

Case No. 74275

In the Supreme Court of Nevada

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

vs.

CRISWELL RADOVAN, LLC; CR CAL NEVA, LLC;
ROBERT RADOVAN; WILLIAM CRISWELL;
CAL NEVA LODGE, LLC; POWELL, COLEMAN
AND ARNOLD, LLP; DAVID MARRINER;
MARRINER REAL ESTATE, LLC

Respondents.

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Elizabeth A. Brown
Clerk of Supreme Court

APPEAL

from the Second Judicial District Court, Washoe County
The Honorable N. PATRICK FLANAGAN, District Judge
The Honorable JEROME POLAHA, District Judge
The Honorable EGAN WALKER, District Judge
District Court Case No. CV16-00767

**PETITION FOR REHEARING TO
CLARIFY AND CORRECT THE OPINION**

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PETITION FOR REHEARING

Appellant seeks rehearing, just to correct footnote 10. While this Court correctly reversed the damages award, in footnote 10, it suggested that the parties had not addressed an award of attorney fees, suggesting they were affirmed. This was imprecise, because while Judge Flanagan indicated that he *would* grant fees, he never *actually* made a fees award. Then, after Judge Flanagan died, Judge Walker refused to grant respondents' motion for fees, because he was without jurisdiction to do so, as there were no timely post-judgment motions.

Under the circumstances, Yount seeks to clarify and correct that footnote because there was no attorney's fee award. NRAP 40(a)(2).

This Court should strike the last two sentence of footnote 10:

¹⁰ In light of our decision, we need not address the remaining arguments on appeal. ~~And, as the parties do not address the district court's attorney fees awards, we decline to address them. See *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) ("Issues not raised in an appellant's opening brief are deemed waived.")~~.

Alternatively, this Court should delete the footnote.

PROCEDURAL BACKGROUND

Judge Flanagan Issues an Oral Ruling

After trial, Judge Flanagan issued an oral decision against Yount on all claims. (Opinion 8; 10 App. 2295.) The court then *sua sponte* awarded defendants damages—in part in a specific amount—on their “affirmative defense” of unclean hands, along with “all attorney’s fees and costs.” (Opinion 8; 10 App. 2296-97.)

Judge Flanagan Enters a Final Judgment but Does Not Calculate Attorney’s Fees

A week after the oral ruling, the district court issued an amended written order awarding another \$1.5 million in compensatory damages, plus “two years’ salary, managements fees (if applicable), and attorney’s fees and costs of suit” to CR and Marriner. (Opinion 6 n.1, 8; 10 App. 2300.) As defendants had not moved for fees, however, the order did not calculate such an award. (10 App. 2300.) On October 16, 2017, Yount appealed. (Opinion 8.) This Court later determined that this amended order was a final judgment on all of the parties’ claims, and no post-judgment motions had been timely filed, so this appeal divested the district court of jurisdiction. (Opinion 9.)

***Judge Polaha Recognizes that Defendants
Have Not Filed a Motion for Attorney's Fees***

After the case was transferred to Judge Jerome Polaha following Judge Flanagan's untimely death, defendant Marriner noted that the district court still needed to "receive and decide motions for attorney's fees under NRCp 54(d)(2)."¹ (10 App. 2333.) Judge Polaha ordered the defendants file a motion for attorney's fees. (12 App. 2755.)

***Defendants Move for Attorney's Fees; Judge Walker
Refuses Based on this Court's Appellate Jurisdiction***

On April 2, 2018, more than six months after Judge Flanagan's amended order that constituted the final judgment, Criswell Radovan filed a motion for attorney's fees. (Ex. 1.) On April 4, 2018, Mariner likewise filed a motion for attorney's fees. (Ex 2.)

Judge Egan Walker, who now replaced Judge Flanagan, refused to alter the damages award or to award attorney's fees because no timely post-judgment motions had been made and this Court had assumed appellate jurisdiction over this case. (Opinion 9; 20 App. 4864-66.)

¹ Like this Court, Yount refers to the 2017 version of the rules. (See Opinion 11 n.5.)

ARGUMENT

This Court correctly reversed the damages award and remanded for the district court to remove that award from its order, *but* this Court should correct a technical misstatement in footnote 10: while this Court stated that “the parties do not address the district court’s attorney fees awards,” there was no such award to address. As there was no attorney’s fee award to contest on appeal, Yount did not waive the issue.

A. Judge Flanagan’s Final Order Did Not Award Attorney’s Fees

As this Court determined, Judge Flanagan’s written order was an appealable final judgment because it disposed of all the issues presented in the case. *See Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000).

It did not have to—and here, did not—resolve attorney’s fees. *See id.*; NRAP 3A(b)(8). That is because the district court awards attorney’s by considering a party’s specific request under the factors in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969) and reducing the request to a dollar amount; the court’s announcement that it *will* award fees is not, itself, such an award. *Caldwell v. Finochi*, 909

So. 2d 976, 978 (Fla. Dist. Ct. App. 2005) (holding that order that purported to award fees without calculating a specific number “did not actually award fees, but reserved jurisdiction to determine the amount of fees”).² Judge Flanagan never considered any request under *Brunzell* and never calculated an award. Indeed, defendants first moved for a specific award of fees long *after* this matter was on appeal. And that specific request was never granted.

B. Defendants’ Motions Were Untimely

Judge Walker was correct to deny defendants’ motions. He had no jurisdiction or discretion to award attorney’s fees requested more than 200 days after the final judgment—more than 180 days after the time for doing so expired. NRCP 54(d). (Opinion 9.)

CONCLUSION

Although this Court correctly determined that the damage award should be reversed, this court should clarify its opinion because there was no award of attorney’s fees in this case.

² See also *Allen v. Nelson*, 126 Nev. 688, 367 P.3d 744 (2010) (summary award without analysis of *Brunzell* factors was abuse of discretion).

Dated this 17th day of August, 2020.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 40(a)(3), because it contains 915 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

DATED this 17th day of August, 2020.

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CERTIFICATE OF SERVICE

I certify that on August 17, 2020, I submitted the foregoing PETITION FOR REHEARING TO CLARIFY AND CORRECT THE OPINION for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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An Employee of Lewis Roca Rothgerber Christie LLP

EXHIBIT 1

EXHIBIT 1

2010

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**IN THE SECOND JUDICIAL DISTRICT COURT OF
THE STATE OF NEVADA IN AND FOR THE
COUNTY OF WASHOE**

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

Plaintiff,

vs.

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

Defendants.

CASE NO.: CV16-00767

DEPT NO.: B7


DEFENDANTS' MOTION FOR ATTORNEYS' FEES AND INTEREST

Defendants Criswell Radovan, LLC (Criswell Radovan), CR Cal Neva, LLC ("CR Cal Neva"), Robert Radovan ("Radovan"), William Criswell ("Criswell"), and Powell, Coleman and Arnold LLP ("PCA"), (Collectively "Defendants"), by and through their undersigned counsel, hereby move this Court for an award of attorneys' fees and interest.

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

DATED this 2 day of April, 2018.

HOWARD & HOWARD ATTORNEYS PLLC

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 William Criswell, Cal Neva Lodge, LLC,
 Powell, Coleman and Arnold LLP,*

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

This matter came before the Honorable Patrick Flanagan for a bench trial on August 29, 2017. On September 8th, at the conclusion of the trial, Chief Judge Flanagan issued an oral decision on the record in open court lasting over two hours. Significantly, in those findings, Chief Judge Flanagan entered a sweeping defense verdict in favor of the Defendants, dismissing all of Mr. Yount's claims against the Defendants with prejudice. Chief Judge Flanagan then specifically found that Mr. Yount had colluded with another investor, IMC Investment Group ("IMC") to intentionally interfere with Criswell Radovan's refinancing efforts with Mosaic, which ultimately led to the demise of the Project.

Chief Judge Flanagan then entered a multi-million dollar award against Mr. Yount and in favor of Defendants for this intentional interference. A week later, on September 15, 2017, he issued a separate Amended Order clarifying his damage award. A final Judgment was entered in this matter on March 12, 2018, and a notice of entry of same was filed on March 13, 2018. Defendants now move this court for an award of attorneys' fees and interest.

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II.

