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IN THE SUPREME COURT OF NEVADA

CRISWELL RADOVAN, LLC; CR CAL NEVA, LLC,; WILLIAM CRISWELL; ROBERT RADOVAN; CAL NEVA LODGE, LLC; and POWELL, COLEMAN AND ARNOLD, LLP; Appellants, *vs.* GEORGE STUART YOUNT, Individually and in his Capacity as Owner of GEORGE STUART YOUNT IRA, Respondent.	Case No. 77987

RESPONSE TO ORDER TO SHOW CAUSE

Appellants Criswell Radovan, LLC; CR Cal Neva, LLC; William Criswell; Robert Radovan, Cal Neva Lodge, LLC; and Powell, Coleman and Arnold, LLP ("Appellants" or the "CR Parties") hereby respond to the Court's June 26, 2019 Order to Show Cause.

I. INTRODUCTION

This appeal was filed primarily as an abundance of caution, as the procedural posture of this case is highly unusual. It is summarized as follows: Judge Flanagan issued an oral ruling following the bench trial below. He later issued a written

"Amended Order," from which Yount appealed. Judge Flanagan died, and Judge Polaha entered a post-appeal Judgment on the record pursuant to NRCP 63, the terms of which differed from Judge Flanagan's Amended Order. The CR Parties brought post-trial motions to correct that Judgment. Meanwhile, Yount moved this Court to determine whether it had jurisdiction over his pending appeal. The Court ruled that it did, and its Order included a *dictum* stating that the district court lacked jurisdiction over the pending post-trial motions. The district court therefore declined to consider those motions, and it issued no written formal written order (only a minute order). The CR Parties' appeal followed 30 days after that minute order.

If Judge Polaha's written Judgment modified Judge Flanagan's ruling to the CR Respondents' detriment, then the CR Parties must have a remedy *somewhere*, yet they appear to have a remedy nowhere. They cannot obtain relief through Yount's pending appeal, which was taken from Judge Flanagan's Amended Order rather than Judge Polaha's subsequent Judgment. They could not obtain relief from the district court, which declined on jurisdictional grounds to consider a motion or issue a written order. And it now appears as though jurisdiction may not lie in *this* Court, either, as there is no written order from which to appeal.

This procedural tangle appears perplexing, but its cause is simple: Judge Polaha inadvertently modified a final judgment from which Yount had perfected an appeal. Because this modification came after Yount's appeal, it was beyond the

scope of that appeal while simultaneously stripping the district court of jurisdiction to correct it. Judge Polaha lacked jurisdiction to modify an order post-appeal, but he nevertheless inadvertently did so. Judge Walker also lacked jurisdiction to modify an order post-appeal, and he declined to do so.

There are two ways in which the Court can set things right: (1) the Court could rule that a district court's refusal to issue a written order on the CR Parties' post-trial motions is, itself, appealable; or (2) the Court could rule that the Amended Order is the "final judgment" below and that Judge Polaha's Judgment is void to whatever extent it deviates from the Amended Order.

II. FACTS/PROCEDURAL HISTORY

The Underlying Dispute

This case arises from a dispute over shares in a real estate development project.[1] Plaintiff George Stuart Yount ("Yount") sued the CR Parties and others for various claims including fraud and conversion based upon his allegations that he did not receive the shares that he had been promised. (*See generally* Complaint, attached as **Exhibit A**.) Specifically, Yount allegedly believed that he was receiving $1 million in equity shares under the project's private placement memorandum when he in fact received $1 million of identical equity shares from

[1] A comprehensive factual recitation may be found in the CR Parties' Answering Brief filed in Case No. 74275. However, the facts of the underlying dispute are not relevant to the Court's Order to Show Cause, and they are therefore not addressed in detail here.

another investor.

After receiving his shares, Yount colluded with a group of disgruntled investors who actively meddled in the project's financing and attempted to supplant it with financing of their own. They were successful in torpedoing the project's financing, but they failed completely in arranging any alternative financing. Without funding, the project ultimately fell into bankruptcy.

Judge Flanagan Issues Lengthy Ruling; Yount Appeals from "Amended Order"

On September 8, 2017, following a bench trial, the Honorable Patrick Flanagan issued a lengthy oral ruling denying all of Yount's claims and awarding Appellants compensatory damages, attorneys' fees, and litigation costs. (*See generally* excerpt from Trial Transcript, Volume VII, attached as **Exhibit B**.) This oral ruling was memorialized in a written "Amended Order" filed one week later on September 15, 2017. (*See* **Exhibit C**.) The Amended Order granted the CR Parties the following relief:

> 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.

(Ex. C at 2.)

Plaintiff/Respondent filed a Notice of Appeal from this Order on September 19, 2017 (*see* **Exhibit D**), which created Case No. 74275 (the "Related Case"). The CR Parties were satisfied with the district court's judgment and did not appeal.

Judge Polaha's Written Judgment Varies from Judge Flanagan's Ruling

Judge Flanagan sadly died before a final judgment could be entered. The matter was therefore referred to On March 13, 2018, The Honorable Jerry Polaha entered a written Judgment which had been submitted to chambers by counsel for Co-Defendants David Marriner and Marriner Real Estate, LLC. (*See* **Exhibit E**.)

The terms of Judge Polaha's Judgment materially differed from those of Judge Flanagan's September 19, 2017 Amended Order. (*See* Ex. C at 3:22–4:1.) The Judgment included the $1.5 million damage awards to Mr. Criswell and Mr. Radovan, but crucially omitted the CR Parties' awards for lost development fees, management fees, attorneys' fees, and costs. (*Id.*) This is a clear difference in substance, and the CR Parties therefore filed a Motion to Amend and Motion for Attorneys Fees on March 27, 2018, seeking inclusion of those items. (*See generally*

Exhibit F.)

Yount's Motion to Determine Appellate Jurisdiction

On August 9, 2018, Yount filed in the Related Case a Motion to Determine Appellate Jurisdiction. (**Exhibit G**.) The Court ruled on Yount's Motion without any additional briefing on August 24, 2018 (**Exhibit H**), stating that Judge Polaha's March 12, 2018 Judgment "made no substantive changes to the terms of the amended order" (*id.* at 2). Although this may have been true with respect to Yount's appeal (which challenged the district court's judgment *in toto*), the terms *were* substantively different with respect to the CR Parties' damages because it (unilaterally and without hearing) excised their awards for lost development fees, management fees, attorneys' fees, and costs. (*Compare* Ex. E *with* Ex. C.)

Judge Walker Declines to Consider the CR Parties' Post-Trial Motions

Judge Walker heard the CR Parties' post-trial motions on December 20, 2018. (*See generally* **Exhibit I**.) During that hearing, Judge Walker concluded that he lacked jurisdiction to modify Judge Polaha's Judgment, and stated on the record that he did not intend to reduce that decision into writing:

> [THE COURT:] Here's what I intend to do: I was first made aware of an order from the Nevada Supreme Court that was issued August 24th, 2018 [*i.e.* the Court's Order on jurisdiction]. The last sentences of which seem to me an unequivocal comment on my jurisdiction; jurisdiction is jurisdiction is jurisdiction. It doesn't matter if you stipulate to waive it, stipulate to invoke it, if either of those decisions are wrong, I don't have it. My job as district court judge is to be quick, decisive, and the words of Peter Breen, wrong. ***I don't intend to do anything***

> ***further in this case.*** I'll give you all opportunity to brief why you think I may have jurisdiction to act. I may or may not act upon that jurisdiction if I agree with it. ***I have made oral pronouncements today. I don't intend to matriculate those into writing,*** if and until the Nevada Supreme Court tells me I should or you all convince me I have remaining jurisdiction.

(Ex. I at 58:20–59:10; emphases added.) On January 17, 2019, the district court posted minutes of the proceedings, which stated as follows:

> ***The Court does not intend to do anything further in this case pending further order from the Nevada Supreme Court.*** The Court will give counsel the opportunity to brief why they believe this Court may have jurisdiction to act and, if the Court agrees, it may or may not act upon that jurisdiction. ***The Court will not matriculate the oral pronouncements made today into writing, if and until the Nevada Supreme Court informs the Court it should or until counsel convinces the Court that it has remaining jurisdiction.***

(*See* **Exhibit J**.) This appeal followed.

III. ARGUMENT

This case is unusual. The CR Parties acknowledge that, generally speaking, "only a written judgment has any effect, and only a written judgment may be appealed." *Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987). But this common-sense statement of the law provides little guidance for a litigant facing a situation where a district court declines to produce a written judgment, and there is at least some authority from some sister jurisdictions indicating that a district court's refusal to issue a written order based on a *sua sponte* finding of a lack of jurisdiction amounts to an appealable final order. *See, e.g.*,

Sellers v. City of Summerville, 81 Ga. App. 406, 58 S.E.2d 855 (1950) (holding that trial court's *sua sponte* determination that it lacked jurisdiction to enter any order or judgment on questions raised by demurrers and declined to proceed further was a final judgment from which writ of error would lie). Indeed, extant Nevada case law which has not been explicitly overruled suggests that an oral pronouncement may act as a final judgment. *See Lewis v. Williams*, 61 Nev. 253, 123 P.2d 730, 731 (1940) ("The final judgment was rendered on December 12, 1941, the date the trial court orally pronounced its judgment in open court."). Meanwhile, "[f]iling a timely notice of appeal is jurisdictional and an untimely appeal may not be considered." *Zugel by Zugel v. Miller*, 99 Nev. 100, 101, 659 P.2d 296, 297 (1983). The CR Parties therefore brought this appeal to ensure that their rights were protected and that no remedies were waived.

It may be the case that the Court lacks jurisdiction to consider this appeal, but it cannot be the case that the CR Parties have nowhere to turn to set things right. *See Marbury v. Madison*, 5 U.S. 137, 147 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.") Judge Polaha inadvertently modified an appealable final judgment after Yount had perfected an appeal from that order (*compare* Ex. C *with* Ex. E), and Judge Walker concluded that he could not modify Judge Polaha's written order. Either this Court can consider the issue, the District Court can consider the issue, or there is no issue to consider because Judge Polaha's Judgment had no legal effect.

A. The Court May Conclude That a District Court's Refusal to Produce a Written Order is Appealable

Generally, "[a]n oral pronouncement of judgment is not valid for any purpose," and only a written final order may be appealed. *Rust*, 103 Nev. at 689, 747 P.2d at 1382. However, it stands to reason that district court may not escape appellate review by simply declining to issue a written order. *Rickey v. Douglas Milling & Power Co.*, 45 Nev. 341, 205 P. 328 (1922) (holding that the constitutional right of appeal may be regulated by the Legislature as to the time and manner of taking an appeal, so long as the regulations do not unreasonably restrict the right). If a district court manifests an intent not to issue a written order, as was the case here, the Court should accept that refusal to exercise jurisdiction as the functional equivalent of a written order denying the relief sought.

B. Alternatively, the Court Should Hold That Judge Polaha's Judgment is Void Because it Altered a Final Judgment and Dismiss this Appeal

To whatever extent this case appears to present any complicated procedural issues, it is because understandable mistakes placed its procedural posture outside of the normal bounds of the Rules: Judge Polaha inadvertently modified a final judgment from which an appeal was taken, and this Court inadvertently stated that Judge Polaha's Judgment "made no substantive changes to the terms of [Judge Flannagan's] . . . amended order." (*See* Ex. H.) If it were the case that Judge Polaha's Judgment made no substantive changes to Judge Flanagan's Amended Order, then there would be no issue; Judge Flanagan's Amended Order would be a

substantively appealable final judgment, Judge Polaha's Judgment would have merely repeated its terms without changing them, the district court would lack jurisdiction to consider motions filed after Yount's appeal.[2]

But Judge Polaha's Judgment *did* change the terms of Judge Flanagan's Amended Order by signing a proposed order which omitted items of damage that Judge Flanagan had awarded. (*Compare* Ex. E *with* Ex. C.) This modification came *after* Yount's appeal from the Amended Order, it appears to have been unintentional, and it was done without hearing or briefing. The result is a situation in which a final order was modified by mistake, the unintentionally modified order is not the subject of any appeal, and the district court now believes that it lacks jurisdiction to correct the damage due to a pending appeal from the original order.

If Judge Walker lacked jurisdiction to consider the CR Parties' Motion to Amend due to Yount's pending appeal from the Amended Order, then Yount's appeal also prevented Judge Polaha from modifying the Amended Order in the first place. And if the Court's Order on Jurisdiction in the Related Case was predicated on the idea that Judge Polaha's Judgment "made no substantive changes to the terms of [Judge Flannagan's] . . . amended order," (Ex. H), then it follows that Judge Polaha's Judgment must be void to whatever extent that it varied from Judge

[2] With the exception of motions brought under the *Huneycutt* procedure. *See Huneycutt v. Huneycutt*, 94 Nev. 79, 81, 575 P.2d 585, 586 (1978).

Flanagan's Amended Order. An explicit holding to this effect moots this appeal,[3] and it appears to have been the Court's assumption from the outset. The Court should simply clarify this point and dismiss this appeal as moot.

IV. CONCLUSION

The Court should hold that a district court's refusal to issue a written order is appealable. Alternatively, the Court should rule that Judge Flanagan's Amended Order is the "final judgment" below and that Judge Polaha's Judgment is void to whatever extent it deviates from the Amended Order.

DATED this 9th day of August, 2019.

HOWARD & HOWARD ATTORNEYS, PLLC

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[3] If any further proceedings are necessary in the district court in order for the CR Parties to prove up their damages for fees, costs, or any damage items, they may be addressed upon remand from the Related Case.

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 **RESPONSE TO ORDER TO SHOW CAUSE** 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 August 9, 2019 at Las Vegas, Nevada.

/s/ Ryan O'Malley

An Employee of HOWARD & HOWARD ATTORNEYS PLLC

4831-6649-6156, v. 1

EXHIBIT A

CODE $1422
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FILED

2016 APR -4 PM 2:40

JACQUELINE BRYANT
CLERK OF THE COURT
BY L Aparicio
DEPUTY

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; and DOES 1-10,

Defendants.

CASE NO. CV16 00767

DEPT NO. B7

COMPLAINT
(Exemption from Arbitration Requested)

PLAINTIFF GEORGE STUART YOUNT, individually and in his capacity as owner of the GEORGE STUART YOUNT IRA (hereinafter "Plaintiff"), for their Complaint against Defendants 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 (hereinafter "Defendants") and DOES 1 through 10, inclusive, allege as follows:

PARTIES

1. Plaintiff George Stuart Yount is an individual who resides in Crystal Bay, Nevada.

2. The George Stuart Yount IRA is an IRA owned by George Stuart Yount, for which Premiere Trust, Inc., serves as custodian.

3. Defendant Criswell Radovan, LLC ("Criswell Radovan") is a Nevada limited liability company whose managers are Sharon Criswell, William Criswell and Robert Radovan, and upon information and belief is the owner of CR Cal Neva, LLC.

4. Defendant CR Cal Neva, LLC ("CR") is a Nevada limited liability company whose managing member is William Criswell, and upon information and belief is owned by William Criswell, Robert Radovan and/or Criswell Radovan.

5. Defendant Robert Radovan ("Radovan") is an individual residing, upon information and belief, in Napa, California, and doing business in Nevada both individually and through various entities, including Defendants.

6. Defendant William Criswell ("Criswell") is an individual residing, upon information and belief, in Napa, California, and doing business in Nevada both individually and through various entities, including Defendants.

7. Defendant Cal Neva Lodge, LLC ("CNL") is a Nevada limited liability company whose manager is Robert Radovan.

8. Powell, Coleman and Arnold LLP ("Powell Coleman") is a law firm located in Dallas, Texas, who has and continues to represent CR and CNL as to the financing and development of the Cal Neva Lodge located in Nevada and California (as referred herein, the "Cal Neva Lodge", or "Project").

9. Defendant David Marriner ("Marriner") is an individual residing in Incline Village, Nevada, and acting as an agent and/or broker for CNL, CR, Criswell Radovan, LLC, and

the Cal Neva Lodge.

10. Marriner Real Estate, LLC ("Marriner Real Estate") is a Nevada limited liability company whose manager is David Marriner, and upon information and belief is solely owned by David Marriner which has acted as an agent and/or broker for CNL, CR, Criswell Radovan, LLC, and Cal Neva Lodge.

11. Plaintiff is ignorant of the true names and capacities of the DOES named herein as DOES 1 through 10, inclusive, and therefore sues these Defendants by such fictitious names. Plaintiff will amend this Complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes, and thereon alleges, that each of these fictitiously named DOE Defendants was, and continues to be, responsible in some manner for the acts or omissions herein alleged.

ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

12. On or about February 18, 2014, 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. 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.

13. On or about July 25, 2015, Radovan sent an email to Plaintiff providing numerous documents and other information related to the Project and development of the Cal Neva Lodge, including financial information, with the intent to induce the Plaintiff into purchasing a "Founders Unit" in CNL for $1,000,000, as CNL was serving as the primary development vehicle for the Project.

14. Plaintiff was later provided a "Subscription Booklet" that included Subscription Instructions, a member signature page, a certificate of nonforeign status, investor instruction to escrow and wire transfer information and an IRS form W-9. Plaintiff was also informed that there was still $1,500,000 of Founders Units available for purchase of the $20,000,000 of Founders Units authorized under the Subscription Agreement and related offering materials. Plaintiff reviewed the Subscription Booklet, and based on the information contained therein and the representations made by Radovan, Criswell, Marriner, and their respective agents and entities, including Defendants, decided to purchase a Founders Unit in the amount of $1,000,000. Plaintiff elected to utilize funds held by the George Stuart Yount IRA of Plaintiff for the purchase of such Founders Unit.

15. On or about October 12, 2015, Plaintiff, as owner of the George Stuart Yount IRA, and Deborah Erdman as Trust Officer for Premier Trust Inc., as the custodian of the George Stuart Yount IRA, signed and delivered the Subscription Agreement. On October 13, 2015, Criswell, as president of CR signed the Acceptance of Subscription as manager of CNL. On October 15, 2015, Premier Trust Inc. on behalf of the George Stuart Yount IRA, wired the amount of $1,000,000 to the trust account of Powell Coleman, the designated escrow holder for subscription funds under the Subscription Agreement. Pursuant to the Subscription Agreement the $1,000,000 was to be deposited into the account of CNL.

16. On or about December 12, 2015, a meeting of members and investors in the Project was held at the Fairwinds Lodge near the Cal Neva Lodge. At that meeting, for the first time, Plaintiff was informed of several issues that were not disclosed or were incorrectly represented to him prior to his investment, primarily that the Project was substantially over budget and the Cal Neva Lodge was not going to open as scheduled.

17. The revelations at the December 12, 2015 meeting caused great concern to the Plaintiff and the members and investors. Additionally, at that time, the bank statements of CNL did not reflect that the $1,000,000 had been deposited into any CNL account.

18. On or about January 22, 2016, Plaintiff received a Capitalization Table for CNL indicating that his $1,000,000 investment was not in CNL, but was within the $2,000,000 equity

investment of CR in CNL. Plaintiff immediately responded that was in error and that his intent all along, and the terms of the Subscription Agreement, provided for his purchase of a Founders Unit under the Subscription Agreement as was evidenced by the fully executed Subscription Agreement delivered by Plaintiff to CNL. Plaintiff had never entered into any verbal or written agreement to buy any portion of the CR's Founder's Units in CNL. Plaintiff then requested that the Capitalization Table be corrected to reflect that he was a holder of a $1,000,000 Founders Unit in CNL, as provided by the Subscription Agreement.

19. Based on these series of events, Plaintiff then started inquiring into the whereabouts of his $1,000,000.

20. On or about February 2, 2016, Plaintiff received an email from Bruce Coleman, a partner of Powell Coleman, with attached documents, apparently drafted by Powell Coleman, consisting of an Assignment of Interest in Limited Liability Company (backdated to October 13, 2015), Resolution of Members of CNL approving such assignment, and a Purchase Agreement for CR to repurchase from Plaintiff the one-half of CR's equity position in CNL, which was asserted by Powell Coleman to have been transferred to Plaintiff for $1,000,000, which agreement also classified Plaintiff's $1,000,000 as a loan from Plaintiff to CR. Basically these assignment documents set forth that the Subscription Agreement had been erroneously executed and that the parties actually intended for the Plaintiff to purchase an interest in CR's Founder Units in CNL, which was neither the intent nor agreement of the parties. Plaintiff responded to Mr. Coleman expressly representing that it was never his intent, nor the agreement of the parties, to purchase any portion of CR's interest in CNL, and that the only agreement and intent was to purchase a Founders Unit in CNL in accordance with the Subscription Agreement, as evidenced by his signed Subscription Agreement.

21. On or about March 16, 2016, Plaintiff sent an email to Mr. Coleman inquiring as to the whereabouts of his $1,000,000. After a series of emails between Plaintiff and Mr. Coleman, Mr. Coleman disclosed that the $1,000,000 had been transferred to CR on October 14, 2015, because "I was told by CR that it had sold 50% of its $2m interest in Cal Neva Lodge, LLC to you for $1m and that the payment would be transferred through my trust account. At the time

of this transaction Cal Neva Lodge had already sold all of the shares it was authorized to sell under the terms of its Operating Agreement, so I had no reason to question the sale of a portion of CR's interest to you." As of March 16, 2016, Mr. Coleman, upon Plaintiff's information and belief, had in his possession the executed Subscription Agreement of October 13, 2015 with attached escrow instructions. Those escrow instructions directed that Powell Coleman was the escrow holder and specifically set forth that the $1,000,000 from Plaintiff be retained in the escrow account until such time as certain conditions were met, at which time the funds were to be deposited into CNL. Plaintiff then asked Mr. Coleman for any documentation demonstrating that CR had sold 50% of its interest to him and authorizing that the payment would be transferred through his trust account. No such documentation was ever provided by Mr. Coleman.

22. Plaintiff has made repeated demands on Criswell and Radovan and their respective entities, including Defendants, for repayment of his $1,000,000 and has yet to be repaid.

FIRST CAUSE OF ACTION
(Breach of Contract against CR Cal Neva LLC, Cal Neva Lodge, LLC and Criswell Radovan, LLC)

23. Plaintiff realleges and incorporates by this reference, as set forth in full herein, the allegations in paragraphs 1 through 22 above.

24. The Subscription Agreement Plaintiff signed on October 13, 2015, which was countersigned by Criswell on October 14, 2015, was a binding contract which required the Plaintiff's $1,000,000 to be held in escrow and then either deposited into the account of CNL if certain conditions were met, and if not, returned to the Plaintiff. If, as represented by counsel for CNL, the authorized capital of CNL, the terms of the offering, or the operating agreement for CNL prohibited the purchase by the Plaintiff, then the $1,000,000 should have been returned to the Plaintiff as directed in the Subscription Agreement. The $1,000,000 was not returned to Plaintiff; it was instead deposited into an account of CR without any authorization by Plaintiff or any agreement for such a transfer. The actions by CR and its agents and/or attorneys constituted a breach of the Subscription Agreement causing damage to the Plaintiff in an amount in excess $1,000,000.

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SECOND CAUSE OF ACTION
(Breach of Duty Against Defendant Powell Coleman and Arnold LLP)

25. Plaintiff realleges and incorporates by this reference, as set forth in full herein, the allegations in paragraphs 1 through 24 above.

26. Powell Coleman is the designated escrow holder for investor purchases under the Subscription Agreement for shares of CNL. As such, Powell Coleman had a duty, fiduciary, statutory or otherwise, (1) to comply with all provisions of the Subscription Agreement and the Investor's Instructions to Escrow and Wire Transfer Information, a copy of which is attached to this Complaint and incorporated herein as **Exhibit 1**, and (2) to insure that Plaintiff's $1,000,000 was only released from escrow upon specific instructions from the Plaintiff.

27. On or about October 14, 2015, Powell Coleman received a wire transfer for $1,000,000 into their trust account from Premier Trust Inc., on behalf of and as custodian of the George Stuart Yount IRA.

28. On October 15, 2015, Powell Coleman negligently distributed and transferred Plaintiff's $1,000,000 to CR without Plaintiff's consent and without any documentation evidencing that the $1,000,000 was for a purchase agreement between CR and Plaintiff and that payment was to go through the Powell Coleman Trust Account. Such transfer of Plaintiff's $1,000,000 was a breach of the duty that Powell Coleman, as an escrow holder, had to Plaintiff. Such breach of duty has caused Plaintiff damages in excess of $1,000,000.

