

**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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Dec 18 2020 10:08 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**Supreme Court Case No. 81422**

District Court Case No. CV1800764

**JOINT APPENDIX**

**VOLUME 1**

**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 DISTRICT COURT, WASHOE COUNTY,  
THE HONORABLE LYNNE K. SIMONS, DISTRICT JUDGE**

MATUSKA LAW OFFICES, LTD.  
Michael L. Matuska (SBN 5711)  
2310 S. Carson Street, #6  
Carson City, NV 89701

*Attorney for Appellant*  
JAY KVAM

**APPELLANT'S APPENDIX  
ALPHABETICAL INDEX**

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1 **CODE: \$1425**

2 Michael L. Matuska, Esq. SBN 5711  
3 MATUSKA LAW OFFICES, LTD.  
4 2310 South Carson Street, Suite 6  
5 Carson City, NV 89701  
6 Attorneys for Plaintiff

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

9 JAY KVAM,

Plaintiff,

10 v.

11 BRIAN MINEAU; LEGION INVESTMENTS,  
12 LLC; 7747 S. May Street, an Unincorporated  
13 Joint Venture; and DOES I-X, inclusive,

Defendants.

**VERIFIED COMPLAINT**

14 COMES NOW Plaintiff, JAY KVAM, by and through his counsel of record, Matuska Law  
15 Offices, Ltd., Michael L. Matuska, and hereby complains, alleges, and avers as follows:

16 **I.**  
17 **PARTIES**

18 1. Plaintiff JAY KVAM ("KVAM") is now and at all times mentioned herein was a  
19 resident of Washoe County, Nevada.

20 2. Defendant LEGION INVESTMENTS, LLC ("LEGION") is a Nevada limited  
21 liability company, duly formed and operating pursuant to Chapter 86 of the Nevada Revised  
22 Statutes, with its principal place of business in Washoe County, Nevada.

23 3. Defendant BRIAN MINEAU ("MINEAU") is now and at all times mentioned  
24 herein was a resident of Washoe County, Nevada and the member/manager of LEGION.

25 4. 7747 S. May Street, Chicago, Illinois, is an unincorporated joint venture formed  
26 between KVAM, MINEAU, LEGION, and Michael Spinola, and is hereafter referred to "7747."

27 ///

MATUSKA LAW OFFICES, LTD.  
2310 S. Carson Street, #6  
Carson City NV 89701  
(775) 350-7220



1           b.     Renovation would proceed through three (3) funding draws, one draw to be  
2 funded by each joint venturer;

3           c.     MINEAU would manage the project;

4           d.     The profits would be shared 1/3<sup>rd</sup> each between KVAM, LEGION, and  
5 Spinola; and

6           e.     MINEAU would transfer all interest in the joint venture to KVAM in the  
7 event the joint venture failed.

8           9.     The joint venture created by the Agreement identified above and described herein  
9 as 7747 was an unincorporated association that was not registered with the Nevada Secretary of  
10 State and did not file a Statement of Partnership pursuant to NRS 87.4327.

11          10.    KVAM invested \$93,781.31 in the project to date through a series of four (4) wire  
12 transfers as follows:

13           a.     \$44,000 on February 13, 2017 for the purchase money

14           b.     \$781.31 on February 13, 2017 for closing costs

15           c.     \$20,000 on April 4, 2017 for the first draw

16           d.     \$20,000 on April 14, 2017 for the second draw

17           e.     \$9,000 on May 18, 2014 for the third draw.

18          11.    The amounts listed in Par. 10 are exclusive of any additional costs and interest, and  
19 include KVAM's funding contribution, as well as Spinola's funding contribution, for which  
20 KVAM acceded to Spinola's interest in the joint venture such that Spinola is no longer part of the  
21 joint venture.

22          12.    KVAM has not received his annual interest payment on any of the advances  
23 identified in Par. 10.

24          13.    Title to the House vested in LEGION, which is MINEAU's limited liability  
25 company.

26          14.    MINEAU initially represented that the project would take approximately six (6)  
27 weeks to complete. The timeframe was later extended to 90 days for the construction phase.

28    ///

3 16. KVAM lacks knowledge as to whether MINEAU funded his required renovation  
4 draw.

17. KVAM has demanded payment and an accounting from MINEAU and LEGION on multiple occasions, including demands and letters sent on February 16, 2018, March 9, 2018, and March 14, 2018. These demands have been refused.

8 18. KVAM is now disassociated from 7747.

19. Plaintiff has been forced to retain an attorney to prosecute the action and is entitled to recover the legal fees and costs incurred a result thereof.

**III.**  
**FIRST CAUSE OF ACTION**  
**(Declaration of Joint Venture)**

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

21. There is an actual, justiciable, present controversy between KHAM, MINEAU, and LEGION on the question of whether the Agreement identified in Par. 7 constitutes a joint venture agreement, an agreement for MINEAU to transfer his membership interest in LEGION, or some other type of agreement.

22. KIAM therefore requests a declaration on the legal rights created by the Agreement, the status of the unincorporated joint venture referred to herein as 7747 and the respective interests of the joint venturers.

23. KVAM further requests a declaration on the amount of loans and contributions made to the 7747 by each of the joint venturers.

### III. FIRST CAUSE OF ACTION (Declaration of Joint Venture)

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

21. There is an actual, justiciable, present controversy between KHAM, MINEAU, and LEGION on the question of whether the Agreement identified in Par. 7 constitutes a joint venture agreement, an agreement for MINEAU to transfer his membership interest in LEGION, or some other type of agreement.

22. KIAM therefore requests a declaration on the legal rights created by the Agreement, the status of the unincorporated joint venture referred to herein as 7747 and the respective interests of the joint venturers.

23. KVAM further requests a declaration on the amount of loans and contributions made to the 7747 by each of the joint venturers.

24. KHAM further requests a declaration that 7747, MINEAU, and LEGION were required to assign the entire interest in the 7747 to KHAM in the event it failed in any way.

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**IV.**  
**SECOND CAUSE OF ACTION**  
**(Rescission or Reformation of Agreement)**

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

26. The parties were mutually mistaken about the viability of the project, the legal status of the joint venture created by the Agreement and identified herein as 7747, and the rights and obligations of the Parties as a result thereof.

27. The Agreement should be rescinded and KVAM should be restored to his original position with all money returned at a reasonable rate of interest of not less than 7%.

28. In the alternative, the Agreement should be reformed to clarify the status of 7747 as a joint venture and the role of the joint venturers.

**V.**  
**THIRD CAUSE OF ACTION**  
**(Breach of Contract - Loan)**

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

30. KVAM has demanded his annual payment and repayment of the monies loaned, but Defendants have failed and refused to repay him.

31. KVAM has performed all conditions precedent to his right to be repaid on the loan and, to the extent any further conditions were not performed, KVAM's performance was excused or rendered impossible by the acts of the Defendants.

32. As a result of the foregoing, KVAM has been damaged in an amount to be proven at trial in excess of \$10,000.

**VI.**  
**FOURTH CAUSE OF ACTION**  
**(Breach of Contract and Tortious Breach of Implied Covenant of Good Faith**  
**and Fair Dealing - Joint Venture Agreement)**

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

34. As parties to the joint venture Agreement, MINEAU and LEGION owed multiple legal and fiduciary duties to KVAM, which included the duty to maintain books and records, the duty to account to KVAM, the duty of loyalty, the duty of care, and the duty to fulfill the purpose of the joint venture and the terms of Agreement in good faith in a timely manner.

35. As parties to the joint Venture Agreement, MINEAU and LEGION further owed a duty of good faith to KVAM.

36. MINEAU and LEGION breached their legal, contractual, and fiduciary duties to KVAM and 7747 by inter alia: failing to properly manage and complete the renovation, comingling joint venture funds with LEGION's accounts, failing to account to KVAM, and making multiple misrepresentations to KVAM as set forth above regarding the timing of completion and the status of the project.

37. As a result of the foregoing, KHAM and 7747 have been damaged in an amount to be determined at trial in excess of \$10,000.

38. As a further result of the above-described wrongful, fraudulent, oppressive, and malicious conduct, KVAM is also entitled to punitive and exemplary damages.

**VII.**  
**FIFTH CAUSE OF ACTION**  
**(Accounting)**

VII.

## FIFTH CAUSE OF ACTION (Accounting)

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

40. As a joint venturer in 7747, MINEAU and LEGION have the duty to account to KHAM and KHAM has the right to examine the books and records of the joint venture.

41. The exact amount owing KVAM is yet unknown and KVAM is entitled to an equitable accounting in order to determine the same.

**VIII.**  
**SIXTH CAUSE OF ACTION**  
**(Court Supervision of Dissolution and Winding Up, and Appointment of Receiver)**

## VIII.

**SIXTH CAUSE OF ACTION**  
**(Court Supervision of Dissolution and Winding Up, and Appointment of Receiver)**

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





1 futile for him to delay the filing of this Complaint in order to attempt to secure Defendants'  
2 agreement to initiate this action.

3 WHEREFORE, Plaintiff prays for relief as follows:

4 1. For an order declaring the rights and obligations of KVAM, MINEAU, LEGION,  
5 and 7747;

6 2. For Court supervised winding up and an order appointing a receiver to secure any  
7 remaining assets and to complete any remaining steps to winding up 7747;

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

10 4. For an order declaring that MINEAU and LEGION are liable for any debts of 7747  
11 existing prior to or after the disassociation of KVAM and that they are further obligated to  
12 indemnify KVAM against any liabilities;

13 5. For an equitable accounting;

14 6. For compensatory damages in an amount to be proven at trial in excess of \$15,000;

15 7. For punitive and exemplary damages in excess of \$100,000;

16 8. For an award of costs and attorney fees incurred in prosecuting this action;

17 9. For such other and further relief as the Court deems just in the premises.

18 Respectfully submitted,

19 Dated this 11<sup>th</sup> day of April 2018.

20 The undersigned does hereby affirm that the preceding document does not contain the  
21 social security number of any person.

22 MATUSKA LAW OFFICES, LTD.

23  
24 By:

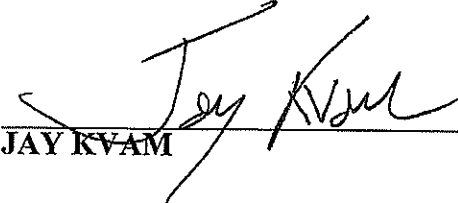
25 MICHAEL L. MATUSKA, SBN 5711  
26 Attorneys for Plaintiff, JAY KVAM,  
27 individually and derivatively on behalf  
28 the unincorporated joint venture identified as 7747

VERIFICATION

STATE OF NEVADA                    )  
COUNTY OF CARSON CITY        ) ss.

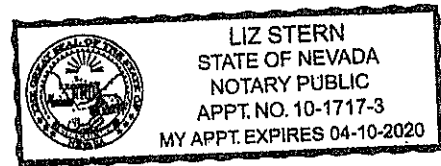
JAY KVAM, being first duly sworn, deposes and says:

That he is the Plaintiff in the above-entitled action; that he has read the foregoing instrument and knows the contents thereof and that the same is true of his own knowledge except for those matters stated on information and belief, and as to those matters, he believes them to be true.

  
JAY KVAM

SUBSCRIBED AND SWORN to before me,  
this 4th day of April 2018,  
by JAY KVAM.

  
NOTARY PUBLIC



1 **CODE 1137**

2 **GUNDERSON LAW FIRM**

3 Austin K. Sweet, Esq.

4 Nevada State Bar No. 11725

5 Mark H. Gunderson, Esq.

6 Nevada State Bar No. 2134

7 3895 Warren Way

8 Reno, Nevada 89509

9 Telephone: 775.829.1222

10 *Attorneys for Brian Mineau and Legion Investments*

11  
12 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**  
13 **IN AND FOR THE COUNTY OF WASHOE**

14 JAY KVAM,

Case No. CV18-00764

15 Plaintiff / Counterdefendant,

Dept. No. 3

16 vs.

17 BRIAN MINEAU; LEGION INVESTMENTS,  
18 LLC; 7747 S. May Street, an Unincorporated  
19 Joint Venture; and DOES I-X, inclusive,

20 Defendants / Counterclaimants.  
21 \_\_\_\_\_/

22 **ANSWER AND COUNTERCLAIM**

23 BRIAN MINEAU ("Mineau") and LEGION INVESTMENTS, LLC ("Legion"), by and  
24 through their counsel of record, Austin K. Sweet, Esq., and Mark H. Gunderson, Esq., answer the  
25 Verified Complaint ("Complaint") filed by JAY KVAM ("Kvam") as follows:

26 1. Mineau and Legion admit the allegations set forth in Paragraphs 1 through 3 of the  
27 Complaint.

28 2. Mineau and Legion deny the allegations set forth in Paragraphs 4 through 7 of the  
Complaint.

3. Mineau and Legion admit that, in February 2017, Kvam and Legion entered into an  
agreement (the "Agreement") involving a property located at 7747 S. May Street, Chicago, Illinois  
(the "House"). The Agreement speaks for itself. Mineau and Legion deny all other allegations set  
forth in Paragraph 8 of the Complaint, including all subparts.

- 1           4.       Mineau and Legion deny the allegations set forth in Paragraph 9 of the Complaint.
- 2           5.       Mineau and Legion admit that Kvam funded \$93,781.31 pursuant to the Agreement.
- 3 Mineau and Legion deny all other allegations set forth in Paragraph 10 of the Complaint, including
- 4 all subparts.
- 5           6.       Mineau and Legion deny the allegations set forth in Paragraph 11 of the Complaint.
- 6           7.       Mineau and Legion admit that Kvam has not received any annual interest payments
- 7 pursuant to the Agreement. Mineau and Legion deny all other allegations set forth in Paragraph 12
- 8 of the Complaint.
- 9           8.       Mineau and Legion admit that the House is owned by Legion and that Mineau is
- 10 Legion's sole member. Mineau and Legion deny all other allegations set forth in Paragraph 13 of the
- 11 Complaint.
- 12           9.       Mineau and Legion deny the allegations set forth in Paragraphs 14 through 29 of the
- 13 Complaint.
- 14           10.      Mineau and Legion admit that Kvam has demanded repayment of the monies funded
- 15 pursuant to the Agreement and that Legion has failed and refused to make such payments at this time.
- 16 Mineau and Legion deny all other allegations set forth in Paragraph 30 of the Complaint.
- 17           11.      Mineau and Legion deny the allegations set forth in Paragraphs 31 through 52 of the
- 18 Complaint.
- 19           12.      To the extent any allegations set forth in the Complaint are not specifically addressed
- 20 in this Answer, such allegations are denied.

21                                   **AFFIRMATIVE DEFENSES**

- 22           1.       Kvam has failed to state a claim upon which relief can be granted.
- 23           2.       To the extent any joint venture exists, this Court lacks subject matter jurisdiction to
- 24 resolve any dispute involving such a joint venture.
- 25           3.       To the extent any joint venture exists, this Court lacks personal jurisdiction over such
- 26 a joint venture.
- 27           4.       The Agreement is vague and ambiguous.
- 28           5.       The Agreement lacks essential terms and is therefore not an enforceable contract.

- 1           6.     Kvam's claims are barred by the parol evidence rule.
- 2           7.     Kvam's claims are barred by the statute of frauds.
- 3           8.     Mineau's and/or Legion's performance under the Contract was excused because
- 4 Kvam's actions made Mineau's and/or Legion's performance impossible.
- 5           9.     Kvam has failed to exhaust his statutory remedies.
- 6           10.    Kvam's claims are barred by the doctrine of waiver.
- 7           11.    Kvam's claims are barred by the doctrine of release.
- 8           12.    Kvam's claims are barred by the doctrine of estoppel.
- 9           13.    Kvam's claims are barred by the doctrine of laches.
- 10          14.    Kvam's claims are barred by the doctrine of unclean hands.
- 11          15.    Kvam has suffered no damages for which Mineau or Legion can be held liable.
- 12          16.    Kvam's claims are mitigated by assumption of the risk.
- 13          17.    Kvam has failed to join all necessary parties to this action.
- 14          18.    Kvam's damages, if any, were caused by the negligence of others.
- 15          19.    Kvam's damages, if any, were caused by his own actions.
- 16          20.    Kvam's damages, if any, were caused by the acts or omissions of others.
- 17          21.    Kvam failed to mitigate his damages.
- 18          22.    Kvam's damages, if any, resulted from an independent, intervening cause over which
- 19 Mineau and Legion had no control.
- 20          23.    Mineau's and Legion's contractual obligations, if any, were excused because Kvam
- 21 breached the contract first.
- 22          24.    Mineau's or Legion's conduct was not wrongful, fraudulent, oppressive, or malicious.
- 23          25.    Any and all actions taken by Mineau and Legion were just, fair, privileged, with good
- 24 cause, in good faith, and without malice.
- 25          26.    Mineau and Legion reserve the right to assert additional affirmative defenses after
- 26 further investigation and discovery.
- 27                WHEREFORE, Mineau and Legion pray for relief as follows:
- 28           1.     That Kvam take nothing by way of the Complaint;



1 declined to modify the Agreement and informed Kvam that, pursuant to the Agreement, he would be  
2 paid what he is owed under the Agreement when the House is sold.

3 15. After Legion and Mineau refused to renegotiate the terms of the Agreement, Kvam  
4 began undertaking efforts to interfere with Mineau's business investments and harm Mineau's  
5 business relationships in an effort to coerce Mineau into renegotiating the terms of the Agreement  
6 and/or to retaliate against Mineau.

7 16. Among other things, Kvam wrongfully and fraudulently accessed Atlas's bank  
8 accounts and engaged in unauthorized and fraudulent online banking transactions. Specifically,  
9 without any legal authority whatsoever, Kvam used Atlas's operating funds to pay off an interest-free  
10 debt held by Atlas which would not come due for several more years, causing Atlas's operating  
11 account to be overdrawn and forcing Mineau and Legion to liquidate other assets to provide Atlas  
12 with adequate operating funds and avoid drastic financial and business consequences.

13 17. Among other things, Kvam wrongfully and fraudulently turned off the power to the  
14 House without notifying Legion or Mineau, causing the pipes in the House to freeze, burst, and flood  
15 the House.

16 18. Among other things, after initiating this suit, Kvam caused his process servers to  
17 harass, threaten, and intimidate Mineau's family. Specifically, Kvam's agents entered Mineau's  
18 property and knocked on his front door in an effort to serve Mineau with process in this action.  
19 Mineau's wife answered the door and informed the process servers that Mineau was not home. The  
20 process servers raised their voices, threatened, and harassed Mineau's wife until she told them to  
21 leave the property. The process servers refused to leave and continued to scream, threaten, and harass  
22 Mineau's wife until she called the police. The process servers left before the police arrived, then  
23 returned shortly after the police left and again entered the property and screamed at, threatened, and  
24 harassed Mineaus' wife.

