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IN THE SUPREME COURT OF NEVADA

GEORGE STUART YOUNT, Individually and in his Capacity as Owner of GEORGE STUART YOUNT IRA, Appellant, *vs.* CRISWELL RADOVAN, LLC; CR CAL NEVA, LLC,; WILLIAM CRISWELL; CAL NEVA LODGE, LLC; POWELL, COLEMAN AND ARNOLD, LLP; DAVID MARRINER; and MARRINER REAL ESTATE, LLC Respondents.	Case No. 74275 From the Second Judicial District Case No. CV16-00767

ANSWERING BRIEF

RESPONDENTS CRISWELL RADOVAN, LLC; CR CAL NEVA, LLC, ROBERT RADOVAN; WILLIAM CRISWELL; CAL NEVA LODGE, LLC; AND POWELL, COLEMAN AND ARNOLD, LLP

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NRAP 26.1 DISCLSOURE

1. William Criswell is an individual.
2. Robert Radovan is in an individual.
3. Criswell Radovan, LLC is a Limited Liability Company owned by William Criswell and Robert Radovan.
4. CR Cal Neva, LLC petitioned for bankruptcy protection before trial and is not a party this appeal.
5. Cal Neva Lodge, LLC petitioned for bankruptcy protection before trial and is not a party to this appeal.
6. Powell, Coleman and Arnold, LLP is a Texas limited liability partnership. The firm's named partners are Bruce Coleman, Patrick Arnold, and William Powell.

Dated this 10th day of July, 2019.

HOWARD & HOWARD ATTORNEYS, PLLC

By: */s/ Ryan O'Malley*
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CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

STATEMENT OF THE CASE

This appeal arises from Yount's dismay at an outcome based upon facts and issues that he fully litigated. The ruling below was the first time that Yount had been surprised by anything. Throughout the trial, Yount had presented voluminous testimony and documents on an issue that had been central to this litigation since pre-trial discovery: Yount's role in causing the failure of the Cal Neva redevelopment project (the "Project"). Yount understood this issue well—he developed the relevant facts through discovery, identified key players, anticipated the evidence against him, and strategically deployed evidence and testimony of his own (including material that had not been disclosed or developed during discovery). In short, he had planned ahead to address a known issue.

To be clear: Yount was surprised by a *result*, not an *issue.* Pleadings are intended to provide notice of the *issues* to be tried so that the parties know what evidence is relevant at trial. CR's unclean hands defense alerted Yount that evidence related to his interference potentially fatal to his lawsuit, in which he claimed over $1 million in compensatory and punitive damages. He thoroughly prepared the issue for trial and presented voluminous evidence, including dozens of documents and a witness specifically aimed at interference.

Judge Flanagan's damages award was supported by the evidence. His findings of fact were based on a meticulous evaluation of the evidence, which he stated on the record over the course of a two-hour ruling spanning more than fifty

typewritten pages. Both Criswell and Radovan testified that Yount's interference in the Project's financing had cost them far more than $1.5 million in equity, management fees, and development fees. If greater clarity is required, then at most the case should be remanded for a hearing on damages. Judge Flanagan's merits findings were well-considered and legally correct. The Court should reject Yount's request that it reweigh the evidence and order judgment in his favor.

STATEMENT OF FACTS

Criswell Radovan's Long History of Successful Projects

William Criswell ("Criswell") has been in the real estate business since 1970, and had been operating his own development company since 1976. (6 App. 1445.)[1] By 1984, it was ranked as the 19th largest developer in the United States, with numerous successful office building and high-end hotel projects to its name. (6 App. 1446.)

Criswell met Robert Radovan ("Radovan") (Criswell and Radovan collectively referred to as "CR") in 1995. (6 App. 1447.) The two formed a bond over their prior service in the Navy; Criswell had served as an Instructor of Special Operations and Naval Intelligence, and Radovan had served in the Navy SEALS. (6 App. 1447.) Their mutual respect led to a business partnership and the formation of Criswell Radovan, LLC. (6 App. 1447.)

[1] All appendix citations refer to Appellant's Appendix.

Prior to the Cal Neva project at issue here, CR had developed an impressive group of projects in: (1) Napa Valley, California—such as Calistoga Ranch, a world class five-star resort hotel; a Westin Hotel in downtown Napa; and redevelopment of approximately 3000 acres in Pope Valley containing a historic resort hotel, a golf course, lakes, vineyards, a winery and numerous residential home sites; (2) Ireland—a Four Seasons luxury hotel and residences, and (3) Dallas, Texas—a 42 story luxury condominium residence tower in the center of downtown, among others. (6 App. 1448–49.) All of these projects were developed successfully and remain successful; none had failed or gone bankrupt. (6 App. 1450.)

The Cal Neva Project

In 2013, Criswell Radovan acquired the historic Cal Neva Hotel in Lake Tahoe, with the intent of re-opening it after a multi-million dollar renovation (the "Project"). (6 App. 1448–50.) The Project's general contractor, Penta Building Group ("Penta"), set to work on the site, and substantial completion was initially targeted for December 12, 2015 (Frank Sinatra's 100th birthday). (7 App. 1713.)

The Project was to be funded through conventional debt financing and $20 million of equity. (6 App. 1351.) The equity shares were governed by a Private Placement Memorandum ("PPM"). (7 App. 1553.) The equity was offered to investors in early 2014 as twenty shares priced at $1 million apiece. (9 App. 2149.) The equity offering was put out to private investors through the Project's

agent and broker, David Marriner ("Marriner") of Marriner Real Estate. (5 App. 1164–65.) The PPM expressly stated that the Founder Shares were not registered securities; they were appropriate investment vehicles only for Accredited Investors as defined in Regulation D of the Securities Act of 1933.[2] (6 App. 1281.)

CR Cal Neva's Shares and Pre-Approval to Sell $1 Million in Equity

The PPM required CR Cal Neva to own $1 million of this equity in order to ensure that they had "skin in the game" as the Project's developers and managers, and that was all that CR Cal Neva had ever intended to hold. (5 App. 1152–54.) However, CR Cal Neva had initially purchased $2 million of the Project's equity in order to ensure that the Project had the necessary financing to get underway. (6 App. 1344; 6 App. 1408–09.) Criswell explained at trial that the Project's membership had unanimously authorized it to sell the excess $1 million equity stake at a later time:

> Q. Sir, did you understand and believe that CR Cal Neva was authorized to sell one of its two founders shares?
>
> A. Yes.
>
> Q. What's the source of your belief?
>
> A. . . . I know it was also approved by the investors at the time of closing.

[2] Yount acknowledged at trial that he is an Accredited Investor within the meaning of Regulation D. (8 App. 1792.)

(5 App. 1152–53.)

Yount's Interest and Due Diligence

Yount is a sophisticated businessman and investor. (8 App. 1781; 6 App. 1474.) He operates two successful construction material companies, which collectively generate eight-figure annual sales. (7 App. 1677–1678.) Yount has been involved in the acquisition, construction, and/or development of at least ten factories. (7 App. 1678.) He has also built two homes, both of which experienced issues with cost overruns and delays (they were ultimately beautiful homes notwithstanding these issues, one of which was featured in the Wall Street Journal). (8 App. 1780.) Yount has also invested in various other business, and has sat on several boards of directors. (8 App. 1781–82.) He understands how to read and interpret financial statements, and he justifiably considers himself to be a sophisticated investor. (8 App. 1781–82.)

In February of 2014, Marriner approached Yount about potentially investing in the Project. (5 App. 1182.) Yount was not interested at that time. (5 App. 1182.) No further communication concerning the Project occurred until June 17, 2015 (about 16 months later) when Yount contacted Marriner expressing interest in the Project. (11 App. 2355.)

Yount undertook due diligence regarding the Project with the full cooperation of CR and Marriner. (7 App. 1633; 8 App. 1798.) On July 14, Marriner conducted a 2-hour site visit with Yount and provided him with

information about the Project. (8 App. 1820–1821; 14 App. 3485.) On that same day, Yount was provided with a document entitled "July 2015 Monthly Status Report." (9 App. 2062.) The document contained a construction summary identifying various anticipated cost overruns, including several unexpected building code issues. (9 App. 2062; 5 App. 1083.)

The report additionally indicated that the Project's construction schedule was being compressed due to delays caused by scope changes. (5 App. 1083–84.) In addition to this construction report, Yount was also provided with a copy of the Private Placement Memorandum and supporting documentation, including budgets and timelines. (8 App. 1783; 7 App. 1688.) Yount testified at trial that he reviewed these materials and understood them. (8 App. 1783–85.)

Yount's CPA Blesses the Project

Yount's CPA, Kenneth Tratner, also reviewed the documents and concluded the Project was a reasonable investment. (7 App. 1708–09; 8 App. 1788.) Tratner's review included retaining a hospitality expert to assist in his evaluation of the financial projections for the Project. (7 App. 1512.) Those projections included management and development fees associated with the Project. (8 App. 1788.) The construction budgets showed the development fees which Criswell and Radovan received in the amount of $1.2 million. (6 App. 1368.) Both Tratner and his expert agreed that the projections for hotel income and expense were reasonable, including CR's management fees. (8 App. 1788.)

Yount's Independent Investigation and Vetting

Immediately following the tour, Yount contacted the Project's architect, Peter Grove, to ask his opinion regarding its viability. Grove gave a candid assessment, acknowledging that the Project was experiencing cost overruns but nevertheless expressing optimism that it would ultimately succeed:

> I'm going to say [the chance of success is] pretty good ... Short term they are in a fundraising mode. ***Construction costs are exceeding the budget and they/we are trying to get our arms around it [. . .] and keep it in check*** . . . . I really [like] the ownership team. Quality guys.

(10 App. 2357, emphasis added.) At trial, Yount indicated that he believed that Grove was honest with him, and that he would not misrepresent facts about the Project's costs or schedule. (8. App. 1817.)

Yount also corresponded directly with Radovan. In a July 25, 2015 e-mail, Radovan addressed the cost overruns and refinance plans with Yount:

> We are refinancing the [$6 million] mezzanine piece with a less costly $15,000,000 mezzanine. This is to cover the added costs of regulatory and code requirements which changed or were added by the two counties and TRPA which we deal with. We have also added some costs for design upgrades within the project.

(2 App. 329, emphasis added.) In other words, Radovan informed Yount that the Project intended to refinance its existing $6 million mezzanine loan with a $15 million mezzanine loan, thereby adding $9 million to the Project to cover change orders and cost overruns going forward. (*See id.*; *accord* 7 App. 1507.) The change orders and additional cost items that had occurred through that point were

detailed in the Construction Progress Report that Yount received following the site inspection. (10 App. 2356–57.)

Yount's Notes Memorializing His Understanding of Due Diligence Findings

Yount kept contemporaneous notes regarding his July 2015 due diligence efforts. (8 App. 1823.) Those notes confirm his understanding that the construction costs were going to be at least $10 million over budget from what was represented in the Private Placement Memorandum, with additional cost overruns on the way. (8 App. 1824.) His notes also confirm his understanding that CR Cal Neva held $2 million of the project's equity. Additionally, as of late July, Yount understood that the full opening of the Project was being pushed back to April of 2016. (8 App. 1838.)

Yount Declines Additional Due Diligence

At trial, Yount acknowledged that he declined to perform any additional due diligence on the Project, and that all of his questions and requests for information were answered.[3] (8 App. 1806–09.) He declined multiple offers from Marriner to undertake another site tour. (8 App. 1809.) He ignored numerous emails from Marriner and Radovan asking whether he had any other questions about the Project. (8 App. 1810–11.) In short, Yount was satisfied as a

[3] Yount's accountant, Ken Tratner, also testified that CR answered all of his questions and provided all information that he had requested. (9 App. 2011–12.)

sophisticated investor that the due diligence that he had performed was sufficient, in spite of offers from CR to supply additional information.[4]

Yount is Informed that Grand Opening has been Pushed Back

Communication between Yount and Criswell Radovan slowed during the month of August. (8 App. 1819.) However, a piece of internal correspondence from Yount's CPA shows that Radovan had at some point informed Yount that, due to change orders, the Project would not be able to open on December 12, 2015, as originally planned. (6 App. 1299–30.) Instead, the Project would have a "soft opening" in March followed by a grand opening on June 19, 2016 (Father's Day).

Yount Goes "Radio Silent," Les Busick Increases his Investment

Yount sought to fund his potential investment in the Project through an IRA spun off from his 401K, but the arrangements took several months. (8 App. 1809, 8 App. 1819.) Communication with Yount had effectively ceased by September,[5] and CR did not know whether Yount would follow through with an investment. (6 App. 1307–08.) The demands of the Project compelled them to set their sights elsewhere. (6 App. 1307–08; 9 App. 1961.)

[4] During trial, Yount acknowledged that he understood the Project to be a speculative, risky investment. (8 App. 1784.)

[5] Yount sent only one substantive email to Criswell Radovan between September 1 and October 13. (10 App. 2274.)

Les Busick[6] was one of the original investors in the Project and a member of its Executive Committee, with a long career as a contractor and developer. (8 App. 1817–18; 9 App. 2179; 9 App. 2188.) As an Executive Committee member, he had access to full information regarding the status of the Project. (5 App. 1212–14; 8 App. 1978.) He ultimately purchased the last $1.5 million of equity at the end of September 2015. (7 App. 1729.) Notably, Busick decided to make this significant additional investment after walking the Project with Penta and going over the anticipated cost overruns.[7] (5 App. 1219–20.)

Yount Resurfaces and Purchases CR Cal Neva's Interest

On October 1, 2015, Yount contacted Marriner indicating that he had decided to invest in the Project and requesting wiring instructions. (8 App. 1846.) Although Busick had purchased the last remaining $1.5 million equity interest under the PPM, CR Cal Neva was willing to sell Yount $1 million of its equity in the Project. (6 App. 1409, 1414.) CR had intended to divest $1 million of its equity from the outset, and they recognized Yount as a sophisticated businessman and a prominent member of the community—in other words, a valuable business partner. (9 App. 2201–02; 9 App. 2166.)

[6] At trial, Yount testified that Busick was "a very successful and well-known person in the area," and that he was impressed by the fact that he was an investor in the Project. (8 App. 1818.)

[7] Yount testified at trial Busick was "[a] good acquaintance" of his. However, Yount never saw fit to contact Busick or any other investors as part of his due diligence into the Project. (8 App. 1817–19.)

On October 10, 2015—two days before Yount invested—Yount sent an e-mail to Radovan asking for a schedule update. (8 App. 1841–42.) Radovan reaffirmed that the Project was on target for a soft opening in the spring and a grand opening on Father's Day 2016. (8 App. 1841.) This appeared to satisfy Yount, and on October 13, 2015, he tendered payment for his $1 million share. (8 App. 1829.)

CR never hid the fact that Yount was purchasing its extra share. Radovan testified at trial that he believed that Marriner had informed Yount would be buying CR's extra share. (6. App. 1356.) Marriner subsequently sent Yount an e-mail with wiring instructions directing the funds to Criswell Radovan, LLC (CR's main entity),[8] which supported Radovan's belief that Yount knew the payment was going to CR rather than the project directly.

Yount Received Precisely What He Bargained For: A Founder's Share

Yount's theory of this case depends on his contention that what he bought (a Founder's Share from CR Cal Neva) was different than what he thought he was buying (a Founder's Share emanating from the PPM). (8 App. 1753.) This is simply not the case. (6 App. 1445.) As identical equity securities of the same class, the Founder's Shares are fungible—each Founder's Share has the identical rights, obligations, and value as any other. (6 App. 1455.)

[8] For a brief explanation of the various entities at issue, *see* 10 App. 2352–53.

Indeed, from the moment Yount bought his interest, he acted as a full founding investor. (10 App. 2276.) He attended Executive Committee meetings and involved himself actively in those proceedings. (7 App. 1732–33; 7 App. 1749; 10 App. 2276.) There is no evidence in the record that an equity share purchased "under the PPM" would have placed Yount in any position different than the one he was in after he purchased CR Cal Neva's share. (8 App. 1859; 9 App. 2152.)

During closing arguments, Yount's counsel acknowledged that there was no functional difference between the CR Cal Neva share and the one Busick purchased:

> THE COURT: [I]f I laid that founders share from Mr. Criswell and Mr. Radovan right next to the founders share of Mr. Busick, what difference is there?
>
> MR. CAMPBELL: Well, there's a big difference with it if there's no shareholder approval[9] as we saw in the document.
>
> THE COURT: I'm not talking about the process, the shareholder approval set out in the operating agreement. What's the difference between those two shares?
>
> MR. CAMPBELL: Functionally, there is no difference.

(9 App. 2152.)

[9] As explained elsewhere in this Brief, CR in fact had shareholder approval to sell the share.

Cost Overruns and the Vital Mosaic Loan

As Radovan had indicated to Yount back in their July 25, 2015 email correspondence, the Project continued to experience cost overruns. The amounts of the monthly overruns through October were extremely close to Radovan's estimate of $9 million in his July 25, 2015 email to Yount:

(Total overruns through July, 2015)	$2,461,471
August, 2015	$2,181,221
September, 2015	$4,640,000
October, 2015	$600,000
Total overruns through October, 2015:	$9,882,692

(8 App. 1830–35; 9 App. 2129–30.) Radovan had anticipated these overruns, but they nevertheless required a debt refinance for the Project to stay viable. (10 App. 2259–60.)

Radovan was extremely close to closing a refinance loan with Mosaic Group ("Mosaic"). (9 App. 2118–19; 10 App. 2296.) The loan ("Mosaic Loan") would have refinanced all of the Project's debt and injected another $16 million of capital into the Project and covered all change orders with an additional $4–5 million as a "cushion" for contingencies. (8 App. 1828; 10 App. 2261.) A conditional term sheet had already been signed setting forth terms as was

evidenced by a voicemail from Mosaic's CEO to Radovan on November 19, 2015:[10]

> 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***. 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 [number omitted] or the office, and I look forward to our partnership.

(9 App. 2118; emphases added.)

The December 2015 Meeting and the Incline Men's Club ("IMC") Revolt

On December 12, 2015, CR held a meeting and Christmas party for the members of the Project. (6 App. 1387.) The purpose of the get-together (beyond celebration and socializing) was to allow the members of the Executive Committee to meet, and to update the other members on the status of the Project. (6 App. 1388.)

Radovan began the Executive Committee meeting by giving a presentation. (6 App. 1392–93.) His primary concern was obtaining Committee approval for the Mosaic Loan, which was vital to the success of the Project. (7 App. 1616–17.) The situation was becoming increasingly urgent, as Mosaic was eager to close and

[10] Mosaic's CEO is named Ethan Penner, and he identifies himself in the voicemail at issue.

was pushing Radovan to get a commitment letter approved. (6 App. 1389.) Radovan discussed the status of the Project, the extent of the cost overruns, and the Mosaic Loan's essential role in providing necessary W for the Project to be completed successfully. (7 App. 1616–17.)

Radovan's presentation was poorly received by a group of investors consisting of the Incline Men's Club[11] ("IMC") and an individual named Molly Kingston ("Kingston") (for simplicity, IMC and Kingston will be referred to collectively as the "IMC Group"). (6 App. 1248–50.) They shouted complaints about the cost overruns and proposed refinancing. (5 App. 1249.) Kingston insisted that the Project raise equity financing rather than debt. (7 App. 1617.) The discussion became sufficiently heated to end the party after an hour. (5 App. 1250.)

"Divide and Conquer"—The Yount/IMC Coalition Forms

Yount was also displeased after the December 12, 2015 meeting. He confronted Criswell and asserted that "this is not what we signed up for. We want our money back. This is totally misleading and we feel we've been taken advantage of." (8 App. 1736). It is unclear how Yount believed that Radovan's presentation was "not what [he] signed up for," as it was entirely consistent with

[11] IMC is the Project's largest shareholder, holding $6 million of the Project's $20 million equity. (7 App. 1754–55.)

the information that he was given during the due diligence process. (7 App. 1623–25.)

Yount's e-mail correspondence from the month following the meeting makes clear that he had enthusiastically cast his lot with the IMC Group, and that he worked with them to sink the Mosaic Loan and oust Criswell Radovan. (8 App. 1861–1910.) He agreed to participate in what he described as a "good cop/bad cop" routine with the IMC Group against CR. (8 App. 1907.) Correspondence between Yount and the IMC Group described a "divide and conquer" approach and set forth a list of "action items." (8 App. 1867.) The IMC Group copied Yount on Dropbox links containing documents "for our eyes only," apparently meaning the IMC Group and other like-minded investors, such as Yount. (8 App. 1866.) Before the Mosaic Loan was sunk (but apparently anticipating that event), Yount arranged a meeting between IMC members and a lender called North Light. (6 App. 1314; 7 App. 1644.) The Yount

In correspondence with Kingston, Yount "thank[ed] [her] for [her] support" and assured her that "[w]e've got each other's backs." (8 App. 1864.) Kingston was particularly zealous about removing CR as the developers of the Project, and Yount approved, writing her that "there's no way to the finish line with these developers [*i.e.* CR.]" (8 App. 1751.) At trial, Yount rather modestly described himself as "trying to work together [with the IMC Group] to solve a problem." (8 App. 1865.)

The Yount/IMC Coalition Torpedoes the Mosaic Loan, and the Project

On February 1, 2016, the IMC Group met with Mosaic. (8 App. 1885.) Neither Criswell nor Radovan were informed or invited. (8 App. 1924–25.) Yount participated in multiple pieces of e-mail correspondence among the IMC Group in the days leading up to the meeting. (8 App. 1865–72.) In these exchanges, Yount expressed his preference for a loan with North Light rather than Mosaic, and he coordinated with the IMC to demand that Criswell and Radovan step down as the developers of the Project. (8 App. 1865–72.)

What was said at the meeting is not clear, but its impact was immediate: That same day, Radovan received an e-mail from Mosaic stating that the lender was backing off form the refinance and tearing up the term sheet. (8 App. 1937–38; 10 App. 2296.) The stated reason was that "there seems to be a little bit of a mess right now." (8 App. 1937.) Whatever transpired persuaded Mosaic that a project that it had been excited about five weeks beforehand was now a "mess" beyond repair.

And, indeed, a mess it became. As effective as the Yount/IMC coalition was in torpedoing the Mosaic loan, it then failed completely to arrange for any alternative financing to replace it. (10 App. 2296.) As a result, the Project is now in a regrettable and wholly unnecessary bankruptcy. As Yount himself acknowledged at trial, the Project likely would have succeeded had the Mosaic loan been funded. (10 App. 2295.)

The Present Lawsuit and Yount's Claims

Yount commenced the underlying civil action on April 4, 2016, asserting claims against: (1) Criswell; (2) Radovan; (3) Criswell Radovan, LLC; (4) Cal Neva Lodge, LLC; (5) Powell, Coleman and Arnold, LLP; (6) David Marriner; and (7) Marriner Real Estate, LLC. (*See generally* 1 App. 1–29.)

The CR Respondents answered on June 7, 2016, generally denying liability and asserting the following affirmative defenses: (1) Failure to State a Claim; (2) Inaccurate Terms and Conditions; (3) Laches; (4) Waiver; (5) Estoppel; (6) Comparative Negligence; (7) Failure to Mitigate Damages; (8) Unclean Hands; (9) Acquiescence; (10) Indemnity/Contribution; (11) No Fraud; (12) Good Faith; (13) Business Necessity; and (14) Right to Amend. (*See generally* 1 App. 65–75.) No express counterclaims appeared in the pleading.

The Pre-Trial Motions and the Parties' Arguments Regarding Interference

The CR Respondents' Motion for Summary Judgment identified Yount's interference with the Mosaic loan as a central issue in the case and a central element of its defense to Yount's claims. (3 App. 715.) The CR Respondents included these allegations for the simple reason that they were vital to their theory of the case; Yount's claims all depend upon his assertion that some combination of the CR Respondents were responsible for the failure of the Project. If *Yount* is responsible, then he cannot establish causation or damages, and he is additionally barred from recovery under the doctrine of unclean hands. (5 App. 1120.)

CR Respondents' Trial Statement and
Proposed Findings of Fact and Conclusions of Law

The CR Respondents' Trial Statement described Yount's role in causing his own damages, as well as those of the CR Respondents:

> [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 [Yount] 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; emphasis added.) Similarly, their Proposed Findings of Fact and Conclusions of Law stated that "Yount's alleged damages result[ed] in whole or in part from the interference in the Mosaic Loan" (5 App. 1137), and urged the district court to find that Yount had caused damages *exceeding* his own claims. (5 App. 1141.)

Yount's Case-in-Chief and Chaney's Surprise Testimony On Interference

This case was tried in a 7-day bench trial before The Honorable N. Patrick Flanagan. In his case-in-chief, Yount called the following witnesses: (1) David Marriner; (2) William Criswell; (3) Robert Radovan; (4) Bruce Coleman; (5) Stuart Yount; and (6) Kenneth Tratner, all of whom testified as to their roles and perceptions in the story described previously.

Yount also called Brandon Chaney, a member of the IMC who testified voluntarily at the request of Yount's counsel. Chaney was not listed in Yount's NRCP 16.1 disclosures, nor was he deposed. His testimony therefore came as a

minor surprise, as "[Chaney] wasn't involved in anything before." (7 App. 1768–69.)

Chaney's testimony was aimed entirely at exonerating Yount/IMC in interfering with the Mosaic loan. (8 App. 1974 – 9 App. 2017.) According to Chaney, Criswell and Radovan were to blame for the Project's failure, and IMC did not request a secret meeting to undermine the Mosaic loan; instead, *Mosaic* requested the private meeting because of their concerns about the Project. (*Id.*)

Chaney's testimony was poorly received by the trial court, which found that he lacked credibility based on several inconsistencies between his testimony and the rest of the record. (10 App. 2279–81.) In the end, Chaney's testimony served only to confirm that IMC met privately with Mosaic, which resulted in the termination of the Mosaic loan—an outcome that Chaney described as "actually a good thing[12]." (15 App. 3695.)

Radovan Offers Testimony on Damages; Only "Foundation" Objection

During Radovan's trial testimony, his counsel asked him to articulate the damages caused by Yount's conduct in this case:

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

[12] This is a discordantly upbeat characterization of the event that directly led to the failure of the Project.

> THE WITNESS: I can tell you personally, you know, this thing is going to cost Bill and I at least 1.6 million, revenues that would have come to our operating company, a million dollars a year, roughly. Bill nor I have not been paid one penny in the last two years, which has dramatically cost us.
>
> And the entire time, you know, me and my staff and Bill, we have worked tirelessly without getting paid, despite all of the, sorry, crap, worked to protect everyone's interests. And it's been a huge, huge toll on myself, my family. As Dave talked about it the other day, it's been unbelievably difficult, not just the capital side of it is devastating, and this never should have happened. This came from a couple of people trying to steal a project.

(7 App. 1649.) Radovan's testimony in this regard was consistent with the CR Respondents' Proposed Findings of Fact and Conclusions of Law, which stated that the CR Respondents were damaged "far in excess" of $1 million. (5 App. 1149.)

CR Raises Damages in its Closing

During closing arguments, counsel for CR observed that the evidence presented during trial established that Yount had caused millions of dollars' worth of damage, notwithstanding the lack of an express counterclaim in the pleadings:

> [MR. LITTLE:] And, your Honor, importantly, we pled —we haven't sued him for a counterclaim, but we have pled affirmative defenses and whether you call it—
>
> THE COURT: Unclean hands.
>
> MR. LITTLE: Unclean hands, estoppel, waiver, contributory fault, it's all the same failure to mitigate damages, all roads lead to the same path. 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 $2 million in damages.*** More importantly, he's caused all of these investors to be in the position they're at now. So unless your Honor has further questions.
>
> THE COURT: No, I don't.

(9 App. 2210–11.)

The District Court's Oral Ruling

On September 8, 2017, the district court issued a lengthy oral ruling spanning over 50 pages. (9 App. 2246 – 10 App. 2297.) Judge Flanagan carefully walked through each witness's testimony and the relevant exhibits. (*Id*.) The Court adopted the proposed findings of fact submitted by counsel for the CR Respondents and the Marriner Defendants, and thoroughly analyzed each of Yount's claims before rejecting them. (10 App. 2287–95.)

The Court then found that the evidence introduced trial established that Yount had intentionally interfered with the prospective contractual relationship between Mosaic and CR Cal Neva, LLC, which caused the failure of the Project. (10 App. 2296–97.) The district court therefore held Yount liable for 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.
>
> ***This Court has documented dozens of e-mail exchanges between Mr. Yount and the IMC and their efforts to undermine the Mosaic loan. . . .***

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

(10 App. 2296–97, emphases added.)

The Amended Order

On September 15, 2017, Judge Flanagan issued a First Amended Order which clarified his ruling from the bench by describing the damage award with greater particularity. (10 App. 2299–30.) The Court clarified that Criswell and Radovan (individually) were awarded $1.5 million in compensatory damages, plus two years' salary, management fees (if applicable), attorney's fees and costs of suit.

Judge Flanagan's Death and Judge Polaha's Confirmation of his Findings

Judge Flanagan sadly passed away on October 6, 2017, before he could issue a written order. It therefore fell to Judge Polaha to determine whether the case could be completed under NRCP 63.

Judge Polaha ultimately determined that the recalling of witnesses or reopening of evidence was not necessary, and for sound reason: The trial was over and the issues ruled upon. The only step remaining to "complete" the trial

was to enter an order based upon the full trial record and Judge Flanagan's extensive oral ruling, which Judge Polaha did:

> 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 arguments 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.

(12 App. 2742.)[13]

Motion to Conform Pleadings Pursuant to NRCP 15(b)

On August 21, 2018, Marriner filed a Motion to Amend the Pleadings to Conform to the Evidence and Judgment, which the CR Respondents subsequently joined. (18 App. 4487; 20 App. 4754.) Judge Walker ultimately refused to consider the Motion, citing a perceived lack of jurisdiction. (20 App. 4864.)

[13] Judge Polaha had unfortunately signed an order provided by Marriner's counsel which omitted the district court's award of management fees and development fees. The CR Respondents filed a Motion to Amend the Judgment seeking inclusion of those items, which Judge Walker declined to consider for a lack of jurisdiction. Judge Walker's ruling is the subject of a related appeal, No. 77987.

SUMMARY OF THE ARGUMENT

Yount (together with the IMC Group) intentionally undermined a multi-million dollar investment project, causing its failure and bankruptcy. Yount then sued the property developer whose project he ruined, claiming that *they* defrauded *him*, and seeking millions of dollars in damages arising from the failure of the Project. He now claims to be surprised to discover that the question of who ruined the Project was an issue central to the case, or that he may be held liable if the evidence (including his own evidence and testimony) reveals that *he* in fact intentionally destroyed those millions of dollars' worth of value to the damage of the parties sitting at the defendants' table. He urges the Court to believe that nobody warned him about these issues and possibilities, and they were therefore unforeseeable.

Express counterclaims are often essential to protect a party's due process rights by providing fair notice of the issues and stakes. But in cases such as this one where a counterclaim would not have revealed any new issues or spurred additional discovery, and the facts necessary to give rise to relief come out at trial without objection, then insistence upon a counterclaim is simple formalism; it is a refusal to provide relief because a pleading lacked specific language. All parties recognized the importance of the Mosaic Loan, they all presented evidence on the issue, and the amount in controversy was sufficient to incent the parties to conduct

adequate discovery. There was no surprise and no prejudice; therefore, the matter was tried by consent.

Alternatively, the Court could have recast the CR Respondents' affirmative defense for unclean hands as a claim for tortious interference with a contract, or tortious interference with a business expectancy under NRCP 8(c). The Rule permits a court to redesignate an affirmative defense as a counterclaim in cases where justice so requires. In particular, courts recognize that it is sometimes unclear whether a defense intended to offset damages should be viewed as an affirmative defense or a counterclaim, and Rule 8(c) may be properly invoked to prevent a formalistic distinction between the two from barring a recovery. *See Reiter v. Cooper*, 507 U.S. 258, 262,113 S. Ct. 1213, 1217 (1993) (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1275, pp. 459–460 (2d ed. 1990)). Invoking the Rule in this case would serve that aim.

Senior Judge Flanagan was an intelligent and experienced jurist, and his ruling was not some radical aberration from settled law—in fact, both Judge Polaha and Judge Walker endorsed his ruling as permissible under the rules. Judge Polaha certified under NRCP 63 that he had reviewed the entire trial court record and determined that entering judgment on Judge Flanagan's ruling was appropriate without further evidence or testimony. Although Judge Walker ultimately declined to rule on the parties' post-trial motions on jurisdictional grounds, he correctly noted that NRCP 54 "beg[a]n and end[ed] [any] decision as

regards to [Yount's] complaint and the [CR Respondents'] request [for relief]." (20 App. 4834.) Neither of them found error in Judge Flanagan's ruling, despite Yount's insinuation to the contrary. All three judges had the correct view of the law.

Yount's claims all lack merit because he received the founder's share that he bargained for. Criswell Radovan owned two founder's shares. The governing documents—which were unanimously approved by the Executive Committee—authorized the sale of one of those shares. The sale to Yount was therefore already pre-authorized; no second vote was required. Even if an authorizing vote were required, Yount chose to sue for rescission of his purchase shortly before the annual meeting during which a vote would have occurred; he therefore disclaimed the interest he claims to have wanted. Yount's argument that the sale was void because it was not approved by the Executive Committee has the procedure backwards: A vote can occur only *after* the sale of a share has closed.

Finally, the Court should ignore Yount's invitation to reweigh the evidence on appeal. As the trier of fact, Judge Flanagan was in the best position to weigh the evidence and testimony. This case's witness testimony was particularly credibility-driven, with different persons testifying to radically different versions of the same events. This Court should not upend Judge Flanagan's considered rulings based on a cold record on appeal.

ARGUMENT

I. YOUNT TRIED HIS INTERFERENCE WITH THE MOSAIC LOAN BY CONSENT

The test of consent by implication to the trial of claims not set forth in the complaint is whether a party did not object to the introduction of evidence[14] or introduced evidence himself that was relevant only to that issue.[15] Yount did both.

A. Yount Introduced Evidence About Interference

Yount introduced (or stipulated to the introduction of) numerous documents related to his interference with the Mosaic Loan, and he offered testimony regarding that same issue.

[14]; *See, e.g., Miller v. Mills Const., Inc.*, 352 F.3d 1166, 1171 (8th Cir. 2003) (affirming award on unpled breach of contract claim against contractor for providing subcontractor deficient materials where subcontractor presented evidence on the issue without objection from contractor); *Shen v. Leo A. Daly Co.*, 222 F.3d 472, 479 (8th Cir. 2000) (reversing and remanding district court's refusal to allow unpled offset where former employee testified on cross-examination that he owed money to employer and no objection made); *Norris v. Bovina Feeders, Inc.*, 492 F.2d 502, 506 (5th Cir. 1974) (claim for lost earnings outside the pleadings tried by consent where evidence presented and no objection made).

[15] *Peter Fabrics, Inc. v. S.S. Hermes*, 765 F.2d 306, 312 (2d Cir. 1985) (affirming FRCP 15(b) amendment including unpled counterclaim for indemnity where opposing party introduced evidence of contract containing indemnity provision during case-in-chief); *Antilles Cement Corp. v. Fortuno*, 670 F.3d 310, 319 (1st Cir. 2012) (affirming district court's FRCP 15(b) amendment to add unpled BAA preemption claim where relevant evidence was introduced by all parties without objection and it became clear that BAA preemption was "at the heart" of the proceeding).

i. Yount's Stipulated Documents Concerning Interference

At the outset of trial, Yount stipulated to the admissibility of dozens of emails pertaining solely to the intentional interference claim, including three that *he* offered—exhibits 55, 58 and 59. (13 App. 3195–96.) Judge Flanagan based his award on many of these documents. (10 App. 2296.) Among others, these documents included:

- **Trial Exhibit 109:** Email exchange between IMC and Yount before the secret meeting with Mosaic sharing information "for our eyes only".

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

- **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.

- **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".

- **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.

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

- **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.

- **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).

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

- **Trial Exhibit 126:** Email exchange with 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".

- **Trial Exhibit 127:** Email from Yount 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, Yount and IMC are discussing another potential investor.

- **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".

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

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

- **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.

In short, Yount acquiesced and participated in the creation of a rich factual record related to his interference with the Mosaic Loan.

ii. Yount's Testimony Concerning Interference

Yount's interference with the Mosaic Loan was a central theme for nearly every witness who testified, including witnesses that Yount's counsel called in his case in chief as well as Yount himself.

For example, during Yount's case-in-chief, his counsel asked him whether he had "ever conspire[d] to somehow undermine the Mosaic Loan[.]" A 16-page colloquy ensued, in which Yount tried to downplay and explain away the numerous emails showing his active involvement. (7 App. 1741–57.)

Yount's counsel later called Brandon Cheney from IMC and questioned him extensively on the Mosaic Loan. This witness had not been disclosed prior to the filing of pre-trial memoranda, and he had not been deposed; nevertheless, Yount had apparently determined before trial that Chaney's testimony may be useful to address the loan interference issue. To be clear, the sole purpose of Cheney's testimony was to blame the loss of the Mosaic Loan on CR and to deflect blame from Yount and the IMC Group. (8 App. 1974 – 9 App. 2017.)

Under direct examination and cross examination, Chaney flatly and repeatedly denied that Yount or the IMC Group had anything to do with Mosaic's withdrawal from the Project. He instead blamed Criswell Radovan, notwithstanding all of the documentary evidence to the contrary. Judge Flanagan ultimately found this testimony not credible; to the contrary, his testimony had

backfired badly and demonstrated that Yount, Chaney, and the rest of the IMC Group were responsible for the Project's failure. (10 App. 2279–81.)

B. Yount Did Not Object to Evidence About Interference

The Mosaic Loan came up repeatedly during pretrial practice and the trial itself; indeed, the word "Mosaic" appears over 300 times in the trial transcript. Yount never objected to this testimony as irrelevant or beyond the scope of the pleadings. The only objection to testimony in this area came on other grounds when Respondents' counsel examined Radovan about how the CR Respondents had been damaged by Yount and IMC's interference:

> Q. Sir, can you quantify how C.R. 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.

(7 App. 1649.) Counsel's question was an invitation for Radovan to lay an evidentiary foundation for an award of damages. The objection to this line of questioning was one of "foundation"—not of relevance or scope, and certainly not that Yount was being blind-sided or ambushed by a trial on the issue of his interference with the Mosaic Loan and the resultant damages to the CR Respondents.

Yount's post-trial objections to CR's damage award are irrelevant to whether the issue was tried by consent. Objections relevant to *trial* by consent are

those made *at trial*; post-trial objections are irrelevant. *See, e.g.*, *Mays v. Porter*, 398 S.W.3d 454, 458 (Ky. Ct. App. 2013) (affirming trial by consent where specific objections to evidence on unpleaded issue came in post-trial briefing because objections must be made at trial); *Plymel v. B.W. Projects, Inc.*, 1920973, 1993 WL 537839 (Ala. 1993) (same).

C. Yount's Presentation of the Evidence Was Not Prejudiced

The essential issue in evaluating whether an issue was tried by consent is whether a party faced material prejudice in its ability to introduce evidence relevant to the claim. *See D. Federico Co., Inc. v. New Bedford Redevelopment Auth.*, 723 F.2d 122, 126 (1st Cir. 1983); *Matter of Nett*, 70 B.R. 868, 871 (Bankr. W.D. Wis. 1987) ("The fact that [a post-trial] amendment changes the legal theory of the action is immaterial so long as the opposing party has not been prejudiced in the presentation of its case"). It is not enough that an unpled issue changes the legal effect of the evidence in a manner that potentially increases a party's potential liability; what matters is the presentation of the evidence itself. *Id.*, *see also Liberty Mut. Ins. Co. v. Leroy Holding Co., Inc.*, 226 B.R. 746, 758 (N.D.N.Y. 1998).

Leroy Holding illustrates this principle. The case was an adversarial bankruptcy proceeding in which the plaintiff creditor neglected to plead a claim pursuant to 11 U.S.C. § 362(h) for monies that the debtor had paid to the defendant creditor after the filing of a bankruptcy petition. The parties

nevertheless introduced stipulated evidence of the payments, and the plaintiff creditor brought a post-trial motion to amend the pleadings under Rule 15(b). The district court granted the motion and rejected the defendant creditor's prejudice arguments:

> [The defendant] also contests the motion on the ground that it will be prejudiced if it is granted. [The defendant] states that if it had known that these funds could be ordered returned to the [debtor's] bankruptcy estate, it would have negotiated a different settlement of its bankruptcy claim . . . . ***[this contention] of prejudice, however, relate[s] not to the evidence admitted at trial but to its possible legal effect.***

226 B.R. at 759 (emphasis added). So long as both parties were able to present evidence relevant to the unpled claim, there was no unfair prejudice; the fact that a Rule 15(b) amendment may impact the legal effect of that evidence was irrelevant. *Id.*, *see also See D. Federico Co.*, 723 F.2d at 126 ("The fact [an unpleaded claim] involves a change in the nature of the cause of action, or the legal theory of the action, is immaterial so long as the opposing party has not been prejudiced in presenting its case.").

Here, Yount has not been prejudiced in presenting his case regarding his interference with the Mosaic Loan. He stipulated to the admissibility of numerous documents, testified at length on the issue himself, and presented a witness whose testimony was entirely devoted to interference. In short, he litigated the issue fully. Judge Flanagan's ruling granting relief to the CR Respondents based on this

record "related not to the evidence at trial, but to its . . . legal effect." *Leroy Holding*, 226 B.R. 759.

Yount's suggestion that he would have presented even *more* witnesses on had an express counterclaim been pled is spurious. Yount was presumably aware of the identities of these witnesses before trial; nevertheless, he chose not to depose them or call them to testify. He instead relied upon Chaney, who Judge Flanagan found to be completely lacking in credibility. Whether Yount's other alleged witnesses would have fared any better (or even testified as Yount claims[16]) is unclear.

Yount knew that Mosaic's withdrawal from the Project was a major issue, and he knew that those Mosaic executives were apparently available to testify about the reason for that withdrawal. Yount is a wealthy man, and he claimed over a million dollars in compensatory and punitive damages. Yount's suggestion that he did not depose or present three important witnesses due to cost concerns and a desire to mount only a proportional defense is, frankly, absurd. The Court should disregard it.

[16] Yount's claims regarding the supposed testimony of the three Mosaic executives are bare assertions completely unsupported by the record, and the Court should disregard them on that basis alone.

D. Yount's Cited Nevada Authorities Support CR's Argument

The various Nevada authorities that Yount cites in his brief support the CR Respondents' argument, not Yount's. He is right that there is no implied consent where a party objects or a party lacked notice of the issue, but neither of those things are true here.

Yount correctly describes *Klabacka v. Nelson,* 133 Nev. Adv. Op. 24, 394 P.3d 940 (2017) as a case that "reversed a judgment based upon implied consent where the defendant had *moved to dismiss that claim*, demonstrating an objection to the admission of evidence on the issue." (Opening Br. at 39.) But Yount did not move to dismiss any of the CR Respondents' claims or defenses, nor did he object to the introduction of damages evidence during trial. The rationale in *Klabacka* therefore does not apply here.

Similarly, *Ivory Ranch v. Quinn River Ranch,* 101 Nev. 471, 473, 705 P.2d 673, 675 (1985) rejected an implied consent argument "when the issue was not raised in the pleadings or the trial statements, and the district court did not notify the parties that it was considering the issue." (Opening Br. at 39.) Here, the CR Respondents *did* raise Yount's interference with the Mosaic Loan in their pretrial statement, as well as in their proposed findings of fact and conclusions of law. More importantly, *Ivory Ranch* involved a case in which one of the parties "was deprived of reasonable, prior notice of [the] particular issue and was denied the opportunity to develop facts and confront the issue." 101 Nev. at 473, 705 P.2d at

675. Here, Yount's interference with the Mosaic Loan was a central issue in the case from the outset, the relevant facts were developed through discovery, and Yount presented documents and witnesses squarely related to the issue during trial.

On the other hand, *Poe v. La Metropolitana Compania Nacional De Seguros, S.A.*, 76 Nev. 306, 309, 353 P.2d 454, 456 (1960). affirmed a finding of trial by consent where "[1] the defendant had raised the issues in his opening argument, [2] counsel for plaintiff had specifically referred to the matter as an issue in the case, [3] it had been explored in discovery, and [4] there was no objection to the admission of evidence relevant to the issue at trial." (Opening Br. at 39–40.) These factors from *Poe* track the facts here:

1. Although the parties waived opening arguments in the bench trial below, all parties' pretrial statements raised Yount's interference with the Mosaic Loan as an issue in the case;
2. Yount's offered testimony denying his interference with the Mosaic Loan, presented a witness whose testimony was exclusively related to the interference issue, and stipulated to the admissibility of numerous documents related to Yount's interference;
3. Yount's interference with the Mosaic Loan was explored in discovery, including lengthy questioning related to the issue in his own deposition; and

4. Yount did not object to the admission of the evidence related to his interference with the Mosaic Loan.

In short, Judge Flanagan's ruling in the district court was fully consistent with the *Klabacka*, *Ivory Ranch* and *Poe* decisions.

E. CR Did Not Disclaim a Right to Damages

Yount's disclaimer argument is based upon highly selective quotations from the record and the exclusion of sentences providing vital context. A full view of the record shows that CR did not disclaim a right to damages; rather, CR *emphasized* the evidence of damages in the record. (In this subsection, excerpts omitted from the quotations in Yount's Opening Brief are italicized.)

Yount first quotes Radovan as stating, on cross examination, that he had not asserted a "compulsory counterclaim." However, Yount's quotation omits the preceding question and answer, in which Radovan states that Yount caused CR millions of dollars' worth of damages:

> *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.

(7 App. 1668.; emphasis added.) Similarly, Yount's brief quotes CR's closing argument out of context by omitting a discussion of the damages caused by Yount's interference:

> [MR. LITTLE:] And, your Honor, importantly, we pled —we haven't sued him for a counterclaim, but we have pled affirmative defenses and whether you call it—
>
> THE COURT: Unclean hands.
>
> MR. LITTLE: Unclean hands, estoppel, waiver, contributory fault, it's all the same failure to mitigate damages, all roads lead to the same path. 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 $2 million in damages. More importantly, he's caused all of these investors to be in the position they're at now.*

(9 App. 2210–11; emphasis added.) Again, an acknowledgement that the pleadings do not contain a counterclaim was tightly bound to a discussion of the damages Yount caused. These statements do not disclaim an implied counterclaim; they *emphasize* the facts supporting the implied claim.

F. Conclusion—Yount Tried Interference By Consent

If Yount believed that evidence related to the Mosaic loan was "ancillary," as he now argues on appeal, he presumably would have moved *in limine* to exclude that evidence, or at the very least would have objected orally at trial when the issue was raised repeatedly. Yount did not believe the issue to be ancillary, however; he made it a centerpiece of his case, offering extensive evidence and testimony pointing the finger at Criswell Radovan and explaining away his own

involvement. The strategy backfired, but the issue was nevertheless tried by consent. Yount cannot rescind that consent because he is dissatisfied by the outcome.

II. JUDGE FLANAGAN'S RULING WAS PROPER UNDER THE RULES OF CIVIL PROCEDURE

Because Yount's interference with the Mosaic loan was tried by consent, the CR Respondents were not required to make an NRCP 15(b) motion to conform the pleadings to the evidence. Even if they were so-required, such a motion can be made at any time, including after remand. Such a motion would be granted because good cause exists for amendment.

A. Under, Rule 15(b) Parties are Not Required to Amend Their Pleadings When Issues are Tried by Consent

NRCP 15(b) provides that "failure to . . . amend does not affect the result of the trial on th[o]se issues" tried by consent, and that a motion to amend "may" be made but is not required. Yount's argument that the lack of an NRCP 15(a) prevented the judgment here is therefore simply wrong. "If an issue, though never actually pleaded, is tried by express or implied consent of the parties, ***the pleadings may be deemed amended to conform, even after judgment or on appeal***." *Francois v. Francois*, 599 F.2d 1286, 1294 n.5 (3d Cir. 1979) (emphasis added; applying identical Federal Rule); *cited with approval in* Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1493 (entitled "Issues Not Raised by Pleadings But Tried by Consent—In General"). Because

Yount's interference with the Mosaic loan was tried by consent,[17] the district court could have simply deemed the CR Respondents' Answer to include a counterclaim for interference with a contract, interference with a business expectancy, or any other appropriate claim—no motion was necessary. *Francois*, 599 F.2d at 1294 n.5; *see also Thompson v. Brown*, 633 S.W.2d 382, 384 (Ark. Ct. App. 1982) (applying identical Arkansas Rule, ordering amendment of judgment on remand to reflect issue tried by consent in absence of motion).

B. Even if a Motion were Required, it Could be Made on Remand

NRCP 15(b)'s provision stating that pleadings may be amended "may be made upon motion of any party at any time even after judgment" is not foreclosed by an appeal. "[T]he pleadings may be amended to include issues tried by consent, either by motion or through the judgment of the court, *at any time, even on remand following an appeal*." *Marsh Inv. Corp. v. Langford*, 620 F. Supp. 880, 883 (E.D. La. 1985) (applying identical Federal Rule), *aff'd*, 784 F.2d 184 (5th Cir. 1986). Thus, if a motion to amend the pleadings were required,[18] the issue could simply be remedied by a motion following remand to the district court. *Id.*, *see also Ostano Commerzanstalt v. Telewide Sys., Inc.,* 880 F.2d 642, 646 (2d.

[17] *See supra* section I.

[18] The quoted language from *Langford* reiterates the principle that a court may simply amend the pleadings "through judgment of the court" without a motion. 620 F. Supp. at 883. Nevertheless, it also correctly states that a motion may be brought after remand if necessary. *Id.*

Cir. 1989) (affirming district court's grant of motion to add party to conform to the judgment after remand from appeal)"

C. Alternatively, Judge Flanagan Could Have Converted the CR Respondents' Affirmative Defense as a Counterclaim

Even if simple trial by consent did not apply to this case, the district court could have converted the CR Respondents' counterclaim for unclean hands into a counterclaim for tortious interference with a prospective economic advantage.

NRCP 8(c) provides that, "if a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so." This does more than offer broad discretion for a district court to convert counterclaims; rather, it is mandatory, and courts have broad discretion in recasting claims in the interest of justice. *See, e.g.*, *Dennison Mfg. Co. v. Ben Clements & Sons, Inc.*, 467 F. Supp. 391, 399 (S.D.N.Y. 1979); *cf. Longley v. Heers Bros., Inc.*, 86 Nev. 599, 603–04, 472 P.2d 350, 353 (1970) (converting counterclaim into affirmative defense where justice so-requires).

Yount's interference with the Mosaic Loan is the same conduct raised by the CR Respondents' unclean hands defense. Converting the same conduct into a reasonable counterclaim was well within the district court's discretion under NRCP 8(c).

D. NRCP 54(c) Provides an Additional Basis for Relief

NRCP 54(c) provides: "[e]very other final judgment [besides default judgments] should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." "The Nevada Supreme Court recognized the liberal nature of NRCP 54(c) by confirming 'Under the liberalized rules of pleading,' a final judgment must grant the relief a party is entitled to, even where the prayer for relief did not ask for such relief." *Magill v. Lewis*, 74 Nev. 381, 387 88, 333 P.2d 717, 720 (1958). *Magill* recognized that Rule 54(c) "implements the general principle of Rule 15(c), that in a contested case a judgment is to be based on what has been proved rather than what has been pleaded." *Magill*, 74 Nev. at 388; *see also Grouse Creek Ranches v. Budget Fin. Corp.*, 87 Nev. 419, 427, 488 P.2d 917, 923 (1971) (NRCP 54(c) authorized the district court to amend the pleadings to grant a primary lien where the objecting party joined issue on the matter and suffered no prejudice); *Rental Dev. Corp. of Am. v. Lavery*, 304 F.2d 839, 842 (9th Cir. 1962) (finding no prejudice to defendant lessor as a result of plaintiff lessee's failure to include a request for cancellation of the lease in plaintiff's complaint since it was permissible for the Court to order cancellation of the lease based on the issues framed by the pleadings and trial proceedings).

III. YOUNT'S LIABILITY FOR TORTIOUS INTERFERENCE WITH A PROSPECTIVE ECONOMIC ADVANTAGE WAS ESTABLISHED IN THE DISTRICT COURT

Near the end of his two-hour oral ruling, Judge Flannagan stated that "but for the *intentional interference with the contractual relations* between Mosaic and Cal Neva LLC, [the] [P]roject would have succeeded." (10 App. 2295; emphasis added.) Yount seizes on this characterization of the court's ruling to raise various claims of error, including: (1) the lack of a contract between Cal Neva, LLC and Mosaic; (2) a lack of standing for the CR Respondents; and (3) an alleged lack of overt actions by Yount to disrupt the Mosaic Loan.

A fair reading of Judge Flanagan's ruling makes clear that his ruling was based upon tortious interference with a prospective economic advantage, not an existing contract. The lack of a contract is therefore irrelevant, and Yount's arguments regarding standing are inapplicable. The record below supports Judge Flanagan's factual findings regarding interference with the Mosaic loan. The Court should reject Yount's arguments.

E. Judge Flanagan's Ruling Was Based Upon Tortious Interference with a Prospective Economic Advantage, Not Interference With Contractual Relations

Tortious interference with contractual relations and interference with prospective economic advantage[19] are closely related torts, but they are not the

[19] "Interference with a prospective economic advantage" goes by slightly different names in different jurisdictions and contexts, such as "interference with a business expectancy," or "interference with prospective contractual relations." These differing labels describe the same basic tort.

same. "The principal difference between the two is that the former requires the existence of a valid contract, while the latter simply requires the existence of an economic relationship between plaintiff and a third party." *Maltz v. Union Carbide Chemicals & Plastics Co., Inc.*, 992 F. Supp. 286, 312 (S.D.N.Y. 1998).

Judge Flanagan's use of the phrase "interference with . . . contractual relations" is not conclusive—the substance of the ruling is what matters, not the label. *See Otak Nevada, L.L.C. v. Eight Jud. Dist. Ct.*, 129 Nev. 799, 809, 312 P.3d 491, 498 (2013) ("[T]his court has consistently analyzed a claim according to its substance, rather than its label."). Moreover, this Court will affirm a correct decision even if the court below articulated the wrong reason. *Sengel v. IGT*, 116 Nev. 565, 570, 2 P.3d 258, 261 (2000) (citing *Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981)).

Any reasonable reading of Judge Flanagan's ruling shows that it was based upon Yount's interference with a *prospective* contract between Mosaic and CR Cal Neva, LLC and not an *existing* contract. *See Coast Cities Truck Sales, Inc. v. Navistar Int'l Transp. Co.*, 912 F. Supp. 747, 772 (D.N.J. 1995) ("[T]he difference between tortious interference with prospective contractual relations and tortious interference with performance of a contract is simply the existence of a contract, as opposed to plaintiff's reasonable expectation of an agreement."). The court's ruling stated that, were it not for Yount's interference, "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." (10 App. 2295; emphases added.) Judge Flanagan's findings of fact centered on Mosaic's "enthusiasm to close this deal." (10 App. 2296.) In short, Judge Flanagan recognized that the deal had not closed yet, but he made a factual finding that the loan would have closed if not for Yount's interference. His rationale depends on the expectation of an agreement and not the existence of one. This describes a claim for tortious interference with a prospective economic advantage.

It seems probable that Judge Flanagan simply misspoke[20] when he referred to "interference with the contractual relations" between Mosaic and Cal Neva. At most, the district court mislabeled the legal theory upon which its ruling was based. Mislabeling is not reversible error. *See Otak Nevada*, 129 Nev. at 809, 312 P.3d at 498.

F. The Record Supports Judge Flanagan's Ruling on Tortious Interference with a Prospective Economic Advantage

Yount's arguments based on the lack of a contract and standing do not apply to a ruling based upon interference with a prospective economic advantage, and the record supports Judge Flanagan's factual findings.

[20] *See Shockley Plumbing Co., Inc. v. NationsBank, N.A.*, 493 S.E.2d 227, 229 (1997) ("We will not reverse a trial court merely because it misspoke in stating the reason for its ruling.").

i. No Existing Contract is Required

Yount's argument that the CR Respondents "must establish a valid and existing contract[21]" does not apply to tortious interference with a prospective economic advantage. *Commodores Entm't Corp. v. McClary*, 324 F. Supp. 3d 1245, 1256 (M.D. Fla. 2018) (holding that interference with a prospective economic advantage requires only "an understanding between the parties [that] would have been contemplated had the defendant not interfered"). Yount's arguments in this connection are therefore irrelevant.[22]

ii. All CR Respondents Have Standing

Because no express contract is required, privity of contract is not necessary to establish standing. Instead, all that is required is a causal link between the defendant's intentional conduct and the claimant's damages. *See In re Amerco Derivative Litig.*, 127 Nev. 196, 226, 252 P.3d 681, 702 (2011). Here, all parties (including Yount) testified that the Mosaic Loan would have covered the Project's debts, and the district court found that the Project likely would have succeeded had the Mosaic Loan been closed (10 App. 2295.) The failure of the Mosaic Loan led directly to the failure of the Project, the loss of the CR Respondents' equity

[21] Opening Br. at 57.

[22] Alternatively, the executed term sheet should be construed as a conditional contract, as CR paid $50k in earnest money in connection with that instrument.

interest, the loss of the CR Respondents' management fees, development fees, and other damages. In short, all of the CR Respondents were harmed by the interference at issue, and they have standing for their claims here.

iii. The Record Supports Judge Flanagan's Finding

A district court's findings of fact are accorded deference unless they are "clearly erroneous and not based on substantial evidence." *Beverly Enterprises v. Globe Land Corp.*, 90 Nev. 363, 365, 526 P.2d 1179, 1180 (1974); *see also Chateau Vegas Wine, Inc. v. S. Wine & Spirits of Am., Inc.*, 127 Nev. 818, 825, 265 P.3d 680, 684 (2011), *as corrected on denial of reh'g* (Apr. 17, 2012). Particular deference is given to a district court's assessment of the credibility of witnesses. *See, e.g.*, NRCP 52(a); *Unionamerica Mtg. v. McDonald*, 97 Nev. 210, 626 P.2d 1272 (1981). This is so because a district court judge is in a position to actually listen to witnesses testify and assess their demeanor and credibility, which gives them insights beyond the cold text of a written record. *See B.S. & K. Mining Co. v. American Smelting & Refining Co.*, 10 Ariz. App. 585, 461 P.2d 93 (1969).

At the very least, substantial evidence supports Judge Flanagan's denial of Yount's various claims. Yount contends that he was faulted simply for being "aware of" IMC's intentions to sabotage the Mosaic Loan and "not doing enough to stop it". He then cites a few cases that suggest liability for interference, conspiracy and/or aiding and abetting will not lie without some level of active participation on his part. This is a self-serving characterization of the evidence.

Although Yount may not have attended the Mosaic meeting, the evidence overwhelmingly demonstrated that he was conspiring with IMC to sabotage that loan and oust Defendants from the Project. Judge Flanagan's ruling closely analyzed the various stipulated documents[23] in the record and correctly found that it did not describe "inaction" on Yount's part. (9 App. 2246 – 10 App. 2297.) He may have been absent from the meeting with Mosaic, but his correspondence shows that he was quite active behind the scenes. (8 App. 1865–72.) He plotted the removal of CR as the project's developers, agitated against the Mosaic Loan, and attempted to arrange alternative financing through North Light. (8 App. 1865–72.) In short, he interfered with the Mosaic Loan and cheered its collapse.

IV. THE DAMAGE AWARDS WERE NOT SPECULATIVE

In his oral decision, Judge Flanagan awarded Radovan and Criswell $1.5 Million Dollars each in compensatory damages, 2-year's salary, management fees, attorney's fees and costs. (10 App. 2296–97.) A week later, on September 15, 2017, he issued a separate Amended Order clarifying his damage award and including lost development fees to Criswell Radovan. (10 App. 2299–2301.) These damage awards found substantial support in the record.

In terms of the compensatory damage award, Radovan testified that Yount's interference cost him and Criswell at least $1.6 Million. (7 App. 1649.) He also testified they worked two years on the Project without salary. (*Id.*) These

[23] *See supra* Section I(A)(i).

damages do not include evidence that had been presented of the loss of their investment in the Project nor the expected gains on that investment. (*Id.*) Nor do these damages include their general loss of business reputation and goodwill from this Project failing under their leadership. (*See* 10 App. 2346.) Accordingly, there was more than sufficient evidence to support the $1.5 Million award to Criswell and Radovan.

In terms of lost Development Fees, the evidence at trial showed that Criswell Radovan was the developer of the Project, entitled to a $1.2 Million Development Fee, payable in monthly installments of $60,000.00. Criswell Radovan earned all of its Development Fee, but "recontributed to the Company $480,000.00 of its Development Fee as of June 1, 2014." (10 App. 2435.) Criswell Radovan was not repaid its Development Fee before the Project failed. (7 App. 1582.) Pursuant the Amended Order, and as argued in Defendants' Motion to Amend Judgment, the Judgment should be amended to include and award of $480,000.00 to Criswell Radovan. The basis and amount of this damage award was clearly in the record.

The basis for a lost Management Fee award was also clearly substantiated by the record, leaving only the amount to be calculated. Radovan testified that his lost management fees from the project were $1 million per year. (7 App. 1649.) Indeed, the Financial Pro Forma which forms the basis for these damages was not only thoroughly vetted by several experts in the hotel industry, including

Starwood Hotel and Resorts, but according to testimony at trial, by Yount's own accountant, Ken Tratner, who looked at the Pro Forma for reasonableness and concluded that it was reasonable. (7 App. 1512.) As articulated in Defendants' Motion to Amend Judgment, the evidence at trial showed that Criswell and Radovan had a binding agreement with Cal-Neva Lodge that they would manage the operations of the property once it was completed and opened. This is reflected in the Confidential Private Placement Memorandum, which recognizes that Cal-Neva Lodge will enter to a hotel management agreement with Criswell Radovan or its affiliate. (10 App. 2435.) It is also reflected in the Amended and Restated Operating Agreement, which states that "day-to-day management of the Project will be performed by an Affiliate of CR." (*Id.*)

The basis for the damage award was clearly substantiated in the record below. ***In fact, Radovan testified in addition to the $1.6 million he and Criswell lost from its equity stake in the Project, they lost an additional $1 million per year.*** (7 App. 1649.) To whatever extent amounts need to be determined with particularity, these issues can be resolved on remand.

V. TWO OTHER JUDGES AGREED WITH JUDGE FLANAGAN'S APPROACH

Yount's implication that Chief Judge Flanagan was confused about what he was doing gave him too little credit. Judge Flanagan was a sophisticated trial lawyer and judge, and his nearly two-and-a-half hour oral decision from the bench

shows precisely the level of detail and care he took when analyzing the evidence and weighing the credibility of witnesses who came before him.

In any event, two other Second Judicial District judges have had occasion to touch this case since Judge Flanagan's passing, both of whom have endorsed Judge Flanagan's approach and ruling.

A. Judge Polaha Agreed With Judge Flanagan's Ruling, in Spite of Yount's Mischaracterization

Yount's claim in his opening brief that "Judge Polaha rejected defendant's contention that he could rule they had a counterclaim" is misleading. Shortly after the case was assigned to him, Judge Polaha conducted an in-chambers telephonic conference to assess the status of the case and discuss the case's concededly unusual procedural posture with counsel. Yount cites a block quote from that in-chambers conference which contains certain omissions. What follows is Yount's block quote with the omitted material in italics:

> [MR. LITTLE:] Another alternative for this court would be to look at the objections that have been lodged by Mr. Campbell, review those and make decisions based on the findings based on that.
>
> *In other words, you don't have to spend your time going through the entire transcript of the proceedings and justifying every finding of fact and conclusion of law because he set forth certain objections that he has chosen.*
>
> MR. POLSENBERG: Let me say two things about that second course. First I think that it would be reversible error on its face and second our objections are a lot more than that expressed by Rick [Campbell].

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

(10 App. 2321.)

Judge Polaha therefore did not "reject [the CR Respondents'] contention that he could rule they had a counterclaim." Rather, he concluded (at Yount's urging) that he could not reweigh the evidence when Judge Flanagan had already ruled, because he "was unable to observe the witnesses, make the decisions on credibility or things like that." (10 App. 2321.) Judge Polaha did not rule that the CR Respondents could not assert a counterclaim, nor did he conclude that was restrained from ruling on that legal issue. He simply acknowledged in an in-chambers conference that reweighing the *evidence* would be improper.

Judge Polaha ultimately ruled that entry of written judgment was appropriate based on a full review of the record. (11 App. 2742.)

In short, Judge Polaha declined to reweigh evidence that Judge Flanagan had already considered, which was appropriate. He reviewed the record in its entirety, as NRCP 63 requires. He determined that the record was complete, there was no need to recall witnesses, and entry of a final judgment was appropriate.

B. Judge Walker Agreed With Judge Flanagan's Ruling

Although Judge Walker ultimately refused to issue any rulings on jurisdictional grounds, he ably and persuasively articulated why Judge Flanagan's ruling was correct:

> THE COURT: ***[W]hy doesn't the language of Rule 54 begin and end my decision as regards your complaints and the defendant's request?***
>
> And here's what I mean. It says, "Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings."
>
> Because your compliant with Judge Flanagan—and let us pause for a moment.
>
> Mr. Polsenberg, I'm beginning to get to know you. You strike me as a person, who like me, skews to respect for the position, whether you like the person or not. We all must respect the position of a district judge.
>
> I was a little touchy about some of the criticisms you offered of my former colleague, Judge Flanagan. I'm not going to say anything else about it, except to say, I didn't see him operating. And ***I don't know why he couldn't do exactly what he did, in light of that admonition under the Rules of Civil Procedure.***

(20 App. 4834–35; emphases added.)

In short, it is not the case that Judges Polaha and Walker recognized error in Judge Flanagan's decision but believed themselves helpless to address it, as Yount suggests. They agreed that he had the authority under the Rules to do what he did, and they therefore did not disturb his ruling.

VI. YOUNT'S CLAIMS FAIL BECAUSE HE RECEIVED THE FOUNDER'S SHARE HE BARGAINED FOR

All of Yount's claims hinge on the theory that the founder's share he bought was less than what he bargained for because the Executive Committee had not voted to approve the sale. These arguments fail for several reasons: (1) Criswell Radovan had pre-authorization to sell one of its two founder's shares, and no confirming vote was required; (2) even in the absence of pre-authorization, a vote is not a prerequisite to closing on the sale of a share; (3) even if a confirming vote were required before the sale became final, Yount disclaimed his interest and waived his claim shortly before the Executive Committee was scheduled to conduct that vote; (4) Yount did not suffer any damages; and (5) the Project's financing was not adversely affected.

A. The Executive Committee Pre-Authorized the Sale of One of the CR Cal Neva Shares

The governing documents, including the Project's Operating Agreement and agreement with its initial lender, reflect that CR Cal Neva was only required to hold $1 million of the equity in the Project. (5 App. 1152–54.) The members of the Project had always contemplated that CR Cal Neva would divest itself of one of those two shares, and they had unanimously approved the documents so-stating. (5 App. 1152–53.) Therefore, no approval was required for CR Cal Neva to sell its extra share to Yount, as such a vote had already been held and unanimously approved. (*Id.*)

B. A Vote Comes <u>After</u> the Final Sale of an Interest, Not Before

Yount's claim that the sale was void because it required as two-thirds vote of the membership to become effective has the procedure backwards—the sale must close *first*, and then a vote confirming the sale follows during the next annual meeting. (2 App. 269.)

In his opening brief, Yount cites Section 12.2 of the Operating Agreement, which is a general statement that transfers of Founder Shares require 67% approval. However, Yount ignores sections 12.3 and 12.6, which clarify that closing the sale is actually required *before* the matter is submitted to a vote. More specifically, Section 12.6.1 says "a proposed transfer of Interests requiring the Members' approval will be submitted to the Members for their approval ***after***: (a) the transferee has executed this Agreement and any other documents and instruments as the Company may require[.]" (2 App. 269; emphasis added.) This exactly is the closing process that Yount went through—that is, he signed the Operating Agreement and Subscription Agreement certifying that he was an accredited investor.

Section 12.6.2 clarifies that "[u]pon satisfaction of Sections 12.3, 12.4 and for Interests, 12.6.1, the request for transfer of Interests will be submitted to the Members at the Company's next annual or special meeting". (2 App. 269–70.) These sections clearly show that Yount needed to close and sign the operative documents confirming he is an accredited investor, *then* submit the transfer to vote

at the next annual meeting. Yount therefore misleads the Court by ignoring this clear language and instead citing only to the broad requirement that transfers get approval.

C. Yount Disclaimed his Interest at the Eleventh Hour

Even if a confirming vote were required before the sale took effect, Yount's claim that he did not receive the interest that he wanted is belied by the fact that he disclaimed his interest immediately before the confirming vote was set to occur. Section 12.3 provides that "any such transfer requiring approval of the Members … will be considered by the Members at the Members' next annual or special meeting." The Project's 2016 annual meeting was set to take place in April 6.[24] Multiple witnesses testified that Yount's approval would have been rubber-stamped had the matter come to a vote during that meeting.

Shortly before that annual meeting was to take place, Yount commenced this lawsuit disclaiming his interest in the CR Cal Neva Founder Share. (7 App. 1637.) Yount therefore frustrated the normal process through which the voting rights in his interest would fully vest, and then claimed damages based upon the damage caused by his own conduct.[25] Thus, even if a vote were required, Yount's own conduct is the reason why it did not occur.

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[24] *See* 10 App. 2443 ("[T]he annual meeting of Members of the Company for the transaction of such business as may properly come before the meeting will be held on the first Wednesday in April at 4:00 p.m. in each fiscal year[.]"

[25] This, in addition to the undermining of the Mosaic Loan, would be a second example in this case of Yount causing his own damage in this lawsuit.

D. Yount Was Not Damaged

Even assuming that Yount's interest did not carry voting rights until a confirming vote was held, there is no record in the evidence that Yount suffered any actual damages. Under the Operating Agreement, the matters upon which Members could vote were minimal:

- Approving Substitute Members by a 67% vote;
- Removing Criswell Radovan as Manager of the Company by a unanimous vote;
- Removing Criswell Radovan as manager of the company's business (a non-paying position), with an 80% vote;
- Replacing a Member Representative to the Executive Committee by a 67% vote if any die, resign, or are removed.
- Calling a Special Meeting[26] of Members by a 10% vote; and
- Extending the expiration of the entity's initial term by a unanimous vote.

These measures are something less than the "oversight, control, and management" that Yount claimed the other members had and he lacked.

Even if the above voting opportunities were considered to significantly affect the value of the interest that Yount received, he was not deprived of those

[26] Any action taken at such a special meeting must be approved by the vote margins described in this list.

opportunities in any way—he did not miss a single vote, and not a single vote was or should have been called for. Had Yount simply waited until the April 2016 annual meeting, his voting rights would have been approved, and he would not have faced any limitations.

E. The Project's Financing Was Not Adversely Affected

Finally, Yount states that he believed that the Company would have $1 million in additional capital due to his purchase of an interest in the Project, and he claims to have been misled because he purchased an extant share from CR Cal Neva instead.

Yount's position is wrong as a simple matter of finance. As Yount acknowledges, the Project had $20 million of equity available under the PPM, Yount took too long to commit, and the Interest that would have been sold to him, together with an additional $500,000 Interest was sold to Busick instead. The end result of this series of transactions is as follows: (1) Yount had a $1 million Founder's Interest in the Project (from CR Cal Neva), and (2) the Project had an additional $1.5 million in financing (from Busick's investment)—a stronger capitalization than Yount had intended to come from his investment, and a better situation for the Project which had sold its full capitalization.

If Yount had purchased the $1 million under the PPM, the results would have been exactly the same: Yount would have had a $1 million interest, and the Project would have had an additional $1 million in financing (from Yount's

investment). This would leave the Project with $500k *less* in equity financing than did Busick's investment. In any case (and as Yount acknowledges) there is no way that the Project could have raised more than $20 million in equity under the PPM, and that amount is exactly what the Project raised. Whether that capitalization came from Busick or Yount made no difference to the health of the Project.

VII. YOUNT'S REQUESTS FOR JUDGMENT AS A MATTER OF LAW FAIL

Yount urges the Court to order judgment in his favor for his claims for fraud, securities fraud, and negligence. The CR Respondents refer the court to Judge Flanagan's lengthy and well-reasoned decision, and ask that the Court afford his factual findings the appropriate deference. Yount is not entitled to an entry of judgment on the record below.

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CONCLUSION

The Court should affirm the judgment below. Alternatively, the Court should remand for additional proceedings to establish the CR Respondents' damages and otherwise affirm.

Dated this 10th day of July, 2019.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this 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 with 14 point, double-spaced Times New Roman font.

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 13,777 words.

3. I hereby certify that I have read this appellate 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), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in

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conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 10th day of July, 2019.

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CERTIFICATE OF SERVICE

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

I served the foregoing **ANSWERING BRIEF** in this action or proceeding electronically with the Clerk of the Court via the E-Flex system, which will cause this document to be served upon the following counsel of record:

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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 10, 2019 at Las Vegas, Nevada.

/s/ Ryan O'Malley

An Employee of HOWARD & HOWARD ATTORNEYS PLLC

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