LEGAL ARGUMENT

A. Defendants Are Entitled to An Award of their Attorneys' Fees.

District courts may award attorney fees "only if authorized by a rule, contract or statute." *Barney v. Mt. Rose Heating & Air Conditioning*, 124 Nev. 821, 825 (2008). On September 8, 2017, at the conclusion of the trial of this matter, Chief Judge Patrick Flanagan issued an oral decision in which he dismissed all of Plaintiff's claims against the Defendants with prejudice, and entered a multi-million dollar award against Plaintiff and in favor of the Defendants. In his order from the bench at the conclusion of trial, Judge Flanagan stated that:

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.*

Transcript of Proceedings, Trial VII, 1140/22 – 1141/3 (emphasis added).

Judge Flanagan reiterated his award of attorneys' fees to Defendants in his Amended Order of September 15, 2017, in which he clarified his oral recitation as follows:

1. WILLIAM CRISWELL ("Criswell"), is awarded \$1.5 million in compensatory damages, two years' salary, management fees (if applicable), *attorney's fees* and costs of suit;

2. ROBERT RADOVAN ("Radovan"), is awarded \$1.5 million in compensatory damages, two years' salary, management fees (if applicable), *attorney's fees* and costs of suit;

...

4. POWELL, COLEMAN AND ARNOLD, LLP ("PCA"), is awarded its *attorney's fees* and costs of suit;

5. CRISWELL RADOVAN, LLC (Criswell Radovan), is awarded its lost Development Fees, *attorney's fees* and costs of suit;

6. CR CAL NEVA, LLC ("CR Cal Neva"), is awarded its lost Development Fees, *attorney's fees*, and costs of suit;

7. CAL NEVA LODGE, LLC, is awarded its *attorney's fees* and costs of suit.

1 See Amended Order, dated September 15, 2017 (emphasis added).

2 Judge Flanagan's oral and amended decisions were formalized in a Judgment entered on
3 March 12, 2018. Defendants are entitled to an award of their attorneys' fees based on the above
4 referenced orders and as the prevailing parties in this litigation pursuant to the Operating
5 Agreement governing relations between the parties.

6 The Amended and Restated Operating Agreement (the "Operating Agreement")
7 referenced in Judge Flanagan's orders governs the rights and obligations of Cal Neva Lodge, LLC
8 and its members. See Exhibit 1, Operating Agreement, attached hereto. Paragraph 16.10 of the
9 Operating Agreement provides that:

10 If any Member or Manager commences an action against the other Members and/or
11 Manager to interpret or enforce any of the terms of this Agreement or as the result
12 of a breach by the other Member(s) or Manager(s) of any terms hereof, the losing
13 (or defaulting) Member(s) or Manager(s) will pay to the prevailing Member(s) or
14 Manager(s) reasonable attorneys' fees, costs and expenses incurred in connection
15 with the prosecution or defense of such action (including at the appellate level),
16 whether or not the action is prosecuted to a final judgment.

17 Operating Agreement, attached hereto as Exhibit 1.

18 In this matter Defendants fully prevailed in the trial of this matter and are therefore entitled
19 to their attorneys' fees and costs pursuant to the Operating Agreement. In *Barney*, the Nevada
20 Supreme Court restated the factors that the district court is to consider in awarding attorney fees,
21 as follows: (1) the advocate's qualities, which include evaluating ability, training, education,
22 experience, professional standing, and skill; (2) the character of the work, which includes
23 determining its difficulty, intricacy, importance, as well as the time and skill required, the
24 responsibility imposed, and the prominence and character of the parties when affecting the
25 importance of the litigation; (3) the work performed, which includes looking at the skill, time,
26 and attention given to the work; and (4) the result, and whether the attorney was successful and
27 what benefits were derived. *Id.* at 829. See also *Brunzell v. Golden Gate National Bank*, 85 Nev.
28 345, 349 (1969). The Court went on to reiterate the requirement set forth in *Shuette v. Beazer
Homes Holdings Corp.*, 121 Nev. 837, 865 (2005) that sufficient reasoning and findings be made
by the district court in support of its determination concerning attorney's fees. *Id.* at 830.

Here, Defendants are entitled to an award of its attorney's fees in this matter pursuant to
the Operating Agreement and the court's order cited above in the amount of \$170,657.50. See

1 Exhibit "2," Declaration of Martin A. Little and invoices for fees from Jolley Urga Woodbury &
2 Little, attached to the affidavit as Exhibit "2-A," and Howard & Howard Attorneys PLLC,
3 attached to the affidavit as Exhibit "2-B." When analyzing the fees requested from Jolley Urga
4 Woodbury & Little and Howard & Howard Attorneys PLLC pursuant to the factors set forth in
5 *Brunzell* and reiterated in *Barney*, the Court must find the fees to be reasonable and necessary to
6 the prosecution and defense in this matter. *Id.*

7 As to the first *Brunzell* factor, the qualities of the advocate, Martin A. Little represented
8 Defendants from the inception of the matter beginning at the law firm of Jolley Urga Woodbury
9 & Little and subsequently at Howard & Howard from June 2017 forward. Martin A. Little has
10 been practicing law in Nevada for nineteen years and is the partner responsible for this matter.
11 For eighteen of those years, Mr. Little was with the firm Jolley Urga Woodbury & Little, a firm
12 that is experienced in commercial litigation, having himself practiced extensively in this field.
13 Mr. Little continued handling the matter when he joined the firm of Howard & Howard in June
14 2017, a well regarded firm in the legal community. At the conclusion of trial, Judge Flanagan
15 stated the following with regard to Mr. Little's advocacy:

16 These types of cases present unique challenges. They involve complex financial
17 transactions, in this case, an iconic landmark in our nation's history. When I was a
18 baby lawyer, I joined a large law firm and I was encouraged to meet one of the
19 senior partners there by the name of Rex Jamieson. He was a legend in the Nevada
20 Bar. And he had a few rules of practice that he wanted to impart upon the young
21 lawyers under his tutelage, many of which I remember to this day.

22 And this was one of them. He said, in your career, you will handle cases in which
23 there are thousands of dollars in dispute. Then as your career advances, you will
24 handle cases in which tens of thousands of dollars and then hundreds of thousands
25 of dollars and then millions of dollars will be in dispute. But never forget behind
26 every one of these cases is a human being.

27 These cases present unique challenges to any trier of fact, because often times they
28 involve very good people with the best of motives on all sides. It takes a very
special kind of lawyer to handle these types of cases. We have about 11,000
licenses to practice law in the State of Nevada. Of those, probably 8,000 are in
state. The largest law firm in our state is the Attorney General's Office. You add
up the Clark County District Attorney's Office, the Washoe County District
Attorney's Office, the Public Defender's Offices and all the other public offices,
probably takes up about a third of all the licenses to practice law.

1 But most lawyers don't practice in a court of law. Many of them are transactional
2 lawyers, never step in a courtroom. Many of them do trusts and estates, taxes.
Personal injury cases are more likely than not to settle.

3 So that leaves a very discreet subset of lawyers they call trial lawyers, not litigators,
4 trial lawyers. These are lawyers who have acquired the skill in taking complex
5 cases, synthesizing them down in readily understandable units, and presenting
them to any trier of fact, bench or jury. We rely upon these lawyers. Our whole
system of justice relies upon these lawyers.

6 I don't know as I sit here now how this case is going to resolve itself, but I want all
7 sides to know that in this Court's opinion, they have been represented by some of
8 the finest lawyers to come before this Court. And I thank them for their hard work
and dedication on behalf of their respective clients.

9
10 Transcript of Proceedings, Trial VI, 974/22 – 976/17.