25 19. As a result of these actions, among others, Mineau and Legion have been forced to  
26 retain counsel to pursue the claims listed below.

27 ///

28 ///



**FIRST CLAIM FOR RELIEF**  
**(Breach of Contract)**

20. Mineau and Legion reallege the allegations contained in the other paragraphs of this Counterclaim and incorporate them by reference as if fully set forth here.

21. Kvam alleges that the Agreement constitutes a binding legal contract.

22. To the extent that the Agreement constitutes a binding legal contract, Mineau and Legion fulfilled all of their obligations pursuant to the Agreement and are entitled to full performance from Kvam.

23. Kvam breached the Agreement by, among other things, demanding payment before payment was due, interfering with the renovation of the House by turning off the utilities without notifying Legion, and by interfering with Legion's ability to perform its obligations under the Agreement and finish renovating the House for a profit.

24. As a result of Kvam's breach of contract, Mineau and Legion are entitled to damages in excess of \$15,000.00, plus interest, attorneys' fees, and costs.

25. By reason of Kvam's breach of contract, Mineau and Legion have been compelled to retain the services of an attorney and Mineau and Legion are entitled to recover the reasonable amount of their attorneys' fees and costs expended in the defense and prosecution of this matter.

**SECOND CLAIM FOR RELIEF**  
**(Breach of the Covenant of Good Faith and Fair Dealing)**

26. Mineau and Legion reallege the allegations contained in the other paragraphs of this Counterclaim and incorporate them by reference as if fully set forth here.

27. Kvam alleges that the Agreement constitutes a binding legal contract governed by the laws of the State of Nevada.

28. In Nevada, every contract contains an implied covenant of good faith and fair dealing.

29. By the actions described above, Kvam has breached the implied covenant of good faith and fair dealing by performing in a manner that was unfaithful to the purpose of the Agreement.

30. Kvam's breach of the covenant of good faith and fair dealing directly and proximately caused Mineau and Legion to suffer damages in excess of \$15,000.00.



1 44. Kvam undertook the actions described above with the intent to vex, harass, and annoy  
2 Mineau and Legion and his actions were taken with malice, fraud, and oppression. As a result,  
3 Mineau and Legion are entitled to an award of exemplary and punitive damages.

4 45. As a result of Kvam's wrongful conduct, Mineau and Legion are entitled to damages  
5 in excess of \$15,000.00, plus interest, attorneys' fees, and costs.

6 46. By reason of Kvam's wrongful conduct, Mineau and Legion have been compelled to  
7 retain the services of an attorney and Mineau and Legion are entitled to recover the reasonable amount  
8 of their attorneys' fees and costs expended in the defense and prosecution of this matter.

9  
10 **FIFTH CLAIM FOR RELIEF**  
**(Deceptive Trade Practices)**

11 47. Mineau and Legion reallege the allegations contained in the other paragraphs of this  
12 Counterclaim and incorporate them by reference as if fully set forth here.

13 48. Mineau and Legion entered into a business transaction with Kvam that is subject to  
14 the provisions of the Deceptive Trade Practices Act, NRS Chapter 598.

15 49. By his actions describe above, Kvam has engaged in deceptive trade practices by using  
16 coercion, duress, and intimidation through the course of this transaction.

17 50. As a result of Kvam's wrongful conduct, Mineau and Legion are entitled to damages  
18 in excess of \$15,000.00, plus interest, attorneys' fees, and costs.

19 51. Kvam's actions in this regard were malicious, fraudulent, and oppressive. As a result,  
20 Mineau and Legion are entitled to an award of exemplary and punitive damages.

21 52. By reason of Kvam's wrongful conduct, Mineau and Legion have been compelled to  
22 retain the services of an attorney and Mineau and Legion are entitled to recover the reasonable amount  
23 of their attorneys' fees and costs expended in the defense and prosecution of this matter.

24  
25 **SIXTH CLAIM FOR RELIEF**  
**(Abuse of Process)**

26 53. Mineau and Legion reallege the allegations contained in the other paragraphs of this  
27 Counterclaim and incorporate them by reference as if fully set forth here.

28 ///

1           54.     Through his actions described above, Kvam is using the statutes and laws of the State  
2 of Nevada for an ulterior purpose and for private gain by wrongfully initiating, prosecuting, and  
3 otherwise using this action not to resolve a legitimate legal dispute, but instead to force Mineau and  
4 Legion to buy him out of the Agreement, pay him more than he is entitled under the Agreement,  
5 and/or pay sooner than he is entitled under the Agreement.

6           55.     Kvam's actions are willful, intentional, and not proper in the regular conduct of the  
7 proceeding.

8           56.     As a result of Kvam's wrongful conduct, Mineau and Legion are entitled to damages  
9 in excess of \$15,000.00, plus interest, attorneys' fees, and costs.

10          57.     Kvam's actions in this regard were malicious, fraudulent, and oppressive. As a result,  
11 Mineau and Legion are entitled to an award of exemplary and punitive damages.

12          58.     By reason of Kvam's wrongful conduct, Mineau and Legion have been compelled to  
13 retain the services of an attorney and Mineau and Legion are entitled to recover the reasonable amount  
14 of their attorneys' fees and costs expended in the defense and prosecution of this matter.

15                                   **SEVENTH CLAIM FOR RELIEF**  
16                                   **(Trespass)**

17          59.     Mineau and Legion reallege the allegations contained in the other paragraphs of this  
18 Counterclaim and incorporate them by reference as if fully set forth here.

19          60.     Through his actions described above, Kvam intentionally caused his agents to  
20 physically enter Mineau's property without permission, after they had been instructed to leave  
21 Mineau's property, and without legal purpose or justification.

22          61.     Kvam's agents acted intentionally and at Kvam's direction to invaded Mineau's  
23 property.

24          62.     As a result of Kvam's wrongful conduct, Mineau and Legion are entitled to damages  
25 in excess of \$15,000.00, plus interest, attorneys' fees, and costs.

26          63.     By reason of Kvam's wrongful conduct, Mineau and Legion have been compelled to  
27 retain the services of an attorney and Mineau and Legion are entitled to recover the reasonable amount  
28 of their attorneys' fees and costs expended in the defense and prosecution of this matter.

**EIGHTH CLAIM FOR RELIEF**  
**(Trespass to Chattels)**

64. Mineau and Legion reallege the allegations contained in the other paragraphs of this Counterclaim and incorporate them by reference as if fully set forth here.

65. Legion owns the House and all real and personal property within the House.

66. Through his actions described above, Kvam intentionally impaired the condition, quality, and value of the House, its components, and the personal property within the House.

67. As a result of Kvam's actions, Legion has been deprived of the use and value of the House while the damage is being repaired.

68. Through his actions described above, Kvam intentionally, deceptively, and fraudulently exercised dominion and control of Atlas's assets, depriving Atlas of its operating capital and necessary liquidity.

69. As a result of Kvam's action, Mineau and Legion were forced to liquidate other assets and use their own personal funds to restore Atlas's operating capital and avoid drastic financial and business consequences.

70. As a result of Kvam's wrongful conduct, Mineau and Legion are entitled to damages in excess of \$15,000.00, plus interest, attorneys' fees, and costs.

71. Kvam's actions in this regard were malicious, fraudulent, and oppressive. As a result, Mineau and Legion are entitled to an award of exemplary and punitive damages.

72. By reason of Kvam's wrongful conduct, Mineau and Legion have been compelled to retain the services of an attorney and Mineau and Legion are entitled to recover the reasonable amount of their attorneys' fees and costs expended in the defense and prosecution of this matter.

**NINTH CLAIM FOR RELIEF**  
**(Conversion)**

73. Mineau and Legion reallege the allegations contained in the other paragraphs of this Counterclaim and incorporate them by reference as if fully set forth here.

74. Legion owns the House and all real and personal property within the House.

75. Through his actions described above, Kvam seriously interfered with Legion's rights in the House, its components, and the personal property within the House.





1 97. Kvam's conduct in this regard was at least negligent.

2 98. As a result of Kvam's wrongful conduct, Mineau and Legion are entitled to damages  
3 in excess of \$15,000.00, plus interest, attorneys' fees, and costs.

4 99. By reason of Kvam's wrongful conduct, Mineau and Legion have been compelled to  
5 retain the services of an attorney and Mineau and Legion are entitled to recover the reasonable amount  
6 of their attorneys' fees and costs expended in the defense and prosecution of this matter

7 WHEREFORE, Mineau and Legion pray for:

8 1. Judgment for damages in excess of \$15,000.00 in favor of Mineau and Legion and  
9 against Kvam according to the evidence;

10 2. Punitive and exemplary damages in an amount to be determined at trial;

11 3. An award of interest, costs and attorneys' fees;

12 4. Declaratory relief; and

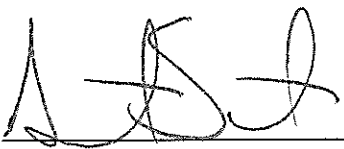
13 5. Such further relief as the Court deems proper.

14 **AFFIRMATION**

15 The undersigned does hereby affirm that the preceding document, **ANSWER AND**  
16 **COUNTERCLAIM**, filed in the Second Judicial District Court of the State of Nevada, County of  
17 Washoe, does not contain the social security number of any person.

18 DATED this 5 day of June, 2017.

19 GUNDERSON LAW FIRM

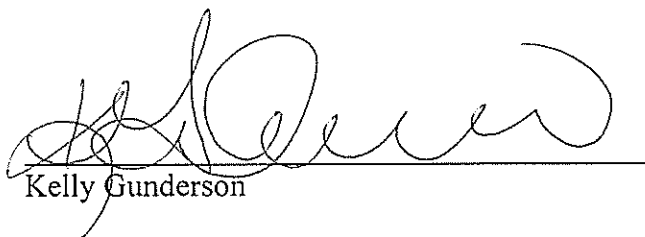
20  
21 By:   
22 Austin K. Sweet, Esq.  
23 Nevada State Bar No. 11725  
24 Mark H. Gunderson, Esq.  
25 Nevada State Bar No. 2134  
26 3895 Warren Way  
27 Reno, Nevada 89509  
28 Telephone: 775.829.1222  
*Attorneys for Brian Mineau and Legion Investments*



1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of the law office of Gunderson Law  
3 Firm, and that on the 5 day of June, 2018, I electronically filed a true and correct copy of the  
4 **ANSWER AND COUNTERCLAIM**, with the Clerk of the Court by using the electronic filing  
5 system which will send a notice of electronic filing to the following:

6  
7 Michael Matuska, Esq.  
8 Matuska Law Offices, Ltd.  
9 2310 South Carson Street, Suite 6  
10 Carson City, Nevada 89701  
11 *Attorneys for Jay Kvam*

12   
13 Kelly Gunderson  
14  
15  
16  
17  
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28

**CODE: 2315**

Michael L. Matuska, Esq. SBN 5711  
MATUSKA LAW OFFICES, LTD.  
2310 South Carson Street, Suite 6  
Carson City, NV 89701  
Attorneys for Plaintiff

**THE SECOND JUDICIAL DISTRICT COURT OF NEVADA**

**IN AND FOR THE COUNTY OF WASHOE**

JAY KVAM,

Plaintiff,

Case No. CV18-00764

v.

Dept. No. 3

BRIAN MINEAU; LEGION INVESTMENTS,  
LLC; 7747 S. May Street, an Unincorporated  
Joint Venture; and DOES I-X, inclusive,

Defendants.

**MOTION TO DISMISS COUNTERCLAIM, OR ALTERNATIVELY,**

**FOR A MORE DEFINITE STATEMENT**

Plaintiff / Counter-Defendant, JAY KVAM, Kvam”), by and through his counsel of record, Matuska Law Offices, Ltd., Michael L. Matuska, Esq., pursuant to NRCP 9(b), NRCP 9(f), NRCP 12(b)(5), and NRCP 12(e), hereby moves this Court for an Order dismissing the fourth through the eleventh Claims for Relief set forth in the Counterclaim filed on June 5, 2018 by Defendants / Counterclaimants, BRIAN MINEAU and LEGION INVESTMENTS (collectively, “Mineau”), or alternatively, for a more definite statement as to Counterclaims four through eleven, on the grounds that the Counterclaims grossly over reach in attacking Kvam personally through claims of fraud, negligence, abuse of process, etc., all through bare, conclusory allegations, that are devoid of the required specifics as to time, place, and manner; as a consequence, the Counterclaims fail in several respects to state a claim upon which relief may be granted, or at the very least, Defendants

1 should be ordered to plead certain of their borderline scandalous tort claims with more specificity.

2 This motion is made and based upon the Verified Complaint, the Answer and  
3 Counterclaim, all other pleadings and papers on file herein, and on the following Points and  
4 Authorities.

5  
6 **POINTS AND AUTHORITIES**

7 **I. STATEMENT OF FACTS**

8 **A. ALLEGATIONS OF THE VERIFIED COMPLAINT**

9 Kvam's Verified Complaint asserts that he, along with Brian Mineau, Legion and Michael  
10 Spinola, entered into an unincorporated joint venture to purchase, restore, and re-sell a house  
11 located at 7747 S. May Street, in Chicago, Illinois. (See Verified Complaint, paragraph 8). The  
12 Verified Complaint asserts specifically that, on or about February 2, 2017, the present parties and  
13 Mr. Spinola entered into a written agreement, under which Kvam would provide the money to  
14 purchase the house, and would be entitled to a 7% annual return on that investment, with an  
15 annual payment due 12 months from the date of disbursement. (See Verified Complaint,  
16 paragraph 8).

17  
18 Renovation of the house would be funded through three (3) funding draws, one such draw  
19 to be funded by each individual member of the joint venture; Mineau would manage the project,  
20 and the three (3) individuals would split equally any profit from the joint venture. (See Verified  
21 Complaint, paragraph 8). Under the written agreement, Mineau agreed to transfer all interest in  
22 the joint venture to Kvam, in the event that the joint venture failed. (See Verified Complaint,  
23 paragraph 8).

24  
25 Kvam invested \$93,781.31, as follows:

- 26 a. \$44,000 on February 13, 2017 for the purchase money  
27 b. \$781.31 on February 13, 2017 for closing costs  
28

- c. \$20,000 on April 4, 2017 for the first draw
- d. \$20,000 on April 14, 2017 for the second draw
- e. \$9,000 on May 18, 2017 for the third draw.

(See Verified Complaint, paragraph 10).

Kvam subsequently acceded to Mr. Spinola's interest, such that Mr. Spinola ceased to be a part of the joint venture. (See Verified Complaint, paragraph 11).

The joint venture thereafter failed, in that Mr. Kvam to date has not received the annual payment due 12 months from the date of disbursement, and title to the house at 7747 S. May Street remains vested in Legion. Construction has stalled, Mineau has not provided a budget or completion date, and he refuses to account to Kvam for funds spent on the project. (See Verified Complaint, paragraphs 12 - 17). Kvam therefore has disassociated from the joint venture, and has been forced to bring the present action for rescission or reformation of the parties' agreement, breach of contract, breach of the covenant of good faith and fair dealing, accounting, court assistance in the dissolution and winding up of the joint venture, declaratory and injunctive relief, and a derivative claim on behalf of the joint venture.

#### B. ALLEGATIONS OF THE ANSWER AND COUNTERCLAIM

##### 1. Factual Allegations in the Answer

Defendants' Answer admits the existence of an agreement "involving a property located at 7747 S. May Street, Chicago, Illinois," but alleges the agreement is only between Kvam and Legion. (See Answer, paragraph 3). Mineau and Legion admit that Kvam "funded \$93,781.31 pursuant to the agreement," and that "Kvam has not received any annual interest payments pursuant to the Agreement." (See Answer, paragraphs 5, 7). Mineau and Legion admit "that the House is owned by Legion and that Mineau is Legion's sole member," and that "Kvam has demanded repayment of the monies funded pursuant to the Agreement and that Legion has failed

1 and refused to make such payments at this time.” (See Answer, paragraphs 8, 10). The Answer  
2 includes 26 affirmative defenses, all of which merely list the name of the affirmative defense but  
3 fail to allege any facts to support the affirmative defenses.

4 2. Factual Allegations in the Counterclaim

5 With respect to the project to renovate and resell the house located at 7747 S. May Street,  
6 in Chicago, Defendants essentially admit that Kvam funded \$93,781.31 for the project, but allege  
7 that repayment is not yet due. (See Counterclaim, paragraphs 2 - 12). Defendants allege that after  
8 a falling out between Kvam and Mineau, Kvam demanded to be bought out of the 7747 S. May  
9 Street agreement, and after Mineau refused to modify the agreement, Kvam “began undertaking  
10 efforts to interfere with Mineau’s business investments and harm Mineau’s business relationships  
11 in an effort to coerce Mineau into renegotiating the terms of the Agreement and/or retaliate against  
12 Mineau.” (See Counterclaim, paragraphs 13 - 15).

13 Defendants then allege three distinct actions by Mr. Kvam, involving (1) an unrelated  
14 company, Atlas Investors Southside LLC (“Atlas”); (2) Kvam supposedly “turning off” power to  
15 the 7747 S. May Street house; and (3) Kvam’s process servers’ alleged harassment of Mr.  
16 Mineau’s wife during service of process in the present case.<sup>1</sup>

17 First, regarding Atlas, an admittedly “unrelated” investment company, Defendants allege  
18 that Kvam “refused to make a duly-imposed capital call” in Atlas, which caused the parties’  
19 falling out. (See Counterclaim, paragraph 13). Defendants allege that, “Among other things,” that  
20 Mr. Kvam:

21 wrongfully and fraudulently accessed Atlas’s bank accounts and engaged in  
22 unauthorized and fraudulent banking transactions . . . Specifically, without any  
23 legal authority whatsoever, Kvam used Atlas’s operating funds to pay off an  
24 interest-free debt held by Atlas which would not come due for several more years,

25  
26  
27 <sup>1</sup> While Defendants use the phrases “Among other things,” or “among others” four times on page 5 of the  
28 Counterclaim to describe the alleged actions of Mr. Kvam, in support of their Counterclaim, Defendants provide only  
these three (3) additional allegations regarding Mr. Kvam’s actions.

causing Atlas's operating account to be overdrawn and forcing Mineau and Legion to liquidate other assets to provide Atlas with adequate operating funds and avoid drastic financial and business consequences.

(See Counterclaim, paragraph 16).

Second, Defendants allege that, "Among other things," Mr. Kvam "wrongfully and fraudulently turned off the power to the House without notifying Legion or Mineau, causing the pipes in the House to freeze, burst, and flood the House." (See Counterclaim, paragraph 17).

