IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

Yossi Attia and Mo Jacob,
Appellants and Cross-Respondents
v.
Dennis E. Rusk and Dennis E. Rusk, Architect, LLC,
Respondents and Cros

No. 75290

Electronically Filed
Mar 28 2018 10:08 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

DOCKETING STATEMENT
CIVIL APPEALS

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See* KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

Docket 75290 Document 2018-11901

1. Judicial District Eighth Department Twenty

County Clark Judge Eric Johnson

District Ct. Case No.

2. Attorney filing this docketing statement:

Attorney Robert A. Nersesian Telephone 702.385.5454

Firm Nersesian & Sankiewicz

Address 528 S. 8th St.
Las Vegas, NV 89101

Client(s) Dennis E. Rusk and Dennis E. Rusk Architect, LLC

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney Terry A. Coffing Telephone 702.942.2136

Firm Marquis, Auerbach & Coffing

Address 10001 Park Run Dr.
Las Vegas, NV 89145

Client(s) Yossi Attia and Mo Jacob, f/k/a Moshe Schnapp

Attorney Telephone

Firm

Address

Client(s)

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- ☒ Judgment after bench trial
- ☐ Judgment after jury verdict
- ☒ Summary judgment
- ☐ Default judgment
- ☐ Grant/Denial of NRCP 60(b) relief
- ☐ Grant/Denial of injunction
- ☐ Grant/Denial of declaratory relief
- ☐ Review of agency determination
- ☒ Dismissal:
  - ☐ Lack of jurisdiction
  - ☐ Failure to state a claim
  - ☐ Failure to prosecute
  - ☐ Other (specify): No reason stated.
- ☐ Divorce Decree:
  - ☐ Original
  - ☐ Modification
- ☒ Other disposition (specify): Leave to Amend

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (*e.g.*, bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

Rusk v. Attia, 8th Dist. Ct., Case No. 08A564309; Rusk v. Nevada State Board of Architecture, Interior Design and Residential Design, 8th Dist. Ct., Case No. A-17-764562-J; In re: Verge Living Corp., U.S. Bkrptcy Ct., D. Nev., Case No. 1: 09-bk-10177-RR; Verge v. Rusk, adv. case, U.S. Bkrptcy Ct., D. Nev. Case No. 9: 09-bk-10177-RR; Jacob v. Rusk, U.S. Dist. Ct., D. Nev. Case no. 2:16-cv-02639-JAD-VCF; and Rusk v. Nevada State Board of Architecture, Interior Design and Residential Design, 8th Dist. Ct., Case No. A-17-750672-W

8. Nature of the action. Briefly describe the nature of the action and the result below:

Rusk sued Attia and Schnapp for breach of a written and signed settlement agreement for a sum certain made in a bankruptcy court settlement conference together with related torts. Attia, only, counterclaimed for breach of the agreement at issue in the settled litigation. When it became apparent after partial summary judgment that that matter was settled, Attia amended his complaint, and now alleged a claim for fraud in the inducement in defense of the settlement agreement. That ws the issue which was tried.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

Did the District Court err in not fully granting summary judgment on Rusk's initial motion for summary judgment, the rehearing thereon, and the second motion for summary judgment considering that the issues actually tried were not before the court at the times these motions were heard and the initial motion was not opposed as required?

Did the District Court err in failing to try, and essentially dismissing, sub silencio, Rusk's tort claims without hearing or consideration?

Did the District Court err in granting Appellants leave to amend after the time for amendment had passed, when essentially the same motion had been denied by the prior judge on the case, and even the District Court recognized that there was no good cause for the delay in bringing the motion?

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

None known.

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain: It appears that the District Courts grant of leave to amend directly violates the ruling in Nutton v. Sunset Station, Inc., 357 P.3d 966 (Nev. App. 2015). The issue in Nutton has never been before the Nevada Supreme Court (the reconcilliation of NRCP 15 and NRCP 16(b)), and this thusly presents and issue of first impression in this court.

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

The current matter is not a matter which falls within the exclusive retention of the Supreme Court, nor a matter presumptively falling within the purview of the Court of Appeals. As the Court can see from the related cases, and the fact that the current dispute has been ongoing since 2007, a finality of a decision would be beneficial as putting a conclusive end to this matter.

14. Trial. If this action proceeded to trial, how many days did the trial last? Three

Was it a bench or jury trial? Bench

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

No.

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from 1/30/18;

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

Rusk is of the understanding that the Decision and Order, by its terms, contemplated further proceedings prior to the entry of a final order, and did not view the order appealed from by Attia and Schnapp as a final order from which to appeal. Nonetheless, due to the time for filing a cross-appeal, Rusk was constrained to file a cross-appeal.

17. Date written notice of entry of judgment or order was served 1/30/18; 1/28/16, etc

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☐ NRCP 59 Date of filing _____

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. *See* AA Primo Builders v. Washington, 126 Nev. ____, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion _____

(c) Date written notice of entry of order resolving tolling motion was served _____

Was service by:

☐ Delivery

☐ Mail

19. Date notice of appeal filed 3/1/18; Cross-appeal: 3/15/18

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

3/1/18: Yossi Attia and Mo Jacob f/k/a Moshe Schnapp

3/15/18: Dennis E. Rusk and Dennis E. Rusk Architect, LLC

20. Specify statute or rule governing the time limit for filing the notice of appeal, *e.g.*, NRAP 4(a) or other

NRAP 4(a)(1) and NRAP 4(a)(2)

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

☒ NRAP 3A(b)(1)	☐ NRS 38.205
☐ NRAP 3A(b)(2)	☐ NRS 233B.150
☐ NRAP 3A(b)(3)	☐ NRS 703.376
☐ Other (specify)	

(b) Explain how each authority provides a basis for appeal from the judgment or order:

Rusk is not sure it does. NRAP 3A(b)(1) provides for an appeal of a "final judgment." The document from which Attia and Schnapp filed their notice of appeal is a "Decision and Order," admittedly including the direction of a judgment within the order. Nonetheless, the District Court has acknowledged that it still intends to issue a final judgment upon consideration of the interest briefing it also directed in the very same "Decision and Order." In short, the District Court Decision and Order appears ambiguous, and the "final judgment" set forth in NRAP 3(b)(1) may still be pending.

22. List all parties involved in the action or consolidated actions in the district court:
(a) Parties:

Yossi Attia; Mo Jacob, f/k/a Moshe Schnapp; Dennis E. Rusk; Dennis E. Rusk Architect, LLC; Emvelco RE Corp.; Vortex Resources Corp.; Emvelco Corp.; and A.O. Bonanza Holdings, LLC

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

Save for Yossi Attia; Mo Jacob, f/k/a Moshe Schnapp; Dennis E. Rusk; Dennis E. Rusk Architect, LLC, the remaining parties named were either not served or no longer exist.

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

Rusk: 1. Breach of Contract; 2. Breach of Covenant of Good Faith and Fair Dealing; 3. Fraud in the Inducement/Intentional Misrepresentation; 4. Negligent Misrepresentation; and 5. Civil Conspiracy

Attia: Offset; Fraud in the Inducement (original contract); Fraud in the Inducement (settlement agreement); unjust enrichment; constructive fraud; malpractice; breach.

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☐ Yes

☒ No

25. If you answered "No" to question 24, complete the following:
(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☒ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☒ No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)):

Rusk's claims for conspiracy, negligent misrepresentation, and fraud brought by Rusk were never actually adjudicated. The Decision and Order, nonetheless, indicated that they would not be adjudicated. Thus, the Decision and Order, while not adjudicating these claims, did dispose of the entire litigation (subject possibly and solely to the arguable need for a final judgment as discussed above).

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Dennis E. Rusk
Name of appellant

Robert A. Nersesian
Name of counsel of record

3/28/18
Date

Signature of counsel of record

Nevada, Clark County
State and county where signed

CERTIFICATE OF SERVICE

I certify that on the 28th day of March, 2018, I served a copy of this completed docketing statement upon all counsel of record:

☐ By personally serving it upon him/her; or

☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Terry Coffing, Esq.
Marquis Aurbach Coffing
10001 Park Run Drive
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M. Nelson Segal, Esq.
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Las Vegas, Nevada 89101

Dated this 28th day of March, 2018

Signature

Electronically Filed
10/20/2011 07:04:16 AM

CLERK OF THE COURT

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Attorneys for plaintiffs Dennis E. Rusk, Architect LLC and Dennis E. Rusk, individual

DISTRICT COURT

CLARK COUNTY, NEVADA

DENNIS E. RUSK, Architect LLC, a Nevada limited liability company, and DENNIS E. RUSK, an individual,

Plaintiffs,

vs.

YOSSI ATTIA, an individual; MOSHE SCHNAPP, an individual; EMVELCO RE CORP., a Nevada corporation; VORTEX RESOURCES CORP. F/K/A EUROWEB INTERNATIONAL CORP. AND F/K/A EMVELCO CORP., a corporation state unknown; A. O. BONANZA HOLDINGS, LLC, a Nevada limited liability company; and DOES 1-100,

Defendants.

Case No. A-11-650222-C

Dept.: XXXI

COMPLAINT FOR:

1. Breach of Contract;
2. Breach of Covenant of Good Faith and Fair Dealing;
3. Fraud in the Inducement/Intentional Misrepresentation;
4. Negligent Misrepresentation; and
5. Civil Conspiracy

Comes now plaintiffs, DENNIS E. RUSK, Architect, LLC, a Nevada limited liability company, and DENNIS E. Rusk, an individual, and allege as follows:

GENERAL ALLEGATIONS APPLICABLE TO ALL CAUSES OF ACTION

1. Plaintiff DENNIS E. RUSK, Architect, LLC, is, and at all times relevant herein was, a Nevada limited liability company doing business as an architect licensed by the State of Nevada in Clark County, Nevada. Plaintiff DENNIS E. RUSK is, and at all times relevant herein was, an individual doing business as an architect licensed by the State of Nevada and doing business and residing in Clark County, Nevada. Plaintiffs collectively may be referred to hereinafter as "Rusk" or "plaintiff" or "plaintiffs".

2. Defendant YOSSI ATTIA ("Attia") is an individual who is believed to have, at all relevant times herein, resided in Los Angeles County, California.

3. Defendant MOSHE SCHNAPP ("Schnapp") is an individual who is believed to have, at all relevant times herein, resided in Los Angeles County, California.

4. Defendant EMVELCO RE CORP. is a Nevada corporation, at all relevant times herein, was doing business in Clark County, Nevada.

5. Defendant VORTEX RESOURCES CORP. F/K/A EUROWEB INTERNATIONAL CORP. AND F/K/A EMVELCO CORP., is a corporation state unknown, but at all times relevant herein doing business in Clark County, Nevada.

6. Defendant A.O. BONANZA HOLDINGS, LLC is a Nevada limited liability company, which, at all times relevant herein, was doing business in Clark County, Nevada.

7. Plaintiffs are unaware currently of the true names and capacities of those defendants sued herein as DOES 1-100 and therefore sue said defendants by such fictitious names. On information and belief, all such DOE defendants are, and at all material times herein were, individuals residing in Clark County, Nevada or elsewhere or business organizations doing business in Clark County, Nevada or elsewhere. Plaintiffs will seek leave of court to amend this

Complaint to allege the true names and capacities of said defendants if and when the same have been ascertained.

8. Plaintiffs are informed and believe, and thereon allege, that each of the defendants sued herein, including those named as DOES, are the agents, servants, supervisors, employees, officers, directors, alter egos or wholly-owned or controlled entities of each other, and of the other defendants, and in doing the things herein alleged, acted within the course, scope, control and/or authority of such agency, employment, alter ego relationship, ownership or some other relationship and with the full knowledge and consent of the other defendants, or are in some other manner legally responsible for the acts as alleged herein.

9. Between about 2002 and 2008, plaintiffs did work for defendants and others as an architect and also did other tasks at defendants' request for what was originally a senior apartment building. The project was later changed by defendants to a multi-story, mixed use condominium project known originally as "Aquitania" and later as "Verge." The project was located at the intersection of Main Street and Bonanza Road in Las Vegas, Nevada (hereinafter sometimes "the project"). All of the work by plaintiffs was done in Las Vegas, Nevada.

10. Plaintiffs performed all work they were obligated to perform and/or requested of them.

11. Defendants failed to pay plaintiffs sums due and owing to them, despite demand therefore.

12. Defendants terminated plaintiffs as architect for the project on April 2, 2008 before plans for the interiors of the units were submitted to the City of Las Vegas Planning, Building and Public Works Department. Defendants have not articulated why plaintiffs were terminated. Plans for the shell of the building – at least those plaintiffs were responsible for – had been approved by the City and were "permittable." The Final Map had also been completed. Defendants had failed to obtain city approval for something they were responsible for: life-safety plans. And they never paid the required fees so that permits could be issued.

13. Plaintiffs brought a civil lawsuit in Nevada state court in the Eighth District Judicial Court (Clark County) against defendants and others based on the failure to pay plaintiffs. One of the others sued was Verge Living Corporation ("VGL"), which was also involved in the project. *Rusk et al. v. Attia* et al. (Nev. Dist. Ct. Case A564309 filed on or about June, 2008).

14. VGL then filed for federal bankruptcy protection in early 2009 in California. The case was then transferred to the federal bankruptcy court in Las Vegas, Nevada (Chap. 11 Case No. BK-S-09-16295-BAM). VGL filed an adversary action against plaintiffs and the court directed that plaintiffs file their claims against the non-VGL parties (including the defendants in this action) as separate adversary actions, which was done by plaintiffs as adversary cases 09-1106 and 09-1108.

15. During a settlement conference on October 21, 2009 conducted by a federal bankruptcy settlement judge in the chambers of the Las Vegas bankruptcy court, plaintiffs agreed in writing with defendants to the material terms of a final settlement agreement which called for defendants to pay plaintiffs the total sum of $400,000. Attorneys Michael Goch, Esq. and Robert Yaspan, Esq. participated in the settlement conference on behalf of the defendants and VGL. Thereafter, the settlement agreement went through some further negotiations on non-material issues and was finalized in writing within 10 days. The finalized version of the agreement included a timetable for payment that called for $37,500 to be paid in December, 2009 and the remaining $362,500 by January 6, 2010.

16. Counsel Goch represented to plaintiffs on December 7, 2009 that he had the first payment of $37,500 in his client trust account and was prepared to deliver that to plaintiffs *only* if plaintiffs would dismiss their adversary actions against defendants with prejudice. In a good faith effort to complete the settlement, plaintiffs complied, and Mr. Goch then made the first payment of $37,500. However, defendants have never paid any of the rest of the money owed ($362,500) without offering a reasonable explanation of why they agreed to pay the entire amount when two months later they could not pay. They also never offered to set up a payment plan nor have they ever made any further payments. Defendants have paid nothing since their

December, 2009 payment of $37,500. Instead, defendants, in an intentional effort to cause emotional distress to plaintiffs, offered to transfer essentially worthless penny stocks to plaintiffs to pay their debt.

17. Plaintiffs believe that defendants knew all along that they would not pay the entire $400,000 they agreed to pay, or they lacked a reasonable basis to represent that they would pay that amount, and that their real goal was to obtain dismissals of the adversary actions against them with prejudice, not only to avoid paying what they owed to plaintiffs, but in part because plaintiffs had then pending against them on the eve of the settlement agreement a motion for default, based on defendants failure to timely plead in the adversary cases. It was unclear whether the failure to plead was caused by the defendants or their attorneys or both, which could have led to a legal malpractice case against their attorneys Michael Goch and Robert Yaspan and their respective offices. Mr. Yaspan represented defendants in the adversary actions for quite some time until Mr. Goch substituted into the cases. It is unknown to plaintiffs at this time whether attorney Goch had prior knowledge of, participated in, and/or conspired to execute the schemes alleged herein. It is also unknown to plaintiffs at this time whether attorney Robert Yaspan had prior knowledge of, participated in, or conspired to, execute the schemes alleged herein. However, plaintiffs do plan to conduct discovery on those issues in this case in an effort to determine whether any additional defendants should be named herein.

FIRST CAUSE OF ACTION

FOR BREACH OF CONTRACT

(By Plaintiffs Against All Defendants)

18. Plaintiffs incorporate herein by reference each and every allegation contained in paragraphs 1-17, above, as though set forth fully at this point.

19. Defendants entered into a settlement agreement and agreed in writing in October, 2009 to pay plaintiffs the sum of $400,000 in exchange for dismissals with prejudice of plaintiffs' adversary bankruptcy actions and to release the debtor in bankruptcy, Verge Living

Corporation. Defendants paid $37,500 of that amount in December, 2009 but have not paid a penny since and have offered no credible explanation of why they haven't paid, nor have they offered to, nor have they made, any partial payments, other than essentially worthless penny stocks.

20. The acts of defendants have caused damage to plaintiffs in an amount in excess of $10,000 to be proven at trial. Plaintiffs are also entitled to interest on the sum certain due since January 10, 2010. In addition, plaintiffs had to hire attorneys to file this action to recover the monies owed and they seek reimbursement of their attorneys fees and costs incurred in this action.

SECOND CAUSE OF ACTION

FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

(By Plaintiffs Against All Defendants)

21. Plaintiffs incorporate herein by reference each and every allegation contained in paragraphs 1-20, above, as though set forth fully at this point.

22. There is implied in every contract in the State of Nevada a covenant of good faith and fair dealing. This covenant prohibits arbitrary or unfair acts by one party that work to the disadvantage of the other. With regard to the settlement agreement negotiated and agreed to between plaintiffs and defendants, defendants breached the covenant of good faith and fair dealing by failing to pay the amounts owed and/or by failing to ever make any effort to make partial or periodic payments. They also breached the covenant by entering into the contract when they lacked a reasonable basis for thinking that they would be able to perform the contract. They further breached the covenant by entering into it with no intent to fully perform, but seeking only to get the adversary bankruptcy cases dismissed against them and VGL and to avoid default judgments and to avoid malpractice cases against their attorneys. Plaintiffs relied on defendants representations that they had the money to pay according to the settlement

agreement in dismissing the adversary actions, and defendants were in a superior or entrusted position of knowledge as to whether they could pay.

23. The acts of defendants have caused damage to plaintiffs in an amount in excess of $10,000 to be proven at trial. Plaintiffs are also entitled to interest on the sum certain of $362,000 due since January 10, 2010. In addition, plaintiffs had to hire attorneys to file this action to recover the monies owed and they seek reimbursement of their attorneys fees and costs incurred in this action.

