

IN THE SUPREME COURT OF THE STATE OF NEVADA

In the matter of:

JAY KVAM,

Appellant,

vs.

BRIAN MINEAU; and LEGION
INVESTMENTS, LLC,

Respondents.

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Supreme Court Case No. 81422

District Court Case No. CV18-00764

APPELLANT'S OPENING BRIEF

**APPEAL FROM AN ORDER GRANTING PARTIAL SUMMARY
JUDGMENT, INCLUDING SUMMARY JUDGMENT ON APPELLANT'S
SEVENTH CAUSE OF ACTION FOR INJUNCTIVE RELIEF
IN THE SECOND JUDICIAL COURT, WASHOE COUNTY, THE
HONORABLE LYNNE K. SIMONS, DISTRICT JUDGE**

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons or entities described in Nev. R. App. P. 26.1(a), and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

1. Appellant Jay Kvam is an individual and currently represented by the undersigned counsel of record, Matuska Law Offices, Ltd., Michael L. Matuska.

2. Respondent Brian Mineau is an individual, and based on information and belief, is the sole member/manager of Legion Investments, LLC. Brian Mineau and Legion Investments, LLC are represented by the Gunderson Law Firm, Austin K. Sweet, Esq.

3. 7747 S. May Street is an unincorporated joint venture that was entered into between Jay Kvam, Brian Mineau and Michael Spinola who is not a party to these proceedings. 7747 S. May Street is a nominal defendant that was included for the derivative action and does not have separate representation in these proceedings.

Dated this 17th day of December, 2020.



MATUSKA LAW OFFICES, LTD.
Michael L. Matuska (SBN 5711)
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JURISDICTIONAL STATEMENT

This is an appeal from an order granting partial summary judgment including summary judgment on Appellant's seventh cause of action for injunctive relief. The order is appealable under NRAP 3A(b)(3) [An order granting or refusing to grant an injunction or dissolving or refusing to dissolve an injunction].

Dates establishing the timeliness of the appeal are as follows:

Notice of entry of the partial summary judgment order, entered on June 5, 2020, was served on all ECF filers also on June 5, 2020. [14 JA 1993].

ROUTING STATEMENT

This appeal may be assigned to the Court of Appeals because it involves the grant or denial of injunctive relief under NRAP 17(b)(12), pre-trial discovery orders under NRAP 17(b)(14) and an order granting in part a motion for summary judgment and it does not involve matters presumptively retained by the Supreme Court pursuant to NRAP 17(a).

STATEMENT OF ISSUES

1. Whether Judge Simons committed multiple errors of law and abused her discretion by granting partial summary judgment in favor of Mineau/Legion based on DA (deemed admitted) findings of fact and a sham declaration, and by failing to first rule on underlying discovery motions.
2. Whether genuine issues of fact remain for trial.

3. Whether Judge Simons abused her discretion by failing to rule on the Discovery Commissioner's January 10, 2020 *Recommendation for Order*?

4. Whether Judge Simons abused her discretion by failing to rule on Kvam's *Motion for Reconsideration*?

STATEMENT OF THE CASE

This case concerns a failed real estate investment whereby the parties agreed to purchase, renovate and resell a house located at 7747 S. May Street, Chicago, Illinois, essentially, a "flip" project. Appellant Jay Kvam is the plaintiff in the district court. Respondents Brian Mineau and Legion Investments, LLC (hereafter, "Mineau/Legion") are the defendants. Mineau is the sole member/manager of Legion.

The operative pleading is Kvam's Second Amended Complaint ("SAC") which contains causes of action including Declaration of Joint Venture; Rescission or Reformation of Agreement; Breach of Contract – Loan; Breach of Contract and Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing – Joint Venture Agreement; Accounting; Court Supervision of Dissolution and Winding Up, and Appointment of Receiver; Temporary and Permanent Injunction; Fraud, Fraudulent Inducement and Concealment; Conversion; Rico; and Derivative Claim (on behalf of the unincorporated joint venture referred to as 7747 S. May Street).

Regarding injunctive relief, Kvam's SAC alleges as follows:

IX.
SEVENTH CAUSE OF ACTION
(Temporary and Permanent Injunction)

46. Plaintiff hereby incorporates by reference all of the paragraphs above as though fully set forth herein.

47. Following dissolution of the joint venture, MINEAU and LEGION should be temporarily and permanently enjoined from conducting any business on behalf of 7747 or incurring any liabilities in furtherance of the renovation project, except as approved by the Court and necessary to preserve the House.

* * * *

WHEREFORE, Plaintiff prays for relief as follows:

* * * *

3. For a temporary and permanent injunction enjoining MINEAU and LEGION from any further involvement with 7747 and its assets;

(5 JA 756).

On January 6, 2020, Mineau/Legion filed a *Motion for Summary Judgment* in which they requested summary judgment on all of the causes of action alleged in Kvam's SAC. [7 JA 1003]. Their motion was supported by a sham declaration from Brian Mineau [7 JA 1033]. Par. 25 of Mineau's declaration added new facts after the close of discovery, contradicted and disavowed his previous sworn declaration and discovery responses, was not credible on its face, and was not supported by the extensive record. In contrast, Kvam provided a detailed opposition that was supported by 27 exhibits including a lengthy declaration. [10 JA 1251]. Kvam also explained in his opposition that in order to more fully respond to Mineau/Legion's

Motion for Summary Judgment, he needed discovery that was addressed in the January 10, 2020 *Recommendation for Order* from the Discovery Commissioner, Hon. Wesley Ayers. [9 JA 1226]. To date, Judge Simons has not ruled on Commissioner Ayers' *Recommendation for Order*.

Kvam also filed a motion requesting reconsideration of a prior discovery order and sanctions relating to the new, fraudulent material asserted in Par. 25 of Mineau's declaration. [See *Motion for Reconsideration of Order Affirming Discovery Commissioner's Recommendation, Entered May 16, 2019, For Discovery Sanctions; and For Other Relief*, 12 JA 1518]. Judge Simons never ruled on this motion, either.

On June 5, 2020, Judge Simons entered the *Order Granting, in Part, and Denying, in Part, Defendants' Motion for Summary Judgment; Order Granting Summary Judgment on Claim Pursuant to Court's NRCP 56 Notice*. [14 JA 1948]. Essentially, Judge Simons granted summary judgment on most of Kvam's causes of action, including all of his claims for monetary damages, leaving only the causes of action for declaration of joint venture, dissolution and winding up and accounting. In addition, Judge Simons *sua sponte* granted summary judgment in favor of Mineau/Legion on a counterclaim that they asserted in response to Kvam's original *Verified Complaint*, despite the fact that most of the counterclaims had already been dismissed and Mineau/Legion did not assert any counterclaims in their answer to Kvam's SAC. [See *Answer to Second Amended Verified Complaint*, 5 JA 769].

Regarding Kvam's Seventh Cause of Action for Temporary and Permanent Injunction, Judge Simons ordered as follows:

IV. CONCLUSIONS OF LAW

* * * *

62. Temporary and Permanent Injunction.

63. The *SAC's* Seventh Cause of action is for Temporary and Permanent Injunction.

64. Based on the findings and conclusions on the *SAC's* Second, Third, Fourth, Fifth and Sixth Causes of Action, and on the *FACC's* Third Claim for Relief for Declaratory Relief, and the deposit of the funds with the Court, the *SAC's* Seventh Cause of Action for Temporary and Permanent Injunction is legally ineffectual and summary judgment should be denied.

IT IS HEREBY ORDERED SUMMARY ADJUDICATION IS GRANTED, DENIED AND HELD IN ABEYANCE AS FOLLOWS:

* * * *

8. Based on the Court's foregoing findings of fact and conclusions of law, summary adjudication is **DENIED** on the *SAC's* Seventh Cause of Action for Temporary and Permanent Injunction as the claim is legally ineffectual based on the deposit of funds.

[14 JA 1971, 1982, 1988, 1990].

Based on the foregoing, Judge Simons' order regarding injunctive relief is based entirely on the various other findings of fact and conclusions of law stated throughout the order, including her findings, conclusions and order granting summary judgment in favor of Mineau/Legion on a counterclaim that had been

superseded by their subsequent pleadings and was no longer pending. To make matters worse, some of Judge Simons' findings of fact are not supported by any citation to the record, she largely ignored Mr. Kvam's declaration, and many of her findings of fact are supported by a reference to "DA", which she explains means that the bare, conclusory allegations in Mineau/Legion's counterclaims are deemed admitted, even though most of the counterclaims had been dismissed, the pleadings had long since been superseded and no counterclaims were pending. As such, this Court's review of the sufficiency of the order on Kvam's Seventh Cause of Action for Temporary and Permanent Injunction is inextricably linked to a review of the rest of the order and Judge Simons' novel theory of summary judgment based on deemed admitted counterclaims that were not even pending.