Third, Defendants allege that, "Among other things," Mr. Kvam

[C]aused his process servers to harass, threaten, and intimidate Mineau's family. Specifically, Kvam's agents entered Mineau's property and knocked on his front door in an effort to serve Mineau with process in this action. Mineau's wife answered the door and informed the process servers that Mineau was not home. The process servers raised their voices, threatened, and harassed Mineau's wife until she told them to leave the property. The process servers refused to leave and continued to scream, threaten, and harass Mineau's wife until she called the police. The process servers left before the police arrived, then returned shortly after the police left and again entered the property and screamed at, threatened, and harassed Mineau's wife.

(See Counterclaim, paragraph 18).

Of course, neither Atlas nor "Mineau's wife" have been made parties to this case.

### 3. Claims for Relief in the Counterclaim

Based on the allegations regarding the disputed agreement to remodel and resell 7757 S. May Street, and the additional allegations in the Counterclaim involving (1) Atlas's accounts; (2) Kvam supposedly turning off power to the 7747 S. May Street house; and (3) Kvam's process servers' alleged harassment of Mr. Mineau's wife during service of process in the present case, Mr. Mineau and Legion assert the following claims for relief:

First: Breach of Contract

Second: Breach of the covenant of good faith and fair dealing

Third: Declaratory relief

Fourth: Intentional interference with prospective economic advantage

1 Fifth: Deceptive trade practices

2 Sixth: Abuse of process

3 Seventh: Trespass

4 Eighth: Trespass to chattels

5 Ninth: Conversion

7 Tenth: Fraud

8 Eleventh<sup>2</sup>: Negligence

9 **II. ARGUMENT**

10 The fourth through the eleventh counterclaims are the product of a desperate effort to  
11 convert this simple business dispute, regarding a failed house flipping project, into a tort action  
12 based on harassing process servers and the accounts of a company that is not a party to the case.  
13 Mineau's effort is desperate, because he asserts claims that, at most, would be the claims of non-  
14 parties – Atlas and Mineau's wife – and they base their tort claims on conspicuously vague and  
15 conclusory allegations, devoid of facts regarding time, place, and manner. Counterclaims (4) –  
16 (11) are alleged for the sole purpose of punishing Kvam for demanding repayment of his loan and  
17 intimidating him to drop his claim.<sup>3</sup> For multiple, overlapping reasons, counterclaims four (4)  
18 through eleven (11) should be dismissed.

20 Alternatively, this Court should demand that any counterclaim that is not dismissed be re-  
21 plead so as to be based upon specific factual allegations regarding time, place, manner, and special  
22 damages. Kvam and this Court should not be left guessing as to the nature of Mineau's  
23

24  
25 

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<sup>2</sup> Both Defendants' tenth counterclaim for fraud, and eleventh counterclaim for negligence, are listed under the  
26 headings, "TENTH CLAIM FOR RELIEF." In the present Motion, Kvam will distinguish the eleventh counterclaim  
for negligence either as the eleventh claim for relief or the eleventh counterclaim.

27 <sup>3</sup> This Motion to Dismiss does not address the issues of absolute judicial privilege and Nevada's anti-SLAPP statutes,  
28 or the statutes precluding offers to be used as evidence, all of which preclude Mineau's counterclaims which seek to  
punish Kvam for filing his Complaint. These issues are reserved for future motions if necessary.

counterclaims.

A. STANDARD OF REVIEW ON MOTION TO DISMISS

NRCP 12(b)(5) mandates dismissal of a cause of action that fails to state a claim upon which relief can be granted. NRCP 12(b)(5) provides in pertinent part, as follows:

**(b) How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

...  
(5) failure to state a claim upon which relief can be granted . . . . A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. . . . If, on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Nevada is a “notice pleading” jurisdiction and, therefore, a complaint need only set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has “adequate notice of the nature of the claim and relief sought.” *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984). In reviewing motions to dismiss under NRCP 12(b)(5), a district court must construe the pleadings liberally, accept all factual allegations in the Complaint as true, and draw every fair inference in favor of the non-moving party. *Blackjack Bonding v. City of Las Vegas Mun. Court*, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000) (citing *Simpson v. Mars, Inc.*, 1134 Nev. 188, 190, 929 P.2d 966, 967 (1997)).

However, dismissal under NRCP 12(b)(5) is proper where the allegations are insufficient to establish the elements of a claim for relief. *Stockmeier v. Nevada Dep’t of Corr, Psychological Review Panel*, 124 Nev. 313, 316, 183 P.3d 133, 135, (2008). “To survive dismissal, a complaint must contain some ‘set of facts, which, if true, would entitle [the plaintiff] to relief.’” *In re*



1 *AMERCO Derivative Litig.*, 127 Nev. 196, 210-11, 252 P. 3d 681, 692 (2011) (quoting *Buzz Stew,*  
2 *LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008)).

3 Further, a “court may take into account matters of public record, orders, items presented in  
4 the record of the case, and any exhibits attached to the complaint when ruling on a motion to  
5 dismiss for failure to state a claim upon which relief can be granted.” *Breliant v. Preferred*  
6 *Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993).  
7

8 B. THE FOURTH COUNTERCLAIM SHOULD BE DISMISSED BECAUSE  
9 DEFENDANTS DO NOT ALLEGE ACTUAL HARM

10 Mineau’s fourth counterclaim is for Intentional Interference with Prospective Economic  
11 Advantage (“IIPED”). A cause of action for IIED requires the following elements:

12 (1) a prospective contractual relationship between the plaintiff and a third party; (2)  
13 knowledge by the defendant of the prospective relationship; (3) intent to harm the  
14 plaintiff by preventing the relationship; (4) the absence of privilege or justification  
15 by the defendant; and (5) actual harm to the plaintiff as a result of the defendant's  
conduct.

16 (*Wichinsky v. Mosa*, 109 Nev. 84, 87-88, 847 P. 2d 727, 729-30 (1993) (quoting *Leavitt v. Leisure*  
17 *Sports, Inc.*, 103 Nev. 81, 88, 734 P.2d 1221, 1225 (1987))).

18 Mineau’s fourth counterclaim appears to rely solely on the allegations that Kvam “turned  
19 off” the utilities to the 7747 S. May Street house, thus allegedly causing pipes to freeze and burst.  
20 Defendants apparently allege that Kvam sabotaged a project he had invested nearly \$100,000 in to  
21 date, and intended to prevent prospective economic relationships with as yet unknown buyers of  
22 the house.  
23

24 Mineau failed to allege any prospective economic relationship with particularity. His bare  
25 allegations that he enjoyed prospective economic relationships, and that Kvam knew about these  
26 relationships, is insufficient. In the present case, the Counterclaim alleges that the prospective  
27 economic relationships at issue were “with various third parties involving the marketing and sale  
28

of the house.” (See Counterclaim, paragraph 39). There is no allegation the house has been offered for sale. Consequently, no specific third-party purchasers could possibly be identified in the Counterclaim. Kvam cannot even tell what relationships are being referenced. Mineau failed to identify any purchase offers, or the terms thereof. It is unlikely that there would be any purchase offers, considering the admitted facts in the pleadings that the project is not complete.

Presumably, Mineau meant to allege that he has not been able to list the property for sale because the project is not complete. This is the more reasonable interpretation of the counterclaims. However, this interpretation would preclude the fourth cause of action for IIPED, because there have been no offers on the unlisted, unfinished project; hence there can be no interference.

Mineau’s fourth counterclaim should also be dismissed because he failed to allege any evidence of damages. The house has not yet been sold. As such, Mineau does not know whether the house will sell for more or less than he would have received but for the interference with his non-existent, but alleged, prospective economic relationships.

C. THE FIFTH AND TENTH COUNTERCLAIMS FOR CONSUMER FRAUD AND FRAUD SHOULD BE DISMISSED BECAUSE DEFENDANTS FAIL TO ALLEGE THOSE CLAIMS WITH SPECIFICITY, NRS CHAPTER 598 DOES NOT APPLY TO THE PRESENT TRANSACTION, AND DEFENDANTS FAIL TO IDENTIFY AN ALLEGED MISREPRESENTATION

Mineau’s fifth counterclaim is for an unspecified breach of Nevada’s Deceptive Trade Practices Act, NRS Chapter 598. Mineau’s tenth counterclaim is for fraud. Deceptive trade practices is considered consumer fraud; hence the fifth counterclaim for deceptive trade practices/consumer fraud and common law fraud must be plead with specificity. (See *Davenport v. GMAC Mortg.*, 2013 Nev. Unpub. LEXIS 1457; 2013 WL 5437119 (Nev. 2013)). In

1 *Davenport*, an unpublished opinion that nevertheless was signed by all seven Nevada Supreme  
2 Court Justices, the Court stated:

3       Regarding fraud-based claims, *NRCP 9(b)* provides, in relevant part, that "the  
4 circumstances constituting fraud . . . shall be stated with particularity." "The  
5 circumstances that must be detailed include averments to the time, the place, the  
6 identity of the parties involved, and the nature of the fraud . . . ." *Brown v. Kellar*,  
7 *97 Nev. 582, 583-84, 636 P.2d 874, 874 (1981)*. *Davenport's* claims for fraud,  
consumer fraud, constructive fraud, and civil conspiracy must satisfy *NRCP 9(b)'s*  
heightened pleading standards.

8 (*Davenport v. GMAC Mortg.*, 2013 Nev. Unpub. LEXIS 1457 at \*5; 2013 WL 5437119 (Nev.  
9 2013)).

10       In *Davenport*, the Supreme Court dismissed fraud and consumer fraud claims both because  
11 the plaintiff failed to state the elements of a legally cognizable claim for fraud and consumer  
12 fraud, and because the plaintiff failed to plead his claims with specificity.

13       The Court stated the elements of fraud, as follows:

14       In order to state a claim for fraud, a plaintiff must allege:

15       (1) a false representation made by the defendant; (2) defendant's knowledge or  
16 belief that its representation was false or that defendant has an insufficient basis of  
17 information for making the representation; (3) defendant intended to induce  
plaintiff to act or refrain from acting upon the misrepresentation; and (4) damage to  
the plaintiff as a result of relying on the misrepresentation.

18 (*Davenport v. GMAC Mortg.*, 2013 Nev. Unpub. LEXIS 1457 at \*7; 2013 WL 5437119 (Nev.  
19 2013)) (quoting *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 447, 956 P.2d 1382, 1386 (1998)).

20       The Supreme Court affirmed the dismissal of the fraud claim in *Davenport*, because the plaintiff  
21 failed to allege that defendant, GMAC, made a misrepresentation. *Id.*, 2013 Nev. Unpub. LEXIS  
22 1457 at \*7; 2013 WL 5437119.

23       However, the Court also affirmed the dismissal because the factual allegations supporting  
24 claims for both fraud and consumer fraud were not plead with particularity:

25       Not only did *Davenport* fail to state legally sufficient claims against GMAC for  
26 fraud and consumer fraud, but he did not plead those claims with particularity.  
27 Rather than identifying the time, place, and circumstances of GMAC's alleged  
28

1 deceptions, Davenport lumped GMAC together with the other defendants and  
2 declared that it defrauded him. These conclusory averments do not satisfy *NRC*  
3 *9(b)*.

4 *Id.*, 2013 Nev. Unpub. LEXIS 1457 at \*8-9; 2013 WL 5437119.

5 In the present case, Mineau's counterclaims for fraud and consumer fraud fail to allege the  
6 time, place, and circumstances of any conduct by Kvam. As in *Davenport*, Defendants  
7 counterclaims should be dismissed for this reason alone.

8 With respect to Defendants' fifth counterclaim for deceptive trade practices, Defendants'  
9 claim that Kvam used "coercion, duress, and intimidation through the course of this transaction"  
10 apparently in reference e to NRS 598.0923(4):

11 **NRS 598.0923 "Deceptive trade practice" defined.** A person engages in  
12 a "deceptive trade practice" when in the course of his or her business or occupation  
13 he or she knowingly:

14 . . . .

15 4. Uses coercion, duress or intimidation in a transaction.

16 Mineau did not allege facts sufficient to determine if NRS 598.0923 even applies.  
17 Mineau's reference to "this transaction" apparently is a reference to the joint venture to remodel  
18 and sell the Chicago house. (See Counterclaim, paragraph 49). In contrast, NRS 598.0923 refers  
19 to "business or occupation." Mineau did not allege that the joint venture agreement is part of  
20 Kvam's business or occupation,

21 In addition, Mineau failed to allege the time, place and manner of any coercion, duress or  
22 intimidation. Parsing through Defendants vague factual allegations, the only conduct of Mr.  
23 Kvam that may be seen as part of the house remodel project and either intimidating or coercive, is  
24 the allegation that he "turned off" utilities to the house. However, there is no allegation that  
25 providing power is part of Kvam's "business or occupation," or that such alleged actions were  
26 done "knowingly." Mineau is not a consumer, but joint-venturerer with Kvam in the house  
27 remodel project. NRS Chapter 598 was not intended to apply to the dispute alleged in the  
28

Counterclaim, and even if it were, the factual allegations are devoid of the detail that must support a claim for consumer fraud.

For these reasons, the fifth counterclaim should be dismissed.

In his tenth counterclaim, Mineau asserts a claim for fraud without identifying a misrepresentation. Kvam's alleged action in "turning off" utilities to the Chicago is not based on a misrepresentation; Defendants' sole factual allegation of this incident is the conclusory allegation that Mr. Kvam "wrongfully and fraudulently turned off power to the house . . ." (See Counterclaim, paragraph 17). Defendants do not allege a misrepresentation. Similarly, the allegations regarding claims that might be asserted by non-party Atlas do not involve a misrepresentation, and the allegations regarding non-party process servers harassing Mr. Mineau's wife do not involve a misrepresentation.

The tenth counterclaim for fraud should be dismissed.

D. THE SIXTH COUNTERCLAIM FOR ABUSE OF PROCESS SHOULD BE DISMISSED BECAUSE THE FILING OF A COMPLAINT IS NOT AN ABUSE OF PROCESS, AND BECAUSE DEFENDANTS DO NOT ALLEGE A WILLFUL ACT IN THE USE OF PROCESS

Defendants' sixth counterclaim for abuse of process alleges that "this action" is the abuse of process in that it was instituted for an "ulterior purpose." (See Counterclaim, paragraph 54). Defendants do not allege that Mr. Kvam committed a willful act in the use of process not proper in the regular conduct of the proceeding.<sup>4</sup>

In *Land Baron Invs., Inc. v. Bonnie Springs Family Ltd. P'Ship*, 131 Nev. Adv. Op. 69, 356 P.3d 511(2015), the Nevada Supreme Court stated the elements of a cause of action for abuse

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<sup>4</sup> As discussed below, the alleged intentional harassment of Mr. Mineau's wife by Kvam's licensed process servers are (1) not the alleged actions of Kvam, and (2) may not be attributed to Kvam through any cognizable legal theory.

of process, as follows:

To support an *abuse of process* claim, a claimant must show "(1) an ulterior purpose by the [party abusing the process] other than resolving a legal dispute, and (2) a willful act in the use of the legal process not proper in the regular conduct of the proceeding."

*Id.* at 131 Nev. Adv. Op. 69 at \*19, 356 P.3d 511, 519 (emphasis in original) (citing *LaMantia v. Redisi*, 118 Nev. 27, 31, 38 P.3d 877, 880 (2002)). The Court continued:

[T]he claimant must provide facts, rather than conjecture, showing that the party intended to use the legal process to further an ulterior purpose. *LaMantia*, 118 Nev. at 31, 38 P.3d at 880 (holding that where the party presented only conjecture and no evidence that the opposing party actually intended to improperly use the legal process for a purpose other than to resolve the legal dispute, there was no *abuse of process*). The utilized process must be judicial, as the tort protects the integrity of the court. Furthermore, the tort requires a "willful act," and the majority of courts have held that merely filing a complaint and proceeding to properly litigate the case does not meet this requirement.

We agree with the majority rule that filing a complaint does not constitute *abuse of process*.

*Id.* at 131 Nev. Adv. Op. at \*19-20, 356 P.3d at 519-20) (emphasis in original)

In the present case, Defendants apparently assert that the summons and complaint is the "process" at issue. Under *Land Baron Invs., Inc.*, the filing of a complaint "does not constitute an abuse of process." Defendants also fail to allege any willful act of Mr. Kvam in the use of process. The sixth counterclaim for abuse of process should be dismissed.

E. THE SEVENTH COUNTERCLAIM FOR TRESPASS SHOULD BE DISMISSED BECAUSE KVAM MAY NOT BE HELD LEGALLY RESPONSIBLE FOR THE ALLEGED INTENTIONAL TORTS OF DULY LICENSED PROCESS SERVERS

Mineau's seventh counterclaim for trespass concerns allegations about process servers. The process servers are licensed under NRS 648 and operate as independent contractors. They are not parties to this case; however, their declarations of service are on file and indicate that Brian Mineau refused to accept service. Brian Mineau is the registered agent for Legion, and he uses his

1 home address as the registered address. He is required to have a person available to accept process  
2 under NRS 14.020. He cannot refuse it.<sup>5</sup>

3 Nevertheless, Mineau alleges that Kvam "intentionally caused his agents to physically  
4 enter Mineau's property without permission, after they had been instructed to leave . . ." and that  
5 "Kvam's agents acted intentionally and at Kvam's direction to invaded (sic) Mineau's property."  
6 (See Counterclaim, paragraphs 60 - 61). Kvam is not alleged to have set foot on Mr. Mineau's  
7 property, and it is difficult to see how leaving process on the porch is an invasion of property,  
8 especially in light of the fact that Mineau is required by statute to accept service on behalf of  
9 Legion and cannot tell a process server to leave and refuse process.  
10

11 Perhaps Mineau's seventh counterclaim is based on some misconceived notion of  
12 respondeat superior liability for intentional acts of agents. Mineau failed to allege sufficient facts  
13 to determine that process servers licensed under Chapter 648 operate as "agents" and respondeat  
14 superior liability is limited to employment situations.  
15

16 In *Rockwell v. Sun Harbor Budget Suites*, 112 Nev. 1217 \*; 925 P.2d 1175 (1996), the  
17 Nevada Supreme Court considered whether an apartment operator could be held legally  
18 responsible, under a theory of respondeat superior, and others, for the actions of its security guard  
19 in murdering a resident of the apartment complex. The Court stated:

20 "Respondeat superior liability attaches only when the employee is under the control  
21 of the employer and when the act is within the scope of employment."

22 *Molino v. Asher*, 96 Nev. 814, 817, 618 P.2d 878, 879 (1980). Therefore, an  
23 actionable claim on a theory of respondeat superior requires proof that (1) the actor  
24 at issue was an employee, and (2) the action complained of occurred within the  
25 scope of the actor's employment.

26 (Rockwell v. Sun Harbor Budget Suites, 112 Nev. 1217, 1223; 925 P.2d 1175, 1179).