11 In looking at the second *Brunzell* factor, the character of the work performed, the claims
12 pursued by Plaintiff in this case involved a complicated business dispute in connection with his
13 purchase of a founding member share from CR Cal Neva, requiring substantial work to
14 successfully defend through trial. As noted above, Judge Flanagan stated at the close of trial that
15 “[t]hese types of cases present unique challenges. They involve complex financial transactions,
16 in this case, an iconic landmark in our nation's history.” Transcript of Proceedings, Trial VI,
17 974/22-24. As the court is well aware, the matter proceeded to a bench trial resulting in a defense
18 verdict for the Defendants, along with an award of millions of dollars in compensatory damages
19 in their favor. Additionally, the hourly fees charged by the attorneys in the defense of this matter
20 are reasonable under the circumstance for this nature of case, ranging from \$250/hour to
21 \$400/hour. When appropriate, tasks were completed by attorneys billing at lower rates. The
22 hourly rates charged are well within what is customary in Nevada. The total amount of the fees
sought is \$170,657.50.¹

23 The third *Brunzell* factor requires the Court to look at the work performed on behalf of
24 Defendants in this matter. The attorneys representing Defendants pursued all available defenses
25 and remedies on their behalf as against Plaintiff in this matter. The Declaration of Martin A. Little
26 offered in support of this Motion in conjunction with the billings submitted detail the work that
27

28
¹ The invoices for March 2018 have not yet been generated at the time of the filing of this Motion.

1 was completed by counsel on behalf of Defendants in this matter. As a summary of the work
2 performed, the litigation of these claims required counsel to: have substantial communication
3 with Defendants concerning the claims being alleged and the defenses to be pursued; investigate
4 and research the defenses available to Defendants; respond to Plaintiff's claims; prepare document
5 disclosures and conduct depositions of Plaintiff and witnesses; prepare and file motions for
6 summary judgment, and respond to the numerous motions filed by Plaintiff; review and analyze
7 the extensive documents disclosed by the parties; prepare and respond to discovery requests;
8 analyze and develop possible avenues to obtain additional information relevant to the claims and
9 potential recovery; and prepare for and attend the trial in this matter and defend an appeal arising
10 from the trial. All of the time spent in this matter was necessary and reasonable given the nature
11 of the claims and was spend in the prosecution and defense of this matter.

12 The final *Brunzell* factor concerns the result obtained, and there is no question that
13 Defendants are the prevailing party in this matter as they obtained a defense verdict on all of
14 Plaintiff's claims along with an award of compensatory damages in the millions of dollars.
15 Although Plaintiff was vigorous in the prosecution of his claims, Defendants' zealous defense
16 ultimately won the day.

17 In analyzing Defendants' request for fees pursuant to *Brunzell*, the Court must find the
18 amounts requested reasonable and necessary to the defense of this matter. Therefore, Defendants
19 respectfully request that they be awarded fees in the amount of \$170,657.50 pursuant to the
20 Operating Agreement governing the relationship between the parties.

21 **B. Defendants are Entitled to Interest in the Amount of \$165,490.09 Each.**

22 Pursuant to NRS 17.130, Defendants Radovan and Criswell are entitled to prejudgment
23 interest from the time of service of the Summons and Complaint until the date of judgment.
24 According to NRS 17.130,

25 1. In all judgments and decrees, rendered by any court of justice, for any debt,
26 damages or costs, and in all executions issued thereon, the amount must be
27 computed, as near as may be, in dollars and cents, rejecting smaller fractions, and
no judgment, or other proceedings, may be considered erroneous for that omission.

28 2. When no rate of interest is provided by contract or otherwise by law, or

1 specified in the judgment, the judgment draws interest from the time of service of
2 the summons and complaint until satisfied, except for any amount representing
3 future damages, which draws interest only from the time of the entry of the
4 judgment until satisfied, at a rate equal to the prime rate at the largest bank in
5 Nevada as ascertained by the Commissioner of Financial Institutions on January 1
or July 1, as the case may be, immediately preceding the date of judgment, plus 2
percent. The rate must be adjusted accordingly on each January 1 and July 1
thereafter until the judgment is satisfied.

6 As noted above, at the close of the trial in this matter, Judge Flanagan awarded Radovan
7 and Criswell \$1.5 million each in compensatory damages, two year's salary, management fees,
8 attorney fees and costs. A week later, on September 15, 2017, he issued a separate Amended Order
9 clarifying his damage award and including lost development fees to Criswell Radovan. The salary,
10 management fees and lost development fees are the subject of a separate motion to amend
11 judgment pending before the court. As such, by way of the present motion, Defendants are
12 seeking interest on the \$1.5 million each in compensatory damages awarded in favor of Radovan
13 and Criswell, respectively, and will move for a separate award of interest on any damages
14 specified in an amended judgment, if any.

15 Defendants were served with a copy of the Summons and Complaint on April 21, 2016.
16 In Nevada, the prime rate of interest was 3.5% for the period January 1, 2016 to December 31,
17 2016; 3.75% for the period January 1, 2017 to June 30, 2017; 4.25% for the period July 1, 2017
18 to December 31, 2017; and 4.5% since January 1, 2018. *See* Exhibit 3, Nevada Commissioner of
19 Financial Institution's Prime Interest Rate.

20 For the period April 21, 2016 to December 31, 2016, or 254 days (2016 was a leap year),
21 the statutory rate was 3.50% plus 2, for total of 5.50% per annum. The per diem rate comes to
22 \$225.41 (\$1.5 million x 0.0550 / 366). The prejudgment interest due to Defendants for the period
23 April 21, 2016 to December 31, 2016, therefore comes to \$57,254.14 (\$225.41 x 254 days).

24 For the period January 1, 2017 to June 30, 2017, or 180 days, the statutory rate was 3.75%
25 plus 2, for total of 5.75% per annum. The per diem rate comes to \$236.30 (\$1.5 million x 0.0575
26 / 365). The prejudgment interest due to Plaintiff for the period January 1, 2017 to June 30, 2017,
27 therefore comes to \$42,534.00 (\$236.30 x 180 days).

28 For the period July 1, 2017 to December 31, 2017, or 183 days, the statutory rate was

1 4.25% plus 2, for total of 6.25% per annum. The per diem rate comes to \$256.85 (\$1.5 million x
2 0.0625 / 365). The prejudgment interest due to Plaintiff for the period July 1, 2017 to December
3 31, 2017, therefore comes to \$47,003.55 (\$256.85 x 183 days).

4 Finally, for the period January 1, 2018 to March 12, 2018, or 70 days, the statutory rate
5 was 4.50% plus 2, for total of 6.50% per annum. The per diem rate comes to \$267.12 (\$1.5 million
6 x 0.0650 / 365). The prejudgment interest due to Plaintiff for the period January 1, 2018 to March
7 12, 2018, therefore comes to \$18,698.40 (\$267.12 x 70 days).

8 The total prejudgment interest due to Defendants Radovan and Criswell is therefore
9 \$165,490.09 each (\$57,254.14 + \$42,534.00 + \$47,003.55 + \$18,698.40).

10 III.

11 CONCLUSION

12 Based on the foregoing, Defendants respectfully request an award of attorneys' fees in the
13 amount of \$170,657.50 and a net interest award of \$165,490.09 each to Defendants Radovan and
14 Criswell with interest to continue to accrue until the judgment entered in this matter is fully
15 satisfied.

16 DATED this 2 day of April, 2018.

17 HOWARD & HOWARD ATTORNEYS PLLC

18
19 By: 

20 Martin A. Little, Esq.
21 Alexander Villamar, Esq.
22 3800 Howard Hughes Pkwy, Suite 1000
23 Las Vegas, Nevada 89169
24 Telephone No. (702) 257-1483
25 Facsimile No. (702) 567-1568
26 Attorneys for Criswell Radovan, LLC,
27 CR Cal Neva, LLC, Robert Radovan,
28 William Criswell, Cal Neva Lodge, LLC,
Powell, Coleman and Arnold LLP

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SECOND JUDICIAL DISTRICT COURT
COUNTY OF WASHOE, STATE OF NEVADA

AFFIRMATION

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

- OR -

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

_____ A specific state or federal law, to wit:

(State specific state or federal law)

- OR -

For the administration of a public program

- OR -

_____ For an application for a federal or state grant

- OR -

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

Date: April 2, 2018

HOWARD & HOWARD ATTORNEYS, PLLC

By: 

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William Criswell, Cal Neva Lodge, LLC,
and Powell, Coleman and Arnold LLP*

CERTIFICATE OF SERVICE

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

On this day I served the foregoing **DEFENDANTS' MOTION FOR ATTORNEYS' FEES AND INTEREST** in this action or proceeding electronically with the Clerk of the Court via the E-File and Serve system, which will cause this document to be served upon the following counsel of record:

Richard G. Campbell, Esq.
The Law Office of
Richard G. Campbell, Jr., Inc.
333 Flint Street
Reno, NV 89501
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Attorneys for Plaintiff

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David Marriner and
Marriner Real Estate, LLC

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Attorneys for Plaintiff

I certify under penalty of perjury that the foregoing is true and correct, and that this Certificate of Service was executed by me on April 2nd, 2018 at Las Vegas, Nevada.