THIRD CAUSE OF ACTION
(Fraud Against Defendants William Criswell; Robert Radovan; CR Cal Neva, LLC; Criswell Radovan, LLC; Cal Neva Lodge, LLC; David Marriner; and Marriner Real Estate, LLC)

29. Plaintiff realleges and incorporates by this reference, as set forth in full herein, the allegations in paragraphs 1 through 28 above.

30. Defendants knowingly made fraudulent misrepresentations or material omissions of fact to Plaintiff intended to induce Plaintiff into contributing $1,000,000 to obtain a Founders Unit in CNL. Such fraudulent misrepresentations include, but are not limited to, that the Cal Neva Lodge would open on or near the end of 2015; that the Project was only slightly over

budget; that a refinancing of the $6,000,000 mezzanine financing with a $15,000,000 loan was in place or imminent; that the developers had a successful track record of developing similar projects; that the developers would not receive distributions or other payments related to the Project until after the preferred returns and equity investments were paid or returned to the investors; and, that there was $1,500,000 left under the offering authorized and contemplated by the Subscription Agreement and related offering documents for purchase of a Founders Unit by Plaintiff.

31. Prior to Plaintiff signing the Subscription Agreement, there was also a material omission by Defendants, and Defendants failed to disclose, that CNL's liabilities exceeded its assets, and that Project was in fact in need of capital because the general contractor and numerous sub-contractors had not been paid. Plaintiff was not aware of the inaccuracy of the representations by Defendants, or the material omissions by Defendants, and was never informed prior to his investment that the Project was in serious financial trouble, that the offering contemplated by the Subscription Agreement and related offering documents was fully subscribed, and that the offering limit of $20,000,000 had already been met when he signed the Agreement.

32. Plaintiff justifiably relied on the representations by Defendants and would not have made the investment had he known the true status and details of the Project or CNL. Plaintiff suffered damages from Defendants' fraud in excess of $1,000,000.

FOURTH CAUSE OF ACTION
(Negligence Against Defendant Powell, Coleman and Young LLP)

33. Plaintiff realleges and incorporates by this reference, as set forth in full herein, the allegations in paragraphs 1 through 32 above.

34. Defendant Powell Coleman had a duty as attorneys serving as escrow holder of Plaintiff's $1,000,000 to insure that distribution of that amount was done in accordance with the Subscription Agreement and Plaintiff's authorized and intended use for such funds. Powell Coleman's transfer of those funds to its client, CR, without any express written authorization from Plaintiff, was the proximate cause of Plaintiff's damages that are in excess of $1,000,000.

FIFTH CAUSE OF ACTION

(Conversion against CR Cal Neva, LLC, William Criswell, Robert Radovan and Criswell Radovan, LLC)

35. Plaintiff realleges and incorporates by this reference, as set forth in full herein, the allegations in paragraphs 1 through 34 above.

36. Defendants wrongfully exercised dominion over Plaintiff's $1,000,000 when it instructed their attorneys, Powell Coleman, to transfer Plaintiff's $1,000,000 out of Powell Coleman's trust account and into the possession of Defendants. Plaintiff had never authorized such transfer, nor executed any documents allowing such transfer, and such act to direct the transfer of funds was in derogation of Plaintiff's ownership of such funds. Such Conversion caused Plaintiff damages in excess of $1,000,000.

SIXTH CAUSE OF ACTION

(Punitive Damages against all Defendants)

37. Plaintiff realleges and incorporates by this reference, as set forth in full herein, the allegations in paragraphs 1 through 36 above.

38. Defendants Criswell Radovan, CR, Criswell, Radovan, Marriner and Marriner Real Estate's actions were fraudulent and in conscious disregard of Plaintiff's rights with the express malicious intent of causing harm to Plaintiff, and as such Plaintiff should be entitled to punitive damages.

39. Defendant Powell Coleman was specifically engaged in the business of administering escrows in Nevada and acting as an escrow agent for a Nevada business transaction, involving a Nevada property and holding money for residents of Nevada, without having procured a Nevada license to act as an escrow agent. As such Nevada Revised Statute 645A.222(2) authorizes an action for an award of punitive damages.

SEVENTH CAUSE OF ACTION

(Claim for Fraud under NRS 90.570 in the Offer, Sale and Purchase of a Security against Defendants William Criswell; Robert Radovan; CR Cal Neva, LLC; Criswell Radovan, LLC; Cal Neva Lodge, LLC; David Marriner; and Marriner Real Estate, LLC)

40. Plaintiff realleges and incorporates by this reference, as set forth in full herein, the allegations in paragraphs 1 through 39 above.

41. Defendants knowingly made fraudulent misrepresentations and/or material omissions of fact to Plaintiff intended to induce Plaintiff into contributing $1,000,000 to obtain a Founders Unit in CNL. Such fraudulent misrepresentations include, but are not limited to, that the Cal Neva Lodge would open on or near the end of 2015; that the Project was only slightly over budget; that a refinancing of the $6,000,000 mezzanine financing with a $15,000,000 loan was in place or imminent; that the developers had a successful track record of developing similar projects; that the developers would not receive distributions or other payments related to the Project until after the preferred returns and equity investments were paid or returned to the investors; and, that there was $1,500,000 left under the Subscription Agreement and related offering documents for purchase of a Founders Unit by Plaintiff.

42. Prior to Plaintiff signing the Subscription Agreement, there was also a material omission by Defendants, and Defendants failed to disclose, that CNL's liabilities exceeded its assets, and that Project was in fact in need of capital because the general contractor and numerous sub-contractors had not been paid. Plaintiff was not aware of the inaccuracy of the representations by Defendants, or the material omissions by Defendants, and was never informed prior to his investment that the Project was in serious financial trouble, that the offering contemplated by the Subscription Agreement and related offering documents was fully subscribed, and that the offering limit of $20,000,000 had already been met when he signed the Agreement.

Plaintiff justifiably relied on the representations by Defendants and would not have made the investment had he known the true status and details of the Project or CNL. Plaintiff suffered damages from Defendants' fraud in excess of $1,000,000.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment as follows:

1. For damages against Defendants in excess of $1,000,000;
2. For punitive damages provided for by law;
3. For interest on the judgment as provided by law;
4. An award of attorneys' fees as provided for by law and under NRS 645A.222 and NRS 90.660(3);
5. Costs of the suit herein incurred; and,
6. For other such relief as the Court may deem just and proper.

DATED: April 1, 2016.

DOWNEY BRAND LLP

By: _____
RICHARD G. CAMPBELL, JR.
Attorney for Plaintiff

DOWNEY BRAND LLP

VERIFICATION

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

I, GEORGE STUART YOUNT, declare:

I am the Plaintiff in the above-entitled action.

I have read the foregoing COMPLAINT on file herein and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

DATED this 1 day of April, 2016.

GEORGE STUART YOUNT

Subscribed and sworn to before me,
this 18 day of April, 2016.

NOTARY PUBLIC
Commission Expires: 4/28/18

ERIN MOORE
Notary Public
State of Nevada
Appt. No. 14-13678-2
My Appt. Expires Apr. 28, 2018

DOWNEY BRAND LLP

SECOND JUDICIAL DISTRICT COURT

COUNTY OF WASHOE, STATE OF NEVADA

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, filed in this case: **COMPLAINT;**

☒ 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

Dated: April 1, 2016.

DOWNEY BRAND LLP

By: _____

DOWNEY BRAND LLP

EXHIBIT INDEX

EXHIBIT NO.	DESCRIPTION	LENGTH
1	Subscription Agreement	14 pages

DOWNEY BRAND LLP

Exhibit 1

Exhibit 1

SUBSCRIPTION BOOKLET

(for Founding Members)

CAL NEVA LODGE, LLC

SUBSCRIPTION INSTRUCTIONS

EACH POTENTIAL INVESTOR WHO WISHES TO SUBSCRIBE FOR FOUNDERS UNITS MUST COMPLETE, EXECUTE AND RETURN TO THE COMPANY THE FOLLOWING DOCUMENTS CONTAINED IN THIS SUBSCRIPTION BOOKLET (AS APPLICABLE):

(1) A Subscription Agreement;

(2) A Member Signature Page and Power of Attorney;

(3) A Certificate of Nonforeign Status (for Members who are individuals);

(4) A Certificate of Nonforeign Status (for Members who are entities);

(5) Investor's Instructions to Escrow and Wire Transfer Information; and

(6) IRS Form W-9.

ALSO, IF APPLICABLE, PLEASE DELIVER THE FOLLOWING:

IF THE POTENTIAL INVESTOR IS A TRUST, INCLUDE A COPY OF THE TRUST AGREEMENT.

IF THE POTENTIAL INVESTOR IS A PARTNERSHIP, INCLUDE A COPY OF THE SIGNED PARTNERSHIP AGREEMENT, AND A COMPLETED SUBSCRIPTION AGREEMENT FOR **EACH** PARTNER.

IF THE POTENTIAL INVESTOR IS A CORPORATION, INCLUDE A COPY OF THE BOARD RESOLUTION DESIGNATING THE CORPORATE OFFICER AUTHORIZED TO SIGN ON BEHALF OF THE CORPORATION AND AUTHORIZING THE INVESTMENT AND THE CORPORATION'S MOST RECENT FINANCIAL STATEMENTS.

IF POTENTIAL INVESTOR IS A LIMITED LIABILITY COMPANY, INCLUDE A COPY OF THE SIGNED OPERATING AGREEMENT AND THE ARTICLES OF ORGANIZATION OR CERTIFICATE OF FORMATION, AS FILED, AND A COMPLETED SUBSCRIPTION AGREEMENT FOR **EACH** MEMBER AND **EACH** MANAGER.

SUBSCRIPTION AGREEMENT

TO: CAL NEVA LODGE, LLC,
a Nevada limited liability company
c/o CR Cal Neva, LLC
1336-D Oak Street
St. Helena, California 94574

Potential Investor:

The undersigned (the "Purchaser"), by completing and executing this Subscription Agreement and the Member Signature Page and Power of Attorney, hereby tenders this subscription and applies for the purchase of the number of Founders Units (the "Founders Units") of CAL NEVA LODGE, LLC, a Nevada limited liability company (the "Company"), set forth below the Purchaser's signature hereto, at a price of $1,000,000 per Founders Unit (the "Purchase Price"). The Purchaser hereby acknowledges receipt of a copy of the Company's Confidential Private Placement Memorandum, dated _____ (the "Memorandum").

The Purchaser (or, if the Purchaser is signing in a fiduciary capacity, the person or persons for whom the fiduciary is signing) hereby represents and warrants to the Company that:

(a) The Purchaser is an "accredited investor" within the meaning of Regulation D promulgated under the Securities Act of 1933, as amended (the "Securities Act"). The specific category or categories of "accredited investor" applicable to the Purchaser are as follows:

A. AND B. ARE APPLICABLE TO INDIVIDUALS (Please INITIAL applicable blanks):

A. ____ The Purchaser is a natural person and has a net worth, either alone or with the Purchaser's spouse, of more than $1,000,000 (*excluding* the value of Purchaser's primary residence).

B. ____ The Purchaser is a natural person and had income in excess of $200,000 ($300,000 including income of spouse) during each of the previous two years and expects to have income in excess of such amounts during the current year.

C. THROUGH F. ARE APPLICABLE TO NON-INDIVIDUALS (Please INITIAL applicable blanks):

C. ____ The Purchaser is a trust with total assets in excess of $5,000,000, not formed for the specific purpose of acquiring the Founders Units, and the purchase is directed by a person meeting the criteria described in Subsection (g) below.

D. ____ The Purchaser is an employee benefit plan within the meaning of Title I of the Employee Retirement Income Security Act of 1974 that either (i) has its investment decisions made by a plan fiduciary, as defined by Section 3(21) of such Act, which is a bank, savings and loan association, insurance company or a registered investment adviser, or (ii) has total assets in excess of $5,000,000 or, if a self-directed plan, the investment decisions are made solely by persons who are accredited investors as described herein.

E. ____ The Purchaser is an entity (*excluding* a trust UNLESS it is a revocable grantor trust) in which all of the equity owners are accredited investors within categories A and B above.

F. _____ The Purchaser is a corporation, or a partnership, not formed for the specific purpose of acquiring the Founders Units, with total assets in excess of $5,000,000.

(b) The Purchaser understands that the Company has not registered the Founders Units under the Securities Act, or qualified the Founders Units under the applicable securities laws of any state, in reliance on exemptions from registration and qualification, and the Purchaser understands that such exemptions depend in large part on the Purchaser's investment intent at the time the Purchaser acquires the Founders Units;

(c) The Founders Units subscribed for herein will be acquired for the Purchaser's own account, for investment and not for resale or distribution to any person, corporation, or other entity, and the Purchaser has no intention of distributing or reselling the Founders Units;

(d) The Purchaser acknowledges that any disposition of the Founders Units is subject to restrictions imposed by federal and state law and that the certificates representing the Founders Units will bear a restrictive legend. The Purchaser also recognizes that the Founders Units cannot be disposed of by the Purchaser, absent registration and qualification, or an available exemption from registration and qualification, and that no undertaking has been made with regard to registering or qualifying the Founders Units in the future. The Purchaser understands that the availability of an exemption in the future will depend in part on circumstances outside the Purchaser's control and that the Purchaser may be required to hold the Founders Units for a substantial period. The Purchaser recognizes that no public market exists with respect to the Founders Units and no representation has been made to the Purchaser that such a public market will exist at a future date. The Purchaser understands that no state securities administrator or commissioner has made any finding or determination relating to the fairness for investment of the Founders Units and that no such administrator or commissioner has or will recommend or endorse the Founders Units;

(e) The Purchaser has not seen or received any advertisement or general solicitation with respect to the sale of the Founders Units;

(f) The Purchaser believes, by reason of the Purchaser's business or financial experience, that the Purchaser is capable of evaluating the merits and risks of this investment and of protecting the Purchaser's interest in connection with this investment;

(g) The Purchaser acknowledges that prior to acquiring the Founders Units, the Purchaser has been provided with financial and other written information about the Company and the terms and conditions of the offering. The Purchaser has been given the opportunity by the Company to obtain such information and ask such questions concerning the Company, the Founders Units and the Purchaser's investment as the Purchaser felt necessary, and to the extent the Purchaser took such opportunity, the Purchaser received satisfactory information and answers. If the Purchaser requested any additional information which the Company possessed or could acquire without unreasonable effort or expense which was necessary to verify the accuracy of the financial and other written information furnished to the Purchaser by the Company, such additional information was provided to the Purchaser and was satisfactory. In reaching the conclusion to acquire the Founders Units, the Purchaser has carefully evaluated the Purchaser's financial resources and investment position and the risks associated with this investment, and the Purchaser acknowledges that the Purchaser is able to bear the economic risks of this investment. The Purchaser further acknowledges that the Purchaser's financial condition is such that the Purchaser is not under any present necessity or constraint to dispose of the Founders Units to satisfy any existing or contemplated debt or undertaking;

(h) The Purchaser hereby accepts full and sole responsibility for all state and federal tax consequences which may result from the Purchaser's acquisition of the Founders Units;

(i) The Purchaser, if subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), has taken into consideration the diversification requirements of ERISA prior to making an investment in the Founders Units;

(j) The Purchaser, if executing this Subscription Agreement and the Member Signature Page and Power of Attorney in a representative or fiduciary capacity, has full power and authority to execute and deliver this Subscription Agreement, the Operating Agreement and the Member Signature Page and Power of Attorney on behalf of the subscribing individual, partnership, trust, estate, corporation, or other entity for whom the Purchaser is executing such

documents, and such individual, partnership, trust, estate, corporation, or other entity has full right and power to perform pursuant to such documents and to become a member in the Company pursuant to the Operating Agreement;

(k) The Purchaser has thoroughly read the Memorandum and all documents attached thereto, and understands the contents of such documents. The Purchaser is familiar with the Company's business objectives and financial arrangements in connection therewith and believes the Founders Units that the Purchaser is purchasing are the kind of securities that the Purchaser wishes to hold for investment and that the nature and purchase price of the Founders Units are consistent with the Purchaser's investment program. No representations or warranties have been made to the Purchaser regarding this investment contrary to those contained in the Memorandum and attached documents, and the Purchaser agrees to inform the Company if the Purchaser learns that any statements made to the Purchaser in connection with the Purchaser's investment in the Company are untrue. The information set forth herein is true and correct;

(l) The Purchaser acknowledges and agrees that the Purchaser is not entitled to cancel, terminate or revoke this Subscription Agreement or any of the Purchaser's agreements hereunder and that this Subscription Agreement and any other agreements made hereby shall survive Purchaser's death or disability; and

(m) The Purchaser has such knowledge and experience in financial and business matters and in investments to be capable of evaluating the merits and risks of the investment in the Founders Units.

In addition, the Purchaser:

(1) Understands that the Founders Units being acquired will be governed by the Operating Agreement;

(2) Understands that the Company shall have the right to accept or reject this subscription in whole or in part in its sole and absolute discretion;

(3) Understands that no public market for the Founders Units exists, or is likely to develop, and that it may not be possible to liquidate this investment readily, if at all, in the case of an emergency or for any other reason;

(4) Understands that the Founders Units are subject to transfer restrictions as set forth in the Operating Agreement;

(5) Acknowledges that to extent desired the Purchaser has consulted with the Purchaser's financial, business and tax advisers before executing this Subscription Agreement;

(6) Acknowledges and agrees that a breach by the Purchaser of any of the Purchaser's representations made herein which results in a loss by the Company of the exemptions from registration and qualification requirements under applicable federal and state securities laws will cause the Purchaser to be liable to the Company for all damages and losses caused thereby;

(7) If the consideration to be delivered is cash, Purchaser agrees to deliver the Purchase Price via bank wire transfer to the Company (or directly to the designated third-party escrow for the benefit of the Company, as applicable), see wire transfer instructions attached hereto, no later than three days after delivery of email notice by the Company to the Purchaser (the "Funding Notice") and acknowledges that the Purchaser's failure to timely deliver the Purchase Price will materially and adversely affect the Offering, the other investors and the Company and that the Purchaser will be responsible for all damages and losses that result from the Purchaser's failure to timely deliver the Purchase Price; and

(8) Acknowledges and agrees that any funds delivered by the Purchaser to a designated third-party escrow for the benefit of the Company will be delivered to the Company (not Purchaser) upon either the termination or successful closing of the Offering, and that such funds will be returned to Purchaser by the Company only if the Company at the time of termination has not accepted subscriptions of at least $14,000,000 (the "Offering Minimum").

This Subscription Agreement and all rights hereunder, shall be governed by, and interpreted in accordance with, the laws of the State of Nevada.

[Signature Page Follows]

IN WITNESS WHEREOF, the Purchaser has duly executed and delivered this Subscription Agreement effective as of the date set forth below.

Date: 10-12, 2015

[CORPORATION/TRUST]

"PURCHASER"
Premier Trust, Inc. Custodian FBO
George Stuart Yount, IRA

By: Deb Erdmann

Title: DEBORAH ERDMANN
VP / TRUST OFFICER

By: _____

Title: _____

Address: Premier Trust, Inc.
4465 S. Jones Boulevard
Las Vegas, NV 89103

EMAIL ADDRESS: KKlein@premiertrust.com

Taxpayer ID No.: 1761

Subscription Amount: $1,000,000.00

Number of Founders Units ($1,000,000 Each): _____

I hereby confirm that the trust named above is a revocable grantor trust in which each of the grantors is an individually accredited investor as described in Sections (a) A. or B. of this Subscription Agreement.

By: _____

Title: _____

ACCEPTANCE OF SUBSCRIPTION

THE FOREGOING SUBSCRIPTION IS HEREBY ACCEPTED FOR 1 FOUNDERS UNITS.

DATED: Oct 13, 2015

CAL NEVA LODGE, LLC

By: CR CAL NEVA, LLC, a Nevada limited liability company, Manager

By: _____

Title: President

Form **W-9**
(Rev. August 2013)
Department of the Treasury
Internal Revenue Service

Request for Taxpayer Identification Number and Certification

Give Form to the requester. Do not send to the IRS.

Print or type
See Specific Instructions on page 2.

Name (as shown on your income tax return)
Premier Trust, Inc. Custodian FBO George Stuart Yount, IRA

Business name/disregarded entity name, if different from above

Check appropriate box for federal tax classification:
☐ Individual/sole proprietor ☐ C Corporation ☐ S Corporation ☐ Partnership ☐ Trust/estate

☐ Limited liability company. Enter the tax classification (C=C corporation, S=S corporation, P=partnership) ▶

☒ Other (see instructions) ▶

Exemptions (see instructions):
Exempt payee code (if any)
Exemption from FATCA reporting code (if any)

Address (number, street, and apt. or suite no.)
Premier Trust, Inc.
4465 S. Jones Boulevard

Requester's name and address (optional)

City, state, and ZIP code
Las Vegas, NV 89103

List account number(s) here (optional)

Part I Taxpayer Identification Number (TIN)

Enter your TIN in the appropriate box. The TIN provided must match the name given on the "Name" line to avoid backup withholding. For individuals, this is your social security number (SSN). However, for a resident alien, sole proprietor, or disregarded entity, see the Part I instructions on page 3. For other entities, it is your employer identification number (EIN). If you do not have a number, see *How to get a TIN* on page 3.

Social security number
___ - ___ - ____

Note. If the account is in more than one name, see the chart on page 4 for guidelines on whose number to enter.

Employer identification number
__-1761

Part II Certification

Under penalties of perjury, I certify that:

1. The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me), and
2. I am not subject to backup withholding because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding, and
3. I am a U.S. citizen or other U.S. person (defined below), and
4. The FATCA code(s) entered on this form (if any) indicating that I am exempt from FATCA reporting is correct.

Certification instructions. You must cross out item 2 above if you have been notified by the IRS that you are currently subject to backup withholding because you have failed to report all interest and dividends on your tax return. For real estate transactions, item 2 does not apply. For mortgage interest paid, acquisition or abandonment of secured property, cancellation of debt, contributions to an individual retirement arrangement (IRA), and generally, payments other than interest and dividends, you are not required to sign the certification, but you must provide your correct TIN. See the instructions on page 3.

Sign Here Signature of U.S. person ▶ [signature] Date ▶ 10/12/15

General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

Future developments. The IRS has created a page on IRS.gov for information about Form W-9, at *www.irs.gov/w9*. Information about any future developments affecting Form W-9 (such as legislation enacted after we release it) will be posted on that page.

Purpose of Form

A person who is required to file an information return with the IRS must obtain your correct taxpayer identification number (TIN) to report, for example, income paid to you, payments made to you in settlement of payment card and third party network transactions, real estate transactions, mortgage interest you paid, acquisition or abandonment of secured property, cancellation of debt, or contributions you made to an IRA.

Use Form W-9 only if you are a U.S. person (including a resident alien), to provide your correct TIN to the person requesting it (the requester) and, when applicable, to:

1. Certify that the TIN you are giving is correct (or you are waiting for a number to be issued),
2. Certify that you are not subject to backup withholding, or
3. Claim exemption from backup withholding if you are a U.S. exempt payee. If applicable, you are also certifying that as a U.S. person, your allocable share of any partnership income from a U.S. trade or business is not subject to the withholding tax on foreign partners' share of effectively connected income, and
4. Certify that FATCA code(s) entered on this form (if any) indicating that you are exempt from the FATCA reporting, is correct.

Note. If you are a U.S. person and a requester gives you a form other than Form W-9 to request your TIN, you must use the requester's form if it is substantially similar to this Form W-9.

Definition of a U.S. person. For federal tax purposes, you are considered a U.S. person if you are:

- An individual who is a U.S. citizen or U.S. resident alien,
- A partnership, corporation, company, or association created or organized in the United States or under the laws of the United States,
- An estate (other than a foreign estate), or
- A domestic trust (as defined in Regulations section 301.7701-7).

Special rules for partnerships. Partnerships that conduct a trade or business in the United States are generally required to pay a withholding tax under section 1446 on any foreign partners' share of effectively connected taxable income from such business. Further, in certain cases where a Form W-9 has not been received, the rules under section 1446 require a partnership to presume that a partner is a foreign person, and pay the section 1446 withholding tax. Therefore, if you are a U.S. person that is a partner in a partnership conducting a trade or business in the United States, provide Form W-9 to the partnership to establish your U.S. status and avoid section 1446 withholding on your share of partnership income.

