberg*

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ADRIENNE R. BRANTLEY-LOMELI (SBN 14,486)
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

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Reno, Nevada 89501
Phone (775) 384-1123

Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of June, 2018, I served the foregoing "Plaintiff's Motion for Limited Post Judgment Discovery" 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

MARK G. SIMONS
SIMONS LAW, PC
6490 S. McCarran Blvd., #20
Reno, Nevada 89509

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

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INDEX OF EXHIBITS

EXHIBIT NO.	DESCRIPTION	NUMBER OF PAGES
1	Excerpts of Trial Transcript, Volume 6, dated September 7, 2017	8
2	Excerpts of Trial Transcript, Volume 7, dated September 8, 2017	6
3	Declaration of Richard G. Campbell, Jr., dated June 15, 2018	5

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Clerk of the Court
Transaction # 6731590 : csulezic

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 VI

September 7, 2017

9:00 a.m.

Reno, Nevada

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

004959

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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silly.

Q. Sir, in November of 2013, was Mosaic prepared close this loan by year's end?

A. Yes.

Q. Do you have any proof of that?

A. I do. I have a voicemail from Ethan Penner, the CEO of Mosaic, from November 19th saying that they're willing to close by the end of the year.

MR. LITTLE: Your Honor, I'd like the Court to listen to that voice message.

MR. CAMPBELL: Your Honor, I got to object.

THE COURT: Go ahead.

MR. CAMPBELL: This is totally unverified. If they wanted to have Mr. Penner here to testify, they should have had him testify. I never seen a voice message off a phone. It's so hard to authenticate something like that. I don't think it's right to allow him to do that.

THE COURT: It's his phone?

MR. LITTLE: Exactly, it's his phone. He can authenticate it. It's self-authenticating by the gentleman identifying himself and talking. It's impeachment evidence. We didn't know that Mr. Chaney was going to come in here and say that Mosaic wasn't going to close and we pushed them to the side and somehow we're to blame for it. So it's

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impeachment evidence.

THE COURT: Have it marked and I'll admit it and we can play it. Let's have the clerk mark it.

MR. LITTLE: I don't have it, your Honor. I don't have a written transcript of it. I just have the message itself. I mean, I can have that transcribed, but I wanted to play it to the Court.

THE COURT: Okay. Well, I'd like to have some physical exhibit.

MR. LITTLE: Okay.

THE COURT: So let's go ahead and have it played and my court reporter will transcribe it and we'll print it out.

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BY MR. LITTLE:

Q. Let's identify what date this is.

A. This is November 19th, 2015, at 2:55 p.m..

Q. And it's from who?

A. From Ethan Penner who is the CEO of Mosaic.

Q. What's the phone number?

A. (310) 926-4600, which is the Mosaic line.

Q. Let's go a head and play it.

(Hey, Robert, Ethan Penner. I'm calling because I heard that we haven't connected with you in more like than a week and I know that a lot of work has been expended on both

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sides and a lot of enthusiasm exists on our side to get this deal done for you. So I don't want to -- I want to make sure we don't lose that window of opportunity to kind of get it done in the time frame that you need. We also need to kind of budget our resources, not just capital, but time, so because there are other deals that also are aiming for a year-end close. So please get back to me, either cell (310) 702-0135 or the office, and I look forward to our partnership.)

Q. Sir, did you or Mr. Criswell stand in the way of Mosaic not closing by year end or early January?

A. Absolutely not.

THE CLERK: Your Honor, that would be, after it's transcribed, it will be Exhibit 217. You said that's admitted?

THE COURT: Yes.

THE CLERK: Thank you.

BY MR. LITTLE:

Q. I want to move on to another topic. You heard Mr. Chaney say that there was no detailed discussion of cost overruns at the July 2015 meeting. Do you recall hearing that?

A. Yes.

Q. In fact, the Court can interpret his testimony for

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CROSS EXAMINATION

BY MR. CAMPBELL:

Q. Mr. Radovan, you just said that the you believe the Mosaic loan would have closed. Do you have any documents at ally other than what we've seen in this trial where there was an indication that the Mosaic loan was going to close?

A. They wanted to move forward.

Q. Do you have any documents is the question?

A. No.

Q. And when you played the tape -- well, prior to playing the tape or the voicemail, you said that Mr. --

A. Penner.

Q. -- Penner. Your testimony was he had told you that it was going to close by year end?

A. Yes, sir.

Q. Could you play that tape again?

A. Uh-huh.

MR. CAMPBELL: Is that okay, your Honor?

(Voicemail played at this time.)

BY MR. CAMPBELL:

Q. Mr. Penner didn't say that your deal was going to close. He actually said that he has other deals that were going to close towards of end of the year, correct?

A. That is correct. He was referring to our deal in

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

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

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

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

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

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

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

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

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

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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 3

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EXHIBIT 3

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

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DISTRICT COURT

WASHOE COUNTY, NEVADA

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

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RICHARD G. CAMPBELL, Jr. declares:

1. I represented plaintiff George Stuart Yount in the matter of *Yount vs. Criswell Radovan, et al.*, and have been his attorney since the inception of this case.
2. Mr. Yount alleged that he was fraudulently induced to invest in the Cal Neva Lodge LLC ("Cal Neva") and that defendants converted his $1 million dollar investment.
3. Defendants did not plead any counterclaims and only pleaded the affirmative defense of unclean hands.
4. Defendants contended that Mr. Yount had unclean hands and was not entitled to a damage award because he conspired with other investors to interfere with the Cal Neva's refinancing loan with Mosaic Real Estate Credit LLC ("Mosaic"). Defendants did not ask for damages.
5. Throughout trial defendants stated that they did not bring any counterclaims and only pleaded an affirmative defense.
6. After the seven-day bench trial, Judge Flanagan awarded substantial damages in favor of defendants based on Mr. Yount's alleged interference with the Mosaic loan.
7. After trial, I spoke with Sterling Johnson, the Vice President of Investment at Mosaic and Howard Karawan, the advisor for Mosaic. Based on the notes of those conversations, I recall the details as follows.
8. Mr. Johnson stated that, in October or November of 2015, he was communicating with Criswell Radovan as the developers of the Cal Neva Lodge regarding a loan to the Cal Neva lodge LLC.

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9. Mr. Sterling and Mr. Karawan said they were in contact with Robert Radovan who was the person running the refurbishing of the Cal Neva Lodge to obtain information from Mr. Radovan regarding the loan in order for Mosaic to do its due diligence on the proposed loan.

10. Mr. Sterling stated that, by late January of 2016, he had not received documents and information from Mr. Radovan despite repeated promises from him to provide information related to Mosaic's due diligence.

11. Mr. Karawan said that Pete Dordick, who he believed was an advisor to Criswell Radovan and or Cal Neva Lodge LLC, put Mr. Karawan in touch with some of the investors in the Cal Neva Lodge which lead to Mosaic calling for a meeting in Sacramento on February 1, 2016.

12. Mr. Sterling and Mr. Karawan attended the February 1, 2016 meeting with Brandon Cheney, Paul Jameson, Les Busick, and Phil Busick who were members of the Executive Committee of the Cal Neva Lodge LLC, to discuss the loan to Cal Neva. Ethan Penner the Managing Partner for Mosaic was also at that meeting.

13. Mr. Sterling and Mr. Karawan informed me that Mr. Penner lead the discussion and reiterated his frustration with Mr. Radovan and the lack of communication and providing information for Mosaic's due diligence. Mr. Penner told the representatives of the Cal Neva Lodge LLC that Mosaic was not proceeding forward with the loan in light of the frustration with Mr. Radovan.

14. Mr. Sterling stated that nothing that was discussed at the meeting nor any comments made by any of the members of the Executive Committee of the Cal Neva Lodge LLC had anything to do with the decision to not move forward with the loan. That decision was made because there was not enough information provided by Criswell Radovan for Mosaic to complete its due diligence.

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15. Mr. Johnson and Mr. Karawan declined to sign affidavits to the above but stated that they would testify to the above if deposed.

Dated this 15 day of June, 2018.

RICHARD G. CAMPBELL, JR.

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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, Suite 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 LIMITED POST JUDGMENT DISCOVERY

Defendants Criswell Radovan, LLC ("Criswell Radovan"), CR Cal Neva, LLC ("CR Cal Neva"), Robert Radovan ("Radovan"), William Criswell ("Criswell"), and Powell, Coleman and Arnold LLP ("PCA"), (collectively "Defendants"), by and through their undersigned counsel,

hereby file this Opposition to Plaintiff's Motion for Limited Post Judgment Discovery.

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 9 day of July, 2018.

HOWARD & HOWARD ATTORNEYS PLLC

By: _____

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

I.
STATEMENT OF FACTS

A. Mr. Yount's Interference with the Mosaic Loan Was Alleged Even Before Trial.

While this lawsuit was initiated with Plaintiff's breach of contract, breach of duty, fraud, and conversion claims against Defendants, Mr. Yount's intentional interference with the loan between Mosaic and Cal Neva Lodge quickly became a central focus of the case. Since before trial, Defendants have stressed Plaintiff's role in undermining the Mosaic loan. In Defendants' August 25, 2017 Proposed Findings of Fact and Conclusions of Law, Defendants stated:

> [Mr. Yount] 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.
>
> Yount was aware of the ***interference*** when it occurred.
>
> Yount's alleged damages result in whole or in part from the ***interference*** in the Mosaic loan.