An Employee of HOWARD & HOWARD ATTORNEYS PLLC

EXHIBIT 2

EXHIBIT 2

CODE: 2010

ANDREW N. WOLF (#4424)
JEREMY L. KRENEK (#13361)
Incline Law Group, LLP
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Attorneys for Defendants DAVID MARRINER and
MARRINER REAL ESTATE, LLC

IN THE SECOND JUDICIAL DISTRICT COURT OF
THE STATE OF NEVADA IN AND FOR THE
COUNTY OF WASHOE

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

Plaintiff,

v.

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

Defendants.

CASE NO. CV16-00767

DEPT NO. B7

MARRINER'S MOTION FOR ATTORNEY'S FEES

TO: THE HON. JERRY POLAHA, District Judge, and to plaintiff GEORGE STUART
YOUNT, individually, and in his capacity as Owner of GEORGE STUART YOUNT IRA,
("Plaintiff"), and his attorneys of record:

1 PLEASE TAKE NOTICE that defendants DAVID MARRINER and MARRINER REAL
2 ESTATE, LLC (collectively, "Marriner"), hereby move the court for an award of attorney's fees,
3 as sanctions under NRS 18.010(2)(b), and as further provided by NRCP 54(d) and 18.010.

4 This motion is supported by the following Memorandum of Points and Authorities, the
5 attached Declaration of Andrew N. Wolf, the exhibit(s) filed herewith, and Judge Flanagan's
6 previous determination of Marriner's entitlement to attorney's fees per NRS 18.010(3), as set
7 forth in his ruling from the bench and the Amended Order filed September 15, 2017. This Motion
8 seeks an award of attorney's fees in the amount of **\$82,599** against plaintiff GEORGE STUART
9 YOUNT, individually, and in his capacity as Owner of GEORGE STUART YOUNT IRA.

10 Dated: April 4, 2018.

11 Incline Law Group, LLP

12 By: 

13 ANDREW N. WOLF (#4424)

14 JEREMY L. KRENEK (#13361)

15 Attorneys for Defendants DAVID MARRINER
16 and MARRINER REAL ESTATE, LLC
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MEMORANDUM OF POINTS AND AUTHORITIES

1. Introduction

This is an action for alleged fraud and other alleged misconduct in the sale of an LLC membership interest. On September 8, 2017, at the conclusion of the seven day bench trial in this matter, the late Hon. Patrick Flanagan ruled from the bench. Flipping through his stack of yellow legal pads containing his copious notes diligently written throughout the trial, Judge Flanagan took nearly **2.5 hours** (and 51 pages of transcript) summarizing the testimony of every witness on direct, cross and re-direct examination, his impressions of each witness, the importance of various exhibits, and then detailing his findings of fact, conclusions of law and his decision on the merits of all claims and defenses. The detail and diligence of Judge Flanagan was overwhelming. Judge Flanagan's conclusions are also interspersed in his periodic colloquy with Mr. Yount's trial attorney, Richard Campbell, during Mr. Campbell's closing argument and rebuttal argument. The ruling from the bench includes Judge Flanagan's decision awarding attorney's fees to each defendant, as authorized by NRS 18.010(3).¹ One week later, on September 15, 2017, a partial trial transcript became available, and Judge Flanagan *sua sponte* filed an *AMENDED ORDER* clarifying and detailing his award of damages, costs and attorney's fees to each defendant.

¹ NRS 18.010 Award of attorney's fees.

2. In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to a prevailing party:

- (a) When the prevailing party has not recovered more than \$20,000; or
- (b) Without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations. It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public.

3. In awarding attorney's fees, the court may pronounce its decision on the fees at the conclusion of the trial or special proceeding without written motion and with or without presentation of additional evidence.

4. Subsections 2 and 3 do not apply to any action arising out of a written instrument or agreement which entitles the prevailing party to an award of reasonable attorney's fees.

1 Accordingly, Marriner's entitlement to an award of attorney's fees has already been established by
2 the trial court without a motion, per NRS 18.010(3), pending a determination of the amount.

3 Thereafter, Judge Flanagan suddenly fell ill and passed away before a form of judgment
4 had been submitted to him for signature. Thereafter the matter was assigned to District Judge Jerry
5 Polaha who, after receiving briefing from the parties, entered judgment on March 12, 2018.
6 Although Judge Flanagan stated in his ruling from the bench and in his Amended Order that
7 defendants are entitled to an award of their attorney's fees, the amount was not specified.
8 Accordingly, the Judgment states: "...[D]efendants may seek recovery of their attorney's fees by
9 an appropriate motion pursuant to NRCP 54(d) and NRS 18.010, or as otherwise allowed by law."

10 **2. Statement of the Case & Factual Summary**

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

26 Judge Flanagan ruled that there was no evidence to support *any elements* of Yount's
27 fraud claims – there were no false statements, no reliance by Mr. Yount and no damages,
28 because Yount received exactly what he bargained for – a Founder's membership unit in the

1 LLC. Trial Transcript at 1133:8 to 1137:12. (All references herein are to the Trial Transcript
2 and the Trial Exhibits, unless stated otherwise.)

3 The facts are exhaustively detailed in Judge Flanagan's ruling from the bench found at
4 pages 1090:14 to 1141:4 of the trial transcript (the final 51 pages), and numerous comments and
5 colloquies by Judge Flanagan during closing arguments.² For sake of efficiency, the detailed facts
6 are not repeated here, and Marriner encourages the court to closely examine Judge Flanagan's
7 ruling from the bench and assorted colloquies referenced above.

8 **3. Summary of Claims versus Marriner**

9 The three claims asserted against Marriner were for common law fraud, state law
10 securities fraud, and punitive damages. As mentioned, Judge Flanagan's ruling from the bench
11 and the Amended Order found no evidence of fraud, no misinformation, no fraudulent intent, no
12 damages, and no evidence to support any elements of fraud. Judge Flanagan's factual findings
13 and repeated colloquy during closing arguments were emphatic that Mr. Yount received exactly
14 what he thought he was purchasing – a \$1 Million Founders Share in the Cal Neva Lodge LLC.
15 As Judge Flanagan described it, Mr. Yount wanted to buy “a Cadillac,” and he received a
16 Cadillac.

17 In fact, on questioning by Judge Flanagan during closing argument, Mr. Yount's trial
18 counsel, Richard Campbell, agreed with Judge Flanagan that if you put the two shares side-by-
19 side -- the original issue Founder's share sold to Mr. Busick (the one that Yount claims he
20 intended to purchase) and the CR Cal Nevada Founder's share re-sold to Mr. Yount --
21 “Functionally, there is no difference.” (Trial Transcript 996:8-19.)³ On this basis, as well as

22
23 ² Judge Flanagan's comments and colloquies that underscore his decision-making, in addition to his 51
24 pages of rulings from the bench, and appear in the Trial Transcript, Vol. 7, at 980:9 to 982:16; 992:21 to
25 997:20; 997:22 to 998:4; 1009:18 to 1010:24; 1016:20 to 1017:5; 1066:17-20; 1078:12-20 (Yount's
26 willingness to reinvest once his confidence in management is restored); and 1087:23 to 1088:18.

27 ³ THE COURT: “... tell me if I laid that Founders share from Mr. Criswell and Mr. Radovan right next to
28 the Founders share of Mr. Busick, what difference is there? MR. CAMPBELL: Well, there's a big
difference with it if there's no shareholder approval as we saw in the document. THE COURT: I'm not
talking about the process, the shareholder approval set out in the operating agreement. What's the
difference between those two shares? MR. CAMPBELL: Functionally, there is no difference.” (Trial
Transcript 996:8-19.)

1 uncontroverted testimony of Mr. Radovan cited by Judge Flanagan at 1106:4-6,⁴ and 1110:15-17,⁵
2 and a mountain of other testimony and exhibits cited by Judge Flanagan during his ruling from
3 the bench, Judge Flanagan concluded there was no damage, and no fraud, among other things.