MEMBER SIGNATURE PAGE AND POWER OF ATTORNEY

CAL NEVA LODGE, LLC,
a Nevada limited liability company

The undersigned, desiring to become a Member of CAL NEVA LODGE, LLC, a Nevada limited liability company (the "Company") hereby agrees to all of the terms and conditions of the Amended and Restated Operating Agreement of the Company (the "Operating Agreement") referred to, described in, and attached as an Exhibit to, the Company's Confidential Private Placement Memorandum dated 10-12-15 (the "Memorandum"), and agrees to be bound thereby. Any capitalized term contained herein that is not defined herein shall have the meaning set forth in the Operating Agreement.

The undersigned further grants to the Manager of the Company (the "Manager"), a special Power of Attorney irrevocably making, constituting and appointing the Manager as the undersigned's attorney-in-fact with full power of substitution with power and authority to act in the undersigned's name and on the undersigned's behalf, to execute, acknowledge and swear to in the execution, acknowledgment, and filing of documents which shall include, by way of illustration but not of limitation, the following:

(a) The Operating Agreement of the Company, any amendments to the foregoing which, under the laws of the State of California or the laws of any other state, are required to be executed or filed or which the Company deems to be advisable to execute or file;

(b) Any other instrument or document which may be required to be filed by the Company under the laws of any state or by any governmental agency;

(c) Any instrument or document which may be required to effect the continuation of the Company, the admission of an additional or substituted Members, or the dissolution and termination of the Company (provided the continuation, admission or dissolution and termination are in accordance with the terms of the Operating Agreement) or to reflect any reduction in the amount of capital contributions of the Members; and

(d) Any other documents deemed by the Manager to be necessary for the business of the Company.

The Power of Attorney granted hereby is a special Power of Attorney coupled with an interest, is irrevocable, shall survive the death or incapacity of the undersigned and is limited to the matters set forth herein. This special Power of Attorney may be exercised by the Manager, acting for the undersigned by a facsimile signature of the Manager; this Power of Attorney shall survive an assignment by the undersigned of all or any portion of the undersigned's Founders Units, but only until the assignee of the Founders Units is recognized as the owner of the Founders Units as set forth in the Operating Agreement.

[Signature Page Follows]

THIS SUBSCRIPTION IS FOR 1 FOUNDERS UNITS ($1,000,000.00 EACH).

TOTAL INVESTMENT AMOUNT: $ 1,000,000.00

Executed on 10-12, 2015, at Las Vegas, Nevada

Signature of Subscriber

Signature of Subscriber

Social Security Nos.: 1761

Driver's License Nos.

Email Address: KKlein@premiertrust.com

Home Address: Premier Trust, Inc.
City: 4465 S. Jones Boulevard State:
Zip: Las Vegas, NV 89103

Home Phone: ( )

Business Address: Premier Trust, Inc.
City: 4465 S. Jones Boulevard State:
Zip: Las Vegas, NV 89103

Business Phone: (702) 207-0750

REGISTRATION:
PLEASE PRINT YOUR NAME(S) EXACTLY AS YOUR FOUNDERS UNITS ARE TO BE REGISTERED:

TITLE REGISTRATION PREFERENCE
CHECK ONE

A. ___ Individual Ownership
B. ___ Joint Tenants with Right of Survivorship (ALL MUST SIGN)
C. ___ Trust (Date Trust Established _____)
D. ___ Partnership
E. ___ Community Property
F. ___ Tenants in Common (ALL MUST SIGN)
G. ___ Corporation
H. ___ Limited Liability Company
I. X Other Retirement Plan I, etA

CERTIFICATE OF NONFOREIGN STATUS

Members That Are Entities

Section 1446 of the Internal Revenue Code provides that a limited liability company taxed as a partnership must pay a withholding tax to the Internal Revenue Service with respect to a member's allocable share of such limited liability company's effectively connected taxable income, if the member is a foreign person. To inform **CAL NEVA LODGE, LLC**, a Nevada limited liability company (the "Company") that the provisions of Section 1446 do not apply, the undersigned hereby certifies on behalf of Premier Trust, Inc. Custodian FBO: George Stuart Yount, IRA (name of entity) (the "Member") the following:

1. The Member is not a foreign corporation, foreign partnership, foreign trust, or foreign estate (as those terms are defined in the Internal Revenue Code and Income Tax Regulations);

2. The Member's U.S. employer identification number is: 1761; and

3. The Member's principal office address is: Premier Trust, Inc. 4465 S. Jones Boulevard Las Vegas, NV 89103.

The Member hereby agrees to notify the Company within 60 days if the Member becomes a foreign person and agrees to execute a new Certificate of Nonforeign Status from time to time as required by the Company. The Member understands that this certification may be disclosed to the Internal Revenue Service by the Company and that any false statement contained herein could be punished by fine, imprisonment or both.

Under penalty of perjury, I declare that I have examined this certification and to the best of my knowledge and belief, it is true, correct, and complete, and I further declare that I have authority to sign this document on behalf of the Member.

Dated: 10-12, 2015

(Please print name of Member)
By: [signature]
Title: DEBORAH ERDMANN
VP / TRUST OFFICER

(Please print name and title of person signing this Certificate)

INVESTOR'S INSTRUCTION TO ESCROW AND WIRE TRANSFER INFORMATION

I hereby instruct Powell Coleman & Arnold LLP ("Escrow Holder") to accept the sum of $ 1,000,000 by. This sum is my investment in Cal Neva Lodge, LLC (the "Company"). I direct that this sum be placed in an escrow (the "Escrow") and retained by Escrow Holder until such time as either subscriptions for 14 Units are accepted and deposited into the Escrow representing a total sum of $14,000,000 or the subscription period sooner expires by its terms under the Subscription Agreement, now scheduled for expiration on April 30, 2014 (unless extended for up to 90 days by the Company) (the "Termination Date"). Escrow Holder's wire transfer information is set forth below.

In the event that the total amount held in the Escrow reaches $14,000,000, I further instruct Escrow Holder to disburse my funds deposited into the Escrow to the Company or its designated representative or agent. I acknowledge having read the Subscription Agreement and Confidential Private Placement Memorandum copies of which I received from the Company.

If, before the Termination Date, the amount deposited into the Escrow has not reached $14,000,000, I direct Escrow Holder to return my investment of $ 1,000,000. by check directly to me at the following address:

Premier Trust, inc.
4465 S. Jones Boulevard
Las Vegas, NV 89103

By my signature below I agree that Escrow Holder has no duty to me other than to disburse the funds contained in the Escrow as instructed when one or the other of the above described events occurs. I further advise Escrow Holder that I have given the Manager of the Company a power of attorney to act for me in all matters related to the Escrow with the exception of modifying or canceling all Escrow Instructions, which modification or cancellation must be in a writing signed by all of the Investors unless all of the monies deposited into the Escrow are returned to the respective investor in connection with such modification or cancellation.

Premier Trust, Inc. Custodian FBO

Date: 10-12, 2015

Investor Signature
SSN: 1761
Telephone No.: 702 307 0770

DEBORAH ERDMANN
VP / TRUST OFFICER

Investor Signature
SSN:
Telephone No.:

Escrow Holder's Wire Transfer Information:

BBVA Compass Bank
8080 N. Central Expressway
Dallas, Texas 75206

Powell Coleman & Arnold LLP
IOLTA Account No.: 3816
ABA No.: 7445

Corporate Resolution
of
Premier Trust, Inc.

A Board of Directors Resolution executed on July 24, 2001 appointed and resolved the following named individual be empowered to sign documents on behalf of the Corporation:

Mark Dreschler — President, Secretary, Treasurer

AND, a Board of Directors Resolution executed on April 15, 2010, appointed and resolved the following named individual be empowered to sign documents of behalf of the Corporation:

Nancy Dirk — Assistant Treasurer

AND, a Board of Directors Resolution executed on April 15, 2010, appointed and resolved the following named individual be empowered to sign documents on behalf of the Corporation:

Stacy Libbey — Assistant Secretary

AND, a Board of Directors Resolution executed on April 1, 2015, appointed and resolved the following named individuals be empowered by this Corporate Resolution to sign documents as the Fiduciary, pursuant to the governing document, on behalf of the Corporation:

Kathleen M. Allinger	Trust Officer
Marsha G. Walters	Trust Officer
Deborah Erdmann	Trust Officer
Brian Simmons	Trust Officer
Susan Callaghan	Trust Officer
Asif Siddiq	Trust Officer
Nicole Shrive	Trust Officer
Janette Garcia	Operations Officer

I, Stacy Libbey, was duly appointed Assistant Secretary of Premier Trust Inc. on April 15, 2010. I do hereby certify that said Resolution dated April 1, 2015 is in force and effect at this time.

April 1, 2015
Date

Stacy Libbey, Assistant Secretary

The following specimen signatures are provided for your reference:

Mark Dreschler, President

Stacy Libbey, Assistant Secretary

Nancy Dirk, Assistant Treasurer

Marsha G. Walters, Trust Officer

Kathleen M. Allinger, Trust Officer

Deborah Erdmann, Trust Officer

Brian Simmons, Trust Officer

Susan Callaghan, Trust Officer

Asif Siddiq, Trust Officer

Nicole Shrive, Trust Officer

Janette Garcia, Operations Officer

STATE OF NEVADA }
COUNTY OF CLARK } ss:

On April 1, 2015, personally appeared before me, a Notary Public in and for said County and State, Stacy Libbey who acknowledged to me that she executed the foregoing instrument.

Notary Public

ASHLEY RIESEN
Notary Public State of Nevada
No. 13-10820-1
My appt. exp. Mar. 28, 2017

EXHIBIT B

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

THE COURT: All right.

MR. CAMPBELL: Again, your Honor --

THE COURT: I understand.

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

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

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(A break was taken.)

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

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

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Neva and that's Exhibit 1. He was not involved in the sale of securities. He invested in Cal Neva Lodge LLC. He never told any investor that he had investigated any representation in the operating agreement.

He met Mr. Yount in 1996 at a barbecue. He considered him a friend and that's not unusual up in a close community like Incline Village. They met at lunch sometime in June and Mr. Yount inquired, how is the project going? Mr. Marriner offered to take him on a tour of the Cal Neva site.

He had told Mr. Yount that they were looking to open on December 12th, which was the 100th anniversary of Frank Sinatra's birthday. And he sent Mr. Yount the latest executive committee reports. Told Mr. Yount at that time that the opening date was still 12/12/2015. And he also told that there was 1.5 million, the last tranche available for investment under the PPM.

He forwarded Exhibit 3, which was the PPM, to Mr. Yount. He also sent the latest construction report, which was July, and Exhibit 8 to Mr. Yount. Again, he stated they were looking at a target date for opening of December 12th. This is sometime in June that these discussions and e-mails took place.

He sent Mr. Yount the term sheets through an

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e-mail, which is Exhibit 11. In those term sheets are disclaimers. Mr. Yount testified he read those. And on Exhibit 12, Mr. Marriner sent another e-mail to Mr. Yount asking if he had any questions. And Mr. Yount responded with some questions and they were directed to Mr. Radovan.

Exhibit 12 is the July status report, which contains the change orders and the impact those change orders had on the development of the project. Exhibit 14 is another e-mail from Mr. Marriner to Mr. Yount saying that Mr. Radovan will get back to Mr. Yount to answer all of those questions that he had raised. And Exhibit 18 is an e-mail from Mr. Radovan to Mr. Yount, which was cced to Mr. Marriner, which responded to the 11 questions asked by Mr. Yount. They discussed a $15 million mezzanine loan to cover the change orders, as well as potential upgrades and expanding the scope of construction.

Mr. Marriner was never involved in the financing of this project. He was not involved with the executive committee, the construction committee, and he was not privy to the figures being bantered about amongst those entities.

Mr. Marriner never gave Mr. Yount any specific numbers on the change orders. Mr. Marriner was never involved with Hall or the business discussions regarding potential financing by Hall. Mr. Marriner has a background

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in construction and clearly knows that unless you have capital, the project dies. Mr. Marriner never spoke to Mr. Yount regarding the destination of his $1 million investment.

Exhibit 29, which is the e-mail string from August to September 28th, Mr. Marriner was trying to be helpful in assisting Mr. Yount in moving money around. He sent an e-mail, which is Exhibit 30, which states that Robert hopes to close out the funding very soon.

Mr. Marriner never spoke to Mr. Yount regarding the Mosaic loan. Mr. Marriner testified that Hall still had $5 million to loan, that they were looking at a $15 million mezzanine loan, and that Mosaic loan was still in the works, and he believed the project was still on schedule.

He talked about a perfect storm, that is, simultaneous investments of Mr. Yount and Mr. Busick. However, he was informed by Mr. Radovan that CR still had another funding membership available under the PPM.

Two weeks afterwards, Mr. Yount invested in Cal Neva Lodge LLC. Mr. Marriner testified that there is no difference between the two shares, that is, the shares of Mr. Busick and the shares of CR Cal Neva. But he was told by Mr. Radovan that he would take -- that Mr. Radovan would take care of the plaintiff's investment.

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Mr. Marriner was clear in his testimony that this is not a security. This was a real estate investment. Mr. Marriner knew that through -- that Mr. Radovan had an additional founding membership available for Mr. Yount.

Mr. Marriner knew that the Mosaic $50 million loan was the best solution for financing and taking this project to closure of construction.

After the December 12th meeting, Mr. Marriner testified that there was a general feeling among the investors for a need for more transparency and greater financial reports, more frequent financial reports. He knew that $8.6 million in cost overruns were there for work that had already been done and was proposed in the future.

On cross examination by Mr. Wolf, Mr. Marriner reiterated in an e-mail dated August 3rd, 2015, that Mr. Yount was dealing directly with Mr. Radovan and it was a hand-off from -- by Mr. Marriner of Mr. Yount to Mr. Radovan.

Mr. Marriner testified that Mr. Yount conducted due diligence between July 25th and August 3rd, spoke to Peter Grove, the architect, who coincidentally is or was the architect for Mr. Yount's personal residence. Mr. Marriner testified that the information provided to Mr. Yount was fair and was accurate.

Mr. Marriner testified that Mr. Yount knew that

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Mr. Radovan needed more money and he attempted to help by engaging the Wittenbergs and Boulder Bay as potential investors. Mr. Marriner testified that there was no false information provided to Mr. Yount and he had sent all the executive committee reports to Mr. Yount and that he had no reason to doubt the veracity of the information contained therein. Exhibit 10, the construction summary was given to Mr. Yount before he invested and Mr. Yount was fully advised as to the status of the project.

Mr. Marriner testified as to Mr. Busick's site visit, and at that time, the tower was finished or approximately 95 percent done. Mr. Busick was on the executive committee. He was one of the original, if not the original investor in this project. He had a background in construction.

Mr. Marriner testified that there was a lot of activity on that site. That Mr. Busick appeared pleased with the progress with construction. That Mr. Busick felt they could make the opening. Lee Mason, a representative of Penta Construction, also appeared to be excited, as was Mr. Marriner. It looked as if the project was close to being finished. It appeared to be a very good job.

On September 30th, Mr. Marriner testified that there was no adverse information to be shared with Mr. Yount.

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That there was no indication of a problem at that time.

As to the CR share, Mr. Marriner testified that he was pleased to have a share available for Mr. Yount. That there was no indication that CR was, quote, bailing out, close quote, of the project. That the CR shares were part of the original 20 founding shares and there were no differences between the CR shares and the other shares.

Mr. Marriner testified he was very excited about this project. He labeled it as, quote, sensational, close quote, project. And he was devastated professionally and personally over the loss of this project, this lawsuit, his reputation, and his friends.

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On cross examination by Mr. Little, he pointed out in Exhibit 3 that Exhibit 3 contained a disclosure that this was not a security and explained the risk of such a speculative investment.

Mr. Marriner pointed out his background in construction and testified that renovating old properties raise common problems, that this was a fluid project, and the monthly status reports, which is Exhibit 10, were prepared by third parties. And on page 16 of Exhibit 10 identifies the adverse impact some of these changes had, particularly the sewer, on the project's progress and that the information contained therein was accurate.

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Exhibit 14 was identified as an e-mail, which demonstrated that Mr. Yount knew of the debt. Exhibit 13 was an e-mail from Mr. Yount's architect, Peter Grove, who termed the project to be very good. Mr. Yount's CPA reviewed the investment. The testimony is Mr. Yount never asked for any additional information.

Exhibit 27 is an e-mail from the -- from Mr. Yount to his CPA, which demonstrates that Mr. Yount knew that the opening was being pushed back to March. Exhibit 36 is an e-mail three days before Mr. Yount's investment, which demonstrates he knew the opening was for Father's Day.

Mr. Yount took a site visit with Mr. Lee Mason and questioned whether or not the change orders were necessary. There did not appear to be any red flags and Mr. Marriner felt optimistic about the project. Exhibit 37 is an e-mail dated October 10th, which introduced the new general manager and the chef to the investors.

Mr. Marriner testified to the deal with Starwood in which the Cal Neva Lodge would be added to the Starwood's luxury collection. And he testified that it certainly did not look like the project was about to fail.

Mr. Marriner found no improprieties by Criswell Radovan and that in fact Criswell Radovan was still in charge of this project. Mr. Marriner testified that there was no

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involvement by Mr. Criswell in Mr. Yount's investment.

Mr. Marriner testified that selling of the CR founders share was not taking money out of the company and the transfer was specifically authorized by Exhibit 5, section 12.1, 12.3, 12.4, and 12.6.2.

On redirect, Mr. Marriner again walked through the financials, Exhibit 4 and Exhibit 60, which was an e-mail by Mr. Marriner to all the investors.

Mr. Criswell testified, testified that he was a partner in CR LLC, which was a limited liability company used as conduit to move money into and out of a particular project. That he had a separate LLC for each project when the project was funded. And that CR Cal Neva LLC was the manager of an SPE.

He testified that they purchased the Cal Neva for $13 million in a joint venture with Canyon and walked through that transaction. He testified that CR had $2 million into the project.

He testified that the construction budget was prepared by third parties, Hal Thannisch, Penta Construction, and perhaps the architect. Nevertheless, it was outside sources.

Mr. Criswell testified that his daughter invested $220,000 to cover short-term debts. That CR was to receive a

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development fee of $60,000 a month with a cap of 2.2 million.

Mr. Criswell testified to a July 2015 executive committee meeting wherein the parties discussed the budget shortfall of 2.5 to 5 million. They discussed financing options. They discussed the Ladera loan. And in order to meet future and present needs, they discussed the mezzanine loan. And in August and September, the parties discussed a total refinance of the project.

Mr. Criswell testified on October 10th he became aware of the Busick investment and that Mr. Yount funded several days later. Mr. Criswell testified that Mr. Radovan asked for his consent to sell a CR founders share to Yount. Everyone, apparently, everybody wanted to have Mr. Yount participate in the Cal Neva project.

Exhibit 33 is from Heather Hill, an employee of CR, to Bruce Coleman, who is the general counsel for Criswell Development Corporation in the past. Mr. Criswell testified that he believed he never needed prior approval for the Yount transaction and that he had in fact prior approval for that transfer and that there was no discussion of securities fraud.

Mr. Criswell testified to the 12/12 executive committee meeting before the party, which meeting was expanded to include all the investors, who were told that the

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project was over budget due to cost overruns. Mr. Criswell wanted the executive committee's approval for the Mosaic loan with changes to at least get a conditional commitment.

The executive committee did not approve the Mosaic loan at that time. They asked Mr. Radovan to hold off to see if they couldn't explore other options.

Mr. Criswell testified that the cost overruns were discussed in July and the discussions in the December meeting centered on Mosaic's loan. Mr. Criswell testified that the IMC, Incline Men's Club, the largest investor at $6 million in this project disagreed with his approach. However, Mr. Criswell testified that those were the only dissidents and the rest of the investors -- the rest of the investors approved of their approach to Mosaic.

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At that party, Mr. Criswell reached out to Mr. Yount and Mr. Criswell testified that Mr. Yount told him that he didn't know about all of these cost overruns and extra expenses and the financial condition of the project. Mr. Criswell testified that they probably could have done a better job reporting to investors about the financing and the status of the construction.

Mr. Criswell testified that the EC was provided monthly budget reports and they were prepared by Thannisch and Penta. Mr. Criswell testified he saw the cost overruns

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in the September report, which was before Mr. Yount invested in the project.

Mr. Criswell testified that they were looking at a December 12th substantial completion date. That they still had $9 million from Hall to complete or that they had the option to raise additional capital from the investors.

Exhibit 46 is an e-mail from Mr. Yount requesting the return of his $1 million investment. Ms. Clerk, can I have Exhibit 43?

Mr. Criswell testified that he told Mr. Yount that he would try and find someone to buy his share and that he felt this was going to be very easy to find other investors. However, Mr. Criswell testified that Mr. Yount had already been provided all of this information beforehand.

Mr. Criswell testified that CR had advanced $900,000 over time reflected in journal entries. And that Mr. Yount's money was spent paying past due bills on the Cal Neva, as well as other Criswell Radovan projects.

Exhibit 49 is an e-mail packet with material dated 12/17/15. It shows in big black bold title page, 35 million in debt, 20 million in equity, $55 million project. This is important, because throughout these proceedings there's been an allegation that these numbers were not shared and were misleading. The Court finds that these numbers provided by

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the defendants were remarkably accurate and it's spot on.

Mr. Criswell testified that afterwards he found out that Mr. Yount wanted a preferred share. However, he testified that is what he got, because the Criswell -- the CR share was a founders share.

On cross examination by Mr. Little, Mr. Criswell testified that Mr. Radovan told the executive committee of the cost overruns and a number of 9.3 million and that they needed financing. There was a number of 10.5 million discussed as well.

Mr. Criswell testified that there's no difference between a CR share, founders share, and the share Mr. Busick purchased.

Mr. Criswell testified to his professional background in construction and hotel development, which is impressive. He had developed the Four Seasons Hotel in Dublin, wineries in Napa, other resorts that are award winning.

He testified to meeting Mr. Radovan while Mr. Criswell was serving in the Navy as a supervisor for the Navy Special Operations and Mr. Radovan was a United States Navy Seal. Impressive credentials for any individual.

Mr. Criswell testified he never met Mr. Yount before his investment and that the information provided to

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Mr. Yount was truthful and accurate. That CR was authorized to sell the two founders shares. And on redirect, when shown Exhibit 4 on page nine, demonstrated that there was an interest reserve for the loan and that the CR share was the same founders share as that bought by Mr. Busick.

That the information was given to the plaintiff was accurate and consistent with the information that Mr. Radovan gave to the executive committee and Mr. Yount, which included monthly reports, financial documents, and that the numbers were consistent.

Mr. Criswell testified that the Ladera agreement required CR to keep $1 million in the project. Exhibit 150, page three, section five, showed that there was no prepayment penalty on the Ladera loan.

Mr. Criswell testified that Mr. Yount was not prevented from asking for any documents or information. And that Mr. Busick's $1.5 million investment went into the project and indeed was more advantageous than the investment by Mr. Yount, because it infused an additional half million dollars into the project.

Mr. Wolf cross-examined Mr. Criswell and demonstrated that the pro forma had projected a $51 million project, that the change orders were anticipated, and that the added scope included a new kitchen and the condo

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development.

Mr. Radovan testified as to Exhibit 5, Exhibit 4, the guaranteed maximum price contract, Exhibit 1, and stated that he was aware of Mr. Yount's interest in this project in July and he was aware that Mr. Yount had been given Exhibits 3, 4 and 5.

Mr. Radovan testified he knew the Hall loan was out of balance in July of 2015 and that he knew the opening would have to be pushed back because of the sewer pipe and other change orders and the requirements imposed by Starwood.

He testified that he told Mr. Yount's CPA that the opening was pushed back because of the construction issues and he told Mr. Yount about the scheduled pushback. Exhibit 36, which is the e-mail of October 10th to Mr. Yount's architect, Peter Grove, and to his CPA regarding pushing back the dates of the opening. This was two days before Mr. Yount's investment.