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27 <sup>5</sup> The court may take judicial notice of matters of public record when ruling on a motion to dismiss. *Niles v. Nat'l*  
28 *Default Servicing Corp.*, 126 Nev. 742, 367 P.3d 804 (2010) (citing *Brelant v. Preferred Equities Corp.*, 109 Nev.  
842, 847, 858 P.2d 1258, 1261 (1993)). This includes judicial notice of Legion's registered agent and registered  
office on file with the Nevada Secretary of State.

1 In the present case, Defendants allege, without a factual basis, that Kvam personally  
2 directed licensed process servers to harass Mr. Mineau's wife in the course of serving process. As  
3 with all of Defendants' tort-related allegations, time, place, manner, and other specifics are simply  
4 left out, resulting in no support for borderline criminal legal conclusions. Kvam did not employ  
5 the process servers. He did not control the details of their work. The process servers were  
6 engaged by undersigned counsel. The licensed process servers themselves are not made parties to  
7 this case. Ironically, Mineaus' seventh counterclaim is an admission that he and wife refused  
8 service, even though they use the residence as the registered address for Legion and are required  
9 by law to have someone there to accept service. These facts are more suggestive of improper  
10 conduct by the Mineaus and Legion than improper conduct by a process server.

11  
12 Kvam cannot be held legally responsible for the alleged intentional conduct and alleged  
13 trespass of the licensed process servers who served Mr. Mineau and Legion, and the seventh  
14 counterclaim should be dismissed.

15  
16 F. THE EIGHTH COUNTERCLAIM FOR TRESPASS TO CHATTELS SHOULD  
17 BE DISMISSED BECAUSE THERE ARE NO ALLEGATIONS OF CHATTELS OR  
18 TRESPASS

19 Mineau's eighth counterclaim is for trespass to chattels. Kvam is truly confused by this  
20 counterclaim, as there is no allegation that he ever stepped foot in the May Street house, and no  
21 chattels are identified anywhere in the 99 paragraphs of Mineau's Answer and Counterclaims.  
22 The house project is not finished, and it is difficult to imagine why Mineau would have personal  
23 property in an unfinished house in Chicago that he is trying to flip and sell. In addition, the eighth  
24 counterclaim for trespass to chattels is based on alleged conduct against Atlas, which is not even a  
25 party to this case, and is not alleged to have caused any damage to Atlas or any other person or  
26 entity. Mineau essentially alleges that he paid off a legitimate debt of Atlas in order to avoid  
27  
28



1 damages to Atlas, Mineau, or Legion. Other than Atlas's money, no other chattels are identified,  
2 and it is up to Mineau to settle his accounts with Atlas. The eighth counterclaim should be  
3 dismissed.

4 G. DISMISSAL OF THE NINTH COUNTERCLAIM IS APPROPRIATE BECAUSE  
5 THE COUNTERCLAIM FAILS TO ALLEGE THAT KHAM EXERCISED ANY ACTS OF  
6 DOMINION AND CONTROL AND LAPSES INTO ADDITIONAL ALLEGATIONS  
7 CONCERNING ATLAS.  
8

9 Mineau's ninth counterclaim is for conversion. A claim for conversion requires the  
10 following elements:

- 11 1. That the Defendants committed a distinct act of dominion wrongfully exerted over  
12 the Plaintiff's personal property, and
- 13 2. The act was in denial of, or inconsistent with, the Plaintiff's title or rights therein,  
14 or  
15
- 16 3. The act was in derogation, exclusion, or defiance of the Plaintiff's title or rights in  
17 the personal property.

18 *See Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 606, 5 P.3d 1043, 1048 (2000)  
19 ("Conversion is a distinct act of dominion wrongfully exerted over another's personal property in  
20 denial of, or inconsistent with his title or rights therein or in derogation, exclusion, or defiance of  
21 such title or rights."); *Edwards v. Emperor's Garden Restaurant*, 122 Nev. 317, 328, 130 P.3d  
22 1280, 1287 (2006) ("Conversion is a distinct act of dominion wrongfully exerted over personal  
23 property in denial of, or inconsistent with, title or rights therein or in derogation, exclusion or  
24 defiance of such rights."). Conversion requires major or permanent damage or interference with  
25 personal property, and is not available for minor damage or real property. *Id.*  
26

27 Mineau's theory of conversion fails on all counts. His claim for conversion concerns  
28

1 alleged damage to real property. Although he also alleges conversion of personal property, he  
2 failed to identify any such property or major damage. Through it all, he failed to allege any acts  
3 of dominion and control by Kvam. His claim for conversion becomes hopelessly confused when  
4 he lapses into allegations concerning a non-party, Altas. For these reasons, Mineau's ninth  
5 counterclaim for conversion should be dismissed.

6  
7 H. THE ELEVENTH COUNTERCLAIM FOR NEGLIGENCE SHOULD BE  
8 DISMISSED FOR LACK OF DUTY AND PURSUANT TO THE ECONOMIC LOSS  
9 DOCTRINE

10 Mineau's eleventh counterclaim is for negligence. A cause of action for negligence  
11 requires:

- 12 1. Defendant owed a duty of care to Plaintiff;
- 13 2. Defendant breached that duty;
- 14 3. The breach was the legal cause of plaintiff's injuries; and
- 15 4. Plaintiff suffered damages.

16  
17 *Scialaba v. Brandise Constr. Co.*, 112 Nev. 965, 921 P.2d 928 (1996). Although Mineau included  
18 a generic allegation that "Kvam owed Mineau and Legion a duty to act with reasonable care to  
19 avoid damaging Mineau, Legion, or their property," there is no allegation of any duty owed by  
20 Kvam that he could have breached. The closest Mineau comes to alleging a breach of a duty is the  
21 allegation in par. 17 of his counterclaims that Kvam turned off the power. However, Mineau  
22 never alleged that Kvam was at the May Street house or that Kvam had a duty to provide power.  
23 Rather, Mineau largely admits that the agreement was for Kvam to provide funding for the project,  
24 which Mineau admits he did. As the project manager, Mineau's allegation of negligence against  
25 Kvam is simply to divert attention away from his own negligence by failing to complete the  
26 project, and apparently, by failing to maintain power to the project, as well.

1 Mineau's eleventh counterclaim is also hopelessly confused by including allegations  
2 concerning Atlas, a non-party.

3 Mineau's eleventh counterclaim is also barred by the economic loss doctrine which was  
4 adopted in Nevada in *Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000). The  
5 plaintiff homeowners in *Calloway* sued the City of Reno and framing subcontractors who had  
6 performed work on their homes, seeking recovery for alleged construction defects in the homes.  
7 The plaintiffs in part asserted tort theories of recovery, but alleged only economic losses. The  
8 District Court dismissed the plaintiffs' tort claims based on the economic loss rule.  
9

10 The Nevada Supreme Court affirmed the decision of the District Court to dismiss  
11 plaintiffs' tort claims pursuant to the economic loss rule, explaining:

12 Under the economic loss doctrine 'there can be no recovery in tort for purely  
13 economic losses.' American Law of Products Liability (3d), § 60:39, at 69 (1991).  
14 Purely economic loss is generally defined as 'the loss of the benefit of the user's  
15 bargain... including... pecuniary damage for inadequate value, the cost of repair  
16 and replacement of the defective product, or consequent loss of profits, without any  
17 claim of personal injury or damage to other property. *Id.* § 60:36, at 66.  
18 *Calloway*, 116 Nev. at 257.<sup>6</sup>

19 \* \* \* \*

20 The economic loss doctrine marks the fundamental boundary between contract law,  
21 which is designed to enforce the expectancy interests of the parties, and tort law,  
22 which imposes a duty of reasonable care and thereby encourages citizens to avoid  
23 causing physical harm to others.

24 \* \* \* \*

25 Under the economic loss doctrine 'there can be no recovery in tort for purely  
26 economic losses. *Calloway*, 116 Nev. at 256, 993 P.2d at 1263 (*quoting* Sidney R.  
27 Barrett, Jr., *Recovery of Economic Loss in Tort for Construction Defects: A*  
28 *Critical Analysis*, 40 S.C.L.Rev. 891, 894 (1989)).

---

<sup>6</sup> The Court made it clear that the property damage referred to as "other property" is damage to "property other than the defective entity itself." *Calloway*, 116 Nev. at 262. In doing so, the Court expressly rejected the Appellants argument that a defective component of house that causes damage to other components of the house qualifies as damage to "other property."

1 The Court also noted that the rule "shields a defendant from unlimited liability for all of  
2 the economic consequences of a negligent act, particularly in a commercial or professional setting,  
3 and thus ... keeps the risk of liability reasonably calculable." *Id.*, 993 P.2d at 1266 (internal  
4 quotation marks omitted).  
5

6 The economic loss doctrine is not an affirmative defense. The economic loss doctrine  
7 delineates the distinction between contract claims and tort claims, and bars plaintiffs from  
8 recovering in tort what they can recover in contract. It "primarily functions to bar the recovery of  
9 purely monetary losses in certain products liability and unintentional tort actions." *Davis v.*  
10 *Beling*, 278 P.3d 501, 514, 128 Nev. Adv. Op. 28 (2012). "[W]hen economic loss occurs as a  
11 result of negligence in the context of commercial activity, contract law can be invoked to enforce  
12 the quality expectations derived from the parties' agreement." *Terracon Consultants v. Mandalay*  
13 *Resort*, 206 P.3d 81, 87, 125 Nev. 66, 75 (2009). Additionally, the doctrine is based on balancing  
14 the need for useful economic activity with plaintiff's recovery and to prevent tort claims from  
15 deterring useful economic activity. *See id.* "Intentional torts are not barred by the economic loss  
16 doctrine." *Halcrow, Inc. v. Eighth Judicial Dist. Court of State*, 302 P.3d 1148, 1155, 129 Nev.  
17 Adv. Op. 42 (2013). As such, the economic loss doctrine does not bar contract claims or  
18 intentional torts.  
19  
20

21 In this case the expectations of the parties are defined by their joint venture agreement,  
22 which precludes Mineau's separate counterclaim for negligence.

### 23 **III. CONCLUSION**

24 The only duty imposed on Kvam pursuant to the parties' joint venture agreement was  
25 funding for the project at 7747 May Street, Chicago, Illinois, which he undeniably provided.  
26 Mineau has not kept of his end of the bargain and has not completed project, has not provided a  
27 completion date, and has not repaid Mineau any part of his investment. Mineau has tried to punish  
28

Kvam by filing eleven specious counterclaims after Kvam predictably demanded his money back. The counterclaims lack essential elements of the causes of action, lack any allegations of time, place and manner of the alleged wrongs, and include confusing allegations regarding non-parties such as process servers and Atlas.

For the foregoing reasons, Mineau's counterclaims four through eleven should be dismissed with prejudice, or alternatively, Mineau should be required to provide a more definite statement.

**AFFIRMATION**

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated this 25<sup>th</sup> day of June, 2018.

MATUSKA LAW OFFICES, LTD.



By:

MICHAEL L. MATUSKA, SBN 5711  
Attorneys for Plaintiff, JAY KVAM,  
individually and derivatively on behalf  
the unincorporated joint venture identified as  
7747

1 **CODE: 2490**

2 Michael L. Matuska, Esq. SBN 5711  
3 MATUSKA LAW OFFICES, LTD.  
4 2310 South Carson Street, Suite 6  
5 Carson City, NV 89701  
6 Attorneys for Plaintiff

7 **THE SECOND JUDICIAL DISTRICT COURT OF NEVADA**

8 **IN AND FOR THE COUNTY OF WASHOE**

9 JAY KVAM,

Plaintiff,

Case No. CV18-00764

10 v.

Dept. No. 3

11 BRIAN MINEAU; LEGION INVESTMENTS,  
12 LLC; 7747 S. May Street, an Unincorporated  
13 Joint Venture; and DOES I-X, inclusive,

Defendants.

14 **MOTION FOR DISSOLUTION**

15 COMES NOW Plaintiff, JAY KVAM, by and through his counsel of record, Matuska Law  
16 Offices, Ltd., Michael L. Matuska, and hereby moves for dissolution of the Unincorporated Joint  
17 Venture identified as 7747 S. May Street. This motion is made and based on the points and  
18 authorities attached hereto, the affidavit of Jay Kvam and attached exhibits submitted herewith,  
19 and all other pleadings, exhibits and documents of record.

20 Dated this 11<sup>th</sup> day of July, 2018.

21 MATUSKA LAW OFFICES, LTD.

22 *Michael L. Matuska*

23 By:

24 MICHAEL L. MATUSKA, SBN 5711  
25 Attorneys for Plaintiff, JAY KVAM,  
26 individually and derivatively on behalf  
27 the unincorporated joint venture identified as  
28 7747

1                   **POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR DISSOLUTION**

2                   **I.       BACKGROUND**

3                   On or about February 14, 2017, the Plaintiff Jay Kvam ("Kvam") entered into an  
4                   agreement (the "Agreement") with Defendants Brian Mineu ("Mineau") and Legion Investments,  
5                   LLC ("Legion") concerning property located at 7747 May Street, Chicago, Illinois (the  
6                   "Property") as follows:

7                               Terms of Agreement between Legion Investments LLC (its Members) and  
8                               Jay Kvam (Initial Funding Member of Same)  
9                               Re: 7747 May Street, Chicago, Illinois.

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

20                   See Affidavit of Jay Kvam ("Kvam Aff.") and Ex. "1" attached thereto.

21                   Mineau is the project manager, even though that is not expressed in the Agreement. Kvam  
22                   funded \$93,781.31 toward the purchase and renovation of the Property as shown on the summary  
23                   attached Ex. "2" to his affidavit. Kvam does not know whether Mineau and Legion funded their  
24                   share of the project draws, and they have refused Kvam's request for information (Kvam Aff. and  
25                   Ex. "3" attached thereto). The project has experienced multiple difficulties and delays and does  
26                   not have a completion date. Kvam has not been paid the annual return called for in the Agreement  
27                   or refunded any part of his investment. (Kvam Aff.) It is unclear whether Mineau has the  
28                   motivation or financial ability to complete the project.

29                   **II.       ARGUMENT**

30                               A.       Joint Venture Agreement v. Membership Agreement

31                   The Agreement is not the model of clarity. The Agreement reads, in part, as a membership  
32                   agreement whereby Kvam acquired a 1/3<sup>rd</sup> membership interest in Legion. Legion is Mineau's

1 limited liability company that predates the Agreement and owns multiple assets. (Kvam Aff.).  
2 Consequently, an interpretation of the Agreement that gives Kvam 1/3<sup>rd</sup> ownership in Legion  
3 would be very favorable to Kvam. As such, Kvam does not believe that Mineau intended to  
4 transfer ownership in Legion. (Kvam Aff.). Rather, the Agreement is more reasonably construed  
5 as a joint venture agreement between Kvam on one hand, and Mineau and Legion on the other  
6 hand. This interpretation is supported by Uniform Partnership Act.

7 A joint venture is essentially a single-purpose partnership, and the principles of partnership  
8 law apply to joint ventures. *Clark v. Jdi Loans, LLC* (In re Clubs), 130 Nev. Adv. Op. 14, 319  
9 P.3d 625, 631 (2014). As such, the Agreement in this case should be analyzed under NRS  
10 Chapter 87.

11 Chapter 87 actually contains two (2) distinct version of the Uniform Partnership Act. NRS  
12 87.001 – 87.430 are identified as “the Uniform Partnership Act” (NRS 87.010) and apply to  
13 partnerships that were formed before July 1, 2006, or if formed after July 1, 2006, elect to be  
14 governed by the Uniform Partnership Act. NRS 87.4301 – 87.565 comprise the Uniform  
15 Partnership Act – 1997 (hereafter, “UPA 1997”) and apply to partnerships that were created on  
16 after July 1, 2006, or if created prior to July 1, 2006, elect to be governed by the UPA 1997. NRS  
17 87.4314. The joint venture in this case was formed in 2017 and did not elect to be governed by  
18 the earlier UPA, hence, it is governed by the UPA 1997.

19 B. Presumption of Partnership – NRS 87.4322

20 **NRS 87.4322 Formation of partnership.**

21 1. Except as otherwise provided in subsection 2, the association of two or  
22 more persons to carry on as co-owners of a business for profit forms a  
23 partnership, whether or not the persons intend to form a partnership.

24 2. An association formed under a statute other than NRS 87.4301 to  
25 87.4357, inclusive, a predecessor statute or a comparable statute of another  
26 jurisdiction is not a partnership under NRS 87.4301 to 87.4357, inclusive.

27 3. In determining whether a partnership is formed, the following rules apply:

28 (a) Joint tenancy, tenancy in common, tenancy by the entireties, joint  
property, common property or part ownership does not by itself establish a  
partnership, even if the co-owners share profits made by the use of the property.

(b) The sharing of gross returns does not by itself establish a partnership,  
even if the persons sharing them have a joint or common right or interest in  
property from which the returns are derived.



(c) A person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment:

- (1) Of a debt by installments or otherwise;
- (2) For services as an independent contractor or of wages or other compensation to an employee;
- (3) Of rent;
- (4) Of an annuity or other retirement or health benefit to a beneficiary, representative or designee of a deceased or retired partner;
- (5) Of interest or other charge on a loan, even if the amount of payment varies with the profits of the business, including a direct or indirect present or future ownership of the collateral, or rights to income, proceeds or increase in value derived from the collateral; or
- (6) For the sale of the goodwill of a business or other property by installments or otherwise.

(NRS 87.4322) (emphasis added)

The Agreement expressly provides that Kvam and Mineau are to share net profits; as such, they are presumed to be partners under NRS 87.4322(3)(c), and none of the other exceptions to this presumption apply.

C. Partnership Property

“Property is presumed to be partnership property if purchased with partnership assets, even if not acquired in the name of the partnership or of one or more partners with an indication in the instrument transferring title to the property of the person’s capacity as a partner or of the existence of a partnership.” NRS 87.4324(3). The property in this case was purchased with joint venture funding and is therefore considered be partnership property.

D. Duty to Account

Members of a joint venture owe each other fiduciary duties, including the duty of loyalty for the duration of the venture. *Brinkerhoff v. Foote*, 2016 WL 7439357 (No. 68851, December 22, 2016) (unpublished); *Leavitt v. Leisure Sports, Inc.*, 103 Nev. 81, 86, 734 P.2d 1221, 1224 (1987); see also NRS 87.4336.

**NRS 87.4335 Rights and duties of partner with respect to information.**

1. A partnership shall keep its books and records, if any, at its chief executive office.
2. A partnership shall provide partners and their agents and attorneys access to its books and records. It shall provide former partners and their agents and attorneys access to books and records pertaining to the period during which they

were partners. The right of access provides the opportunity to inspect and copy books and records during ordinary business hours. A partnership may impose a reasonable charge, covering the costs of labor and material, for copies of documents furnished.