FACTUAL BACKGROUND

The following facts are set forth in the *Declaration of Jay Kvam in Support of Opposition to Defendants' Motion for Summary Judgment; and Cross-Motion for Partial Summary Judgment* [10 JA 1290-98].

1. In late December, 2016, Michael Spinola contacted Kvam about a house "flip" project Mineau was starting at 7747 S. May Street, Chicago, Illinois (the "Property" or the "Project") [10 JA 1291 ¶2].

2. On December 30, 2016 or January 1, 2017, Mr. Spinola introduced Kvam to Mineau at a Starbucks in Reno, Nevada. At that meeting, Spinola and

Mineau prepared an outline of the project financing. Spinola took a photo of that outline which he later sent to Kvam's email on January 7, 2017 [10 JA 1291-92 ¶2, 1301].

3. Kvam had never engaged in a flip project before. Mineau represented that he had such experience and that he had successfully and profitably completed flip projects in Chicago. Kvam relied on Mineau's experience and the information that he provided including the outline of project financing [10 JA 1291-92 ¶3].

4. The discussions about the Project are encapsulated in the outline of project financing which indicates that the Project would cost \$44,000 for the purchase price and \$70,000 for repairs which would be repaid with interest at the rate of 7% per annum in (3) three months, which would be \$1,995 in interest. The outline of project financing also includes \$13,520 for escrow closing costs. Based on an estimated re-sale price of \$169,000, the Project would generate an estimated profit of \$39,485, which would be divided three (3) ways, \$13,161 each. [10 JA 1292 ¶4, 1303].

5. On January 2, 2017, Mineau copied Kvam on an email that included an unsigned bid from Triple "R" Construction for \$70,000. The bid was dated November 11, 2016 and stated: "THIS JOB WILL TAKE 3 MONTHS FROM START TO FINISH." [10 JA 1292 ¶5; 1307-10].

6. Mineau signed a purchase agreement on January 3, 2017 in the amount

of \$44,000 [10 JA 1292 ¶6, 1312-15].

7. On February 13, 2017, Kvam wired \$44,000 to escrow for the purchase price and another \$784.31 for miscellaneous escrow fees and escrow closed that same day [10 JA 1292 ¶7, 1317-19, 1321-24].

8. Mineau acquired title to the Property in the name of his limited liability company, Legion Investments, LLC, which held title for the benefit of the joint venturers [10 JA 1292 ¶7, 1326-30].

9. The next day, on February 14, 2017, Kvam signed a document entitled “Terms of Agreement” which provides in its entirety as follows:

Terms of Agreement between Legion Investments LLC (its
Members) and Jay Kvam (Initial Funding Member of Same)

Re:

7747 May Street, Chicago, Illinois.

With Regards to acquisition of the aforementioned property, it is understood that the membership of Legion Investments LLC for this acquisition is Brian Mineau, Jay Kvam and Michael Spinola. All parties are entitled to 33.33% of net profit, after all expenses are accounted for, to include interest due on funds dispersed. Initial purchase is being funded by Kvam, who is there by assigned any remedies due should the transaction fail in anyway. Initial funder will be due a 7% annual return on any funds provided due from date of disbursement. There is expected to be 3 renovation draws necessary on this project. First draw to be funded by Mr. Kvam, Due to present and ongoing business dealings between Jay and Michael, Michael has agreed to allot %50 of his 1/3 profit for both initial funding's.

[10 JA 1293 ¶8, 1332].

Mineau and Spinola had previously signed the Terms of Agreement on February 13, 2017 [*Id.*]. The Terms of Agreement does not purport to encapsulate the entire agreement between the parties, and it does not in fact encapsulate the entire agreement between the parties [10 JA 1293 ¶8].

10. On February 17, 2017, Kvam texted Mineau to ask for wiring details to forward the first payment to the contractor. Mineau responded “Not yet, he was getting the wiring info for a separate account so he could keep May Street funds separate from other projects.” [10 JA ¶9, 1334].

11. Mineau contacted a different contractor, TNT Complete Facility Care, Inc. [“TNT”] after March 16, 2017 [10 JA 1293 ¶9, 1336]. Mineau prepared the Contractor Agreement with TNT [10 JA 1338] and signed the agreement on March 20, 2017 [See Contractor Agreement 7 JA 1054-67; 10 JA 1293 ¶11, 1340].

12. The Contractor Agreement provides that the project will be “turn key” complete by June 1, 2017 at a total cost of \$80,000 [See Addendum “A” to Contractor Agreement, 7 JA 1065; 10 JA 1293 ¶10]. Addendum A specifies the payment schedule, including:

- \$20,000 to secure permits, architects, demo;
- \$15,000 to begin reconstruction April 17th 2017
- \$15,000 due April 27th 2017
- \$13,000 due May 8th 2017
- \$9,000 due May 18th 2017
- Final payment of \$8,000 due upon punch list completion.

The Contractor Agreement also specifies that “The Owner [Legion/Mineau,

ed.] will approve the percentage of work at its sole discretion” [See Addendum “B” 7 JA 1066] and “IN ORDER TO RECEIVE PAYMENT, CONTRACTOR MUST PROVIDE INVOICES . . .” [7 JA 1054-55 ¶].

13. Mineau never obtained invoices from TNT, never verified that work was progressing, and instructed Kvam to make the payments without regard to the progress of construction. Mineau never gave Kvam a copy of the Contractor Agreement, so Kvam did not know the payment schedule or amounts, and relied on Mineau. Kvam first obtained the Contractor Agreement through the discovery process in this lawsuit [10 JA 1293-94 ¶11].

14. On March 23, 2017, Mineau texted that “... we are ready for our first draw on May street 20k. I will email the wiring instructions to you jay and if you have time to get it out some time in the next day or two, I would appreciate it.” [7 JA 1294 ¶12, 1343]. Later that morning, Mineau emailed Kvam with wire instructions as an attachment [*Id.*, 1345-46]. Kvam wired \$20,000 to TNT that same day [*Id.* ¶11, 1348-49].

15. On April 13, 2017, Mineau texted that “I spoke with Derek last night and this morning and next Tuesday or Wednesday is good for the next draw if that works for you. He said Easter pushed a few inspections back but we will be done no later than the 16th of May.” [10 JA 1294 ¶13, 1351]. In reliance on that text message, Kvam sent another \$20,000 on April 14, 2017 [*Id.*, 1343-54].

16. Kvam wired another \$9,000 on May 18, 2017 [10 JA 1294 ¶14, 1356].

17. Kvam began to ask questions of Mineau on about May 21, 2017: “Have you heard from Derek recently about May Street? How’s it progressing in these, as I’ve heard, last couple weeks of renovation?” Mineau replied: “I did actually he called me about an hour and a half ago and told me he is installing floors this week and should be finished very soon.” [10 JA 1294 ¶14, 1358].

18. Although Mineau was able to procure the property for \$44,000, most of the other representations he made to Kvam have proven to be false. For instance, Kvam first discovered on July 12, 2017 that Mineau’s budget for construction costs had increased from \$70,000 to \$80,000 only when a third-party, Bradley Tammen, forwarded a copy of an email conversation that Mineau had initiated with Tammen to solicit funds [10 JA 1294 ¶15, 1367-63].

19. Also, Mineau never informed Kvam that he did not have his share of funding. Kvam would not have proceeded with this Project had he known that Mineau needed to borrow his share of funding as he now claims in his sham Declaration [10 JA 1295 ¶16].

20. During this litigation, Kvam began researching the permit history for the Property through the Cook County, Illinois public records. The summary report was provided as Exhibit “23” with Mineau’s *Motion for Summary Judgment* [8 JA 1187-89] and confirms that there were no inspections at the time of the second draw

on April 14, 2017, and the floors were not ready to install at the time of the third draw on May 18, 2017, all as represented by Mineau. In fact, there was no progress beyond demolition (which should have been covered by the first draw), and the Project could not have been on track to be completed by the 16th of May. In fact, the first permit that was issued on April 21, 2017 was for “Removal of Drywall Only.” The permit for “Interior Alteration of a Single Family Residence, Architectural, Mechanical, Plumbing and Electrical Involved” was not issued until June 14, 2017 [10 JA 1295 ¶17; 8 JA 1188-89].

21. Mineau continued to misrepresent the status of the project to Kvam. The misrepresentations are detailed at Kvam Dec. Pars. 18-24 and include:

On September 25, 2017, Mineau stated: “Also spoke with Derek this morning and we are final about to cross the finish line, need two more inspections by the city (one this week) then the other and we are done.” [10 JA 1296 ¶21; 11 JA 1372].

On October 12, 2017, Mineau stated: “... he said they are doing the final touches then the occupancy inspection then it’s completed.” [10 JA 1296 ¶21; 11 JA 1374].

On November 5, 2017, Mineau stated: “I spoke to Derek on Friday morning ... and he said some of the plumbing work wasn’t to the inspector’s standard / preference and that he didn’t pass. He is correcting the items now

and asked if I could send him \$1500 (of the 10k remaining budget on Monday to help correct these items and speed it up. I told him I would. Once they are completed and we have a new date I will let everyone know.” [10 JA 1296 ¶22; 11 JA 1376].

On November 19, 2017, Mineau stated: “... he [Cole] said they will be done in 14-17 days from tomorrow, ...” and: “... I plan on having an agent come to the property to list no later than the 8th of December and he said it would be done.” [10 JA 1296 ¶23; 11 JA 1385].

22. Based on the permit history [Mineau’s Ex. “23” 8 JA 1188-89] these various statements about the status of the Project and inspections were false. There were no inspections beyond the rough plumbing and rough electrical that only partially passed with comments on July 11, 2017 and July 17, 2017 [10 JA 1296 ¶25 and Inspection Reports 11 JA 1387-1405].

The following facts are set forth in the Declaration of Kvam’s expert witness, Benjamin Charles Steele, C.P.A. which was submitted as Exhibit “40” to Kvam’s *Opposition to Motion for Summary Judgment*, as well as Mr. Steele’s Report and Amended Report which were submitted as Exhibits “41” and “42” (hereafter, “Steele Dec.” and “Steele Report”) [11 JA 1429-1444].

23. Mr. Steele reviewed TNT’s bank records and was able to confirm that TNT was working on other projects for Mineau/Legion at the same time including

8744 Bishop, 8754 S. Michigan, 9919 Forest and 1404 and 1408 Wyoming [11 JA 1443]. The funding for these other projects went into the same bank account xxx1855 and was therefore commingled with Kvam's funding for 7747 S. May Street [*Id.*]. From there Mr. Steele reported as follows:

a. "I am unable to confirm how much of Kvam's funding was used on the 7747 May Street project, and whether the funding from Mineau/Criterion NV LLC was used on the project." [11 JA 1443];

b. "Based on a text from Brian Mineau to Jay Kvam on February 7, 2017, TNT Complete Care Facility 'was getting wiring info for a separate account so he could keep May Street funds separate from other projects.' This did not happen, and the May Street project funds wound up in TNT's account 1855 along with funds for other projects . . ." [11 JA 1443];

c. "The project should have been \$3,000 from punch list completion based on the above listed draws in the amount of \$69,000" [11 JA 1443];

d. "The records supporting the project costs are limited or non-existent." [11 JA 1443];

e. "Paragraph 4 of the contract required the contractor and subcontractors to provide invoices furnish documents and pictures of completed work. It appears Brian Mineau directed Kvam to make payments

with TNT without requesting or receiving the required documents to verify the amount of work completed.” [11 JA 1444];

f. “The accounting records are incomplete and cannot support the level of work completed.” [11 JA 1444].

PROCEDURAL BACKGROUND

A. Pre-filing History

1. Before filing suit, Kvam sent a letter to Mineau asking for his money back and included some proposals [12 JA 1616].

2. Kvam then had his attorney send a letter to Mineau on February 16, 2018 which explained that “Unless you consider Mr. Kvam to be a member of Legion Investments, LLC, that agreement is best described as a combination loan agreement and joint venture agreement, with Mr. Kvam a lender and joint venturer, and you as the project manager and managing member of Legion Investments, LLC.” [12 JA 1620].

3. Mineau/Legion’s attorney responded “Mr. Mineau, Mr. Spinola, and Legion have complied with the terms of the Agreement and intend to continue doing so. The terms of the Agreement do not entitle Mr. Kvam to be ‘reimbursed’ or bought out on demand.” [12 JA 1624].

4. Mineau/Legion’s attorney later wrote that “No aspect of NRS Chapter 87 applies to this dispute.” [12 JA 1638].

B. The Pleadings

5. The project was never completed, Kvam was never repaid, and Kvam eventually filed suit in the court below on April 11, 2018 [1 JA 1]. The Complaint included causes of action as follows:

- i. Declaration of Joint Venture;
- ii. Rescission or Reformation of Agreement;
- iii. Breach of Contract – Loan;
- iv. Breach of Contract and Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing – Joint Venture Agreement;
- v. Accounting;
- vi. Court Supervision of Dissolution and Winding Up; Appointment of Receiver;
- vii. Temporary and Permanent Injunction;
- viii. Derivative Claim (on behalf of the unincorporated joint venture referred to as 7747 S. May Street).

6. The case was assigned to Dept. 3, Hon. Jerome Polaha [1 JA 24].

7. Mineau/Legion filed an *Answer and Counterclaim* on June 5, 2018 in which they denied the characterization of the Project as a joint venture that is governed by NRS Chapter 87 and asserted 11 counterclaims [1 JA 10]. There is no charitable way to describe the counterclaims. They included ridiculous allegations

and theories such as Kvam committed trespass or abuse of process when the process server served Legion at Mineau's house, which is the address Mineau uses as the registered address; that Kvam somehow caused damage to the Property (alleged as trespass and conversion) even though he never went to Chicago to view the Property; and that Kvam was guilty of fraud and deceptive trade practices.

8. Kvam filed a *Motion to Dismiss Counterclaim, or Alternatively, for a More Definite Statement* on June 25, 2018 [1 JA 24]. Judge Polaha dismissed the counterclaims for conversion and trespass to chattels and various other claims about an unrelated entity, Atlas Investors Southside LLC. Judge Polaha ordered a more definite statement regarding counterclaims five (deceptive trade practices), ten (fraud) and eleven (negligence). [1 JA 107, 112].

9. Meanwhile, Kvam also filed a *Motion for Dissolution* pursuant to the Uniform Partnership Act codified in NRS Chapter 87. [1 JA 44]. Mineau/Legion opposed the motion on the basis that "the Terms of Agreement are incredibly unclear" [1 JA 79:22] and "The record before the Court is simply insufficient to establish that Kvam and Mineau formed a partnership pursuant to NRS 87.4322" [1 JA 80:4-5]. Judge Polaha denied the motion on September 4, 2018 [1 JA 100].

10. Mineau/Legion filed a document entitled *First Amended Counterclaim* on October 5, 2018 [2 JA 114]. The document was not a more definite statement nor was it part of an answer; therefore, it was not a recognized pleading. Regardless,

Kvam filed a *Motion to Dismiss Counterclaim and for Summary Judgment* on October 25, 2018 [2 JA 128]. On January 1, 2019, Judge Polaha dismissed all of Mineau/Legion's remaining counterclaims except for the third counterclaim for declaratory relief [2 JA 313, 329].

11. Mineau sold the Property at a loss with the interior demolished to Thousand Oaks Management, LLC for \$41,000 on November 16, 2018 [10 JA 1296 ¶26; 11 JA 1407-09]. The sale generated net proceeds in the amount of \$24,473.77 [*Id.*]. Kvam was left to find out about the sale on his own and moved for a temporary restraining order and preliminary injunction on November 30, 2018 to prevent the loss of the sale proceeds [10 JA 1296-97 ¶26; 2 JA 214]. The Temporary Restraining Order was entered on December 3, 2018 [3 JA 251]. Facing no other option, Mineau/Legion stipulated to deposit the proceeds of sale with the clerk of the court [10 JA 1296-97 ¶26; 3 JA 256].

12. At a subsequent hearing on February 11, 2020, Mineau/Legion's counsel acknowledged that Legion had received a refund from escrow in the amount of \$1,864.14 after the temporary restraining order and after the sale proceeds had been deposited with the clerk of the court. [See Transcript, 15 JA 2150 at 19:10-12]. This refund has not been deposited with the clerk of the court.

13. On December 24, 2018, Kvam filed a *Motion for Leave to file Amended Complaint* to add claims of fraud and breach of contract against Mineau due to his

failure to fund the Project and to make other changes to the complaint to reflect the recent sale of the Property [3 JA 273]. Judge Polaha granted that motion on January 29, 2019 [3 JA 376] and Kvam filed his *First Amended Complaint* (“FAC”) on January 31, 2019 [3 JA 379]. The answer filed by Mineau/Legion on February 19, 2019 did not contain any counterclaims [3 JA 390].

14. The case was reassigned to Dept. 6, Hon. Lynne K. Simons, on June 6, 2019 [4 JA 602].

15. On June 19, 2019, Kvam filed a *Motion for Leave to File Second Amended Complaint* [4 JA 620]. As explained in that motion:

Through extensive discovery conducted to date, there is no evidence that Kvam’s money was used to improve the Property. Based on the sale for a loss, photographs which indicate that the property was in worse shape, and newly discovered evidence that Mineau, Legion and their cohorts and colleagues were working on other projects at the same time, some of which were sold for a profit, Kvam now seeks to file the Second Amended Complaint to include causes of action for conversion/diversion of funds and RICO violations.

[4 JA 622:1-6].

Judge Simons granted Kvam’s motion for leave to amend [5 JA 750] and Kvam filed his *Second Amended Complaint* (“SAC”) on September 11, 2019 [5 JA 756]. The Answer filed by Mineau/Legion on September 25, 2019 did not contain any counterclaims [5 JA 769].

16. The parties stipulated to an amended scheduling order which extended the discovery cut-off date to December 6, 2019 [See Stipulation and Order, 5 JA

735, 738].

C. Kvam's First Motion to Compel

17. Kvam served his First Requests for Production of Documents on August 29, 2018 which contained the following requests that are still at issue in this appeal:

REQUEST NO. 6:

Produce all tax returns for Legion Investments, LLC, since its creation on July 2, 2014.

REQUEST NO. 7:

Produce all schedule K-1s for Legion Investments, LLC, since its creation on July 2, 2014.

REQUEST NO. 8:

Produce all of Brian Mineau's Schedule Es relating to Legion Investments, LLC, since its creation on July 2, 2014.

[3 JA 420, 426]. Mineau/Legion objected to these requests [3 JA 433, 435-36]. Following an extensive effort to meet and confer, Kvam limited the time frame of the requests to 2017 and 2018 [3 JA 470]; however, Mineau/Legion persisted with their objections and Kvam filed his *First Motion to Compel* on March 15, 2019 [3 JA 395].

18. The Discovery Commissioner, Wesley Ayers, entered his *Recommendation for Order* on April 9, 2019 in which he recommended granting in part and denying in part Kvam's *First Motion to Compel*, with no award of attorney's fees. With regard to Request No. 6, Commissioner Ayers provided a lengthy

discussion of the limited protection afforded under *Hetter v. Dist. Court*, 110 Nev. 513, 874 P.2d 762 and *Cain v. Price*, 134 Nev. Adv. Op. 26, 415 P.3d 25 and recommended as follows: “For all of these reasons, the Court finds that Plaintiff has not yet demonstrated that he is entitled to Defendant Legion’s tax returns in this case.” [4 JA 528, 538:1-9] (emphasis added). The recommendation was similar for Requests 7 and 8.

19. Judge Polaha affirmed the *Recommendation for Order* in its entirety on May 16, 2019 [4 JA 593].

20. At the time Commissioner Ayers and Judge Polaha ruled on Kvam’s *First Motion to Compel*, they did not have the benefit of the report from Benjamin Charles Steele, CPA that was prepared on September 24, 2019 [11 JA 1429-44] or Mineau’s perjured declaration that was provided with his January 6, 2020 *Motion for Summary Judgment* [7 JA 1034-39].

D. Kvam’s Second Motion to Compel

21. Following the filing of Kvam’s SAC with the cause of action for conversion, Kvam issued his *First Set of Requests for Admission* [6 JA 874] and *Fourth Set of Requests for Production of Documents* [6 JA 940] which requested information about other projects that Mineau was working on in Chicago. Mineau/Legion’s responses contained mostly objections [6 JA 951, 962].

22. Following efforts to meet and confer by Kvam’s counsel, Kvam filed

his *Second Motion to Compel* on November 26, 2019. The *Second Motion to Compel* contains a detailed factual history and included extensive exhibits to explain the developing case regarding comingling of funds and conversion, including the Steele Report [6 JA 845] and extensive bank account information [6 JA 855-73].

23. On January 10, 2020, Commissioner Ayers entered his *Recommendation for Order* which recommended granting Kvam's *Second Motion to Compel* (except for the request for invoices from TNT for projects other than those shown in the bank statements) and for an award of attorney's fees to Kvam in the amount of \$2,500 [9 JA 1226, 1234-36]. Commissioner Ayers understood the developing case on conversion and RICO and explained that:

Plaintiff has therefor presented evidence that apart from the funds ostensibly used to purchase the May St. property and associated closing costs, \$69,000 was transferred into account 1855 to fund renovation work that was supposed to cost \$80,000. But the only work done on that project was worth less than \$40,000, leaving at least \$29,000 unaccounted for. Significantly, the entire \$69,000 was transferred to an account that was also receiving and transferring funds used on other TNT projects – all of these funds were commingled. A reasonable possibility exists that a substantial portion of the \$69,000 was used in connection with one or more of those other TNT projects.

[9 App 1229-30] (emphasis in original)

24. Judge Simons never ruled on Commissioner Ayers' *Report and Recommendation*.

E. Defendants' Motion for Summary Judgment

25. On January 6, 2020, Mineau/Legion filed their *Motion for Summary*

Judgment on all causes of action alleged in Kvam's SAC [7 JA 1003]. Mineau/Legion submitted 32 exhibits including a declaration from Brian Mineau.

26. In their *Motion for Summary Judgment*, Mineau/Legion altered their previous position in at least two material respects:

a. Mineau/Legion conceded that the Project should be characterized as a joint venture that is governed by NRS Chapter 87 as alleged in Kvam's First Cause of Action (Declaration of Joint Venture) [7 JA 1013-14]. As a result, Mineau is considered a fiduciary to Kvam with the corresponding duties to disclose, exercise due care, loyalty, and to account (See NRS 87.4336; *Nevada Power Co. v. Monsanto Co.*, 891 F.Supp. 1406, 1416 and n.3 (D. Nev. 1995) quoting *Mackintosh v. Matthews & Co.*, 109 Nev. 628, 634, 855 P.2d 549, 553 (1993)).

b. Mineau changed his testimony of whether and how he provided funding for the Project.

i. Mineau was asked in Kvam's Interrogatory No. 6 to "Identify all persons who contributed capital or funds for the purchase and improvement of the Property . . ." After identifying the \$93,000 provided by Kvam, Mineau/Legion responded:

Criterion NV LLC,
7560 Michaela Dr.
Reno, NV 89511

Contributions: March 26, 2017 \$20,000.00

[12 JA 1536].

The responses from Mineau/Legion were verified by Mineau, individually and as Manager of Legion Investments, on personal knowledge. Criterion NV LLC is not a party to the Terms of Agreement, and Kvam interpreted this response as an admission that Mineau did not provide his required funding. That admission prompted Kvam to file the FAC, discussed above.

ii. On January 14, 2019, Mineau/Legion submitted a declaration with their *Opposition to Motion for Leave to File Amended Complaint* in which Mineau claimed that the payment from Criterion NV LLC was actually made on his behalf. Mineau's declaration contained the following statement:

5. In 2017, Michael Spinola and I caused Criterion NV LLC to contribute \$20,000 to the project at 7747 S. May Street, Chicago, Illinois ("Property") on behalf of Legion.

[3 JA 337; 12 JA 1542]

iii. Mineau submitted another Declaration made under penalty of perjury with his February 25, 2019 *Reply in Support of Motion for Protective Order* in which testified that:

9. In late May 2017, TNT's owner Derek Cole called me and requested a \$20,000.00 construction draw for the project at the Property. I was travelling at the time and was unable to promptly make direct payment; however, I had sufficient cash on hand in my personal safe at home to make this payment. At my request, Michael Spinola agreed to arrange to pick up the cash and have it wired to TNT.

10. Mr. Spinola met my wife at our house, where my wife handed Mr. Spinola the cash from our safe, and Mr. Spinola took it to his bank to have it wired to TNT. The deposit and wire were made through Criterion NV LLC's account.

[12 JA 1544-45]

Mineau cleverly described the transaction between he and Criterion as a cash transaction, thus, there is no documentary support for this transaction.

iv. The discovery deadline in this case expired on December 6, 2019 [5 JA 744]. After the close of discovery Mineau filed a new declaration in Support of the *Motion for Summary Judgment* which disavowed the previous 3 sworn statements as follows:

25. On or about May 26, 2017, Mr. Cole called me and requested the next \$20,000.00 progress payment for the project. I was travelling at the time and was unable to promptly make direct payment; however, at my request, Spinola agreed to arrange to have the funds wired to TNT on my behalf. I have previously testified in this action that Spinola retrieved these funds from my personal safe. However, upon further reflection and consideration in preparing this Declaration and preparing for trial, I believe my previous testimony was mistaken. I now recall that I borrowed the \$20,000 from Bradley Tammen In exchange for the short-term loan of \$20,000, I agreed to repay Mr. Tammen a flat amount of \$28,000 (which has since been repaid in full).

[7 JA 1036-37] (emphasis added).

To recap, Mineau made four (4) different statements that were sworn under penalty of perjury, and which changed from: a payment made by Criterion NV LLC;

to “Michael Spinola and I caused Criterion NV LLC to contribute \$20,000 to the project at 7747 S. May Street, Chicago, Illinois (“Property”) on behalf of Legion”; to “my wife handed Mr. Spinola the cash from our safe”; to “I borrowed \$20,000 from Bradley Tammen. . . which has since been repaid in full.” Mineau does not identify when he borrowed money from Bradley Tammen or when it was repaid. He did not provide a promissory note, checks or any proof that these events occurred. Moreover, based on information from Bradley Tammen, the loan (if it actually occurred) was not repaid, at least not as of November 15, 2017 when Mr. Tammen wrote: “I gave Brian \$20,000 and was supposed to have that back in July + profit.” [12 App 1564].

27. Kvam filed his *Opposition to Defendants’ Motion for Summary Judgment; and Cross-Motion for Partial Summary Judgment* (“Opposition”) on January 16, 2020 [10 JA 1251].¹ Kvam included detailed points and authorities on every cause of action and an extensive statement of facts which was supported by 48 exhibits including declarations from Jay Kvam and Benjamin Charles Steele, CPA. Kvam reminded the court of the outstanding discovery identified in Commissioner Ayer’s *Report and Recommendation* regarding Mineau’s other projects and explained that “[s]uch ruling should be deferred until the outstanding information is supplied and Mr. Steele has been given an opportunity to supplement

¹ Kvam’s detailed Opposition occupies the entirety of Appendix vols. 10 and 11.

his report.” [10 JA 1280]. Kvam objected to Mineau’s declaration at length [10 JA 1263-1264] and further addressed Mineau’s perjured declaration in his *Motion for Reconsideration*, discussed below, in which he asked the court to i) reconsider the prior discovery order; ii) for an order to show cause for Mineau either to prove that he borrowed money from Mr. Tammen which was repaid in full or be held in contempt of court; and iii) for other sanctions and relief [12 JA 1518].

28. At the hearing on Thursday, February 27, 2020, Judge Simons purported to invoke NRCP 56(f) when she stated: “I am, pursuant to Rule 56(f), advising all parties that I intend to grant summary judgment on defendant’s third claim – counterclaim for relief on declaratory judgment.” [Transcript 15 JA 2199:13-16]. She proceeded to give Kvam’s counsel until the next morning to file a response [*Id.* at lines 20-21]. After some back and forth on whether that was reasonable notice, she gave Kvam’s counsel until “5:00 tomorrow” [15 JA 2203:9-10] at which point Kvam’s counsel responded: “I don’t think it’s reasonable.” [*Id.* at line 14]. Not only was the timing unreasonable, but Judge Simons never explained the issues that she wanted briefed. Although Judge Simons eventually extended the response date to “Monday at 10:00 a.m.” [15 JA 2204:5-6], Kvam’s counsel eventually waived any further response and stated “So I think the Court should go ahead and enter judgment as it is, as it was suggested, and we’ll go from there.” [15 JA 2210:21-23].

29. On June 5, 2020, Judge Simons entered an *Order Granting, in Part, and Denying, in Part, Defendants' Motion for Summary Judgment; Order Granting Summary Judgment on Claim Pursuant to Court's NRCP 56 Notice* (the "Order") [14 JA 1948]. The Order contained a conclusion of law in Kvam's favor on one of the major contested issues in the case: "13. Mr. Kvam, Mr. Meneau [sic] and Mr. Spinola formed a joint venture partnership pursuant to NRS 87.4322." [14 JA 1973:16-17]. However, much of the rest of the Order is adverse to Kvam. The order contains 74 Findings of Fact which largely ignore Kvam's declaration on contested issues. Judge Simons' Findings of Fact repeat many of the bare, conclusory allegations contained in Mineau/Legion's *First Amended Counterclaims* with a citation to "DA" which she explains means "deemed admitted due to failure to answer." [14 App. 16:1-2]. These counterclaims were dismissed in large part by Judge Polaha and were not restated in Mineau/Legion's answers to Kvam's FAC or SAC. Based on her DA theory, Judge Simons proceeded to grant summary judgment in favor of Mineau/Legion on their third counterclaim (none was pending), as well as against Kvam on 7 of the 11 causes of action in his SAC.

F. Motion for Reconsideration

30. Lacking any documentation of the alleged loan from Bradley Tammen to Brian Mineau or the repayment thereof with \$8,000 interest, Kvam renewed his request for Mineau's tax schedules, which should prove or disprove whether Mineau

repaid the loan with \$8,000 interest. Kvam's expert witness, Benjamin Charles Steele, explained as follows:

I have reviewed Brian Mineau's January 6, 2020 declaration that was provided as Exhibit "1" to the Motion for Summary Judgment, wherein he testifies at Par. 25 that he borrowed \$20,000 from Bradley Tammen to fund his share of the construction draws, and repaid \$28,000. He did not identify the date of the repayment, and the records provided do not include evidence of this loan or the repayment. Lacking documentation for this loan and repayment, the only other evidence would be Legion Investments, LLC's tax return or Mr. Mineau tax return. The tax returns are necessary to determine how Mr. Mineau reported the transaction with Mr. Tammen related to the investment contribution and expenses paid toward the May Street Property. The returns should report the loan of \$20,000 from Mr. Bradley Tammen and the repayment of the loan in the amount of \$28,000.

[11 JA 1428].

31. On January 24, 2020 Kvam filed a *Motion for Reconsideration of Order Affirming Discovery Commissioner's Recommendation, Entered May 16, 2019; for Discovery Sanctions; and for Other Relief* ("Motion for Reconsideration") [12 JA 1518]. In that motion, Kvam renewed the request for tax information in order to determine if Mineau ever reported a loan or the repayment thereof, for an order to show cause why Mineau should not be held in contempt for perjury, and for related sanctions. Judge Simons never ruled on Kvam's *Motion for Reconsideration*.

SUMMARY OF THE ARGUMENT

Kvam was the victim of a fraud whereby Mineau/Legion constructed a real estate investment scheme, in which there were to be 3 investors, but in fact, only

Kvam put up money. Mineau failed to properly manage the project and instead falsely represented that the project was proceeding through inspections in order to induce Kvam to advance funds. To make matters worse, Kvam's project funds for 7747 S. May Street were commingled with the funds for Mineau's other projects, and it now appears that Kvam's money was used on Mineau's other projects. To date, Kvam has been denied the necessary discovery to prove (or disprove) whether Mineau actually invested money in the project and whether he diverted project funds.

Judge Simons should have rejected Mineau/Legion's *Motion for Summary Judgment* outright, sanctioned them for Mineau's sham declaration submitted in support thereof and compelled discovery as requested by Kvam and as recommended by the Discovery Commissioner. Instead, she ignored the discovery issues and granted summary judgment on most of Kvam's claims, including all of his claims for monetary damages and his request for temporary and permanent injunction. Judge Simons did so by finding that Kvam had somehow admitted the general allegations in Mineau/Legions counterclaims even though no counterclaims were pending and by ignoring the detailed declaration and other evidence submitted with Kvam's opposition.

Regarding the portion of the Order relevant to injunctive relief, Judge Simons merely incorporated all of her findings of fact and conclusions of law on the other causes of action. As such, this Court cannot review the Order regarding injunctive

relief without considering (and reversing) the entirety of the Order.

ARGUMENT

The problems with Judge Simons' June 5, 2020 Order [14 JA 1948] are addressed above. Essentially, Judge Simons granted summary judgment on a counterclaim that was not pending and based her Findings of Fact on the conclusory allegations in Mineau/Legion's *First Amended Counterclaims*, most of which had been dismissed. In so doing, she largely ignored Kvam's detailed declaration but accepted Mineau's sham declaration. She failed to rule on outstanding discovery issues and her so-called NRCP 56 notice was patently unreasonable. These problems permeate her Order to the extent that the Order should be overturned in its entirety. Kvam points to some specific problems with her various findings and conclusions of law, below.

1. Erroneous Findings of Fact

"8. *Mr. Kvam drafted the Terms of Agreement. DA, ¶ 3.*" [14 JA 1963]. As explained above, Judge Simons' "DA" reference means that she deems Kvam to have admitted ¶ 3 of the introductory allegations in Mineau/Legion's *First Amended Counterclaim* [2 JA 114], even though 10 of the 11 counterclaims were dismissed and the remaining counterclaim for declaratory relief was never restated in the subsequent pleadings. Not only does this constitute an abuse of discretion, but Kvam refuted this finding in ¶ 8 of his declaration wherein he explained that he merely

signed the Terms of Agreement that was sent by Mr. Spinola [10 JA 1292, 1331].

“12. *All parties to the Terms of Agreement knew this was a high-risk investment. DA, ¶ 9.*” [14 JA 1964]. It is unclear why Judge Simons included this finding except to advocate for some sort of assumption of the risk theory. In fact, Kvam never admitted any such thing and disputes this statement. He never assumed the risk that Mineau would not complete the project and likely divert funds to his other projects. It is hard to understand how Mineau could have purchased a house for \$44,000, spent at least \$49,000 on the remodel, and then sold the house with the interior demolished for \$41,000 [See closing statement 11 JA 1407]. Moreover, although comparative negligence or assumption of risk may be an affirmative defense to a negligence claim, it is not a defense to claims of breach of contract, fraud, breach of fiduciary duty or other intentional torts. See NRS 41.141.

“43. *On May 26, 2017, Criterion NV LLC, acting on Mr. Mineau’s behalf, wired \$20,000 directly to TNT with reference ‘May Street.’ Motion, Ex. 1 ¶25, Ex. 19.*” [14 JA 1968]. This finding attempts to resolve one of the material disputed issues of fact in this case in favor of Mineau/Legion. Although Mineau’s Exhibit 19 shows a wire transfer of \$20,000 with a reference to “May Street” [8 JA 1143] there is no evidence that this money was sent on Mineau’s behalf or that it was used on the 7747 May Street Project instead of Mineau’s other projects. Likewise, the reference to Motion Ex. 1 ¶25 is a reference to Mineau’s fraudulent declaration

which was discussed above and which actually states:

However, upon further reflection and consideration in preparing this Declaration and preparing for trial, I believe my previous testimony was mistaken. I now recall that I borrowed the \$20,000 from Bradley Tammen In exchange for the short-term loan of \$20,000, I agreed to repay Mr. Tammen a flat amount of \$28,000 (which has since been repaid in full).

[7 JA 1036-37] (emphasis added).

Judge Simons accepted Mineau's sham declaration at face value, including ¶ 25, which was provided after the close of discovery and which disavowed his prior testimony. There is no evidence that Mineau ever contributed money to the Project and he has stubbornly refused to produce evidence that would prove or disprove this allegation, including his tax returns. Specifically, there is no evidence of a loan from Bradley Tammen or Mineau's repayment thereof. Kvam's efforts to obtain this evidence and hold Mineau liable for his perjured declaration are discussed above in reference to his *First Motion to Compel* and the subsequent *Motion for Reconsideration*. Judge Simons did not rule on Kvam's *Motion for Reconsideration*.

Ironically, it does not help Mineau to claim that he invested \$20,000 in the Project. If true, the remodel should have been completed and it is even more apparent that Mineau mismanaged the project and diverted funds.

"49. Mr. Kvam acquired information directly from TNT and did not rely on Mr. Mineau's representations." [14 JA 1968]. Judge Simons failed to cite any support for this finding and rejected Kvam's declaration wherein he testified that:

“I relied on Mineau’s experience and the information that he provided to me [10 JA 1291-92 ¶ 3]. Judge Simons largely ignored or misunderstood the extensive record that Kvam provided to her. The parties put this plan together in January, 2017 and escrow closed on the purchase of the Property on February 13, 2017 [10 JA 1291-93 ¶s1-9]. TNT was not involved until approximately March 20, 2017. [See Contractor Agreement 7 JA 1054]. Many of the misrepresentations complained of occurred prior to that time.

To the extent Judge Simons meant to say that Mineau should be excused for providing false status reports based on information received from TNT, that is not a correct statement of the law. A misrepresentation is fraudulent based on knowledge or belief on the part of the defendant that the representation was false or that he had an insufficient basis of information to make the representation. *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 447, 956 P.2d 1382, 1386 (1998); *Blanchard v. Blanchard*, 108 Nev. 908, 911, 839 P.2d 1320, 1322 (1992). Mineau owed a duty of care that required him to supervise the project and to exercise reasonable care or competence in obtaining or communicating information to Kvam.

In *Bill Stremmel Motors, Inc. v. First Nat’l Bank of Nevada*, we adopted the RESTATEMENT (SECOND) OF TORTS § 552 definition of the tort of negligent misrepresentation: (1) One who in the course of his business, profession, or employment or in any other action in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or

communicating the information.

Barmettler v. Reno Air, Inc., 114 Nev. 441, 448-49, 956 P.2d 1382, 1387. Findings of Fact 50-59 are incorrect and irrelevant for these same reasons.

“65. For reasons beyond any of the parties’ knowledge, control or expectation, the contractor hired to perform the renovations did not or was not able to complete the job. DA ¶ 11.” [14 JA 1970]. Although the parties concede as they must that the Project did not progress beyond the demolition phase, there is no evidence to support the finding that the contractor is to blame. Rather, Kvam’s extensive opposition demonstrates why the job was not completed and involves Mineau’s misrepresentation, failure to supervise the project, commingling May Street funds with funds for other projects and likely diversion of funds.

To the extent Judge Simons is attempting to advocate for an affirmative defense of a supervening cause, that affirmative defense does not appear in any of the Mineau/Legion’s pleadings or briefs. Moreover, the question of supervening cause creates an issue of fact and would not offer Mineau a defense in this case.

[W]here an unforeseeable supervening cause intervenes between a defendant's negligence and a plaintiff's injury, the defendant is relieved of liability. However, where a third party's intervening intentional act is reasonably foreseeable, a negligent defendant is not relieved of liability. Further, the question of foreseeability is generally one for the jury.

Dakis v. Scheffer, 111 Nev. 817, 820, 898 P.2d 116, 118 (1995) citing *El Dorado Hotel v. Brown*, 100 Nev. 622, 628-29, 691 P.2d 436, 441 (1984) (citations omitted),

overruled on other grounds by *Vinci v. Las Vegas Sands, Inc.*, 115 Nev. 243, 245, 984 P.2d 750, 752 (1999). As such, the defense of a supervening cause is only a defense to a negligence cause of action. Moreover, any wrongdoing by the contractor was foreseeable in light of Mineau's failure to segregate the project funds and failure to supervise the Project.

"72. *Mineau and Legion fulfilled all of their obligations under the Terms of Agreement. DA ¶ 22.*" [14 JA 1971]. This is not a finding of fact, but rather a conclusory allegation taken straight from Mineau/Legions *First Amended Counterclaims* [2 JA 116]. This allegation has no evidentiary value and is disputed for all of the reasons set forth above and below.

2. Erroneous Conclusions of Law

i. Kvam's First Cause of Action for Declaratory Relief and Mineau/Legion's counterclaim for Declaratory Relief

Judge Simons' first 22 conclusions of law concern Kvam's First Cause of Action for Declaratory Relief and Mineau/Legion's counterclaim for declaratory relief [14 JA 1971-75]. Although she denied Mineau/Legion's *Motion for Summary Judgment* on Kvam's first cause of action, she *sua sponte* granted summary judgment on the third counterclaim for declaratory relief in Mineau/Legion's *First Amended Counterclaim*, even though the earlier pleadings had been superseded and no counterclaims were pending. Kvam was not required to answer Mineau/Legion's

fugitive *First Amended Counterclaim* because all but one of their counterclaims were dismissed and Kvam was granted leave to amend his complaint. Mineau/Legion did not allege any counterclaims in their answers to Kvam's amended complaints.

ii. Kvam's Second Cause of Action (Rescission or Reformation of Agreement)

Conclusions of Law 23-29 address Kvam's Second Cause of Action (Rescission or Reformation of Agreement) [14 JA 1975-76]. However, these conclusions of law repeat an error that was first stated in Conclusion of Law 21.f regarding Mineau/Legions' counterclaim for Declaratory Relief: "There was no meeting of the minds regarding any other provisions to the Terms of Agreement except those written and contained in the Terms of Agreement." [14 JA 1974:21-23]. This conclusion constitutes an abuse of discretion because it is based on Judge Simons' earlier discussion of Mineau/Legion's counterclaim that was not pending and ignores Kvam's declaration and the other evidence he submitted. Kvam explained that the Terms of Agreement came after escrow had already closed on the purchase of the Property. The Terms of Agreement address the obligations between Kvam and Spinola and "does not purport to encapsulate all of the discussions between the parties, and it does not encapsulate all of the discussions between the parties." [10 JA 1293 ¶8]. Mineau/Legion admit, as they must that "the Terms of

Agreement are incredibly unclear.” [1 JA 79:22]. The Terms of Agreement does not contain an integration clause and omits essential terms, such as: Mineau was to manage the Project; the amount and timing of the construction draws; the amount to be contributed by each party; the contractor and renovation costs; and the anticipated completion date of the Project. These missing terms were agreed upon prior to the close of escrow and are encapsulated in the outline of project financing and the subsequent Contractors Agreement and the texts from Mineau about segregating funds for the May Street project from funds dedicated to his other projects. This is explained above and in Kvam’s Declaration: “In general, our discussions about the project are encapsulated in Ex. “3” . . . and ¶ 5.” [10 JA 1292 ¶ 4].

Rescission is a remedy, equitable in nature, that allows an aggrieved party to a contract to abrogate totally, or cancel, the contract, with the final result that the parties are returned to the position they occupied prior to formation of the contract. *See Bergstrom v. Estate of DeVoe*, 109 Nev. 575, 577, 854 P.2d 860, 861 (1993) citing *Crowley v. Lafayette Life Ins. Co.*, 106 Idaho 818, 821, 683 P.2d 854, 857 (1984); *Breuer–Harrison, Inc. v. Combe*, 799 P.2d 716, 731 (Utah Ct.App.1990); *Nervik v. Transamerica Title Ins. Co.*, 38 Wash.App. 541, 547-48, 687 P.2d 872, 876 (1984).

Similarly, the remedy of reformation is available to relieve a party to a contract of a mistake. *See Grand Hotel Gift Shop v. Granite State Ins. Co.*, 108 Nev.

811, 817, 839 P.2d 399, 599, 603 (1992); 1 Restatement (Second) of Contracts § 158 (1979); 2 Restatement (Second) of Contracts § 204 (1979).

Under the rule stated in § 204, when the parties have not agreed with respect to a term that is essential to a determination of their rights and duties, the court will supply a term that is just in the circumstances.

1 Restatement (Second) of Contracts § 158, Comment c.

Or they may have expectations but fail to manifest them, either because the expectation rests on an assumption which is unconscious or only partly conscious, or because the situation seems to be unimportant or unlikely, or because discussion of it might be unpleasant or might produce delay or impasse.

Id. at § 204, Comment c.

The fact that an essential term is omitted may indicate that the agreement is not integrated or that there is a partial rather than complete integration. In such cases, the omitted term may be supplied by prior negotiations or a prior agreement.

Id. at § 204, Comment e.

The February 14, 2017 Terms of Agreement is not a complete, integrated contract. The Terms of Agreement needs to be supplemented by the oral agreements between the parties and additional writings. To the extent the parties did not have a meeting of the minds or their agreement is otherwise characterized by fraud or mistake, it should be rescinded or reformed.

iii. Third Cause of Action (Breach of Contract – Loan)

Kvam has described the Terms of Agreement as a hybrid loan agreement and profit-sharing agreement. This interpretation is supported by the face of the Terms

of Agreement: “All parties are entitled to 33% of net profit, after all expenses are accounted for . . . Initial funder (Kvam, ed.) will be due a 7% annual return on any funds provided due from date of disbursement.” [9A App 1332]. This interpretation is also supported by Kvam’s declaration and evidence. Despite the foregoing, Judge Simons concluded: “34. Kvam has not identified any evidence of a loan agreement and thus cannot establish a breach” and “35. The terms of Agreement provide Mr. Kvam will receive 7% annual return on any funds provided if the project was profitable.” [14 JA 1977-78] (emphasis added). Judge Simons misread the Terms of Agreement and Kvam’s testimony relating thereto and injected an entirely new condition of profitability into the Terms of Agreement. Pursuant to the Terms of Agreement, Kvam was due a 7% annual return on any funds provided due from date of disbursement” without any conditions.

iv. Fourth Cause of Action (Breach of Contract and Tortious Breach of Covenant of Good Faith and Fair Dealing)

Kvam’s Fourth Cause of Action actually asserted two related but separate claims – breach of the joint venture agreement and tortious breach of the covenant of good faith and fair dealing implied therein. Judge Simons’ conclusions of law 37-47 do not adequately address either claim. As explained above, Mineau breached the joint venture agreement by failing to supervise the project, failing to complete the project, failing to provide his share of financing, and failing to pay Kvam from

the proceeds of sale.

Under the implied covenant of good faith and fair dealing, a party must act in good faith to accomplish the intended purpose of the contract and cannot advance their own interests in a manner that would compromise the contract. See *Hilton Hotels Corp. v. Butch Lewis Productions, Inc.*, 107 Nev. 226, 234, 808 P.2d 919, 922-23 (1991). A plaintiff may recover damages for breach of the implied covenant of good faith and fair dealing even where there has not been a breach of contract. *Morris v. Bank of Am. Nevada*, 110 Nev. 1274, 1278, 886 P.2d 454, 457 (1994). Good faith is a question of fact. *Consol. Generator-Nevada, Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998).

Where a fiduciary relationship or other special relationship exists, a breach of the covenant of good faith and fair dealing is tortious. A partnership is a special relationship. *Great Amer. Ins. Co. v. Gen. Builders, Inc.*, 113 Nev. 346, 354, 934 P.2d 257, 263 (1997); *K-Mart Corp. v. Ponsock*, 103 Nev. 39, 49, 732 P.2d 1364, 1371 (1987) abrogated on other grounds by *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990). Judge Simons' concluded that the parties formed a joint venture. [See Conclusion of Law 13, 14 JA 1973]. Mineau therefore owed a special and fiduciary duty to Kvam such that Kvam's cause of action for tortious breach of the covenant of good faith should have survived summary judgment.

v. Fifth Cause of Action – Accounting

Judge Simons denied Mineau/Legions' *Motion for Summary Judgment* on Kvam's Fifth Cause of Action for accounting [¶55 12 App 1981].

vi. Sixth Cause of Action – Court Supervision of Dissolution and Winding Up, and Appointment of Receiver

Judge Simons denied Mineau/Legion's *Motion for Summary Judgment* on Kvam's Sixth Cause of Action [¶61 12 App 1982].

vii. Seventh Cause of Action (Temporary and Permanent Injunction)

In a confusing and contradictory manner, Judge Simons ruled that:

64. Based on the findings and conclusions on the *SAC's* [Second Amended Complaint's, ed.] Second, Third, Fourth, Fifth and Sixth Causes of Action, and on the *FACC's* [First Amended Counterclaim's, ed.] Third Claim for Relief for Declaratory Relief, and the deposit of the funds with the court, the *SAC's* Seventh Cause of Action for Temporary and Permanent Injunction is legally ineffectual and summary judgment should be denied." [12 App 1982].

To the extent Conclusion of Law 64 is based on Judge Simons' various findings and conclusions on Kvam's other causes of action and Mineau/Legion's non-existent counterclaims, Conclusion of Law 64 must be reversed for the reasons set forth above.

To the extent Conclusion of Law 64 is based on the premise that Kvam was only seeking injunctive relief to prevent Mineau from absconding with the proceeds of sale, this is mistaken. The SAC clearly explains that Kvam is seeking an

injunction pending final winding up to prevent Mineau from conducting any further business on behalf of the joint venture [See SAC 5 App 762 ¶46].

Kvam obtained a temporary restraining order on December 3, 2018 to prevent the loss of the proceeds of sale. [3 JA 251]. On February 11, 2020, Mineau/Legion's counsel acknowledged that Legion had received a refund from escrow in the amount of \$1,864.14. [See Transcript, 15 JA 2150 at 19:10-12]. This refund has not been deposited with the clerk of the court. Kvam needs to be able to pursue a second motion for injunctive relief for these funds.

viii. Eighth Cause of Action (Fraud, Fraudulent Inducement and Fraudulent Concealment)

Conclusions of Law 66-78 address Kvam's Eighth Cause of action for Fraud, Fraudulent Concealment and Fraudulent Inducement and are encapsulated in Judge Simons' conclusion that "Mr. Kvam has not established that he relied on any false information to his detriment." [¶76 14 JA 1982]. Many of Judge Simons' other conclusions repeat the argument, explained above, that Mineau is not liable for fraudulent information that he allegedly conveyed from the contractor. Aside from obvious problems of lack of proof and hearsay, Judge Simons ignored or rejected Kvam's declaration wherein he testified that: "I relied on Mineau's experience and the information that he provided to me." [14 JA 1292:4-5]. Judge Simons also misunderstands the extensive record that was provided to her. The parties put this

plan together in January, 2017 and escrow closed on the purchase of the Property on February 13, 2017. [9A App 1292-93 ¶1-9]. Many of the misrepresentations complained of occurred before Mineau even contacted TNT about the project on approximately March 20, 2017 [8 App 1054]. Moreover, Mineau was required by the Contractor Agreement to obtain invoices, inspect the status of work and supervise the project. He failed to do so.

Also, a misrepresentation is fraudulent based on knowledge or belief on the part of the defendant that the representation was false or that he had an insufficient basis of information to make the representation. *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 956 P.2d 1382; *Blanchard v. Blanchard*, 108 Nev. 908, 839 P.2d 1320. There was no basis for Mineau to repeatedly report that the Project was almost complete when he had not inspected the Project and permits had not even been issued.

Kvam's Declaration and other evidence demonstrate that material issues of fact exist regarding Mineau's misrepresentations, concealment and non-disclosure, particularly whether Mineau: (i) misrepresented that he would provide funding to the project and concealed that he was unable to provide funding and had to borrow money (if that actually happened); (ii) misrepresented that he had successfully completed flip projects in Chicago (past tense) and concealed that the same contractor was working on his other projects that could take time and resources away

from the May Street Project; (iii) misrepresented his intention to supervise the Project and concealed his lack of project supervision; (iv) misrepresented that Kvam's project funds would be placed in a separate account and concealed that the funds were commingled with funds for Mineau's other projects; (v) concealed that the contract price had increased from \$70,000 to \$80,000; (vi) concealed that he transferred his partnership interest to Bradley Tammen (if that is what happened); (vii) concealed the sale of the property; (viii) made multiple misrepresentations concerning the status of the project when he instructed Kvam to make payment and thereafter; and (ix) likely used May Street funds on his other projects.

ix. Ninth Cause of Action (Conversion)

Conclusions of Law 79-85 address Kvam's Ninth Cause of Action for Conversion. Judge Simons granted Mineau/Legions' *Motion for Summary Judgment* largely on the basis the project funds were paid to the contractor rather than to Mineau, directly [¶83 14 App 1985]. This point is irrelevant to any of the causes of action, including the cause of action for conversion, which is premised on project funds being commingled with funds for Mineau's other projects and the growing evidence that project funds were used on those other projects. The extent of the diversion of funds is the subject of *Kvam's Second Motion to Compel* discussed above and it was an abuse of discretion for Judge Simons to grant summary judgment without ruling on the Discovery Commissioner's

Recommendation for Order. The claim of conversion is also predicated on the proven fact that Legion received the sale proceeds, and later refund from escrow, which have not been paid to Kvam.

It is important to note that the tort of conversion focuses on the distinct act of dominion. The tort of conversion is not concerned with the question of who received the illicit proceeds. Personal liability attaches when a person participates in conversion, even if that person does not personally benefit from the conversion. *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428, 434 (6th Cir. 2012), rehearing and rehearing denied; *Binder v. Disability Group, Inc.*, 772 F.Supp.2d 1172, 1182 (C.D. Cal. 2011); *In re American Home Mortgage Holding*, 458 B.R. 161, 170 (Bankr. D. Del. 2011); Knepper & Bailey *Liability of Corporate Officers and Directors* § 6.07[2] (8th ed.) (“It is not necessary that the property be converted for their own personal benefit.”). “Further, conversion is an act of general intent, which does not require wrongful intent and is not excused by care, good faith, or lack of knowledge.” *Evans v. Dean Witter Reynolds*, 116 Nev. 598, 606, 5 P.3d 1043, 1048 (2000) citing *Bader v. Cerri*, 96 Nev. 352, 357 n. 1, 609 P.2d 314, 317 n. 1 (1980), *overruled on other grounds by Evans*, 116 Nev. at 608, 611, 5 P.3d at 1050, 1051. “Whether a conversion has occurred is generally a question of fact for the jury.” *Id.* at 606, 1048.

It is undisputed that Mineau and Legion took title to the Property. It is also undisputed that Mineau represented that the project funds would be held in a

“separate account so he could keep May street funds separate from other projects.” This did not happen. The conversion consists of diverting Project funds and withholding the proceeds of sale. The focus is on Mineau’s actions in derogation of the rights of Kvam and the joint venture to have the Project funds applied to the Project. It does not matter who ultimately received the funds, so long as Mineau participated in the conversion, which he did by allowing Project funds to be commingled with other funds. As for the proceeds of sale, there is no dispute that Mineau kept those from Kvam. Mineau no longer denies the diversion of funds, and the record demonstrates that he did not pay the proceeds of sale to Kvam.

x. Tenth Cause of Action (RICO)

Conclusions of Law 79-85 address Kvam’s Tenth Cause of Action for violation of Nevada’s Racketeering Influenced and Corrupt Organizations Act (RICO) [12 App 1986-88].

NRS 207.390 “Racketeering activity” defined. “Racketeering activity” means engaging in at least two crimes related to racketeering that have the same or similar pattern, intents, results, accomplices, victims or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated incidents, if at least one of the incidents occurred after July 1, 1983, and the last of the incidents occurred within 5 years after a prior commission of a crime related to racketeering.

Unfortunately, Judge Simons did not consider the predicate acts identified by Kvam. *Siragusa v. Brown*, 114 Nev. 1384, 1399, 971 P.2d 801, 810-11 (1998) explains that there is no continuity requirement in Nevada as there is under federal

RICO statutes. Racketeering under Nevada law means engaging in at least two crimes related to racketeering as defined in NRS 207.390. The required predicate acts are listed in NRS 207.360 and include: 9. Taking property from another not under circumstances amounting to robbery; 27. Embezzlement of money or property valued at \$650 or more; 28. Obtaining possession of money or property valued at \$650 or more, or obtaining a signature by means of false pretense; 29. Perjury or subornation of perjury; 30. Offering false evidence.

Mineau has not denied the predicate acts, nor can he at this point. Mineau obtained signatures from Kvam on the Terms of Agreement and wire transfers and obtained money under false pretenses, including the representations that the money would be placed in a separate account, that work was progressing, and that Kvam should send additional payments. Although the construction draws were not paid directly to Mineau, they were paid for the benefit of Property owned by his company, Legion Investments, LLC, and Mineau later obtained possession of the proceeds of sale. Mineau apparently took money from Kvam when he used it on his other projects. The false evidence and perjury are now evident based on Mineau's declaration [7 JA 1036-37].

xi. Eleventh Cause of Action (Derivative Claim)

Conclusions of Law 95-97 address Kvam's Eleventh Cause of Action for a derivative claim [12 App 1988]. Judge Simons granted Mineau/Legion's *Motion for*

Summary Judgment on this cause of action based on the conclusion that “Mr. Kvam conceded the partnership does not hold any independent claims for relief against Mineau/Legion.” [¶ 96 12 App 2038]. Kvam never conceded any such thing and it is not clear what Judge Simons is referring to. Kvam’s brief opposition regarding this cause of action is repeated in its entirety as follows:

Mineau seems to misunderstand the nature of a derivative claim and has not cited any legal authorities to support his motion for summary judgment regarding Kvam’s Eleventh Cause of Action. “A partnership may maintain an action against a partner for a breach of the partnership agreement, or for the violation of a duty to the partnership, causing harm to the partnership.” NRS 87.4335(1) [Should be NRS 87.4337(1), ed.]. Also, “A partner may maintain an action against the partnership or another partner for legal or equitable relief . . .” This is exactly what Kvam has asserted. All of the aforementioned claims are asserted on his own behalf and on behalf of the joint venture. This is to prevent any argument from Mineau that the rights asserted belong to the joint venture, rather than Kvam. Mineau did not raise that argument in this motion for summary judgment.

[10 JA 1284:19-28]

CONCLUSION

To the extent Judge Simons’ findings and conclusions on Kvam’s Seventh Cause of Action for Temporary and Permanent Injunction are based on her findings and conclusions on Kvam’s other causes of action and Mineau/Legion’s non-existent counterclaims, the findings and conclusions must be reversed for the reasons set forth above, including: i) The findings and conclusions are based upon an erroneous legal theory that Kvam is deemed to have admitted the general allegations in

Mineau/Legion's counterclaims; ii) the findings and conclusions are based on Mineau's perjured declaration; iii) the various findings were rebutted by the lengthy, detailed declaration and other evidence that Kvam submitted in opposition to Mineau/Legion's Motion for Summary Judgment; and iv) the various conclusions are erroneous as a matter of law. The problems created by Judge Simon's unlawful deemed admitted theory, reliance on a non-existent counterclaim and disregard for Kvam's declaration so permeate her Order that the entire Order must be set aside.

To the extent Conclusion of Law 64 is based on the premise that Kvam was only seeking injunctive relief to prevent Mineau from absconding with the proceeds of sale, this is mistaken. The SAC clearly explains that Kvam is seeking an injunction pending final winding up to prevent Mineau from conducting any further business on behalf of the joint venture. Kvam should also be able file a motion for temporary restraining order and preliminary injunction pursuant to NRCP 65 to prevent the loss of the remaining \$1,864.14 that has not been deposited with the clerk of the court.

It was also an abuse of discretion for the Judge Simons to consider Mineau/Legion's Motion for Summary Judgment without addressing the outstanding discovery issues, including Commissioner Ayers' January 10, 2020 *Report and Recommendation* regarding Kvam's *Second Motion to Compel* and Kvam's *Motion for Reconsideration* regarding discovery of Mineau/Legion's tax schedules.

Wherefore, Appellant Jay Kvam respectfully requests an order reversing the June 5, 2020 *Order Granting, in Part, and Denying, in Part, Defendants' Motion for Summary Judgment; Order Granting Summary Judgment on Claim Pursuant to Court's NRCP 56 Notice*. [14 JA 1948] in its entirety, and for such other and further relief consistent with the foregoing.

Respectfully submitted this 17th day of December, 2020.

MATUSKA LAW OFFICES, LTD.

By:



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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because:

☒ This brief has been prepared in a proportionally spaced typeface using Word Times New Roman 14-point font size.

☐ This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ Proportionately spaced, has a typeface of 14 points or more, and contains 12,148 words: or

☐ Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

☐ Does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable

Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 17th day of December 2020

MATUSKA LAW OFFICES, LTD.

By: 

MICHAEL L. MATUSKA, SBN 5711

Matuska Law Offices, Ltd.

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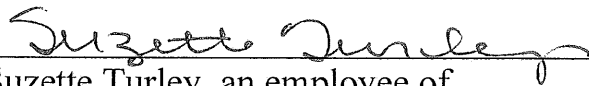
CERTIFICATE OF SERVICE

I certify that on the 18th day of December 2020, **APPELLANT'S OPENING BRIEF** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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Dated this 18th day of December 2020.



Suzette Turley, an employee of
Matuska Law Offices, Ltd.