Mr. Radovan testified he told Mr. Yount that they were raising $9 million because they knew more change orders were coming. Mr. Radovan testified to a conversation he had with Mr. Yount's CPA in August. That he doesn't know if Mr. Marriner knew of the pushback dates. In deposition, he did correct that testimony and stated that Mr. Marriner did know of the pushback dates.

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Mr. Radovan testified to the Mosaic loan that was in the works as of -- in September of 2015. That they were looking at a high 40 million of dollars. The project was looking for different options for financing, including a capital call, which was discussed in April.

Mr. Radovan testified that the issues relating to the tower were 95 percent complete and the restaurant was 85 percent complete.

Mr. Radovan testified that the executive committee agreed to take the loan up in early November seeking an additional $16 million in debt.

Throughout this time, Mr. Radovan testified he was vaguely aware of Mr. Yount's interest in the project. Exhibit 29 is an e-mail between Mr. Yount and Mr. Marriner and there was no indication that the plaintiff would invest in the project. It had been three to four months of inactivity by Mr. Yount.

Mr. Yount was in the process of trying to extricate the money out of his 401K, but as everybody testified, there was radio silence between the parties during this time.

Mr. Radovan testified that he spoke to Mr. Busick after Labor Day, who expressed some interest in investing in the $1.5 million tranche, as well as, and this is important,

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three to four other potential investors. They had a meeting in Napa at the defendant's office in Napa with Mr. Busick's son. And, subsequently, on the 29th, the Busicks invested.

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.

In Exhibit 33, the assistant, which I believe is Ms. Hill, discussed a swap agreement, and Mr. Radovan wanted to know if there was anything required to properly effectuate the transfer of the CR founders share to Mr. Yount who was seeking to purchase a founders share.

It required under Exhibit 5, the operating agreement, which is article 12.2 and 12.3, one, that Mr. Yount sign the PPM; two, that the transfer be approved at the next meeting or annual meeting, or in writing; and, three, even if it was not approved, the buyer would keep the beneficial interest.

Mr. Coleman testified that he was counsel for Mr. Criswell back in 1982 and he had met Mr. Radovan in 2000. They had formed CR and worked on 20 projects. There were only two projects in litigation and two in bankruptcy back in the '80s. But most importantly, those were not CR projects.

Mr. Coleman testified that he was contacted regarding the Cal Neva project and with Brandon Iverson

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formed several LLCs and the operating agreement.

Exhibit 3, Exhibit 5 were discussed. Section 7.4 of Exhibit 5, demonstrates that CR put in $2 million into the project for two shares and there was a journal error of $480,000, which was subsequently reconciled.

Mr. Coleman testified that the subscription agreement advises the investors that this is not a security. It is a private placement memorandum. And that they must be a qualified investor. Mr. Coleman testified that there were no written escrow instructions.

Exhibit 33 is an e-mail from Ms. Hill to Mr. Coleman discussing the transfer. Exhibit 33 is an e-mail dated October 2nd and he had said that -- excuse me -- Mr. Coleman had heard that Mr. Busick was interested in increasing his investment and that CR was selling one of their two shares.

Exhibit 42 is the e-mail regarding Mr. Yount's investment. Money came into Mr. Coleman's escrow account and went out the next day.

Mr. Coleman was questioned as to whether this was a swap, was this an assignment of the CR per the operating agreement? Mr. Coleman was emphatic, it was neither. It was simply CR selling their share. It was simply Mr. Yount buying a member's share and stepping into the shoes of CR and

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becoming a member.

The effective date was backdated so as to give Mr. Yount every day of interest he was due under the agreement.

On cross examination by Mr. Little, Mr. Coleman testified he was instructed to wire Mr. Yount's money to CR. He says this was simply a common transaction of one owner selling a share to a buyer. He testified under -- as to Exhibit 5, section 12.3, that the approval was at, quote, the next member meeting, close quote. 12.4 required approval, quote, after the transferee executes the documents, close quote. That there was no preapproval needed and that CR share is a founders share. And under 12.6.2, even if the transfer is not approved, that Mr. Yount would still have the economic benefit of the $1 million investment. That this was simply a personal, private transaction.

On redirect, Mr. Radovan was called back to the stand. He testified that he told Mr. Yount about the $9 million in change orders in July. He had a conversation with Mr. Yount regarding the change orders and Exhibit 18. He had a conversation regarding the transfer and sent documents to Mr. Yount. In October and November, the company was not out of money. The company was paying the contractors.

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There was some testimony on cross examination -- excuse me -- direct examination that the general manager hadn't been paid, Thannisch hadn't been paid $90,000, Paul Dosick hadn't been paid $90,000, North Star Demo had a claim for asbestos removal of $96,000. However, Mr. Radovan explained that those changes came in after November. And up until that time, the company was paying its contractors. That this was not a failing operation.

Mr. Radovan testified the debt was disclosed to the members in the November meeting. The members were aware of the 9 to $10 million in cost overruns, the July report numbers were updated and the members were told of the $51 million Mosaic loan.

The members discussed financing for months. Mr. Radovan asked the EC for approval of the Mosaic loan. Mr. Radovan met with Mosaic in December. And, finally, the executive committee approved the Mosaic loan in December. They set up a meeting between Mosaic and CR.

Mr. Radovan testified that this was not a troubled project, that they had money, that it was staffed, that they had Starwood on aboard. That this should have been opened but for the interference of certain members of the executive committee with the loan with Mosaic.

Mr. Little cross-examined Mr. Radovan regarding

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Exhibit 3, stating that it was not updated because upon advice of securities counsel must have been the same document provided to all investors, and, again, the disclaimers were discussed.

Mr. Radovan testified that the answers and information given to Mr. Yount were truthful. That the opening was moved before Mr. Yount invested. That the project was not failing. They had 100 people on site. They had a chef, they had a general manager. And, in fact, Mr. Busick walked the project and invested more money.

Mr. Radovan testified that everyone wanted Mr. Yount as a member. He was a neighbor, he was a community leader, a pillar of the community in one person. And there's nothing in the record that would contradict that description of Mr. Yount. Mr. Radovan was excited about the project and that the CR shares were no different than the founders shares.

Mr. Yount took the stand and he testified to his background, the fact that he had lived in Lake Tahoe for 20 years, attended UNR. He had worked with Peter Grove, the architect, for some 40 years.

He testified that in the spring of 2014, he spoke with Mr. Marriner regarding the Cal Neva project, but he was not interested at that time in investing. However, he

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testified in June of 2015, he became interested and reached out to Mr. Marriner because his 401K fund was available for investment.

Mr. Yount testified that he was in, quote, constant communication, close quote, with Mr. Marriner up until the time of the investment. That he walked the site with Mr. Marriner, who according to Mr. Yount appeared to be very knowledgeable about the project.

He received the e-mail, which is Exhibit 8 after the tour and was told that 1.5 million equity was still available under the PPM, which entitled him to certain priorities and to purchase a cabin. Mr. Yount testified he reviewed the PPM, which is Exhibit 3, reviewed the confidential offer memorandum, Exhibit 4, and signed the amended and restated operating agreement, which he read, which is Exhibit 5.

Exhibit 11 was the financial material e-mail from Mr. Marriner. Exhibit 12 was the e-mail from Mr. Marriner regarding questions. Mr. Yount testified that he thought that Mr. Marriner was trying to sell a founders share under the PPM and that he had questions about the project.

Exhibit 13 is an e-mail from Mr. Peter Groves rating the project's chances of success as very good. That he, being Peter Grove, was very impressed with the management

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team. In that e-mail, he was advised of cost overruns, which the parties were trying to -- which the developers were trying to get their arms around. Exhibit 15 is an e-mail stating that the cost overruns were $9 million in cost overruns. There was no information on the change of schedule and Exhibit 34 is an e-mail string regarding the 401K.

On October 3rd, Mr. Yount decided to make the investment. He testified in July, he did not know of the refinance and would not have invested had he did.

Mr. Marriner wanted Mr. Yount to reach out to Roger Wittenberg for refinance or investment. Mr. Wittenberg is not an investor, operated an investment vehicle called North Light. Mr. Yount testified that he was never told that the loan was out of balance.

Most importantly, Mr. Yount testified that had he been told the loan was out of balance he, quote, would have been concerned and would have inquired more, close quote. Not that he would pull the investment, not that he would refuse to invest, but that he would have inquired more and he would have been concerned.

A series of e-mails, Exhibits 35, 36, 38 recount the investment documents. Importantly was an e-mail sent by Mr. Yount's CFO. Ms. Clerk. I sent the wire instructions to both of you and Premier. They were very close -- excuse

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me -- they were very clear and they are attached again. I'm concerned with this round-about e-mail string about wire instructions, a great opportunity to send $1 million to the wrong person. Okay. Kreskin couldn't have called it better.

Exhibit 40 is Mr. Radovan's acceptance of Mr. Yount's $1 million for the founders shares. Mr. Yount testified that he would not have invested because the sale of this one share by CR was a clear indication, quote, that the project was going to die and the developer was trying to get out, close quote.

Again, Mr. Yount testified about the 12/12 party. But I circle back to that comment Mr. Yount testified to about not willing to invest because of the sale of CR's share. It contradicts his e-mail to Mr. Radovan on December 13th when he demanded his $1 million investment to be returned. However, he said that once there was financial stability and faith in the management, that they, he and his wife, would reconsider investing again. There was some argument made that Mr. Yount was straddling the fence, wanted in, wanted out. I think this e-mail by Mr. Yount could support that characterization.

Mr. Yount testified that it would have been insane to undermine the Mosaic loan and that the Exhibits 47 -- excuse me -- the e-mail exhibits were simply to try to calm

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down the IMC. Mr. Yount testified he never spoke to Mosaic. That he wanted to get paid and he testified he still does. He still wants to get paid as do everybody.

Exhibit 50 is an e-mail from Mr. Criswell dated 12/16. Mr. Yount testified that he thought the Mosaic loan was imminent and he wanted the project to succeed. He described the executive committee meeting on December 12th as rousing. But there was a discussion about trying to get his money paid back or at least reflect his investment through a note, which never occurred, or at least this Court has no evidence of that.

Exhibit 58 is an e-mail from Mr. Yount to Molly Kingston regarding the bus going off the road or in the ditch and how they couldn't continue with the project with CR as developers.

59 is an e-mail dated January 25th to Paul Jamieson and he was aware of the CR share and the PPM share and called it a bait and switch. Exhibit 122 is an e-mail regarding the IMC meeting with the Mosaic in which Mr. Yount expressed some concern.

Exhibit 62 an e-mail from Mr. Yount to Mr. Marriner stating that he was not, quote, fully informed, close quote, about the financials. Mr. Yount testified to a meeting with Mr. Criswell in the Hyatt lobby on December

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27th, where they discussed memorializing his investment with the note. Mr. Criswell testified that he assured Mr. Yount that they would buy his note back, buy his share back, once they had been made whole from the Cal Neva.

Mr. Yount testified that he never wanted to participate in the Cal Neva Lodge going forward. He just wanted to get his money back, and that's memorialized in Exhibit 69.

On cross examination by Mr. Little, Mr. Yount testified that he is the CEO of two corporations that are involved in acquisition and development, that he has built two homes and he has considerable experience with cost overruns and delays. That Mr. Yount considers himself to be a sophisticated investor. That he sits on several boards. He sits on the board of the TRPA. That he appreciates the risks in all investments and that he utilized a CFO and a CPA in evaluating this investment.

He was shown Exhibit 3 wherein the disclaimers clearly stated this was not a security, that there was a risk of insufficient funding, and there was a risk of losing the entire investment.

Exhibit 13 was the e-mail from his architect, Peter Grove, wherein they discuss the cost overruns, fundraising and the management and likelihood of success,

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which the e-mail -- which the architect indicated was pretty good. He was aware of the information given to the CPA who gave Mr. Yount a green light to invest.

He was aware of the compensation of the manager. On page 11 of the Exhibit 4, forward looking statements. Page three, subsection iii, he read and understood those provisions. Page 14 of the subscription agreement contained the documents, he was aware of those. He was and is an accredited investor. Under Exhibit 42, section B, he was aware that the founders share was not registered. He read and understood that. Section G, he read and understood that. Page three, he read and understood that section.

We move to the escrow instructions, and in Exhibit 4 and 5, he read and understood that, particularly the schedule 4.3. Exhibit 4, which is page eight, he realized that the time line for opening was off at the time of his investment.

He was in possession of Exhibit 10, the July construction status report. He saw other construction status reports. And he realized that Exhibit 10 was prepared by a third party.

He testified it was reasonable to rely upon the construction manager's reports. He testified he knew the budget was being adversely impacted at the time of his

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investment. He testified he never had any contact with William Criswell, just Mr. Radovan.

He testified that Mr. Radovan spoke to him regarding the delays. And there was an e-mail after Mr. Yount had toured the site. Mr. Yount testified that Mr. Marriner offered on a number of occasions to take him on another site tour and spoke to him about the delays, but Mr. Yount did not take up that offer.

Mr. Yount testified that he didn't have any questions of the defendants and that he never asked for anything that the defendants didn't give him.

He testified to Exhibit 13, which is the e-mail from Peter Grove, the architect, regarding the cost overruns and their attempts to get their arms around them. That Mr. Yount testified that he was open to get more information. And Exhibit 28 demonstrates Mr. Yount was aware of the change in opening, also demonstrated by his deposition on page 160.

Mr. Yount testified that the CPA gave him no pause or cause for not investing in the project. Mr. Yount testified that Les Busick is a friend, knew he was an investor, and he knew he sat on the executive committee. Mr. Yount received a list of the other investors and that the delay in funding his investment was because of the 401K.

Mr. Yount admitted that from September 1st to the

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date of his investment, there was only one e-mail between him and the developers. Exhibit 14, which is a July 19th, 2015 e-mail demonstrates that the parties were aware of at least $5 million in cost overruns. Exhibit 15, which is a July 22nd e-mail, again, restated the fact that there would be $5 million or more in overruns.

Exhibits 18 and 21 are Mr. Radovan's responses to Mr. Yount's questions and Mr. Yount's notes, which is Exhibit 21, which demonstrated that the developers had $2 million in founders shares and that the developers wanted to raise 10.5 million between the debt and equity. He admitted that it was told there was 5 to $6 million in cost overruns and maybe others, up to $3 million in contingency funds needed.

Exhibit 153, which is an e-mail dated July 27th, 2015, is a summary of the cost overruns. Exhibit 27 is an e-mail between the CPA and the Mr. Yount advising him that the opening had been pushed back. And Exhibit 21 was Mr. Yount's notes confirming that.

Mr. Yount testified after the break that the sale by Criswell Radovan of that founders share signals the project in trouble. But he admitted he was not a commercial developer. He never had any money in commercial developments. He was unaware that hotels often run two years

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in the red.

Exhibit 33 is an e-mail dated October 7th, 2015. When contrasted with Mr. Yount's deposition at page 93 and 105, he was asked, what about the difference in the shares? He couldn't point to any.

On page 222 of his deposition, Mr. Yount testified that the defendants never obstructed the plaintiffs due diligence. They provided the documents and information whenever asked. And that Mr. Yount admitted that he was not the only potential investigator for the $1.5 million share that was opened.

Exhibit Number 54, which is the second amended complaint served by Brandon Chaney during the course of some mediation. Mr. Yount testified that nobody told him to serve -- he did not tell Mr. Chaney to serve the complaint.

However, if you look at the complaint, page four, paragraph 15, contradiction, the evidence shows that the contractors were paid. Paragraph 18, the evidence shows that the project was over budget. Paragraph 20, there was a mistake in the -- it was a typographical mistake. In paragraph 21, Penta had been paid. And as to the scheduled opening, defendant knew it had been pushed back.

Mr. Yount testified he never wanted to participate in the Cal Neva project after the December meeting. And he

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had discussed replacing Criswell Radovan, but he was not part of the IMC or IMC's efforts to replace Criswell Radovan.

However, Exhibit 50, the e-mail with Paul Jamieson discussing our team. Exhibit 55 is an e-mail with Mr. Radovan regarding the IMC. Exhibit 58 is an e-mail from Molly Kingston from the IMC declaring a divorce. Exhibit 59 is an e-mail to Paul Jamieson for approval, asking Mr. Jamison's approval to send an e-mail to get Criswell Radovan out.

Exhibit 109 is an e-mail regarding a drop box for your eyes only. Exhibit 110 is an e-mail to Paul Jamieson specifically instructing it not to be shared with CR, discussing our team to which Mr. Radovan had never disavowed. Exhibit 114 is an e-mail demanding a meeting. Exhibit 115 is an e-mail discussing this with Robert -- regarding a discussion with Robert.

118 is an e-mail with Paul Jamieson regarding the infamous meeting with Mosaic. 119 is an e-mail to Busick with Paul Jamieson's meeting with -- with Paul Jamieson regarding a meeting with IMC. 120, 121, 122, all of these e-mails involve Mr. Yount and members of the IMC.

Mr. Yount testified that he didn't hold himself out as a member, that he distanced himself from the IMC, but, however, he attended executive committee meetings. He was

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considered by all to be a member, and certainly by the e-mail string was cahoots with this cabal involving certain members of the IMC, and that he testified he was not opposed to the removal of CR as manager of this project.

Exhibit 119 talks about talking points and using Mr. Yount's letter as leverage encouraging everybody to be a cohesive group and using Mr. Yount as the IMC's spokesperson, quote, unquote.

This is demonstrated as well on Exhibits 121, 125, 126, 127, 130, 131, 132, 133 in which members of the IMC -- strike that -- in which I believe Ms. Molly Kingston is referred to as our hero by Mr. Yount and to keep it up.

Mr. Wolf cross-examined and talked about trust and verify, President Reagan's admonition with the Russians, I think it was the Salt Treaty. But in cross examination by Mr. Wolf, Mr. Yount testified that he has no evidence that CR doesn't have hotel experience. I'm going to resist -- strike that.

And despite the e-mail of 12/13 about the wheels were coming off the bus, there were a number of investors, that they were looking at a refinance of the mezzanine and a refinance of the entire project. And that the Mosaic loan was the only exit strategy, and this is Mr. Yount's testimony, was the only exit strategy to get their money back

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and that he was in favor of it.

However, Mr. Yount testified that he didn't mean to undermine the Mosaic loan, but that he was not interested -- strike that -- but simply monitoring it. He under cross examination of Mr. Wolf, he acknowledged the risk factors, the answers given by Mr. Radovan to the questions, and under Exhibit 153, the payment application and the numbers were close to what Mr. Radovan had told Mr. Yount. And he knew that other investors were looking at the investment in the Cal Neva.

On cross examination by Mr. Little, Mr. Yount testified that CR Cal Neva had executed a term sheet of $47 million in late October, which was to close in 30 days, and that was true. And that Mr. Radovan's testimony regarding the executive committee and Mosaic was true. And Mr. Yount testified that those loans would cover all the debt and that the project would have been completed.

Mr. Yount testified he didn't torpedo the loan. He didn't want Mosaic, however, he never tried to resurrect the Mosaic loan.

Brandon Chaney testified. He was a member of the Incline Men's Club and met Mr. Marriner in 2014 regarding the Cal Neva. The Incline Men's Club is the largest investor in the project with $6 million collectively invested. His role

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was to represent the investors -- excuse me -- he testified that Mr. Marriner's role was to represent the investment, he vouched for the developers and told everyone the construction budget was on schedule. He assured the Incline Men's Club that this wouldn't go over budget.

He testified that Mr. Yount was on the executive committee -- excuse me -- the witness, Mr. Chaney, was on the executive committee, because it was the largest investor and the duties of the executive committee was to represent the members to guide the project.

However, he also testified he did not regularly attend meetings of the executive committee. He testified to the July Fairwinds meeting where Mr. Radovan gave an overview to the EC.

There were several problematic aspects of Mr. Chaney's testimony. Mr. Chaney testified that the PPM was disorganized and it was clear that the managers were not knowledgeable about the money. He testified that Mr. Radovan had oversubscribed the PPM. Well, that was wrong. And he testified that Mr. Radovan had taken money from Busick and Mr. Yount. Well, the evidence shows that was wrong, too.

Mr. Chaney testified that he was concerned with the sale of the Radovan -- the CR share, because he wanted to have the defendants to have some skin in the game. Well, the

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evidence shows that they did. And they were concerned about the defendant's using the money to pay other debts. Well, the evidence shows that the money was sent to CR, who used it to pay not just other CR debts, but close to $300,000 in debts owed to the project.

He testified that he had heard of Mosaic from Mr. Radovan in October of 2015 and they were going to refinance the entire project. That Mr. Radovan had provided a term sheet, but that Mr. Chaney didn't know Mosaic.

In November of 2015, Mr. Chaney testified that Mosaic pushed back. Well, that's belied by the voicemail of Mr. Penner, CEO of Mosaic, which indicated in the end of November they were very anxious and enthusiastic about the loan.

Mr. Chaney testified that the entire executive committee met with Mosaic, who had asked for the meeting with Mr. Chaney and Mr. Busick and Mr. Jamieson and without CR. This was curious, because why would Mosaic reach out to Mr. Chaney, who claimed he didn't know anybody at Mosaic?

When asked who called him for this important meeting, Mr. Chaney could only remember the first name, didn't know the last name. Again, why would Mosaic, who had been involved with both Mr. Criswell and Mr. Radovan since September of 2014 in trying to get this loan in the works

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reach out to somebody who admittedly didn't know him to have a meeting without Mr. Criswell or Mr. Radovan present? I believe there was some testimony that there may have been a family connection or familiarity between Mr. Criswell and the Halls. It just did not make sense.

Mr. Tratner testified out of order, but he testified he looked at the investment on behalf of Mr. Yount. He was sent the updated financial projections, the profit and loss. He spoke to Mr. Radovan regarding forecasting prospective, the profit and loss.

On cross examination from Mr. Little, he was shown Exhibit 19, and he testified that this was 1 million of a $60 million project, testified to the PPM, Mr. Yount's notes with the updated information. And that Mr. Radovan said, quote, please let me know if you need any more info, close quote. Mr. Little cross-examined him and said that the defendants answered all of his questions.

Mr. Chaney resumed the stand and testified about Exhibit 122. And despite the fact, this is another curious fact about Mr. Chaney's testimony, despite the fact that he realized that the Mosaic loan was the best chance for this project to go to completion and get everybody paid, they never pursued it. He claimed on his testimony that CR never pursued Mosaic. Well, that's wrong. And that's demonstrated

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by Mr. Penner's voicemail indicating that in November that Mosaic was still interested. As a matter of fact, Ms. Clerk, number two.

THE CLERK: Yes, your Honor.

THE COURT: Last paragraph, we also told them that for the better part of three months, we have not heard much from the team. They went on to explain a little of the history of the deal from their perspective, and to tell you the truth, there seems to be a little bit of a mess right now. Let's underline, underline these last two words. We are going to take a step back, tear up the executed term sheet, tear up the executed term sheet, the deal, the loan that would have saved this project. It had been executed. Give you and the ownership time to figure things out on your own, and at the right moment, if you desire, reintroduce the deal to Mosaic. That's all. Thank you, Ms. Clerk.

When confronted with the audit, Mr. Chaney testified, although the records appeared to be a mess, the auditor did not find any improprieties, although he did testify that this was phase one of the audit. However, most tellingly, he didn't want to do phase two, because it cost money. He could have, perhaps should have, but it cost money to do an audit on a deal worth almost $60 million.

He also testified that there were other options,

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Colombia Pacific, Langham. That they hired a broker to pitch the project, but there was a lack of confidence in CR.

They talked about the winery litigation between Mr. Radovan and himself, and it's clear he was bitter and it's clear he was prejudiced and it's clear he's biased against Mr. Radovan, and as Mr. Campbell rightly pointed out, perhaps he had every right to be. But that bias is there. That bitterness is there.

He has been found personally liable for tortious interference with a contract, with a verdict in the form of $6.4 million. He wasn't subpoenaed. He volunteered to testify here, because as he said, quote, I have a story to tell, close quote.

He testified that he did call David Marriner up, doesn't recall the exact words, but he told him to give back the commission or bad things would happen. And this was before his testimony at trial. Mr. Chaney testified he told Mr. Marriner to do the right thing, get on the right side. And as far as other members of the IMC calling Mr. Marriner, he testified that, quote, it could have happened, close quote. But all he wanted Mr. Marriner to do was open your eyes.

Mr. Chaney admitted that two years later, CR is still the manager of the Cal Neva. That although there were

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procedures and a process in place that could have removed them, no such move has been made to date. And that CR is still trying to finance the Cal Neva.