3. Each partner and the partnership shall furnish to a partner, and to the legal representative of a deceased partner or partner under legal disability:

(a) Without demand, any information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties under the partnership agreement or NRS 87.4301 to 87.4357, inclusive; and

(b) On demand, any other information concerning the partnership's business and affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.

Despite the foregoing, Mineau and Legion have failed and refused to account to Kvam and disavowed their fiduciary duties. (See Kvam Aff. and Exs. "4" and "5"). Their attorney has gone so far state that "Mr. Kvam is not entitled to any 'disclosures' or 'an accounting' from Brian Mineau or Legion Investments . . ." For these reasons, Kvam has dissociated from the joint venture and brought this action for dissolution and other forms of relief.

#### E. Dissolution

"A partner is dissociated from a partnership upon the occurrence of any of the following events: 1. The partnership's having notice of the partner's express will to withdraw as a partner or on a later date specified by the partner." NRS 87.4343(1). "A partner has the power to dissociate at any time, rightfully or wrongfully, by express will pursuant to subsection 1 of NRS 87.4343." NRS 87.4344(1). Kvam provided multiple notices of dissociation. (See Kvam Aff. and Ex. "4"). Because Kvam dissociated under NRS 87.4343 subpart 1, his dissociation resulted in the dissolution of the joint venture. He also has the right to request judicial dissolution due to the failure of the joint venture and the failure of Legion and Mineau to account.

**NRS 87.4351 Events causing dissolution and winding up of partnership business. A partnership is dissolved, and its business must be wound up, only upon the occurrence of any of the following events:**

**1. In a partnership at will, the partnership's having notice from a partner, other than a partner who is dissociated under subsections 2 to 10, inclusive, of NRS 87.4343, of that partner's express will to withdraw as a partner, or on a later date specified by the partner;**

2. In a partnership for a definite term or particular undertaking:

(a) Within 90 days after a partner's dissociation by death or otherwise under subsections 6 to 10, inclusive, of NRS 87.4343 or wrongful dissociation under

subsection 2 of NRS 87.4344, the express will of at least half of the remaining partners to wind up the partnership business, for which purpose a partner's rightful dissociation pursuant to subparagraph (1) of paragraph (b) of subsection 2 of NRS 87.4344 constitutes the expression of that partner's will to wind up the partnership business;

(b) The express will of all of the partners to wind up the partnership business; or

(c) The expiration of the term or the completion of the undertaking;

3. An event agreed to in the partnership agreement resulting in the winding up of the partnership business;

4. An event that makes it unlawful for all or substantially all of the business of the partnership to be continued, but a cure of illegality within 90 days after notice to the partnership of the event is effective retroactively to the date of the event for purposes of this section;

5. On application by a partner, a judicial determination that:

(a) The economic purpose of the partnership is likely to be unreasonably frustrated;

(b) Another partner has engaged in conduct relating to the partnership business which makes it not reasonably practicable to carry on the business in partnership with that partner; or

(c) It is not otherwise reasonably practicable to carry on the partnership business in conformity with the partnership agreement; or

6. On application by a transferee of a partner's transferable interest, a judicial determination that it is equitable to wind up the partnership business:

(a) After the expiration of the term or completion of the undertaking, if the partnership was for a definite term or particular undertaking at the time of the transfer or entry of the charging order that gave rise to the transfer; or

(b) At any time, if the partnership was a partnership at will at the time of the transfer or entry of the charging order that gave rise to the transfer.

Because the joint venture is dissolved, it must be wound up. "Subject to subsection 2, a partnership continues after dissolution only for the purpose of winding up its business. The partnership is terminated when the winding up of its business is completed." NRS 87.4352(1).

WHEREFORE, Kvam respectfully requests an order declaring that the unincorporated joint venture referred to as 7747 S. May Street was dissolved on Kvam's dissociation on March 14, 2018 and must be wound up, ordering Mineau and Legion to provide a complete accounting and winding up plan within thirty (30) days, and scheduling a hearing on the winding up plan within approximately forty-five (45) days.

1                   **Affirmation**

2                   The undersigned does hereby affirm that the preceding document does not contain the  
3 social security number of any person.

4                   Dated this 11<sup>th</sup> day of July, 2018.

6                   MATUSKA LAW OFFICES, LTD.

7                   

8                   By:

9                   MICHAEL L. MATUSKA, SBN 5711  
10                  Attorneys for Plaintiff, JAY KVAM,  
11                  individually and derivatively on behalf  
12                  the unincorporated joint venture identified as  
13                  7747

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Matuska Law Offices, Ltd. and that on the 11<sup>th</sup> day of July 2018, I served a true and correct copy of the preceding document entitled **MOTION FOR DISSOLUTION** as follows:

Austin K. Sweet, Esq.  
GUNDERSON LAW FIRM  
3895 Warren Way  
Reno, NV 89509  
[asweet@gundersonlaw.com](mailto:asweet@gundersonlaw.com)

☐ **BY U.S. MAIL:** I deposited for mailing in the United States mail, with postage fully prepaid, an envelope containing the above-identified document(s) at Carson City, Nevada, in the ordinary course of business.

☒ **BY CM/ECF:**

☐ **BY PERSONAL SERVICE:** I personally delivered the above-identified document(s) by hand delivery to the office(s) of the person(s) named above.

☐ **BY FACSIMILE:**

☐ **BY FEDERAL EXPRESS ONE-DAY DELIVERY.**

☐ **BY MESSENGER SERVICE:** I delivered the above-identified document(s) to Reno-Carson Messenger Service for delivery.

/s/ Michael L. Matuska  
MICHAEL L. MATUSKA

1 **CODE 2645**

2 GUNDERSON LAW FIRM

3 Austin K. Sweet, Esq.

4 Nevada State Bar No. 11725

5 Mark H. Gunderson, Esq.

6 Nevada State Bar No. 2134

7 3895 Warren Way

8 Reno, Nevada 89509

9 Telephone: 775.829.1222

10 *Attorneys for Brian Mineau and Legion Investments*

11  
12 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**  
13 **IN AND FOR THE COUNTY OF WASHOE**

14 JAY KVAM,

Case No. CV18-00764

15 Plaintiff / Counterdefendant,

Dept. No. 3

16 vs.

17 BRIAN MINEAU; LEGION INVESTMENTS,  
18 LLC; 7747 S. May Street, an Unincorporated  
19 Joint Venture; and DOES I-X, inclusive,

20 Defendants / Counterclaimants.  
21 \_\_\_\_\_/

22 **OPPOSITION TO MOTION TO DISMISS COUNTERCLAIM,**  
23 **OR ALTERNATIVELY, FOR A MORE DEFINITE STATEMENT**

24 Defendants / Counterclaimants BRIAN MINEAU ("Mineau") and LEGION  
25 INVESTMENTS, LLC ("Legion"), by and through their counsel of record, Austin K. Sweet, Esq.,  
26 and Mark H. Gunderson, Esq., submit the following Opposition to the *Motion to Dismiss*  
27 *Counterclaim, or Alternatively, for a More Definite Statement* ("Motion") filed by Plaintiff /  
28 Counterdefendant JAY KVAM ("Kvam"). This Opposition is made and based upon the following  
memorandum of points and authorities, the pleadings on file in this case, and any oral argument this  
Court wishes to entertain.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Mineau and Legion's Counterclaim is adequately pled with sufficient specificity. Kvam  
4 evidently disagrees with the allegations in the Counterclaim and believes he can successfully defend  
5 those claims at trial. However, Kvam's arguments only emphasize the need to litigate these claims  
6 on the merits. The Counterclaim is properly pled and should not be dismissed.

7 The Motion should be denied.

8 **II. LEGAL STANDARD**

9 A complaint will not be dismissed for failure to state a claim unless it appears beyond a doubt  
10 that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him  
11 to relief. Simpson v. Mars Inc., 113 Nev. 188, 929 P.2d 966 (1997). The court must construe the  
12 pleading liberally and draw every fair intendment in favor of the plaintiff. Capital Mtg. Holding v.  
13 Hahn, 101 Nev. 314, 705 P.2d 126 (1985).

14 A pleading which sets forth a claim for relief shall contain (1) a short and plain statement of  
15 the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief  
16 the pleader seeks. NRCP 8(a). Courts liberally construe pleadings to place into issue matters which  
17 are fairly noticed to the adverse party. Hay v. Hay, 100 Nev. 196, 678 P.2d 672 (1984).

18 In all averments of fraud, the circumstances constituting the fraud shall be stated with  
19 particularity. NRCP 9(b). Malice, intent, knowledge, and other condition of mind of a person may  
20 be averred generally. Id. This level of pleading is required "in order to afford adequate notice to the  
21 opposing part[ies], so that they can defend against the charge and not just deny that they have done  
22 anything wrong." Rocker v. KPMG LLP, 122 Nev. 1185, 1192, 148 P.3d 703, 707-08  
23 (2006) (abrogated on other grounds by Buzz Stew. LLC v. City of N. Las Vegas, 124 Nev. 224, 181  
24 P.3d 670 (2008)).

25 **III. ARGUMENT**

26 Kvam attacks the Fourth through Eleventh Claims for Relief in the Counterclaim. Kvam does  
27 not dispute that the first three claims for relief in the Counterclaim are adequately pled. Each  
28 challenged claim for relief will be addressed in turn.

1           ***A. The Fourth Claim for Relief Is Adequately Pled.***

2           As alleged in the Counterclaim, Mineau and Legion enjoyed prospective economic  
3 relationships with various third parties involving the marketing and sale of the House. Counterclaim  
4 ¶ 39. Kvam knew of these relationships. *Id.* ¶ 40. In taking the actions described in the Counterclaim  
5 (including (1) inhibiting Mineau's and Legion's accessibility to cash by improperly paying off the  
6 Atlas loan and (2) turning off the heat to the House in the winter without notifying Legion or Mineau,  
7 causing the pipes to freeze, burst, and flood the house), Kvam intended to harm Mineau and Legion  
8 by preventing and/or interfering with those relationships. *Id.* ¶ 41. Based upon these allegations, the  
9 Fourth Claim for Relief (Intentional Interference with Prospective Economic Advantage) is  
10 adequately pled.

11           In the Motion, Kvam argues that the Counterclaim is inadequately pled because Mineau and  
12 Legion do not specifically identify the parties who expressed interest in purchasing the House or the  
13 terms of a purchase offer, nor do they specifically quantify the damages they have suffered. Motion  
14 at 8:24 – 9:16. However, such specificity is not required under the notice pleading standard of NRC  
15 8(a). Mineau and Legion have sufficiently pled their Fourth Claim for Relief. Kvam's arguments  
16 that he would not have "sabotaged a project he had invested nearly \$100,000 in to" or that he  
17 considers it "unlikely that there would be any purchase offers" go to the merits of the dispute and  
18 should be left for trial.

19           For these reasons, the Motion should be denied. However, if this Court agrees that the Fourth  
20 Claim for Relief lacks sufficient specificity, Mineau and Legion request leave to amend their  
21 Counterclaim to include additional details as necessary.

22           ***B. The Fifth and Tenth Claims for Relief Are Adequately Pled.***

23           As alleged in the Counterclaim, Mineau and Legion entered into a business transaction (the  
24 Agreement) with Kvam that is subject to the provisions of the Deceptive Trade Practices Act, NRS  
25 Chapter 598. Counterclaim ¶ 48. In taking the actions described in the Counterclaim (including (1)  
26 inhibiting Mineau's and Legion's accessibility to cash by improperly paying off the Atlas loan and  
27 (2) turning off the heat to the House in the winter without notifying Legion or Mineau, causing the  
28 pipes to freeze, burst, and flood the house; (3) threatening to further sabotage the project or initiate



1 baseless litigation unless Mineau and Legion agreed to pay Kvam more than he is owed, sooner than  
2 he is owed; and (4) threatening and intimidating Mineau's family to coerce settlement), Kvam has  
3 engaged in deceptive trade practices. Id. ¶ 49. Based upon these allegations, the Fifth Claim for  
4 Relief (Deceptive Trade Practices) is adequately pled.

5 As further alleged in the Counterclaim, Kvam intentionally, deceptively, and fraudulently  
6 exercised dominion and control of Legion's assets by intentionally turning off the power to the House  
7 while deceptively and fraudulently concealing his actions from Mineau and Legion. Counterclaim  
8 ¶¶ 17; 85. Kvam also intentionally, deceptively, and fraudulently accessed Atlas's online banking  
9 account and engaged in unauthorized banking transactions to the detriment of Mineau and Legion.  
10 Id. ¶¶ 16; 86; 87. Based upon these allegations, the Tenth Claim for Relief (Fraud) is adequately  
11 pled.

12 Kvam moves to dismiss the Fifth and Tenth Claims for Relief based upon a lengthy discussion  
13 of an unpublished decision of the Nevada Supreme Court from 2013. Motion at 9:27 – 11:7.  
14 Unpublished decisions issued before January 1, 2016, may not be cited for any persuasive or  
15 precedential purpose. NRAP 36(c). Kvam's reference to and discussion of Davenport v. GMAC  
16 Mortg., No. 56697, 2013 WL 5437119 (Nev. Sept. 25, 2013) should be disregarded in its entirety.  
17 Regardless, unlike the plaintiff in Davenport, Mineau and Legion have very specifically identified  
18 the actions and conduct taken by Kvam which constituted deceptive trade practices and fraud.

19 Kvam next asserts that his relationship with Mineau and Legion was a joint venture, and then  
20 argues that NRS Chapter 598 does not apply to joint ventures. Motion at 11:11 – 12:3. Mineau and  
21 Legion dispute having a joint venture with Kvam; regardless, Kvam offers no justification or citation  
22 for his bald assertion that NRS Chapter 598 does not apply to joint ventures.

23 Finally, Kvam argues that the Counterclaim fails to state a claim for fraud because Mineau  
24 and Legion do not allege a misrepresentation. 12:9. Mineau and Legion's Tenth Claim for Relief is  
25 not based upon any fraudulent misrepresentations; rather, it is based upon Kvam's fraudulent conduct  
26 as alleged in the Counterclaim and reiterated above.

27 ///

28 ///

1 For these reasons, the Motion should be denied. However, if this Court agrees that the Fifth  
2 or Tenth Claims for Relief lack sufficient specificity, Mineau and Legion request leave to amend their  
3 Counterclaim to include additional details as necessary.

4 ***C. The Sixth Claim for Relief Is Adequately Pled.***

5 As alleged in the Counterclaim, Kvam is using the statutes and laws of the State of Nevada  
6 for an ulterior purpose and for private gain by wrongfully initiating, prosecuting, and otherwise using  
7 this action not to resolve a legitimate legal dispute, but instead to force Mineau and Legion to buy  
8 him out of the Agreement, pay him more than he is entitled under the Agreement, and/or pay him  
9 sooner than he is entitled under the Agreement. Counterclaim ¶ 54. Specifically, the Counterclaim  
10 alleges that Kvam caused his process servers to harass, threaten, and intimidate Mineau's family. Id.  
11 ¶ 18. Since the Counterclaim was filed, Kvam has also attempted to use this action to discover  
12 Legion's historical financial records, bank records, and tax returns, which have absolutely no bearing  
13 on this case, and to force a liquidation of the House sooner than required under the Agreement. See  
14 e.g., Motion for Dissolution filed by Kvam July 11, 2018. Based upon these allegations, the Sixth  
15 Claim for Relief (Abuse of Process) is adequately pled.

16 Kvam moves to dismiss the Sixth Claim for Relief upon the argument that the filing of a  
17 complaint itself does not constitute an abuse of process. Motion at 12:24 – 13:20. However, as  
18 explained above and in the Counterclaim, the abuse of action claim does not arise solely out of the  
19 filing of the complaint. This argument is therefore inapposite.

20 For these reasons, the Motion should be denied. However, if this Court agrees that the Sixth  
21 Claim for Relief lacks sufficient specificity, Mineau and Legion request leave to amend their  
22 Counterclaim to include additional details as necessary, including allegations regarding to acts taken  
23 since the Counterclaim was filed.

24 ***D. The Seventh Claim for Relief Is Adequately Pled.***

25 As alleged in the Counterclaim, Kvam intentionally caused his agents to physically enter  
26 Mineau's property without permission, after they had been instructed to leave Mineau's property, and  
27 without legal purpose or justification, thus constituting a trespass. Counterclaim ¶ 60. Based upon  
28 these allegations, the Seventh Claim for Relief (Trespass) is adequately pled.

1 In his Motion, Kvam argues that he should not be held liable for the conduct of his agents.  
2 This argument contradicts basic agency law. A principal is bound by acts of its agent while acting in  
3 the course of his agency, and a principal is liable for those acts within the scope of the agent's  
4 authority. Nevada Nat. Bank v. Gold Star Meat Co., 89 Nev. 427, 429, 514 P.2d 651, 653 (1973).

5 Kvam goes on to assert, without any supporting evidence whatsoever, various extraneous  
6 facts which he claims justify his agents' actions. Kvam claims, among other things, that the process  
7 servers are licensed under NRS Chapter 648, that Mineau "refused to accept service," that leaving  
8 process on the porch is not an invasion of property, and that the process servers were hired by Kvam's  
9 attorney, not Kvam. None of these allegations are alleged in the Counterclaim, nor are they supported  
10 by any evidence or affidavits; thus, these additional alleged facts are insufficient to warrant dismissal.  
11 Regardless, none of these factual allegations defeat the allegations of the Counterclaim: whether the  
12 process servers were licensed does not excuse their trespass, Mineau was never required to "accept"  
13 service, and the *Declarations of Service* specifically state that the process servers returned to  
14 Mineau's property "per the client's instructions." These allegations are more than adequate to sustain  
15 a claim for trespass and only emphasize the need to litigate this dispute on the merits.

16 For these reasons, the Motion should be denied. However, if this Court agrees that the  
17 Seventh Claim for Relief lacks sufficient specificity, Mineau and Legion request leave to amend their  
18 Counterclaim to include additional details as necessary.

19 ***E. The Eighth Claim for Relief Is Adequately Pled.***

20 As alleged in the Counterclaim, Kvam intentionally turned off the power to the House without  
21 notifying Mineau or Legion, causing the pipes to freeze, burst, and flood the House. Counterclaim ¶  
22 18. Through these actions, Kvam intentionally impaired the condition, quality, and value of the  
23 House, its components, and the personal property within the House. Id. ¶ 66. Furthermore, Kvam  
24 intentionally accessed Atlas's bank account and engaged in unauthorized online banking transactions  
25 on Atlas's behalf, causing Atlas's operating account to be overdrawn. Id. ¶ 16. This forced Mineau  
26 and Legion to liquidate other assets to provide Atlas with adequate operating funds and avoid drastic  
27 financial and business consequences. Id. ¶ 69. Based upon these allegations, the Eighth Claim for  
28 Relief (Trespass to Chattels) is adequately pled.