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HOWARD & HOWARD ATTORNEYS PLLC

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Page 7 (emphasis added).

> 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.

Page 11 (emphasis added).

In addition to the discussion of Plaintiff's interference in the Proposed Findings, his interference was a topic of discussion throughout Defendants' deposition of Mr. Yount, as illustrated below:

> Q Do you know why Mosaic backed out of the project?
> A No.
>
> Q Did that have anything to do with **you or the efforts, if any, of the members of the IMC group**?
> A Not me for sure.
>
> Q Did that have anything to do with the efforts of the IMC group or Molly Kingston?
> A I think it's been alleged that they did, but I think it was the IMC group. I don't think anybody alleged Molly Kingston was involved in that, but I don't know that.

Yount Deposition, 114: 9—20 (emphasis added).

> Q So you don't believe they were trying to **tank that loan**?
> A No, I don't believe so, but I don't know that.

Yount Deposition, 115: 25, 116: 2 (emphasis added).

> Q There was never any discussion with you about trying to **tank the Mosaic deal**?
> A No. I never had any feeling like that. They would have no benefit.

Yount Deposition, 203: 12—15 (emphasis added).

Furthermore, Plaintiff's interference was even discussed in Defendants' Motion for Summary Judgment, as reproduced below:

> Unfortunately, [Mr. Yount] 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.

Motion for Summary Judgment, pg. 8: 7—11.

B. Mr. Yount's Interference with the Mosaic Loan Was Litigated Throughout Trial.

Plaintiff's interference was not only emphasized *before* trial, it was also woven *throughout* trial. Mr. Yount's counsel stipulated into evidence fifty-six (56) defense exhibits—the majority of which were emails that dealt directly with Plaintiff's interference[1]—and also presented three of his own trial exhibits (exhibits 55, 58, and 59) relating to the interference claim.[2] Plaintiff has cited to several such emails in his Motion, including emails between him and the Incline Men's Club ("IMC") members, as well as an email from Sterling Johnson, the Vice President of Investments at Mosaic, in which the loan offer was withdrawn.[3]

Additionally, witnesses at trial from both sides were exhaustively asked about Mr. Yount's intentional interference with the Mosaic loan—so much so, that a simple key word search of the trial transcripts reveals that the term "Mosaic" was used over 300 times. Exhibit 2, summarized below, contains trial transcript excerpts from the examination of Defendants Criswell and Radovan, Mr. Yount, and Brandon Chaney, and from statements by Mr. Campbell, Mr. Little, and Mr. Wolf, all of which pertain to Plaintiff's interference with the loan.

During the examination and cross-examination of Defendants Criswell and Radovan, the issue of interference during came up in both the questions asked of them and in the answers they gave. And during the questioning of Mr. Yount, he was asked many times about his interference with the loan, even by his own counsel. While he was on the stand, the term interference came up so often, in fact, that creative terms such as "tanking" and "torpedoing" the loan were used in

[1] As Judge Flanagan described, "[t]his Court has documented dozens of e-mail exchanges between Mr. Yount and the IMC and their efforts to undermine the Mosaic loan…" September 8, 2017, Trial Transcript, pg. 1140: 1—4.
[2] *See* Exhibit 1 for a description of relevant trial exhibits.
[3] Plaintiff's Motion for Limited Post Judgement Discovery, pg. 3.

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the questions and replies. Relevant portions of his questioning relating to interference with the Mosaic loan are produced below:

> Q [By Plaintiff's counsel to Mr. Yount]. Mr. Yount, you've been in the courtroom, you heard Mr. Radovan and Mr. Little's discussion about participating with the IMC in some kind of plan or scheme, right?[4]
>
> Q [By Plaintiff's counsel to Mr. Yount]. Did you ever conspire to somehow undermine the Mosaic loan?[5]
>
> Q [By Defendants' counsel to Mr. Yount]. I also understood from your testimony that you distanced yourself from the IMC folks and played no role in their effort to torpedo the loan?[6]
>
> Q [By Defendants' counsel to Mr. Yount]. You weren't referring to the secret Mosaic torpedo meeting?
> A [Mr. Yount]. As far as I know, there was no such meeting. You keep trying to put things in my mouth about torpedoing things, but it's just not what I know.[7]
>
> Q [By Defendants' counsel to Mr. Yount]. Now, you've suggested in your testimony today that the loan was not torpedoed. What do you think happened after that meeting other than the loan being tanked or rescinded? Do you think there was some path forward with Mosaic after the meeting?[8]

In addition to questioning Plaintiff on the issue, Plaintiff's counsel even called Brandon Chaney from IMC as a witness and questioned him extensively on this key defense issue. For example, Plaintiff's counsel asked Mr. Chaney if he and his partners went into the meeting with Mosaic "to somehow torpedo the Mosaic loan?"[9] Plaintiff's counsel also asked Mr. Chaney if Plaintiff did anything to interfere with the Mosaic Loan.[10]

Notably, during examination and cross-examination, Plaintiff and his counsel did not object to questioning relating to interference on grounds that they were blindsided by the issue of interference with the Mosaic loan and the resultant damages to Defendants. Instead, Plaintiff's

[4] August 31, 2017, Trial Transcript, pg. 585: 9—11.
[5] August 31, 2017, Trial Transcript, pg. 585: 16—17.
[6] September 6, 2017, Trial Transcript, pg. 727: 19—21.
[7] September 6, 2017, Trial Transcript, pg. 734: 18—22.
[8] September 6, 2017, Trial Transcript, pp. 767: 21—24, 768:1—9.
[9] September 6, 2017, Trial Transcript, pg. 842: 21—24.
[10] September 6, 2017, Trial Transcript, pp. 862: 24, 863: 7.

counsel's only objection relating to this line of questioning was one of "foundation", as demonstrated below:

> Q. [By Defendants' counsel]. 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.[11]

C. Judge Flanagan Found that There Was Solid Evidence of an Interference Claim and Awarded Damages Accordingly.

The late Chief Judge Flanagan's findings illustrate how central Plaintiff's interference with the Mosaic loan was during trial. As Judge Flanagan stated, there was "solid evidence" of Mr. Yount and the IMC's efforts to undermine the Mosaic loan."[12] Judge Flanagan therefore ruled against Plaintiff and awarded Defendants damages "on Defendants' counterclaim," [13] finding that "but for the intentional interference with the contractual relations between Mosaic and Cal Neva, the project would have succeeded. That is undisputed."[14]

II.

THIS COURT SHOULD DENY PLAINTIFF'S MOTION FOR POST-JUDGMENT DISCOVERY

A. NRCP 27(b) Does Not Allow for Post-Judgment Depositions in This Case.

NRCP 27—the rule pursuant to which Mr. Yount seeks to depose Mosaic members Sterling Johnson, Ethan Penner, and Howard Karawan—"provides for the perpetuation of testimony in limited circumstances."[15] Section (a) "provides for the perpetuation of testimony

[11] August 31, 2017, Trial Transcript, pg. 493: 6—24.
[12] September 8, 2017, Trial Transcript, pg. 1140: 1—4.
[13] Amended Order, pg. 1: 25.
[14] September 8, 2017, Trial Transcript, pg. 1139: 20—22; *see also* pg. 1131: 11—13 (Judge Flanagan stating "[t]hat 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.").
[15] *Sunrise Hosp. v. Eighth Judicial Dist. Court In & For Cty. of Clark*, 110 Nev. 52, 54, 866 P.2d 1143, 1144 (1994).

prior to trial," while section (b), the relevant section here, "deals with perpetuation of testimony pending appeal."[16] NRCP 27(b) (emphasis added) provides in relevant part:

> If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered *may* allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. . .If the court finds that the perpetuation of the testimony is *proper* to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken....

As the Nevada Supreme Court states, "[a]n order permitting the perpetuation of testimony is to be granted only in extraordinary circumstances."[17] Case law interpreting FRCP 27 (hereinafter "Rule 27" or "the Rule") provides insight as to the nature and purpose of NRCP 27.[18] Rule 27 "is not a license for general discovery,"[19] nor is it a "substitute for discovery"; instead, the "scope of discovery allowed under Rule 27 is much narrower than that available under the general discovery provisions of Rule 26."[20] Specifically, "Rule 27 properly applies ***only*** in that special category of cases ***where it is necessary to prevent testimony from being lost.***"[21]

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[16] *Ash v. Cort*, 512 F.2d 909, 911 (3d Cir. 1975).

[17] *Sunrise Hosp.*, 110 Nev. at 55, 866 P.2d at 1145.

[18] *See Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (citing *Las Vegas Novelty v. Fernandez*, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990)) ("Federal cases interpreting the Federal Rules of Civil Procedure 'are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.'").