4 **4. Defense Judgment**

5 The court's March 12, 2018, Judgment, as well as Judge Flanagan's ruling from the
6 bench awarded judgment to all defendants on all claims by Yount: "It will be the order of the
7 Court, Ms. Clerk, that judgment is in favor of all defendants." (Transcript at 1140:22-23.) This
8 complete defense award was made following a series of prior rulings that each claim was without
9 merit.⁶ Judge Flanagan found no false statements, no reliance and no damages. Under any
10 analysis, the two fraud claims against Marriner were completely unsupported and groundless.

11 **5. Defense Judgment and Damages Award to Marriner**

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

14 "3. DAVID MARRINER is awarded \$1.5 million in compensatory damages (fn1),
15 attorney's fees and costs of suit... (fn1: "1 These damages include both lost
16 commissions (Ex. 1) and loss of business good will.")

17 "8. MARRINER REAL ESTATE, LLC, is awarded its attorney's fees, and costs. (fn6)
(fn6: "6 Only to the extent that they are not duplicative of any award or fees to David
18 Marriner individually.")

19 Thus, Judge Flanagan determined pursuant to NRS 18.010(3) that Marriner, along with the
20 other defendants, is entitled to recover his attorney's fees. Marriner now moves the court for an
21 order confirming his right to an award of attorney's fees and determining the amount to be
22 awarded.

23
24 ⁴ "Mr. Radovan testified that the CR Cal Neva had as available a Founders share under the PPM. That it
was the same as the Founders share Busick purchased."

25 ⁵ "...the CR shares were no different than the Founders shares."

26 ⁶ Transcript at 980:13-19, 1131:20 and 1132:3 (first cause of action for breach of contract); 1133:7 (second
27 cause of action for breach of fiduciary duty); 1133:8 to 1137:12 (third cause of action for fraud – no false
statements, no reliance and no damages); 1138:3 (fourth cause of action for negligence); 1138:14 (fifth
28 cause of action for conversion); 1139:1-2 (sixth cause of action for punitive damages); 1139:3-8 (state
securities fraud).

1 **6. Discussion**

2 **A. Attorney's Fees Awarded as Sanctions**

3 NRS 18.010(2)(b) mandates that a district court must award attorney fees to a prevailing
4 party as a sanction when the district court determines that a claim of the opposing party was
5 brought or maintained without reasonable grounds or to harass the prevailing party.⁷

6 For purposes of NRS 18.010(2)(b), a claim is frivolous or groundless if there is no
7 credible evidence to support it. *See, Rodriguez v. Primadonna Co.*, 125 Nev. 578, 588, 216 P.3d
8 793, 800 (2009). To support an award of attorney's fees on such grounds, "there must be evidence
9 in the record supporting the proposition that the complaint was brought without reasonable
10 grounds or to harass the other party." *Kahn v. Morse & Mowbray*, 121 Nev. 464, 479, 117 P.3d
11 227, 238 (2005) (internal quotation marks omitted); see also *Bower v. Harrah's Laughlin, Inc.*,
12 125 Nev. 470, 493, 215 P.3d 709, 726 (2009). "Determining whether attorney fees should be
13 awarded under NRS 18.010(2)(b) requires the court to inquire into the actual circumstances of the
14 case, 'rather than a hypothetical set of facts favoring plaintiff's averments.'" *Baldonado v. Wynn*
15 *Las Vegas, LLC*, 124 Nev. 951, 967–68, 194 P.3d 96, 106–07 (2008) (citation omitted).

16 NRS 18.010(2)(b) provides that courts should liberally construe the statute in favor of
17 awarding attorney's fees in all appropriate situations. The legislature expressed its intent that the
18 court award attorney's fees and impose sanctions in all appropriate situations in order to punish
19 and deter frivolous or vexatious claims and defenses due to the burden such claims and defenses
20 place on judicial resources. *See Trustees, etc. v. Developers Surety & Indem. Co.*, 120 Nev. 56,
21 84 P.3d 59, 63 (2004) (discussing the evolution of NRS 18.010(2)(b)).

22 In *Watson Rounds, P.C. v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 79, 358 P.3d 228
23 (2015) ("*Watson Rounds*"), the court held that NRCP 11 does not supersede NRS 7.085,

24 ⁷ NRS 18.010(2)(b) was amended in 2003, after *Barozzi v. Benna*, 112 Nev. 635, 639, 918 P.2d 301,
25 303 (1996), to include as justification for attorney fees "maintain[ing]" a claim without reasonable ground.
26 2003 Nev. Stat., ch. 508, § 153, at 3478. Accordingly, since the 2003 amendment, continuing or
27 maintaining an action which a litigant learns is groundless after initiating it is a proper basis for an award
28 of sanctions under the statute.

29 NRS 7.085(1) separately allows a district court to require an attorney to personally pay expenses
30 and attorney fees relating to a case when the attorney filed or maintained an action that was not well-
31 grounded in fact or existing law, did not provide a good faith argument for a change to existing law, or
32 unreasonably extended the proceedings. *Stubbs v. Strickland*, 297 P.3d 326, 330, 129 Nev. Adv. Op. 15
33 (2013).

1 concluding that each represents a distinct and independent mechanism for sanctioning attorney
2 misconduct. *Watson Rounds*, 358 P.3d at 232. After thorough examination, the Court also held
3 that the safe harbor provisions of NRCPC 11 are not applicable to a request for sanctions under
4 NRS 7.085. *Watson Rounds*, 358 P.3d at 231. The same analysis applies to NRS 18.010(2)(b),
5 which contains nearly identical language to NRS 7.085(2), was added by the same 2003
6 legislative enactment (2003 SB250), and likewise clearly indicates that it serves as an
7 independent mechanism for awarding attorney's fees in addition to NRCPC 11.

8 **B. Plaintiff's Claims and Allegations against Marriner**

9 Plaintiff asserted only three of his claims against Marriner, for fraud, punitive damages
10 and state law securities fraud. All three of these claims are premised on the same factual
11 allegations. Plaintiff's original complaint alleged that "everybody did everything" with no
12 differentiation among the defendants in regard what misrepresentations and alleged concealments
13 were attributed to the various defendants. Instead, all of the alleged fraudulent acts were
14 collectively alleged against all of the defendants. Accordingly, in response to the Complaint,
15 Marriner filed a motion to dismiss or, in the alternative, for a more definite statement. Judge
16 Flanagan denied dismissal but ordered Plaintiff to amend the complaint with a more definite
17 statement specifying with particularity what Marriner allegedly did wrong. The court's order
18 dated September 13, 2016, concluded:

19 ...[T]he Supreme Court of Nevada requires allegations of fraud to be held to
20 a higher pleading standard and be plead with particularity. Here, the Court
21 finds that Plaintiff's Complaint fails to reach the higher pleading standard
22 set forth under NRCPC 9(b). The Complaint raises only general allegations
23 against the whole, and does not identify what party made the fraudulent
misrepresentations. However, it is because public policy prefers the case
be decided on the merits that the Court is not inclined [to] entertain
dismissal.

24 Accordingly, Defendant's Motion to Dismiss is DENIED, and
25 Defendant's Motion for a More Definite Statement is GRANTED.

26 Order, filed September 13, 2016, at 6:1-10. Marriner's alternative motion for more
27 definite statement had requested the following relief: "In the alternative, Marriner moves for a
28 more definite statement of the circumstances of the fraud alleged against Marriner, per NRCPC

1 12(e) and 9(b).” (Marriner Motion to Dismiss, etc., filed June 28, 2016 at 2:5-6.)

2 Thereafter, plaintiff filed his Second Amended Complaint on September 27, 2016. As
3 revised, the Second Amended Complaint (SAC) asserted the following material allegations
4 against Marriner. Each of the paragraphs below quotes the text of the SAC, indicating the
5 paragraph number of the SAC. After each quoted paragraph of the SAC, Marriner summarizes
6 the evidence and/or findings which indicate that each allegation was groundless.

7 ¶ 14. On or about July 22, 2015, Marriner represented to Yount that the project was
8 on schedule, and would open in December 2015, and sent to Yount via e-mail with
9 an attached construction progress report that did not disclose that the project was
substantially over budget, was in need of a cash infusion and that the General
Contractor, Penta, had not been paid, facts which Marriner was aware of.