24. The conduct of defendants, and each of them, was done with fraud, malice, oppression and constituted despicable conduct, thus warranting the imposition of punitive damages against them.

THIRD CAUSE OF ACTION

FOR FRAUD IN THE INDUCEMENT/INTENTIONAL MISREPRESENTATION

(By Plaintiffs Against All Defendants)

25. Plaintiffs incorporate herein by reference each and every allegation contained in paragraphs 1-24, above, as though set forth fully at this point.

26. Defendants represented that they would pay $400,000 pursuant to the settlement agreement. Defendants knew they were not going to pay that amount and that such representation was false and/or they lacked a reasonable basis to represent that they would be able to pay that amount. Defendants intended by their conduct to induce plaintiffs to dismiss their adversary bankruptcy cases with prejudice. Plaintiffs were unaware that defendants intended not to pay the full amount and that defendants lacked a reasonable basis to represent that they would pay. In entering into the settlement agreement, plaintiffs justifiably relied on the representations of defendants that they would pay.

27. Plaintiffs have sustained damages as a result of the conduct of defendants in that they gave up all causes of action and all damages they would have been entitled to had they pursued their adversary cases. Plaintiffs seek all damages they would have been entitled to on all

causes of action in their adversary actions, which exceed $10,000 in an amount to be proven at trial. Such causes of action are incorporated herein by reference. In addition, plaintiffs had to hire attorneys to file this action to recover the monies owed and they seek reimbursement of their attorneys fees and costs incurred in this action.

28. The conduct of defendants, and each of them, was done with fraud, malice, oppression and constituted despicable conduct, thus warranting the imposition of punitive damages against them.

FOURTH CAUSE OF ACTION

FOR NEGLIGENT MISREPRESENTATION

(By Plaintiffs Against All Defendants)

29. Plaintiffs incorporate herein by reference each and every allegation contained in paragraphs 1-28, above, as though set forth fully at this point.

30. Defendants made a representation in the course of their business to plaintiffs that they would pay $400,000 pursuant to the settlement agreement. Defendants failed to exercise reasonable care or competence in making this communication and agreement with plaintiffs. The representation was false. The representation was made for the purpose of having plaintiffs dismiss their adversary cases, which were based on plaintiffs' business transactions. Plaintiffs justifiably relied on the false representation that defendants would pay the full settlement amount.

31. Plaintiffs sustained losses because of the false representation. Plaintiffs have sustained damages as a result of the conduct of defendants in that they gave up all causes of action and all damages they would have been entitled to had they pursued their adversary cases. Plaintiffs seek all damages they would have been entitled to on all causes of action in their adversary actions, which exceed $10,000 in an amount to be proven at trial. Such causes of action are incorporated herein by reference. In addition, plaintiffs had to hire attorneys to file

this action to recover the monies owed and they seek reimbursement of their attorneys fees and costs incurred in this action.

FIFTH CAUSE OF ACTION

FOR CIVIL CONSPIRACY

(By Plaintiffs Against All Defendants)

32. Plaintiffs incorporate herein by reference each and every allegation contained in paragraphs 1-28, above, as though set forth fully at this point.

33. Defendants, and each of them, engaged in concerted action and a civil conspiracy for the unlawful purpose of inducing plaintiffs to dismiss their adversary cases with prejudice, to avoid paying what they owed to plaintiffs, to avoid potential legal malpractice actions against their attorneys, and for the purpose of harming plaintiffs.

34. Plaintiffs have sustained damages as a result of the conduct of defendants in that they gave up all causes of action and all damages they would have been entitled to had they pursued their adversary cases. Plaintiffs seek all damages they would have been entitled to on all causes of action in their adversary actions, which exceed $10,000 in an amount to be proven at trial. Such causes of action are incorporated herein by reference. In addition, plaintiffs had to hire attorneys to file this action to recover the monies owed and they seek reimbursement of their attorneys fees and costs incurred in this action.

35. The conduct of defendants, and each of them, was done with fraud, malice, oppression and constituted despicable conduct, thus warranting the imposition of punitive damages against them.

PRAYER

WHEREFORE, plaintiffs pray for Judgment against defendants, and each of them, as follows on all causes of action:

1. For general damages in an amount according to proof but in excess of $10,000;

2. For interest on the sum certain of $362,500 since January 6, 2010;

3. For pre-judgment interest;

4. For attorneys fees;

5. For costs of suit;

6. For punitive damages on the Second, Third and Fifth causes of action;

7. For such other and further relief as the court deems just and proper.

Date: October 19, 2011

LAW OFFICES OF RICHARD VILKIN, P.C.

By: _____

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Attorneys for plaintiffs Dennis E. Rusk, Architect LLC and Dennis E. Rusk, individual

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CLERK OF THE COURT

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Attorneys for Defendants-Counterclaimant

DISTRICT COURT

CLARK COUNTY, NEVADA

DENNIS E. RUSK, Architect, LLC, a Nevada limited liability company, and DENNIS E. RUSK, an individual,

Plaintiffs,

vs.

YOSSI ATTIA, an individual; MOSHE SCHNAPP, an individual; EMVELCO RE CORP., a Nevada corporation; VORTEX RESOURCES CORP., F/K/A EUROWEB INTERNATIONAL CORP. AND F/K/A EMVELCO CORP., a corporation state unknown; A.O. BONANZA HOLDINGS, LLC, a Nevada limited liability company: and DOES 1-100,

Defendants.

YOSSI ATTIA, an individual,

Counterclaimant,

vs.

DENNIS E. RUSK, Architect, LLC, a Nevada limited liability company, and DENNIS E. RUSK, an individual, and DOES 1 through 100, inclusive and ROE CORPORATIONS 1 through 100, inclusive,

Counterdefendants.

Case No.: A-11-650222-C
Dept. No.: XX

AMENDED COUNTERCLAIM

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AMENDED COUNTERCLAIM

Counterclaimant, Yossi Attia ("Counterclaimant or "Attia"), by and through his counsel of record, the law firm of Marquis Aurbach Coffing, alleges the following against Dennis E. Rusk, Architect, LLC, a Nevada Limited Liability Company (hereinafter "Rusk LLC"). and Dennis E. Rusk, an Individual (hereinafter "Rusk"):

PARTIES

1. Attia via Verge Living was a developer (in capacity of major shareholders with the parent Company) of a high-rise building that was set to be built on the intersection of Bonanza and Main in downtown Las, Vegas, Nevada.

2. Defendant Rusk LLC is and was at all times relevant herein, a limited liability company doing business in Clark County, Nevada.

3. Defendant Rusk is and was at all times relevant herein, a resident of Las Vegas, Nevada.

4. The names and capacities, whether individuals, corporate, associate or otherwise of Defendants named herein as DOE and ROE CORPORATION are unknown or not yet confirmed. Upon information and belief, said DOE and ROE CORPORATION Defendants are responsible for damages suffered by Plaintiff and, therefore, Plaintiff sues said Defendants by such fictitious names. Plaintiff will ask leave to amend this Complaint to show the true names and capacities of each DOE and ROE CORPORATION Defendant at such time as the same has been ascertained.

JURISDICTION AND VENUE

5. This Court possesses subject matter jurisdiction over this matter because Clark County, Nevada is the judicial district in which a substantial part of the events or omissions giving rise to the claims set forth herein occurred.

GENERAL ALLEGATIONS

THE FORMATION OF THE CONTACT FOR SERVICES

6. In January of 2005, Attia and Verge Living Corporation's ("Verge Corporation"), predecessor in interest, entered into a contract with and Rusk LLC for the purposes of having

Rusk design a high-rise condominium and mixed commercial project to be located in downtown to be known as "the Verge" (as referred to as the "Project").

7. Prior to executing the contract, Rusk personally represented to the Defendants that he was very experienced in designing high-rise buildings and well-connected in the Las Vegas development community.

8. However, both of these representations he made proved to be knowingly and intentionally false, as Rusk had never been involved with the design of a high-rise structure and was not as connected as promised.

9. Significantly, Attia relied upon these misrepresentations when entering the contract with Plaintiffs. Plaintiffs aware and testify for it that Attia is inexperience developer when it comes to asses and understand fully the design of a high-rise structure.

RUSK'S DEFICIENT DESIGN DOCUMENTS

10. In 2007, nearly two years after the contract was executed, the Verge project was ready to begin construction.

11. In early March 2007, Rusk submitted his first set of design documents for the Verge to Don White ("White") of the City of Las Vegas' Building Department (the "City").

12. On March 22, 2007, White issued his Plan Review Comments ("PRC") on the first set of plans. While White's first PRC was more than six (6) pages, it referenced twenty four (24) specific deficiencies in Rusk's design documents.

13. Based on Rusk's first set of design documents, White affirmed that the project was unbuildable and that he could not approved this first set of design documents.

14. On May 21, 2007, Rusk submitted his second set of design documents to the City.

15. Two days later, White issued an eight (8) page PRC finding ten (10) of the previously noted deficiencies unresolved and seven (7) new deficiencies.

16. Unfortunately, this pattern of Rusk submitting design plans with White continuously rejecting the plans due to various deficiencies became commonplace. Ultimately, Rusk submitted deficient designs on six occasions prior to the Settlement Agreement. At the settlement negotiations, however, Rusk promised the Defendants an advance, revised set of plans

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that would supersede the prior sets of deficient plans. ***Therefore, when referring to "plans," hereinafter, it is imperative to understand that Counterclaimant is referring to the advance, revised plans that were promised at the settlement negotiations, not the previously rejected, deficient plans. At the settlement negotiations, Rusk consistently represented that these advance, revised plans were different than the previous iterations of the plans. Ultimately, the promise of the advance, revised plans induced the Defendants to enter into the Settlement Agreement with Rusk.***

RUSK'S REPEATED FALSE ASSURANCES TO THE DEFENDANTS

17. In the meantime, the Defendants began moving forward with the marketing and selling of condominium units based on the conversations they were having with Rusk concerning the deadlines for the project.

18. In particular, Rusk repeatedly assured Attia that his plans (please note again, that plans refer to ADVANCE set in compare to prior set) were good and that any issues he was having with the City regarding the plans would be resolved favorably.

19. Unfortunately, Rusk's assurances and representation to the Defendants proved to be a farce. Ultimately, Rusk was terminated from the project.

THE SETTLEMENT NEGOTIATIONS IN THE VERGE'S BANKRUPTCY PROCEEDINGS

20. After Rusk's termination, Plaintiffs filed false suit based on the Defendants' failure to pay the full amount under the contract – while Rusk basically invented these purported amounts, as these alleged amounts were NEVER a part of ANY contract.

21. Due to Plaintiffs' conduct, Verge Corporation was forced to file bankruptcy and the project died. Eventually, Rusk sued in state court for the money he thought he was owed; however, his action was stayed as a result of the Verge's bankruptcy proceedings.

22. After the state court action was removed to the United States Bankruptcy Court, the matter was refashioned as two adversary cases in the Nevada bankruptcy court.

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23. On October 21, 2009, some of the parties to the above-mentioned Verge adversary actions participated in an all-day, voluntary settlement conference in the chambers of the Las Vegas bankruptcy court.

24. Bankruptcy judge John Rossmeissl, a visiting judge from the Eastern District of Washington, conducted the conference and a settlement was reached.

25. During the settlement negotiations, the Defendants were incline to settle, as in the relevant times, they had Yasheng Group a prominent huge corporation which potentially wanted the plan/project (and even were willing to invest considerable amounts of funds, as well as payment/investment in stocks) and wishes to free themselves of Rusk intellectual rights and were certain that if they could get untangled from the bankruptcy, they could potentially retain a new architect to adopt and put the finishing touches on Rusk's plans and move forward with the project. Rusk even in the mediation negotiation entertains the idea that he himself may continue with them, as he does not have any issue with them.

26. At the settlement negotiations, Rusk affirmatively and repeatedly represented to the Defendants that his plans were excellent, were ready to go, and could be used to immediately move forward with the construction of the Project. Rusk knew that Attia is inexperience high rise developer, and knew that when he refer to the plans, according to him, and to Attia understanding, he refer to NEW SET OF PLANS, which NOW (at the relevant time) are perfect and ready to pull a permit.

27. Rusk repeatedly stated that there was great value in the plans (the new advance set) and if the Defendants settled with him, he would release the plans to them so that another architect could put the finishing touches on the plans and proceed with the Project.

28. Based on the foregoing, the Defendants **justifiably** relied on Rusk's representations (thinking that in essence since the last inspection by the city, the amount of deficiencies was reduced, and per Rusk he amend the plans, so this set is ready to go) and moved forward with the Settlement Agreement—as the entire purpose of settling with Rusk was to be able to use his plans (said new ADVANCE SET OF PLANS) and salvage the Project.

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29. Significantly, however, the Defendants were not aware of the fact that Rusk intentionally misrepresented his qualifications and experience from the outset and continued such deliberate misrepresentations during the settlement negotiations just to get the Defendants to agree to the Settlement Agreement. Specifically, Defendants were unaware of the fact that Rusk had never built a high-rise; the Defendants did not know that Rusk's plans (advance set), at all times, and were completely unbuildable and incapable of being approved. In fact, it was not until after the settlement negotiations that the Defendants were made aware of the fact that the plans were nowhere near complete and was of little, if any, value, and maybe more severe, no update was done what so ever since the last submission to the City of Las Vegas.

30. **It was not until later**, at the Architecture Board hearings, that Rusk admitted that many of his representations to the Defendants were false.

31. As a result of Rusk's numerous and continued deliberate misrepresentations during the settlement negotiations, the Defendants suffered damages in excess of $17 million, which is a part of Attia's offset counterclaim against Rusk in this matter.

THE ARCHITECTURE BOARD PUNISHES RUSK FOR HIS CONDUCT ON THE VERGE PROJECT

32. After a complaint was filed with the Nevada State Board of Architecture (the "Architecture Board") by the Verge Corporation, the Architecture Board held evidentiary hearings regarding Rusk's work on the Verge project. Rusk and White both testified at that hearing.

33. During the Architecture Board hearings, Rusk made the same misrepresentation that he made in the negotiation of the underlying contract and during the settlement negotiations, where on the settlement negotiations he orally stated that he being paid and dismissed so Attia to receive AMENDED and REVISED plans. However, the Architecture Board were able to see through Rusk's falsehoods and specifically concluded, with respect to the subject plans, that Rusk's practice of architecture violated NRS 623.270(1)(c) and that **his conduct throughout the course of events described above was both "negligent and incompetent."**

34. Moreover the Architecture Board found that Rusk lacked credibility, that he was incapable of accepting responsibility for his actions, he was arrogant, lacked knowledge and experience of this kind of project, and damaged not only Verge Corporation but also members of the public who attempted to purchase condominium units.

35. As a result of the Architecture Board findings at the hearing, Rusk was order to pay a fine of $10,000.00 for his conduct stemming from the Verge Project, all the fees and costs of the Architecture Board's investigation, and was placed on a three year probation (in which he had to take additional course work, submit all his contracts for architectural services to the Architecture Board for review, among other things). Said ruling of the Architecture Board is final. As a result, Rusk's registration as an architect was placed on probation for three years.

FIRST CLAIM FOR RELIEF

(Offset)

36. Counterclaimant repeats and realleges the paragraphs above as though fully stated herein.

37. Attia is entitled to an offset against Counterdefendants for damages incurred as a result of Counterdefendants' conduct as set forth in this pleading.

38. Attia has been forced to retain an attorney to prosecute this matter and is entitled to recover attorney fees and costs incurred herein as special damages.

39. Counterdefendants' actions directly and proximately caused Attia to suffer damages in excess of $10,000.00.

SECOND CLAIM FOR RELIEF

(Fraud in inducement, Fraud or International or Negligent Misrepresentation – Underlying Contract)

40. Counterclaimant repeats and realleges the paragraphs above as though fully stated herein.

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41. Counterclaimants **intentionally and knowingly made misrepresentations** to Attia with respect to Rusk's experience in high-rise buildings and expertise in architecture design documents, as well as the timeline for Verge's construction.

42. Counterdefendants' intent was to induce Attia to contract with Counterdefendants for the drafting of architecture plans related to Verge.

43. Attia **justifiably** relied on Counterdefendants' misrepresentations when he contracted with Counterdefendant for the drafting of plans related to Verge and abided by the timeline given to him by Counterdefendants with regard to the construction of Verge, by holding a large sales event, building a sales center and accepting earnest money deposits on units, among other things.

44. Attia has been required to retain the services of attorneys to prosecute this matter and therefore is entitled to reasonable attorneys' fees and costs as a result of bringing this action.

45. Counterdefendants' actions directly and proximately caused Attia to suffer damages in excess of $10,000.00.

THIRD CLAIM FOR RELIEF

(Fraud in inducement, Fraud or International or Negligent Misrepresentation – Settlement Agreement)

46. Counterclaimant repeats and realleges the paragraphs above as though fully stated herein.

47. For the very beginning of Rusk's dealings with Attia and the other Defendant, he intentionally misrepresented his qualifications and experience and continued this farce during settlement negotiations simply to get the Defendants enter the Settlement Agreement with him.

48. At the settlement negotiations, Rusk affirmatively and repeatedly represented to the Defendants that his plans were excellent, were ready to go, and could be used to immediately move forward with the construction of the Project. Rusk literally lied in regard to the quality and readiness of the plans, like it supposed to be AMENDED and REVISED plans, while Plans were not delivered, amended or revised. They were still no good, to say the least.

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49. Based on these representations by Rusk, Defendants **justifiably** moved forward with the Settlement Agreement.

50. Unfortunately, it was not until later at the Architecture Board hearings that **Rusk admitted that his representations regarding the plans were false.** Per Rusk testimony, Attia was inexperience high-rise developer, and did not really understand the magnitude of those plans, as such it was "easy" to deceive Attia about the readiness of the New amended set of plans.

51. Attia has been required to retain the services of attorneys to prosecute this matter and therefore is entitled to reasonable attorneys' fees and costs as a result of bringing this action.

52. Counterdefendants' actions directly and proximately caused Attia to suffer damages in excess of $10,000.00.

FOURTH CLAIM FOR RELIEF

(Unjust Enrichment)

53. Counterclaimant repeats and realleges the paragraphs above as though fully stated herein.

54. Attia conferred a benefit on Counterdefendants by agreeing to pay $350,000.00 to Counterdefendants for Counterdefendants' architectural work related to Verge.

55. Attia provided said payment to Counterdefendants at Counterdefendants' specific request and with the express understanding that Counterdefendants would perform the architectural work related to Verge in exchange for such payment, while per Rusk testimony, Attia relied heavily on Rusk presentation, as he was inexperienced high-rise developer.

56. Counterdefendants appreciated, accepted, and retained the benefits conferred upon them by Attia, by, among other things, receiving, using and enjoying the payments made by Attia. There is material failure of consideration by Rusk, as in actual Attia paid and dismissed RUSK to receive AMENDED and REVISED plans, while in real life Plans were not delivered, amended or revised. They were still no good.

57. Counterdefendants' failure to satisfy the obligations owed to Attia violates fundamental principles of justice, equity, and good conscience.

58. Counterdefendants' actions directly and proximately caused Attia to suffer damages in excess of $10,000.00.

59. Attia has been required to retain the services of attorneys to prosecute this matter and therefore is entitled to reasonable attorneys' fees and costs as a result of bringing this action.

FIFTH CLAIM FOR RELIEF

(Constructive Fraud)

60. Counterclaimant repeats and realleges the paragraphs above as though fully stated herein.

61. Counterdefendants gained and maintained a fiduciary or confidential relationship with Attia while working for Attia and/or Verge Living.

62. While working for Attia, Counterdefendants gained knowledge related to Attia's development plans for Verge, including financing for the same.

63. Because Counterdefendants gained knowledge related to Attia's development plans while working for Attia and were the lead design professional on the Verge project, Counterdefendants maintained a fiduciary or confidential relationship to Attia.

64. Because of the relationship, Counterdefendants were bound and had a duty, in equity and good conscience, to act in good faith and with due regard to the interests of Attia.

65. Counterdefendants' actions were in their own interest and **against the interest of Attia** because Counterdefendants' incompetency and deficiencies delayed and eventually resulted in the demise of Verge.

66. Attia incurred a loss from Counterdefendants' actions. Counterdefendants breached their duty to Attia by submitting deficient plans to the City of Las Vegas, refusing to make corrections to the plans, delaying the timeline of the Verge project, lacking the experience and expertise they alleged to have, and refusing to keep Attia informed of the continuous deficiencies and resulting delay of the project timeline.

67. Counterdefendants' actions directly and proximately caused Attia to suffer damages in excess of $10,000.00.

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68. Attia has been required to retain the services of attorneys to prosecute this matter and therefore is entitled to reasonable attorneys' fees and costs as a result of bringing this action.

SIXTH CLAIM FOR RELIEF

(Professional Malpractice)

69. Counterclaimant repeats and realleges the paragraphs above as though fully stated herein.

70. Attia sustained an actual loss resulting from the professional negligence of Counterdefendants.

71. Counterdefendants had a professional duty to use skill, prudence and diligence as other members of their profession commonly possess and exercise.

72. Counterdefendants breached their duty to Attia by their grossly negligent conduct as the lead design professional on the Verge project.

73. Counterdefendants breached their professional obligation of providing documents that were supposed to be complete and code-compliant by their submission of grossly deficient plans to the City of Las Vegas, which demonstrated Counterdefendants' gross negligence in the preparation of the same.

74. Additionally, Counterdefendants had no knowledge or experience in this type of project, resulting in the disruption of plans for numerous individuals who attempted to purchase condominiums in Verge, anti the eventual failure of the entire project.

75. Counterdefendants' negligent conduct proximately caused Attia to lose millions of dollars related to Verge.

76. Attia suffered an actual loss or damage as a result of Counterdefendants' negligence.

77. Counterdefendants' actions directly and proximately caused Attia to suffer damages in excess of $10,000.00.

78. Attia has been required to retain the services of attorneys to prosecute this matter and therefore is entitled to reasonable attorneys' fees and costs as a result of bringing this action.

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SEVENTH CLAIM FOR RELIEF

(Breach of Contract)

79. Counterclaimant repeats and realleges the paragraphs above as though fully stated herein.

80. The agreement entered into between Attia and Counterdefendants constitutes a contractual relationship between Attia and Counterdefendants in which Counterdefendants were to provide architectural plans for the Verge project, and for which Attia were to pay Counterdefendants $350,000.00.

81. Attia has performed all duties and obligations required of him under the contract.

82. Despite Attia's full performance, Counterdefendants have refused, failed, and neglected to honor their obligations under the contract. As such Attia is entitled for rescission for material failure of consideration by RUSK and/or RUSK LLC.

83. Counterdefendants' actions directly and proximately caused Attia to suffer damages in excess of $10,000.00.

84. Attia has been required to retain the services of attorneys to prosecute this matter and therefore is entitled to reasonable attorneys' fees and costs as a result of bringing this action.

EIGHTH CLAIM FOR RELIEF

(Breach of Implied Covenant of Good Faith and Fair Dealing – Underlying Contract)

85. Counterclaimant repeats and realleges the paragraphs above as though fully stated herein.

86. Counterdefendants owed a duty of good faith and fair dealing inherent in the underlying contract for architectural services with Attia.

87. Counterdefendants breach this duty of good faith and fair dealing.

88. Counterdefendants' actions directly and proximately caused Attia to suffer damages in excess of $10,000.00.

89. Attia has been required to retain the services of attorneys to prosecute this matter and therefore is entitled to reasonable attorneys' fees and costs as a result of bringing this action.

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NINTH CLAIM FOR RELIEF

(Breach of Implied Covenant of Good Faith and Fair Dealing – Settlement Agreement)

90. Counterclaimant repeats and realleges the paragraphs above as though fully stated herein.

91. Counterdefendants owed a duty of good faith and fair dealing inherent in the Settlement Agreement with Attia.

92. Counterdefendants breach this duty of good faith and fair dealing. Counterdefendants by their actions and testimonies under various capacities prove that they entered the Settlement Agreement without clean hands. **As much as it sounds ridiculous, Rusk and Rusk LLC OBJECTED their own Settlement Agreement in Bankruptcy Court, so by their own admission, the settlement agreement is void and null!!**

93. Counterdefendants' actions directly and proximately caused Attia to suffer damages in excess of $10,000.00.

94. Attia has been required to retain the services of attorneys to prosecute this matter and therefore is entitled to reasonable attorneys' fees and costs as a result of bringing this action.

TENTH CLAIM FOR RELIEF

(Setting Aside the Settlement Agreement)

95. Counterclaimant repeats and realleges the paragraphs above as though fully stated herein.

96. During the settlement negotiations in 2009, Rusk repeatedly intentionally asserted that his architectural plans were good, had significant value, and that the plans could be used to immediately move forward to commence construction.

97. During the settlement negotiations, Attia believed and was lead to believe, he could potentially retain a new architect to adopt and put the finishing touches on Rusk's plans and move forward with the project.

98. The sole purpose of settling with Rusk, even though Attia thought that Rusk had been overpaid already, was to be able to use Rusk's plans (new AMENDED REVISED set of plans) and salvage the project and Attia and others significant investments.

99. In October 2009, when the settlement agreement was executed, Attia did not have knowledge that Rusk had never built a high-rise and that Rusk had never designed or built a steel-framed structure.

100. Further Attia did not know that Rusk's plans, at all times, including in 2009, were completely unbuildable, incapable of being approved, negligent, incompetent, far below the standard for architects in Las Vegas, and worth very little if anything.

101. Rusk's representations regarding his plans and his experience **were intentional, material, false and were designed to induce Attia to rely on the representations** and enter into the Settlement Agreement, while Rusk knows (and testify for it) that Attia is inexperienced high-rise developer.

102. Attia reasonably relied on Counterdefendants' fraudulent misrepresentations when he entered into the settlement agreement.

103. As a result of Attia's reasonable reliance on Counterdefendants' fraudulent misrepresentations, Attia was damaged by the fact that he released claims, paid funds, and executed the Settlement Agreement. Moreover, Rusk and Rusk LLC objected to the approval of said settlement agreement by Bankruptcy court. Which as a result there is NO ORDER by court to enter said settlement, and said RUSK OBJECTION TO HIS OWN SETTLMENT just show clearly that he himself filing a lawsuit on Settlement Agreement that ACCORDING TO HIM, is Null and VOID.

104. For the reason set forth above, Attia is entitled to have the entire settlement agreement set aside.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for the following relief against Defendants:

1. For damages against Counterdefendants in an amount to be proven at trial, in excess of $10,000;

2. For an award of reasonable attorney fees and costs of suit;

3. For pre-judgment interest and post-judgment interest on all damages as allowed by law;

4. For any further relief as the Court deems to be just and proper.

Dated this 29th day of March, 2016.

MARQUIS AURBACH COFFING

By _____

Terry A. Coffing, Esq.
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Jonathan B. Lee. Esq.
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **DEFENDANT'S/COUNTERCLAIMANT'S AMENDED COUNTERCLAIM** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 29th day of March, 2016. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:[1]

Robert A. Nersesian, Esq.
NERSESIAN & SANKIEWICZ
528 S. Eighth St.
Las Vegas, NV 89101
Attorneys for Plaintiffs/Counterdefendants

Penny M. Williams, an employee of Marquis Aurbach Coffing

[1] Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

NJUD
Beau Sterling, Esq.
Nevada Bar No. 6833
STERLING LAW, LLC
228 South 4th Street, 1st Floor
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Phone: (702) 583-3333
Email: bsterling@sterlinglaw.com
Attorneys for plaintiffs and counterdefendants
Dennis E. Rusk, Architect LLC and Dennis E. Rusk, an individual

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

DENNIS E. RUSK, Architect LLC, a Nevada limited liability company, and DENNIS E. RUSK, an individual, Plaintiffs, vs. YOSSI ATTIA, an individual; MOSHE SCHNAPP, an individual; EMVELCO RE CORP., a Nevada corporation; VORTEX RESOURCES CORP. F/K/A EUROWEB INTERNATIONAL CORP. AND F/K/A EMVELCO CORP., a corporation state unknown; A. O. BONANZA HOLDINGS, LLC, a Nevada limited liability company; and DOES 1-100, Defendants.
YOSSI ATTIA, an individual; and MOSCHE SCHNAPP, an individual, Counterclaimants, v. DENNIS E. RUSK, Architect LLC, a Nevada limited liability company, and DENNIS E. RUSK, an individual, and DOES 1 through 100, inclusive; and ROE CORPORATIONS 1 through 100, inclusive, Counterdefendants.

Notice of Entry of Judgment and Order

TO THE COURT AND ALL INTERESTED PARTIES:

Please take notice that, on September 16, 2013, the Court entered the attached ***Order Granting in Part and Denying in Part Plaintiffs' Motion for Partial Summary Judgment and Other Relief; Judgment.***

STERLING LAW
APPELLATE ATTORNEYS

Dated: September 17, 2013.

STERLING LAW LLC

By: _____
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228 South 4th Street, 1st Floor
Las Vegas, Nevada 89101
(702) 583-3333 (phone)
(702) 583-3330 (e-fax)
bsterling@sterlinglaw.com

Attorneys for Plantiffs/Counterdefendants

CERTIFICATE OF SERVICE

I hereby certify that on this date, September 17, 2013, I served the foregoing **Notice of Entry of Judgment and Order**, with its attachment, by personal service (hand delivery) upon the following:

Matthew L. Johnson
MATIHEW L. JOHNSON & ASSOCIATES, P.C.
Lakes Business Park
8831 West Sahara Avenue
Las Vegas, Nevada 89117

_____
Beau Sterling, Esq.

RECEIPT OF COPY

The undersigned hereby acknowledges receipt on this date, September 17, 2013, of a copy of the foregoing **Notice of Entry of Judgment and Order**, with its attachment, by personal service (hand delivery) upon the following:

Matthew L. Johnson
MATTHEW L. JOHNSON & ASSOCIATES, P.C.
Lakes Business Park
8831 West Sahara Avenue
Las Vegas, Nevada 89117

_____
An Employee of Matthew L. Johnson & Associates, P.C.

Print Name: Annabelle Elayda

STERLING LAW
APPELLATE ATTORNEYS

EXHIBIT A

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CLERK OF THE COURT

Beau Sterling, Esq.
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Richard Vilkin, Esq.
Nevada Bar No. 8301
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Dennis E. Rusk, Architect LLC and Dennis E. Rusk, an individual

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

DENNIS E. RUSK, Architect LLC, a Nevada limited liability company, and DENNIS E. RUSK, an individual, Plaintiffs, vs. YOSSI ATTIA, an individual; MOSHE SCHNAPP, an individual; EMVELCO RE CORP., a Nevada corporation; VORTEX RESOURCES CORP. F/K/A EUROWEB INTERNATIONAL CORP. AND F/K/A EMVELCO CORP., a corporation state unknown; A. O. BONANZA HOLDINGS, LLC, a Nevada limited liability company; and DOES 1-100, Defendants.	Case No. A-11-650222-C Dept.: XXXI ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND OTHER RELIEF; JUDGMENT
YOSSI ATTIA, an individual; and MOSCHE SCHNAPP, an individual, Counterclaimants, v. DENNIS E. RUSK, Architect LLC, a Nevada limited liability company, and DENNIS E. RUSK, an individual, and DOES 1 through 100, inclusive; and ROE CORPORATIONS 1 through 100, inclusive, Counterdefendants.	

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND OTHER RELIEF; JUDGMENT

Plaintiffs and counterdefendants Dennis E. Rusk, an individual, and Dennis E. Rusk, Architect LLC ("the Rusk parties"), moved for partial summary judgment on their First and Second Causes of Action (Breach of Contract and Breach of the Implied Covenant of Good Faith and Fair Dealing), to voluntarily dismiss their remaining claims, and to dismiss the counterclaims by defendants and counterclaimants Yossi Attia, an individual, and Mosche Schnapp, an individual ("Attia and Schnapp") as moot, the Honorable Judge Joanna S. Kishner presiding.

Defendants Attia and Schnapp opposed the Rusk parties' motion for partial summary judgment and other relief. The court notes, however, that Attia and Schnapp have submitted no affidavits (other than an affidavit from their present attorney Katie A. Bindrup, Esq., whose testimony was made on information and belief and not on personal knowledge and is therefore ruled inadmissible) or other evidence in support of their arguments in opposition, but relied entirely on the evidence submitted by the Rusk parties, to which there were no objections.

On April 25, 2013 in Dept. 31 of the above-entitled court, a hearing was held on the Rusk parties motion. Beau Sterling, Esq. and Richard Vilkin, Esq. of Sterling Law, LLC appeared on behalf of the Rusk parties. Katie A. Bindrup, Esq. of the Law Offices of Matthew L. Johnson & Associates, P.C. appeared on behalf of Attia and Schnapp.

On August 1, 2013 in Dept. 31 of the above-entitled court, a further hearing was held at the court's request regarding clarifications of the court's ruling on April 25, 2013. Richard Vilkin, Esq. appeared on behalf of plaintiffs and Matthew L. Johnson, Esq. appeared on behalf of defendants.

After considering the motion and reply papers, the opposition papers, the exhibits and other documents presented to the court, and after hearing the arguments of counsel, the court rules and orders as follows:

Undisputed Material Facts

The court finds the following material facts as undisputed and proven:

1. On June 3, 2008, plaintiff Rusk filed a state court Complaint in the Eighth Judicial District Court captioned *Dennis E. Rusk et al. v. Yossi Attia and Mosche Schnapp et al.* (Nev. District Court Case No. A564309). On July 7, 2008, plaintiffs filed their First Amended Complaint. Exhibit A (all references to exhibits and declarations are to evidence filed and presented by plaintiffs in their motion papers).

2. Although the First Amended Complaint contained 10 causes of action, the essence of the claims was that defendants Yossi Attia and Mosche Schnapp, amongst others, had failed to pay plaintiffs according to certain agreements, and promises, regarding payment for plaintiffs' architectural services during the time period from 2002 to 2008. Exhibit A, paras. 17-20.

3. The project at issue started as a senior apartment building but ended up being an 11-story condominium project, known as "Verge," located at the intersection of Main and Bonanza in Las Vegas. Exhibit A, para. 17.

4. On January 26, 2008, one of the defendants, Verge Living Corporation (hereinafter sometimes "VLC"), filed a Notice of Removal to the United States Bankruptcy Court in the Central District of California. Exhibit B.

5. Upon motion by the Rusk parties herein, the case was then transferred to the bankruptcy court in the District of Nevada, with Case No. BK-S-09-16295-BAM. Exhibit G and Declaration of Richard Vilkin, para. 2. The Rusk parties were represented in the bankruptcy proceedings by attorney Richard Vilkin, of counsel to Sterling Law, LL, among others. *See id.*

6. The matter was refashioned as two adversary cases in the Nevada bankruptcy court, with the court, due to procedural reasons, directing that debtor VGL file its claims as an adversary Complaint (Exhibit C), with plaintiffs in the state court action directed to file their claims against the debtor as Counterclaims and their other claims as a Third Party Complaint. Exhibits D, E and F. The Third Party Complaint included defendants herein, Yossi Attia and Mosche Schnapp, as third party defendants. Exhibit F. *See also*, Dec. of Vilkin, para. 2.

7. The adversary cases were numbered 09-1106 and 09-1108, with 09-1108 being the "lead" action of the two. Dec. of Vilkin, para. 2.

8. On October 21, 2009, all of the parties to the above-mentioned Verge adversary actions participated in an all-day, voluntary settlement conference in the chambers of the Las Vegas bankruptcy court. Bankruptcy judge John Rossmeissl, a visiting judge from the Eastern District of Washington, conducted the conference. At the conclusion of the all-day conference, plaintiff Rusk provided a written settlement offer as to both adversary actions. This offer was accepted by defendants Attia and Schnapp on October 26, 2009. Exhibit H and Dec. of Vilkin, para. 3.

9. The material terms of the Settlement Agreement (Exhibit H) are as follows:

(1) Yossi Attia and Mosche Schnapp are each individually obligated to pay a total of $400,000. While the offer originally required full payment within 45 days, the offer was amended to require defendants to pay the settlement amount within 75 days and was due by January 6, 2010. (*See also* Exhibit I)

(2) The settlement amount of $400,000 would include all amounts due for all claims against Attia and Schnapp by Rusk's consultants who worked on the project;

(3) All parties stipulate to the dismissal with prejudice of all claims in Adversary cases 09-1106 and 09-1108, with mutual releases;

(4) Approval of the court;

(5) Payment to be made by a cashier's check to the Law Offices of Richard Vilkin, P.C. Client Trust Account;

(6) Rusk will provide written releases from all of his consultants.

(7) Rusk waives all claims against the debtor VGL, with all parties signing mutual releases.

10. Plaintiff Rusk provided all of the Releases required under the Settlement Agreement. Exhibit I.

11. Defendants herein provided all of the Releases they were required to provide. Exhibit J.

12. The Releases of Attia and Schnapp by Rusk's consultants (these consultants are engineers and others who worked with Rusk on the project) were prepared by Attia and Schnapp's then-counsel California attorney Michael Goch, and required, in order to be effective,

that Attia and Schnapp pay the full settlement amount to the Law Offices of Richard Vilkin, P.C. Client Trust Account, who was then obligated to distribute said funds—as per the Releases—to the consultants.

13. Attia and Schnapp, through their counsel Michael Goch, agreed to make an initial, early payment of $37,500. Exhibits I and J.

14. Counsel Goch said he would deliver the early payment only after he received dismissals with prejudice of all parties in the adversary cases. Exhibit T.

15. Rusk, along with counsel Goch, signed and filed the Stipulation for a dismissal with prejudice (Exhibit O) of Rusk's Third Party Complaint, and it was signed and the case ordered dismissed with prejudice by the bankruptcy court on December 21, 2009. Exhibit P.

16. Although counsel for Attia and Schnapp did deliver the check for $37,500 to plaintiff by way of letter dated December 21, 2009, Attia and Schnapp never made any further payments. Exhibit J and Dec. of Vilkin, para. 4.

17. Counsel Goch, representing Attia and Schnapp, admitted to the remaining debt—the one at issue in the case at bar—in writing on two separate occasions. First, he wrote an email on January 4, 2010 stating that his clients didn't understand that the money was owed by January 6, 2010 but they were attempting to get it. Exhibit K. And, second, Attia and Schnapp made an offer on January 18, 2010 to transfer to plaintiff Rusk four million (4,000,000) shares of penny stocks to pay off part of the debt. Exhibit L and Declaration of Vilkin, para. 4. These penny stocks—even if they could be sold—were claimed by Attia and Schnapp to be worth $80,000. Exhibit L. Plaintiff Rusk found evidence on the internet that, at the time, the shares were only worth .007 cents each, thus having a possible value of $28,000, assuming they could be sold (4,000,000 X .007 = $28,000). Exhibit L.

18. Plaintiff Rusk did move the bankruptcy court for relief from the dismissal, but the court ruled that this was a breach of contract matter that did not warrant relief in the bankruptcy court from the dismissal, and that plaintiff Rusk's remedy should be through a state court action for Breach of Contract. It stated: "Breach of contract claims are best brought before the state courts; that is where Rusk should seek his remedy." Exhibit N, at 11:19-20. The court finds that

the handling of this motion and subsequent Order by the bankruptcy court (Exhibit N) constitutes an order approving the settlement on the non-debtor parties as required by the Settlement Agreement. Exhibit H.

19. In their Opposition to the motion, Attia and Schnapp argued to the court, amongst other things, that the matter had been fully released and therefore there was no basis to vacate the dismissal with prejudice. Exhibit M, at 8:6 to 9:17.

20. The debtor in the bankruptcy case, Verge Living Corporation, did make a motion to the bankruptcy court to approve the settlement entered into by VLC and the Rusk parties and consultants. Exhibit X. The court granted the motion and ordered that the debtor VLC was authorized to enter into the settlement. Exhibit Q. This court finds that the Order of the bankruptcy court approving the settlement by the debtor VLC with the Rusk parties (Exhibit Q) constitutes an order approving the settlement as required by the Settlement Agreement between the Rusk parties and Attia and Schnapp in Exhibit H.

21. Defendants Attia and Schnapp have made no payments on the $362,500 that became due on January 6, 2010 and plaintiff Rusk has had no communication from them concerning payment (other than the communications described above in January, 2010) until filing the instant action on October 20, 2011. Dec. of Vilkin, para. 4.

22. In responding to written interrogatories in the case at bar, defendants Attia and Schnapp said, when asked a series of questions concerning why they haven't paid the money they owed or on what basis they claim they don't owe the money, made the repeated conclusory statement: "Plaintiff's actions rendered the settlement agreed void." Exhibit S.

23. Plaintiffs filed their Complaint in the case at bar on October 20, 2011. The Complaint alleges five causes of action: 1) Breach of Contract, 2) Breach of the Covenant of Good Faith and Fair Dealing, 3) Fraud in the Inducement/Intentional Misrepresentation, 4) Negligent Misrepresentation, and 5) Civil Conspiracy. (*See* court file.)

24. The first cause of action for Breach of Contract involves allegations that defendants Attia and Schnapp violated the Settlement Agreement by not paying. Complaint, paras. 18, 19 and 20. The second cause of action for Breach of the Covenant of Good Faith and

Fair Dealing also only involves allegations of bad faith breach of the Settlement Agreement. Complaint, paras. 21-23. (Court file.)

25. The Third, Fourth and Fifth causes of action in the Complaint involve allegations that defendants Attia and Schnapp fraudulently and/or negligently induced plaintiff Rusk to enter into the Settlement Agreement and dismiss the adversary actions when they knew they could not or would not pay the settlement amount. Complaint, paras. 25-31. The Fifth cause of action involves allegations that defendants and others entered into a civil conspiracy to induce plaintiff Rusk to settle and dismiss the adversary cases. Complaint, paras. 32-35. (Court file.)

26. Defendants Attia and Schnapp filed Counterclaims in this case. Those counterclaims are denominated Offset, Fraudulent or Intentional or Negligent Misrepresentation, Unjust Enrichment, Constructive Fraud, Professional Malpractice, Breach of Contract, and Breach of the Implied Covenant of Good Faith and Fair Dealing. *See* Answer and Counterclaim filed March 21, 2012, paras. 6-30. (court file.)

27. In the case at bar, the $362,500 was due from Attia and Schnapp on January 6, 2010. Exhibits H, I and J.

28. As of the hearing on the instant motion, it has been three years and more than three months (39 months plus) since the money became due. The prime interest rate in Nevada has been 3.25 percent since January 1, 2009. Exhibit R. The prejudgment interest rate in this case is 5.25 percent (3.25 percent plus 2 percent per NRS 99.040).

29. At the rate of 5.25 percent per annum, one year of interest is $19,031.25. (5.25 percent X $362,500 = $19,031.25). To get a monthly amount, divide $19,031.25 by 12 and that equals $1,585.93 per month. At the time plaintiffs' motion in this case was first heard on April 25, 2013, it had been 39 months since the money became due on January 6, 2010. Therefore, 39 months X $1,585.93 = $61,851.27. The amount due in interest is calculated as of the date of the hearing. The Rusk parties are due continuing interest from the May, 2013 forward until Final Judgment, at the same rate of $1,585.93 per month.

30. Adding the prejudgment interest of $61,851.27 to the amount due under the Settlement Agreement of $362,500, the total amount of the Judgment, including prejudgment interest through April 30, 2013 is $424,351.27.

31. Pursuant to the Settlement Agreement and the Releases exchanged pursuant thereto (*see* Exhibit I.), the Rusk parties released Attia and Schnapp from:

> . . . from "all claims, damages, debts, liens, liabilities, demands, obligations, costs, attorneys fees, expenses, compensation, actions and/or causes of action, of every nature, character and description, whether known or unknown, which Releasor now owns or holds, or at any time prior to the execution of this Release has owned or held including, without limitation, those arising from or related to services rendered or costs incurred in connection with the project located at the intersection of Main Street and Bonanza Road, Las Vegas, Nevada and the adversary proceedings filed in the United States Bankruptcy Court for the District of Nevada, Adversary Proceedings Nos. 09-01106 and 09-01108."

32. Pursuant to the Settlement Agreement and the Releases exchanged pursuant thereto (*see* Exhibit J.), Attia and Schnapp released the Rusk parties from the exact same thing:

> . . . from "all claims, damages, debts, liens, liabilities, demands, obligations, costs, attorneys fees, expenses, compensation, actions and/or causes of action, of every nature, character and description, whether known or unknown, which Releasor now owns or holds, or at any time prior to the execution of this Release has owned or held including, without limitation, those arising from or related to services rendered or costs incurred in connection with the project located at the intersection of Main Street and Bonanza Road, Las Vegas, Nevada and the adversary proceedings filed in the United States Bankruptcy Court for the District of Nevada, Adversary Proceedings Nos. 09-01106 and 09-01108."

33. Pursuant to the Settlement Agreement and the Releases exchanged pursuant thereto (*see* Exhibit I.), Rusk's consultants have released Attia and Schnapp:

> . . . from "all claims, damages, debts, liens, liabilities, demands, obligations, costs, attorneys fees, expenses, compensation, actions and/or causes of action, of every nature, character and description, whether known or unknown, which Releasor now owns or holds, or at any time prior to the execution of this Release has owned or held including, without limitation, those arising from or related to services rendered or costs incurred in connection with the project located at the intersection of Main Street and Bonanza Road, Las Vegas, Nevada, or which were contracted for or performed at the request of Dennis E. Rusk and/or Dennis E. Rusk, Architect, LLC."

The Rusk parties Are Entitled To Partial Summary Judgment

A. Breach of Contract

The motion for partial summary judgment is granted as to the Rusk parties' First Cause of Action for Breach of Contract.

"'A breach of contract may be said to be a material failure of performance of a duty arising under or imposed by agreement.'" *Calloway v. City of Reno*, 116 Nev. 250, 256, 993 P.2d 1259, 1263 (2000), quoting from *Bernard v. Rockhill Dev. Co.*, 103 Nev. 132, 135, 734 P.2d 1238, 1240 (1987) and *Malone v. University of Kansas Medical Center*, 220 Kan. 371, 552 P.2d 885, 888 (1976).

The court finds that there was a valid and enforceable settlement agreement between the Rusk parties on one side and Attia and Schnapp on the other side. The court finds further that the Rusk parties performed everything that was required of them in the Settlement Agreement, or such performance was waived or excused. The court finds further that Attia and Schnapp breached the contract by failing to pay the full amount due under the Settlement Agreement by January 6, 2010 and that such failure was unjustified and unexcused. The court also finds that the Rusk parties suffered damages as a result of the conduct of both Attia and Schnapp, individually and jointly, and that such damages are in the sum of $424,351.27 (as of April 30, 2013, plus subsequently accrued interest), to which he Rusk parties are entitled by way of judgment. *See* Nevada Jury Instructions (Civil) (State Bar of Nevada 2011), Contracts Instruction 13CN.1, citing *Nevada Contract Services, Inc. v. Squirrel Companies*, 119 Nev. 157, 161, 68 P.3d 896, 899 (2003).

B. Breach of Implied Covenant of Good Faith and Fair Dealing

The motion for partial summary judgment also is granted as to the Rusk parties' Second Cause of Action for Beach of the Implied Covenant of Good Faith and Fair Dealing, which the court construes as a contract (rather than a tort) claim.

> In this action, plaintiff seeks to recover damages [he][she] claims were sustained as a result of a breach of the implied covenant of good faith and fair dealing. Every contract in Nevada imposes upon the contracting parties a duty of good faith and fair dealing, which prohibits arbitrary or unfair acts by one party that work to the disadvantage of the other. Each party must act in a manner that is faithful to the purpose of the contract

and the justified expectations of the other party.

Nevada Jury Instructions (Civil) (State Bar of Nevada 2011), Implied Covenant of Good Faith and Fair Dealing Instruction 11FD.1 [multiple citations omitted].

> To establish a contractual breach of the implied covenant of good faith and fair dealing, plaintiff must establish:
>
> 1. A contract existed between plaintiff and defendant;
>
> 2. Defendant performed in a manner that was unfaithful to the purpose of the contract or deliberately contravened the intention and spirit of the contract; and 3. Defendant's conduct was a substantial factor in causing damage to the plaintiff.

Nevada Jury Instructions (Civil) (State Bar of Nevada 2011), Implied Covenant of Good Faith and Fair Dealing Instruction 11FD.3 [citations omitted].

The motion for partial summary judgment on the Rusk parties' Second Cause of Action for Beach of the Implied Covenant of Good Faith and Fair Dealing is granted because defendants Attia and Schnapp failed to pay the full amount due on January 6, 2010 or to make any payments after that. Because this is a claim sounding in contract (rather than tort), the proper amount of damages on this cause of action is limited to contract damages; accordingly, the amount of damages incurred by plaintiffs on this cause of action is the same as that calculated above for the Breach of Contract cause of action (that being $424,351.27, as of April 30, 2013, plus subsequently accrued interest).

Judgment

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

Summary judgment is granted and hereby entered in favor of the Rusk parties, Dennis E. Rusk, individually, and Dennis E. Rusk, Architect, LLC, and against defendants herein appearing, Yossi Attia and Mosche Schnapp, jointly and severally, and in their individual capacities, on the Rusk parties' causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing in the amount of $424,351.27 (as of April 30, 2013) plus prejudgment interest in the amount of $1,585.93 per month ($52.140 per day) from May 1, 2013

until the date of entry of this Judgment, plus post judgment interest thereon at the statutory legal rate (presently 5.25 percent) until paid.

Disposition of Remaining Claims

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED:

The motion by the Rusk parties for dismissal of the counterclaims alleged by defendants Attia and Schnapp is denied without prejudice.

The motion by the Rusk parties to voluntarily dismiss their Third, Fourth and Fifth Causes of action is denied without prejudice. Those are sufficiently pled and outside the contract.

All other parties listed in the caption of this case have not appeared in this action and are not part of this Order and Judgment.

Date: ~~August~~ September 6, 2013

JOANNA S. KISHNER

District Court Judge

Submitted by,

STERLING LAW, LLC

By: _____

Richard Vilkin, Esq.
Nevada Bar No. 8301
228 South 4th St., First Floor
Las Vegas, Nevada 89101
(702) 583-3333
Attorneys for plaintiffs and counterdefendants Dennis E. Rusk, Architect LLC and Dennis E. Rusk, individual

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CLERK OF THE COURT

ORDR

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

DENNIS E. RUSK, Architect LLC, a Nevada limited liability company, and DENNIS E. RUSK, an individual,

Plaintiffs,

v.

YOSSI ATTIA, an individual; MOSHE SCHNAPP, an individual; EMVELCO RE CORP., a Nevada corporation; VORTEX RESOURCES CORP. AND F/K/A EUROWEB INTERNATIONAL CORP. AND F/K/A EMVELCO CORP., a corporation state unknown; A. O. BONANZA HOLDINGS, LLC, a Nevada limited liability company; and DOES 1-100,

Defendants.

Case No. A-11-650222-C

Dept No. XXXI

DECISION AND ORDER ON DEFENDANTS' MOTION FOR LEAVE TO REHEAR AND RECONSIDER THE COURT'S ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter came on for hearing on Department XXXI Chamber's Calendar on December 6, 2013, on Defendants' Motion for Leave to Reconsider the Court's Order Granting in Part and Denying in Part Plaintiffs' Motion for Partial Summary Judgment. Having reviewed the pleadings, having reviewed the merits of the Motion, the positions of the parties, and good cause appearing, the Court finds and rules as follows:

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JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

DEFENDANT'S MOTION FOR LEAVE TO REHEAR AND RECONSIDER

A Court has the inherent authority to reconsider its prior orders. *Trail v. Faretto*, 91 Nev. 401, 403, 536 P.2d 1026, 1027 (1975). Pursuant to *Masonry & Tile Contractors Ass'n v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 941 P.2d 486 (1997), the trial court may reconsider a previously decided issue if substantially different evidence is subsequently introduced, or if the prior decision is clearly erroneous.

Within the Eighth Judicial District Court, when a party seeks reconsideration of a Court's previous order, the party must comply with EDCR 2.24(b). EDCR 2.24(b) requires "[a] party seeking reconsideration of a ruling of the court, other than any order which may be addressed by motion pursuant to NEV. R. CIV. P. 50(b), 52(b), 59 or 60, must file a motion for such relief within 10 days after service of written notice of the order or judgment[.]" EDCR 2.24(b). Pursuant to EDCR 2.24(b), Defendant timely filed the instant Motion to Rehear and Reconsider on October 1, 2013, following the Notice of Entry of Judgment and Order on September 17, 2013.

In evaluating a Motion for Reconsideration, the Court engages in a two-step process. First, the Court determines in accordance with NRCP 60(b)'s provisions if there is "mistake, inadvertence, surprise or excusable neglect[.],"If the first step is met then the Court reviews the evidence to determine if a different result should occur. In Nevada, "[o]nly in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted." *Achrem v. Expressway Plaza Ltd.*,

JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

112 Nev. 737, 742, 917 P2d 447,450 (1996).

In the present matter, Defendants have sought reconsideration from the Court's previous September 16, 2013, Order Granting in Part and Denying in Part Plaintiff's Motion for Partial Summary Judgment and Other Relief; Judgment. In their Motion for Reconsideration, Defendants argue that their prior counsel's failure to submit a proper affidavit from the clients pursuant to NRCP 56(e), and purported failure to set forth sufficient facts or argument in the Opposition to the Motion for Partial Summary Judgment, qualifies as excusable neglect under NRCP 60(b).

Defendants further argue that Mr. Rusk made, and Defendants unknowingly relied upon, fraudulent representations during the negotiations leading up to the Settlement Agreement, the facts of which were not fully briefed by Defendants' former counsel. Defendants argue a genuine issue of material fact exists as to whether or not the Settlement Agreement and Releases were valid and enforceable, and request the September 16, 2013, Order to be set aside.

Plaintiff opposes the Motion, arguing that Defendants' Motion presents no new evidence to the Court beyond what was originally presented, previously known, or available to Defendants that warrants reconsideration of the Court's Order. Plaintiff further argues that the affidavit included in Defendants' current Motion for Leave to Rehear and Reconsider is procedurally defective. Plaintiff argues that Defendants are using their current Motion to bring before the Court a new theory of fraud in the inducement of the Settlement Agreement that is

factually unsupported, procedurally bared, and improper for consideration on rehearing.

In addressing the Motion for Reconsideration, the Court first looks to determine whether Defendant's arguments are considered "excusable neglect" in accordance with applicable precedent. The Court also looks to whether there is new law or facts or whether the information was available to Defendant at the time of the prior Motion.

In the present case, it is evident from the record presented that the information which Defendants assert should have presented was information known to Defendants at the applicable time and were not "new" facts or information. Further, although Defendants assert that there is "excusable neglect", unlike the case law they rely upon, Defendants do not set forth the basis of their assertion. Instead, Defendants only state that prior counsel should have presented either more information or should have presented Defendants' case in a more persuasive manner. They do not provide a good reason, or any reason, why counsel failed to present the information they now contend should have been presented. The mere failure to present a party's case in a manner new counsel perceives it should have been presented, does not meet the excusable neglect standard without anything more.

Further, the fact that Defendants failed to provide certain admissible evidence in their Opposition to the underlying motion, such as an admissible affidavit, does not trigger reconsideration pursuant to the excusable neglect standard without providing any reason why the affidavit was not provided.

JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

Moreover, in the present case the Court is not confronted with a subtle and technical aspect of procedure; the ignorance of which could be readily excused. See Union Petrochemical Corp. of Nevada v. Scott, 96 Nev. 337, 339, 609 P.2d 323, 324 (1980). Instead, the requirements of submitting an affidavit based on personal knowledge pursuant to NRCP 56(e), are simple and direct, were readily accessible to Defendants' prior counsel, and as such, with no basis offered by Defendants for the failure to provide the affidavit; Defendant's failure to follow such requirements is not excusable. See id.

In sum, in the present case, after a review of all the pleadings and record, as well as applicable law, the Court finds that there are not "new issues of fact or law" that would support a different ruling from the Court pursuant to the reconsideration standard.[1] Further, based on what was presented, there is not a showing of excusable neglect.[2]

In the absence of new evidence or law, the Court also reviewed the record to determine whether it made an error of law or mistake in granting in part and denying in part Plaintiff's Motion for Partial Summary Judgment. Given that the Court fully analyzed the arguments in the pleadings, applicable case law, and the oral argument of parties on April 25, 2013, and August 1, 2013, the Court then properly, in accordance with applicable statutory authority, ruled on Plaintiff's

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[1] Although not necessary for the instant ruling, the Court notes that Defendants had an opportunity to present the instant issues at the subsequent hearing on April 25, 2013, but did not do so. The Court also notes that the issues relating to the alleged deficiencies in Mr. Rusk's architectural plans were previously referenced in Defendant's Opposition to Plaintiffs and Counter-Defendants Motion for Partial Summary Judgment and to Dismiss all Other Claims, and thus, they are not new facts.

[2] In setting forth that the evidence was not presented of excusable neglect, the Court takes no position as to whether prior counsel should have presented information in a different manner as that issue is not before the Court.

Motion for Partial Summary Judgment. As such, there was no error of law or mistake.

CONCLUSION

Based upon the foregoing, the Court hereby DENIES Defendants' Motion for Leave to Reconsider the Court's Order Granting in Part and Denying in Part Plaintiff's Motion for Partial Summary Judgment and the Court AFFIRMS its prior ruling.

Dated this 6th day of December, 2013.

JOANNA S. KISHNER
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on or about the date filed, a copy of this Order was provided to all counsel, and/or parties listed below via one, or more, of the following manners: via email, via facsimile, via US mail, via Electronic Service if the Attorney/Party has signed up for Electronic Service, and/or a copy of this Order was placed in the attorney's file located at the Regional Justice Center:

Beau Sterling, Esq.
Sterling Law, LLC

Daniel T. Foley, Esq.
Foley & Oakes, PC

TRACY CORDOBA
JUDICIAL EXECUTIVE ASSISTANT

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CLERK OF THE COURT

NOTC
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DISTRICT COURT
CLARK COUNTY, NEVADA

DENNIS E. RUSK, Architect, LLC, a Nevada limited liability company, and DENNIS E. RUSK, an individual,

Plaintiffs,

vs.

YOSSI ATTIA, an individual; MOSHE SCHNAPP, an individual; EMVELCO RE CORP., a Nevada corporation; VORTEX RESOURCES CORP., F/K/A EUROWEB INTERNATIONAL CORP. AND F/K/A EMVELCO CORP., a corporation state unknown; A.O. BONANZA HOLDINGS, LLC, a Nevada limited liability company; and DOES 1-100,

Defendants.

YOSSI ATTIA, an individual;

Counterclaimant,

vs.

DENNIS E. RUSK, Architect, LLC, a Nevada limited liability company, and DENNIS E. RUSK, an individual, and DOES 1 Through 100, inclusive and ROE CORPORATIONS 1 through 100. Inclusive

Counterdefendants

Case No. A-11-650222-C
Dept. No. XXXI

NOTICE OF ENTRY OF ORDER GRANTING IN PART MOTION TO REOPEN DISCOVERY, ORDER DENYING COUNTER MOTION FOR RECONSIDERATION OF ORDER DENYING RENEWED MOTION TO DISMISS COUNTERCLAIMS AS MOOT AND FOR VOLUNTARY DISMISSAL OF THEIR REMAINING CLAIMS, ORDER DENYING ORAL MOTION PURSUANT TO NRCP RULE 54(b)

FOLEY & OAKES

NOTICE OF ENTRY OF ORDER GRANTING IN PART MOTION TO REOPEN DISCOVERY, ORDER DENYING COUNTER MOTION FOR RECONSIDERATION OF ORDER DENYING RENEWED MOTION TO DISMISS COUNTERCLAIMS AS MOOT AND FOR VOLUNTARY DISMISSAL OF THEIR REMAINING CLAIMS, ORDER DENYING ORAL MOTION PURSUANT TO NRCP RULE 54(b)

TO: DEFENDANTS AND THEIR ATTORNEYS OF RECORD HEREIN:

YOU AND EACH OF YOU will please take notice that the Order Granting in Part Motion to Reopen Discovery, Order Denying Counter Motion for Reconsideration of Order Denying Renewed Motion To Dismiss Counterclaims As Moot And For Voluntary Dismissal Of Their Remaining Claims And Order Denying Oral Motion Pursuant to NRCP Rule 54(b) was entered with the above-entitled Court on June 10, 2014.

A copy of said Order is attached hereto.

DATED this 16th ~~day~~ of June 2014.

Respectfully Submitted,
FOLEY & OAKES, PC

DANIEL T. FOLEY, ESQ.
Nevada Bar No. 1078
850 East Bonneville Avenue
Las Vegas, Nevada 89101
Attorneys for Yossi Attia and Moshe Schnapp

FOLEY & OAKES

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that on this day, I served a copy of the foregoing NOTICE OF ENTRY OF ORDER GRANTING IN PART MOTION TO REOPEN DISCOVERY, ORDER DENYING COUNTER MOTION FOR RECONSIDERATION OF ORDER DENYING RENEWED MOTION TO DISMISS COUNTERCLAIMS AS MOOT AND FOR VOLUNTARY DISMISSAL OF THEIR REMAINING CLAIMS, ORDER DENYING ORAL MOTION PURSUANT TO NRCP RULE 54(b) via mailing, first-class postage fully prepaid, at Las Vegas, NV, addressed to the following interested parties, **as they have not been added to the E-Service Master List on Wiznet**:

Robert A. Nersesian, Esq.
NERSESIAN & SANKIEWICZ
528 S 8th St.
Las Vegas, Nevada 89101
Attorneys for Plaintiffs/Counterdefendants

DATED this 10th day of June 2014.

An Employee of Foley & Oakes, PC

FOLEY & OAKES

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CLERK OF THE COURT

ORDR

DANIEL T. FOLEY, ESQ.
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Email: yhenricks@law-mh.com
Attorneys for Yossi Attia and Moshe Schnapp

DISTRICT COURT
CLARK COUNTY, NEVADA

DENNIS E. RUSK, Architect, LLC, a Nevada limited liability company, and DENNIS E. RUSK, an individual,

Plaintiffs,

vs.

YOSSI ATTIA, an individual; MOSHE SCHNAPP, an individual; EMVELCO RE CORP., a Nevada corporation; VORTEX RESOURCES CORP., F/K/A EUROWEB INTERNATIONAL CORP. AND F/K/A EMVELCO CORP., a corporation state unknown; A.O. BONANZA HOLDINGS, and DOES 1-100,

Defendants.

YOSSI ATTIA, an individual;

Counterclaimant,

vs.

DENNIS E. RUSK, Architect, LLC, a Nevada limited liability company, and DENNIS E. RUSK, an individual, and

Case No. A-11-650222-C
Dept. No. XXXI

ORDER GRANTING IN PART MOTION TO REOPEN DISCOVERY, ORDER DENYING COUNTER MOTION FOR RECONSIDERATION OF ORDER DENYING RENEWED MOTION TO COUNTERCLAIMS AS MOOT AND FOR VOLUNTARY DISMISSAL OF THEIR REMAINING CLAIMS, ORDER DENYING ORAL MOTION PURSUANT TO NRCP RULE 54(b)

Hearing Date: May 13, 2014
Hearing Time: 10:00 a.m.

FOLEY & OAKES

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DOES 1 Through 100, inclusive and ROE CORPORATIONS 1 through 100. Inclusive

Counterdefendants

ORDER GRANTING IN PART MOTION TO REOPEN DISCOVERY, ORDER DENYING COUNTER MOTION FOR RECONSIDERATION OF ORDER DENYING RENEWED MOTION TO DISMISS COUNTERCLAIMS AS MOOT AND FOR VOLUNTARY DISMISSAL OF THEIR REMAINING CLAIMS, ORDER DENYING ORAL MOTION PURSUANT TO NRCP RULE 54(b)

THIS MATTER came on for hearing on the 13th day of May 2014, at the hour of 10:00 a.m., with Daniel T. Foley, Esq. appearing on behalf of the Defendants/Counterclaimants Yossi Attia and Moshe Schnapp, Robert A. Nersesian, Esq. appearing on behalf of Plaintiffs/Counterdefendants, the Court having considered the papers and pleadings on file herein, and entertaining oral arguments, the Court hereby rules as follows:

IT IS HEREBY ORDERED that Defendants/Counterclaimants' Motion to Reopen Discovery is Granted in part and Denied in part.

IT IS HEREBY ORDERED that Discovery is reopened up to and until September 1, 2014.

IT IS HEREBY ORDERED that the parties may take up to 5 depositions each and may serve each other with requests for Production of Document. The parties can agree to additional discovery if they so choose.

IT IS HEREBY ORDERED that after September 1, 2014, the parties shall have up to and until October 1, 2014 to file dispositive motions.

IT IS HEREBY ORDERED that the trial in this case is scheduled for December 8, 2014 at 9:00 ~~10:00~~ a.m. The Pretrial Conference is scheduled for November 6, 2014 at 10:15. Calendar call is scheduled for December 2, 2014 at 9:00 a.m.

///

///

FOLEY & OAKES

IT IS HEREBY ORDERED that Plaintiffs/Counterdefendants' Oral Motion for NRCP Rule 54(b) certification of this Court's Order granting Partial Summary Judgment is Denied.

DATED this 29 day of MAY 2014.

JOANNA S. KISHNER
DISTRICT COURT JUDGE

Submitted by:

FOLEY & OAKES, PC

DANIEL T. FOLEY, ESQ.
Nevada Bar No. 1078
850 E. Bonneville Avenue
Las Vegas, Nevada 89101
Attorneys for Defendants/Counterclaimants

Approved as to Form and Content:
NERSESIAN & SANKIEWICZ

Robert A. Nersesian, Esq.
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528 S. 8th St.
Las Vegas, Nevada 89101
Attorneys for Plaintiffs/Counterdefendants

FOLEY & OAKES

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CLERK OF THE COURT

NEO
Edward D. Boyack
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BOYACK & TAYLOR
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702.562.3415
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Attorney for Defendants/
Counter claimant

DISTRICT COURT
CLARK COUNTY, NEVADA

DENNIS E. RUSK, Architect, LLC, a Nevada limited liability company, and DENNIS E. RUSK, an individual,

Plaintiffs,

vs.

YOSSI ATTIA, an individual; MOSHE SCHNAPP, an individual; EMVELCO RE CORP., a Nevada corporation; VORTEX RESOURCES CORP., F/K/A EUROWEB INTERNATIONAL CORP. AND F/K/A EMVELCO CORP., a corporation state unknown; A.O. BONANZA HOLDINGS, LLC, a Nevada limited liability company; and DOES 1-100,

Defendants.

AND ALL COUNTER ACTIONS

CASE NO. A-11-650222-C
DEPT. XXXI

NOTICE OF ENTRY

NOTICE OF ENTRY

PLEASE TAKE NOTICE that an **ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND COUNTER-CLAIMANT'S MOTION TO AMEND COUNTERCLAIM** was entered in the above referenced case on the * day of *, a copy of which is attached hereto.

DATED this 9 day of January, 2015.

BOYACK & TAYLOR

By: _____

EDWARD D. BOYACK
Nevada Bar No. 005229
401 N. Buffalo Drive #202
Las Vegas, Nevada 89145
Attorney for Defendants/ Counter claimant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of January, 2015, service of the foregoing **NOTICE OF ENTRY** was made this date via electronic service through the Eighth Judicial District Court to the person(s) named below:

Mardell Collins

An Employee of Boyack & Taylor

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CLERK OF THE COURT

ORDR
Edward D. Boyack
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702.562.3415
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Attorneys for Defendants/Counterclaimant

DISTRICT COURT
CLARK COUNTY, NEVADA

DENNIS E. RUSK, Architect, LLC, a Nevada limited liability company, and DENNIS E. RUSK, an individual,

Plaintiffs,

vs.

YOSSI ATTIA, an individual; MOSHE SCHNAPP, an individual; EMVELCO RE CORP., a Nevada corporation; VORTEX RESOURCES CORP., F/K/A EUROWEB INTERNATIONAL CORP. AND F/K/A EMVELCO CORP., a corporation state unknown; A.O. BONANZA HOLDINGS, LLC, a Nevada limited liability company; and DOES 1-100,

Defendants.

YOSSI ATTIA, an individual,

Counterclaimant,

vs.

DENNIS E. RUSK, Architect, LLC, a Nevada limited liability company, and DENNIS E. RUSK, an individual, and DOES 1 through 100, inclusive and ROE CORPORATIONS 1 through 100, inclusive,

Counterdefendants

CASE NO. A-11-650222-C
DEPT. XXXI

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND COUNTER-CLAIMANT'S MOTION TO AMEND COUNTERCLAIM

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ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND COUNTER-CLAIMANT'S MOTION TO AMEND COUNTERCLAIM

Plaintiff/Counter Defendant filed a Motion for Summary Judgment which came before the court on November 4, 2014. Defendants'/Counter claimant filed a counter motion to amend the counterclaim. Plaintiff previously filed a motion for partial summary judgment and motion to dismiss the counterclaim, which was heard on April 25, 2013. Thereafter, motions for reconsideration of the denial of the dismissal of the counterclaim followed on October 1, 2014. Plaintiff Rusk renewed the Motion for Summary Judgment previously without prejudice and sought a finding that the counter claim should be dismissed as it relates to Defendant Attia. The Plaintiff's previous attempts to have the counter claim dismissed have been unsuccessful, and the motion filed by Plaintiff on October 1, 2014 is a renewed motion of the previous motions, which were denied by the Court.

The Court having considered the motions and all exhibits, hearing the oral arguments of counsel and being fully advised, and good cause appearing therefore,

IT IS HEREBY ORDERED ADJUDGED AND DECREED that Plaintiff's motion for Summary Judgment should be and hereby is denied.

IT IS HEREBY FURTHER ORDERED ADJUDGED AND DECREED that the subject Motion for Summary Judgment is similar in nature to the previous motions filed by Plaintiff/Counter defendant relating to dismissal of the causes of action outlined in the Defendants/Counter claimants' counterclaim; consequently, no new facts or issues were raised in the Motion for Summary Judgment and thereby the motion is denied.

THE COURT FURTHER FINDS there are genuine issues of material fact regarding the facts alleged in the Defendants/Counterclaimant's counter claim.

IT IS HEREBY FURTHER ORDERED ADJUDGED AND DECREED that Plaintiff's Motion to Strike the Counter Motion to File an Amended Counterclaim is hereby deemed Moot.

IT IS HEREBY FURTHER ORDERED ADJUDGED AND DECREED that Defendants/Counterclaimant's Motion to amend the Counterclaim is hereby denied.

IT IS SO ORDERED.

DATED this 5th day of January, 2015.

JOANNA S. KISHNER
DISTRICT COURT JUDGE

Approved by:

NERSESIAN & SANKIEWICZ

By: _____
Robert A. Nersesian
Nevada Bar No. 002762
528 S. Eighth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiffs/ Counterdefendants

Submitted by:

BOYACK & TAYLOR

By: _____
Edward D. Boyack
Nevada Bar No. 005229
401 N. Buffalo Drive #202
Las Vegas, Nevada 89145
Attorneys for Defendants/ Counterclaimant

ORDR

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

DENNIS E. RUSK, Architect, LLC, a Nevada limited liability company, and DENNIS E. RUSK, an individual,

Plaintiffs,

vs.

YOSSI ATTIA, an individual; MOSHE SCHNAPP, an individual; EMVELCO RE CORP., a Nevada corporation; VORTEX RESOURCES CORP., F/K/A EUROWEB INTERNATIONAL CORP. AND F/K/A EMVELCO CORP., a corporation state unknown; A.O. BONANZA HOLDINGS, LLC, a Nevada limited liability company: and DOES 1-100,

Defendants.

Case No. A-11-650222-C

Dept. No. XX

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CLERK OF THE COURT

ORDER GRANTING COUNTERCLAIMANT'S MOTION FOR LEAVE TO AMEND COUNTERCLAIM

Defendant/Counterclaimant ("Defendant"), Yossi Attia, having filed his Motion for Leave to Amend Counterclaim and the matter having come for hearing on January 6, 2016, with the Court entertaining arguments thereon and having considered the pleadings, papers and documents on file therein and being otherwise fully advised, and good cause appearing therefore, it is hereby ordered as follows:

FACTUAL FINDINGS AND LEGAL ANALYSIS

1. On September 16, 2013, Judge Kishner issued an order granting Partial Summary Judgment of Plaintiffs/Counter defendants Dennis Rusk and Dennis E. Rusk, Architect, LLC (collectively, the "Plaintiffs") claims.

ERIC JOHNSON
DISTRICT JUDGE
DEPARTMENT XX

2. Within said order, Judge Kishner found that the settlement agreement at issue included clauses whereby Plaintiffs and Defendant waived all causes of action against each other for acts done prior to the agreement.

3. As a result, Judge Kishner ordered the Defendants to pay damages and interest for the Plaintiffs' breach of contract claim. However, Judge Kishner did not dismiss Defendant's Counterclaims, all of which alleged causes of action occurring before the signing of the settlement agreement.

4. This Court, in considering Defendant's Motion for Leave to Amend Counterclaim, has reviewed the litigation in this matter, in particular, Judge Kishner's order granting Partial Summary Judgment on September 16, 2013.

5. On reflection, Judge Kishner's order appears internally inconsistent in that it grants Summary Judgment on Plaintiffs' causes of action for breach of contract and breach of implied covenant of good faith and fair dealing, finding that Plaintiffs and Defendant entered a valid settlement agreement in which Defendant failed to comply. In view of Judge Kishner granting Summary Judgment on Plaintiffs' causes of action, this Court cannot see how Summary Judgment could not have been granted as to Defendant's Counterclaims absent the court implicitly finding the claims included fraud in the inducement of the settlement agreement. Indeed, this argument is clearly expressed by defense counsel immediately after the entry of the Summary Judgment order. The Court repeatedly denied Plaintiffs' renewed or new Motions to Dismiss/Summary Judgment which again can only be explained if the Court concluded the Counterclaims implicitly included fraud in the inducement.

6. Defendant did attempt to amend his Counterclaims to specifically include fraud in the inducement on the eve of a trial setting on October 4, 2014. Judge Kishner denied this motion but expressed in orally ruling that the "essence" of the fraud claims had been implicit from the

beginning of the litigation. While this statement of the prior judge is not the clearest as to meaning, the fact Judge Kishner has consistently refused to dismiss the Counterclaims strongly suggests that the Court believed fraud in the inducement was implicit in the Counterclaims. This was this Court's understanding of the Counterclaims upon taking over the litigation.

7. On November 18, 2015, this Court ruled that despite the previous rulings it did not believe the Counterclaims properly alleged fraud in the inducement. However, in view of Judge Kishner's prior rulings, which this Court perceived as suggesting the Counterclaims did include fraud in the inducement, the Court invited Defendant to file a Motion to Amend, which he did.

8. The Court has also considered Plaintiffs' contention Defendant cannot create an issue of fact by his own inconsistent statements. *Aldabe v. Adams*, 81 Nev. 280 (1965). The Court agrees that Defendant's statements to the Architecture Board concerning Rusk's ineptness, made sometime before the reaching of the settlement agreement, arguably do not appear to support Defendant's contention he made the settlement agreement to obtain plans from Plaintiff that he thought he could use with revisions. However, these two statements of the Defendant concern distinctly different events at different periods of time. Unlike the situation in the Nevada Supreme Court's decision in *Aldabe*, Defendant did not make one statement concerning the settlement negotiations and then a materially different statement about the negotiations to create an issue of fact. The Court sees the instant situation as one lending to potential effective cross-examination as opposed to Summary Judgment.

9. Moreover, this Court understands Plaintiffs' position that they are being subject to additional litigation costs in view of the Court's order. However, this order does not change to any marked degree the track Judge Kishner set and, at least, implicitly, the parties understood the litigation to be moving. If Defendant's contention of fraud in the inducement when presented at trial is as ludicrous as Plaintiffs claim, Plaintiffs may seek attorney fees and costs under NRS 18.010.

10. After considering the motion, opposition, and reply and reviewing the entire record of the case, this Court concludes there is good cause under Nevada Rules of Civil Procedure 15 and 16 to allow Defendant to amend his Counterclaim in contravention of the Court's earlier scheduling order. When a party seeks leave to amend a pleading after the expiration of the deadline for doing so, it must first demonstrate "good cause" under Rule 16(b) for extending the deadline before the merits of the motion may then be considered under Rule 15(a). *Nutton v. Sunset Station, Inc.*, 357 P.3d 966 (Nev. App. 2015). Courts have identified four factors that may aid in assessing whether a party exercised diligence in attempting to meet a deadline such as a scheduling order: (1) the explanation for the untimely conduct, (2) the importance of the requested untimely action, (3) the potential prejudice in allowing the untimely conduct, and (4) the availability of a continuance to cure such prejudice. *Id.* at 971–972. The first factor is by far the most important consideration and may alone be decisive. *Id.* at 972. As discussed above, Judge Kishner's actions in not granting Summary Judgment as to Defendant's Counterclaims and repeated denials of Plaintiff's renewed or new Motions to Dismiss/Summary Judgment can only be explained if Judge Kishner concluded the Counterclaims implicitly included fraud in the inducement. While Judge Kishner subsequently denied a motion by Defendant to amend his Counterclaims to specifically include fraud in the inducement, the motion was made on the eve of a prior trial setting and in denying the motion Judge Kishner orally expressed the "essence" of the fraud claims had been implicit from the beginning of the litigation. This statement, in view of the Court's other actions, strongly suggests the Court believed fraud in the inducement was implicitly included in Defendant's Counterclaims. The Defendant was reasonably operating pursuant to that understanding in preparing for trial in this matter.

11. This Court, in being assigned this case was also under the impression from the hearings conducted that fraud in the inducement was pled as part of Defendant's Counterclaims. At

Plaintiff's request, this Court reviewed Defendant's Counterclaims and concluded that fraud in the inducement was not implicitly or properly pled and so ruled. However, in view of the length of this litigation and Defendant's reasonable understanding that Judge Kishner considered his Counterclaims to include fraud in the inducement, the Court finds Defendant's explanation for his untimely conduct demonstrates good cause under Rule 16. The Court also finds Defendant's Motion to Amend and proposed amendments are essential for Defendant's Counterclaims to be considered and to properly proceed in this litigation.

12. In assessing the potential prejudice to Plaintiff, the Court again notes essentially all of Judge Kishner's actions in this litigation suggest she would have allowed Defendant to introduce evidence of fraud in the inducement at trial to prove his Counterclaims. Plaintiff's counsel has expressed he intended to object to the introduction of such evidence because the claim was not properly pled. However, in view of Judge Kishner's rulings, Plaintiff's counsel needed to be prepared to meet such evidence. Plaintiff was on notice of the fraud in the inducement claim. Defendant's requested amendments simply correct the allegations concerning fraud in the inducement which were previously presented, but insufficiently pled. Consequently, the Court finds the potential prejudice to the defendant in allowing the motion after the scheduling order deadline does not preclude a finding of good cause under Rule 16. Additionally, any prejudice Plaintiff suffers can be adequately cured through the extension of the discovery deadline for depositions. The Court finds the Parties should be given the opportunity to conduct additional discovery on the fraud in the inducement claim considering the Court has granted Defendant's motion for leave to amend. The Court finds based on the above that good cause exists to extend the discovery deadline in this matter.

13. Considering Defendant's Motion to Amend under Rule 15, at this time Defendant may amend his pleading only by leave of court and "leave shall be freely given when justice so

requires." For the same reasons stated above in analyzing whether to allow Defendant's Motion to Amend under Rule 16, the Court finds under Rule 15 that justice requires that Defendant be allowed to amend his Counterclaims.

ORDER

IT IS ORDERED that Defendant's Motion for Leave to Amend his original counterclaim to add/clarify the asserted fraud claims a result of the purported fraud in the inducement of the Settlement Agreement is hereby GRANTED.

IT IS FURTHER ORDERED Judge Kishner's September 16, 2013 order granting Partial Summary Judgment is modified. Specifically, Judge Kishner's factual conclusions are not altered, but this Court withdraws the granting of Summary Judgment on Plaintiffs' first and second causes of action.

IT IS FURTHER ORDERED the trial in this matter shall be bifurcated. The initial and sole issues before the jury shall be Plaintiffs' claims, Defendant/Counterclaimant's third claim for relief in his amended Counterclaim, and whether Plaintiffs engaged in fraud in the inducement of the Settlement Agreement. If the jury finds no such fraud, and finds for Plaintiffs on their causes of action, the Court will enter judgment against Defendant/Counterclaimant on his remaining counterclaims. If the jury finds fraud in the inducement against Plaintiffs, then the Settlement Agreement will be treated as invalid and the trial will continue to a second stage in order to litigate Defendant/Counterclaimant's counterclaims.

Plaintiffs contend they are unprepared to defend against the fraud in the inducement claim because it was not properly pled. Plaintiffs' counsel, however, had to appreciate Judge Kishner appeared to accept an implicit theory of fraud in the inducement and should have been prepared to deal with the Counterclaims in view of the Court's repeated refusal to dismiss the Counterclaims. Nevertheless, IT IS ORDERED that good cause exists to reopen discovery until Monday, April 4,

2016, as provided in the Court's minute order dated February 2, 2016, in order for the parties to conduct the necessary discovery concerning the purported fraud in the inducement of the Settlement Agreement. During this time period, any further proceedings concerning discovery are to be referred to the Discovery Commissioner.

IT IS SO ORDERED this 28th day of March, 2016.

ERIC JOHNSON
DISTRICT COURT JUDGE

ERIC JOHNSON
DISTRICT JUDGE
DEPARTMENT XX

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Steven D. Grierson
CLERK OF THE COURT

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Attorneys for Plaintiffs and Counterdefendants

DISTRICT COURT
CLARK COUNTY, NEVADA

DENNIS E. RUSK, Architect, LLC, a Nevada limited liability company, and DENNIS E. RUSK, an individual, Plaintiffs, vs. YOSSI ATTIA, an individual; et al, Defendants.	Case No. A-11-650222-C Dept. No. XX
YOSSI ATTIA, an individual; Counterclaimant, vs. DENNIS E. RUSK, et al, Counterdefendants	

NOTICE OF ENTRY OF DECISION AND ORDER

PLEASE TAKE NOTICE that the Decision and Order entered on the 30th day of

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Case Number: A-11-650222-C

January, 2018. A copy of said Decision and Order is attached hereto.

DATED this 30th day of January, 2018.

NERSESIAN & SANKIEWICZ

/s/ Robert A. Nersesian
Robert A. Nersesian
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Thea Marie Sankiewicz
Nevada Bar No: 2788
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Las Vegas, Nevada 89101
Phone: 702-385-5454
Fax: 702-385-7667
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of January, 2018, pursuant to NRCP 5(b) and EDCR 8.05(f), a true and correct copy of the forgoing **NOTICE OF ENTRY OF DECISION AND ORDER** was served to the following parties via e-service through EJDC e-filing, and that the date and time of the electronic service is in place of the date and place of deposit in the mail:

Terry A. Coffing, Esq.
Marquis Aurbach Coffing
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Las Vegas, Nevada 89145
tcoffing@maclaw.com
Attorneys for Defendants/Counterclaimants

/s/ Rachel Stein
An employee of Nersesian & Sankiewicz

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Steven D. Grierson
CLERK OF THE COURT

ORDR

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

DENNIS E. RUSK, Architect, LLC, a Nevada limited liability company, and DENNIS E. RUSK, an individual,

Plaintiffs,

vs.

YOSSI ATTIA, an individual; MOSHE SCHNAPP, an individual; EMVELCO RE CORP., a Nevada corporation; VORTEX RESOURCES CORP., F/K/A EUROWEB INTERNATIONAL CORP. AND F/K/A EMVELCO CORP., a corporation state unknown; A.O. BONANZA HOLDINGS, LLC, a Nevada limited liability company: and DOES 1-100,

Defendants.

Case No. A-11-650222-C

Dept. No. XX

YOSSIA ATTIA, an individual,

Counterclaimant,

vs.

DENNIS E. RUSK, Architect, LLC, a Nevada limited liability company, and DENNIS E. RUSK, an individual, and DOES 1 through 100, inclusive and ROE CORPORATIONS 1 through 100, inclusive,

Counterdefendants.

DECISION AND ORDER

Introduction

This matter having come before the Honorable Eric Johnson, Judge of the above-entitled Court, on July 25th through 27th, 2016 for a bench trial: with Robert Nersesian, Esq., appearing on

Case Number: A-11-650222-C

behalf of Plaintiffs and Counter-Defendants Dennis E. Rusk ("Mr. Rusk"), and Dennis E. Rusk Architect, LLC (hereafter sometimes referred collectively as "Mr. Rusk" or "Counterdefendant"), and Terry Coffing, Esq. and Jonathan Lee, Esq., appearing on behalf of Defendants/Counterclaimants Mo Jacob f/k/a Moshe Schnapp ("Mr. Jacob") and Yossi Attia ("Mr. Attia") (hereinafter sometimes referred collectively as "Counterclaimants"). The Court having heard the testimony of witnesses, arguments of the parties, and considered the moving papers, oppositions, and each party's respective Motions to Strike, filed thereto, the decision is as follows:

Factual Summary

Underlying this action is a contract for professional services wherein Mr. Attia, and the Verge Living Corporation, engaged Mr. Rusk to provide services as an architect for the Verge project, a high-rise condominium development and mixed commercial project located in downtown Las Vegas, Nevada. Ultimately, Mr. Rusk was terminated from the project and the condominium project was never constructed. Mr. Rusk filed a Complaint in the Eighth Judicial District Court alleging that Defendants/Counterclaimants, Mr. Attia and Mr. Jacobs, failed to compensate Mr. Rusk according to certain agreements for his architectural services from 2002 to 2008.

The Verge Living Corporation, the company overseeing the Verge project, filed for bankruptcy in 2008 and the Verge project eventually ceased. The state court action was removed to the United States Bankruptcy Court where it was, for procedural reasons, fashioned into two adversary proceedings. On October 21, 2009, a settlement conference was held at the United States Bankruptcy Court before the Honorable John Rossmeissl.[1] The individuals present at the settlement conference included Mr. Attia, Mr. Jacob, and Mr. Darren Dunckel, former President and sole employee of the Verge Living Corporation. Also present was Mr. Rusk, as well as the attorney

[1] Judge Rossmeissl was a visiting United States Bankruptcy Judge from the Eastern District of Washington.

representatives for each individual and for the Verge Living Corporation. The bankruptcy settlement conference lasted all day. Ultimately, a settlement agreement was drafted and signed by all parties and their attorneys. Under the terms of the agreement, Mr. Attia and Mr. Jacobs agreed to pay Mr. Rusk a total of $400,000 to resolve all claims and litigation between the parties. Mr. Attia and Mr. Jacobs were to pay the settlement amount in 45 days, but this was subsequently amended to 75 days, with payment due January 6, 2010. The parties subsequently executed the required releases and dismissals of litigation. Mr. Attia and Mr. Jacobs made an early payment of $37,500. However, they made no additional payment on the agreement.

Procedural History

On October 20, 2011, Mr. Rusk filed a Complaint against Mr. Attia, Mr. Jacob, and other various Defendants alleging Breach of Contract, Breach of Covenant of Good Faith and Fair Dealing, Fraud in the Inducement/Intentional Misrepresentation, Negligent Misrepresentation, and Civil Conspiracy. On March 21, 2012, Counterclaimants filed an Answer and Counterclaims. Counterclaimants later moved to amend their Counterclaims. On March 28, 2016, this Court entered an Order granting Counterclaimants' Motion for Leave to Amend Counterclaims to include Fraud in the Inducement and Breach of Implied Covenant of Good Faith and Fair Dealing as to the underlying contract and the settlement agreement, as well as a claim to set aside the settlement agreement. The Court also modified Judge Kishner's September 16, 2013 Order by withdrawing the granting of Summary Judgment on Plaintiff's first and second causes of action for Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing. This Court further bifurcated the trial in this matter, with the first phase of trial to consist only of Counterclaimants' claim for Fraud in the Inducement as to the settlement agreement. The Court determined if Mr. Rusk did not induce the settlement agreement through fraud, then the agreement resolved all of Counterclaimants' counterclaims and Plaintiff would be due $362,500, plus accrued interest, as damages on the breach

of contract and breach of covenant of good faith and fair dealing. If the first phase of trial revealed that the settlement agreement was invalid, then a second phase would be held to determine Plaintiffs'/Counterdefendants' remaining claims and Defendants'/Counterclaimants' remaining counterclaims.

Testimony at Trial

The sole issue in this first phase of trial was whether or not Mr. Rusk engaged in fraudulent inducement during the course of the settlement negotiations at the bankruptcy settlement conference held on October 21, 2009, and whether or not the settlement agreement is valid. These allegations are laid out in Defendant/Counterclaimant's third counterclaim for relief.

Mo Jacob

Defendant/Counterclaimant Mo Jacob ("Mr. Jacob") was the first witness to testify. Mr. Jacob is an accountant and worked for Mr. Attia's companies, including the Verge Living Corporation where he served as a consultant to the board and managers of the Verge project. He was also responsible for arranging financing for the Verge project, which had a general budget of roughly $100 million. Mr. Jacob claimed Mr. Rusk characterized the Verge as a "one of a kind" project and emphasized the uniqueness of the architecture and design.[2]

Mr. Jacob stated that Mr. Rusk first submitted the Verge project plans to the City of Las Vegas sometime in 2007, but there were numerous problems with these plans, including an issue pertaining to fire safety. Mr. Rusk repeatedly made promises to the board and the managers of the Verge project that he would quickly obtain the permit. However, Mr. Jacob stated the Verge project was having problems acquiring contractor bids because not a single contractor was willing to bid to work on the Verge project.

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[2] Trial Tr. 24:19-22, July 25, 2016

Mr. Jacob further testified that he and Mr. Rusk not only had a business relationship, but they were also friends. Mr. Jacob knew Mr. Rusk's family, and he even loaned Mr. Rusk money at one point. Mr. Jacob attended the Bankruptcy Court settlement conference on October 21, 2009. Mr. Jacob testified his goal at the settlement conference was to buy the rights of Mr. Rusk's architecture plans and move forward with salvaging the Verge project. Although the settlement conference started poorly, negotiations progressed as the day went on. Mr. Jacob and Mr. Rusk conversed with each other outside the presence of any attorneys during the breaks in the settlement conference. Discussions occurred between them two to five times that day, the first conversation occurring approximately one and a half hours after the settlement conference began. Mr. Attia and Mr. Dunckel were also present during most of these interactions. According to Mr. Jacob, Mr. Rusk represented to him the previous plans submitted to the City of Las Vegas which had been repeatedly rejected were now fixed and "shovel ready."[3] Mr. Rusk reassured him the plans had been improved and were finalized. Because of this, Mr. Rusk's plans were presumably functional. Under the agreement, Mr. Rusk was to be paid $400,000, a majority of which still needed to be raised from third party investors. Mr. Rusk was well aware of this fact.

Darren Dunckel

Darren Dunckel is a consultant who currently works for a company called Management Action Programs, which provides workshops and consulting for various companies. Mr. Dunckel and Mr. Attia worked for the same company in the early 1990s and had offices next to each other. Mr. Attia later asked Mr. Dunckel to work on the Verge project in 2006. Mr. Dunckel's responsibilities for the Verge project included marketing and sales for both the commercial and residential portions of the building. At that time, Mr. Dunckel was the President and sole employee

[3] Trial Tr. 45:15–17; 64:16–20, July 25, 2016

of the Verge Living Corporation. Mr. Dunckel testified Mr. Attia introduced him to Mr. Rusk, who was the architect for the Verge project. Mr. Dunckel recalled the Verge project's budget as roughly $80 million. Mr. Rusk was aware of this budget. When marketing the Verge project, Mr. Dunckel communicated to prospective tenants a mid-2008 move in date. Approximately 70–80% of the building was pre-sold at the initial sales event. Mr. Rusk was also aware of the marketing success and the expectation occupancy was expected in mid-2008. Sometime in 2007, Mr. Dunckel became aware that Mr. Rusk's plans were rejected on numerous occasions by the City of Las Vegas. Mr. Dunckel testified the Verge project was still experiencing delays in late 2007 as a result of unapproved plans.

Mr. Dunckel stated the ultimate purpose of the Verge Living Corporation filing for Chapter 11 bankruptcy was to enable the Verge project to eventually move forward with the plans and follow through with building the Verge project. Mr. Dunckel confirmed he attended the bankruptcy settlement conference on October 21, 2009. He testified he had a private conversation with Mr. Rusk, Mr. Attia, and Mr. Jacob towards the end of the day. According to Mr. Dunckel, Mr. Rusk represented to Mr. Attia and Mr. Jacob he had improved the plans and they were ready to be approved by the City of Las Vegas. Mr. Rusk urged the group to settle the dispute so everyone could move forward with building the Verge project. Mr. Dunckel verified the Verge Living Corporation did not have money to pay Mr. Rusk at the time of the settlement conference. It was Mr. Dunckel's understanding that upon the execution of the settlement agreement, the Verge Living Corporation would have complete control of Mr. Rusk's plans.

Yossi Attia

Defendant/Counterclaimant Yossi Attia was the CEO of a company which funded the Verge project. Mr. Attia was introduced to Mr. Rusk through an individual who was planning to develop a senior citizen community in downtown Las Vegas. That project eventually morphed itself into the

Verge project. Mr. Rusk was hired as an architect in January 2005, and presented a plan to Mr. Attia which included the concept of using stagger trusses. According to Mr. Rusk, this type of design could help erect the 300-unit high rise building in only 21 days. Mr. Attia understood Mr. Rusk's responsibilities in regard to the Verge project as essentially including everything from hiring the engineers to obtaining approval of the plans from the City of Las Vegas. Additionally, Mr. Attia had the understanding the Verge project would begin construction in November 2006, with an estimated completion of two years after that date. At some point after the sales event in June 2007, Mr. Attia became aware Mr. Rusk's plans were being repeatedly rejected by the City of Las Vegas. Mr. Attia testified as a result of the plans lacking approval from the City of Las Vegas, the Verge project experienced delays.

Mr. Attia attended the bankruptcy settlement conference held on October 21, 2009. In the bankruptcy case, Mr. Attia was personally being sued. Mr. Attia's primary objectives of the settlement conference included the release of claims against him personally, and the purchase of the Verge project plans to facilitate a third-party investment opportunity. In Mr. Attia's opinion, Mr. Rusk was not owed anything for the performance of his services with the Verge project. During one of the breaks in the settlement conference, Mr. Rusk approached Mr. Attia, Mr. Jacob, and Mr. Dunckel and told them his plans were "complete and ready."[4] Mr. Rusk also stated the plans had been approved by the City of Las Vegas. After that discussion, negotiations progressed. Mr. Attia does not remember if he told the lawyers about the conversation with Mr. Rusk and what Mr. Rusk had promised. Shortly thereafter, a handwritten document was created memorializing the terms of the settlement reached, which Mr. Yaspan drafted.[5] Mr. Attia confirmed the Verge Living

[4] Trial Tr. 13:2–10, July 26, 2016

[5] *See* Exhibit 15.

Corporation needed to raise money to follow through with their obligations under the settlement agreement. Mr. Attia further confirmed he signed and submitted a complaint against Mr. Rusk with the Nevada Board of Architecture on behalf of the Verge Living Corporation. The complaint alleged that Mr. Rusk was negligent in his work on the Verge project. Ultimately, this complaint resulted in the Board finding Mr. Rusk had been negligent in the Verge project and Mr. Rusk was disciplined.[6]

During cross examination, Mr. Attia was asked about statements made in a sworn Affidavit to this Court. In paragraph 23 of the Affidavit, Mr. Attia indicated that upon Mr. Rusk releasing his plans, the Verge Living Corporation could potentially hire another architect who could put finishing touches on the plans and the Verge project could move forward. Mr. Attia confirmed the Verge Living Corporation expected it would be necessary to make changes to Mr. Rusk's plans. Mr. Attia emphasized that although Mr. Rusk stated the plans were complete and ready, he expected another architect would take over a project of this size and follow it through completion. In paragraph 41 of the Affidavit, Mr. Attia indicated he had received information from an architectural expert on February 13, 2008, that Mr. Rusk's plans were not buildable. When asked about this statement in cross-examination, Mr. Attia indicated the date might be incorrect.

Robert Yaspan

Robert Yaspan, Esq. represented the Verge Living Corporation in regard to its Chapter 11 Bankruptcy filing. His contact/management representative with the Verge was Mr. Dunckel. He had an understanding of both the bankruptcy case as well as the adversary claims filed within that action. Mr. Yaspan was also present at the settlement conference on October 21, 2009. He confirmed Mr. Rusk, Mr. Attia, Mr. Jacob, Mr. Dunckel, and Richard Vilkin were present at that

[6] *See* Exhibit 27.

conference. When questioned about the relationship between the parties at the time of the settlement conference, Mr. Yaspan stated they often expressed opinions about each other which were not "polite."[7] Mr. Yaspan testified after mid-afternoon break in the proceedings when the Judge asked for a meeting of the lawyers without their clients, Mr. Dunckel, Mr. Attia and Mr. Jacob approached him and indicated a meeting had occurred with Mr. Rusk and there was a settlement. Presumably, the meeting between these individuals took place outside the presence of their Counsel. Mr. Yaspan testified he wrote the settlement agreement and it was created in collaboration with the other attorneys present at that settlement conference.[8] While on the stand, Mr. Vilkin was asked to write in his own handwriting "6) All parties agree they had a chance to discuss this settlement with their own counsel prior to accepting it."[9]

Mr. Yaspan confirmed the Verge Living Corporation did not have the money at that point to pay the money referenced in this agreement; the Verge Living Corporation needed to raise capital to facilitate this agreement.

Richard Vilkin

Richard Vilkin, Esq. was Mr. Rusk's attorney and was present at the bankruptcy settlement conference.[10] When Mr. Vilkin arrived at the settlement conference, he and Mr. Rusk waited in the public area. Mr. Rusk did not exchange words with anyone at this time. According to Mr. Vilkin, Mr. Rusk did not have an opportunity to speak with anyone other than his attorneys that day. Mr. Vilkin stated Mr. Rusk accompanied him at all times during the settlement conference, with the exception of when Mr. Vilkin used the restroom. Even then, Mr. Rusk remained with his attorney.

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[7] Trial Tr. 87:6, July 26, 2016

[8] *See* Exhibit 15.

[9] *See* Exhibit 35.

[10] Beau Sterling, Esq. was Mr. Vilkin's co-counsel in the case and was also present at the settlement conference.

None of the other attorneys ever told Mr. Vilkin that Mr. Rusk had left and met with the other parties personally. Mr. Vilkin testified in April 2008, that Mr. Vilkin became aware Mr. Jacob made what Mr. Rusk believed to be a death threat against him. Mr. Vilkin attempted to file a police report on behalf of Mr. Rusk in connection with this alleged threat, but the police station would not accept the complaint. Mr. Vilkin never disclosed this death threat at any point further in the litigation. Due to these facts, Mr. Vilkin made sure Mr. Rusk was nowhere near Mr. Jacob or the other individuals associated with the Verge Living Corporation on the day of the settlement conference. Mr. Vilkin regularly gives clients instructions to keep quiet during settlement conferences and related proceedings.

When reviewing the handwritten settlement document, Mr. Vilkin testified it was his handwriting on the document, with the exception of the interlineation in item two (page one of the document) stating "approving the settlement."[11] Mr. Vilkin confirmed his handwriting is on the entirety of page two, but the first seven lines on page three are not his handwriting. The last sentence "All releases signed + exchanged offer payment" is his handwriting. Mr. Vilkin was unsure of exactly whose handwriting, other than his own, was in the settlement agreement, but he believed it may have belonged to Mr. Yaspan. While on the stand, Mr. Vilkin was asked to write in his own handwriting "6) All parties agree they had a chance to discuss this settlement with their own counsel prior to accepting it."[12]

Mr. Vilkin confirmed a settlement agreement was reached in writing for $400,000.00 to Mr. Rusk by the conclusion of the settlement conference. The money was to be paid to Mr. Rusk in

[11] *See* Exhibit 15; Trial Tr. 18:19–22, July 27, 2016.

[12] *See* Exhibit 34.

exchange for a release of the remaining claims.[13] When this document was executed, all parties and their attorneys were in the same room. There was no discussion regarding the quality of Mr. Rusk's plans, let alone the plans as a component of the settlement agreement in general. When drafting the settlement agreement, it was Mr. Vilkin's intent to include everything pertinent to the agreement between the parties. To his understanding, nothing in the settlement agreement related to further work being performed by Mr. Rusk on the Verge project. In Mr. Vilkin's opinion, if there was a discussion of Mr. Rusk's plans, he would have incorporated it in the agreement.

Mr. Vilkin testified that not only did animosity exist between the parties, but he and opposing counsel had issues getting along throughout the bankruptcy adversary proceedings. There was an initial payment made of $37,500.00 as part of the settlement. After the $37,500.00 was paid and split, Mr. Vilkin was upset because he felt like he had been taken advantage of by opposing counsel. Mr. Vilkin believed opposing counsel never intended that Mr. Attia and Mr. Jacobs would pay the remaining amount. Ultimately, the second payment was never paid. Mr. Vilkin stated he filed a Motion in Bankruptcy Court to set aside the settlement agreement based on fraud, but the bankruptcy Judge remanded this state law claim to this Court.

Dennis Rusk

Counterdefendant Dennis Rusk is an architect by trade. He was licensed at all times relevant to the facts of this lawsuit, up until September 2011, when the Board placed him on probation. Mr. Rusk was unaware of the budget of the Verge project and he did not contemplate the budget at any point in his designs. Mr. Rusk considered the individuals associated with the Verge project as professional affiliates rather than friends, including Mr. Jacob. According to Mr. Rusk, he never considered Mr. Jacob a friend.

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[13] *See* Exhibit 15.

When questioned about the October 21, 2009 settlement conference, Mr. Rusk strongly denied seeing Mr. Attia at the settlement conference, besides the few minutes before the conference began, and the few minutes after it ended. Mr. Rusk testified that although they broke for lunch, he accompanied his attorneys. Rusk stated at no point did he leave the room where the settlement conference took place, except to have lunch. Mr. Rusk further testified the only time he and his attorney were separated was the few minutes Mr. Vilkin stepped out to use the restroom during the conference. Mr. Rusk stated his attorney never let him out of his sight. There was no way for Mr. Rusk to know whether or not Mr. Attia or Mr. Jacob were outside the room where the settlement conference took place. Further, Mr. Rusk never at any point entered the room where Mr. Attia and Mr. Jacob were located. Mr. Rusk testified that he never spoke to any of the individuals present at the settlement conference either in the days leading up to the conference, at the conference, or during the days following the conference. Additionally, he does not use the term "shovel ready" in his daily conversations. The last time Mr. Rusk spoke to either Mr. Jacob or Mr. Attia was sometime in early 2008. Mr. Rusk testified that during a meeting with Mr. Jacob in March 2008, Mr. Jacob told Mr. Rusk "I have done murder before."[14] Mr. Rusk took this statement as a death threat.

Mr. Rusk stated Mr. Vilkin drafted the handwritten settlement agreement that he signed. Mr. Rusk was aware that the Verge Living Corporation required financing before following through with the $400,000.00. Mr. Rusk stated his understanding of the settlement agreement was to resolve all claims against each other.

Mr. Rusk testified he believed the City of Las Vegas approved his plans. Mr. Rusk said he saw his plans with approved seals at the City of Las Vegas building department. Mr. Rusk stated he also had communication with the city's reviewer of his plans who indicated they were moving

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[14] Trial Tr. 137:7, July 27, 2016.

forward with approval and he eventually logged on the building department website and noticed his plans were approved. In his opinion, the plans met all requirements for approval from a design perspective.[15]

Findings of Fact and Conclusions of Law

In his closing brief, Counterdefendant requested to reopen his case to introduce into evidence Exhibit 16, which is the signed settlement agreement. Counterclaimants object, arguing Counterdefendant cannot justify moving to reopen a month after trial and cannot use Exhibit 16 in his argument. The Court finds it does have the authority to reopen and allow Counterdefendant to admit Exhibit 16. During trials, courts have allowed parties to reopen their cases to admit evidence a party inadvertently failed to move for admission. In the instant case, this was a bench trial and the parties chose to submit briefs as closing arguments. Counterdefendant's request to reopen to admit Exhibit 16 was not procedurally out of order and there was no prejudice to the opposing party. The validity of the signed settlement agreement and whether Counterdefendant had induced it through fraud was the entire crux of the bench trial. Consequently, Counterclaimants cannot claim they would be unfairly prejudiced by its admission. The proper evidentiary foundation for the admission of the exhibit had been laid; the only problem was the Counterdefendant had neglected to timely move for its admission. This Court's receipt of Exhibit 16 is "purely a procedural ministerial act for which the court is allowed great discretion." *United States v. Hatchett*, 31 F.3d 1411, 1425–26 (7th Cir. 1994); *see also Davison's Air Serv., Inc. v. Montierth*, 119 Idaho 967, 968, 812 P.2d 274, 275 (1991) ("This Court has recognized the power of a court to reopen a case prior to final judgment."). Similarly, the Nevada Supreme Court has stated that the "decision to reopen a case for the introduction of additional evidence is within the sound discretion of the trial court" and "district

[15] *See* Exhibit 22.

courts should freely grant leave to amend and reopen." *Ford v. Ford*, 105 Nev. 672, 676, 782 P.2d 1304, 1307 (1989) (citing *Andolino v. State of Nevada*, 99 Nev. 346, 351, 662 P.2d 631, 634 (1983)). Additionally, the high Court has expressed "[w]hen an essential element of a party's case can be easily and readily established by reopening the case, refusal to reopen will most often constitute an abuse of discretion." *Id.* As the Seventh Circuit Court of Appeals noted in *United States v. Davis*, 15 F.3d 1393, 1413 (7th Cir. 1994), a trial is a "search[] for truth, not for alleged errors." Therefore, the Court grants Counterdefendant's request to reopen and admits Exhibit 16 into evidence.

Counterclaimants also move to strike portions of Counterdefendant's closing argument which they claim relies on exhibits and evidence not admitted during trial. The Court in reaching its decision has attempted to avoid and not consider evidence and exhibits not admitted during the trial. The Court in this Order sets out the testimony and exhibits upon which it relies. Counterclaimants object to the handwriting exemplars, Exhibits 35 and 36, which the Court conditionally admitted pending additional foundation. As further explained below, Counterdefendant's legal authority in his closing brief establishes he laid sufficient foundation for their admission and the Court does consider them. Counterclaimants also challenge Counterdefendant's argument concerning evidence related to the City of Las Vegas' approval of Mr. Rusk's plans for the Verge project. As stated at trial, the Court does not accept Mr. Rusk's testimony as evidence that the City of Las Vegas actually approved the plans. However, what Mr. Rusk saw or heard at the city building department or on its website or from its representatives is relevant to Mr. Rusk's state of mind, the reasonableness of his state of mind at the time of the settlement conference, and whether Mr. Rusk sought to induce the settlement agreement through fraud. This evidence is considered only for this purpose. Additionally, Counterclaimants challenge Counterdefendant's treatment in closing argument of the Board of Architecture's decision finding Mr. Rusk negligent in the Verge project. As discussed more below, Counterdefendant subsequently filed a Motion to Strike this evidence because the

Board's decision was withdrawn. For purposes of this Court's decision, the Court treated the Board's decision as establishing Mr. Rusk was negligent in his work and his plans for the Verge project and the plans were unbuildable. These facts, however, do not impact the Court's ultimate decision as to Counterclaimants' fraud in the inducement claim. Consequently, as discussed above and to the degree exhibits and evidence Counterclaimants challenge are not discussed below, Counterclaimants' Motion to Strike is granted. In all other respects, it is denied.

While agreeing on little, both sides agree as to the elements Counterclaimants must show by clear and convincing evidence to establish fraud in the inducement. Consequently, Counterclaimants must prove each of the following essential elements: (1) a false representation made by the opposing party; (2) the opposing party's knowledge or belief that the representation was false, or knowledge that they had an insufficient basis for making the representation; (3) the opposing party's intention to induce the claimant to consent to the contract's formation; (4) the claimant's justifiable reliance upon the misrepresentation; and (5) damage to the claimant resulting from such reliance. *J.A. Jones Const. Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 291, 89 P.3d 1009, 1018 (2004); *see also Cleverley v. Ballantyne*, No. 2:12-CV-444-GMN, 2014 WL 294519 at *4 (D. Nev. Jan. 24, 2014). Clear and convincing evidence is evidence which is beyond a mere preponderance of the evidence. *See, e.g., Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1260, 969 P.2d 949, 957 (1998); *Topaz Mutual Co. v. Marsh*, 108 Nev. 845, 850–851, 839 P.2d 606, 610 (1992). As defined by the standard Nevada civil jury instructions:

> Clear and convincing evidence is that measure of degree of proof which will produce in the mind of the [trier of fact] a firm belief or conviction as to the allegations sought to be established. It is an intermediate degree of proof, being more than a mere preponderance but not to the extent of such certainty as required to prove an issue beyond a reasonable doubt. Proof by clear and convincing evidence is proof which persuades the jury that the truth of the contentions is highly likely.

Nevada Jury Instructions, Civil, Inst. 2EV.2 (State Bar of Nevada 2011); *see also* Ninth Circuit Model Jury Instructions, Civil, Inst. 1.07 (2018) ("it means that the party must present evidence that

leaves you with a firm belief or conviction that it is highly probable that the factual contentions of the claim or defense are true").

The crux of Counterclaimants' fraud in the inducement claim is that Mr. Rusk met with Mr. Attia and Mr. Jacob during a break in the settlement discussion and Mr. Rusk represented his plans for the Verge project as "shovel ready." Consequently, Mr. Attia and Mr. Jacob agreed to pay $400,000 for the "shovel ready" plans. Counterdefendant contends no such meeting occurred. The first question then is whether Counterclaimants proved by clear and convincing evidence that such a meeting occurred. This Court finds the Counterclaimants did not prove such a meeting by the clear and convincing standard.

This point is a difficult one. Mr. Attia, Mr. Jacob, and Mr. Dunckel all testified the meeting occurred and were largely consistent as to their recollections of the meeting. Mr. Viskin testified the three men told him of the meeting and assisted him in drafting the handwritten agreement. Mr. Rusk testified and denied any meeting occurred. Mr. Vilkin testified that no one mentioned any such meeting to him and Mr. Rusk could not have met with Mr. Attia, Mr. Jacob, and Mr. Dunckel because he was with Mr. Rusk throughout the settlement conference. While the number and consistency of Counterclaimants' witnesses give their contention weight, ultimately, the "weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. What is important is how believable the witnesses were, and how much weight [the trier of fact] think[s] their testimony deserves." Ninth Circuit Manual of Model Civil Jury Instructions, Inst. 1.14 (2017). While the Court cannot point to anything in the witnesses' manner while testifying to suggest a lack of credibility in their testimony, the Court in considering the witnesses' interest in the outcome of the case, their bias, and prejudice and, primarily, the reasonableness of their testimony in light of all the evidence, concludes there is not clear and convincing evidence a meeting occurred.

At the time of the October 21, 2009, settlement conference, a contentious relationship existed

between the parties. Adversary proceedings were filed within the Verge Living Corporation's bankruptcy case. Mr. Attia had signed and filed a consumer Complaint with the Board against Mr. Rusk in June 2008 alleging Mr. Rusk was negligent with his work on the Verge project and that he failed to pay subcontractors upon receiving payment from the Verge Living Corporation. Mr. Yaspan testified as to the parties speaking poorly of each other. Mr. Rusk stated he never left the room at any point during the settlement conference, except to have lunch with his attorneys. Mr. Rusk claimed the only time he saw Mr. Attia and Mr. Jacob was during the short time before the conference began and after it ended. Mr. Vilkin instructed Mr. Rusk not to speak to anyone on the day of the settlement conference and only let Mr. Rusk out of his sight to use the restroom. Given these facts and testimony at trial, clear and convincing evidence does not support the conclusion that a meeting between Mr. Attia, Mr. Jacob, and Mr. Rusk occurred outside the presence of their attorneys at the October 21, 2009, settlement conference.

Based on the testimony and review of the handwriting exemplars admitted at trial from Mr. Vilkin and Mr. Yaspan,[16] this Court finds Mr. Vilkin to have primarily drafted the settlement agreement stemming from the October 21, 2009, settlement conference. The Court further finds the first seven (7) lines of the addendum to likely have been drafted by Mr. Yaspan, with the final sentence of the addendum drafted by Mr. Vilkin. Counterclaimants contend that an insufficient foundation has been laid to admit and consider the handwriting exemplars Counterdefendant moved to admit and the Court conditionally admitted. The exemplars were executed at trial before the Court and the Court can make a general assessment of the similarities and differences in the handwriting. *See* NRS 52.045 ("Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated is sufficient for authentication."); *see also United States v.*

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[16] *See* Exhibits 34, 35.

Marshall, 2011 WL 284297, at *6 (D. Conn. July 14, 2011) ("[T]rier of fact may compare handwriting specimens which have been authenticated with others . . ."). This Court finds Mr. Vilkin's testimony credible to suggest he drafted the majority of the settlement agreement, especially considering Mr. Yaspan's testimony he drafted the agreement in collaboration with the other attorneys present at the settlement agreement.

In reviewing the terms of the handwritten settlement agreement and considering the testimony in this matter, the Court finds the document to be fully inclusive of the agreement between the parties at the time of the bankruptcy settlement conference. The plain language of the settlement agreement indicates payment to Mr. Rusk in the amount of $400,000.00 in exchange for Mr. Rusk to release all claims against any and all parties. In addition, the parties stipulated to a dismissal with prejudice of all claims in the adversary cases. Nothing in the settlement agreement contemplates the rights to Mr. Rusk's architectural plans as a component of the agreement between the parties. Furthermore, nothing in the agreement contemplates the quality or character of Mr. Rusk's plans. Given this Court's findings that Mr. Vilkin drafted the majority of the agreement on October 21, 2009, it would follow that as Mr. Rusk's attorney, Mr. Vilkin included the necessary terms as agreed to by the parties that day. Mr. Yaspan testified he was personally aware through his conversations with his clients of a supposed meeting between Mr. Rusk, Mr. Dunckel, Mr. Jacob, and Mr. Attia at the settlement conference and the settlement to pay Mr. Rusk $400,000 for buildable plans. It would likewise follow as the Verge Living Corporation's attorney and as a partial scrivener of the settlement agreement, Mr. Yaspan would have ensured the handing over of Mr. Rusk's plans to the Verge project and the necessity of their buildability be included in the agreement. The Court has concerns regarding Mr. Rusk's credibility as his contentions involving the personnel and professional relationships of the parties go against much of their recollection and would seem inconsistent with his long-term involvement with the Verge project and the depth of his work with

the various parties. Mr. Vilkin also expressed certain animosities toward the parties which may suggest some bias. However, the Court likewise sees no evidence of trust and respect between the parties at the time of the settlement conference which would have likely resulted in the meeting Mr. Jacob, Mr. Attia, and Mr. Dinkel described, much less the occurrence of such a meeting and the failure to include its optimal terms specifically in an agreement both parties' attorneys participated in writing. After considering the testimony at trial, this Court concludes the settlement agreement as drafted fully encompasses the agreement between the parties at the October 21, 2009, settlement conference, and the Counterclaimants failed to show by clear and convincing evidence that a meeting resulting in additional unmemorialized terms occurred. Without such a meeting between Mr. Attia, Mr. Jacob, and Mr. Rusk, Mr. Rusk could not have made the contended false representations on October 21, 2009. As a consequence, the first element of fraud in the inducement has not been met by clear and convincing evidence.

Although the Court's resolution of the likelihood of a meeting resulting in unsubscribed terms largely resolves this claim, the Court will assume a meeting did occur and certain representations were made and evaluate the remaining elements for fraud in the inducement. The Court does this for two purposes. First, while the Court concludes Counterclaimants did not establish the occurrence of such a meeting by clear and convincing evidence, Counterclaimants presented significant testimony on this issue. Second, and most importantly, the Court's conclusions as the remaining elements further bolster, in the Court's mind, the unlikelihood a meeting of the nature contended actually occurred.

Even if Mr. Rusk's made representations to Mr. Attia, Mr. Jacobs, and Mr. Dunckel that they could use his "shovel ready" plans with the completion of the settlement agreement, Mr. Rusk had a good faith belief that his plans were approved or close to being approved by the City of Las Vegas. Mr. Rusk testified he saw approved plans from the City of Las Vegas and had communications with

the plans reviewer of the city's building department who was responsible for review of the plans and who advised him they were moving towards being approved. He also testified he saw his plans had been approved on the building department's website. While this testimony is hearsay and not considered for the truth of whether the City of Las Vegas actually approved the plans, the testimony and exhibits are relevant as to Mr. Rusk's state of mind and whether he knowingly sought to deceive Mr. Jacob and Mr. Attia or did not have a reasonable basis for making his representations. This Court concludes that Mr. Rusk, to the extent he did have any conversations with Mr. Jacobs, Mr. Attia, and Mr. Dunckel about the plans, did not act with the knowledge or belief his representations were false and had a reasonable basis for making his statements. Consequently, the second element of fraud in the inducement is not met by clear and convincing evidence.

The reasonableness of reliance is a question of fact and is judged by reference to plaintiff's, or in this case, the Counterclaimants' knowledge and experience. *OCM Principal Opportunities Fund v. CIBC World Markets Corp.*, 68 Cal. Rptr. 3d 828, 856 (Cal. Ct. App. 2007). Generally, a party claiming fraud in the inducement does not have a duty to investigate the other party's representation unless his failure to do so is manifestly unreasonable in light of his own intelligence or information. *Id.*; *see also Pacific Maxon, Inc. v. Wilson*, 96 Nev. 867, 870, 619 P.2d 816, 818 (1980). Applying this principle, a defrauded party to an agreement does not need to investigate the other party's representations absent any facts to alert the defrauded party that his reliance is unreasonable. *Sippy v. Cristich*, 4 Kan.App.2d 511, 609 P.2d 204, 208 (1980). "The test is whether the recipient has information which would serve as a danger signal and a red light to any normal person of his intelligence and experience. *Collins v. Burns*, 103 Nev. 394, 397, 741 P.2d 819, 821 (1987) (citing *Sippy v. Cristich*, 4 Kan.App.2d at 609, P.2d at 208).

Based on the tumultuous relationship and history between the parties at the time of the settlement conference, the Court concludes Mr. Attia and Mr. Jacob could not have justifiably relied

on Mr. Rusk's alleged representations concerning the quality or readiness of his plans at the settlement conference. Mr. Jacob testified that he and Mr. Rusk were close friends. Mr. Rusk testified to a much different and much more distant and non-personal relationship. Having heard the testimony and observed the parties, the Court questions to some degree Mr. Rusk's dismissal of the close nature of his relationship with Mr. Jacob. However, none of the evidence in the case suggests any type of friendly relationship, much less close relationship, continued between the two individuals after Mr. Rusk was terminated from the Verge project.

Counterclaimants point to the fact that neither of them are architects or have any significant building background and would need to rely on Mr. Rusk's expertise in assessing the plans. They also argue the history between the parties shows Mr. Rusk repeatedly being removed and brought back to the project. Consequently, they contend there is nothing unusual about them relying on Mr. Rusk once again when he came to them at the settlement conference. Counterclaimants' contention reminds the Court of Taylor Swift's song "We Are Never Ever Getting Back Together" which chronicles an on again/off again relationship. Its lyrics summarize Counterclaimants' position—"I say, 'I hate you,' we break up, you call me, 'I love you.'"[17] But, even in Ms. Swift's song, she reaches the point where "We are never ever getting back together."[18] The Court does not find clear and convincing evidence that the nature of the parties' relationship was anywhere close to the parties getting back together to the extent that Mr. Jacobs and Mr. Attia would blindly rely on Mr. Rusk's alleged representations about his plans. Mr. Rusk had been repeatedly removed from the Verge Project, the parties had sued each other, and Mr. Attia had filed a complaint with the Board of Architecture contending Mr. Rusk was negligent in work on the project. *In re Sir*, No. 07-52029-

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[17] Taylor Swift, *We Are Never Ever Getting Back Together* (Big Machine Records 2012).

[18] *Id.*

RLE, 2010 WL 2179177, at *12 (Bankr. N.D. Cal. May 25, 2010) (explaining party's awareness of other party's gambling problem was a factor which created a duty to investigate investment proposal and at the very least ask to see supporting documentation).

Counterdefendant points out Mr. Attia, in affidavits to this Court, stated he had hired an architectural expert to review Mr. Rusk's plans and he had received an opinion eight months before the settlement conference the plans were not buildable. Mr. Attia was questioned about this during his testimony and he indicated the date in the affidavit was a mistake. The Court notes Mr. Attia had filed his complaint with the Board of Architecture before the settlement conference and presumably Mr. Attia would have had some expert advice in making his allegations against Mr. Rusk of negligence. Again, the Court looks to the settlement agreement and its lack of any terms referencing the plans and buildability. With the relationship that existed at the time of the settlement conference, if Mr. Jacobs and Mr. Attia had decided to rely on Mr. Rusk's statements one last time, the Court finds it hard to believe they and/or their attorneys would not have included some reference to this critical term in the agreement. *Peterson Indus., Inc. v. Lake View Tr. & Sav. Bank*, 584 F.2d 166, 168–69 (7th Cir. 1978) ("[w]here it appears that a person charging misrepresentation has actually investigated and received information from his own sources (rebutting the misrepresentation), as here, he is not in a position to claim he was deceived[.]") (quoting *Hayes v. Disque*, 401 Ill. 479, 488, 82 N.E.2d 350, 355 (1948)).

With these underlying facts in mind and based on Mr. Jacob and Mr. Attia's knowledge and experience with Mr. Rusk at the time of the October 21, 2009 settlement conference, an individual in either Mr. Attia or Mr. Jacob's position would not have reasonably relied on such statements made by Mr. Rusk. Under the circumstances, if there was any such reliance, Mr. Jacobs and Mr. Attia would have certainly made sure it was documented in the settlement documents. Again, the fact the settlement documents do not mention the rights to the plans or their buildability leads this Court to

conclude the fourth element of fraud in the inducement is not met by clear and convincing evidence.

The Court's analysis above resolves Defendants'/Counterclaimants' fraud in the inducement claim. The Court chooses not to discuss the fifth element of damages.

By separate motion, Counterdefendant has moved to strike Defendants'/Counterclaimants' admission of the Board of Architecture finding Mr. Rusk was negligent in his work on the Verge project. Counterdefendant notes the Board has withdrawn the ruling for the moment and there is no longer a current finding of negligence on Mr. Rusk's part. Because the Court has found, even accepting Counterclaimants' admission of the Board's decision, Counterclaimants' have not proven their claim of fraud in the inducement by clear and convincing evidence, the Court denies Counterdefendant's Motion to Strike as moot.

Based upon the Court's above factual and legal findings, the Court finds Counterclaimants have failed to establish by clear and convincing evidence the settlement agreement entered into by the parties at the October 21, 2009, settlement conference was procured by fraud. The Court has previously held if valid, the document is fully inclusive of the agreement between the parties at the time of the bankruptcy settlement conference, resolving all claims by either party against the other. Further, the agreement between the parties includes only the terms as evidenced in the document itself. By its terms, the settlement agreement obligates Mr. Attia and Mr. Jacobs individually to pay a total of $400,000 to Counterdefendant by January 6, 2010 in exchange for dismissal of all claims in any then pending adversary proceeding and release of any other then existing possible claims, whether known or unknown. Pursuant to the Settlement Agreement and the Releases exchanged pursuant to the agreement, the Counterdefendant released Mr. Attia and Mr. Jacobs, and Mr. Attia and Mr. Jacobs released Counterdefendant from:

> . . . all claims, damages, debts, liens, liabilities, demands, obligations, costs, attorney's fees, expenses, compensation, actions and/or causes of action of every nature, character and description, whether known or unknown, which Releasor now owns or holds, or at any time prior to the execution of this Release has owned or held including, without limitation, those

arising from or related to services rendered or costs incurred in connection with the project located at the intersection of Main Street and Bonanza Road, Las Vegas, Nevada and the adversary proceedings filed in the United States Bankruptcy Court for the District of Nevada, Adversary Proceedings Nos. 09-01106 and 09-01108.

All of Counterclaimants' counterclaims arise from Mr. Rusk's services rendered in regard to the Verge project and existed prior to the execution of the settlement agreement and releases. Consequently, this Court enters judgment against Counterclaimants on their counterclaims as contained Defendants'/Counterclaimants' Amended Answer of March 29, 2016, and in favor of Plaintiff/Counterdefendant.

The Court adopts the findings of fact 1 through 27 and 31 through 33 on pages 2 through 7 of the Order of Judge Johanna Kishner in this matter dated September 16, 2013. As of January 6, 2010, Mr. Attia and Mr. Jacobs owed $362,500 to Counterdefendant which has not been paid. Plaintiff's first cause of action is for breach of contract. "A breach of contract may be said to be a material failure of performance of a duty arising under or imposed by agreement." *Calloway v. City of Reno*, 116 Nev. 250, 256, 993 P.2d 1259, 1263 (2000) (*quoting Bernard v. Rockhill Dev. Co.*, 103 Nev. 132, 135, 734 P.2d 1238, 1240 (1987)). The Court finds there was a valid and enforceable settlement agreement between the parties and the Counterdefendant performed everything the agreement required or such performance was waived or excused. The Court finds Mr. Attia and Mr. Jacobs in failing to pay the full amount due by January 6, 2010, breached the agreement and their failure has not been justified or excused. The Court finds Defendants'/Counterclaimants' failure to pay what was due caused the Plaintiff/Counterdefendant damages in the amount of $362,500 plus subsequently accruing interest.

Plaintiff's/Counterdefendant's second cause of action is for breach of implied Covenant of Good Faith and Fair Dealing. To establish a contractual breach of the implied covenant of good faith and fair dealing, Plaintiff must establish: (1) a contract existed between the parties; (2) Defendants performed in a manner that was unfaithful to the purpose of the contract or deliberately

contravened the intention and spirit of the contract; and (3) Defendants' conduct was a substantial factor in causing damage to Plaintiff. Nevada Jury Instructions (Civil) Inst. 1FD.3 (State Bar of Nevada). Mr. Attia and Mr. Jacobs failed to pay the full amount due on January 6, 2010, or to make any payments after that date. The Court finds contract damages define the appropriate damages due to Plaintiff and Defendants' improper conduct under the contract and Defendants' conduct caused Plaintiff $362,500 plus subsequently accruing interest.

Conclusion

Accordingly, and based upon the foregoing, **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** judgment is rendered in favor of Plaintiff/Counterdefendant and against Defendants/Counterclaimants.

IT IS FURTHER ORDERED the settlement agreement arising from the October 21, 2009 settlement conference and all releases of the parties pursuant to the agreement are valid and enforceable.

IT IS FURTHER ORDERED Mr. Yossi Attia and Mr. Mosche Jacobs, jointly and severally, and in their individual capacities, pay Mr. Dennis E. Rusk, individually, and Dennis E. Rusk, Architect, LLC, damages of $362,500 plus subsequently accruing interest on Plaintiff's/Counterdefendant's causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing.

IT IS FURTHER ORDERED the parties within 21 days of the date of this Order shall file with the Court briefs stating their positions as to the applicable and appropriate interest to be assessed in this matter.

IT IS FURTHER ORDERED that Counterclaimants' Motion to Strike is **GRANTED** in part and **DENIED** in part.

IT IS FURTHER ORDERED that Plaintiff's/Counterdefendant's Motion to Strike is

DENIED as moot.

IT IS FURTHER ORDERED a second phase of trial shall not proceed in this matter.

DATED this 30 day of January 2018.

ERIC JOHNSON
DISTRICT COURT JUDGE

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DISTRICT JUDGE
DEPARTMENT XX