[19] *Turner v. Nationstar Mortg., LLC*, 2016 BL 415539, 3 (N.D. Tex. Nov. 21, 2016).

[20] *Ash v. Cort*, 512 F.2d at 911-12.

[21] *Ash v. Cort*, 512 F.2d at 911 (emphasis added); *See also Petition of Fer*kauf, 3 F.R.D. 89, 91 (S.D.N.Y.1943) (stating that Rule 27 applies "to situation where, for one reason or another, testimony might be lost to a prospective litigant unless taken immediately."); *Application of Deiulemar Compagnia Di Navigazione S.p.A. v. M/V Allegra*, 198 F.3d 473, 484 (4th Cir. 1999) ("Rule 27 properly applies only in that special category of cases where it is necessary to prevent testimony from being lost.") (internal citations removed); *Lampton v. Diaz*, No. 3:09CV324-DPJ-MTP, 2010 WL 4338650, at *4 (S.D. Miss. Oct. 26, 2010) ("Rule 27(b) requires 'a real showing of the need for the preservation of the evidence.'") (internal citations omitted); *Cent. States, Se. & Sw. Areas Pension Fund v. Nagy Ready Mix, Inc.*, No. 10 CV 0358, 2012 WL 6720447, at *2 (N.D. Ill. Dec. 27, 2012) (stating that because Rule 27(b) requires establishing the need for preservation of the evidence, "the moving party must demonstrate a risk of permanent loss of the desired testimony.") (internal citations removed); *Penn Mut. Life Ins. Co. v. United States*, 68 F.3d 1371, 1375 (D.C. Cir. 1995) (stating that Rule 27 requires that "a petitioner demonstrate an immediate need to perpetuate testimony."); 8 Charles Alan Wright, et al., *Federal Practice and Procedure*: Civil 2D § 2072 (petitioner must establish that "the taking of the testimony [is] made necessary by the danger that it might be lost by delay."); *In re Certain Inv'r in EFT Holdings Inc. to Perpetuate Testimony of Mr. Jack Qin Under FRCP Rule 27*, No. CV 13-0218 UA SS, 2013 WL 3811807, at *3 (C.D. Cal. July 22, 2013) ("Rule 27 applies where testimony or evidence might be lost ... unless a deposition is taken immediately to preserve the testimony for future use."); *State of Arizona*

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The reasons advanced by Plaintiff do not entitle him to invoke NRCP 27(b). Pages of Plaintiff's Motion are devoted to discussing the facts of this case and claiming there is a possibility that Mosaic could have withdrawn the loan because of a lack of confidence in Criswell Radovan's management, but Plaintiff's Motion is entirely void of any discussion as to why the circumstances here are anything but ordinary. Plaintiff appears to erroneously view a motion pursuant to NRCP 27(b) as a license for general discovery, rather than as a tool for a narrow scope of discovery in limited circumstances. In Plaintiff's motion, there is no mention whatsoever of any reason for taking the depositions immediately or for preserving the evidence, much less an utterance of any concern of loss of the testimony. For these reasons, Mr. Yount has not made the requisite showing under NRCP 27(b) that the perpetuation of the testimony is proper to avoid a failure or delay of justice.[22] Therefore, this Court should not allow the deposition of Mr. Sterling Johnson, Ethan Penner, or Howard Karawan.

B. Intentional Interference is Not a "New Theory of Liability"; Plaintiff Had Notice of the Issue.

Plaintiff makes the argument that the interference theory under which Judge Flanagan based his award of damages is a "new theory of liability," and so Mr. Yount "could not have reasonably discovered or introduced evidence to rebut that theory."[23] Plaintiff even goes so far as to say that the first time he knew he could be liable for intentional interference and possible damages was at Judge Flanagan's oral ruling. Yet, as described below, Plaintiff's own Motion

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v. State of California, 292 U.S. 341, 347–48, 54 S. Ct. 735, 737–38, 78 L. Ed. 1298 (1934) (stating that it must appear that the taking of testimony "is made necessary by the danger that it may be lost by delay."); *Kendrick v. Irwin*, 77 F. App'x 770, 771 (6th Cir. 2003) ("The party making the motion must show that there is a danger that the testimony will be lost by delay," and "[m]ere allegations that witnesses might die or memories might fade are not sufficient to justify the granting of the motion."); *In re Whitehead*, 476 F. App'x 281, 282 (3d Cir. 2012) (stating that petitioner "made no attempt to demonstrate that the testimony of three of his putative witnesses was in danger of being lost[, and] as to the fourth, he asserted only that she seemed elderly and walked with a cane" and holding that petitioner "did not demonstrate that the perpetuation of that testimony would "'prevent a failure or delay of justice.'") (internal citations removed).

[22] NRCP 27(b) ("If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken…").

[23] Plaintiff's Motion for Limited Post Judgement Discovery, pg. 6 (emphasis added).

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says otherwise. And a review of the facts of this case provides even more proof that Plaintiff has known about the interference issue.

1. Plaintiff's Own Motion Shows that he Knew About the Interference Issue.

As Plaintiff states, since a time as early as the filing of their answer, Defendants' have "alleged that Mr. Yount conspired with other investors to **interfere** with the Project's refinancing loan."[24] Plaintiff then goes on to state that from there, "*[d]iscovery focused on* the subscription agreement and other pre-investment documents, communications between Mr. Yount and defendants, and *communications between Mr. Yount and the investors that allegedly conspired to* ***interfere*** *with the Mosaic loan.*"[25] And then Plaintiff states that during trial, "defendants introduced a series of email communications between Mr. Yount and members of the Incline Men's [C]lub ("IMC")," "an email from Sterling Johnson, the VP of [I]nvestments at Mosaic, that withdrew the preliminary loan offer," "an email that evidenced a meeting with members of the Executive Committee and members of Mosaic"—which Plaintiff says we introduced "[t]o demonstrate that investors conspired to **interfere** with the loan"—and "a voicemail from another member of Mosaic, Ethan Penner."[26]

2. The Facts of the Case Provide Even More Proof that Plaintiff Knew About the Interference Issue.

As Plaintiff points out in his Motion, and as described in the Statement of Facts section, Plaintiff had notice of the interference claim even before trial. Defendants' Motion for Summary Judgement and Defendants' Proposed Findings of Fact and Conclusion of Law informed Mr. Yount that Defendants were alleging that he conspired with IMC to interfere with the Mosaic loan. Importantly, the Proposed Findings specifically stated that "[t]his intentional interference

[24] Plaintiff's Motion for Limited Post Judgement Discovery, pg. 3: 1—2.
[25] Plaintiff's Motion for Limited Post Judgement Discovery, pg. 3: 3—6 (emphasis added).
[26] Plaintiff's Motion for Limited Post Judgement Discovery, pg. 3-4.

has damaged the Defendants far in excess of Plaintiff's $1 Million investment"—thus Plaintiff was aware that he could liable for money damages.

During trial, a substantial amount of both documentary and testimonial evidence was presented concerning Mr. Yount's willful interference with the Mosaic loan. Plaintiff himself concedes that emails were admitted into evidence to show that there was interference with the loan. Plaintiff stipulated into evidence *dozens* of emails relating to his interference,[27] which illustrates that he consented to Defendants putting on evidence of the interference and damages.[28] Importantly, Plaintiff even presented *his own trial exhibits* on the issue.[29]

A peruse through the trial transcript shows that the issue was extensively tried. Because the interference with the loan was such a major part of this case—the loss of the Mosaic loan led to the demise of the project and significant damages to Defendants—Mr. Yount's interference was discussed in the questioning of almost all witnesses at trial, as shown in Exhibit 2. Particularly telling is the questioning reproduced below, which demonstrates that both Plaintiff's and Defendants' counsel asked Mr. Yount about the tanking of the Mosaic Loan:

> *By Plaintiff's Counsel:*
> Q. Mr. Yount, you've been in the courtroom, you heard Mr. Radovan and Mr. Little's discussion about participating with the IMC in some kind of **plan or scheme**, right?[30]
>
> Q. Did you ever conspire to somehow **undermine the Mosaic loan**?[31]
>
> *By Defendants' Counsel:*
> Q. I also understood from your testimony that you distanced yourself from the **IMC folks and played no role in their effort to torpedo the loan?**[32]
>
> Q. You weren't referring to the secret **Mosaic torpedo meeting?**
> A. As far as I know, there was no such meeting. You keep trying to put things in my mouth about **torpedoing things, but it's just not what I know.**[33]

[27] *See* Exhibit 1.
[28] *See* Defendants' Motion for Judgment as a Matter of Law, for Relief from Judgment, to Alter and Amend the Judgment, to Amend the Findings, and for a New Trial, pg. 24: 2—6.
[29] *See* Exhibit 1.
[30] August 31, 2017, Trial Transcript, pg. 585: 9—11.
[31] August 31, 2017, Trial Transcript, pg. 585: 16—17.
[32] September 6, 2017, Trial Transcript, pg. 727: 19—21.
[33] September 6, 2017, Trial Transcript, pg. 734: 18—22.