10 **Paragraph 14 was Baseless and Unsupported by Credible Evidence**
11 **Because:**

- 12 ➤ The *Cal Neva Renovation July 2015 Monthly Status Report* (Exhibit 10 at
13 Pages 2 and 16), which Marriner delivered to Plaintiff on July 14, 2015
14 (Exhibit 8), explicitly described a variety of items which were going to
15 cause schedule delays and cost overruns. This report, Exhibit 10, was
16 prepared by experts directly involved in the construction project, not by
Marriner.
- 17 ➤ Plaintiff consulted with his personal architect, Peter Grove, who by
18 coincidence was the architect for the Cal Neva renovation project and was
19 integrally involved in the administration of the construction contract for the
20 project. Plaintiff could not have had any better resource than Mr. Grove with
21 regard to seeking out project cost and schedule information. On July 17,
22 2015, Mr. Grove informed Plaintiff that “Construction costs are exceeding
23 the budget and they/we are trying to get our arms around it... and keep it in
24 check.” (Trial Exhibit 13).
- 25 ➤ Plaintiff’s correspondence with Robert Radovan (Trial Exhibit 18, 19, 20),
26 and related trial testimony revealed that Plaintiff was advised in late July,
27 2015, that the cost impacts to the project required a refinancing of the \$6
28 Million mezzanine loan via a new \$15 Million loan to cover the \$9 Million

1 plus in cost overruns.

- 2 ➤ Plaintiff digested all of the information he received regarding cost overruns
3 and the anticipated refinancing and provided it to his CPA and in-house
4 financial advisors to assist Plaintiff in making his investment decisions.
5 (Trial Exhibits 19 and 21, GSY002040.)
- 6 ➤ There was no evidence that as of the date of Plaintiff's investment, the
7 general contractor had not been paid. In fact, the uncontroverted testimony
8 was that on September 30, 2015, less than two weeks before Yount invested,
9 Marriner toured the project site with another investor, Les Busick, and the
10 project superintendent Lee Mason, and they observed considerable
11 construction activity on site, no indication that the contractor was stopping
12 work, and both Marriner and Busick felt very optimistic with the progress
13 they saw at the site. (Transcript at 114:21 to 119:14, and 146:15 to 148:14.)
14 Trial Exhibits 152 and 153 indicate that up to the point of the September 30,
15 2015, site inspection, and plaintiff's subsequent investment less than two
16 weeks later, payments to the general contractor were current. There is no
17 evidence in the record that Marriner was informed that the contractor wasn't
18 being paid or was going to pull off the job, before Plaintiff invested. In fact,
19 the first formal notification by the contractor, Penta Building Group, LLC,
20 to the developer and its construction manager that it intended to stop work is
21 a notice dated December 31, 2015, Trial Exhibit 111, i.e., 2 ½ months after
22 Plaintiff's investment.
23 (Paragraphs 38 and 54 of the SAC are identical and are baseless for the
24 same reasons.)

24 ¶ 15. During July, August, September and October 2015, prior to October 12 when
25 Younts sent \$1,000,000 to the escrow holder for shares in the offering under the
26 Private Placement Memo, Marriner knew that the general contractor and
subcontractors on the job were not being paid, but did not disclose this to Yount.

27 **Paragraph 15 was Baseless and Unsupported by Credible Evidence**
28 **Because:**

- See information cited in regard to paragraph 14, above.
- There was no evidence presented that, as of the date of Plaintiff's investment, the general contractor had not been paid, or intended to halt work, or that Marriner knew this purported information
- In fact, Trial Exhibits 152 and 153 indicated that up to the point of Plaintiff's investment, payments to the general contractor were current. There is no evidence that Marriner was provided or aware of the general contractor's applications for payment, such as Exhibit 153, which were being reviewed by Yount's own architect, Peter Grove. (Paragraphs 39 and 55 of the SAC are identical and are baseless for the same reasons.)

¶ 16. Prior to Yount's investment, Marriner knew that the developers had requested \$1,000,000 from another investor, Les Busick, to meet the immediate needs of the project to keep Penta from leaving the job. This was not disclosed to Yount.

Paragraph 16 was Baseless and Unsupported by Credible Evidence Because:

- There was no evidence, such as expert witness testimony, establishing that Marriner had a duty to inform Plaintiff that there was a competing investor looking to invest, and it is likely that doing so would have breached an obligation to someone.
- It had already been disclosed to Yount that the renovation project was facing \$9 Million in cost overruns and that the developers were looking to raise more capital and to refinance the project's construction loans. From the very beginning, Plaintiff was informed by his own architect that "They are in fundraising mode. Construction costs are exceeding the budget and they/we are trying to get our arms around it ...and keep it in check." (Exhibit 13.)
- The need to fund cost overruns through additional capital and lender financing was never concealed. In fact, Plaintiff understood and signed various disclosures including specific Risk Factors associated with any future cost overruns. (See Risk Factors described on Page 12 of the Private

1 Placement Memorandum, Trial Exhibit 3.) The description of business risks
2 includes the following acknowledgment:

3 “Insufficient Funding; Dilution. If the Company is unable to raise sufficient
4 financing and/or equity funding to complete the purchase and
5 redevelopment of the Property, implementation of its Business Plan will be
6 delayed and will greatly reduce the company’s possibility of success. Such
7 implementation also may be delayed or impeded by budgetary and cost
8 overruns which may require additional capital. Such additional funds may
9 come from available financing but the source of such funds may also be the
10 sale of additional Units to additional investors.

11 (Paragraphs 40 and 56 of the SAC are identical and are baseless for the
12 same reasons.)

13 ¶ 17. On July 14, 2015, Marriner sent Yount an investor list that [showed]
14 \$1,500,000 available under the \$20,000,000 Private Placement Memo. Marriner
15 knew that prior to Yount's investment in October 2015 that the \$20,000,000 cap on
16 funds that could be raised under the Private Placement Memo had been fully met
17 yet failed to inform Yount of this fact, and that Yount could no longer be included
18 in the investor group under the Private Placement Memo.

19 **Paragraph 17 was Baseless and Unsupported by Credible Evidence**
20 **Because:**

- 21 ➤ The evidence at trial was that Marriner discussed the possibility of an
22 oversubscription with Mr. Radovan, who informed Marriner that they could
23 sell Plaintiff one of CR’s two Founder’s shares. There was no suggestion to
24 Marriner that there would be any difference between the Founder’s share
25 that might be sold to Les Busick and a Founder’s share that might be
26 substituted and transferred by CR to Plaintiff. (Trial Transcript at 70:20 –
27 77:23, 120:23 to 121:14 and 337:1-6.)
- 28 ➤ In colloquy with Plaintiff’s counsel quoted in footnote 3, above, Plaintiff
expressly conceded that there was no functional difference between the CR
Founder’s share and any others.
- (Paragraphs 41 of the SAC are identical and are baseless for the same
reasons.)

¶ 36. On or about February 18, 2014, David Marriner, acting individually and as Marriner Real Estate, collectively hereafter "Marriner," met with Plaintiff and told him about the new owners and developers of the Cal Neva Lodge, primarily Radovan and Criswell and their related entities, including Defendants, who were looking for investors to help fund a newly formed Nevada LLC that would acquire, remodel and reopen the Cal Neva Lodge. Marriner acted as and represented that he was the agent and broker for the new owner and their myriad legal entities. Thereafter, for a period of several months, Marriner acting individually and as the owner of Marriner Real Estate, kept in contact with Plaintiff and made numerous representations about the Project, the development of the Cal Neva Lodge and Radovan and Criswell's successful development history. Specifically, Marriner told Yount that Criswell and Radovan had a successful track record in developing high end hotel/resort properties. Marriner also provided marketing and promotional materials related to the Project, and tours of the Cal Neva Lodge, all intended to induce Plaintiff to become an investor in the Project and Cal Neva Lodge.

Paragraph 36 was Baseless and Unsupported by Credible Evidence Because:

- Overwhelming evidence was presented at trial that Messrs. Criswell and Radovan had exceptional qualifications and experience. (Trial Transcript at 289:19 to 294:22.) There was no evidence offered to refute this fact, or to support the misguided allegation that Marriner had knowingly misrepresented the developers' track record.
(Paragraph 52 of the SAC identical and is baseless for the same reasons.)