1 Kvam argues that the Eighth Claim for Relief should be dismissed because “it is difficult to  
2 imagine why Mineau would have personal property in an unfinished house in Chicago that he is  
3 trying to flip and sell.” Motion at 15:23-24. Anything in the House when the flood occurred which  
4 was not a fixture of the House or not yet permanently affixed to the House, including any Construction  
5 materials, tools, and supplies, constitutes personal property. Kvam’s inability to imagine the types  
6 of personal property that would be damaged when a partially constructed home floods does not excuse  
7 his improper conduct.

8 Kvam next argues that the Counterclaim does not allege that Kvam’s conduct with respect to  
9 Atlas “is not alleged to have caused any damage to Atlas or any other person or entity.” Motion at  
10 15:24-28. On the contrary, the Counterclaim specifically alleges that, because of Kvam’s  
11 unauthorized conduct, Mineau and Legion were forced to liquidate their own assets to infuse Atlas  
12 with the operating capital necessary to avoid drastic financial and business consequences.  
13 Counterclaim ¶ 69.

14 For these reasons, the Motion should be denied. However, if this Court agrees that the Eighth  
15 Claim for Relief lacks sufficient specificity, Mineau and Legion request leave to amend their  
16 Counterclaim to include additional details as necessary.

17 *F. The Ninth Claim for Relief Is Adequately Pled.*

18 As alleged in the Counterclaim, Kvam intentionally turned off the power to the House without  
19 notifying Mineau or Legion, causing the pipes to freeze, burst, and flood the House. Counterclaim ¶  
20 18. Through these actions, Kvam seriously interfered with Legion’s rights in the House, its  
21 components, and the personal property within the House. *Id.* ¶ 75. Furthermore, Kvam intentionally  
22 accessed Atlas’s bank account and engaged in unauthorized online banking transactions on Atlas’s  
23 behalf, causing Atlas’s operating account to be overdrawn. *Id.* ¶ 16. This forced Mineau and Legion  
24 to liquidate other assets to provide Atlas with adequate operating funds and avoid drastic financial  
25 and business consequences. *Id.* ¶ 80. Based upon these allegations, the Ninth Claim for Relief  
26 (Conversion) is adequately pled.

27 Kvam simply argues that the Ninth Claim for Relief should be dismissed because the  
28 Counterclaim “failed to identify any such property or major damage.” Motion at 17:1-2. Again, the

1 Counterclaim specifically alleges that Kvam intentionally turned off the power to the House, causing  
2 it to flood and seriously damage the House, its components, and the personal property in the House.  
3 Counterclaim ¶ 75. The NRCP 8(a) notice pleading standard does not require Mineau and Legion to  
4 enumerate the various aspects of the House that were damaged and the various pieces of personal  
5 property within the House that were damaged by the flood.

6 For these reasons, the Motion should be denied. However, if this Court agrees that the Ninth  
7 Claim for Relief lacks sufficient specificity, Mineau and Legion request leave to amend their  
8 Counterclaim to include additional details as necessary.

9 ***G. The Eleventh Claim for Relief Is Adequately Pled.***

10 As alleged in the Counterclaim, Kvam owed Mineau and Legion a duty to act with reasonable  
11 care to avoid damaging Mineau, Legion, or their property. Counterclaim ¶ 92. By turning off the  
12 power to the House without notifying Mineau or Legion, Kvam seriously damaged the House, its  
13 components, and the personal property within the House. *Id.* ¶ 93. As a direct and proximate result,  
14 Legion's real and personal property was damaged. *Id.* ¶ 94. Furthermore, by improperly accessing  
15 Atlas's online bank accounts and making unauthorized banking transactions, Kvam deprived Atlas  
16 of its operating capital and necessary liquidity. *Id.* ¶ 95. As a direct and proximate result, Mineau  
17 and Legion were forced to liquidate other assets and use their own personal funds to restore Atlas's  
18 operating capital to avoid drastic financial and business consequences. *Id.* ¶ 96. Based upon these  
19 allegations, the Eleventh Claim for Relief (Negligence) is adequately pled.

20 Kvam argues that he was not negligent, Mineau was. Motion at 17:20-28. This statement  
21 hardly warrants dismissing the properly pled Eleventh Claim for Relief and further emphasizes that  
22 this dispute should proceed with litigation on the merits.

23 Kvam goes on to argue that the Eleventh Claim for Relief is barred by the economic loss  
24 doctrine. Motion at 18:3 – 19:20. However, Kvam's own citation belies his argument. The economic  
25 loss doctrine bars purely economic losses, not losses caused by personal injury or damage to other  
26 property. Opposition at 18:12-16; see also Calloway v. City of Reno, 116 Nev. 250, 257, 993 P.2d  
27 1259 (2000). Here, the Counterclaim specifically alleges that Kvam's negligence damaged Mineau's  
28 and Legion's property. The economic loss doctrine therefore does not bar the Eleventh Claim for

1 Relief.

2 For these reasons, the Motion should be denied. However, if this Court agrees that the  
3 Eleventh Claim for Relief lacks sufficient specificity, Mineau and Legion request leave to amend  
4 their Counterclaim to include additional details as necessary.

5 *H. Mineau and Legion Should Be Granted Leave To Amend As Necessary To Cure*  
6 *Any Deficiencies In The Counterclaim.*

7 As explained in this Opposition, the Counterclaim is adequately and properly pled. The  
8 Motion should therefore be denied in its entirety. However, should this Court determine that the  
9 Counterclaim fails to adequately plead any claims for relief, Mineau and Legion should be afforded  
10 the opportunity to amend their Counterclaim and add any detail or specifics necessary to cure any  
11 deficiencies.

12 Leave to amend a pleading shall be freely given when justice so requires. NRCP 15(a). In  
13 the absence of any apparent reason, such as undue delay, bad faith, or dilatory motive on the part of  
14 the movant, leave to amend should be freely given. Stephens v. Southern Nev. Music Co., 89 Nev.  
15 104, 507 P.2d 138 (1973).

16 Here, should this Court determine that any deficiency exists in the Counterclaim, justice  
17 requires that Mineau and Legion be given leave to amend and cure any such defects. This matter  
18 should be resolved on the merits and should not be adjudicated as a result of a technical deficiency.  
19 There has been no undue delay, bad faith, or dilatory motive on behalf of Mineau or Legion. Indeed,  
20 this case is still in its infancy and Kvam would not be unduly prejudiced by granting leave to amend.

21 For these reasons, if any deficiency is determined to exist in the Counterclaim, Mineau and  
22 Legion should be granted leave to amend.

23 **IV. CONCLUSION**

24 Mineau and Legion have properly pled their counterclaims against Kvam. Mineau and Legion  
25 have plainly explained the facts from which their claims arise and the legal basis for their claims.  
26 The Counterclaim clearly, and with adequate particularity, explains the basis of Mineau's and  
27 Legion's Counterclaims. Kvam's various disagreement with the merits of these Counterclaims serve  
28 only to emphasize the need for a resolution of this dispute on the merits.

1 In the event that this Court determines that any deficiencies exist in the Counterclaim, Mineau  
2 and Legion should be granted leave to amend and cure any such deficiencies pursuant to NRCP 15.

3 This dispute should be resolved on the merits. The Motion should be denied.

4 **AFFIRMATION**

5 The undersigned does hereby affirm that the preceding document, **OPPOSITION TO**  
6 **MOTION TO DISMISS COUNTERCLAIM, OR ALTERNATIVELY, FOR A MORE**  
7 **DEFINITE STATEMENT**, filed in the Second Judicial District Court of the State of Nevada,  
8 County of Washoe, does not contain the social security number of any person.

9 DATED this 12 day of July, 2018.

10 GUNDERSON LAW FIRM

11  
12  
13 By: 

Austin K. Sweet, Esq.

Nevada State Bar No. 11725

Mark H. Gunderson, Esq.

Nevada State Bar No. 2134

3895 Warren Way

Reno, Nevada 89509

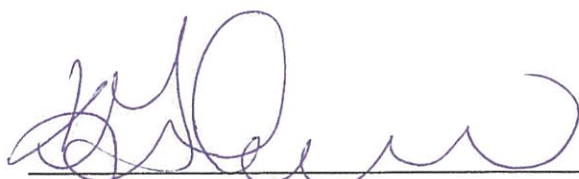
Telephone: 775.829.1222

*Attorneys for Brian Mineau and Legion  
Investments*

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of the law office of Gunderson Law  
3 Firm, and that on the 12 day of July, 2018, I deposited for mailing in Reno, Nevada and  
4 electronically filed a true and correct copy of the **OPPOSITION TO MOTION TO DISMISS**  
5 **COUNTERCLAIM, OR ALTERNATIVELY, FOR A MORE DEFINITE STATEMENT**, with  
6 the Clerk of the Court by using the electronic filing system which will send a notice of electronic  
7 filing to the following:

8  
9 Michael Matuska, Esq.  
10 Matuska Law Offices, Ltd.  
11 2310 South Carson Street, Suite 6  
12 Carson City, Nevada 89701  
13 *Attorneys for Jay Kvam*

14   
15 Kelly Gunderson



1 **CODE: 3790**

2 Michael L. Matuska, Esq. SBN 5711  
3 MATUSKA LAW OFFICES, LTD.  
4 2310 South Carson Street, Suite 6  
5 Carson City, NV 89701  
6 Attorneys for Plaintiff

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

9 JAY KVAM,

Plaintiff,

Case No. CV18-00764

10 v.

Dept. No. 3

11 BRIAN MINEAU; LEGION INVESTMENTS,  
12 LLC; 7747 S. May Street, an Unincorporated  
13 Joint Venture; and DOES I-X, inclusive,

Defendants.

14 **REPLY TO OPPOSITION TO MOTION TO DISMISS COUNTERCLAIM,**

15 **OR ALTERNATIVELY, FOR A MORE DEFINITE STATEMENT**

16 COMES NOW Plaintiff / Counter-Defendant, JAY KVAM, ("Kvam"), by and through his  
17 counsel of record, Matuska Law Offices, Ltd., Michael L. Matuska, Esq., and hereby files this  
18 Reply to the Opposition to Motion to Dismiss Counterclaim, or Alternatively, For a More Definite  
19 Statement filed by Defendants Legion Investments, LLC and Brian Mineau (collectively,  
20 "Mineau").  
21

22 **Introduction**

23 The lack of legal authorities in Mineau's Opposition brief is apparent.

24 Within 10 days after the service of the motion, the opposing party shall  
25 serve and file his written opposition thereto, together with a memorandum of  
26 points and authorities and supporting affidavits, if any, stating facts showing why  
27 the motion should be denied. The failure of the opposing party to serve and file  
28 his written opposition may be construed as an admission that the motion is  
meritorious and a consent to granting the same.

1 (DCR 13(3)).

2 Although Mineau filed and served what he labeled as points and authorities, he failed to  
3 provide any legal authorities in support of his causes of action 3-11 which are the subject of  
4 Kvam's Motion to Dismiss. This should be construed as an admission that those causes of action  
5 lack legal support and must be dismissed as a matter of law. The only legal authorities cited in  
6 Mineau's Opposition is a very brief, general discussion of Rules 12(b), 8(a) and 9(b) on page 2, a  
7 comment on page 4 that *Davenport v. GMAC Mortg.*, 2013 Nev. Unpub. LEXIS 1457; 2013 WL  
8 5437119 (Nev. 2013) should be disregarded because it is an unpublished opinion, and a similar  
9 statement on page 8 that the economic loss doctrine adopted by the Nevada Supreme Court in  
10 *Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000) does not apply. Through it all,  
11 Mineau repeats his confusing, vague and non-specific allegations about non-parties, including a  
12 company referred to as Atlas. Mineau's counterclaims are so lacking in legal authority that this  
13 Court can consider issuing sanctions pursuant to NRCP 11. Kvam addresses the remainder of  
14 Mineau's Opposition in order as follows.

15  
16  
17 **1. Mineau's Fourth Claim for Relief Should Be Dismissed.**

18 The allegations about interference with prospective economic advantage in Mineau's  
19 Fourth Claim for Relief are too vague and uncertain to withstand scrutiny. Mineau failed to allege  
20 any prospective economic relationship with particularity. The Counterclaim alleges that the  
21 prospective economic relationships at issue were "with various third parties involving the  
22 marketing and sale of the house." (See Counterclaim, paragraph 39). There is no allegation the  
23 house has been offered for sale. Consequently, no specific third-party purchasers could possibly  
24 be identified in the Counterclaim. Kvam cannot even tell what relationships are being referenced.  
25 Mineau failed to identify any purchase offers, or the terms thereof. It is unlikely that there would  
26 be any purchase offers, considering the admitted facts in the pleadings that the project is not  
27  
28

complete.

Mineau's fourth counterclaim should also be dismissed because he failed to allege any evidence of damages. The house has not yet been sold. As such, Mineau does not know whether the house will sell for more or less than he would have received but for the interference with his non-existent, but alleged, prospective economic relationships.

**2. Mineau's Fifth and Tenth Claims for Relief Should Be Dismissed**

Mineau's attempted defense of his Fifth and Tenth Claims for Relief for deceptive trade practices and fraud are even more shocking than his original allegations. Mineau argues as follows:

In taking the actions described in the Counterclaim (including (1) inhibiting Mineau's and Legion's accessibility to cash by improperly paying off the Atlas loan and (2) turning off the heat to the House in the winter without notifying Legion or Mineau, causing the pipes to freeze, burst, and flood the house; (3) threatening to further sabotage the project or initiate baseless litigation unless Mineau and Legion agree to pay Kvam more than he is owed, sooner than he is owed; and (4) threatening and intimidating Mineau's family to coerce settlement, Kvam has engaged in deceptive trade practices. (Opposition at 3:25-4:3).

Through it all, Mineau does not deny that deceptive trade practice is a form of fraud that must be alleged with particularity pursuant to NRCP 9(b). Atlas is not a party to this case, and it is not clear how paying off a loan could ever result in damage. Likewise, Mineau never alleged when or how Kvam allegedly turned off the heat, never alleged that Kvam has ever been to the property, or that Kvam had a duty to maintain heat to the property. Mineau invented the allegation of threats to his family members for purposes of his Opposition. That allegation does not appear in the Counterclaim, except as it possibly relates to Mineau's conflict with the process server due to refusal to accept process. Mineau admits in his Opposition that the counterclaims are based on Kvam's demand for repayment and initiating this lawsuit. Mineau failed to rebut the main argument in Kvam's brief, that there is no cause of action based on filing a lawsuit. "We agree

with the majority rule that filing a complaint does not constitute *abuse of process*.” *Land Baron Invs., Inc. v. Bonnie Springs Family Ltd. P’Ship*, 131 Nev. Adv. Op. 69, 19-20, 356 P.3d 511, 519-20 (2015) (emphasis in original).

3. **Mineau’s Sixth Claim for Relief Should be Dismissed**

In defense of his Sixth Claim for Relief, Abuse of Process, Mineau openly admits that his claim is based on Kvam’s demand for repayment and filing a lawsuit. This is inadequate as a matter of law for the reasons explained in Kvam’s Motion to Dismiss.

In *Land Baron Invs., Inc. v. Bonnie Springs Family Ltd. P’Ship*, 131 Nev. Adv. Op. 69, 356 P.3d 511(2015), the Nevada Supreme Court stated the elements of a cause of action for abuse of process, as follows:

To support an *abuse of process* claim, a claimant must show “(1) an ulterior purpose by the [party abusing the process] other than resolving a legal dispute, and (2) a willful act in the use of the legal process not proper in the regular conduct of the proceeding.”

*Id.* at 131 Nev. Adv. Op. 69 at \*19, 356 P.3d 511, 519 (emphasis in original) (citing *LaMantia v. Redisi*, 118 Nev. 27, 31, 38 P.3d 877, 880 (2002)).

Mineau failed to rebut these authorities. Instead he tries to argue in favor of an ulterior purpose by raising a series of irrelevant and desultory allegations, such as Kvam allegedly demanded more than he was due and harassed Mineau with the service of process. He raised a new allegation in his Opposition, that Kvam is conducting discovery against Legion in an improper fashion.<sup>1</sup> He does so by reference to a letter, that is not process.

[T]he claimant must provide facts, rather than conjecture, showing that the party intended to use the legal process to further an ulterior purpose. *LaMantia*, 118 Nev. at 31, 38 P.3d at 880 (holding that where the party presented only conjecture and no evidence that the opposing party actually intended to improperly use the legal process for a purpose other than to resolve the legal dispute, there was

---

<sup>1</sup> Kvam should not have to explain that the requested documents are relevant to the status and funding of the project, as well as the funding and operations of Legion Investments, LLC and the claim to pierce the corporate veil.

1 no *abuse of process*). The utilized process must be judicial, as the tort protects the  
2 integrity of the court. Furthermore, the tort requires a "willful act," and the majority  
3 of courts have held that merely filing a complaint and proceeding to properly  
4 litigate the case does not meet this requirement.

5 *Id.* at 131 Nev. Adv. Op. at \*19-20, 356 P.3d at 519-20) (emphasis in original)

6 Through it all, Mineau has still failed to address the fact that he is legally required to  
7 accept process on behalf of Legion and failed to provide any legal authority for his proposition  
8 that Kvam would ever be liable for the actions of an independently contracted, licensed process  
9 server.