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This questioning from Plaintiff's own counsel, along with their extensive questioning of IMC's Brandon Chaney and Defendants' questioning of numerous other witnesses about the interference, shows that Plaintiff knew that interference was a central part of the case.

It was only after this extensive amount of questioning and discovery that Chief Judge Flanagan ruled on the issue of intentional interference. After a nearly two and a half hour oral decision, in which he carefully detailed and analyzed the evidence and weighed the credibility of the witnesses, Judge Flanagan found that there was "solid evidence" of Mr. Yount's interference with the Mosaic loan—a finding clearly in conflict with Plaintiff's argument that the interference was a new theory of liability. As Judge Flanagan stated:

> 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.[34]

Thus the facts of this case do not support a finding that intentional interference was a "new theory of liability."

3. The "New Theory of Liability" Cases to Which Plaintiff Cites Are Inapposite.

Plaintiff cites to *Stofer v. Montgomery Ward & Co.*[35] and *Ferrell v. Trailmobile, Inc.*[36] in an attempt to support his "new theory of liability" argument. But these cases do not provide guidance relevant here because *Stofer* and *Ferrell* discuss when a **new trial** should be granted. These sixty year old cases from other circuits give no direction as to when post-judgment discovery should be allowed or disallowed.

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[34] September 8, 2017, Trial Transcript, pg. 1140.
[35] 249 F.2d 285, 288 (8th Cir. 1957).
[36] 223 F.2d 697, 698 (5th Cir. 1955).

C. Defendants' Unclean Hands Defense May be Converted into a Counterclaim.

Plaintiff devotes a substantial part of his argument to reiterating that Defendants alleged an unclean hands affirmative defense but did not file an interference counterclaim. As Plaintiff states, "Defendants never pleaded a counterclaim that would have put Mr. Yount on notice that he could be liable for money damages rather than just dismissal of his claims."[37] This mirrors Plaintiff's argument—that "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"—in his Motion for Judgment as a Matter of Law, for Relief from Judgment, to Alter and Amend the Judgment, to Amend the Findings, and for a New Trial.[38] Defendants incorporate their Opposition to that Motion by reference herein.

Both statutes and case law clearly allow for Defendants' affirmative defense to be converted into a counterclaim. One basis for the conversion of the affirmative defense into a counterclaim is NRCP 8(c), which states in relevant part:

> 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.

As interpreted in one Nevada case, pursuant to Rule 8(c), even though the party's "affirmative defense and prayer for relief were neither designated as a counterclaim…, the Court will construe them as such in the interest of justice and judicial efficiency."[39]

NRCP 15(b) is also key here. This rule states, in relevant part:

> When issues not raised by the 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

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[37] Plaintiff's Motion for Limited Post Judgement Discovery, pg. 6: 7—8.
[38] 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 a New Trial, pg. 11: 20—22.
[39] *Las Vegas Dev. Grp., LLC v. SRMOF II 2012-1 Tr.*, 2018 BL 65566, 4 (D. Nev. Feb. 26, 2018) (citing NRCP 8(c)(2)).

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party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

As Nevada case law states, amendments to conform to proof are "perfectly proper," and courts "should be liberal in allowing such amendments."[40] Such an amendment is appropriate here because Plaintiff, except for an after-the-fact objection during closing arguments, failed to object to both the presentation of evidence of the interference claim and damages for Plaintiff's interference. Quite the contrary, Plaintiff stipulated into evidence dozens of emails about the intentional interference claim, including several exhibits of his own, and consented to Defendants' presentation of testimony on the claim through nearly every witness. Plaintiff's objection during questioning was "lack of foundation"—not that Plaintiff was surprised by an unpled counterclaim.

In addition to NRCP 15(b), NRCP 54(c) (emphasis added) provides that:

> [E]very final judgment shall grant the **relief** to which the party in whose favor it is rendered is entitled, even if the party has not demanded such **relief** in the party's pleadings.

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."[41] This rule, like Rule 15(b), is to be applied liberally. The Nevada Supreme Court recognized the liberal nature of NRCP 54(c) by confirming that Nevada has "liberalized rules of pleading."[42]

Based on these rules and case law, the fact that Defendants did not amend their pleadings to include the interference claim does not mean that Defendants could not be awarded on the claim. As the Court stated in *Padilla v. Ghuman*, "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."[43] This is particularly true here, considering that Judge Flanagan's findings and

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[40] *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).
[41] *Magill v. Lewis*, 74 Nev. 381, 387, 333 P.2d 717, 720 (1958).
[42] *Magill*, 74 Nev. at 388.
[43] 183 P.3d 653 (Colo. App. 2007).

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conclusions demonstrate that Plaintiff's unclean hands arose out of the same facts and circumstances that abundantly support Defendants' interference counterclaim—a claim that was litigated through discovery and tried at length.

D. The Cases Cited by Plaintiff in Section C of his Motion Do Not Entitle him to Post-Judgment Discovery.

1. *MEI-GSR Holdings, LLC* and *Bell Tel. Labs., Inc.* Are Not On Point, As They Do Not Even Discuss Post-Trial Discovery.

Plaintiff's citation to *MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, does not bolster his argument.[44] While the case does state that the scope of discovery is left to the trial court's discretion, it makes no mention whatsoever of post-trial discovery. The wording of NRCP 27(b), which states that the court *may* allow for post-trial depositions if the perpetuation of the testimony is proper to avoid a failure or delay of justice, already informs the court that there is a discretionary component to post-judgment discovery, and as such, *MEI-GSR* does not provide helpful guidance here.

In addition, it is not at all clear why Plaintiff cites to *Bell Tel. Labs., Inc. v. Hughes Aircraft Co.*, a Delaware case that is not on point. *Bell Tel. Labs* discusses a motion to reopen and a motion for entry of judgment—not a motion for post-trial discovery—in an action about determining the priority of patents.[45] The court there goes through an analysis of the following Federal Rules of Civil Procedure, none of which are so much as even mentioned in Plaintiff's motion: Rule 59, regarding motions for a new trial; Rule 60(b), regarding relief from judgment or order; and Rule 55(c), regarding motions to set aside a default judgment.

2. *Hoffman* and *Halliburton Energy Servs., Inc.* Are Distinguishable Because Their Narrow Holdings Relate to Post-Judgment Discovery in the Context of Collateral Source Information and Fraud Allegations, Respectively.

Plaintiff cites to *Hoffman v. S.J. Hawk, Inc.*, a New York case with distinguishable facts.[46]

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[44] 134 Nev. Adv. Op. 31, 416 P.3d 249 (2018).
[45] 73 F.R.D. 16 (D. Del. 1976).
[46] 177 Misc. 2d 305, 676 N.Y.S.2d 448 (Sup. Ct. 1998), *aff'd*, 273 A.D.2d 200, 709 N.Y.S.2d 448 (2000).

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There, the "singular issue before th[e] court [was] whether the defendants [were] entitled to post verdict disclosure as to certain '*collateral source*' information."[47] The judge relied on the collateral source statute CPLR 4545(c), "which sets forth a procedure by which evidence may be introduced on collateral sources of payment after the verdict has been reached," in making his decision to allow post-verdict discovery.[48] Here, there is no issue of collateral source information, and Plaintiff cites to no specific statute entitling him to post-judgment discovery, other than the generic NRCP 27, which is inapplicable here for the reasons previously discussed.

Similarly, Plaintiff's final case in Section C of his motion, *Halliburton Energy Servs., Inc. v. NL Indus.*, is a case from the South District of Texas stating that "[p]ostjudgment discovery into alleged fraud is not appropriate unless there has been at least some showing of fraud."[49] This case is inapplicable to Plaintiff's request for post judgment discovery because he has not alleged fraud in his motion.

3. *Caruso* and *Bangaly* Highlight that Post-Judgment Discovery Should Only be Allowed in Limited Circumstances, and the Circumstances Here Do Not Fit Within the Circumstances Allowed.

Plaintiff cites to two cases from other jurisdictions, *Caruso v. Baumle*[50] and *Bangaly v. Baggiani,*[51] which illustrate that there should be an extremely limited scope of post-trial discovery. In *Caruso*, post-trial discovery was allowed "solely for the purpose of authenticating the PIP [personal injury protection] records" that had already been discovered pretrial and introduced in trial.[52] And in *Bangaly*, the court used post-trial discovery only to make sure that the damages from the suit went to the right parties (they examined the marital status of the decedent). Even in the small matter of deciding the marital status of a decedent, the court still

[47] *Hoffman*, 177 at 307 (emphasis changed).
[48] *Hoffman*, 177 at 306.
[49] 618 F. Supp. 2d 614, 654 (S.D. Tex. 2009).
[50] 880 So. 2d 540 (Fla.2004).
[51] 20 N.E. 3d 42, 77 (Ill. Ct. App. 2014).
[52] *Caruso*, 880 at 546.

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had a lengthy discussion of when post-trial discovery is allowed. The *Bangaly* court heavily cited to *Shapo v. Tires 'N Tracks, Inc.*,[53] another Illinois case, which states that:

> [i]n all of the foregoing cases, the **courts did not allow discovery in cases where the evidence could have been discovered prior to judgment** or dismissal. Although these cases are analyzed under the auspices of whether a new trial should have been granted, they are in agreement that **post-trial discovery should only be granted in limited circumstances.**[54]

As these cases describe, post-trial discovery is seldom allowed by the courts and should only be granted in limited circumstances. Mr. Yount, however, looks to expand and open post-trial discovery in hopes of finding evidence which will allow him to strengthen his already tried argument that he did not sink the Mosiac Loan. The late Judge Flanagan already found that there is "solid evidence" that "but for the intentional interference with the contractual relations between Mosaic and Cal Neva LLC, this project would have succeeded." Allowing Plaintiff to question three additional witnesses—who could have been deposed or questioned at any time during the months that this suit was ongoing—and to reexamine the emails and the voicemail that this Court is already familiar with, is not allowed within the limited scope of post-trial discovery described in these cases.

E. Mr. Campbell's Affidavit Underscores Why Post-Judgment Discovery Should Not be Granted.

Despite the fact that the interference issue was a focal point both before and throughout trial, and despite the repeated focus on the infamous February 1 meeting that is central to the interference issue,[55] it was ***after trial*** that "Mr. Johnson and Mr. Karawan discussed the Mosaic meeting with Mr. Campbell."[56] And as Mr. Campbell states in his affidavit, it was ***after trial*** that

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[53] 336 Ill. App. 3d 387, 398, 782 N.E.2d 813, 823 (2002).
[54] *Bangaly*, 20 N.E. 3d at 77 (citing *Shapo*, 336 Ill. App. 3d at 398).
[55] *See* Exhibit 2 (Criswell was asked how the Mosaic loan was torpedoed and responded by discussing the meeting; Mr. Radovan was asked about the meeting; Mr. Yount himself was asked about "the secret Mosaic torpedo meeting"; Mr. Chaney was asked if he went "into the meeting to somehow torpedo the Mosaic loan"; Mr. Little made a statement about "that secret meeting"; Mr. Wolf made a statement that Mr. Yount "knew the meeting that was about to happen was probably not legit…").
[56] Plaintiff's Motion for Limited Post Judgement Discovery, pg. 10: 26—28 (emphasis added).

"Mr. Sterling [Johnson] and Mr. Karawan informed me that Mr. Penner lead [*sic*] the discussion" during the meeting and "told the representatives of the Cal Neva Lodge LLC that Mosaic was not proceeding forward with the loan in light of the frustration with Mr. Radovan."[57]

These delayed, after trial discussions between Mr. Campbell and Mosaic members are problematic because tellingly, Mr. Campbell himself concedes in the very same affidavit that he has known about the interference issue—Mr. Campbell states that "[d]efendants contended that Mr. Yount had unclean hands and was not entitled to a damage award because he conspired with other investors to interfere with the Cal Neva's refinancing loan with Mosaic."[58] Yet, Mr. Campbell's discussions with Mosaic members about the notorious February 1 meeting and the interference issue more generally did not take place until after trial.

Plaintiff's counsel now requests to have discovery once again so they can "verify the reasons why Mosaic decided to withdraw its preliminary offer."[59] But Plaintiff's counsel could have verified the reasons for Mosaic's withdrawal of the loan during discovery, before trial. Mr. Yount was specifically asked "***Do you know why Mosaic backed out of the project?***"[60] during his deposition, which took place almost three months before trial. Although Mr. Campbell was present for Mr. Yount's deposition, and must have heard Mr. Yount be asked about the reasons for Mosaic backing out of the project, it is only now that Mr. Campbell has decided to communicate with Mosaic members about the reasons for their backing out of the project.

Mr. Campbell states that he wishes to depose the three Mosaic members because "Mr. Johnson and Mr. Karawan declined to sign affidavits"[61] relating to the information from their after

[57] Plaintiff's Motion for Limited Post Judgement Discovery, Exhibit 3-Declaration of Richard G. Campbell, Jr., pg. 3: 17—22.
[58] Plaintiff's Motion for Limited Post Judgement Discovery, Exhibit 3-Declaration of Richard G. Campbell, Jr., pg. 2: 12—15.
[59] Plaintiff's Motion for Limited Post Judgement Discovery, pg. 9: 1—2.
[60] June 6, 2017 Yount Deposition, 114: 9—10.
[61] Plaintiff's Motion for Limited Post Judgement Discovery, Exhibit 3-Declaration of Richard G. Campbell, Jr., pg. 4: 1—2.

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trial discussions, allegedly because of the "litigious nature" of Mr. Criswell and Mr. Radovan[62]—two individuals who have not initiated a lawsuit in the last thirty-five years. But the takeaway from Mr. Campbell's affidavit is that it was not until after a completed trial that the non-prevailing counsel sought to obtain information about Mosaic's motive from Mosaic members themselves. Whether Mosaic members had signed the affidavits detailing the after trial discussions or Mr. Campbell submitted his own affidavit detailing the after trial discussions, as occurred here, it does not change the fact that Plaintiff's counsel made the decision not to depose Mosaic members before or even during trial, despite all of the notice given about the interference issue.

III.

CONCLUSION

Based on the foregoing, Defendants respectfully request that Plaintiff's Motion for Limited Post Judgement Discovery be denied in its entirety.

DATED this 9 day of July 2018.

HOWARD & HOWARD ATTORNEYS PLLC

By: _____

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 Defendants, Criswell Radovan, LLC, CR Cal Neva, LLC, Robert Radovan, William Criswell, Cal Neva Lodge, LLC

[62] Plaintiff's Motion for Limited Post Judgement Discovery, pg. 11: 2.

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: July 9, 2018

HOWARD & HOWARD ATTORNEYS, PLLC

By: _____

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

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 LIMITED POST JUDGEMENT DISCOVERY** 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
Attorney 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 July 6th, 2018 at Las Vegas, Nevada.

An Employee of HOWARD & HOWARD ATTORNEYS PLLC

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EXHIBIT “1”

Description of Trial Exhibits Relating to Inference Issue

Exhibits Introduced into Evidence by Plaintiff:

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 the 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."

Trial Exhibit 77: Letter introduced as "impeachment evidence" to rebut Robert Radovan's testimony from the prior day about sabotaging the Mosaic loan.

Exhibits Introduced into Evidence by Defendants:

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".

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Trial Exhibit 115: Email exchange between IMC's Brandon Chaney and Plaintiff shortly before the secret Mosaic meeting wanting to talk about Robert Radovan of Criswell Radovan.

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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 in which 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 120: Email exchange between Plaintiff and IMC just days before the secret meeting with Mosaic discussing financing that Plaintiff had helped arrange through Northlight's Roger Wittenberg, with whom Plaintiff had a prior relationship.

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).

Trial Exhibit 124: Email from Mosaic to Radovan sent a few hours after 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.

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EXHIBIT "2"

Trial Transcript Excerpts

Questioning Mr. Criswell

Q. And no deal ever got done, right?
A. Unfortunately, after **the Mosaic loan was torpedoed**, no, no other deal was done.

Q. Let me ask you this, since you brought it up. I want to make sure this is your testimony. **How was the Mosaic loan torpedoed?**
A. I wasn't in the meeting, but I know that we had scheduled a meeting with the members or members of the executive committee were invited to attend the meeting that Robert had scheduled with Mosaic.

August 30, 2017, Trial Transcript, pg. 280: 14—23.

Questioning Mr. Radovan

Q. Sir, do you believe the Mosaic loan would have closed **but for the interference by the IMC group and Mr. Yount?**
A. Yes.

August 31, 2017, Trial Transcript, pg. 491: 3—6.

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

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August 31, 2017, Trial Transcript, pg. 493: 6—7.

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Q. Did Mr. Yount ever share with you prior to the meeting with Mosaic that you were driving to, that there was going to be a meeting between members of the EC and Mosaic in advance of your planned meeting with Mosaic?
A. No.

Q. Do you believe that he should have so informed you?
A. Well, those people who knew, certainly somebody should have.

Q. And why do you say that?
A. It was totally **unauthorized and, frankly, interference.** And, obviously, in the letter that Mosaic said, starts off with, as you know. That is -- so **they obviously told Mosaic they were authorized to do that**.

August 31, 2017, Trial Transcript, pg. 499: 19—24, 500: 1—8.

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.

August 31, 2017, Trial Transcript, pg. 512: 8—17.

Questioning Mr. Yount
By Plaintiff's Counsel:
Q. Mr. Yount, you've been in the courtroom, you heard Mr. Radovan and Mr. Little's discussion about participating with the IMC in some kind of **plan or scheme**, right?

August 31, 2017, Trial Transcript, pg. 585: 9—11.

Q. Did you ever conspire to somehow **undermine the Mosaic loan**?

August 31, 2017, Trial Transcript, pg. 585: 16—17.

By Defendants' Counsel:
Q. I also understood from your testimony that you distanced yourself from the **IMC folks and played no role in their effort to torpedo the loan?**

September 6, 2017, Trial Transcript, pg. 727: 19—21.

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Q. You weren't referring to the secret **Mosaic torpedo meeting?**
A. As far as I know, there was no such meeting. You keep trying to put things in my mouth about **torpedoing things, but it's just not what I know.**

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September 6, 2017, Trial Transcript, pg. 734: 18—22.

Q. Now, you've suggested in your testimony today that the loan was not **torpedoed**. What do you think happened after that meeting other than the **loan being tanked or rescinded**? Do you think there was some path forward with Mosaic after the meeting?
A. Possibly not. I got the feeling that the Mosaic meeting was a desperation move on Mosaic to possibly put the deal together, because I don't think they were getting communication, the documents now show, that they felt they needed and were required. So they were potentially, I assume, reaching out to the executive committee to assure them that the communication was better than they were finding out

September 6, 2017, Trial Transcript, pg. 767: 21—24, 768:1—9.

Questioning Brandon Chaney (IMC)
Q. Did you or either Mr. Busick or Mr. Jamieson go into the meeting to **somehow torpedo the Mosaic loan?**
A. Absolutely not. We wanted this project to succeed.

September 6, 2017, Trial Transcript, pg. 842: 21—24.

Q. Personally, did you ever see **Mr. Yount try to sabotage the Mosaic loan**?

Q. Did you ever see **Mr. Yount ever try to sabotage any other lenders** coming into the project?

September 6, 2017, Trial Transcript, pg. 862: 24, 863: 1—4.

Statement by Mr. Campbell
"There's no evidence that **Mr. Yount interfered in that**. Mr. Radovan says he thought he did and the loan would close."

September 8, 2017, Trial Transcript, pg. 1016: 8—10.

"Same with the Mosaic loan. You know, the supposition, Mr. Little talks about you can't have a case on supposition. **The supposition that somehow Mr. Yount interfered** or could have prevented this is nothing more than just supposition."

September 8, 2017, Trial Transcript, pg. 1080: 10—14.

Statement by Mr. Little
"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."

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September 8, 2017, Trial Transcript, pg. 1052: 15—23.

Statement by Mr. Wolf
"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…"

September 8, 2017, Trial Transcript, pg. 1073: 16—22.

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Mark G. Simons, Esq., NSB No. 5132
SIMONS LAW, PC
6490 S. McCarran Blvd., #C-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 POST JUDGMENT DISCOVERY

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

Post Judgment Discovery filed by George Stuart Yount, individually and in his capacity as owner of the George Yount, IRA ("Yount").

I. YOUNT'S ARUMENTS ARE WITHOUT MERIT.

Yount argues that post-judgment discovery should be allowed because Judge Flanagan's decision to award relief to the defendants was a surprise to Yount. In fact, Yount contends he "could not have reasonably discovered evidence to rebut" the theory of intentional interference that the defendants presented to Judge Flanagan. Mot., p. 6:11-12.

However, in the next breath, and in fact the same brief to this Court, Yount judicially admits the following:

> **Defendants answered and asserted . . . that Mr. Yount conspired with other investors to interfere with the Project's refinancing loan.**

Mot., pp. 2:23-3:2. Yount's own judicial admissions contradict the fundamental premise of his present motion. Stated another way, Yount contends he should be allowed to conduct discovery post-judgment on an issue that Defendants asserted from day one in this case, i.e., that Yount "conspired with other investors to interfere with the Project's refinancing loan."

In addition to Yount judicially admitting that Defendants' answer alleged wrongful conduct that Yount "conspired with other investors to interfere with the Project's refinancing loan", Yount judicially admits that discovery in the case "focused" on "communications between Mr. Yount and the investors that allegedly conspired to interfere with the Mosaic loan." Mot., p.3:3-6. Yount's judicial admissions requires that the Court deny his Motion.

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

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A judicial admission is a statement of fact in the proceedings that bar a party from later attempting to contest or repudiate such fact. St. Paul Mercury Ins. Co. v. Frontier Pacific Ins. Co., 111 Cal.App.4th 1234, 1248, 4 Cal.Rptr.3d 416, 428-429 (Cal. Ct. App. 2003) ("[a]dmissions of material facts made in an opposing party's pleadings are binding on that party as 'judicial admissions.'"); 29A Am. Jur. 2d Evidence § 783 (July 2010) ("A judicial admission is a party's unequivocal concession of the truth of a matter, and removes the matter as an issue in the case. It is a voluntary concession of fact by a party or a party's attorney during judicial proceedings.").

Post judgment discovery is not an opportunity to retry a case and/or make up for litigation strategies that did not pan out. Yount went to trial knowing full well that at all times in the litigation, Defendants intended to present evidence at trial that Yount's own wrongful conduct barred him from any relief against the Defendants. At trial, the evidence was so overwhelming against Yount, and was so egregious and harmful, that Judge Flanagan entered affirmative judgment in Defendants' favor. Judge Flanagan's decision was correct, appropriate and warranted.

Yount's request for post trial discovery to conduct discovery on an issue that was an issue from day one in the action must be denied. Yount's admission that discovery in the case "focused" on the very activity that Defendants' successfully tried, and upon which Judge Flanagan based his decision, again requires denial of the motion.

II. YOUNT'S WRONGFUL CONDUCT.

In addition to judicially admitting that (1) the Defendants asserted that Yount "conspired with other investors to interfere with the Project's refinancing loan" and (2) that the discovery in the case "focused" on "communications between Mr. Yount and the investors that allegedly conspired to interfere with the Mosaic loan", Yount then

SIMONS LAW, PC
6490 S. McCarran Blvd., #C-20
Reno, Nevada, 89509
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admits that Judge Flanagan specifically ruled on the very issue that (1) was pled by the Defendants in their answer and (2) upon which discovery focused by stating:

> [Judge Flanagan] concluded that "but for the intentional interference with the contractual relations between Mosaic and Cal Neva, LLC the project would have succeeded."

Mot. p, 5: 7-9 (citing Trial Transcript, p. 1139:20-22). These undisputed facts of Yount's wrongful conduct, that it was originally plead, was the "focus" of discovery and upon which Judge Flanagan specifically ruled on prevents post-judgment discovery.

Yount desperately seeks to recharacterize the issue and Judge Flanagan's reasoning by contending that Mosaic's "motivation" for withdrawing the loan was the foundational basis of Judge Flanagan's ruling. Mot., p.5:13-14. This argument has no support in the record or in Judge Flanagan's analysis. Yount's after-trial hindsight into how they could possibly have tried their case if they had a second chance does not support such extraordinary relief as requested. If it did, every trial that ended in a verdict against a party would spawn automatic motions for post-trial discovery on issues that were overlooked, discounted or, better yet, intentionally avoided in discovery or at trial so as to ensure a ground for post-judgment motion for discovery.

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III. CONCLUSION.

Yount was found liable for Marriner's damages. There is substantial evidence in the record supporting liability against Yount for Marriner's damages based upon Yount's intentional interference and his conspiracy to intentionally interfere. Yount was on notice of the issue, discovery was "focused" on the issue and Yount lost on the issue. There is no legal or factual basis for the motion and it must be denied in total.

///

///

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

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

DATED this 12th day of July, 2018.

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

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

005015

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SIMONS LAW, PC
6490 S. McCarran
Blvd., #C-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 LIMITED POST JUDGMENT DISCOVERY** 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 12 day of July, 2018.

Employee of Simons Law, PC

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

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Mark G. Simons, Esq., NSB No. 5132
SIMONS LAW, PC
6490 S. McCarran Blvd., #C-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

MARRINER DEFENDANTS' JOINDER IN DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR LIMITED POST JUDGMENT DISCOVERY

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 join in Defendants' Opposition to Plaintiff's Motion for

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Limited Post Judgment Discovery filed July 9, 2018, by Defendants Criswell Radovan, LLC, CR Cal Neva, LLC, Robert Radovan, William Criswell and Powell, Coleman and Arnold LLP.

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

DATED this 12th day of July, 2018.

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

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

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

005018

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 **MARRINER DEFENDANTS' JOINDER IN DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR LIMITED POST JUDGMENT DISCOVERY** 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 12 day of July, 2018.

Employee of Simons Law, PC

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

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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

005020

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 REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR LIMITED POST JUDGMENT DISCOVERY**

INTRODUCTION

Defendants continue to rewrite history to rationalize the prior Judge's unjustifiable rulings. Not only did Mr. Yount receive no notice of a counterclaim seeking damages against him, defense counsel repeatedly assured him during trial that there was none. Defendants contend that their use of the word "interfere" in asserting their affirmative defense of unclean hands was sufficient to give Mr. Yount notice of a counterclaim against him. Yet, when defendants went into these sensationalized and speculative representations, Mr. Yount's counsel diligently objected, demanding clarity for the record that these allegations were relevant only to an affirmative defense of unclean hands. Each time, defense counsel conceded that they were not pursuing a counterclaim for damages.[1] And defendants never mentioned liability for damages. Thus, in no way has Mr. Yount every acquiesced or otherwise consented to trial of a counterclaim for damages. Put simply these allegations of interference were never relevant to anything other than an affirmative defense.

It is wholly appropriate to expend resources in litigation proportionately to the amount in controversy. *See* FRCP 26(b)(1) ("Parties may obtain discovery . . . that is relevant to any party's claim or defense and *proportional to the needs of the case*, considering the importance of the issues at stake in the action, *the amount in controversy*, . . . and whether the burden or expense of the proposed discovery outweighs its likely benefit."). Enabling a litigant to gauge proportionality is one reason why the rules of procedure require any party seeking damages to disclose "without awaiting a discovery request . . . computations of any category of damages claimed." NRCP 16.1(a)(1)(C); *see*

[1] Undersigned counsel does not accuse defense counsel of being untruthful with Judge Flanagan. The problem arises, rather, from the disgracefully disingenuous and opportunistic positions defendants have advanced post-trial.

Pizzaro-Ortega v. Cervantes-Lopez. 133 Nev. Adv. Op. 37, 396 P.3d 783, 786-87 (2017). Thus, it was reasonable for Mr. Yount to pursue discovery to the limited extent he did when—based on all disclosures defendants had provided—the worst outcome scenario he faced at trial would be a defense judgment (*i.e.*, a recovery of zero) on his claims. It would not have been reasonable to waste resources overturning every stone.

Now, the unusual circumstances of this bizarre trial outcome and the deprivation of due process it presents call for the Court to exercise its power to allow some post-trial discovery.

I.

THIS COURT SHOULD AUTHORIZE LIMITED DISCOVERY

A. Mr. Yount Did Not Have Notice of an Intentional Interference Counterclaim

1. All Pre-Trial Filings and Discovery Focused on Unclean Hands

Defendants fixate on the phrasing used to describe their affirmative defense and contend Mr. Yount had notice of the counterclaim because defendants alleged that Mr. Yount "conspired with other investors to interfere with the loan." However, to prove unclean hands defendants needed to show "misconduct"[2] occurred *i.e.* that Mr. Yount conspired with other investors to interfere with the loan.

Defendants attempt to blur the line between the misconduct prong in unclean hands and a six-element counterclaim of intentional interference with contractual relations. In fact, the phrase defendants use to describe unclean hands does not contain any of the six elements of intentional interference with

[2] *Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.*, 124 Nev. 272, 275, 182 P.3d 764, 766 (2008).

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contractual relations.[3] Thus, by defendants' logic, using a single key word equates to pleading a multi-element counterclaim, praying for and proving damages, and giving adequate notice under the Due Process Clause.[4]

Further, defendants never requested damages. In defendants' proposed findings of fact under the heading "Unclean Hands"[5], defendants requested that Mr. Yount's damages be "offset by the significantly greater damages." Notably, defendants requested that Mr. Yount's damage award be reduced or barred. A clear indication of an affirmative defense.[6]

2. Defendants Admitted at Trial They Did Not Plead or Prove a Counterclaim

Defendants' disingenuous opportunism is most evident in their mischaracterization of the trial. Defendants admitted on three different occasions they did not bring a counterclaim. Mr. Little even conceded in his closing arguments that he had not brought a counterclaim. It was not until defendants received a windfall award that defendants began to claim they had brought a counterclaim.

Defendants contend that a notable example that a counterclaim was litigated was Mr. Little's single question during a seven-day trial regarding

---

[3] 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).

[4] The absurdity of this argument is also demonstrated in Marriner's Opposition to Plaintiff's Motion for Post Judgment Discovery.

[5] Defendants' Proposed Findings of Fact And Conclusions of Law, 11:3-9

[6] *See Las Vegas Fetish & Fantasy Halloween Ball*, 124 Nev. at 275, 182 P.3d at 766 (unclean hands affirmative defense may bar relief); *Mona v. Mona Elec. Grp., Inc.*, 176 Md. App. 672, 717, 934 A.2d 450, 476 (2007) (unclean hands may reduce relief to the extent tainted by misconduct).

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damages. However, this question led to a series of questioning, by both plaintiff's counsel and defense counsel, regarding the type of claim defendants had brought. Mr. Campbell followed Mr. Little's question by directly asking if defendants brought a counterclaim.

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

(Hr'g Tr. 8/31/2017, at 512:18-20, Ex. 1.)

Mr. Little then further clarified that defendants were not pursuing any counterclaims but were instead pleading and proving the affirmative defense of unclean hands.

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

(Hr'g Tr. 8/31/2017, at 515:17-21, Ex. 1.)

Even in Mr. Little's closing arguments he represented to the Court he had not brought any counterclaims.

> 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. 2.)

Further, each piece of evidence defendants cite was relevant to their affirmative defense of unclean hands.[7] Defendants' entire motion is contradicted

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[7] 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. *McLeod v. Stevens*, 617 F.2d 1038, 1040–41 (4th Cir. 1980) ("But all evidence of harm to McLeod was germane to the equitable relief she sought. Its admission without objection, therefore, cannot be treated as implied consent to the trial of the issue of damages")

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by defendants' own testimony. Judge Flanagan's damage award was based on a new theory of liability. Mr. Yount did not have an opportunity to develop a defense or introduced evidence that related to that theory of liability. Justice requires post trial discovery so Mr. Yount can corroborate the prejudice that occurred at trial.

3. Marriner's Ridiculous Contention that Mr. Yount Had Notice of a Counterclaim Before Trial Cannot Stand

Marriner contends that because the word "interfere" was used to describe the misconduct required for defendants' affirmative defense of unclean hands Mr. Yount must have had notice of a counterclaim. Marriner takes this absurd argument one step further and argues that Mr. Yount judicially admitted defendants brought a counterclaim because his motion quotes defendants' findings of fact listed under the heading "unclean hands." This argument is contradicted by defendants' own testimony that they had not brought a counterclaim and Marriner's counsel closing argument that Mr. Yount lacked intent. As discussed above, simple use of the phrase "conspired to interfere" is not sufficient to give Mr. Yount notice of a counterclaim, particularly where the conduct was relevant to the affirmative defense of unclean hands.

Marriner's second argument that Judge Flanagan found Mr. Yount acted wrongfully is completely irrelevant to what Mr. Yount knew before trial.

B. It Would Have Been an Unreasonable Expense to Depose the Mosaic Members Before Trial

Defendants contend that the discovery of the Mosaic employees should have been conducted before trial. The depositions of the three Mosaic members would have been a justifiable expense if Mr. Yount had notice that he could be liable for money damages. However, it was reasonable for Mr. Yount to pursue discovery to the limited extent he did when—based on all disclosures defendants had provided—the worst outcome scenario he faced at trial would be

a defense judgment. There was no justification to run up attorney's fees and waste the client's resources to turn over every stone during discovery.

It is reasonable to consider the proportional needs of the case and the amount in controversy when conducting discovery. *Bailey v. Nat'l Union Fire Ins. Co. of Pittsburgh*, No. 1:12-CV-4206-KOB, 2014 WL 12603133, at *3 (N.D. Ala. Apr. 17, 2014) (considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving discovery issues); *see also* FRCP 26 (requiring that discovery be proportional to the needs of the case); *cf. Baez-Eliza v. Instituto Psicoterapeutico de Puerto Rico*, 275 F.R.D. 65, 70 (D.P.R. 2011) (noting that the discovery process can become longer and more expensive, wasting judicial resources and clients' money along the way).

"The discovery process is not intended to be a means… for lawyers to fill billable hour quotas." *Johnson & Allphin Properties, LLC v. First Am. Title Ins.* Co., No. 2:12-CV-740-RJS-PMW, 2015 WL 1478749, at *2 (D. Utah Mar. 31, 2015). Wasteful consumption of client money serves no purpose. *M. Perez Co. v. Base Camp Condominiums Assn. No. One*, 111 Cal. App. 4th 456, 464, 3 Cal. Rptr. 3d 563, 569 (2003); *Rollins v. Hopkins*, No. 566 EDA 2015, 2016 WL 164540, at *3 (Pa. Super. Ct. Jan. 14, 2016) (warning against wasting the time of counsel or client resources). "Litigation costs… can be enormous, sometimes rivaling or even exceeding the amount involved on the merits." *Rollins v. Hopkins*, No. 566 EDA 2015, 2016 WL 164540, at *3 (Pa. Super. Ct. Jan. 14, 2016). Thus, it is appropriate to balance the amount in controversy, the parties' resources, and the issues at stake when conducting discovery. *Bailey*, No. 1:12-CV-4206-KOB, 2014 WL 12603133, at *3.

Here, if Mr. Yount had notice that millions of dollars were at stake, conducting an additional three depositions would have been a justifiable expense. However, defendants' representations to Mr. Yount that there was no

counterclaim against him effectively informed him that his worst day in court would have been a dismissal of his claims. It was reasonable, given that there were no claims against Mr. Yount, to try the case on a smaller scale.

C. The Procedural Rules on Which Defendants Rely to Convert Unclean Hands into a Counterclaim Still Require Advanced Notice

Defendants also contend that their affirmative defense of unclean hands may be converted into a counterclaim. As set forth more fully in Mr. Yount's "Reply to Defendants' Opposition to Plaintiff's Motion to Amend," Rule 15(b), Rule 54(c), and Rule 8(c) require advanced notice, an opportunity to be heard, and express or implied consent to try the issue.

Rule 54(c) has been reasonably interpreted to apply only where the entitlement to relief not specifically pled has been tested adversarially, tried by consent, or at least developed with meaningful notice. *Peterson v. Bell Helicopter Textron, Inc.*, 806 F.3d 335 (5th Cir. 2015). Thus, Rule 54(c) has limits. *Idaho Res., Inc. v. Freeport-McMoran Gold Co.*, 110 Nev. 459, 462, 874 P.2d 742, 744 (1994).

Defendants' absurd interpretation would swallow the liberal standard of Rule 15(a), the due process considerations of Rule 15(b), the Nevada Court of Appeals' 16(b) good cause test, and all of the discovery protections set forth in Rule 16, Rule 26, and Rule 37. Rule 54(c) cannot be read in a vacuum, "rules of civil procedure must be read together." *Nutton v. Sunset Station, Inc.*, 131 Nev. Adv. Op. 34, 357 P.3d 966, 970 (Nev. App. 2015). The rules must be construed to avoid absurd results. *Houtz v. State*, 111 Nev. 457, 461, 893 P.2d 355, 358 (1995) ("The interpretation of a statute should be reasonable and should avoid absurd results."); *Reed v. Burke*, 219 Ariz. 447, 450, 199 P.3d 702, 705 (Ct. App. 2008).

These procedural rules are not an end run around due process. *Deere & Co. v. Johnson*, 271 F.3d 613, 622 (5th Cir. 2001) (noting a trial court abuses its

discretion when an amendment of the pleadings under 15(b) violates a party's due process); *Peterson,* 806 F.3d at 335 (holding Rule 54(c) assumes that the entitlement to relief not specifically pled has been tested adversarially, tried by consent or at least developed with meaningful notice); *nVision Global Technology Solutions, Inc. v. Cardinal Health 5, LLC*, 2012 WL 3527376, *29 & n.35 (N.D. Ga. 2012) (noting that defendant may assert equitable estoppel counterclaim as affirmative defense because plaintiff had "fair notice" and failed to demonstrate "prejudice or any other grounds" for denying defendant's request).

As discussed above, Mr. Yount did not expressly or impliedly consent to try a counterclaim. Mr. Yount was unaware that substantial money damages were at stake. The new theory of liability prejudiced Mr. Yount and accordingly, it is essential that he be permitted to confirm the motivations behind the withdrawal of the Mosaic loan.

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D. <u>This Court Has Authority to Order Post Judgment Discovery</u>

The unusual circumstances of this trial outcome and the deprivation of due process it presents call for this Court to exercise its power to allow some post-trial discovery. This Court has the authority to order the post judgment depositions of Mr. Sterling Johnson, Mr. Ethan Penner, and Mr. Howard Karawan. Rule 27(b) is discretionary with the court and should be ordered to prevent injustice. Further, this Court's inherent power to control litigation and litigants gives this Court authority to order post judgment depositions. Accordingly, Mr. Yount should be permitted to conduct limited post judgment discovery to discover facts that would corroborate prejudice.

1. A Court May Order Post Judgment Discovery Where the Ends of Justice Require Its Use

Defendants argue that Rule 27 applies only in cases where it is necessary to prevent testimony from being lost. While Rule 27 generally should be used to

preserve evidence that may be lost, *Sunrise Hosp. v. Eighth Judicial Dist. Court In & For Cty. of Clark,* 110 Nev. 52, 55–56, 866 P.2d 1143, 1145 (1994), "the statute is entitled to liberal construction." *Petition of Ingersoll-Rand Co.,* 35 F.R.D. 568, 568 (S.D.N.Y. 1964); *Petition of Ernst*, 2 F.R.D. 447, 450 (S.D. Cal. 1942).

It is proper to use Rule 27 "where the ends of justice clearly require its use." *Geomatrix Sys., LLC v. Waste Eng'g, Inc.*, No. MMXCV084009666S, 2009 WL 567035, at *2 (Conn. Super. Ct. Feb. 9, 2009) *quoting Petition of Christensen*, 25 Conn. Supp. 271, 274, 202 A.2d 834, 836 (Super. Ct. 1964). Rule 27(b) expressly provides that "if the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken." NRCP 27(b). "Evidence that throws a different, greater, or additional light on a key issue might well prevent a failure or delay of justice." *Obalon Therapeutics, Inc.*, 321 F.R.D. 245, 250 (E.D.N.C. 2017). To make the requisite showing that a perpetuation of testimony, may prevent a failure or delay of justice, a party may demonstrate a need for the testimony or evidence that cannot easily be accommodated by other potential witnesses. *Application of Deiulemar Compagnia Di Navigazione S.p.A. v. M/V Allegra*, 198 F.3d 473, 2000 A.M.C. 317, 45 Fed. R. Serv. 3d 1 (4th Cir. 1999).

An order permitting perpetuation of testimony should be granted in extraordinary or unusual circumstances. *Sunrise Hosp.*, 110 Nev. at 55–56, 866 P.2d at 1145. Here, Mr. Yount can demonstrate unusual circumstances. As set forth 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 Findings and for New Trial," defendants never pleaded a counterclaim and conceded during trial that they only brought an affirmative defense. Mr. Yount did not have sufficient notice of a claim for intentional interference with contractual relations and

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accordingly could not have discovered or introduced evidence related to that theory of liability.

Further, the policy underlying Rule 27(b)'s failure or delay of justice test is preventing "fishing expeditions" for the sole purpose of allowing the petitioner to obtain information to formulate the petitioner's complaint. *Sunrise Hosp.*, 110 Nev. at 55–56, 866 P.2d at 1145; *In re Solorio*, 192 F.R.D. 709 (D. Utah 2000) (denying Rule 27 discovery where party only sought to use information to prepare for filing). This is not the case here. Mr. Yount only seeks to obtain information that would corroborate prejudice. Mr. Yount should be permitted to conduct limited post judgment discovery to verify the sole basis for Judge Flanagan's award of damages, the reasons behind the Mosaic loan withdrawal.

2. Courts Have the Power to Allow Post-trial Depositions

Rule 27 aside, courts have inherent power to allow post-trial discovery. *U.S. for Use of Consol. Elec. Distributors, Inc. v. Altech, Inc.*, 929 F.2d 1089, 1091–1092 (5th Cir. 1991) (noting that the district court's inherent power to control litigation and litigants gave the court authority to order a post-trial deposition); *Elliott v. United Employers Cas. Co.*, 35 F. Supp. 781, 782 (S.D. Tex. 1940) (permitting post trial depositions pursuant to broad reading of various rules of civil procedure including Rule 1 which requires the rules to be construed to secure just, speedy, and inexpensive determination of an action). Courts should permit post judgment depositions to prevent injustice. *See Cuffee v. Wal-Mart Stores, Inc.*, 977 So. 2d 1187, 1190 (Miss. Ct. App. 2007) (permitting post judgment deposition to determine if false testimony was given at trial); *cf. Children, Youth & Families Dept. v. Ruth Anne E.*, 126 N.M. 670, 677–678, 974 P.2d 164 (1999) (noting that a post-trial deposition after review of the evidence afforded a party due process in a termination of parental rights case where party did not have an opportunity to present a defense).

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Here, Mr. Yount's due process rights were violated. 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 that is sought. 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. Thus, this Court should permit limited post judgment discovery to prevent injustice.

CONCLUSION

Defendants mischaracterize the trial and gloss over their own concessions that they had not brought a counterclaim to rationalize Judge Flanagan's unjustifiable rulings. Mr. Yount did not have any notice that he faced substantial damages and conducted limited discovery accordingly. The unusual circumstances of this case and the deprivation of due process call for post judgment discovery. Thus, this Court should authorize limited port judgment discovery relating to the withdrawal of the Mosaic loan.

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

Dated this 2nd day of August, 2018.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Joel D. Henriod*

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

005032

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of August, 2018, I served the foregoing "Plaintiff's Reply to Defendants' Opposition to Plaintiff's Motion For Limited Post Judgment Discovery" 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

MARK G. SIMONS
SIMONS LAW, PC
6490 S. McCarran Blvd., #20
Reno, Nevada 89509

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

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INDEX OF EXHIBITS

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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

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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

005036

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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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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already explained this in your testimony, but the delay that Mosaic is talking about here, is that something that is attributable to you or Mr. Criswell?

A. No. We were waiting for approval. You know, as we said in the November meeting, I was given direction, go do X, Y and Z with them. I met with Mosaic and then they agreed to those aspects. We took it back to the committee, tried to do that on the 12th, and nobody wanted to -- it didn't even get to the point of being able to ask for the approval, honestly.

There was too much argument over we should be raising equity, we should be raising this, raising that, do a capital call, these types of things. By the time we got around to the January 27th, we had a structured meeting and asked for the approval of the loan and which was unanimously given.

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

A. Yes.

Q. So look at Exhibit 149. This is the January third party report for Hall. Go to page three again.

A. Okay.

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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 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., 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

005042

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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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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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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