As far as Mr. Chaney and Mr. Radovan go back, Mr. Chaney testified that he had to buy out Mr. Radovan and he settled the lawsuit by paying Mr. Radovan for his share.

Also troubling in Mr. Chaney's testimony is the fact that he claims he was kept in the dark. He wasn't aware of these cost overruns and financials were kept from him. That the third parties Penta and Thannisch, their conclusions or reports were tarnished because they were paid by the defendant, which is not true.

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However, he admitted that he used the CR offices in the summer of the 2015 and he was there about once every other week for two or three days and he had talked to Mr. Radovan all the time. But despite that, he was clueless as to the cost overruns and that Mr. Radovan never provided him with any answers to his questions.

Once again, he testified to the Mosaic telephone call by a Howard and he called Mr. Chaney for the first time and told him, are you aware that -- this is Howard, are you aware of the $1 million break-up fee? Why would somebody from Mosaic call, why would this Howard call Mr. Chaney to discuss a term of an agreement which was shared by

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Mr. Radovan sometime before in the term sheet? Mr. Chaney testified he didn't know Mosaic, he didn't know Howard. This is troubling.

Also, Exhibit 129, which is an e-mail, which outlines the reasons why Mosaic is backing away, curiously, they are identical to Mr. Chaney's issues with Criswell Radovan and this Court cannot find that is coincidental.

On cross examination by Mr. Wolf, Mr. Chaney admitted to calling Mr. Marriner up in late July to do the right thing. Mr. Marriner hung up on him. The telephone call with Mr. Radovan -- in his telephone call with Mr. Marriner, Mr. Chaney called the bankruptcy a disaster, demanded that Mr. Marriner give back all of his commissions.

Mr. Little took Mr. Chaney on cross examination, talked about the Straight Shot suit, spoliation of evidence, and to some extent this Court understands that Mr. Summer was perhaps a rogue employee left over from the prior company acquired by Teleconnex and he worked out of his home.

But he also testified that Mosaic called the executive committee, because Mr. Radovan had not called back. However, that's contradicted by the voicemail in November. Mr. Chaney testified that the break-up fee was news to him, although he had been provided the term sheet prior to this.

Also, Mr. Chaney made what can only be described

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as disturbing comment regarding the Washoe County Sheriff's Office. He testified that the Ladera loan was in default and that the IMC members were only aware of a sheriffs sale of their membership interest the day before the sheriff was to execute on the membership interest. However, the sheriff held off executing on that judgment, because the Incline Village people were very important people in this community. This Court finds that testimony incredible.

Finally, Mr. Radovan took the stand in rebuttal and talked about the $480,000 in development fees. He never told Bruce Chaney that he took $480,000 in fees and that he never took $480,000 until development fees, that that was a double entry, which was subsequently corrected.

That any disbursement had to be approved by Hall and that Hall paid 90 percent of the disbursements and that they needed Hall's approval for any disbursement, significant disbursement. Mr. Radovan testified that he pursued funding until the bankruptcy and that Criswell -- that under any of these circumstances, any of these scenarios, Criswell Radovan would not be involved in the project, but that no one has come up with an option. The entire reason for the refinancing was the cost overruns.

He played and this is Exhibit 217, the e-mail -- excuse me -- the voicemail of Ethan Penner dated

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November 19th at 2:55 p.m., in which he stated there's a lot of enthusiasm regarding the deal and please get back to me, close quote. That Mr. Radovan was not an impediment to the Mosaic deal. That Mr. Chaney had offices in or had an office in Mr. Radovan's and Mr. Criswell's office in Napa. That they are the debtor in possession and they have audited financials and all the members received audited financials and Paul Jamison and Busick has changed sides. This Court finds that really has no bearing on this case, this Court's decision.

That Mosaic would have closed by year end and that all the parties would have been paid. The project would be up, operational, and a spectacular success.

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

As to the first cause of action, breach of contract, Cal Neva LLC is in bankruptcy and under the protection of the bankruptcy court, therefore, the claim against Cal Neva Lodge LLC is dismissed.

Basic contracts principles on the breach of contract require for an enforceable contract, an offer and acceptance and a consideration. However, CR Cal Neva LLC and Criswell Radovan LLC are not parties to the contract of the

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subscription parties and you cannot enforce a contract or find a breach of a contract by a nonparty. First cause of action is dismissed.

Second cause of action, Powell, Coleman, Arnold, breach of fiduciary duty. Under the restatement second of torts, if a fiduciary duty exists between two persons when one of them is under a duty to act for or to give advice to or for the benefit of another upon matters within the scope of the relation.

The Nevada Supreme Court has stated that a breach of fiduciary duty claim seeks damages for injuries that result from the tortious conduct of one who owes a duty to another by virtue of the tortious -- seeks damages that result from a tortious conduct of one who has a duty to another by virtue of the fiduciary duty. In order to prevail on a claim for breach of fiduciary duty, the plaintiff must show the existence of a fiduciary duty, a breach of that duty, and that the breach proximately caused damages.

In this particular case, there may have been a mistake, but that certainly doesn't arise to fraud or a breach of the contract. In this case, this was a simple transaction, the purchase sale agreement, and most importantly, Mr. Yount got what he wanted, which was a founders share.

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Now, it has been argued hypothetically that it may not have been Mr. Yount's desire to buy the founders shares from CR, but from some other party, but it is no different than getting a Cadillac from Jones West Ford or a Cadillac from Don Weir. Mr. Yount ended up with a Cadillac. Therefore, he has not been able to prove damages in this case and the second cause of action is dismissed.

Third cause of action, fraud, all defendants with the exception of Powell, Coleman. This requires a high standard to prove, clear and convincing evidence. It is asserted against Mr. Criswell, Mr. Radovan, CR Cal Neva LLC, Criswell Radovan LLC, Cal Neva Lodge LLC, David Marriner Real Estate LLC, and New Cal Neva Lodge. The elements of fraud are a false representation. There has been no evidence presented here that any of the material facts were proven to be false or known to be false by any of the parties. In fact, the testimony is completely opposite.

Second claim is made with the knowledge or belief that it is false or without a sufficient basis of information. There's no evidence that anybody knew that this was false. He had the information provided by third parties, they were verified again by CPAs, by members on site, the architect, the construction manager. The third element is there's an intent to induce reliance on those false

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statements.

In this case, the defendant had ample opportunities to inspect this and didn't have to rely on, indeed, didn't rely solely on the information provided by the defendants in this case. He gave the information to his CFO. He gave the information to his CPA. He asked his CPA if this was a good investment, whether to proceed, and the CPA gave him a green light he could.

And as far as damages is concerned, well, we go back to the fact that Mr. Yount owns a founders shares in the Cal Neva LLC and has not proven that he has suffered any damages. And the Nevada Supreme Court has also said that the false representation must have played a material and substantial part in leading the defendant to adopt his particular course.

Now, in this case, the allegations are that some of those false statements was the opening date moved back from December 12th to the spring. Well, that was known several days before Mr. Yount invested in it.

Also, that Mr. Yount was buying a founders share under the PPM. Well, the evidence shows that Mr. Yount holds a founders shares that was distributed under the $20 million PPM and constitutes a founders shares.

And that it played a material and substantial part

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in leading the defendant to adopt his present course. Well, it appears that Mr. Yount, a sophisticated investor, reached out, conducted due diligence, independent investigation, and decided to invest knowing full well under Exhibits 3, 4 and 5 that there were risks associated, which included losing his entire investment.

Now, the Blanchard case, I think this is dicta, because it really doesn't square with the facts of this case, states that if a defendant was unaware of the complaint of making an independent investigation will be charged with knowledge of facts, which reasonable diligence would have disclosed, such a plaintiff is deemed to have relied upon his own judgment and not on the defendant's representation.

That doesn't really apply in this particular case. I know the defense relies upon this. Because in that case, it was a husband and wife arguing over the dissolution of a marriage and the dissolution of the marital estate and the property settlement agreement.

The Court in that case denied the wife's motion -- actually, dismissed the lawsuit, Judge Lee Gates dismissed the lawsuit, finding that the wife couldn't prove that there was a misrepresentation, a false misrepresentation as to where the assets were.

The Nevada Supreme Court stated that the

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appellate's actions for intentional misrepresentation imposes a burden on the plaintiff to show the following elements, that the defendant made a false representation to him with knowledge and belief that the representations were false without a sufficient basis for making the representation. Further, the plaintiff must establish that the defendant intended to induce the plaintiff to act or refrain from acting on the representation and that the plaintiff justifiably relied on the representation. Finally, the plaintiff must establish that he was damaged as a result.

In this case, the Nevada Supreme Court found that the husband had superior knowledge of the location of the assets and that the wife did not possess. That there were many assets, there were complex transactions, and that the wife should not bear the loss of the opportunity to prove that representation, because the husband had superior knowledge.

In this particular case, the defendant was just as knowledgeable as everybody else. He was a sophisticated investor, he was a contractor, well-aware of cost overruns, well-aware of the problems in rehabing an old development. Indeed, the testimony is that Mr. Yount has spent almost ten years in building a home on the shores of Lake Tahoe, which is an outstanding addition to the community. That he was

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operating from the same facts and circumstances everybody else was.

That he didn't just rely on the defendants, he relied on his CPA, he relied on his CFO, he relied on the architect, Mr. Grove. He took a tour. He had possession of the reports.

So the Court finds that Blanchard doesn't absolve -- doesn't provide a shield to the defendants, but that the plaintiff has not proven false statements or unjustifiable reliance. And, finally, as stated before, received just what he wanted, which was a founders share, and therefore has not proven damages.

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The fourth cause of action, which was negligence against PCA contains the following elements, that the plaintiff must show that the defendant owed a duty of care to the plaintiff and that the breach of duty has caused plaintiff to suffer damages.

Now, in Nevada, the issues of negligence are factual issues decided by the trier of fact. But synthesized, it's simply that there's a duty, there's a breach, there's causation, there's legal causation, there's actual causation and there's damages.

In this case, negligence against PCA was a mistake and does not rise to the level of negligence. Also, once

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again, Mr. Yount received what he asked for, a founders share, which there is no damages shown. The fourth cause of action is dismissed.

Fifth cause of action, conversion. The Nevada Supreme Court has defined conversion as a distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his title rights therein or in derogation, exclusion or defiance of such title or rights. Conversion is not an act of general intent. The determination of whether a conversion has occurred is a question of fact. In this particular case, the documents show the money went into the project to pay off the debts. Because of that, the fifth of the cause of action is dismissed.

The sixth cause of action, which is punitive damages. Well, punitive damages require a finding that the conduct of the party is outrageous and beyond the pale. The evidence must be convincing by clear and convincing evidence that the defendants have been engaged in oppression, fraud, malice, express or implied, and that the plaintiff in addition to compensatory damages may seek to recover damages as -- for the sake of an example in punishing the defendants.

There's no evidence whatsoever that the conduct of the defendants in this case was outrageous, beyond the pale,

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

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

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

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

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

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

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

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

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

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

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EXHIBIT C

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Clerk of the Court
Transaction # 6301767

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 YOUNT IRA,

Plaintiff,

vs.

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

Defendants.
_____/

Case No.: CV16-00767

Dept. No.: 7

AMENDED ORDER

On September 8, 2017, after hearing testimony and taking evidence in a seven-day bench trial, this Court dismissed Plaintiff's Second Amended Complaint, dismissed the crossclaims by Defendants David Marriner and Marriner Real Estate, LLC as moot and entered judgment against Plaintiff and in favor of Defendants. In its oral ruling, the Court awarded damages on Defendants' counterclaim.

///

///

Upon further consideration, the Court is concerned that its oral recitation of damages maybe subject to misinterpretation and thus hereby amends its previous *Order* 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;
3. DAVID MARRINER; is awarded $1.5 million in compensatory damages[1], attorney's fees and costs of suit;
4. POWELL, COLEMAN AND ARNOLD, LLP ("PCA"), is awarded its attorney's fees and costs of suit;[2]
5. CRISWELL RADOVAN, LLC (Criswell Radovan), is awarded its lost Development Fees,[3] attorney's fees and costs of suit;
6. CR CAL NEVA, LLC ("CR Cal Neva"), is awarded its lost Development Fees,[4] attorney's fees, and costs of suit;
7. CAL NEVA LODGE, LLC, is awarded its attorney's fees and costs of suit; [5]
8. MARRINER REAL ESTATE, LLC, is awarded its attorney's fees, and costs.[6]

IT IS SO ORDERED this 15 day of September, 2017.

Patrick Flanagan
PATRICK FLANAGAN
District Judge

[1] These damages include both lost commissions (Ex. 1) and loss of business good will.
[2] There was no testimony or evidence of damages to PCA produced at trial.
[3] Less that which has been earned and paid up to $1.2 million in the aggregate. (Ex. 3, p. 8)
[4] Less that which has been earned and paid up to $1.2 million in the aggregate. (Ex. 3, p.8)
[5] There were no damages sought on behalf of this project development entity.
[6] Only to the extent that they are not duplicative of any award or fees to David Marriner individually.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 15 day of September, 2017, I electronically filed the following with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Richard G. Campbell, Jr., Esq., attorney for Plaintiff George Stuart Yount;

Andrew N. Wolf, Esq., Attorney for Defendants David Marriner and Marriner Real Estate, LLC; and

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

Judicial Assistant

EXHIBIT D

$2515

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Attorneys for Plaintiff
George Stuart Yount

DISTRICT COURT
WASHOE COUNTY, NEVADA

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

Lewis Roca
ROTHGERBER CHRISTIE

NOTICE OF APPEAL

Please take notice that plaintiff George Stuart Yount, individually and in his capacity as owner of George Yount IRA, hereby appeals to the Supreme Court of Nevada from:

1. All judgments and orders in this case;

2. "Amended Order," entered on September 15, 2017 (Exhibit 1); and

3. All rulings and interlocutory orders made appealable by any of the foregoing.

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

Dated this 16th day of October, 2017.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Joel D. Henriod*
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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of October, 2017, I served the foregoing "Notice of Appeal" on counsel by the Court's electronic filing system to the persons and addresses listed below:

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

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

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

INDEX OF EXHIBITS

EXHIBIT NO.	DESCRIPTION	NUMBER OF PAGES
1	Amended Order	3

EXHIBIT E

CODE: 1880
ANDREW N. WOLF (#4424)
JEREMY L. KRENEK (#13361)
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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

JUDGMENT

This matter came before the Court for a bench trial on August 29, 2017, through September 8, 2017, the late Hon. Patrick Flanagan, District Judge, presiding. Plaintiff George Stuart Yount, individually and in his capacity as owner of George Stuart Yount IRA, appeared

by and through his counsel of record, Richard G. Campbell, Jr., Esq. Defendants Criswell Radovan, LLC, CR Cal Neva, LLC, Robert Radovan, William Criswell, and Powell, Coleman and Arnold, LLP, appeared by and through their counsel Martin A. Little, Esq., of Howard & Howard Attorneys PLLC. Defendants David Marriner and Marriner Real Estate, LLC, appeared by and through their counsel of record, Andrew N. Wolf, Esq., of Incline Law Group, LLP.

On September 8, 2017, at the conclusion of the trial and following the close of the evidence, Judge Flanagan, ruling from the bench, orally stated his findings of fact, conclusions of law and decision on the record in open court pursuant to NRCP 52. Judge Flanagan also adopted the proposed findings of fact submitted by the defendants prior to trial. Transcript 1131:14-16.

On or about September 15, 2017, a transcript of the trial was filed, containing Judge Flanagan's ruling from the bench. On September 15, 2017, the same day, Judge Flanagan issued an *AMENDED ORDER* clarifying his award of damages to the various Defendants.

At the conclusion of his ruling from the bench, Judge Flanagan requested that defendants' counsel prepare the judgment. Thereafter, Judge Flanagan suddenly fell ill and passed away on October 6, 2017. Thereafter, on October 30, 2017, defense counsel jointly submitted a proposed form of findings of fact, conclusions of law and judgment.

Subsequently, the matter was assigned to the undersigned District Judge. On November 13, 2017, the court held a status conference wherein the court directed the parties to file briefs regarding the appropriate procedure to be followed after Judge Flanagan's untimely passing. This briefing was completed on or about February 2, 2018. Based on the briefing, the court determines that the primary rules which govern further proceedings by the undersigned successor judge are NRCP 52 (findings by the court; judgment on partial findings), NRCP 58 (entry of judgment) and NRCP 63 (inability of a judge to proceed).

In this case, Judge Flanagan left an extensive record of his decision, including summaries of witness testimony, the credibility of certain witnesses, his analysis of various trial exhibits, and his determination of each claim for relief.

The court has reviewed the trial transcript in its entirety and the exhibits referenced in the transcript and in Judge Flanagan's ruling. Pursuant to NRCP 63, the court hereby 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 completed 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 subsequently filed 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. See: *Smith's Food King v. Hornwood*, 108 Nev. 666, 836 P. 2d 1241 (1992); and, *Canseco v. United States*, 97 F.3d 1224, 1227 (9th Cir. 1996) [successor judges need only certify their familiarity with those portions of the record that relate to the issues before them]. *Compare: Mergentime Corporation v. Washington Metropolitan Area Transit Authority*, 166 F.3d 1257 (DC Cir. 1999). Accordingly, the court now enters judgment as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Second Amended Complaint, and each of the causes of action stated therein, are dismissed with prejudice as to all Defendants.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that Marriner's and Marriner Real Estate's crossclaim against the other defendants is moot and is dismissed with prejudice.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff GEORGE STUART YOUNT, Individually and in his Capacity as Owner of GEORGE STUART YOUNT IRA, shall pay William Criswell the sum of **$1.5 Million** in compensatory damages.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff GEORGE STUART YOUNT, Individually and in his Capacity as Owner of GEORGE STUART YOUNT IRA, shall pay Robert Radovan the sum of **$1.5 Million** in compensatory

damages.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff GEORGE STUART YOUNT, Individually and in his Capacity as Owner of GEORGE STUART YOUNT IRA, shall pay DAVID MARRINER, individually, the sum of **$1.5 Million**.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that GEORGE STUART YOUNT, Individually and in his Capacity as Owner of GEORGE STUART YOUNT IRA, shall pay each defendant its costs of suit as allowed by law. Each Defendant shall file and serve its verified memorandum of costs as required by Chapter 18 NRCP.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that defendants may seek recovery of their attorney's fees by an appropriate motion pursuant to NRCP 54(d) and NRS 18.010, or as otherwise allowed by law.

DATED this 9 day of March 2018.

DISTRICT COURT JUDGE

Submitted by:

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

EXHIBIT F

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Jacqueline Bryant
Clerk of the Court
Transaction # 6598105 : yviloria

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Attorneys for Defendants,
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Robert Radovan, William Criswell, and
Powell, Coleman and Arnold LLP

IN THE SECOND JUDICIAL DISTRICT COURT OF

THE STATE OF NEVADA IN AND FOR THE

COUNTY OF WASHOE

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

Plaintiff,

vs.

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

Defendants.

CASE NO.: CV16-00767
DEPT NO.: B7

DEFENDANTS' MOTION TO AMEND JUDGMENT

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 to amend the Judgment entered on March 12, 2018, to include lost

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Attorneys for Defendants,
Criswell Radovan, LLC, CR Cal Neva, LLC,
Robert Radovan, William Criswell, and
Powell, Coleman and Arnold LLP

IN THE SECOND JUDICIAL DISTRICT COURT OF

THE STATE OF NEVADA IN AND FOR THE

COUNTY OF WASHOE

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

Plaintiff,

vs.

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

Defendants.

CASE NO.: CV16-00767
DEPT NO.: B7

DEFENDANTS' MOTION TO AMEND JUDGMENT

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 to amend the Judgment entered on March 12, 2018, to include lost

management and development fees, consistent with the Amended Order filed on September 15, 2017.

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 27th day of March, 2018.

HOWARD & HOWARD ATTORNEYS PLLC

By: _____

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Facsimile No. (702) 567-1568
Attorneys for Criswell Radovan, LLC, CR Cal Neva, LLC, Robert Radovan, William Criswell, Cal Neva Lodge, LLC, Powell, Coleman and Arnold LLP,

HOWARD & HOWARD ATTORNEYS PLLC 002783

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

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. A copy of the transcript of the issued decision is attached hereto as **Exhibit 1**. 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:

> In this case, but for the intentional interference with the contractual relations between Mosaic and Cal-Neva, this Project would have succeeded. That is undisputed. . . .

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> This Court has documented dozens of email exchanges between Mr. Yount and the IMC in their efforts to undermine the Mosaic loan and there is no more solid evidence of that than in Exhibit 124. That deal was done. That deal has been executed. That deal was in place. Mosaic had evidenced its enthusiasm to close this deal. And yet the day that individuals from the IMC went to the Mosaic offices without the knowledge of [Criswell Radovan], that deal was dead. The testimony is unequivocal, there was never an attempt by the IMC to resurrect it, despite the open invitation by Mosaic to reintroduce the loan.
>
> **This Court finds that it was the intent of the IMC to kill this loan, divest [Criswell Radovan] from it shares on the threat of legal, civil, criminal actions for their own benefit and not the benefit of the project.**

Id. at 52-53 (emphasis added).

Chief Judge Flanagan then awarded Radovan and Criswell $1.5 million each in compensatory damages, two year's salary, management fees, attorney fees and costs. *Id.* A week later, on September 15, 2017, he issued a separate Amended Order clarifying his damage award and including lost development fees to Criswell Radovan. *See* Amended Order, **Exhibit 2** hereto.

II.

LEGAL ARGUMENT

AN AMENDED JUDGMENT SHOULD BE ENTERED

A. LEGAL STANDARD

A motion to alter or amend the judgment shall be filed no later than 10 days after service of written notice of entry of the judgment. NRCP 59(e). The purpose of such a motion is "to seek correction at the trial court level of an erroneous order or judgment." *Chiara v. Belaustegui*, 86 Nev. 856, 858, 477 P.2d 857, 859 (1970). Specifically, a motion to alter or amend the judgment is a proper method for challenging the total amount of the judgment. *See Fleischer v. August*, 103 Nev. 242, 247, 737 P.2d 518, 521 (1987).

Here, the Judgment should be amended to conform to Judge Flanagan's decision, including the Amended Order, pursuant to which Criswell and Radovan were awarded lost management fees, and Criswell Radovan was awarded lost development fees. The basis for this award was squarely in the record, as was the amount of lost development fees, leaving only the amount of the lost management fees to be quantified.

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B. THE JUDGMENT SHOULD BE AMENDED TO INCLUDE LOST DEVELOPMENT FEES

As the decision and Amended Order correctly note, Criswell Radovan was the developer of the subject project, entitled to a $1.2 million Development Fee, payable in monthly installments of $60,000. *See* Confidential Private Placement Memorandum, Trial Ex. 3, p.8. Criswell Radovan earned all of its Development Fee, but "recontributed to the Company $480,000 of its Development Fee as of 6/1/14." *See* Section 7.4 of the Amended and Restated Operating Agreement, Trial Ex. 5; *see also* Trial Testimony of William Criswell, Volume I, pp. 186-188. Importantly, Criswell Radovan was not repaid its Development Fee before the project failed. *See* Trial Testimony of Robert Radovan, Volume VI, pp. 953-956. Accordingly, pursuant to the Amended Order, the Judgment should be amended to include an award of $480,000 to Criswell Radovan.

C. THE JUDGMENT SHOULD BE AMENDED TO INCLUDE LOST MANAGEMENT FEES

Criswell and Radovan had a binding agreement with Cal Neva Lodge, under which they would manage the operations of the property once it was completed and open. This fact is reflected in the Confidential Private Placement Memorandum, Trial Ex. 3 (recognizing that Cal Neva Lodge will enter into a hotel management agreement with Criswell Radovan or its affiliate) and the Amended and Restated Operating Agreement, Trial Ex. 5 ("Day-to-day management of the Project will be performed by an Affiliate of CR").

As demonstrated by the attached Declaration of William Criswell, key provisions of the Management Agreement were:

- A separate entity, CR Hospitality, LLC was formed by Criswell and Radovan for the purpose of serving as the hotel manager under a franchise agreement with Starwood Hotels and as part of the Starwood Luxury Collection. Criswell and Radovan each owned 30.5% of the membership interest in the entity. The remaining interests were held by key executive personnel in the operation.
- A copy of the Management Agreement was reviewed and approved by the Executive Committee before closing with the investors, and was one of the documents provided to investors such at closing.
- The minimum term of the agreement was 10 years from the date of opening, with two options for CR Hospitality to extend the term by five additional years each.
- The fees to be paid to CR Hospitality or management of the hotel were:
  - A Basic Fee equal to 3% of Revenue; and
  - An incentive fee equal to 10% of Net Operating Income before reserves and debt service.

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- The total fees to be earned by CR Hospitality for the initial term of ten years following opening were estimated in the Financial Pro Forma section of the Confidential Private Offering Memorandum dated March, 2014 and accepted in evidence at trial as Trial Exhibit 4.

The following chart shows the estimates of total management fees for each of the first ten years of operation as shown in Trial Exhibit 4 and calculates the share of those fees that would have been received by each of Radovan and Criswell were it not for Yount's actions:

Lost Management Fees Per Trial Exhibit 4 dated March 2014

1st Ten Year Term

Year	Base Fee[1]	Base Incentive Fee[2]	Total Annual Fees	Criswell Share[3]	Radovan Share
1[4]	650,250	-0-	650,250	198,326	198,326
2	809,416	617,266	1,426,682	435,138	435,138
3	862,039	772,100	1,634,139	498,412	498,412
4	887,900	725,115	1,613,015	491,970	491,970
5	914,537	751,291	1,665,828	508,078	508,078
6	941,973	778,252	1,720,225	524,669	524,669
7	970,232	806,022	1,776,254	541,757	541,757
8	999,339	834,625	1,833,964	559,359	559,359
9	1,029,320	864,086	1,893,406	577,489	577,489
10	1,060,199	881,368	1,941,567	592,178	592,178
				4,927,376	4,927,376
TOTAL					

[1] Found in fourth line from bottom of Financial Pro Forma of Trial Exhibit 4.

[2] The 30.5% share owned by each of Criswell and Radovan in the total management fees to be paid to CR Hospitality. Because this management agreement was for a single property, costs of on site management, record keeping, office space, etc. would have been costs of the hotel itself and are not shown as a reduction in these values.

[3] 2015 was assumed to be a partial year as the first operating year when this projection was prepared in 2014. 2016 was to be the first full year of operations.

[4] Found under Fixed Charges Section of Financial Pro Forma of Trial Exhibit 4.

Importantly, 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 then gave the Pro Forma to a hospitality expert to review who told him it was reasonable; and then accountant Tratner gave Yount the go ahead to invest. *See* Trial Testimony of Ken Tratner, Volume VI, pp. 849-50, 855.

The above estimate of management fees is taken from Trial Exhibit 4, which was prepared in early 2014 and reflected a then depressed hotel market in the area. A more recent, and much higher, projection can be found in an updated pro forma (the "2015 Forecast") dated December 15, 2015 and prepared by Orion Hospitality, an outside consultant in the hospitality industry. Using those projections, the total of projected management fees which were lost by Criswell and Radovan due to the actions of Yount and others would be $7,546,000.

Accordingly, pursuant to the Amended Order, the Judgment should be amended to include an award of **at least** $4,927,376 in lost management fees to each of Criswell and Radovan.

III.

CONCLUSION

Based on the foregoing, Defendants respectfully request that their Motion to Amend Judgment be granted in its entirety.

DATED this 27th day of March 2018.

HOWARD & HOWARD ATTORNEYS PLLC

By: _____

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Alexander Villamar, Esq.
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Telephone No. (702) 257-1483
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Attorneys for Defendants, Criswell Radovan, LLC, CR Cal Neva, LLC, Robert Radovan, William Criswell, Cal Neva Lodge, LLC

HOWARD & HOWARD ATTORNEYS PLLC
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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: March 27th, 2018

HOWARD & HOWARD ATTORNEYS, PLLC

By: _____

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Facsimile: (702) 567-1568
Attorneys for Criswell Radovan, LLC, CR Cal Neva, LLC, Robert Radovan, William Criswell, Cal Neva Lodge, LLC, and Powell, Coleman and Arnold LLP

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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 **DEFENDANTS' MOTION TO AMEND JUDGMENT** in this action or proceeding electronically with the Clerk of the Court via the E-File and Serve system, which will cause this document to be served upon the following counsel of record:

Richard G. Campbell, Esq.
The Law Office of
Richard G. Campbell, Jr., Inc.
333 Flint Street
Reno, NV 89501
Telephone: (775)-384-1123
Facsimile: (775) 997-7417
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Daniel F. Polsenberg, Esq.
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Las Vegas, NV 89169
Telephone: (702) 949-8200
Facsimile: (702) 949-8398
Attorneys for Plaintiff

I certify under penalty of perjury that the foregoing is true and correct, and that this Certificate of Service was executed by me on March 27th, 2018 at Las Vegas, Nevada.

An Employee of HOWARD & HOWARD ATTORNEYS PLLC

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EXHIBIT G

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; and MARRINER REAL ESTATE, LLC,

Respondents.

MOTION TO DETERMINE APPELLATE JURISDICTION

Appellant asks this Court to review whether it has jurisdiction over this appeal. *See Hallicrafters Co. v. Moore*, 102 Nev. 526, 728 P.2d 441 (1986).

An appeal is premature if filed "before entry of the written disposition of the last-remaining timely motion listed in Rule 4(a)(4)"—including a motion for judgment under NRCP 50(b), a motion to amend the findings under NRCP 52(b), and a motion for a new trial or to alter and amend the judgment under NRCP 59. NRAP 4(a)(4), (6).

Here, after the entry of a final judgment, appellant timely filed

post-judgment motions for judgment as a matter of law, for relief from the judgment, to alter and amend the judgment, to amend the findings, and for a new trial. (Attached as Ex. A, filed Mar. 30, 2018 (citing NRCP 50(b), 52(b), 56(a), 59(e), 60(b)); *see also* Ex. 2 to "Amended Notice of Appeal," Doc. 2018-12164, filed in this Court on Mar. 29, 2018 (indicating notice of entry on Mar. 13, 2018).) Respondents (defendants below) also filed a motion to amend the judgment. (Attached as Ex. B, filed Mar. 27, 2018.) Those motions remain pending in the district court. (Ex. C, "Notice of Hearing," filed July 20, 2018.) Appellant therefore believes that the appeal is premature.

The Court should also consider suspending the briefing schedule while it assesses the jurisdictional question.

Dated this 9th day of August, 2018.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/Abraham G. Smith*

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Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that on August 9, 2018, I submitted the foregoing MOTION TO DETERMINE APPELLATE JURISDICTION for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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

EXHIBIT H

IN THE SUPREME COURT OF THE STATE 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; AND MARRINER REAL ESTATE, LLC,

Respondents.

No. 74275

FILED

AUG 24 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER

Appellant has filed a motion for this court to determine its jurisdiction over this appeal. Appellant contends the appeal is premature. We have reviewed the documents on file with this court, and it appears the appeal is timely from a final judgment and that this court has jurisdiction.

On September 15, 2017, after a seven-day bench trial, the district court entered an "Amended Order" dismissing appellant's complaint, dismissing cross-claims, and amending its oral ruling awarding damages on respondents' counterclaim - thereby finally resolving all claims by and against all parties. It appears from the district court docket entries that no post-judgment tolling motions were filed. The amended order was served, but no written notice of entry was filed; and on October 16, 2017, appellant filed a timely notice of appeal. NRAP 4.

Subsequently, on March 12, 2018, the district court entered a "judgment" confirming the amended order. Written notice of entry was filed

18-33097

and served on March 13, 2018; and appellant filed an amended notice of appeal on March 23, 2018. Respondents then filed a "Motion to Amend Judgment" on March 27, 2018; and appellant filed a "Motion for Judgment as a Matter of Law, For Relief from Judgment, To Alter and Amend the Judgment, To Amend the Findings, and For New Trial" on March 30, 2018.

First, the "judgment" entered March 12, 2018, made no substantive changes to the terms of the amended order; therefore, it does not establish a new time to appeal. "The appealability of an order or judgment depends on 'what the order or judgment actually does, not what it is called.'" *Campos-Garcia v. Johnson*, 130 Nev. Adv. Op. 64, 331 P.3d 890, 891 (2014) (*quoting Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 445, 874 P.2d 729, 733 (1994) (emphasis omitted)); *Lee v. GNLV Corp.*, 116 Nev. 424, 426–27, 996 P.2d 416, 417–18 (2000); *Taylor v. Barringer*, 75 Nev. 409, 344 P.2d 676 (1959); *see also Morrell v. Edwards*, 98 Nev. 91, 640 P.2d 1322 (1982) (stating that that test for determining whether an appeal is properly taken from an amended judgment rather than the judgment originally entered depends upon whether the amendment disturbed or revised legal rights and obligations which the prior judgment had plainly and properly settled with finality). Accordingly, the appeal was properly taken from the amended order.

Second, the appeal is properly before this court from the amended notice of appeal as well. The motions to amend and for new trial, filed after the amended notice of appeal, do not toll the time to appeal, and are not relevant to this court's jurisdiction. Indeed, the district court has been divested of its jurisdiction to grant the motions as of the docketing of the appeal. *See Foster v. Dingwall*, 126 Nev. 49, 52-53, 228 P.3d 453, 454-

55 (2010) (holding that timely notice of appeal divests district court of jurisdiction except as to matters independent from the appealed order).

Appellant shall have 15 days from the date of this order to file the request for transcripts; appellant shall have 60 days from the date of this order to file and serve the opening brief and appendix. We caution appellant that no further extensions for filing the request for transcripts will be granted.

It is so ORDERED.

_____, C.J.

cc: Lewis Roca Rothgerber Christie LLP/Las Vegas
The Law Office of Richard G. Campbell, Jr., Inc.
Howard & Howard Attorneys PLLC
Simons Law PC

EXHIBIT I

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE EGAN WALKER, DISTRICT JUDGE

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GEORGE S. YOUNT, ET AL,

Plaintiff, Case No. CV16-00767

vs. Dept. No. 7

CRISWELL RADOVAN, ET AT,

Defendant.

_____/

TRANSCRIPT OF PROCEEDINGS

HEARING ON MOTIONS

Tuesday, December 20, 2018

Reported by: EVELYN J. STUBBS, CCR #356

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APPEARANCES:

For the Plaintiff:

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RENO, NEVADA; TUESDAY, DECEMBER 20, 2018; 2:00 P.M.

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THE COURT: Miss Clerk, would you please announce the case.

THE CLERK: Yes, Your Honor. Case No. CV16-00767 the matter of Yount et al versus Criswell. Matter set for a hearing on motions.

Counsel, please state your appearances.

MS. BRANTLEY-LOMELI: Adrienne Brantley-Lomeli on behalf of Plaintiff George Stuart Yount.

THE COURT: Good afternoon.

MR. POLSENBERG: Good afternoon, Your Honor. Dan Polsenberg.

MR. CAMPBELL: Good afternoon, Your Honor. Rick Campbell on behalf of the Younts.

MR. LITTLE: Good afternoon, Your Honor, Martin Little. I was trial counsel for all of the defendants accept for Mr. Marriner and his company.

THE COURT: Thank you.

MR. SIMONS: Good afternoon, Your Honor, Mark Simons. I represent David Marriner and Marriner Real Estate. And in the courtroom today is Mr. Marriner. I was not trial counsel. I came subsequent.

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THE COURT: I've got you beat. I wasn't the trial judge.

Let me, I guess, set the table for our discussion. In observing that -- not with any facetious intent, but I hope, Counsel, you have had an opportunity to dialog with your clients about this reality, which we all know: If there's a recipe for disaster in any endeavor in life -- sinking ships, planes in combat, trials -- it's to have three judges, three trial judges touch the same case. Are you sure you want me to do this?

MR. SIMONS: While people are gathering their thoughts, I'll step in. I think from my client's perspective, I don't think we have a choice. We need to move forward.

MR. POLSENBERG: Judge, why don't we take a break.

(Recess taken.)

THE COURT: The parties who have previously identified themselves are present in court. We've taken an opportunity for reflection. Has that reflection percolated into any resolution?

MR. POLSENBERG: It's percolated, but not into a resolution. And, you know, the parties have gotten together two or three times.

THE COURT: Once with the Supreme Court, once with Mr. Eisenberg --

MR. POLSENBERG: And Mr. Eisenberg, twice in front him.

THE COURT: Well, I feel compelled to place a few

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things into the record before we begin. And I'm prepared to make some decisions today. I'm aware there is an appeal pending before the Nevada Supreme Court; I'm aware that the parties stipulated to extend the period for briefing until January, pending what I was going to do here.

I'd invite you all to consider this reality, however: Both sides at this juncture are asking me to do something with what Judge Polaha did confirming Judge Flanagan's work. So each side is asking me to make changes.

In my view, if I make any changes or either of those changes or some version of both of those changes, we guarantee ourselves doing this twice.

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Here's what I mean by that. The Nevada Supreme Court has jurisdiction over the judgment that's been entered. I cannot effect that judgment and their jurisdiction over it, and I would not intend to. If I make changes to that which is operative before them, unless they simply dismiss their jurisdiction, they will either confirm or deny what's been done.

If that's different than what I do, we're doing it again. If it's not different than what I do and I make changes, there will inevitably be an appeal. That appeal will result in an affirmation, and not of my work, and we will do it again. I think that's a recipe for madness. That's my personal opinion about it. I appreciate you all being patient with me saying it.

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Assuming that doesn't result finally in any resolutions, let's move a pace. There's a number of motions that need to be heard. I assure you I've read assiduously all things in this file. Whether they're all in my head or not is something altogether different. And I offer no presumptions about that.

There are nine outstanding motions and various replies and oppositions that need some resolution. And I'm going to begin in the order of my choosing. The first one I'd like to begin with is the Motion to Disqualify Plaintiff's Counsel. That's actually the fourth in order, if you will, of the filings. That was lodged initially on March 27th.

Mr. Polsenberg, I don't know if you or Ms. Brantley or Mr. Campbell are going to be the principal target of my questioning.

Sir.

MR. POLSENBERG: I was going to argue everything, until you just said that. So now maybe I'll make one of the two of them answer questions.

THE COURT: I was just going to see if you were going to throw that, I'm sure, extraordinarily, intelligent, capable young attorney to your left under the bus.

MR. POLSENBERG: Exactly what I was saying.

THE COURT: Well, I'll leave that between you and her, I suppose.

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What I'd like to do stylistically, Counsel, I don't want to squash the art of advocacy. I know you'll have some prepared remarks, but I really have some questions I'd like answered first before we get into the arguments. So I'd like to begin with some questions to make sure we're all working on the same operative facts and then give you the opportunity to argue.

MR. POLSENBERG: And that's why I brought Adrienne and Rick along, because Adrienne has read the entire trial transcript and Rick lived through it. So I may call on them for individual questions.

THE COURT: Okay. In general, though, I'll expect one of you to argue or answer a particular issue. I'll give you some latitude, given the representation you just made.

So perhaps we can begin in this way, Mr. Polsenberg. We can all agree -- I know you would all be too polite to do it, but we can all agree, look, I'm just a knuckle-dragging former prosecutor with a lot of trial experience. And so I'm kind of slow on the uptake, but I need to understand a few things factually about this Motion to Disqualify.

If I understand the lay of the land, Mr. Polsenberg, you -- and I'm referring to your law firm, not to you personally -- represented them prior to trial in this case on issues related to this property.

MR. POLSENBERG: Not in this case.

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THE COURT: Prior to this case, I said.

MR. POLSENBERG: Oh, I'm sorry. Yes.

THE COURT: And after you're client now lost to them at trial in this case, he hired you against your former clients.

MR. POLSENBERG: Yes. But that's not the distinction in the rule.

THE COURT: Well, Mr. Polsenberg, we will get to the niceties of the rule. I just want to make sure I'm understanding the lay of this land, because candidly it does not feel very comfortable to me, quite honestly. It feels anathema, in fact, to the general rules under which we all operate. Now, I've got some very pointed questions for your colleagues related to issues of laches, but I just want to make sure we were on the same sheet of music.

I have reviewed, for example, some of the billing inquiries. And you characterize Lewis Roca's representation of the entities on the other side of the room as incidental and minor. And if I may, did that representation include billing in excess of $123,000?

MR. POLSENBERG: Yes.

THE COURT: Here's why I ask. Simple math at $400 an hour would result in a figure in excess of 300 hours of work. Is that true?

MR. POLSENBERG: I'm not good at math, so I'll just

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take your word for it.

THE COURT: All right. So let's assume it's in excess of 300 hours of work. That work involved formation of the entities involved here, correct? Review of some of the loans that preceded -- the Hale loan, for example, that preceded the issues in dispute here; did it not?

MR. POLSENBERG: Yes. The gaming -- it involved the gaming lease and it involved an opinion letter regarding the deed of trust that was related to the loans.

THE COURT: To two of the loans, correct?

MR. POLSENBERG: Yes.

THE COURT: Those two loans are incidental facts related to this controversy; are they not? Because Mr. Yount's claim was these folks didn't tell me the true financial picture when I invested. Isn't that true?

MR. POLSENBERG: I don't think they even rise to incidental to what is now before the Court, because what is now before the Court is the so-called counterclaim. And that involved Mosaic either lending or restructuring loans.

THE COURT: Right.

MR. POLSENBERG: The fact that there were loans is a fact that is part of the case, but any detail of those is not a critical factor in this case.

THE COURT: But at the heart of the complaint by your

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former clients would be: I necessarily spoke with my attorneys about funding related to this project. Right?

MR. POLSENBERG: No and no. No, there was no complaint by them; and no, the discussions they had with us simply involved an opinion letter under Nevada law to assist their California counsel on whether the deed of trust was proper under Nevada law.

THE COURT: Well, you properly anticipated one of my questions. You asked them, of course, if they would mind if you represented Mr. Yount, did you not?

MR. POLSENBERG: No.

THE COURT: Why not?

MR. POLSENBERG: Because I don't think it -- when we did the conflict search it was a prior matter. We didn't represent them anymore, and it was not a substantially related case.

THE COURT: Let's pause there. There has been Mr. Criswell's Motion to Disqualify. Mr. Criswell, as I understand it, complains, "They were my attorneys previously." If I understand the lay of the land, Mr. Little had to know as of June of 2017 that they were involved in this alleged contract because of a related or an unrelated employment -- piece of employment related litigation, right?

MR. LITTLE: I didn't remember that, no. Candidly, Your Honor.

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THE COURT: Well, whether it was in your memory banks or not, you were at least constructively charged with that knowledge. Correct?

MR. LITTLE: Perhaps. I'd have to go back and look at the file. I know that we took over the Mullan file from somebody. I don't recall who. And I think that matter had closed before I moved over to the Howard and Howard law firm and I was wrapped up in this trial.

So it is a very narrow issue.

THE COURT: That then raised the issue of a potential conflict in October, right?

MR. LITTLE: Yes, sir.

THE COURT: They then appeared with you at a settlement conference with Mr. Eisenberg when you knew about the alleged conflict, right?

MR. LITTLE: I thought the conflict issue came up at the first settlement conference with Mr. Eisenberg.

THE COURT: That was in December.

MR. LITTLE: Yeah. We were sitting there in December, and -- because what I had represented to my clients is that they had retained Mr. Polsenberg. I didn't say the law firm. I said, you know, "He's a top appellate attorney in the state." And that's what I represented. When we got to the settlement conference with Mr. Eisenberg -- my client can correct me if I'm

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wrong -- there was a sign-in sheet. And it said, "Lewis and Roca," and that's when they said to me for the first time, "Oh, my gosh. They were our attorneys. They were our go-to Nevada counsel on this project."

THE COURT: And then you had a settlement conference?

MR. LITTLE: And then we had a settlement conference, and that's when I sent the letter, right after that.

THE COURT: You sent a letter.

MR. LITTLE: Yes, sir.

THE COURT: I assume had you reached a settlement, there would be no complaint about the alleged conflict.

MR. LITTLE: Fair.

THE COURT: The letter is sent. And then the motion is filed in March.

MR. LITTLE: Yes, sir.

THE COURT: How is that not subject to laches?

MR. LITTLE: Well, I think we have to look at it in two periods, right? The first period leading up to the December conference, I didn't know from my clients that the Lewis Roca law firm had represented them and represented them to that extent. Certainly it was the situation that I explained: The sign-in sheet; Lewis and Roca; they explained it. As soon as they did that, the next day, I believe, is when I sent the e-mail to Mr. Polsenberg or his associate saying, "Hey, this is conflict.

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Will you guys withdraw?"

They sat on it for a while. Wanted to consider it. I don't know how long that period of time took. Eventually they got back to me and said, "No, we're not going to do it." I think there was about a four- or five-week period of time before I filed the motion. And candidly, Your Honor, that was just the timing issue of it, because I was busy, I was doing it as fast as I could.

THE COURT: I appreciate there are timing issues, and I appreciate there a differences between actual knowledge and constructive knowledge. But I find it -- I'm as uncomfortable with the delay in raising this issue as I am with the issue. I find it -- unseemly is maybe too strong a word. I just find it, to outside observers, outside of the legal profession and all of us, discomforting that your clients would have had them as an attorney when, against Mr. Yount, and then he would hire the people who beat him against your clients. I think citizens in the community -- that's not a legal standard -- are deeply distressed with that sort of thing. That's the level of discomfort I have.

But by the same token, this is a strategic move. I don't believe there is an actual discomfort related to this conflict of interest, given the prodrome of events. If, when first learning of it, even at the settlement conference, your

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clients said, "Wait a minute. Wait a minute. Wait a minute. We can't have them now working against us when they were our attorneys before."

"We'll roll the dice. We'll go to settlement. If we reach a settlement, great. Mores the better. No complaint. No harm, no foul. We will engage in the briefing schedule that Judge Polaha laid out, and no harm, no foul. We'll get all the way to March, and after -- if memory serves -- Judge Polaha's order, and then we'll raise an issue related conflict." That seems unfair.

MR. LITTLE: Well, I can assure Your Honor there was no tactical advantage, there was no ulterior motive for that, other than just timing.

In terms of the settlement conference, I had flown up from Southern Nevada. The clients had come in from California for that settlement conference. Mr. Campbell was there. You know, that's when the issue was raised. I guess, could we have walked out there? Sure. I don't think that that settlement conference lasted very long to begin with.

But sure, Your Honor, I guess you're right. We could have walked out as a matter of principle and said, "We want to address this issue first." I hadn't even researched the issue, written the letter to counsel yet. I think it was the next day that I did that. And, like I said, the delay between when they

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said, "No, we're staying in," and me filing a motion was just a matter of my schedule. And I apologize. I wish I had acted quicker. But there was no bad motive/ulterior motive/tactical advantage there for doing that.

THE COURT: Mr. Polsenberg.

MR. POLSENBERG: Thank you, Your Honor. We responded in seven days. And the reason it took seven days to respond is because we culled what information we could. I brought the general counsel of the firm in, looked at the situation, compared it to the rules.

You know, it may be a lay person's belief that if I ever hired a lawyer, that lawyer could never be against me. If that were actually a law in Nevada, I never would have been in the Wynn case, because at some point before the Wynn had hired my firm. But they didn't hire -- we currently weren't representing the Wynn and we currently weren't representing these people, and they weren't substantial related where I obtained information that gave me an unfair advantage.

They cite the Waid case. And in the Waid case, the attorney, Noel Gage, had defended Vestin on a Ponzi scheme. I couldn't remember the word, a Ponzi scheme. And then after that case was over, the other plaintiffs' suing the Vestin, he defended the Vestin in the prior case on the Ponzi scheme, other plaintiffs brought Noel Gage in late to the case. But since he

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already knew about what the Ponzi scheme was at Vestin, he came in and named all new witnesses, because he knew what went on in that client involving the actual issue involved in the case.

That gave that client an unfair advantage. And that's why the Supreme Court said no, he couldn't be in the second case. This isn't the situation here. We talk about lay reaction to appearances, but they have to show more than that. They'd have so show what kind of information it would be that we'd get out of those prior representations that would give us an unfair advantage.

In the employment matter, all we did was file an answer. And we had to withdraw, because the clients were being uncommunicative and not working with us.

THE COURT: It was curious -- I'm sorry for interrupting. But it was curious in that regard. Some of the billing invoices attached to the Lewis Roca related to that. For example, June of 2016 have interesting notes that probably don't mean anything outside the context of that case. But they include the short phrases we all use when billing. Funding status.

For example, 6-1-2016: Draft and reviewed e-mail to H. Hall regarding X Ruland (phonetic). That's the name of the plaintiff in that case.

Funding status. I don't know what funding status is referring to, but it causes me an itch.

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The very next entry on June 2nd, a variety of entries, telephone conference with John Moore regarding 16.1 extension. I'm assuming that's the 16.1 extension in that case. And funding status, .2; review and respond to email from H. Hill regarding update finding settlement, .2.

It just causes me itch. And I think that's the point of the three-factor test of Waid, is that I'm not supposed to dive too deeply into the actual confidential communications, but make a factual determination regarding the scope of the former representation and whether it's reasonable to infer that the confidential information would have been given to a lawyer representing the client in those matters.

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Your thoughts.

MR. POLSENBERG: Well, I don't know what "funding status" means either. As you can see this case didn't get very far. And point 2 is not a very --

THE COURT: Substantial.

MR. POLSENBERG: Yes. I have to tell you, when I saw what was going on in the Waid case, that made my blood just go chill, where this lawyer on the other side knows all about our so-called Ponzi scheme. We don't have that same kind of situation here. They don't even try to make any kind of analysis as to what it would have been that we would have received that would have given us an unfair advantage.

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So I don't think they've made out a prima facie case, and especially under the Waid case. And yes, I was going to talk about the delay and the waiver and the latches, but I think you've addressed that.

THE COURT: Well, it's Mr. Little's motion. I want to give you an opportunity, Mr. Little. I've telegraphed my thoughts, and I want to give you an opportunity to develop any factual representations you want to make or additional argument.

MR. LITTLE: Thank you, Your Honor. You're obviously very well versed on the motion, so I won't take too much time.

Obviously, under the case law, the law firm opposing the motion, Lewis and Roca, has the burden of showing they don't possess or have access to sources of confidential information. And the standard is if there's any doubt in Your Honor's mind, those doubts have to be resolved against them and in favor of us.

The focus here is not whether they have actual access to confidential information, but whether there's a realistic possibility that they do. I think Mr. Polsenberg misspoke on one part. In terms of what's before Your Honor today, certainly the financing and what is talking about Mosaic is not an issue, but as I understand the appeal from Judge Flanagan's decision and his amend order, they're appealing the whole kit and caboodle, including the defense verdict in our favor. And those issues certainly do involve financing. Your Honor, was dead on.

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Mr. Yount was alleging that we misrepresented the sources of the financing --

THE COURT: The exhibit you used to support damages, was an exhibit used basically to impeach Mr. Yount in terms of the knowledge he had about the status of financing.

MR. LITTLE: Right.

THE COURT: I get it. I understand.

MR. LITTLE: But there's another important point here, Your Honor. If you look at their billing records they were looking at all of the operative agreements in this case, including the operating agreement, which is -- that agreement was cited some 110 times in this case. That is a very important document.

Mr. Campbell was making the argument in this case, which is now up on appeal, that the transaction was void because the operating agreement wasn't followed. And that's a document that they reviewed. They reviewed the business plan. So I think they certainly -- you know, nine different attorneys over a two-year period of time who go to Nevada counsel who were representing my clients on these issues on this project, I don't think that they've met their burden. Their burden is that they don't have access to this information. I don't think they have.

THE COURT: Mr. Little, the heats about to get turned up. And here's what I mean by that. I actually view this as a

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fairly close call, because I think as I look at the Waid factors, it would beg common sense, to my mind, to believe that the scope of the former representation did include conversations about plenary financing. All the financing that might occur. Particularly when financing was -- crumbling is not the word I want to use, but becoming problematic, when they learned that the sewer line repair was going to cost a whole lot more money than it actually cost, for example. That time line, if I understand it, seems to correspond with the period of what I'm going to call dual representation. So I can get to the point where it's reasonable to infer that confidential information may have been exchanged.

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Here's the problem you have with me. You cited Brown versus Eighth Judicial District with the proposition that doubts regarding disqualification should generally be resolved in favor of disqualification. Period.

What does it say? What does the quote that you took from the case actually say? I don't know if you have the case in front of you.

MR. LITTLE: I don't, Your Honor.

THE COURT: It's not a memory test, and I don't blame you for that.

MR. LITTLE: No.

THE COURT: The whole quote is this: While doubts

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should generally be resolved in favor of disqualification, see Cronin at 640, 781 P. 2d at 1153, Hull 513 F. 2d at 571, parties should not be allowed to misuse motions for disqualification as instruments of harassment or delay.

You should know that one of the bugaboos of my position, which I'm very privileged to have, is in a case like this across nine motions with probably 400 string sites, when counsel are sloppy about their citations to relevant precedence, it makes me very grumpy. And it colors the lens through which I see the motion. And to my eye, when I know that there's a significant delay, and the issue of laches is hanging and there was a settlement conference in which no complaint was made about the alleged conflict, which may have resolved the case in plenary fashion, and then I see a quote like that, you know which way I'm going, if you want to respond.

MR. LITTLE: Only other than what I say before, that, Your Honor, we were not -- my delay had nothing to do with tactical advantage. There's no harassment here. It's simply a matter of the smell test. My client, they had paid them a lot of money. They had represented them for two years. And it just didn't feel right that they were now taking a position adverse than when they were their go-to counsel.

I raised the issue the day after I learned of it. Should I have had constructive notice when I was at my prior law

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firm? I can't dispute that. You know, I didn't have actual notice. I didn't remember that issue. When Mr. Polsenberg got involved I didn't know that the law firm had represented them before. That issue, I think I explained how it came up at the settlement conference. And I brought it up to them immediately. When they took their position I moved as quickly as I could to file the motion. I should have brought it faster. I apologize for that.

It wasn't to secure any sort of tactical advantage or anything like that. I don't know that anything was going on in that time period that serves as a prejudice to anyone. But I understand your position.

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THE COURT: Well, you did yourself service by the demeanor in which you responded to a district judge saying, "I'm about to turn up the heat." It doesn't change, to my eye, the intellectual observations that I've made, however. So here's the way I come down on this motion. And it's a messaging to all of you, the way the day is going to proceed. And I invite you at any appropriate break to consider this for your clients.

First, I find pursuant to Waid, when the prior representation by Lewis, Roca and Rothgerber of these defendants included specific legal advice about the source and adequacy, for example, of funding, and then the later trial in this case was -- had as a central issue the source and adequacy of funding, the

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first Waid factor is satisfied. It is reasonable to infer that these defendants engaged in confidential communications with their lawyers.

I realize Lewis Roca is a giant firm with disparately graphically situated offices. I doubt those officers had actual conversations with each other about litigation like this. That matters not. That knowledge is constructively charged throughout the firm. And it is reasonable to infer that some confidential information may have been given, and that it was maybe marginally relevant to the issues raised in the present litigation. But I deny the motion, because of the issue related to the prodrome, I'm calling it; the sequence of events related to how the issue of a so-called conflict was raised, and my belief that it is as much a tactical decision as it is a substantive decision about a real complaint about confidential information.

So for that reason, I deny the Motion to Disqualify, and I direct Mr. Polsenberg that you and your office craft an order denying that motion.

MR. POLSENBERG: Thank you, Your Honor.

THE COURT: The next issue I'd like to go to is the Plaintiff's Motion for Judgment as a Matter of Law, for Relief from Judgment, to Alter and Amend the Judgment, to Amend the Findings, and for a New Trial. I guess we'll get a relatively small -- easy for me to say -- issue out of the case -- out of

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the way.

I've not had the privilege of working with many of you before, but you all should know I will remember you. And I think I will remember in good ways. But if anyone in this case or any other case in front of me files a motion exceeding the page length of the pretrial order, I'm simply going to strike it. I'm not going to look at it. I'm not going to read it. I'm going to strike it.

This motion exceeds more than 20 pages, and closes in on 25 pages. Is that the end of the world? No. But it is, again, a matter of no small irritation to me when, for example, the plaintiffs complain that the pretrial order NRCP 16(b) preclude the defendants from saying that they can amend the pleadings after the date lodged in the pretrial order and then don't follow the pretrial order. That's a matter of no small frustration to me. Anybody want to respond to that?

Let me say it again. A part of your argument, Mr. Polsenberg --

MR. POLSENBERG: Yes, sir.

THE COURT: -- about whether or not they should be able to amend the judgment, the pleadings, the allegations against your clients or otherwise is that 15(b), NRCP 15 shouldn't apply, because there was a pretrial order in this case saying the date certain to amend pleadings was a date last year at the same time

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that you fail to comply with the pretrial order in the pleading length.

MR. POLSENBERG: And, Judge, are saying that our Motion for Judgment as a Matter of Law exceeded the page limit?

THE COURT: Yes.

MR. POLSENBERG: I've got a 15-page motion.

THE COURT: Well, we can parse about that. Whether it's that motion or another motion to which it applies. I'm not going to strike it. I just want to send the message. Don't expect that from a judge's point of view I won't use the rules that you try to use against each other against you. Because there is a motion that you have filed that does exceed the page limit. And it was a matter of no small irritation to me.

MR. POLSENBERG: And I apologize for that. And a lot of these motions have an awful lot of briefing. And I apologize for that at a certain level as well.

But the distinction between Rule 15 and Rule 16 --

THE COURT: Let's not go there yet.

MR. POLSENBERG: All right.

THE COURT: So I'm not going to striking this or any other motion today, but going forward, please be warned. If you don't skew to the admonition that I think it was Mark Twain who said, "If you want me to give you 20 pages on any subject, give me a couple of hours; if you want me to give your five pages on

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any subject, give me a couple of weeks." I expect you to spend a couple of weeks.

MR. POLSENBERG: Very good, Your Honor.

THE COURT: Thank you. So as to the Plaintiff's Motion for Judgment, here's my first concern Mr. Polsenberg, and you touched it on already. Aren't you in essence asking me to act as a intermediate court of appeals?

MR. POLSENBERG: When you came out and you started talking about anything you do really doesn't matter, because the Supreme Court is going to have to address all that, that really got me thinking.

There is Nevada case law saying that a replacement district judge has an obligation to correct the improper rulings by the prior judge. Now we raised that in front of Judge Polaha. And Judge Polaha, I think, took the same approach that you did, and said, "The issue in front of me really is, is there enough under Rule 52." And even though the law in Nevada has veered to the point where a replacement judge has to make things right, I understand that you're coming in essentially after the judgment. There are a lot postjudgment motions going on.

So I do understand what you are saying. And although there are in some contexts the authority of a district judge, whether the same judge as the trial judge or another one, to have to review the trial to determine whether the factors are there.

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Rule 59 has an element of discretion involved. I'm not sure that discretion really comes up here, because my arguments are purely legal. So --

THE COURT: Well, it's a --

MR. POLSENBERG: -- two answers.

THE COURT: Go ahead.

MR. POLSENBERG: Number one, when you came out and said that, I thought, wow, that's a great observation. And my other answer is, but, yeah, I'd really like you to rule on these motions.

THE COURT: Well, of course.

MR. POLSENBERG: But I do understand. I do think in this case -- forgive me for interrupting. I think you are right; whichever you rule, this case is going to go up on appeal.

THE COURT: And I just wonder if all of your collective thoughts -- I mean, I know that I have some of the very best lawyers in the state in front of me, so I don't mean to second-guess any of you, but I just wonder if your clients understand that they're going to double their litigation costs by this process, and their litigation costs have not been insubstantial to date. And someone is going to lose, and lose badly after the dust settles after I do whatever I do and whatever the Supreme Court does. And it just seems a curious use of resources.

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I'm just going to leave it at that. We beat that horse.

MR. POLSENBERG: Yeah. I think it's a really good observation. I think what we were trying to do was get it resolved early enough. I think probably part of what we were doing is trying to get our arguments articulated so the two sides could talk about resolution without having to bother the Supreme Court. But I do think your observations was spot on, Judge.

THE COURT: Well, I appreciate that. I don't want to be spot on so much as I want to try to help both sides of this room get to a resolution. And that's why I'm going to make judgments, because in the end, that's my job.

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The next question I have, and then I promise I'll shut up and let you do whatever advocacy you like, but I think this will help your advocacy in front of me, is why 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.

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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. Please.

MR. POLSENBERG: May I first address Pat Flanagan. He was a close friend of mine, partner of mine and Rick's for many years. We were on the Board of Governors together. We were drinking buddies back when we both drank. And I have a great deal of respect for him. And I have a respect for all judges. And actually, I like almost all judges. So I don't mean anything as a criticism in that sense. I do think he made legal errors in this case.

THE COURT: Well, there are legal errors in every case. Can we agree? No case is perfect.

MR. POLSENBERG: Mr. Jemison, you notice at one point in the transcript Judge Flanagan starts talking about Rex Jemison. And Rex Jemison some said that every -- and Bob Rose, when he was on the Supreme Court -- no trial is perfect. Right.

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But I think these rise to the level of reversible legal error.

And 54(c) I think is a very interesting rule. It's from the federal -- you know, we just steal the federal rules. And 54(c) makes a lot more sense in federal court than it does here. And the reason for that is 54(c) has two parts. You read the second part. The first part is in a default the plaintiff can only recover what is in the prayer for relief.

And there are a number of reasons for that. One of them actually ties in with Rule 8. And that is that a defendant getting the complaint could say, you know, I don't even need to answer this, because I know I'm liable and I know I'm liable for that amount. So I don't mind the judgment being entered.

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Then the second sentence goes further. But our state Rule 8 is different, in that it says that you do not set out as specific claim for relief in money damages. What you ask for is in excess of $10,000. There are a number of reasons for that going back many years. One is so that you don't use the complaint to generate publicity.

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I used to argue on the rules committee that we should change that number. 10,000 was picked when it was the jurisdictional amount in federal court. It's still 10,000, but it's just in excess of $10,000. So a state court judge has no prayer for relief that restricts a money damages case, because we don't articulate anything other than "in excess of $10,000." So

I don't think there's really a whole lot of need in state court for that second sentence.

And the federal courts are very clear that what we're looking at here is, okay if they went under one theory, can they recover under another theory? If they were asking for certain relief, can they recover a different relief?

That's not what happened here. They didn't have a prayer for relief. They had an affirmative defense. So they didn't even have a demand for judgment. And the federal cases have made clear that 54(c) does not get around the fact that the issue had to have been tried by express or implied consent.

THE COURT: And I accept that your point is, look, while there have may have been some conversations about my client, Mr. Yount's, knowledge of the financing and some accusation that he was, in Judge Flanagan's words, with cahoots with the rest of the Incline Men's Club, how was he to know that he would walk into court hoping to get a money judgment in his favor and walk out of court having to pay millions. You know, 4.5 plus attorney's fees and costs, now a request for another five-odd million dollars. I get that from a due process perspective. But isn't that a different question? Isn't that a question of damages?

And as one of the defendant's acknowledges, at most, around you entitled to a new hearing related to what the damages

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may be. Because didn't he impliedly know that their claim was -- to all parties in the room, please be thick skinned. I mean to defame no one. But their claim was he was just a lying officious intermeddler who squirreled the financing for this deal for reasons nobody can fathom.

MR. POLSENBERG: But that was their affirmative defense for not having to pay the million dollars.

THE COURT: I know you say it was an affirmative defense, but we all know -- I, of course, see things through my lens of experience the way we all do, but I've gone to the close of evidence in a first-degree murder case and amended the pleadings. We all know that anyone can at any time seek to adjust the claim for relief to the evidence actually adduced, because trials are living, breathing things. They go in directions we don't expect.

You can't honestly say that your client and his counsel didn't know and expect that walking in he would hope for money and walking out he could have to pay money. Right?

MR. POLSENBERG: Well, no, we didn't expect that. And I got to commend Rick. I mean, he repeatedly objected. He objected even to this being an affirmative defense. He objected to it that there wasn't a counterclaim. He asked the defendants, are you asserting a counterclaim on this. And Marriner went so far as to concede that there was an intentional --

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THE COURT: Let me ask -- and I apologize for talking over --

MR. POLSENBERG: Judge, we've done this before. You know I enjoy it.

THE COURT: Why did you opine that Judge Flanagan's identical damage award to the three individual defendants of 1.5 million was evidence of his prejudice? Meaning Judge Flanagan's prejudice. Why did you opine that?

MR. POLSENBERG: I think it's evidence of excessive damages arising from passion and prejudice. And this is an argument that we have raised in many trials. Last I'm argued it in the Supreme Court was about two and a half weeks ago. Where a jury verdict came in and awarded 7.5 and 7.5. And we said look, the fact that they are identical numbers shows a lack of reflection, which is indicative of passion and prejudice.

THE COURT: All right. One other question that I have curiosity about: You at one point in the -- in your response to their opposition, I believe, indicate that your client would have had to consent to a counterclaim in this case. What did you mean by that?

MR. POLSENBERG: Rule 15(b) and the federal cases under 54(c) talk about how issues have to be tried by consent, either expressed or implied.

THE COURT: Right. So -- I apologize. 15(a) says,

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"Otherwise a party may amend the party's pleading only by leave of the Court or written consent." But isn't the next phrase, "and leave shall be freely granted or given when justice so requires"?

MR. POLSENBERG: Right. And that's when we get into the Nutter case, where Judge Tao explained the distinction between 15 and 16. I've had Ninth Circuit cases on this very point, where, yes, a district court should freely grant up to the point where there's a deadline under Rule 16. And after that, there's a higher and more stringent standard.

And 15(a) is not the same as 15(b). That doesn't mean that amendment should be freely granted to conform to the evidence, unless you meet the requirements of 15(b).

We did not consent. There are cases that say the parties has to understand what's being tried, and let it go and acquiesce, impliedly or expressly consent to a claim being tried. But when the evidence is coming in relevant to something else, it's relevant to their affirmative defense. That doesn't mean that we are consenting to a counterclaim.

THE COURT: Other argument you wanted to offer in light of either my comments or that you haven't had an opportunity to offer?

MR. POLSENBERG: This motion is the motion that during the settlement conference I said to Bob Eisenberg and to Marty,

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this is our motion for everything. So it is, I think, the critical motion in the case. Although I think it ties in a lot with the Rule 27 motion.

I think if you were going to take the approach that everything is going to wind up needing to be decided by the Supreme Court anyway and it is a waste of the parties' resources and the Court's resources to have to go through and have to address all these issues, I think we should still address the Rule 27 issue.

And the Rule 27 issue goes exactly to the notion that there wasn't an interference here. So let me go through all that. We've already discussed this, that they raised an affirmative defense. Unclean hands. But unclean hands is an equitable defense. It's an defense to a claim in equity. If we were bringing an action here saying we want X number of shares or we want them to have to perform things in a certain way, some kind of injunctive relief action, that's when this would apply. But it doesn't apply. This affirmative defense doesn't apply in this case, because it's not equitable. And I don't think they've shown enough for this even to be an affirmative defense here.

Look what they argued. They didn't argue that this was a claim for damages. We objected to this being raised. We objected to it being raised an a claim for damages. They denied it was a counterclaim. They denied under oath that they had ever

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asserted a counterclaim.

Marriner even comes in and says, "Look the purpose of this affirmative defense is to get an offset." So there was nothing there ever telling us about an affirmative defense. And, you know, they -- remember it's unclean hands versus intentional infliction -- or intentional interference with contractual relations. And they don't have a claim for interference. They've got the wrong parties here.

The first thing that you have to do is show what the contract is that's being interfered with. And it looks like they're saying the contract is Cal-Neva's future contract with Mosaic to have a loan. You get the wrong parties here. They can't be suing. Cal-Neva would have to sue.

THE COURT: What about the e-mails, including Exhibit 124 that Judge Flanagan lasered in on, both in his oral pronouncement and in questions during your trial, that he, Judge Flanagan, clearly believe showed that Mr. Yount was at the switch when the torpedo was launched to the Mosaic financing.

MR. POLSENBERG: Man, I sure do not read Exhibit 124 that way at all. The way I read 124 is that Mosaic is saying that -- one of the e-mails in that string, Sterling Johnson, he's talking about C.R. being uncommunicative, having concerns with their management, talking about it being a little bit of a mess. And that they were waiting for three of months for C.R. to

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respond. Paul Jamison in his e-mail in that chain says that the mess is C.R. being unresponsive. And Radovan even says in the e-mail in that chain that -- that Mosaic is irritated by their sluggishness.

It all goes to show it isn't my client that's doing this. They're having problems, which is why I think you need to grant the Rule 27 motion, to let us have the discovery from these individuals from Mosaic, because I think that will show that this so-called interference was not the cause of the brawl. The brawl was because Mosaic was not dealing with them anymore because they were not doing a good job.

But let me go back to my point about the wrong parties. This contract -- first of all, the first element of intentional interference is that you have to have a valid and existing contract. There wasn't an existing contract. They're saying there was interference with negotiations for a contract, but that's not an intentional interference. And who is the contract with. It's the loan contract between Cal-Neva and Mosaic. The cause of action belongs to Cal-Neva, not to them, as individual -- I'll call them shareholders.

And there claim is against another shareholder. Can Cal-Neva sue somebody with an ownership interest in the entity, because that person expressed an -- and I'm assuming facts here that I do not believe to be the facts that were proven. But let

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me just say, if somebody with an ownership interest goes to the business entity and says: I do not like the terms of that loan, that can't be intentional interference with the contract. And they even admit, Marriner admits that there wasn't any intent to interfere.

In fact, Marriner in the briefs in the district court called it inaction. There's no such cause of action as intentional inaction. It has to be an actual interference. And that didn't exist in this case. What they really seem to be saying is that a steward didn't do something to be prevent other people from slowing down and stopping this loan.

THE COURT: Well, by my count though, there are 16 pages of trial transcript about e-mails back and forth. And I've read more e-mails than I care to read already. But I realize that there are intellectual arguments about the limits of what you understood their theory of a claim to be or otherwise.

But don't you agree, there's no real dispute that the defendant's theory in defending the case was that your client had done things affirmatively wrong, including his involvement by their theory with the Mosaic loan.

MR. POLSENBERG: That was their strategy to make us look bad by saying that all the stuff about the Mosaic loan. And we objected. We pointed out it wasn't a counterclaim and we objected saying it's not even a valid affirmative defense.

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THE COURT: And so what then of the issues of judicial economy? And here's why I began with the comments I began.

I get it that your complaint, as I've already said, is about due process notice to your client about the remedies that would be given by Judge Flanagan to the defendants in a loss by him. But why in the world would we have a system where at the end of seven days in a bench trial where a central issue was the actions of Mr. Yount, we would then have to have another seven or multiday trial to determine what those actions meant. Isn't that why 15 and 54 exist?

See to me, from the bench perspective, I don't want any of you to have do this again, let alone do it two or three more times, which is the path we seem to be upon, quite candidly. And I can understand completely, speaking as a trial judge why Judge Flanagan would way, "Look, I'm aware of NRCP 15 and NRCP 54. I'm hearing the witnesses. They're talking about the central facts and issues in this case."

We trial judges have a saying: Be careful what you ask for. And that's clearly what Judge Flanagan did where Mr. Yount is concerned. I will reflect to you, I don't find that offensive, but please convince me --

MR. POLSENBERG: Here's why I find it so offensive. We did not know that this was going it be a claim against us. If we had known it was a claim against us, we would have done things

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different, both in discovery and in trial. Which is why I'm asking you to let me depose these people from Mosaic.

In our brief we talked about proportionality. Proportionality is a huge issue now, when it comes to discovery. Commissioner Ayres has talked about it. You don't do more discovery than you need to do. The discovery that you would do facing an affirmative defense, which honestly doesn't even apply in a damages case, would be much more limited than the discovery you would do defending against an intentional interference.

So we didn't do that discovery. We kept checking during trial, make sure it wasn't a counterclaim, and it wasn't. If the judge -- and the judge -- he certainly should have done it before closing arguments. If a judge is going to say, "I'm going to convert this claim that doesn't exist into a claim that does exist," at that point the trial should have stopped and reopened discovery and allowed us to do these things.

And it makes my record on appeal for what really happened here. So you're saying would a judge need to do something for another seven days? Yes. I don't think it would take seven more days of trial, but I do think that evidence would have been necessary. I think the whole case -- I don't think there is an intentional infliction of emotional -- intentional interference.

THE COURT: I know where you're going.

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MR. POLSENBERG: Thank you, Judge.

An intentional interference with contractual relationships claim here. I do not think that there is one. But if there is one and we didn't know about it, that is a denial of due process and we need a new trial. And if you ordered a new trial, unlike in the federal system, a grant or denial of a new trial is appealable in Nevada.

THE COURT: Let me tell you, maybe this will help for this and subsequent motions. I have no intention -- let me say that again -- I have no intention of disturbing or setting aside Judge Flanagan's findings that the seven causes of action brought by Mr. Yount were not proven. I have no intention of setting that aside.

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Let me help more in this way. The struggle I have after a lot of hours and a lot of conversations with my law clerk, Ms. Bolin, who's behind you all and I introduced to you by this reference, and my administrative assistant Tony Clark's daughter who's also a lawyer, a career law clerk to Brian Sandoval for a while and a formidable attorney herself. All of that leads me to this conclusion and I hate saying this. I have found every way possible to uphold anything that my predecessor has done, not only because I thought he was a fine judge and a fine lawyer, it just makes sense. The last thing we should have is a system where if you get a new judge, you get a new look at

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the facts.

But I can't say on this record how he got to 1.5 million. There's no findings of fact or conclusions of law that have ever been entered by either Judge Flanagan or Judge Polaha.

And let me put this in the record. I don't know if you all know this. I didn't see it in the minutes or anything recorded I've seen, but after Judge Flanagan died and after I was appointed, I had a brief contact with Judge Polaha. And Judge Polaha said, "Look, I'm up to my eyeballs in this" -- I won't tell you the word he used -- "case."

MR. POLSENBERG: I know Judge Polaha, and I know what word he said.

THE COURT: And he said, "I've already read the transcripts. I'll just do you a solid, and I'll finish the thing that I set upon to do."

It speaks volumes of him, and I greatly appreciate it. But it was after he did that, that I said it would make sense that I take the case back, not to get yet a third look at the facts. That's just madness.

But I can't say, from my own independent review, how Judge Flanagan got to 1.5, 1.5, 1.5. And the record doesn't reveal it. And I know the Supreme Court is going to say the same thing. And that's why I don't want to do this. And where I'm

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going, my inclination at the end of day, without cutting through all of the arguments on the rest of these motions would be to set a damages hearing. A hearing where I would allow proof related to claims by the defendants made against Mr. Yount and allow Mr. Yount to answer those claims. Not so much in a new trial setting, but in a setting related to if there are damages, what are they.

Because, for example, I forget the exhibit number, but the financial spreadsheet used to establish that 1.6 somehow is close to 1.5. That was introduced at trial really to impeach Mr. Yount. And that's a prediction by a financial analyst to what might be earned in the future.

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Well, no offense to Mr. Yount, anybody coming into this case knew -- nobody was guaranteed to make a dollar. And nobody has made a dollar, as a matter of fact about it.

MR. POLSENBERG: Well, none of the parties.

THE COURT: Touche.

So I can't say that I have any confidence -- and please, Judge Flanagan forgive me. But I just can't say I have any confidence about how he got where he got. And that is troublesome to me. And so the kind of the where I'm going at the end of the day, if there's relief that's to be granted, I'm not setting aside any judgment. I'm not going to amend the findings, because there aren't any findings that I can find to amend, quite

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honestly. I know what he said in his oral presentation, but you all know better than I, and I know from the Mack litigation that what a judge says and what goes into the order are two different things.

And it's intended to be that way, so that Judge Flanagan can do what he did, which is say, you know what, now that I've said what I've said, I'm going to go back and reread the transcript, which he did, and then I'm going to make some more factual findings, which he did.

And I've done the same thing.

MR. POLSENBERG: Well, it's -- Rick's father-in-law, Charley Springer, used to quote Karl Llewellyn, who wrote the book *Judicial Opinions*. And Karl Llewellyn thinks that judges should write their own findings of fact and conclusions of law.

THE COURT: Show your homework.

MR. POLSENBERG: Because it's, as Llewellyn says, the rassling with ideas instead of just coming up with an answer. It's the having to work it all out where a judge realizes what's really going on.

THE COURT: All right. So I've tipped my hand about an awful lot. I just want to know if there's any other argument you want to make related to this particular motion.

MR. POLSENBERG: My next index card said speculative damages, but I think we've addressed that.

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Thank you, Your Honor.

THE COURT: Mr. Little? Mr. Simons?

MR. SIMONS: Your Honor, I'm going to have the first go. May I use the podium, please.

THE COURT: You certainly may. Although I want you to be comfortable. The great thing about bench issues like this, is I can give you latitude. And standing where you're standing, I couldn't not walk around a courtroom. Mills Lane used to get furious at me. I say Mills, because he was in this courtroom when I first tried cases in Washoe County. And he would get so mad. He would say, "Mr. Walker, would you please stay over there."

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MR. POLSENBERG: A little raspier, Judge.

THE COURT: Yeah, you're right.

MR. SIMONS: All right. In anticipation of my opportunity to get to speak to you, I got so excited I threw water all over the table.

THE COURT: I've done the same thing.

MR. SIMONS: That's the kind of impact you have on me, after you've just given opposing counsel a little bit of a hard time.

I'm going to start off by apologizing. If I violated any rules or miscited any case, it was not intentional, and I apologize.

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Now I'm going to step to the big picture. And again, I'm looking at it a little bit like you, and as appellant counsel, because I wasn't there. So I have to look at what transpired, what are occurred in the case. So I'm going to address the merits of the plaintiff's motion, which is the "I'm going to throw everything in in the kitchen sink motion." Which if I was in that position, I would do too.

So I'm not criticizing that. I'm saying there's a lot of information. But we've got to step back a little bit, because right off the bat you pointed out, there's an appeal.

Now diving deeper into this case, I realized we have an issue. And I wrote some timelines to get us all focused on the issues. And where I'm going to come at this is we have some timing issues with regard to the plaintiff's motion, and then I'll get into subjective matters brought by the plaintiff's motion.

We know -- and if I may approach the Court. I don't think this had been placed in the record. And this is the Supreme Court's order that came down.

Your Honor, may I approach?

THE COURT: Yes, please. And approach freely.

MR. SIMONS: Thank you, Your Honor.

Now this is the order on August 24th, 2018. Why this order was written by the Supreme Court was because counsel --

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MR. POLSENBERG: Your Honor, please forgive me, but I don't know which motion we're on.

MR. SIMONS: Your motion. It goes to whether it should even be considered by the Court.

MR. POLSENBERG: I don't recall them briefing this.

THE COURT: Do you want to respond?

MR. SIMONS: And here's one of the issues, is opposing counsel has the duty to ensure that his motions are timely. And opposing counsel didn't advise the Court that we have an issue, a major issue with the timeliness of their motion.

MR. POLSENBERG: I didn't know they had an issue.

MR. SIMONS: You should know, Counsel.

THE COURT: Hang on. Hang on.

MR. POLSENBERG: I'm going to object to an argument that isn't in the briefs.

THE COURT: I appreciate that, and I wondered when your objection was coming. I'm going give you some latitude, Mr. Simons. I was surprised at the shuffle between you and Mr. Little, and I wondered when your objection was going to come. But I'm nonetheless going to give you some latitude.

MR. POLSENBERG: Thank you, Your Honor.

MR. SIMONS: I want to bring to this Court's attention, and if you have an issue or there's an issue, I propose we do some blind briefing at the end. But we don't just get to avoid

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this, we don't just get to ignore this issue, because you started out with your hearing on "I have a jurisdictional issue, because the Supreme Court has this case up on appeal." So that is what the overlying and overarching concern we have to deal with. It's not going away.

MR. POLSENBERG: Here's why I have a problem with him raising that: It's clear under Honeycutt versus Honeycutt and Foster versus Dingwall, you have the authority to hear these motions. And you'd have to -- may have to certify, if you do a certain thing, or you could just deny -- you have the jurisdiction to hear and deny my motions and their motions.

So if they had briefed this, I would have been able to point that out to them.

THE COURT: If there's a prejudice that inures to your client by this unbriefed argument, I'll give you an opportunity to respond. I'm curious to know, candidly, where he's going. And it may be helpful, because I did, in fairness to me, ask. And I did in my own shorthanded, however blunt way it was, do you all really want me to do this, because I have serious concerns.

So I'm sorry. I'll overrule the objection. Go ahead.

MR. SIMONS: And I'm go to go to the timing and deal with the Honeycutt, because I think Honeycutt doesn't apply.

This order, which the Court can take judicial notice of, is almost -- and I think it will apply as law of the case

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now, because this is an appellate decision coming down telling us what's going on in the underlying case.

The amended order, September 15, says, "Resolved all claims by and against all parties." And this is what the Nevada Supreme Court said, because Mr. Polsenberg went up there to the Nevada Supreme Court, filed a motion to say, "Supreme Court, what is the jurisdiction on this case? Do you have it or can we keep doing stuff down in the state court?" Because there was this March 12th, 2018, judgment.

And so opposing counsel asked what is the effect of this judgment versus the -- so but knowing that this appellate -- excuse me, amended order was entered, opposing counsel took the correct approach and filed an appeal. Timely filed the appeal. No tolling motions were filed, no motions to amend, no Rule 50 motions, no Rule 60 motions. And why is that important? Because the motions that you're presented to now all had -- except for the Rule 60, all have ten-day triggers. You file from the entry, not from the notice of entry, but from the decisional aspect of your -- you've got your clock starts ticking.

So what then happens, is we know, March 12, 2018, the judgment, the formal judgment was entered. And then there was immediately an Amended Notice of Appeal.

Thereafter, Codefendant's Motion to Amend was filed and Yount's various motions were file on March 30th. August 21st,

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we, on behalf of Marriner, filed a motion, which is under a different rule, which is under 15. And I'll get into that when it's my turn to deal with that motion. But then we have the Supreme Court's decision. And the Court has said that the time -- that this appeal was timely, that, at that point, divested the Court of jurisdiction. There was no tolling motion, because the Court looked at the docket -- the Supreme Court looked at the docket in the case and realized no motions in fact says that this Court didn't have jurisdiction to grant the motions as adopting the appeal.

Again, now this brings us into the Honeycutt line of cases. The Honeycutt line of cases starts with what do we do if there is a, quote, timely motion filed and there's an appeal? So the Court can consider it, and if inclined, certify it and you take it up.

And Honeycutt, the case originally started on a motion to remand in the Supreme Court. Then after that, we got the Mack versus Manley case. And then it says, "What jurisdiction does the district court have if the appeal is filed?" And that's the case that says, "Look, district court, you have collateral issues." And we all know --

THE COURT: That was my case.

MR. SIMONS: There you have it. You know the collateral aspect. If you're going to change or alter, you don't

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get to do that, because those issues are up.

So then what comes after is Foster versus Dingwall. And Mr. Polsenberg, that's his case. 2010, in walks Judge Hardesty. Justice Hardesty wrote the decision. And what he says or the Court says in that was to clarify the rule. And the rule is that there has to be timely motions or you're barred. Still get the collateral aspect of it.

So what I'm getting at is there is a major timing issue that the Supreme Court has told us applies in this case. I don't know -- I don't know the answer, but what I think the answer is, the motions to amend, both -- and this goes against my cocounsel, this motion to amend, as well as the plaintiff's motion to amend, new trial, et cetera, they're all untimely. They can't even be considered, because we have been told on August 24th that this was the triggering event.

Now I don't think that applies to my position, because I'm under a different rule. And opposing counsel, their motions were under 50(b), although they just throw that in there. There was actually no argument and there's no support on 50(b). 52, 59 and 60, all those, except for 60, which is the six month, if you look at the six-month, Rule 60 says it's six months from when notice of entry or the effective order was entered.

If we look at the dates, they are outside six months when Yount filed this motion on the rule 60. All the 59 and 52

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motions and 50, all have 10-day triggers. That's a problem, because if the Court is contemplating granting any of the plaintiff's motions, we've got a timing issue whether that would even be an effective motion.

I bring that to your Court's attention because we have an issue, and I'm not going to sit here and make arguments to you and mislead you, since there's a strong likelihood that this case is going up on appeal, since it already has been appealed.

Now moving --

MR. POLSENBERG: Your Honor, if I can renew my objection. He had the time to draw up little charts and look up all these cases, and he hasn't properly raised this. I have got the file in the trunk of my car, because I don't think I was strong enough today to carry it. So I mean I can't address this on the fly.

THE COURT: Nor can I. I don't think Mr. Simons is acting in bad faith, because I think my question, as I meant it to, triggered some cogitation among legal minds.

I'm going to hit the pause button for a minute. I believe it's my obligation at any juncture to offer messages like this to litigants:

So, to Mr. Radovan, Mr. Criswell, Mr. Coleman and to the Younts, this way madness lies. When you have some of the better attorneys in the state who can't decide which law at what

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time applies, and there was an intervening death of the chief judge of the district, who did not get to record written findings of fact and conclusions of law, nothing good is going to follow. That's all I can guarantee.

I began where I'm going to say again, I think we should end, which is the less I do right now, the better. If and until the Supreme Court acts, I believe all I'm going to do is build in layer upon layer upon layer, because I've already messaged to you folks a judgment as to the claims by the plaintiff against the defendants, I am not going to touch, I'm not going to disturb. The resulting damages from the decision of Judge Flanagan to find on a claim, or claims, against the plaintiff is not anathema to my understanding of the law. The how much anybody is going to get out of it is. And that's going to require a trial, for lack of a better term. And that trial is going to involve discovery, because I'm likely to grant postjudgment discovery for the reasons Mr. Polsenberg has identified in his motion. Because candidly, as the finder of the fact I want to know what the Mosaic people are going to say about what Yount did or didn't say to them, because that to me is a part of the damages nexus. That's a reopening of the evidence. That may be for not, depending on what the Supreme Court does.

So is there not a way we can pause, perhaps, and think, using the collective legal experience here, about how best to

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proceed. And I think that was Mr. Simons's point. He's not making the same point I'm making intellectually, but I think that was his point.

Mr. Polsenberg.

MR. POLSENBERG: Your Honor, may I have a copy of this chart?

THE COURT: Sure. You sure can.

MR. POLSENBERG: Do you have a copy?

MR. SIMONS: It's right there. That's all I have.

MR. POLSENBERG: Can I have that copy?

MR. SIMONS: No, you can't.

MR. POLSENBERG: Can I take --

MR. SIMONS: You can take a picture of it with your phone. And actually, all of the detail on that is out of the Court's order that I handed to you.

MR. POLSENBERG: Thank you.

MR. LITTLE: Your Honor, may I have one minute to speak with my client?

THE COURT: You certainly may. I would suggest, folks, that we perhaps take a recess to give people time to let the dust settle and talk to their clients, because, candidly, I don't know why this case hasn't settled. I'm not going to get in the middle of it, unless you ask me to get in the middle of it, other than to observe -- Bob Eisenberg is one of the finest attorneys in the

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state, and in my experience, little though it may be, one of the finer settlement arbiters in this State. And I don't know what happened in those conversations.

But this way, meaning me, the third district judge to have his fingers on this case and is own opinions about things, this way madness lies. That's all I can say. So let's take 15 minutes.

MR. SIMONS: Before we take that break, can I ask for a little bit of clarification on what you just said?

THE COURT: Sure.

MR. SIMONS: Given that we don't have what appears to be any motion, and under Rule 63 Judge Polaha was given the opportunity to reopen the evidence and certified that he did not need to render his decision. And we don't have a Rule 63 considered -- a motion on 63 or any motion that would trigger that type of relief of reopening the evidence, especially since the case is up on an appeal based upon a closed record.

I'm at a loss here as to how this Court could engage in that process.

THE COURT: Well, you may be right. I'll be as honest as I can possibly be. I've looked at the appellate case. I haven't seen this order. I honestly had not seen it. I don't think opposing counsel had seen it until you handed it to us.

MR. SIMONS: Oh, he's seen it. It's his order. He got

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that.

THE COURT: Well, I honestly hadn't read it. And as I peruse it, and it says: The appeal is properly before this Court from the Amended Notice of Appeal as well. The motions to amend and for a new trial, which are the motions we are talking about right now -- filed after the amended notice of appeal do not toll the time to appeal and are not relevant to this Court's jurisdiction. Indeed the district court has been divested of its jurisdiction to grant the motions as of the docketing of this appeal.

Last time I checked, that's says: District Judge, stop.

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MR. POLSENBERG: No, we -- and here's why the case doesn't settle, because we get surprise issues like this. This is the opportunistic way this case has been litigated. And -- and when I argued about Honeycutt -- and I'm just doing this off the top of my head. I didn't expect any of this to come up today. They didn't bother to let me know.

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The -- I said you have the jurisdiction to hear and deny motions. I think that's consistent with the Supreme Court saying "not to grant."

THE COURT: Well, candidly, I think the Supreme Court would, for example, certify questions to me like should they be recused or excused; is there a conflict of interest. I'm

comfortable having made that decision, because I think the Supreme Court wants the trial court to make that decision, quite honestly.

MR. POLSENBERG: Usually they do.

THE COURT: And I could see the Supreme Court saying: Well, Judge Walker has said his inclination is to reopen the evidence for purposes of damages. I could see them sort of buying that question as well. I just don't want to exceed my jurisdiction, which is Mr. Simons's point, and I don't want to do anything to make anything worse than I think they already are.

MR. POLSENBERG: And I don't want to argue an issue that nobody's briefed.

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MR. SIMONS: I'll argue the merits. I won't attack personal counsel. But when counsel says this is gamesmanship on my side, this gentleman is the one who filed the opposition to my motion saying the trial court loses jurisdiction over a case when it enters final judgment and it goes up on an appeal. That's what the plaintiff said.

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THE COURT: Hang on. Hang on. We're not going to fall down that rabbit hole, gentlemen. I'm not going to let it happen in front of me. And if either of you rises to the bait, you'll do so at your own jeopardy.

We're going to take a break. I'll let you talk to your clients. I'm going to think about this, because my inclination

now is to pause this proceeding and require you all to brief this issue, because I think that's the safest way to proceed.

MR. POLSENBERG: That makes sense.

THE COURT: But again, I offer to your collective clients what Mr. Polsenberg was acknowledging is the only people making money on this case are the attorneys and me. We're all getting paid. No one else is guaranteed to get paid out of this case.

And when you have this much collective wisdom in the room and we can't even agree on what jurisdiction I have, you should run from that. You should choose to control your destiny by reaching an agreement. That's all I'm going to say.

MR. POLSENBERG: Very smart, Judge. And I do love a man who quotes Lear.

THE COURT: We'll be in recess.

(Recess Taken)

THE COURT: We are back on the record in CV16-00767, George Stuart Yount versus Criswell Radovan, et al. All parties are present with their respective counsel.

Here's what I intend to do: I was first made aware of an order from the Nevada Supreme Court that was issued August 24th, 2018. The last sentences of which seem to me an unequivocal comment on my jurisdiction; jurisdiction is jurisdiction is jurisdiction. It doesn't matter if you stipulate

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to waive it, stipulate to invoke it, if either of those decisions are wrong, I don't have it. My job as district court judge is to be quick, decisive, and the words of Peter Breen, wrong.

I don't intend to do anything further in this case. I'll give you all opportunity to brief why you think I may have jurisdiction to act. I may or may not act upon that jurisdiction if I agree with it. I have made oral pronouncements today. I don't intend to matriculate those into writing, if and until the Nevada Supreme Court tells me I should or you all convince me I have remaining jurisdiction.

Mr. Polsenberg.

MR. POLSENBERG: Thank you, Your Honor. I think you have jurisdiction to hear my Rule 27 motion, because if Rule 27 expressly says the district court can order discovery while the case is on appeal.

THE COURT: I decline to exercise that jurisdiction if I have it. Again, my rationale, for whatever it's worth, is this: Now that the Supreme Court has jurisdiction over this case, they're going to make, presumably, whatever decision they make. My suspicion is that some version of that decision will involve comment on the lack of findings of fact and conclusions of law in the previous judge's orders.

I can only tell you all that when we go to the district court judges meetings and the Supreme Court talks to us district

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judges, again and again and again they have indicated to us that if we don't show our homework, they're going to at least remand for further findings.

Because I think they will share my view of the record in this case as to calling into question, for example, how the $1.5 million damage amounts were calculated, I suspect this case is coming back. And I intend to do nothing until -- if and until that or something else happens or I'm told to by the Supreme Court.

MR. POLSENBERG: Very good. Thank you, Your Honor.

THE COURT: I apologize for the waste of time.

MR. SIMONS: Didn't waste anybody's time, Your Honor.

You said you're going to order further briefing. Is that a standing order? Do you want us to give you --

THE COURT: I invite you to brief. I suggest you reach an agreement about whether or not that is simultaneous briefing, what I think you call blind briefing or not. But the way I'm laying the table for you all is I don't intend to take any other action, notwithstanding the outstanding matters in this case. And I'm going to code them as resolved, because of the order you provided to me of August 28th.

MR. SIMONS: Fair enough.

THE COURT: We may have to resurrect them if I get further instruction from the Supreme Court. If in the meantime

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you all want to engage in briefing, and I invite you to that, but I don't order it, that you seek -- through which you seek to convince me that I have some remaining Honeycutt jurisdiction, I'll read it. I don't know what I'm going to do about it. I'll read it.

Thank you all very much. I wish you all happy holidays.

(Proceedings Concluded at 3:50 p.m.)

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STATE OF NEVADA)
)ss.
COUNTY OF WASHOE)

I, EVELYN J. STUBBS, official reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify:

That as such reporter I was present in Department No. 7 of the above court on Tuesday, December 20, 2018, at the hour of 2:00 p.m. of said day, and I then and there took stenotype notes of the proceedings had and testimony given therein upon the HEARING ON MOTIONS of the case of GEORGE S. YOUNT, ET AL, Plaintiff, vs. CRISWELL RADOVAN, ET AT, Defendant, Case No. CV16-00767.

That the foregoing transcript, consisting of pages numbered 1 to 61, inclusive, is a full, true and correct transcript of my said stenotype notes, so taken as aforesaid, and is a full, true and correct statement of the proceedings had and testimony given therein upon the above-entitled action to the best of my knowledge, skill and ability.

DATED: At Reno, Nevada, this 16th day of January, 2019.

/s/ Evelyn Stubbs
EVELYN J. STUBBS, CCR #356

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EXHIBIT J

F I L E D
Electronically
CV16-00767
2017-07-21 10:17:34 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 6207767

CASE NO. CV16-00767 GEORGE S. YOUNT ET AL VS. CRISWELL RADOVAN ET AL

DATE, JUDGE OFFICERS OF COURT PRESENT

APPEARANCES-HEARING

7/20/17

STATUS HEARING

HON. PATRICK FLANAGAN
DEPT. NO. 7
T. Travers (Clerk)
S. Koetting (Reporter)
G. Bird (Bailiff)

Counsel Rick Campbell, Esq. was present representing the Plaintiff.
Counsel Martin Little, Esq., was present telephonically, representing Criswell Radovan et al.
Counsel Andrew Wolf, Esq., was present telephonically, representing David Marriner.

The Court noted that counsel, Rick Campbell was present in court, Martin Little and Andrew Wolf were present telephonically.
Counsel Campbell addressed the Court and informed that the bankruptcy status and that there will probably be no money left to satisfy the plaintiff.
Counsel Little informed that he had nothing to add to the bankruptcy issue and discussed the motions the need for replies.
Counsel Wolf addressed the Court and discussed the need for a plan to preserve some equity from the bankruptcy. Further, he stated that all parties had filed summary judgments.
Counsel Campbell stated that he had not seen the motions.
Discussion ensued as to the dates of when motions were filed.
Counsel Wolf addressed the Court and stated the need for time to review the filings.
The Court advised respective counsel to connect and prepare a stipulation as to time needed.
Discussion ensued as to issues with trial date conflicts; respective counsel agreed to a trial on November 6, 2017 if the present issue does not resolved.
Discussion ensued as to a date to hear Pretrial Motions.
Respective counsel agreed to have the Pretrial Motions heard on August 16, 2017 with the Motion to Confirm Trial.

COURT ORDERED: Pretrial Motions hearing shall be set for August 16, 2016 at 1:30 p.m. Respective counsel shall confer and file a stipulation of dates agreed upon.