10 **4. Mineau's Seventh Claim for Relief Should Be Dismissed**

11 The prior discussion regarding process servers applies to Mineau's Seventh Claim for  
12 Relief for Trespass. Here, Mineau's failure to address his statutory duties as a resident agent and  
13 failure to provide any legal authority regarding process servers as agents is fatal to his cause of  
14 action. The sequence concerning the attempted service of process is set forth in affidavits of  
15 service on file with this court. Mineau boldly, candidly and aggressively acknowledges that he not  
16 only refused service, but instructed the female process to leave the property, which she did out of  
17 concern for her physical safety; however, she returned to leave process on the doorstep. From this  
18 sequence, Mineau attempts to concoct a theory of trespass against Kvam. Although Mineau cited  
19 *Nevada National Bank v. Gold Star Meat Co.*, 89 Nev. 427, 429, 514 P.2d 651, 653 (1973)  
20 regarding agency in general, he did not provide any legal authority to support his assertion that a  
21 licensed, independently contracted process server meets the definition of an agent. Likewise,  
22 Mineau failed to rebut Kvam's legal authorities which explain that torts committed by an agent are  
23 only actionable against the principal to the extent the alleged tort was committed within the scope  
24 of the agent's employment. See *Rockwell v. Sun Harbor Budget Suites*, 112 Nev. 1217 \*; 925  
25 P.2d 1175 (1996). Mineau did not allege and did not argue that the scope of employment for a  
26 process server includes intentional torts.  
27  
28

1                   **5. Mineau's Eight Claim for Relief Should be Dismissed**

2                   Mineau has invented additional factual allegations in defense of his Eighth Claim for  
3                   Relief, Trespass to Chattels. Mineau provided no legal support for this theory that he can maintain  
4                   a cause of action for trespass to chattels against Kvam, absent an allegation that Kvam was ever at  
5                   the property. At the very least, Mineau's counterclaim for Trespass to Chattels is so lacking in  
6                   any details that Kvam cannot ascertain when he is alleged to have trespassed or to what chattels.  
7                   Mineau now asserts that construction materials, tools and supplies were in the house when the  
8                   alleged flooding occurred. These items were not mentioned in the Counterclaim, and would seem  
9                   to belong to the contractor, not Mineau.  
10                  

11                  Mineau continues to create confusion and uncertainty regarding his claim for Trespass to  
12                  Chattels by raising allegations relating to a non-party, Atlas.  
13                  

14                   **6. Mineau's Ninth Claim for Relief Should Be Dismissed**

15                  Mineau's ninth counterclaim is for conversion. "Conversion is a distinct act of dominion  
16                  wrongfully exerted over another's personal property in denial of, or inconsistent with his title or  
17                  rights therein or in derogation, exclusion, or defiance of such title or rights." *Evans v. Dean*  
18                  *Witter Reynolds, Inc.*, 116 Nev. 598, 606, 5 P.3d 1043, 1048 (2000). "Conversion is a distinct act  
19                  of dominion wrongfully exerted over personal property in denial of, or inconsistent with, title or  
20                  rights therein or in derogation, exclusion or defiance of such rights." *Edwards v. Emperor's*  
21                  *Garden Restaurant*, 122 Nev. 317, 328, 130 P.3d 1280, 1287 (2006). Conversion requires major  
22                  or permanent damage or interference with personal property, and is not available for minor  
23                  damage or real property. *Id.*  
24                  

25                  Mineau's theory of conversion fails on all counts. His claim for conversion concerns  
26                  alleged damage to real property. Although he also alleges conversion of personal property, he  
27                  failed to identify any such property or major damage. Through it all, he failed to allege any acts  
28

of dominion and control by Kvam. He does not allege that Kvam has ever been to the house or that he has ever taken possession or dominion of any property, real or personal. He failed to provide any legal authority to support his theory that allegedly turning off power is an exercise of dominion and control over personal property. His claim for conversion becomes hopelessly confused when he lapses into allegations concerning a non-party, Altas.

7. **Mineau's Eleventh Claim for Relief Should Be Dismissed**

Mineau clarified in defense of his Eleventh Claim for Relief that allegedly turning off the power is the negligent act complained of. Unfortunately, Mineau still has not alleged that Kvam is a power provider, that he ever went to the property and had the means or opportunity to shut off the power, or that he otherwise had a duty to procure or provide power for the property. Indeed, Kvam is a passive investor located in Washoe County, Nevada. Nevertheless, Mineau alleges:

"Kvam seriously damaged the house, its components, and the personal property within the house" (Counterclaim, Par. 93);

"As a direct and proximate result of Kvam's actions, Legion's real and personal property has been damaged" (Counterclaim, Par. 94);

"Through his actions described above, Kvam deprived Atlas of its operating capital and necessary liquidity." (Counterclaim Par. 95)

Mineau also admitted the allegations of the pleadings that the parties had a contract which governed their responsibilities. As explained in Kvam's Motion to Dismiss, due to the existence of a commercial contract between the parties, Mineau's eleventh counterclaim is barred by the economic loss doctrine which was adopted in Nevada in *Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000).

Under the economic loss doctrine 'there can be no recovery in tort for purely economic losses.' American Law of Products Liability (3d), § 60:39, at 69 (1991). Purely economic loss is generally defined as 'the loss of the benefit of the user's bargain... including... pecuniary damage for inadequate value, the cost of repair

1 and replacement of the defective product, or consequent loss of profits, without any  
2 claim of personal injury or damage to other property. *Id.* § 60:36, at 66.  
3 *Calloway*, 116 Nev. at 257.

4 \* \* \* \*

5 Under the economic loss doctrine there can be no recovery in tort for purely  
6 economic losses. *Calloway*, 116 Nev. at 256, 993 P.2d at 1263 (*quoting* Sidney R.  
7 Barrett, Jr., *Recovery of Economic Loss in Tort for Construction Defects: A*  
8 *Critical Analysis*, 40 S.C.L.Rev. 891, 894 (1989)).

9 The Court also noted that the rule "shields a defendant from unlimited liability for all of  
10 the economic consequences of a negligent act, particularly in a commercial or professional setting,  
11 and thus ... keeps the risk of liability reasonably calculable." *Id.*, 993 P.2d at 1266 (internal  
12 quotation marks omitted).

13 In order to avoid the application of the economic loss doctrine, Mineau now argues that  
14 "The economic loss doctrine bars purely economic losses, not losses caused by personal injury or  
15 damage to other property." (Opposition at 8:24-26). This is the first reference to personal injury,  
16 and Mineau ignores the fact that the only property allegedly damaged was the house and its  
17 components (and now allegedly, tools?) contained therein. These are precisely the damages that  
18 are barred by the economic loss doctrine. The *Calloway* court made it clear that the property  
19 damage referred to as "other property" is damage to "property other than the defective entity  
20 itself." *Calloway*, 116 Nev. at 262. In doing so, the Court expressly rejected the Appellants  
21 argument that a defective component of house that causes damage to other components of the  
22 house qualifies as damage to "other property." Moreover, the economic loss doctrine prevents this  
23 type of unknown and unlimited tort liability when the parties have a contract in a commercial  
24 setting. "[W]hen economic loss occurs as a result of negligence in the context of commercial  
25 activity, contract law can be invoked to enforce the quality expectations derived from the parties'  
26 agreement." *Terracon Consultants v. Mandalay Resort*, 206 P.3d 81, 87, 125 Nev. 66, 75 (2009).  
27 Additionally, the doctrine is based on balancing the need for useful economic activity with  
28



plaintiff's recovery and to prevent tort claims from deterring useful economic activity. *See id.* "Intentional torts are not barred by the economic loss doctrine." *Halcrow, Inc. v. Eighth Judicial Dist. Court of State*, 302 P.3d 1148, 1155, 129 Nev. Adv. Op. 42 (2013). As such, the economic loss doctrine does not bar contract claims or intentional torts.

In this case the expectations of the parties are defined by their joint venture agreement, which precludes Mineau's separate counterclaim for negligence.

### III. CONCLUSION

The only duty imposed on Kvam pursuant to the parties' joint venture agreement was funding for the project at 7747 May Street, Chicago, Illinois, which he undeniably provided. Mineau has not kept his end of the bargain and has not completed project, has not provided a completion date, and has not repaid Mineau any part of his investment. Mineau has tried to punish Kvam by filing eleven specious counterclaims after Kvam predictably demanded his money back. The counterclaims lack essential elements of the causes of action, lack any allegations of time, place and manner of the alleged wrongs, and include confusing allegations regarding non-parties such as process servers and Atlas.

For the foregoing reasons, Mineau's counterclaims four through eleven should be dismissed with prejudice, or alternatively, Mineau should be required to provide a more definite statement.

### AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated this 17<sup>th</sup> day of July, 2018.

MATUSKA LAW OFFICES, LTD.



By:

MICHAEL L. MATUSKA, SBN 5711  
Attorneys for Plaintiff, JAY KVAM

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Matuska Law Offices, Ltd. and that on the 17<sup>th</sup> day of July 2018, I served a true and correct copy of the preceding document entitled **REPLY TO OPPOSITION TO MOTION TO DISMISS** as follows:

Austin K. Sweet, Esq.  
GUNDERSON LAW FIRM  
3895 Warren Way  
Reno, NV 89509  
[asweet@gundersonlaw.com](mailto:asweet@gundersonlaw.com)

☐ **BY U.S. MAIL:** I deposited for mailing in the United States mail, with postage fully prepaid, an envelope containing the above-identified document(s) at Carson City, Nevada, in the ordinary course of business.

☒ **BY CM/ECF:**

☐ **BY PERSONAL SERVICE:** I personally delivered the above-identified document(s) by hand delivery to the office(s) of the person(s) named above.

☐ **BY FACSIMILE:**

☐ **BY FEDERAL EXPRESS ONE-DAY DELIVERY.**

☐ **BY MESSENGER SERVICE:** I delivered the above-identified document(s) to Reno-Carson Messenger Service for delivery.

/s/ Michael L. Matuska  
MICHAEL L. MATUSKA

1 **CODE 2645**

2 GUNDERSON LAW FIRM

3 Austin K. Sweet, Esq.

4 Nevada State Bar No. 11725

5 Mark H. Gunderson, Esq.

6 Nevada State Bar No. 2134

7 3895 Warren Way

8 Reno, Nevada 89509

9 Telephone: 775.829.1222

10 *Attorneys for Brian Mineau and Legion Investments*

11  
12 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**  
13 **IN AND FOR THE COUNTY OF WASHOE**

14 JAY KVAM,

Case No. CV18-00764

15 Plaintiff / Counterdefendant,

Dept. No. 3

16 vs.

17 BRIAN MINEAU; LEGION INVESTMENTS,  
18 LLC; 7747 S. May Street, an Unincorporated  
19 Joint Venture; and DOES I-X, inclusive,

20 Defendants / Counterclaimants.  
21 \_\_\_\_\_/

22 **OPPOSITION TO MOTION FOR DISSOLUTION**

23 Defendants / Counterclaimants BRIAN MINEAU ("Mineau") and LEGION  
24 INVESTMENTS, LLC ("Legion"), by and through their counsel of record, Austin K. Sweet, Esq.,  
25 and Mark H. Gunderson, Esq., submit the following Opposition to the *Motion for Dissolution*  
26 ("Motion") filed by Plaintiff / Counterdefendant JAY KVAM ("Kvam"). This Opposition is made  
27 and based upon the following memorandum of points and authorities, the pleadings on file in this  
28 case, and any oral argument this Court wishes to entertain.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

This dispute arises out of a very short and very poorly worded document signed by Kvam,  
Mineau, and Michael Spinola ("Terms of Agreement") concerning certain real property located at  
7747 S. May Street, Chicago, Illinois ("Property"). The legal consequences and ramifications of the

1 Terms of Agreement are entirely unclear at this early stage in the litigation. The theory underlying  
2 Kvam's lawsuit is that the Terms of Agreement created an unincorporated partnership, which Kvam  
3 now seeks to dissolve. Mineau and Legion dispute that a partnership was ever formed and deny  
4 owing Kvam the various duties and obligations which Kvam seeks to enforce through this lawsuit.  
5 This litigation is in its infancy and discovery has not yet opened. Nonetheless, Kvam has filed the  
6 Motion seeking substantial prejudgment relief.

7       The Motion lacks foundation in Nevada law. Through the Motion, Kvam seeks a prejudgment  
8 determination that: (1) the parties, through their actions, unintentionally formed an unincorporated  
9 partnership; (2) the Property is property of the alleged partnership; (3) Mineau and Legion, not Kvam,  
10 were responsible for maintaining the books, records, and accountings for the alleged partnership; (4)  
11 Mineau or Legion breached their fiduciary duties to Kvam by not providing Kvam with books,  
12 records, and accountings for the alleged partnership, entitling Kvam to properly dissociate from the  
13 partnership; (5) because Kvam has properly dissociated from the partnership, the partnership must be  
14 dissolved and wound up; and (6) Mineau and Legion are responsible for winding up the partnership,  
15 including providing a complete accounting and winding up plan. In order to obtain the relief he seeks  
16 in the Motion, Kvam must prevail on the merits of at least his First Cause of Action (Declaration of  
17 Joint Venture), Fifth Cause of Action (Accounting), and Sixth Cause of Action (Court Supervision  
18 of Dissolution and Winding Up, and Appointment of Receiver). Nevada law does not entitle Kvam  
19 to such provisional relief and the Motion must be denied as procedurally and legally deficient.

20       Regardless, Kvam falls short of establishing that he is entitled to the requested relief based  
21 upon the facts and record presented. Kvam relies entirely upon an incredibly vague, ambiguous, and  
22 incomplete agreement. The Terms of Agreement raises more questions than answers concerning the  
23 parties' respective rights, obligations, and expectations regarding the Property. These questions must  
24 be addressed, vetted, and resolved through litigation and, if necessary, a trial. This Court simply  
25 cannot make the findings sought by Kvam at this early stage of this lawsuit based upon the sparse  
26 record presented.

27       The Motion must be denied.

28 ///

1 **II. ARGUMENT**

2 **A. *The Relief Sought In The Motion Is Not Legally Available As A Provisional,***  
3 ***Prejudgment Remedy.***

4 Kvam brings his Motion at this very early stage in the litigation seeking a judicial  
5 determination that a partnership exists, dissolution of that alleged partnership, and an order forcing  
6 Mineau and Legion to provide a full accounting of the alleged partnership and present a plan to wind  
7 down the alleged partnership within thirty (30) days. Kvam offers no authority, and none exists,  
8 allowing Kvam to obtain this relief through a preliminary, pretrial motion.

9 Kvam's Motion relies entirely upon the Uniform Partnership Act (1997) contained in NRS  
10 Chapter 87. NRS Chapter 87 does not contain any provisional remedies or any process by which a  
11 plaintiff may obtain prejudgment relief such as that sought in the Motion. Simply put, a "motion for  
12 dissolution" is not a valid motion under Nevada law. The relief sought in Kvam's Motion requires  
13 entry of judgment after an adjudication on the merits and cannot be obtained through a provisional,  
14 pretrial motion.

15 A judicial declaration that a partnership exists, dissolution of that partnership, an accounting,  
16 and a court-supervised wind up are among the ultimate relief Kvam seeks in his complaint and require  
17 entry of judgment in Kvam's favor after an adjudication on the merits, not simply a ruling on a pretrial  
18 motion. See, e.g. Costello v. Scott, 30 Nev. 43, 94 P. 222, 223 (1908) ("A decree finding the existence  
19 of a partnership and ordering a dissolution, or finding the fact and time of dissolution, and settling  
20 the proportions of interest of the partners, and referring the cause to ascertain the specific amounts  
21 and to take the account, is a final decree for the purposes of appeal.")

22 The Motion is procedurally improper and must be denied so that litigation on the merits may  
23 proceed.

24 **B. *The Terms of Agreement Is Inadequate To Justify The Relief Sought In The***  
25 ***Motion.***

26 As explained above, the relief sought by Kvam requires entry of judgment after an  
27 adjudication on the merits and cannot be obtained on a provisional, prejudgment basis, so the Motion  
28 should be denied outright. However, should this Court consider any aspect of the Motion properly

1 brought, the Motion must still be denied because the record before the Court at this early stage in the  
2 litigation is insufficient to support the findings sought in the Motion.

3 The Motion relies almost exclusively on the Terms of Agreement. However, the Terms of  
4 Agreement is poorly worded, vague, ambiguous, contradictory, riddled with grammatical errors, and  
5 incomplete. It is impossible to ascertain the full extent of the parties' rights, duties, and obligations  
6 simply by reviewing the Terms of Agreement.

7 In February 2017, Kvam, Mineau, and Michael J. Spinola signed the Terms of Agreement.  
8 The Terms of Agreement is attached as Exhibit 1 to the *Affidavit of Jay Kvam in Support of Motion*  
9 *for Dissolution* ("Kvam Affidavit") and is recited in its entirety in the Motion. The first sentence of  
10 the Terms of Agreement reads, "With Regards to acquisition of the aforementioned property, it is  
11 understood that the membership of Legion Investments LLC for this acquisition is Brian Mineau, Jay  
12 Kvam, and Michael J. Spinola." Kvam acknowledges that, when the Terms of Agreement was signed,  
13 Legion was a preexisting company that owned multiple assets and that it was not the parties' intent  
14 for Kvam to receive an actual membership interest in Legion. Motion at 3:2-4. Mineau agrees: he  
15 never intended that Kvam would become a member of Legion. See Declaration of Brian Mineau,  
16 attached as Exhibit "1," at ¶ 6. Furthermore, there is no mechanism in Nevada law for parties to  
17 become members of a preexisting entity solely with respect to a single asset of that entity. Thus, the  
18 first sentence of the Terms of Agreement is facially vague and ambiguous and none of the parties to  
19 this lawsuit can, at this early stage, explain what this provision is supposed to mean.

20 The second sentence of the Terms of Agreement reads, "All parties are entitled to 33.33% of  
21 net profit, after all expenses are accounted for, to include interest due on funds dispersed." However,  
22 the final sentence of the Terms of Agreement provides that "Michael has agreed to allot %50 of his  
23 1/3 profit to Mr. Kvam for both initial funding's." Again, this provision is facially vague and  
24 ambiguous as to what "both initial funding's" means, and the last sentence of the Terms of Agreement  
25 appears to directly contradict the second sentence of the Terms of Agreement. Furthermore, Kvam  
26 argues that the Terms of Agreement created "a joint venture agreement between Kvam on one hand,  
27 and Mineau and Legion on the other hand," apparently ignoring Michael Spinola. Motion at 3:4-6.  
28 Kvam's arguments are simply not supported by the Terms of Agreement.

1 The third sentence of the Terms of Agreement provides that, "Initial purchase is being funded  
2 by Jay Kvam, who is there by assigned any remedies due should the transaction fail in anyway." The  
3 parties agree that Kvam funded the purchase of the Property by directly wiring money into escrow to  
4 pay the seller. Ex. 1 ¶ 7. However, the remainder of the sentence is ambiguous and confusing. Kvam  
5 makes no effort to decipher this clause in the Motion or in his affidavit.

6 The fourth sentence of the Terms of Agreement holds, "Initial funder will be due a 7% annual  
7 return on any funds provided due from date of disbursement." Kvam apparently believes that this  
8 provision requires Mineau and/or Legion to pay him returns every year. Motion at 2:21-23; Kvam  
9 Affidavit ¶ 7. Again, Mineau disagrees: the Terms of Agreement affords Kvam 7% interest on  
10 disbursements, to be paid from the proceeds of the Property first, before any net profit is distributed.  
11 Ex. 1 ¶ 8. The Terms of Agreement is vague and ambiguous in this regard and subject to multiple,  
12 conflicting interpretations. Discovery, testimony, and trial may be necessary to fully adjudicate the  
13 parties' respective rights and duties concerning this provision. Kvam's arguments are simply not  
14 supported by the record presently before the Court.

15 The final two sentences of the Terms of Agreement seem to run together: "There is expected  
16 to be 3 renovation draws necessary on this project. First draw to be funded by Mr. Kvam, Due to  
17 present and ongoing business dealings between Jay and Michael, Michael has agreed to allot %50 of  
18 his 1/3 profit to Mr. Kvam for both initial funding's." The parties agree that Kvam funded the first  
19 "draw" for renovations by wiring money directly to the contractor hired to renovate the Property. Ex.  
20 1 ¶ 9. However, Kvam apparently believes that this provision required Mineau and/or Legion to fund  
21 the other two "renovation draws." Motion at 2:18-20; Kvam Affidavit ¶ 5. The Terms of Agreement  
22 contain no such requirement, and discovery, testimony, and trial may be necessary to fully adjudicate  
23 the parties' respective rights and duties concerning this provision.

24 Finally, at the bottom of the Terms of Agreement is a rogue notary stamp and signature. The  
25 purpose of this stamp and signature is unclear and certainly does not constitute any proper notarial  
26 act provided in NRS Chapter 240. This undefined stamp and signature only adds to the ambiguity  
27 and uncertainty that surrounds the Terms of Agreement.

28 ///

1 For all these reasons, the Terms of Agreement is facially ambiguous. “[W]hen a contract is  
2 ambiguous, it will be construed against the drafter.” Dickenson v. State Dep’t of Wildlife, 110 Nev.  
3 934, 937, 877 P.2d 1059, 1061 (1994). The Terms of Agreement was drafted by Kvam without any  
4 input, revisions, or modifications by Mineau or Legion. Ex. 1 ¶ 5. Therefore, the full extent of the  
5 parties’ respective rights, duties, and obligations cannot be determined absent a review and  
6 adjudication of extrinsic and parol evidence, with all ambiguities in the Terms of Agreement  
7 construed against Kvam.

8 In addition to being fatally ambiguous in its entirety, the Terms of Agreement lacks essential  
9 terms to form a contract. When essential terms are not agreed upon by the parties, a contract cannot  
10 be formed. Certified Fire Prot. Inc. v. Precision Constr., 128 Nev. 371, 379, 283 P.3d 250, 255 (2012)  
11 (citing Nevada Power Co. v. Public Util. Comm’n, 122 Nev. 821, 839–40, 138 P.3d 486, 498–99  
12 (2006)). The Terms of Agreement is silent regarding the purpose of the project, the scope of the  
13 project, the timeline of the project, the parties’ respective roles, duties, and obligations for the project,  
14 the project’s budget, how the second and third “renovation draws” would be funded, the source of  
15 the project’s anticipated profits, the amount of the project’s anticipated profits, how potential losses  
16 on the project would be allocated, or even the end goal of the project. Kvam also asserts that Mineau  
17 is the manager of the project and the Legion is a partner in this partnership, despite the fact that neither  
18 of these apparently essential terms are contained in the Terms of Agreement. Based upon the sparse  
19 record currently before the Court, the Terms of Agreement therefore lacks essential elements  
20 necessary to form a binding and enforceable contract or partnership.

21 The Terms of Agreement was drafted solely by Kvam and is poorly worded, vague,  
22 ambiguous, contradictory, riddled with grammatical errors, and incomplete. Kvam cannot, as a  
23 matter of law, uses his confusing document as the basis for granting the relief sought in the Motion.  
24 Discovery must be conducted to determine the parties’ intent with respect to the Terms of Agreement,  
25 resolve the myriad ambiguities in the Terms of Agreement, and determine whether the parties ever

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28 ///



1 even reached a meeting of the minds on essential terms necessary to form a contract in the first place.  
2 Any genuine disputes of material fact in this regard must be resolved at trial. The record before the  
3 Court, at this early stage in the litigation, is simply insufficient to justify the relief sought by the  
4 Motion. The Motion must be denied.

5 *C. The Record Does Not Support A Presumption Of Partnership.*

6 Kvam's Motion seeks an order dissolving an unincorporated partnership. Of course, before  
7 this Court could order that a partnership be dissolved, it must adjudicate that a partnership was formed  
8 to begin with. The sparse record before the Court at this early stage in the litigation cannot support  
9 a finding that a partnership was formed.

10 The association of two or more persons to carry on as co-owners of a business for profit forms  
11 a partnership, whether or not the persons intend to form a partnership. NRS 84.4322(1). In  
12 determining whether a partnership is formed, the sharing of gross returns does not by itself establish  
13 a partnership, even if the persons sharing them have a joint or common right in interest in property  
14 from which the returns are derived. NRS 87.4322(3)(b). A person who receives a share of the profits  
15 of a business is presumed to be a partner in the business, unless the profits were received in payment  
16 of a debt or of interest or other charge on a loan, even if the amount of payment varies with the profits  
17 of the business. NRS 87.7322(3)(c).

18 Kvam's First Cause of Action in his Verified Complaint seeks a judicial declaration that the  
19 Terms of Agreement constitutes a joint venture. In his Motion, Kvam also seeks an order that the  
20 Terms of Agreement creates a partnership between Kvam and Mineau pursuant to NRS 84.4322. The  
21 record is insufficient to support an adjudication of Kvam's First Cause of Action at this time.

22 As discussed above, the Terms of Agreement are incredibly unclear. Kvam claims that the  
23 Terms of Agreement expressly provides that Kvam and Mineau are to "share net profits" of a  
24 business, but the Terms of Agreement does not explain what the "business" is, how those profits  
25 should be generated, or the purpose of this sharing of profits. The Terms of Agreement does not  
26 clearly explain whether Kvam's "disbursements" constitute loans or investments, or whether the  
27 distribution of profits constitutes payment of a debt or interest on a loan. Kvam himself seems  
28 uncertain, as he attempts to categorize these disbursements as an investment while simultaneously

1 seeking a guaranteed return plus interest, indicating a loan. Kvam also claims that the partnership is  
2 between Kvam and Mineau, apparently ignoring Legion and Michael Spinola. These questions and  
3 disputes must be resolved through discovery and trial, not a pretrial motion.

4 The record before the Court is simply insufficient to establish that Kvam and Mineau formed  
5 a partnership pursuant to NRS 87.4322. The record does not establish that Kvam and Mineau carried  
6 on as co-owners of a business, what the nature of that business was, or whether their agreement to  
7 share profits indicated a partnership or repayment of a debt or interest. The Motion must be denied.

8 ***D. The Record Does Not Support A Determination That The Property Is Property Of***  
9 ***A Partnership.***

10 For the reasons explained above, this Court should not adjudicate whether a partnership has  
11 been formed at this early stage in the litigation, based upon the sparse record before the Court, and  
12 through a preliminary, pretrial motion. Absent a determination that a partnership was formed, the  
13 rest of the Motion is moot and must be denied. However, should this Court determine that a  
14 partnership was duly formed, the record is insufficient to support a finding that the Property is  
15 partnership property.

16 Property is partnership property if acquired in the name of the partnership or one or more  
17 partners with an indication in the deed of the person's capacity as a partner or of the existence of a  
18 partnership. NRS 87.4324(1). Property is presumed to be partnership property if purchased with  
19 partnership assets. NRS 87.4324(3).

20 Kvam argues in his Motion that the Property is partnership property because it "was purchased  
21 with joint venture funding." Motion at 4:18-19. Again, as discussed above, the record does not  
22 contain adequate information to make this determination. The legal effect of the Terms of Agreement  
23 is unclear, including whether Kvam's distributions should be characterized as a loan or "joint venture  
24 funding," or even whether such "joint venture funding" would constitute "partnership assets" for the  
25 purposes of NRS 87.4324. These questions and disputes must be resolved through discovery and  
26 trial. The Motion must be denied.

27 ///

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1           E.       *The Record Does Not Support A Finding That Mineau And Legion Owed Kvam A*  
2                    *"Duty To Account."*

3           Kvam's Motion argues that, if the Terms of Agreement created a partnership between Kvam  
4 and Mineau, and if the Property was an asset of that partnership, then Mineau and Legion<sup>1</sup> owed  
5 Kvam certain fiduciary duties which they have breached and disavowed. Motion at 5:8-13. Once  
6 again, neither the record nor the Motion supports this conclusion.

7           As Kvam states, partners in a partnership owe each other certain enumerated duties. NRS  
8 87.4335 and NRS 87.4336. Even accepting *arguendo* that a partnership exists, Kvam offers no  
9 explanation or argument supporting his conclusion that Mineau and Legion were the partners  
10 responsible for keeping the partnership's records or maintaining the accounting. Indeed, none of  
11 Kvam's distributions were made to Mineau or Legion; the funds were wired directly from Kvam to  
12 either the seller or the contractor. Ex 1 ¶¶ 7 & 9. It is therefore entirely unclear why Kvam claims  
13 that Mineau and Legion owe him a duty to account, as opposed to Kvam owing them a duty to  
14 account, or how Mineau and Legion supposedly breached that duty when Kvam has all direct  
15 knowledge concerning where his money went. Again, the sparse record does not establish that  
16 Mineau and/or Legion breached or disavowed any fiduciary duties owed to Kvam in this regard.

17           Likewise, Kvam's request that this Court grant his Motion and order "Mineau and Legion to  
18 provide a complete accounting and winding up plan within thirty (30) days" is unjustified. Motion  
19 at 6:21-25. Even this Court determines that a partnership exists and should be dissolved, Kvam has  
20 offered no explanation or authority establishing that Mineau and Legion should be responsible for  
21 preparing the accounting or should bear the burden of preparing and carrying out a winding up plan.

22           There is simply no basis in fact, law, or the record for this Court to determine that Mineau  
23 and/or Legion breached any fiduciary duties owed to Kvam. The Motion must be denied.

24 ///

25 ///

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27 \_\_\_\_\_  
28 <sup>1</sup> Any alleged fiduciary duties owed by Legion are unclear because Kvam claims that the partnership  
was between Kvam and Mineau, not Kvam, Mineau, and Legion. Motion at 4:11-13.

1           ***F. The Record Does Not Support A Finding That The Alleged Partnership Must Be***  
2           ***Dissolved.***

3           For all the reasons explained above, the Motion should be denied before ever reaching a  
4 decision on whether dissolution is appropriate at this time. However, should this Court determine  
5 that: (1) the issues raised in the Motion are properly before this Court for adjudication at this time;  
6 (2) a partnership between Kvam and Mineau was formed; (3) the Property is partnership property;  
7 and (4) dissolution and winding up is a proper provisional remedy, Kvam has still failed to establish  
8 that the alleged partnership should be dissolved.

9           Kvam summarily states that he dissociated by express will under NRS 87.4343(1), thus  
10 triggering the dissolution of a partnership at will pursuant to NRS 87.4351(1). Motion at 5:14-21.  
11 However, if a partnership exists, it would be a partnership for a particular undertaking, not a  
12 partnership at will. Although the intended scope of the project is unclear from the Terms of  
13 Agreement, Kvam argues that the partnership concerned the “purchase, renovation and resale of [the  
14 Property].” Kvam Affidavit ¶ 2. Kvam has expressly stated that this project is not complete. *Id.* ¶  
15 7. Thus, if a partnership exists, it is one for a particular undertaking which is not yet complete.

16           A partner’s dissociation is wrongful if, in the case of a partnership for a particular undertaking,  
17 the partner withdraws by express will before the completion of the undertaking. NRS 87.4344(2)(a).  
18 In a partnership for a particular undertaking, the wrongful dissociation of a partner under NRS  
19 87.4344(2) does not require dissolution of the partnership unless at least half of the remaining partners  
20 expressly elect to do so. NRS 87.4351(2)(a). Thus, Kvam is not entitled to unilaterally dissolve the  
21 alleged partnership before the completion of the project.

22           Lastly, Kvam also claims to have “the right to request judicial dissolution due to the failure  
23 of the joint venture and the failure of Legion and Mineau to account.” Motion at 5:20-22. Kvam has  
24 not offered any evidence or explanation supporting his statement that the joint venture has failed: to  
25 the extent a “joint venture” exists, Legion owns the Property and the project is not yet complete.  
26 Likewise, as explained above, there is no evidence that Legion and Mineau owed Kvam a duty to  
27 account for the alleged partnership or that Legion and Mineau improperly failed to do so. Thus,  
28 Kvam is not entitled to dissolve the alleged partnership at this time pursuant to NRS 87.4351(5).

1 To the extent a partnership exists, Kvam is not entitled to unilaterally dissolve that partnership  
2 at this early stage in the litigation, based upon the sparse record currently before the Court. The  
3 Motion should be denied.

4 **III. CONCLUSION**

5 This entire lawsuit arises out of a document, drafted by Kvam, which is poorly worded, vague,  
6 ambiguous, contradictory, riddled with grammatical errors, and incomplete. It is impossible to  
7 ascertain the full extent of the parties' rights, duties, and obligations without discovery, extrinsic  
8 evidence, and likely a trial. The provisional relief sought by Kvam in the Motion is inappropriate at  
9 this time and should only come, if at all, after an adjudication of this dispute on its merits.


10 Given the limited record currently before this Court, the Motion must be denied.

11 **AFFIRMATION**

12 The undersigned does hereby affirm that the preceding document, **OPPOSITION TO**  
13 **MOTION FOR DISSOLUTION**, filed in the Second Judicial District Court of the State of Nevada,  
14 County of Washoe, does not contain the social security number of any person.

15 DATED this 26 day of July, 2018.

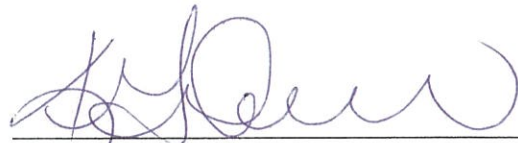
16 GUNDERSON LAW FIRM

17  
18 By:   
19 Austin K. Sweet, Esq.  
20 Nevada State Bar No. 11725  
21 Mark H. Gunderson, Esq.  
22 Nevada State Bar No. 2134  
23 3895 Warren Way  
24 Reno, Nevada 89509  
25 Telephone: 775.829.1222  
26 *Attorneys for Brian Mineau and Legion*  
27 *Investments*  
28

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of the law office of Gunderson Law  
3 Firm, and that on the 26 day of July, 2018, I electronically filed a true and correct copy of the  
4 **OPPOSITION TO MOTION FOR DISSOLUTION**, with the Clerk of the Court by using the  
5 electronic filing system which will send a notice of electronic filing to the following:

6  
7 Michael Matuska, Esq.  
8 Matuska Law Offices, Ltd.  
9 2310 South Carson Street, Suite 6  
10 Carson City, Nevada 89701  
11 *Attorneys for Jay Kvam*

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27  
28 Kelly Gunderson

## EXHIBIT LIST

Exhibit #	Description	Pages
Exhibit "1"	Declaration of Brian Mineau	1

**Exhibit “1”**

**Exhibit “1”**



1 DECLARATION OF BRIAN MINEAU

2 I, BRIAN MINEAU, declare under penalty of perjury that the following is true and correct:

3 1. I am over the age of 18.

4 2. I am a named defendant in this action.

5 3. I am the manager of Legion Investments, LLC ("Legion").

6 4. On February 13, 2017, I signed the document entitled *Terms of Agreement between*  
7 *Legion Investments LLC (its Members) and Jay Kvam (Initial Funding Member of Same) RE: 7747*  
8 *S. May Street, Chicago, Illinois* ("Terms of Agreement").

9 5. Jay Kvam drafted the Terms of Agreement without any input, revisions, or  
10 modifications by me.

11 6. When the Terms of Agreement was signed, Legion was a preexisting company that  
12 owned multiple assets. It was never my intent for Mr. Kvam to become a member in Legion.

13 7. Mr. Kvam funded the purchase of the property located at 7747 S. May Street, Chicago,  
14 Illinois ("Property") by directly writing money into escrow to pay the seller.

15 8. The Terms of Agreement affords Kvam 7% interest on his disbursements, to be paid  
16 from the proceeds of the Property first, before any net profit is distributed by Michael Spinola or me.  
17 It was never my intention to guaranty Mr. Kvam's investment, guaranty that Mr. Kvam would earn a  
18 7% return on his investment, or pay Mr. Kvam an annual payment of 7% of his investment out of  
19 anything other than the proceeds from the Property, if any.

20 9. Mr. Kvam funded the first "draw" for renovations by wiring money directly to the  
21 contractor hired to renovate the Property.

22 10. The foregoing is true and correct and based upon my own personal knowledge except  
23 as to those statements made upon information and belief, and for those I believe them to be true.

24 I declare under penalty of perjury under the law of the State of Nevada that the foregoing is  
25 trust and correct.

26 Executed at Reno, NV this 26<sup>th</sup> day of July, 2018.

27  
28   
BRIAN MINEAU

1 **CODE: 3785**

2 Michael L. Matuska, Esq. SBN 5711  
3 MATUSKA LAW OFFICES, LTD.  
4 2310 South Carson Street, Suite 6  
5 Carson City, NV 89701  
6 Attorneys for Plaintiff

7 **THE SECOND JUDICIAL DISTRICT COURT OF NEVADA**

8 **IN AND FOR THE COUNTY OF WASHOE**

9 JAY KVAM,

Plaintiff,

Case No. CV18-00764

10 v.

Dept. No. 3

11 BRIAN MINEAU; LEGION INVESTMENTS,  
12 LLC; 7747 S. May Street, an Unincorporated  
13 Joint Venture; and DOES I-X, inclusive,

Defendants.

14 **REPLY TO OPPOSITION TO MOTION FOR DISSOLUTION**

15 COMES NOW Plaintiff, JAY KVAM, by and through his counsel of record, Matuska Law  
16 Offices, Ltd., Michael L. Matuska, and hereby replies to the Opposition to Motion for Dissolution.

17 **1. The Uniform Partnership Act Requires a Decree of Dissolution**

18 In their Opposition, Brian Mineau and Legion Investments, LLC (together, "Mineau")  
19 argue at different times that a decree of dissolution is both a "provisional prejudgment remedy"  
20 (Opposition at 2:2) and a final decree (Opposition at 3:18-21 citing *Costello v. Scott*, 30 Nev. 43,  
21 94 P. 222, 223 (1908)). Neither characterization is entirely correct or relevant. A question of the  
22 finality of a decree is relevant only to determine whether an appellant has standing to appeal under  
23 NRAP 3A, not whether the claimant is entitled to relief in the first instance. *Costello v. Scott*, 30  
24 Nev. 43, 94 P. 222, 223 (1908) was decided 97 years before NRCPC 54 was adopted and amended  
25 to include subpart (b) regarding the certification of final judgments as to one or more but fewer  
26 than all of the parties. The various rules governing the finality of judgments and standing to  
27 appeal have no impact on Jay Kvam's right to request a decree of dissolution.  
28

1           Rather, Kvam's right to a decree of dissolution is set forth in the UPA – 1997. Mineau  
2 failed to rebut the discussion of UPA-1997 in Kvam's points and authorities which establish that a  
3 partnership is dissolved and must be wound up following the dissociation of a partner.  
4 Specifically, Mineau did not rebut Kvam's assertion that he is a dissociated partner under NRS  
5 87.4343 and 87.4344. