IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellant,

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,

Respondents.

Case No.: 74275

Second Judicial District Court
Case No. CV16-00767

RESPONDENTS DAVID MARRINER'S AND MARRINER REAL ESTATE, LLC'S ANSWERING BRIEF

MARK G. SIMONS, ESQ.
Nevada Bar No. 5132
SIMONS HALL JOHNSTON PC
6490 S. McCarran Blvd., #F-46
Reno, Nevada 89509
T: (775) 785-0088
F: (775) 785-0089
Email: msimons@shjnevada.com
Attorneys for Respondents David Marriner and Marriner Real Estate, LLC

Docket 74275 Document 2019-24320

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities described in NRAP 26.1(a) and must be disclosed.

1. David Marriner is an individual.

2. Marriner Real Estate, LLC is a Nevada limited liability company, and is wholly owned and managed by David Marriner.

3. Mark G. Simons of SIMONS HALL JOHNSTON PC appears in these proceeding on behalf of David Marriner and Marriner Real Estate, LLC. The undersigned counsel was previously a partner of Simons Law, PC. Andrew N. Wolf and Incline Law Group, LLP represented these Respondents in certain proceedings before the District Court until such time as the undersigned substituted in as counsel of record. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 3rd day of June, 2019.

SIMONS HALL JONSTON, PC
6490 S. McCarran Blvd. F-46
Reno, Nevada 89509

BY: _____
Mark G. Simons, Esq.
Nevada Bar No. 5132
Attorney for Respondents David Marriner and Marriner Real Estate, LLC

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STATEMENT OF THE CASE[1]

This appeal concerns the authority of a District Judge to render appropriate relief when the evidence at trial is overwhelming that another party intentionally and maliciously caused harm. If, pursuant to NRCP 54(c), this Court finds that Judge Flanagan had the authority to enter judgment in favor of Marriner, then Yount's appeal must be denied and this matter remanded for further proceedings consistent with its decision.[2]

Judge Flanagan found after a seven (7) day bench trial that George Stuart Yount ("Yount") was in "cahoots" with the IMC Investment Group ("IMC") to sabotage funding obtained by Cal Neva Lodge, LLC ("LLC") to proceed with the buildout and sale of the historic Cal Neva Lodge in Incline Village, Nevada (the "Project"). IMC was a comprised of a group of investors in the Project with whom Yount was affiliated. IMC and Yount pursued a scheme to sabotage the LLC's funding so that IMC and Yount could capitalize on the financial distress of the Project to install their own funding source and to take over the Project. Yount's scheme further included exploiting the threat of criminal and civil

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[1] Marriner does not include a separate NRAP 17 routing statement, jurisdictional statement or statement of issues on appeal pursuant to NRAP 28(b). Marriner does emphasize that the issues on appeal as framed by Yount contain numerous baseless assumptions and this brief demonstrates the fallacy of such assumptions.

[2] Marriner's motion for attorneys' fees incurred through trial remains pending in the District Court.

penalties to force defendants to forfeit an additional twenty percent (20%) interest in the Project as part of the Yount take-over plan. Respondents' Appendix ("RA") 1 RA 0233.

After trial, Judge Flanagan found that the evidence was overwhelming that Yount "**was [in] cahoots with [a]cabal"** involving the IMC whereby they intentionally sought to and did in fact destroy the LLC's funding package with Mosaic (the "Mosaic Loan"). 10 App. 2277 (emphasis added). Judge Flanagan expressly found that the success of the Project if the Mosaic Loan would have funded and made the following factual determination: "**[t]hat [the] Mosiac [Loan] would have closed by year end and that all parties would have been paid. The project would be up, operational, and a spectacular success**." 10 App. 2287 (emphasis added). Judge Flanagan then found:

> **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.**

Id. at 2295 (emphasis added).

Judge Flanagan is not at fault for Yount's abusive conduct. Judge Flanagan is not at fault for weighing the evidence and judging Yount's credibility over a seven (7) day trial. Judge Flanagan is not at fault for rendering extensive findings of fact and conclusions of law based upon the overwhelming evidence presented to him. Judge Flanagan is not at fault for rendering a decision from the

bench lasting hours and covering 51 pages of transcript. 10 App. 2332. Judge Flanagan is not at fault for taking the time to render an amended order clarifying the scope and breadth of his decision against Yount to ensure the accuracy of his decision. Similarly, Judge Polaha is also not at fault for Yount's abusive conduct and he is not at fault for affirming Judge Flanagan's decision and analysis. Judge Polaha is not at fault for determining that Judge Flanagan's decision and analysis was correct. Instead, Yount is responsible and liable for his own misdeeds—misdeeds that are established by substantial and overwhelming evidence.

Nevada Rules of Civil Procedure 54(c), and case law interpreting this provision, clearly state that District Judges are vested with discretion to render all appropriate relief to a party when warranted and supported by the evidence, regardless of whether or not the requested relief was formally pled. This is exactly what has occurred in this case. While a formally pled counterclaim was not asserted by Marriner, Yount's intentional interference with the Mosaic Loan was admittedly at issue from "day one" in the underlying case. At trial, Yount's intentional interference was in fact expressly, knowingly and intentionally tried by all parties including Yount. Yount himself stipulated to the introduction of the overwhelming evidence of his active participation in intentionally interfering with the Mosaic Loan and he also presented rebuttal witnesses and exhibits trying to validate and/or exonerate his abusive conduct.

After losing, and after being held accountable by Judge Flanagan for his misdeeds, Yount now wants to complain and cast aspersions at Judge Flanagan. Unfortunately, Judge Flanagan is not capable of refuting the baseless allegations against him. Yet it remains clear that Yount's artificially created, after-trial hindsight into other alternatives on how he could possibly, maybe retry the case if he has a second chance does not support any requested relief.

The evidence of the $1.5 million in harm caused to Marriner because of Yount's wrongful conduct was also "undisputed" and established by the very exhibits introduced at trial by Yount himself and/or through the testimony of Marriner and Yount. For Yount to now complain that he is liable for interfering with the very contract he himself introduced as evidence at trial is plain disingenuous and further demonstrates that Judge Flanagan saw Yount for who he really is and rendered appropriate consequences for Yount's misdeeds.

STATEMENT OF THE FACTS

In 2013 developers William Criswell ("Criswell") and Robert Radovan ("Radovan") bought the historic Cal Neva Lodge with the intent of renovating and then managing this Project upon its reopening. 5 App. 1161:13-15; 6 App. 1339: 11-24; 6 App. 1345:10-24. Criswell and Radovan formed three entities: LLC as the entity owning the resort; Criswell Radovan LLC ("CRLLC") as the development company; and CR Cal Neva, LLC ("CR") as the management

company. 6 App. 1336:1-8, 1338:6-8; 10 App. 2435, Section 8.1. Criswell, Radovan, LLC, CRLLC and CR are all represented by Martin A. Little of Howard & Howard and will generally be referred to as the Criswell/Radovan parties unless otherwise specified herein.

Yount's Opening Brief generally refers to all of the Respondents as "Defendants" without taking the time to articulate the distinctions between the Criswell/Radovan parties and Marriner. This failure is fatal to Yount's arguments on appeal against Marriner because Marriner's entitlement to relief was proven by undisputed evidence.

A. MARRINER'S RELATIONSHIP WITH THE LLC.

On February 13, 2014, Marriner Real Estate, LLC entered into the Real Estate Consulting Agreement with the LLC (the "Contract"). 9 App. 2246. Marriner Real Estate, LLC is wholly owned and operated by David Marriner (hereinafter jointly "Marriner" unless otherwise stated). Pursuant to the terms of the Contract, Marriner was the real estate agent who was paid a commission by the LLC for both raising capital and the subsequent sale of condominiums for the LLC. 6 App. 1365; 5 App. 1244. Prior to Yount's wrongful conduct, Marriner individually had been paid approximately $490,000 in income for activities assisting the LLC in raising capital. 6 App. 1349; 6 App. 1487-1488. The LLC paid Marriner a 3% commission for his fundraising activities. 5 App. 1173.

These monies had been earned and paid prior to Yount's wrongful activities. Judge Flanagan found that Marriner was entitled to compensation for his lost commissions and that he invested in the LLC. 9 App. 2246-2247.

In addition to receiving a commission on fundraising activities, Marriner was also entitled to be paid 3% of the gross revenue of the Project on the sale of the condominiums when they were resold. 1 RA 0001-0004. The total value of the Project was calculated at $43,288,000. 20 App. 4901.[3] Accordingly Marriner was contractually entitled to be paid 3% of the gross revenue of $43,288,000 totaling $1,298,640 million. ($43,288,000 X 0.03 = $1,298,640). Marriners' damages are specific, detailed and quantifiable.

In addition to this lost commission income, Marriner lost his equity stake in the LLC in the amount $187,500. 5 App. 1168-1169; 10 App. 2331. In addition, Marriner also lost his right to a Founding Membership Unit in the LLC which was

[3] Plaintiffs' Trial Exhibit 4 (20 App. 4879-4936) is the Confidential Offering Memorandum contains a page entitled "CAL NEVA HOTEL Phase II -- 28 Managed Residences For Sale," at 4901, which shows projected gross sales income from sales of the 28 condos to be constructed at $43,288,000 total. This document also details the $500,000 Founder Member Discount that Marriner lost due to Yount's intentional interference.

valued at $500,000.[4] Marriner also was deprived compensation for additional consulting work, however, this amount was not quantified at trial.[5]

Judge Flanagan's award of $1.5 million to Marriner ties almost exactly to two of the components of harm Marriner established at trial that he sustained as a result of Yount's wrongful conduct: $1,298,640 in lost sales commissions and $187,500 in lost capital.[6]

Yount admitted he was fully aware of Marriner's Contract with the LLC and that he was in "constant communications" with Marriner about the project. 10 App. 2266-2267.

Marriner testified that the Project was "sensational" and he was "devastated professionally and personally over the loss of this project, this lawsuit, his reputation and his friends." 10 App. 2252. Marriner testified the Project was going to be his next five years of work and detailed the harm he sustained by the failure of the Project due to Yount's interference with the Mosaic Loan. 6 App. 1278:22. Marriner also described the impact of Yount's false accusations against

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[4] 1 RA 0002 (last line). (at page 2, last line). The Founder Member Discount was worth $500,000. 20 App. 4901; see also 1 RA 0154.

[5] 1 RA 0003, "additional Work."

[6] However, Judge Flanagan's damage calculation did not include an actual monetary value for Marriner's lost Founding Membership Unit or the additional consulting work. Instead, Judge Flanagan rounded off Marriner's damages to $1.5 million. Marriner elected not to appeal Judge Flanagan's damage award as he desires an end to this ongoing litigation.

him accusing him of fraud "ruined my life." Id., at 1278:15. Marriner also described the loss of the Project caused by Yount as "a nightmare." Id., at 1279:2.

B. YOUNT'S INTENTIONAL INTERFERENCE WITH THE MOSAIC LOAN WAS THE FOCUS OF THE CASE.

The evidence overwhelmingly demonstrates that the issue of Yount's interference with the Mosaic Loan was "in play" from the moment of the "Defendants'" answer, then through discovery, then through pre-trial motion practice, in the trial statements and finally was the major focus of the trial.

1. YOUNT'S JUDICIAL ADMISSIONS OF THE DEFENDANTS' ANSWER AND ASSERTIONS.

Yount has judicially admitted that from day-one, the "defendants" answered they asserted that Yount "conspired with other investors to interfere with the Project's financing." Specifically, in Yount's Motion for Post Judgment Discovery, Yount judicially admits the following:

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

21 App. 4945-46. Next, Yount judicially admitted that discovery in the case "focused" on "communications between Mr. Yount and the investors that allegedly conspired to interfere with the Mosaic loan." Id., at 4946. Finally, Yount further admits that Judge Flanagan then specifically ruled on the very issue that Yount

judicially admitted was "asserted" in the defendants' answer and upon which discovery "focused" by affirming:

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

Id., at 4948.

2. THE MOTION FOR SUMMARY JUDGMENT.

The Criswell/Radovan parties demonstrated that Yount's intentional interference with the Mosaic Loan was the central issue in this case with their Motion for Summary Judgment which details the following:

> Unfortunately, [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.

3 App. 719, at ¶28. Again, the issue of Yount's intentional interference was identified as a critical issue of proof in this case in pre-trial motion practice.

3. DEFENDANTS' TRIAL STATEMENT AND PROPOSED FINDINGS OF FACT.

In Criswell/Radovan's August 25, 2017, Trial Statement, they highlight that at trial Yount's intentional interference with the Mosaic Loan was a pivotal issue and that Yount caused the defendants damages as follows:

> [Yount] conspired with certain other investors to not only interfere with, but ultimately sink the Project's major financing loan with Mosaic, which would have bailed this project out. **This intentional interference has damaged the Defendants far in excess of [Yount's] $1 Million investment. Thus, even if Plaintiff were to prevail on any of his claims, any alleged damages are offset by the significantly greater damages his conduct has caused Defendants**.

5 App. 1120:4-9 (emphasis added). Consistent with the defendants' intent to prove Yount's intentional interference and the harm caused by such interference, the defendants stated that they intended to prove they sustained damages to "offset" any alleged harm claimed by Yount. To further drive these issues home, the following Proposed Findings of Fact and Conclusions of Law were also submitted containing the following affirmations of fact as to Yount's intentional interference and the harm he caused:

> 45. . . . [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 Plaintiffs involvement) went behind Criswell Radovan's back and sabotaged the loan Criswell Radovan had lined up with Mosaic to fund the remaining construction.
>
> 46. Yount was aware of the interference when it occurred.
>
> 47. Yount's alleged damages result in whole or in part from the interference in the Mosaic loan.
>
> . . .
>
> 68. 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 Plaintiffs $1 Million investment.

5 App. 1137, 1141. Again, the issue of Yount's intentional interference was identified as a critical issue of proof at trial along with the harm caused by such interference, again demonstrating that Yount's interference was at issue in the case and intended to be tried at trial by the defendants.

4. THE TRIAL.

In addition to the foregoing, the trial transcript overwhelmingly demonstrates that the defendants affirmatively tried their claim for Yount's intentional interference and that this claim was tried by the express consent of Yount's counsel.

First, Yount's consent to try Yount's intentional interference with the Mosaic Loan began when Yount **stipulated into evidence** 56 defense trial exhibits—the vast majority of which were emails that Judge Flanagan correctly documented as "email exchanges between Mr. Yount and the IMC and their efforts to undermine the Mosaic loan." 10 App. 2296. Rather than object to the issue of Yount's intentional interference with IMC to sabotage the Mosaic Loan, Yount consented to trying this very issue by stipulating into evidence the very exhibits upon which discovery in the case "focused" and upon which Judge Flanagan based his ruling, *i.e.*, Yount's intentional interference activities with the Mosaic Loan.

Not to be outdone on this issue, Yount then affirmatively presented three (3) of his own trial exhibits (Exhibits 55, 58 and 59) to respond to the defendants' interference claim trying to minimize Yount's interference activities:

- Trial Exhibit 55: Email between Yount and IMC two weeks before the Mosaic Loan was torpedoed talking about other refinancing options. 8 App. 1863; 10 App. 2276.

- Trial Exhibit 58: Email from Yount the week before Mosaic Loan was torpedoed saying "there is no way to the finish line with these developers [*i.e.*, Criswell/Radovan]." 8 App. 1864; 10 App. 2276.

- Trial Exhibit 59: Email exchange between Yount and IMC a few days before the Mosaic Loan was torpedoed stating "we need to get more investors on board with their [*i.e.*, Criswell/Radovan] removal." 8 App. 1865; 10 App. 2276.

Yount's stipulation to the admissibility of the foregoing emails, his introduction and use of his own evidence to contest and challenge the claims of interference, and extensive testimony by Yount trying to minimize and/or exonerate his misdeeds, all establish that Yount expressly consented to the trial of his intentional interference with the Mosaic Loan.

Among others, the following emails overwhelmingly demonstrating that Yount actively worked to sabotage the Mosaic Loan that were stipulated into evidence include the following:

- Trial Exhibit 109: Email exchange between IMC and Yount before the secret meeting with Mosaic sabotaging the Mosaic Loan saying the secret information is shared "for our eyes only". 1 RA 0221.

- Trial Exhibit 110: Email exchange between IMC and Yount — referring to themselves as "Team" and discussing their "divide and conquer approach". 1 RA 0222-0224.

- Trial Exhibit 115: Email exchange between IMC's Brandon Cheney and Yount shortly before the secret Mosaic meeting wanting to talk about Robert Radovan of Criswell Radovan. 1 RA 0225.

- Trial Exhibit 118: Yount's email to IMC discussing the ousting of Criswell Radovan and that "we must be extra careful not to underestimate these two tomorrow". 1 RA 0226.

- Trial Exhibit 119: Email exchange between Yount and IMC where they are proposing to use Yount's claim and threat of lawsuit as a coercive means to get Criswell Radovan to leave the Project. 1 RA 027-0236.

- Trial Exhibit 121: Email exchange between Yount and IMC referencing the fact IMC was planning to secretly meet with Mosaic that Monday without Criswell Radovan's knowledge or consent. 1 RA 0231.

- Trial Exhibit 122: Email exchange between IMC and Yount 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). 20 App. 4937-4938).

- Trial Exhibit 124: Email from Mosaic to Radovan the very day IMC secretly met with Mosaic saying they are backing out of the loan and tearing up the term sheet. 20 App. 4939-4934.

- Trial Exhibit 126: Email exchange with Yount 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".[7] 1 RA 0233.

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[7] It is suggested this email conclusively proves Yount's motive to squeeze out Criswell/Radovan by using the financial distress caused by his sabotage of the

- Trial Exhibit 127: Email from Yount to IMC asking for input on his legal strategy against Criswell Radovan. 1 RA 0234-0237.

- Trial Exhibit 130: Less than a week after the Mosaic loan was torpedoed, Yount and IMC are discussing another potential investor. 1 RA 0238.

- Trial Exhibit 131: Less than a week after the Mosaic loan was torpedoed, IMC and Yount are discussing a replacement developer to replace Criswell Radovan and making sure "not [to] discuss with others outside this email list". 1 RA 0239-0240.

- Trial Exhibit 132: Email exchange between Yount and IMC shortly after the Mosaic loan was torpedoed asking about another investment group. 1 RA 0241-0242.

- Trial Exhibit 133: Yount email to IMC—after the Mosaic loan was torpedoed—describing one of the IMC members as "our hero!". 1 RA 0243-0244.

- Trial Exhibit 142: Email exchange between Yount and IMC—approximately 1.5 months after the Mosaic loan was torpedoed—agreeing to a "good cop/bad cop routine" against Criswell Radovan. 1 RA 0245-0248.

In addition, Judge Flanagan specifically cited to Trial Exhibits 121,[8] 125,[9] 126,[10] 127,[11] 130,[12] 131,[13] 132, [14] and 133,[15] to demonstrate that the members of the

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Mosaic Loan to take their 20% interest. Unfortunately, Marriner also became a victim of Yount's scheme against Criswell/Radovan.

[8] 1 RA 0231, Yount communicating with IMC about the IMC's conduct in disrupting the funding of the Mosaic loan.

[9] 1 RA 0232, Yount communicating about the IMC's conduct in disrupting the funding of the Mosaic loan.

IMC and Yount were in extensive communication regarding the Mosaic Loan and their secret intention to sabotage the Mosaic Loan to not fund. 10 App. 2277:9-10. These are the very emails and surrounding testimony that were thoroughly weighed by Judge Flanagan and supported his damage award as follows:

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

10 App. 2296 (emphasis added).

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[10] 1 RA 0233, Yount communicating with IMC about the interference with the funding of the Mosaic loan and best option is to "sell the project".

[11] 1 RA 0234-0237, Yount communicating with IMC about his investment into the LLC.

[12] 1 RA 0238, Yount communicating with IMC about his investment into the LLC.

[13] 1 RA 0239-0240, Yount communicating with IMC about replacement financing to take the place of the Mosaic Loan.

[14] 1 RA 0241-0242, Yount communicating with IMC about replacement financing to take the place of the Mosaic Loan.

[15] 1 RA 0243-0244, Yount communicating with IMC about replacement financing to take the place of the Mosaic Loan calling a member of the IMC "our hero".

In addition, Yount's counsel specifically questioned Yount on the issue of his intentional interference attempting to present contrary evidence seeking to defend or excuse Yount's behavior. Specifically, Yount's counsel employed creative terms such as "scheme", "conspire" and "torpedoing" the Mosaic Loan to engage in questioning at trial as follows:

> Q [By Yount's counsel to 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?[16]
>
> Q. [By Yount's counsel to Yount]: Did you ever conspire to somehow undermine the Mosaic loan?[17]

Yount and his counsel then began a colloquy lasting 16 pages trying to downplay and explain away the damning emails showing his active involvement. 7 App. 1741-1757. Yount was also questioned extensively on the Mosaic Loan—all in an effort to try to undermine the allegations that IMC and Yount conspired to "torpedo" the Mosaic Loan for the Project. 8 App. 1993-1999; 2013-2021.

In addition, Yount called Brandon Cheney from the IMC Group to testify on this key topic. Yount's counsel asks Mr. Cheney if he and his partners went into the secret meeting with Mosaic "to somehow torpedo the Mosaic loan?" 8 App. 1998). Yount's counsel then asked Mr. Cheney if Yount did anything to interfere with the Mosaic Loan. 9 App. 2018:24-2019:7.

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[16] 7 App. 1741.

[17] 7 App. 1741.

Marriner was questioned extensively about the basis of his claim and his resulting damages. Marriner testified he was hired as a consultant to raise money for the development of the LLC. 9 App. 2246:23-2247:1. Marriner also testified that the Project was "sensational" and he was "devastated professionally and personally over the loss of this project, this lawsuit, his reputation and his friends." 10 App. 2252:8-12. Marriner testified the Project was going to be his next five years of work and detailed the harm he sustained by the failure of the Project due to Yount's interference with the Mosaic Loan. 6 App. 1278:22. Marriner also described the impact of Yount's false accusations against him accusing him of fraud "ruined my life." 6 App. 1278:15. Marriner also described the loss of the Project caused by Yount as "a nightmare." Id. 1279:2.

Judge Flanagan's award of $1.5 million to Marriner in financial harm ties almost exactly to the harm Marriner testified he sustained as a result of Yount's wrongful conduct and which was documented in an exhibit that was stipulated into evidence at trial: $1,298,640 in lost sales commissions and $187,500 in lost capital.[18]

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[18] Marriner's damages did not need to be proven with mathematical certainty and can contain minor deviations and uncertainty. *See* Perry v. Jordan, 111 Nev. 943, 948, 900 P.2d 335, 338 (1995) ("Damages need not be determined with mathematical certainty."); *see also* Frantz v. Johnson, 16 Nev. 455, 469, 999 P.2d 351, 360 (2000) ("the mere fact that some uncertainty exists as to the actual amount of damages sustained will not preclude recovery."); Mort Wallin of Lake Tahoe, Inc. v. Commercial Cabinet Co., Inc., 105 Nev. 855, 857, 784 P.2d 954,

Similarly, Yount also testified and admitted all the elements of the intentional interference claim. Yount testified he was fully aware of Marriner's business and financial relationship with the LLC and was in "constant communications" with Marriner about the Project. 10 App. 2267:4-8. Yount testified he was fully aware that the IMC and Mr. Chaney intended to interfere with the LLC's contractual relationship to obtain the Mosiac Loan. Yount attended IMC meetings and "was considered by all to be a member" of the IMC. Id., pp. 2276:24-2277:1.

Yount was fully aware of the IMC's intention to block the Mosaic Loan from funding so the project would collapse and that Yount even acknowledged that such conduct by IMC was clandestine. Id., p. 2270:18-20; *see also* 20 App. 4937-4938 (Trial Exhibit 122--Yount concerned that the IMC's meeting with Mosaic to sabotage the LLC's funding was secret and not "legit").

Judge Flanagan, and Judge Polaha on review, found that the evidence presented was overwhelming that Yount "was [in] cahoots with this cabal involving certain members of the IMC, and that he testified he was not opposed to the removal of" the managers of the project. Id., p. 2277:1-4 (emphasis added).

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955 (1989) ("There is no requirement that absolute certainty be achieved. Obviously, once the fact of damage has been established, some uncertainty in the amount is allowed."). Judge Flanagan's award of damages to Marriner in the amount of $1.5 million is a reasonably accurate assessment of Marriner's damages and should be affirmed.

Judge Flanagan (and Judge Polaha on review) found that it was Yount's and the IMC's intent "to kill" the Mosaic Loan and Yount and the IMC did in fact kill the loan. Id., p. 2296.

Yount knew that the Mosaic Loan was the only exit strategy for the Project and without it, the Project was certain to fail and Marriner and the other defendants would sustain millions of dollars in damages. 10 App. 2277:23-24. The foregoing demonstrates that the issue of the Mosiac Loan and Yount's interference was clearly an issue tried at trial and the evidence was so overwhelming as to Yount's egregious and intentional conduct, causing serious and crippling harm, Judge Flanagan rendered judgment in all of the defendants' favor.

C. YOUNT'S FINAL ADMISSION THAT THE "FOCUS" OF THE TRIAL WAS YOUNT'S INTENTIONAL INTERFERENCE WITH THE MOSAIC LOAN.

To give the Court a frame of reference, a simple key word search of the trial transcript reveals that the term "Mosaic" was used over 300 times. Over seven (7) days, that's 43 times a day Yount's intentional interference with the Mosaic Loan was addressed. Recognizing that Yount's intentional interference with the Mosaic Loan was the primary issue in the trial, Yount's counsel admitted that the defendants tried their claims of wrongdoing against Yount for his participation, collusion and secret conduct to cause the Mosaic Loan to collapse. On the last day of trial, Yount's counsel conceded to Judge Flanagan the following:

> MR. CAMPBELL: Thank you, your Honor. During the course of this trial, **the defendants have really attempted to shift the focus of this case on what happened after October 13th of 2015** (the activities relating to sabotage of the Mosaic Loan). I think they've done that in an attempt to not have this Court focus on what happened to Mr. Yount.

9 App. 2139:2-17 (emphasis added). Simply stated, the defendants tried the factual issues of Yount's wrongful interference and his collusion and agreement with the IMC to destroy the funding of the Mosaic Loan. Yount's wrongful conduct was the focus of the trial, and clearly and unmistakably formed the basis of Judge Flanagan's judgment against Yount.

D. JUDGE FLANAGAN'S ADDITIONAL ADOPTION OF THE DEFENDANTS' FINDINGS AND CONCLUSIONS.

In addition to providing his extensive and exhaustive findings of fact and conclusions of law, Judge Flanagan also adopted and incorporated into his findings of fact and conclusions of law those that had also been submitted by the defendants prior to trial. 10 App. 2287.[19] Those findings and conclusions are in conjunction with and are in addition to those provided by the Court. Criswell/Radovan's findings state the following:

> 45. . . . [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 Plaintiffs involvement) went behind Criswell Radovan's back and sabotaged the

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

loan Criswell Radovan had lined up with Mosaic to fund the remaining construction.

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

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

. . .

68. 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 Plaintiffs $1 Million investment.

5 App. 1137, 1141. Similarly, Marriner's findings also state:

42. Certain members of Cal Neva interfered in the Mosaic refinancing expected by Radovan.

43. Yount was aware of the interference when it occurred.

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

5 App. 1109. Judge Polaha also recognized and addressed Judge Flanagan's adoption and incorporation of these findings of fact in his Judgment affirming Judge Flanagan's decision. 12 App. 2754 ("Judge Flanagan also adopted the proposed findings of fact submitted by the defendants prior to trial").

E. JUDGE POLAHA'S REVIEW AND ANALYSIS CONFIRMED JUDGE FLANAGAN'S FINDINGS AND JUDGMENT.

At the time of decision, NRCP 63 provided that if a judge who was conducting a trial was unable to proceed "any other judge may proceed upon

certifying familiarity with the record and determining that the case may be completed without prejudice to the parties." In addition, Judge Polaha was vested with the authority to "recall any witness whose testimony is material and disputed" and he had the authority to "recall any other witness." Id.

Judge Polaha elected not to recall witnesses, elected not reopen the evidence and elected to reject each of Yount's hyperbolic arguments contending that Judge Flanagan's decision was "erroneous", "unjustified", "nonsensical", "[a] gross violation of due process" and "outrageous". 10 App. 2386:11; 2386:13; 2397:5 2397:6; and 2400:21. Instead, due to Judge Flanagan's unfortunate passing, Judge Polaha "reviewed the trial transcript in its entirety and the exhibits referenced in the transcript." 12 App. 2755:1-2. Specifically, on page 3 of the Judgment, Judge Polaha stated:

> **In this case, Judge Flanagan left an extensive record of his decision, including summaries of witness testimony, the credibility of certain witnesses, his analysis of various trial exhibits, and his determination of each claim for relief.**
>
> **The Court has reviewed the trial transcript in its entirety and the exhibits referenced in the transcript and in Judge Flanagan's ruling.** Pursuant to NRCP 63, the court here certifies its familiarity with the record. Moreover, given the status of the case at the time of Judge Flanagan's passing (evidence closed, closing argument completed and a ruling from the bench on the merits, followed by his written Amended Order), and the detailed extent of Judge Flanagan's ruling from the bench and his subsequent Amended Order dated September 8, 2017, **the court has determined pursuant to NRCP 63, that the proceedings in this case may be completed as set forth herein without prejudice to the parties.**

Under NRCP 63, the court has discretion to recall witnesses. The Court finds no need or reason to recall witnesses.

Id. at 2754:26-2755:10 (emphasis added).

Of critical note, under NRCP 63, Judge Polaha had the discretion to recall witnesses and reopen the evidence if he deemed Judge Flanagan's decision was erroneous, unjustified, nonsensical, a gross violation of due process or outrageous. He did not. He found that Judge Flanagan's extensive record, his findings and his analysis was supported by the record and rejected Yount's arguments. In so ruling, Judge Polaha confirmed he could render judgment on Judge Flanagan's decision and orders after trial and enter judgment and did so "without prejudice to the parties." Id., at 2755:8.[20]

SUMMARY OF THE ARGUMENT

The rules, procedures and policies of the law vest a trial court with full authority to render all appropriate relief to a party if an issue was tried and the parties had a meaningful opportunity to present their respective positions to the Court. In the present case, without objection, the issue of Yount's intentional interference with the Mosaic Loan was at issue from day one in this case, was at issue through discovery, was at issue through pre-trial motion practice and the

[20] In addition to affirming Judge Flanagan's decision, Marriner fully briefed the issue of his damages to Judge Polaha, which Judge Polaha also concluded was appropriate. 10 App. 2331.

"heart" of trial. Even though the issue of Yount's intentional interference was not technically plead as a formal counterclaim, that technicality did not bar or prevent Judge Flanagan from granting relief in Marriner's favor. On the contrary, the rules and procedures of the court allow for Judge Flanagan, and all other judges, the opportunity to grant appropriate relief that a party is entitled to receive.

Turns out, Yount's conduct was so egregious that after a seven (7) day trial Judge Flanagan, the then Chief Judge of the Second Judicial District Court and veteran judge having decades of trial experience as a lawyer, rendered his decision in favor of the defendants and against Yount. Judge Flanagan's decision was emphatic and detailed that Yount's conduct unquestionably was performed with the purpose of destroying the LLC's funding so that Yount could take over the Project and to squeeze Criswell/Radovan for their 20% interest. Judge Flanagan's decision was reviewed by Judge Polaha, another long-standing judge with 20 years of experience, and was again affirmed and Judgment rendered against Yount.

Form does not control substance. The issue of Yount's interference was tried and conclusively determined. The harm to Marriner is quantifiable and Judge Flanagan's decision in Marriner's favor is established by undisputed evidence. Given the circumstances of this case, Yount's appeal must be denied.

ARGUMENT

I. STANDARD OF REVIEW.

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

The decisions of a trial court are always sustained when there is evidence in the record supporting the relief granted even if the trial judge did not specifically apply the correct label supporting the relief requested and even if a wrong label for the claim was articulated by the trial court. Applying this rule of law, it is stated:

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

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

This substantive rule of law is also followed and is believed to be applied by the Nevada Supreme Court. Cockrell v. Cockrell, 84 Nev. 537, 539, 445 P.2d 30, 31 (1968) (affirming judgment based upon both unpled and pled claims because "[u]nder either theory the record supports the judgment of the trial court."). In the present case, overwhelming evidence supports the relief of intentional interference that Judge Flanagan articulated and relied upon in rendering his judgment. *See e.g.*, Martinez v. Maruszczak, 123 Nev. 433, 438–39, 168 P.3d 720, 724 (2007) ("Substantial evidence supports the district court's findings of fact at issue in this matter; thus, we will not disturb them on appeal."). On these grounds this appeal should be denied.

A. SUBSTANTIAL EVIDENCE SUPPORTS THE JUDGMENT IN FAVOR OF MARRINER.

Judge Flanagan's (and Judge Polaha's) decision cannot be overturned because it is supported by substantial evidence. Mackintosh v. California Federal Sav. & Loan Ass'n, 113 Nev. 393, 401, 935 P.2d 1154, 1159-1160 (1997) ("The trier of fact's verdict will not be overturned if it is supported by substantial evidence . . . ."). Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion. James Hardie Gypsum (Nevada) Inc., v. Inquipco., 112 Nev. 1397, 1401, 929 P.2d 903, 907 (1996) ("Substantial

evidence has been defined as that which a reasonable mind might accept as adequate to support a conclusion.").

As demonstrated above, the evidence is undisputed that Marriner was entitled to receive approximately $1.3 million in commission payments and lost his approximate $200,000 investment into the LLC. Yount was aware of Marriner's contract rights to receive these payments and intentionally interfered with the LLC's ability to obtain the Mosaic Loan so that the Project would fail. Yount proceeded on this course of wrongful conduct so that he and the IMC could squeeze Criswell and Radovan out of the Project. Yount knew his conduct was wrong yet continued on with the scheme knowing full well Marriner would be harmed. 20 App. 4397-4398 (Trial Exhibit 122--Yount concerned that the IMC's meeting with Mosaic to derail the LLC's funding was secret and not "legit").

In light of the foregoing evidence, it is clear that Judge Flanagan's decision is based upon substantial evidence. As such, this Court should affirm the Judgment rendered in Marriner's favor against Yount.

B. THIS COURT SHOULD GIVE JUDGE FLANAGAN'S FACTUAL DETERMINATIONS DEFERENCE.

This Court is also to view Judge Flanagan's factual determinations with deference. Edelstein v. Bank of New York Mellon, 128 Nev. 505, 286 P.3d 249, 260 (2012) ("This court reviews a district court's factual determinations

deferentially . . . ."). Further, this Court should not set aside any of Judge Flanagan's factual findings since they are not clearly erroneous and are supported by substantial evidence. Pombo v. Nevada Apartment Ass'n, 113 Nev. 559, 938 P.2d 725, 727 (1997) ("A district court's findings of fact and conclusions of law, even where predicated upon conflicting evidence, must upheld if supported by substantial evidence, and may not be set aside unless clearly erroneous."). Again, based upon the foregoing analysis, Judge Flanagan's factual determinations should be upheld by this Court and Yount's appeal denied.

II. APPLICATION OF NRCP 54(c).

NRCP 54(c) states, **"[e]very other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings**." (emphasis added). The express language of this rule applies to each "party" and "even if" the party has not demanded the specific relief "in its pleadings". This phraseology has been in existence in the Federal Rules of Civil Procedure since 1937 and its Notes state: "This . . . makes clear that a judgment should give the relief to which a party is entitled, regardless of whether it is legal or equitable or both". FRCP 54(c), Notes of Advisory Committee on Rules, 1937.

NRCP 54(c)'s provision applies directly to the facts and circumstances of this case. In Magille v. Lewis, 74 Nev. 381, 388, 333 P.2d 717, 720 (1958), the

Nevada Supreme Court stated NRCP 54(c) grants the District Courts the authority and power to supersede any "particular legal theory of counsel" and that the legal theories of counsel are subordinate to the power of the District Court to grant relief in favor of a party "whether demanded or not" as follows:

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

Magille v. Lewis, 74 Nev. 381, 388, 333 P.2d 717, 720 (1958) (emphasis added) (citation omitted). In discussing the provisions of NRCP 54(c) allowing and authorizing the District Court to grant whatever relief has been proven at trial, regardless of the form of the pleadings, the Magille Court further stated:

> This provision implements the general principle of Rule 15(c), that in a contested case **the judgment is to be based on what has been proved rather than what has been pleaded**. . . .

Id. (emphasis added).[21] As stated by a leading commentator regarding the federal counterpart, "Rule 54(c) ensures that substance will prevail over form." 10 Moore's Federal Practice § 54.72 (3d ed. 2011).[22]

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[21] Yount attempts to distance himself from NRCP 54(c)'s provisions by offering a sever interpretation of NRCP 54(c) that only limits the Court's authority to "fill in

Stated another way, Judge Flanagan had the right and the duty to grant Marriner the relief he was entitled to regardless of whether or not it was demanded or pled. The question of whether the claim was pled is irrelevant if the matter was tried actually and it was proven that the prevailing party was entitled to the relief granted.[23] In the present case, Judge Flanangan was authorized to

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relief, not new claims." OB, p. 49. Yount offers no legal support for this anemic interpretation of NRCP 54(c)'s provisions.

[22] Yount's argument on appeal is premised on form over substance. Yount contends he should escape the liability imposed upon him because the label of a "counterclaim" was not used in the case. As NRCP 54(c)'s express language details, and the policy underlying the implementation and use of NRCP 54(c) provides, labels are irrelevant. Instead, the substance of the contention and the substance of the evidence proven at trial governs the outcome of this appeal. Stated another way, Yount's argument is form prevails over substance. Yount's assertion directly contradicts the purpose of NRCP 54(c)'s substance over form policy.

[23] Yount also cites to Idaho Res., Inc. v. Freeport-McMoran Gold Co., 110 Nev. 459, 462, 874 P.2d 742, 744 (1992) for the proposition that NRCP 54(c) presumes that the theory of relief was tested adversarily and was "squarely presented and litigated by the parties as some stage or other of the proceedings." OB, p. 51. Yount, however, ignores that he judicially admits that from day one the case focused on his intentional interference, that discovery focused on his intentional interference and that the trial was on his intentional interference and that Yount actively sought to contest and challenge the claim of his intentional interference. Given the undisputed circumstances of this case, Yount's intentional interference was "squarely presented and litigated" so NRCP 54(c) does in fact apply.

render judgment in favor of Marriner for Yount's intentional interference with the Mosaic Loan.[24]

The tort of intentional interference with contract has been generally defined as follows:

> (1) a valid and existing contract; (2) the defendant's knowledge of the contract; (3) intentional acts intended or designed to disrupt the contractual relationship; (4) actual disruption of the contract; and (5) resulting damage.

Sutherland v. Gross, 105 Nev. 192, 196, 772 P.2d 1287, 1290 (1989). In the present case, the evidence is undisputed that Marriner had valid contracts with LLC and had previously performed according to the terms and conditions of those contracts;[25] that Yount was aware of Marriner's contract rights; that Yount undertook intentional acts to disrupt the contracts; actual disruption of Marriner's contract rights occurred and Marriner sustained quantifiable damages. In fact, Judge Flanagan specifically found that the elements of a claim for intentional interference were established at trial and "**but for the intentional interference with the contractual relations between Mosaic and Cal Neva LLC, this Project**

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[24] Yount also argues that NRCP 54(c) does not apply because there was no specific prayer for relief asking for damages. OB, p. 50. As detailed above, a prayer asking for damages is not a condition precedent to NRCP 54(c) relief. In fact, NRCP 54(c) states that the form of the pleadings are irrelevant if the entitlement to the relief was proven at trial. Nonetheless, Marriner did request in his prayer "such other relief that the court deems to be fair, just and equitable." 1 App. 211.

[25] In addition, Marriner was also a party to the LLC's Operating Agreement under which Marriner lost his $187,000 investment. 20 App. 4869.; 10 App. 2331. Yount also introduced the LLC's Operating Agreement as Trial Exhibit 5.

would have succeeded. That is undisputed." 10 App. 2295:13-2296:21 (emphasis added).

Consistent with the legal principles and the purpose and scope of Rule 54(c), in Padilla v. Ghuman, 183 P.3d 653, 658 (Colo. Ct. App. 2007), the court stated: "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." In Padilla, the Court held:

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

Id. (emphasis added).

Similar to Padilla, in the instant case, except for single belated after-the-fact objection during closing arguments, Yount failed to object to both the presentation of evidence of the interference claim and the establishment of the damages sustained by Marriner (or any of the other defendants) as a result of Yount's interference. Instead, Yount stipulated to the admission of the evidence (including the very contracts supporting Marriner's damage claims) and cannot now be heard to complain that Judge Flanagan (and Judge Polaha) erred by

imposing consequences on Yount for his intentional misdeeds harming numerous parties with his treachery.[26]

III. YOUNT IS NOT ENTITLED TO DEMAND THIS COURT REWEIGH THE EVIDENCE OR REVISIT YOUNT'S CREDIBILITY.

It has repeatedly been stated by this Court that it will not "reweigh" the evidence nor reconsider the credibility of the witnesses as those functions are in the sole purview of the District Court. As stated in Beverly Enterprises v. Globe Land Corp., 90 Nev. 363, 526 P.2d 1179 (1974):

> "It is the prerogative of the trier of facts to evaluate the credibility of witnesses and determine the weight of their testimony, and it is not within the province of the appellate court to instruct the trier of fact that certain witnesses or testimony must be believed."

Id. at 365, 526 P.2d at 1180 (citation omitted); *see also* Quintero v. McDonald, 116 Nev. 1181, 1184, 14 P.3d 522, 524 (2000) ("The credibility of witnesses and the weight to be given their testimony is within the sole province of the trier of fact.").

In the present case, Yount wants this Court to reweigh the evidence and rule in his favor that Judge Flanagan's findings of facts were erroneous. This

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[26] Yount also points out consent cannot be implied when evidence is admitted over objection and cites to Schwartz v. Schwartz, 95 Nev. 202, 205, 591 P.2d 1137, 1140 (1979) for this proposition. OB, p. 38. However, Yount again fails to address that in this case, he did not object to the evidence of his intentional interference, instead, he stipulated to the admissibility and introduction of all of the evidence, and/or did not object during trial to such evidence. Accordingly, Yount's own arguments support the denial and rejection of his appeal.

Court should not reweigh the evidence as Yount requests. Instead, as shown, there is substantial evidence supporting Judge Flanagan's decision in favor of Marriner. As such, Yount's appeal should be denied.

IV. AT ALL TIMES YOUNT WAS AWARE THAT HIS INTENTIONAL INTERFERENCE WAS THE "FOCUS" OF THE CASE AND WAS THE PRIMARY ISSUE TRIED TO JUDGE FLANAGAN.

Yount also argues that Judge Flanagan violated Yount's due process and he was not provided a "meaningful opportunity" to present his case in response to the assertions of his intentional interference. OB, p. 44. Initially, this argument is disingenuous. Yount judicially admits that he knew from day one that his intentional interference with the Mosaic Loan was being vigorously litigated by the defendants.

As stated above, Yount judicially admitted in these proceedings that from the moment of the filing of the answers in this case by the defendants that Yount's intentional interference with the Mosaic Loan was being asserted and alleged as the cause of all harm and that Yount "conspired with other investors to interfere with the Project's financing." 21 App. 4945-46 ("Defendants answered **and asserted . . . . that Mr. Yount conspired with other investors to interfere with the Project's refinancing loan.**"). Yount also judicially admitted that discovery in the case "focused" on "communications between Mr. Yount and the investors that allegedly conspired to interfere with the Mosaic loan." Id., at 4946.

Yount is bound by these judicial admissions that he was aware at all times that his intentional interference was the focus of this case.[27]

A judicial admission is a statement of fact in the proceedings that bars 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."); 32 C.J.S. Evidence § 628 (May 2010) ("Admissions in a pleading have the effect of withdrawing a fact from issue and eliminating the necessity of proof relating to the fact so admitted . . . .")

In Reyburn Lawn & Landscape Designers, Inc. v. Plaster Development Co., Inc., 127 Nev. 331, 255 P.3d 268, 276 277 (2011) the Nevada Supreme Court articulated that judicial admissions are "deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge." In the present

[27] Given the circumstances of this case, it is difficult to fathom how Yount can argue he was not provided with the opportunity to prepare for and/or was not provided a meaningful opportunity to address his intentional interference with the Mosaic Loan, which was Judge Flanagan's conclusion that "but for the intentional interference with the contractual relations between Mosaic and Cal Neva, LLC the project would have succeeded."

case, Yount's admissions that from the very first day the defendants' answered, the issue of Yount's intentional interference was plead as the primary focus of the defendants' claims of wrongdoing in these proceeding. Accordingly, Yount's judicial admissions demonstrate that Yount's due process concerns were addressed and satisfied.

In addition, as demonstrated above, Yount presented evidence and specifically testified as to his purported lack of activity in interfering with the Mosaic Loan and/or seeking to minimize such interference. Of even more telling import, Yount's counsel took full advantage of Yount's "meaningful opportunity" to contest Yount's intentional interference and was even granted leave to admit additional never-produced documentary evidence (Trial Exhibit 77) attempting to minimize Yount's intentional interference with the Mosaic Loan. Specifically, Yount's counsel sought to introduce a brand-new exhibit as alleged "impeachment evidence" to rebut Radovan's testimony from the prior day about Yount's active sabotage of the Mosaic loan:

> Q. [Yount's counsel To Yount] Did you receive a letter through the course of your dealings with Mr. Radovan that was sent from Mosaic to Mr. Radovan about terminating the loan going forward?
>
> A. Yes.
>
> MR. CAMPBELL: Your Honor, I have a new exhibit. I believe it's an impeachment exhibit. **It goes directly to the heart of the evidence** that we've heard today from Mr. Radovan as to the -- as to what happened with

the Mosaic loan. Mr. Chaney provided it to me. I did not get it in discovery. It was not provided in the CR discovery. But **I think it goes to the heart of the matter** and it should be admitted as an impeachment witness.

. . .

THE COURT: All right. Thank you. 77 is admitted.

9 App. 2016:22-2017:21.

As shown, Yount's counsel's own statements affirm that the Mosaic Loan was the "heart" of "the evidence" at trial. Yount's own judicial admissions conclusively establish that Yount's intentional interference was the "focus" of the defendants' contentions, was the "focus" of discovery and was the "heart" of the trial. Given the foregoing, the Court should not ignore Yount's judicial admissions and should not ignore Yount's aggressive trial activities seeking to minimize Yount's intentional interference with the Mosaic Loan.[28]

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[28] Yount self-servingly argues that if there would have been a counterclaim "labeled" intentional interference he would have tried the case differently and presented evidence from Mosaic executives. OB, p. 44. Yount then cavalierly states that he "made the reasonable decision not to preserve or present evidence on Mosaic's state of mind." OB, p. 45. Yount's conduct begs the question: if Yount knew that from day one his intentional interference was pled by the defendants and that discovery focused on that interference, and that he presented evidence at trial seeking to minimize his interference, how can he be heard now to complain that he made a tactical decision at trial, which tactical decision was unsuccessful. Merely because Yount made a tactical decision at trial does not warrant reversal when Yount was clearly and unmistakably aware of the fact that his intentional interference was a crucial matter during discovery and a potentially dispositive issue at trial. Yount's appeal is not the proper remedy to address and/or relieve Yount of tactical decisions made at trial.

V. YOUNT CONSENTED TO THE TRIAL OF HIS INTENTIONAL INTERFERENCE WITH THE MOSAIC LOAN.

Yount argues that he did not specifically consent to the trial of a counterclaim, therefore, Judge Flanagan's decision was in error. OB, pp. 36-41. However, the issue is not whether Yount consented to something labelled a "counterclaim", instead, the issue is whether Yount consented to the trial of his intentional interference with the Mosaic Loan. As stated above, the labels used and/or not used are irrelevant on appeal. Instead, this Court is to determine whether or not Yount consented to try the issue of his intentional interference.[29]

As demonstrated above, Yount knew from day-one that his intentional interference with the Mosaic Loan was the primary "focus" of this case. Yount's counsel judicially admitted that the focus of the discovery and the trial was on Yount's intentional interference. Yount never objected to the introduction of all the evidence going to the issue of his intentional interference with the Mosaic Loan and in fact stipulated to such evidence. Thereafter, Yount introduced his own evidence and witnesses seeking to minimize his intentional interference. In this

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[29]NRCP 54(c) ("[e]very other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings."); Magille v. Lewis, 74 Nev. 381, 388, 333 P.2d 717, 720 (1958) ("If a party has proved a claim for relief the court will grant him that relief to which he is entitled on the evidence regardless of the designation of the claim or the prayer for relief. . . . the question is not whether the plaintiff has asked for the proper remedy but whether he is entitled to any remedy.").

situation, it is clear that Yount expressly consented and actively participated in the trial of his intentional interference and cannot be heard to now complain.[30]

Yount also cites the case of Poe v. La Metropolitana Compania Nacional De Seguros, S.A., Havana, Cuba, 76 Nev. 306, 310, 353 P.2d 454, 457 (1960), however, Yount fails to address the import of Poe on this case. OB, p. 39. As Yount points out, in Poe, implied consent was applied because "the defendant had raised the issues in his opening argument, counsel for the plaintiff had specifically referred to the matter as an issue in the case, it had been explored in discovery, and there was not objection to the admission of evidence relevant to the issue at trial." OB, p. 39. As explained in detail herein, each of these factors are also present in this case. Accordingly, applying Poe, even absent express consent, the factors of implied consent to try the issue of Yount's intentional interference and the harm caused is undisputed.

VI. MARRINER'S NRCP 15 MOTION.

Of note, Yount argues that no judge granted NRCP 15(b) relief. OB, p. 43. However, post-trial Marriner did in fact file his Motion To Amend The Pleadings To Conform To The Evidence And Judgment pursuant to NRCP 15(b). 2-3 RA

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[30] It's easy to understand why Judge Flanagan perceived Yount as lacking credibility at trial when Yount's own correspondence indicated he was desirous to take over the Project and obtain Criswell/Radovan's 20% interest using "the threat of legal, civil, criminal actions." 10 App. 2296

0249-0513. NRCP 15(b), states that "amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues **may be made upon motion of any party at any time, even after judgment** . . . ." Marriner sought such relief in under the belief that Yount's appeal did not divest the District Court from rendering such relief. *See e.g.*, Shelley v. Union Oil Co. of California, 203 F.2d 808, 809 (9th Cir. 1953) ("[I] is entirely proper under rule 15(b), as well as under the practice long recognized by the courts generally, to permit amendments to conform to the proof; and the amendment may be made at anytime, even after judgment. . . . Even on appeal the pleading may be deemed amended in such cases."). However, Judge Walker declined to rule on Marriner's motion since Yount's appeal was pending. 3 RA 0514-0516. Accordingly, Marriner did in fact take appropriate steps to conform his pleadings to the proof at trial.

VII. YOUNT'S ADDITIONAL ARGUMENTS ARE INAPPLABLE TO MARRINER AND/OR ARE IRRELEVANT.

Yount further argues that all the defendants disclaimed any counterclaim or recovery. OB, pp. 13-14. However, Yount only addresses comments made by Criswell/Radovan's counsel. Marriner's counsel made no such statements.

Further, Marriner did not pled the affirmative defense of unclean hands. However, Judge Flanagan used the concept of Yount's unclean hands to form the

basis of his intentional interference award in favor of all the Defendants. Yount correctly identifies that Marriner did assert an affirmative defense of independent investigation. OB, p. 32. While Yount argues that this affirmative defense does not allow for affirmative recovery, application of NRCP 8(c), independent of NRCP 54(c), did allow Judge Flanagan to treat such affirmative defense as an affirmative basis for recovery in Marriner's favor.

NRCP 8(c) recognizes this very situation and states: "[w]hen a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, **the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation**." NRCP 8(c) (emphasis added). Accordingly, pursuant to Rule 8(c), Judge Flanagan acted properly in granting affirmative relief to Marriner even though his defense was not articulated as an affirmative claim. *See e.g.*, Las Vegas Dev. Grp., LLC v. SRMOF II 2012-1 Tr., US Bank Tr. Nat'l Ass'n, 2018 WL 1073385, at *3 (D. Nev. 2018) (under 8(c), the "affirmative defense and prayer for relief were neither designated as a counterclaim. . . . [however] the Court will construe them as such in the interest of justice and judicial efficiency."). As discussed above, regardless of the labels employed by Judge Flanagan and/or the parties, substantial evidence supports the Judgment in favor of Marriner.

Additionally, Yount argues extensively that Judge Walker's comments are somehow controlling on this Court and/or are part of the record relating to Judge Flanagan's decision. OB., pp. 18-19. It is suggested that Judge Walker's comments are irrelevant to the issues on appeal. Similarly, Yount appears to argue that Judge Walker erroneously denied Yount's request for post-trial discovery. OB, pp. 48-49. However, Yount did not appeal the denial of his post-trial discovery motion.

Yount also argues that that Criswell/Radovan's damages are premised on proof of the lost profits and management fees of the Project. OB, pp. 64-65. Marriner's damages are not implicated by any profitability of the Project and he did not seek or recover management fees, therefore, these arguments are inapplicable to Marriner.

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

Yount argues that he should be entitled to an entirely new trial even on his own claims since Judge Flanagan's decision "was unreliable". OB, p. 69. Similarly, Yount contends Judge Flangan's decision was in error. OB, pp. 71-77. However, it is hornbook law that when a plaintiff fails in its burden to prove each element of its claims, then judgment in a defendant's favor is warranted. *See e.g.*, Alam v. Reno Hilton Corp., 819 F.Supp. 905, 909 (D. Nev. 1993) ("Where

there is a complete failure of proof concerning an essential element of the nonmoving party's case, all other facts are rendered immaterial, and the moving party is entitled to judgment as a matter of law.").

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

1st Claim: Breach of contract. Claims against CR Cal Neva LLC and Criswall Radovan, LLC dismissed as not parties to any of the contracts. 10 App. 2287-2288.

2nd Claim: Breach of fiduciary duties. Dismissed because no wrongful conduct and Yount failed to prove any damages supporting such claim. Id., pp. 2288-2289.

3rd Claim: Fraud. Dismissed because no evidence presented of any material facts that were false. On the contrary, all the evidence established that the information provided was true; Yount had access to all relevant information at all relevant times; Yount never relied upon any representations of others and Yount did not sustain any damages. Id., pp., 2289-2290.

4th Claim: Negligence. Dismissed because no evidence of any breach, causation or damages. Id., pp., 2293-2294.

5th Claim: Conversion. Dismissed because there was no evidence of any conversion of any assets. Id., pp., 2294

6th Claim: Punitive damages. Dismissed because Yount provided "no evidence whatsoever" supporting such claim. Id., pp., 2294-2295.

7th Claim: Securities fraud. Dismissed because of a disclaimer, no security at issue and the interest was not a security. Id., p. 2295.

Of the foregoing claims, Yount's claims against Marriner were only for fraud (4th), securities fraud (7th) and punitive damages (6th).[31] In dismissing those claims, Judge Flanagan specifically found that there was no evidence supporting any claim alleged against Marriner. Accordingly, contrary to Yount's contentions, Judge Flanagan did not apply the affirmative defense of "unclean hands" as a bar to Yount's claims against Marriner. Instead, Judge Flanagan found that Yount's claims failed for lack of evidentiary support. Accordingly, Yount's arguments on appeal also fail.

Thereafter, Judge Polaha "reviewed the trial transcript in its entirety and the exhibits referenced in the transcript." 12 App. 2755. Judge Polaha's independent analysis of the transcript as well as the detailed analysis, factual findings and conclusions of law also determined that Yount's claims failed for lack of evidentiary support. Id. Again, the affirmative defense of unclean hands was inapplicable to the denial of Yount's claims as those claims all failed for lack of proof. Accordingly, there is no evidentiary or legal basis supporting Yount's

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[31] A claim for punitive damages is not an independent claim for relief. Grieves v. Superior Court, 157 Cal.App.3d 159, 163-164, 203 Cal.Rptr. 556, 558 (Cal. Ct. App. 1984) ("There is no cause of action for punitive damages. Punitive or exemplary damages are remedies available to a party . . . . 'Punitive damages are merely incident to a cause of action, and can never constitute the basis thereof.'")

request for a new trial and/or reversal of Judge Flanagan's and Judge Polaha's decision and affirmance of the Judgment in Marriner's favor is warranted.

Lastly, Yount's claims were baseless because Yount received exactly what he paid for and as Judge Flanagan stated:

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

10 App. 2288:21-24 (emphasis added).[32] Stated another way, Yount received exactly what he paid for but vindictively sued Marriner and Criswell/Radovan for return of his investment in the LLC even though Yount's own malicious and intentional interference with the Mosaic Loan is the sole reason the Project failed.[33]

CONCLUSION

A trial court should have the full authority to render all appropriate relief to a party if an issue was tried and the parties had a meaningful opportunity to

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[32] Yount's counsel conceded at the close of trial that Yount contracted for and did in fact receive a founder's share even though the share received was from a different source than originally contemplated. 9 App. 2152:8-19 ("THE COURT: Tell me, and nobody has explained it to me, tell me if I laid that founders share from Mr. Criswell and Mr. Radovan right next to the founders share of Mr. Busick, what difference is there? . . . MR. CAMPBELL: Functionally, there is no difference.").

[33] Yount's original plan was to take over the Project and to squeeze-out Criswell/Radovan and take their 20% interest. However, when the plan failed and the Project was bankrupt, Yount embarked on this litigation suing all the defendants trying to recover his $1 million investment—even though his investment in the LLC was lost due to his own malicious conduct.

present their respective positions to the Court. This policy is embodied in NRCP 54(c). Judge Flanagan's decision and the Judgment in this matter fully comport with the express language of the rule and the policy which underlies it.

Yount's conduct was egregious. Yount knew his conduct would bankrupt the LLC. Yount knew that if the Mosaic Loan was lost, then the LLC could not perform its contractual obligations to Marriner and Marriner would sustain $1.5 million in damages. Yount had no concern for Marriner, the LLC or the other defendants. Yount's objective was to take over the project and squeeze Criswell/Radovan out of the Project. Marriner was an innocent victim of Yount's scheme.

Judge Flanagan's decision was emphatic and detailed. The harm to Marriner is quantifiable and Judge Flanagan's decision in Marriner's favor is established by undisputed evidence. Given the circumstances of this case, Yount's appeal must be denied.

DATED this 3rd day of June, 2019.

SIMONS HALL JONSTON, PC
6490 S. McCarran Blvd, F-46
Reno, Nevada 89509

BY: _____
Mark G. Simons, Esq.
Nevada Bar No. 5132
Attorney for Respondents David Marriner and Marriner Real Estate, LLC

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 28.2

1. I hereby certify that this Respondents' Answering Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Word 10 in 14 font and Times New Roman type.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 11,340 words.

3. Finally, I hereby certify that I have read this answering brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be

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subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 3rd day of June, 2019.

SIMONS HALL JONSTON, PC
6490 S. McCarran Blvd. F-46
Reno, Nevada 89509

BY: _____
Mark G. Simons, Esq.
Nevada Bar No. 5132
Attorney for Respondents David Marriner and Marriner Real Estate, LLC

CERTIFICATE OF SERVICE

I hereby certify pursuant to NRAP 25(c), that on the 3rd day of June, 2019, I caused service of a true and correct copy of the above and foregoing **RESPONDENTS' ANSWERING BRIEF** on all parties to this action by the method(s) indicated below:

X by using the Supreme Court Electronic Filing System:

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

DATED this 3rd day of June, 2019.

An employee of Simons Hall Johnston PC