Judge Flanagan addressed each of the foregoing allegations in his ruling from the bench, Transcript at 1133:8 to 1137:12 (third cause of action for fraud – no false statements, no reliance and no damages); 1139:1-2 (sixth cause of action for punitive damages); 1139:3-8 (seventh cause of action for state securities fraud).

Marriner, therefore, respectfully submits that there is ample evidence for the court to answer the following question in the affirmative:

NRS 18.010(2)(b): *Was Plaintiff's common law fraud, state securities fraud and punitive damages action against Marriner groundless? (i.e., does the record support the proposition that the complaint was brought or maintained without reasonable grounds?) YES.*

- There is no evidence that Marriner misrepresented material information concerning the project to Plaintiff.
- There is no evidence of Marriner concealed material information concerning the

1 project from Plaintiff.

- 2 ➤ The evidence was undisputed that on by August 3, 2015, following Mariner's delivery
3 of the construction status report to Plaintiff on July 14, 2015, Plaintiff no longer
4 sought information from Marriner, and specifically advised Marriner that he was
5 seeking information directly from Mr. Radovan and from Plaintiff's own team of
6 advisors. (Trial transcript at 107:18 – 114:20, and Exhibit 22.)
- 7 ➤ It was also undisputed that in the days and weeks preceding his investment, Plaintiff
8 declined further invitations by Marriner for Plaintiff to view construction progress
9 first-hand by further site tours in September and October, 2015, prior to his
10 investment. (Trial Transcript at 148:15 to 149:11.)
- 11 ➤ In light of the above, it was clear from the evidence that there was no material
12 misrepresentation or concealment by Marriner. Likewise, it was uncontroverted that
13 Plaintiff informed Marriner that he was no longer seeking information from Marriner.
- 14 ➤ In regard to the sale of the CR Founder's share to Plaintiff instead of a previously
15 unsold/unissued share, plaintiff explicitly conceded there was no difference
16 whatsoever between the shares, and offered no evidence whatsoever of any material
17 difference. The court found, therefore, that there were no damages whatsoever
18 attributable to the resale of a Founder's share to Plaintiff instead of the issuance of a
19 new Founder's share.
- 20 ➤ Indeed, Plaintiff's position was actually improved by the way things unfolded, with
21 Mr. Busick purchasing the last \$1.5 Million in unsold Founder shares shortly before
22 the sale of the CR Founder's share to Plaintiff. Through that sequence, an additional
23 \$500,000 in capital was put in the company around the time of Plaintiff's investment,
24 which otherwise might not have been invested. So, if anything, common sense
25 suggests that Plaintiff was placed in a better economic position by acquiring the CR
26 Founder's share rather than purchasing only \$1 Million of the \$1.5 Million in
27 Founders' shares still available.
- 28 ➤ The court reacted negatively to plaintiff's witness, Mr. Chaney, who the court
suggested was not credible. (Trial transcript at 1122:21 to 1125:5.)

- 1 ➤ There was unrefuted documentary evidence that demonstrated Plaintiff's involvement
2 with certain members of the company to interfere with the management of the project
3 and the procurement of the only financing option available to save the project. This
4 evidence strongly suggested that Plaintiff caused any damages he may have suffered.

5
6 Accordingly, the court should award attorney's fees to Marriner under NRS 18.010(2)(b),
7 which imposes a mandatory duty upon the court to award such attorney's fees, if it determines
8 that the action was groundless. On this record, given the complete absence of evidence supporting
9 Plaintiff's allegations against Marriner and given Judge Flanagan's emphatic ruling from the
10 bench, the court should find that the action against Marriner was and is groundless, and should
11 award attorney's fees as sanctions, as mandated by NRS 18.010(2)(b), per Judge Flanagan's
12 previous determination in accordance with NRS 18.010(3) that Marriner is entitled to recover his
13 attorney's fees.

14 C. *Brunzell* factors

15 After a determination is made as to whether fees and costs will be allowed, the court must
16 determine the reasonable amount to be awarded for attorney's fees. The proper factors to be
17 considered in making this determination are: (1) the qualities of the advocate, i.e., the advocate's
18 ability, training, education, experience, professional standing and skill, (2) the character of the
19 work to be done, i.e., its difficulty, intricacy, importance, the time and skill required, the
20 responsibility imposed and the prominence and character of the parties when they affect the
21 importance of the litigation, (3) the work actually performed by the lawyer, i.e., the skill, time and
22 attention given to the work; and (4) the result, i.e., whether the attorney was successful and what
23 benefits were derived. *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349–50, 455 P.2d 31, 33
24 (1969). The *Brunzell* factors are discussed in the following paragraphs.

25 **(1) The qualities of the advocate, i.e., the advocate's ability, training, education,**
26 **experience, professional standing and skill:** Marriner's counsel, Andrew Wolf, graduated law
27 school in 1986 and has been practicing in this district since 1991; and for the past 20 years he has
28 practiced in the fields of real estate law and litigation with Incline Law Group, LLP, and its
predecessor law firm which was founded in 1973. The undersigned is known by several judges in

1 this district to be a capable and ethical attorney, and recently authored a chapter in the State Bar
2 of Nevada's Nevada Civil Practice Manual, on the topic of attorney's fees and costs. Over the
3 course of the past 25 years the undersigned has periodically served as a Judge *pro tem* with the
4 Placer County Superior Court and the Incline Justice Court.

5 During the trial, Judge Flanagan praised the abilities of trial counsel, stating they were
6 some of the best who had ever appeared in his courtroom. (Trial Transcript at 976:12-17.)

7 **(2) The character of the work to be done, i.e., its difficulty, intricacy, importance, the**
8 **time and skill required, the responsibility imposed and the prominence and character of the**
9 **parties when they affect the importance of the litigation:** The work performed included
10 research and analysis of current statutes and case law, the review of literally thousands of pages
11 of discovery material, and the formulation of appropriate pretrial and trial strategies. In this case,
12 the defense required an understanding of limited liability company law and offering documents,
13 as well as an understanding of real estate development and construction issues. Thus, the number
14 of areas of the substantive law involved in this action was quite large and complex.

15 **(3) The work actually performed by the lawyer, i.e., the skill, time and attention**
16 **given to the work:** As noted above, the work performed included review of thousands of pages
17 of discovery, research and preparation of pretrial motions as well as trial documents. The pretrial
18 motions included a successful motion for more definite statement and an unsuccessful motion for
19 summary judgment. Trial preparation included tasks typical for a bench trial in a case of this
20 type, including review and preparation of exhibits, a trial statement, etc. The work in this matter
21 is ongoing due to Judge Flanagan's untimely passing, which has created a novel set of procedural
22 issues requiring additional research and writing of briefs at the court's request. Of course, the
23 parties are now engaged in post-trial proceedings in the trial court, in addition to the pending
24 appeal.

25 **(4) The result, i.e., whether the attorney was successful and what benefits were**
26 **derived:** The result was a clear success: a defense judgment, with an award of damages, costs and
27 an attorney's fees in Marriner's favor.
28

1 **7. Attorney's Fees per Contract.**

2 Section 16.9 on Page 39 of the Cal Neva Lodge, LLC, Amended and Restated Operating
3 Agreement, dated May 1, 2014 (Trial Exhibit 5), contains an attorney's fees provision. To the
4 extent it may apply, Marriner also seeks an award of his attorney's fees pursuant to this provision.

5 **"16.9. Attorneys' Fees.** If any Member or Manager commences an action against the
6 other Members and/or Manager to interpret or enforce any of the terms of this Agreement
7 or as the result of a breach by the other Member(s) or Manager(s) of any terms hereof, the
8 losing (or defaulting) Member(s) or Manager(s) will pay the prevailing Member(s) or
9 Manager(s) reasonable attorneys' fees, costs and expenses incurred in connection with the
10 prosecution or defense of such action (including at the appellate level), whether or not the
11 action is prosecuted to a final judgment."

12 A major focal point of Plaintiff's lawsuit is his assertion that the CR Founder's share he
13 acquired could not be sold to him due to prohibitions on transfer contained in the Operating
14 Agreement. Plaintiff contended that it was fraudulent and in violation of the Operating Agreement
15 to attempt to sell him the CR Founder's share due to the transfer restrictions. Accordingly,
16 Plaintiff's claims against Marriner directly or by implication included an effort to interpret or
17 enforce the Operating Agreement by one member (Plaintiff) against another member (Marriner),
18 wherein plaintiff contended that the CR Founder's share could not be sold to him due to transfer
19 restrictions in the Operating Agreement.

20 Plaintiff's IRA Custodian executed the Subscription Agreement and the Member
21 Signature Page and Power of Attorney, among other documents, on October 12, 2015 (Trial
22 Exhibit 42), which states that Plaintiff thereby agrees to be bound by the terms of the Amended
23 and Restated Operating Agreement (Trial Exhibit 5). The subscription was accepted by the
24 company the following day, October 13, 2015 (Trial Exhibit 40). Plaintiff's acceptance of the
25 Operating Agreement through his acceptance of the subscription is alleged in Paragraph 20 and 29
26 of his Second Amended Complaint, filed September 27, 2016, and indicated in Exhibit 1 attached
27 thereto. Marriner is uncertain, however, whether the contractual attorney's fee provision
28 contained in the operating agreement is applicable to Plaintiff's particular claims against Marriner
and, accordingly, seeks recovery of his attorney's fees by way of the contract, in the alternative to
an award of attorney's fees as sanctions on the grounds described above.

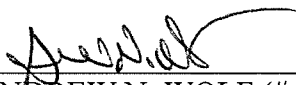
1 **8. Conclusion.**

2 In light of the reasons set forth above, the court should enter its order requiring Plaintiff to
3 pay Marriner reasonable attorney's fees in the amount of **\$82,599**, as set forth in the following
4 Declaration and Exhibit 1.

5 **Affirmation:** The undersigned hereby affirms that the foregoing document does not
6 contain the social security number of any person.

7 Dated: April 4, 2016.

8 Incline Law Group, LLP

9 By: 
10 ANDREW N. WOLF (#4424)
11 JEREMY L. KRENEK (#13361)
12 Attorneys for Defendants DAVID MARRINER
13 and MARRINER REAL ESTATE, LLC
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1 **DECLARATION OF ANDREW N. WOLF IN SUPPORT OF**
2 **DEFENDANT MARRINER'S MOTION FOR ATTORNEY'S FEES**

3 ANDREW N. WOLF hereby declares per NRS 53.045 as follows:

4 1. I am the attorney of record in this lawsuit for defendants DAVID MARRINER
5 and MARRINER REAL ESTATE, LLC (collectively "Marriner"). I have personal knowledge of
6 the facts and information stated herein and would so testify if called as a witness.

7 2. Attached as **Exhibit "1"** hereto is a true copy of a "History Bill" generated by my
8 law firm from our billing and time-keeping program. Substantially all time and expense items are
9 entered into our billing and time-keeping program at or about the time each item of legal services
10 or expense is performed or incurred. The History Bill accurately documents all of the legal
11 services provided by me, my colleagues and my staff members to represent Marriner in this
12 lawsuit, excluding activities in the currently pending appeal, accrued from the inception of this
13 matter in May, 2016, through April 3, 2018.

14 3. The amount of attorney's fees sought or a fair estimate is **\$82,599** consisting of the
15 following items:

- 16 a. Fees for legal services identified in the attached History Bill, in the total
17 amount of \$73,353;
- 18 b. An additional sum of \$2,691 to cover the more than 7.8 hours of time I
19 expended on April 4, 2018, to continue and complete drafting the foregoing
20 motion for attorney's fees and this supporting declaration, which is not
21 included in the attached History Bill;
- 22 c. An additional sum of \$5,175 to cover an estimated 15 additional hours of time
23 to be charged at \$345/hour to review and respond to Plaintiff's post judgment
24 motions and Plaintiff's pending motion to retax costs;
- 25 d. An additional sum of \$1,380 to cover at least four (4) additional hours to be
26 charged at \$345/ hour to prepare a reply to the anticipated opposition to this
27 motion, submit the matter, and to prepare an order and attend a hearing, if any.
- 28 e. Each of the foregoing estimates of time to be incurred in the future is, in my
 judgment, probably lower than the actual hours which will ultimately be

1 incurred, given the length and complexity of the pleadings typically filed in
2 this matter, and given the nature of the issues and the amounts in controversy.

3 4. Except for the estimated fees for future work mentioned in the preceding
4 paragraph, the fees claimed herein were actually and necessarily incurred and are reasonable in
5 the circumstances. My hourly rate was previously \$320/hour, and is currently \$345/hour, which I
6 believe is well within the range of other attorneys in this region with similar experience.

7 5. Costs are sought separately in a Memorandum of Costs.

8 6. The factors identified in *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349-50,
9 455 P.2d 31, 33 (1969), are as follows:

10 **(A) The qualities of the advocate, i.e., the advocate's ability, training, education,**
11 **experience, professional standing and skill:** Marriner's undersigned counsel, Andrew Wolf,
12 graduated law school in 1986 and has been practicing in this District since 1991; and for the past
13 20 years has practiced in the fields of real estate law, business law, and litigation with Incline
14 Law Group, LLP, and its predecessor law firm, which was founded in 1973. The undersigned is
15 known by several judges in this district to be a capable and ethical attorney, and recently authored
16 a chapter in the State Bar of Nevada's Nevada Civil Practice Manual, on the topic of attorney's
17 fees and costs. Over the course of the past 25 years, the undersigned has periodically served as a
18 Judge *pro tem* with the Placer County Superior Court and the Incline Justice Court.

19 During the trial, Judge Flanagan praised the abilities of trial counsel, stating they were
20 some of the best who had ever appeared in his courtroom. (Trial Transcript at 976:12-17.)

21 **(B) The character of the work to be done, i.e., its difficulty, intricacy, importance, the**
22 **time and skill required, the responsibility imposed and the prominence and character of the**
23 **parties when they affect the importance of the litigation:** The work performed included
24 research and analysis of current statutes and case law, the review of literally thousands of pages
25 of discovery material, and the formulation of appropriate pretrial and trial strategies. In this case,
26 the defense required an understanding of limited liability company law and offering documents,
27 as well as an understanding of real estate development and construction issues. Thus, the number
28 of areas of the substantive law involved in this action was quite large and complex.

(C) The work actually performed by the lawyer, i.e., the skill, time and attention given to the work: As noted above, the work performed included review of thousands of pages of discovery, research and preparation of pretrial motions as well as trial documents. The pretrial motions included a successful motion for more definite statement and an unsuccessful motion for summary judgment. Trial preparation included tasks typical for a bench trial in a case of this type, including review and preparation of exhibits, a trial statement, etc. The work in this matter is ongoing due to Judge Flanagan's untimely passing, which has created a novel set of procedural issues requiring additional research and writing of briefs at the court's request. Of course, the parties are now engaged in post-trial proceedings in the trial court, in addition to a pending appeal.

(D) The result, i.e., whether the attorney was successful and what benefits were derived: The result was a clear success: a defense judgment, with an award of damages, costs and an attorney's fees in Marriner's favor.


I declare under penalty of perjury under the laws of the State of Nevada that the foregoing assertions of this declaration are true and correct. Executed this **4th day of April, 2018**, at Incline Village, Washoe County, Nevada.


ANDREW N. WOLF

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

Dated: April 4, 2016.

Incline Law Group, LLP

By: 
ANDREW N. WOLF (#4424)
JEREMY L. KRENEK (#13361)
Attorneys for Defendants DAVID MARRINER
and MARRINER REAL ESTATE, LLC

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Incline Law Group, LLP, and that on this day, I caused to be served, a true and correct copy of:

MARRINER'S MOTION FOR ATTORNEY'S FEES

UPON:

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

VIA: Washoe County Eflex e-filing system: A true and correct copy of the foregoing document(s) was (were) electronically served via the court's electronic filing system to the above named attorneys associated with this case. If the any of the above named attorneys (and all of their listed co-counsel within the same firm) are not registered with the court's e-filing system, then a true and correct paper copy of the above-named document(s) was(were) served on the attorney via U.S.P.S. first class mail with first-class postage prepaid, to the attorney's address listed above, on this date.

Date: April 4, 2018.

/s/ Andrew N. Wolf

Andrew N. Wolf

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Exhibits

Exhibit 1: History Bill

10 Pages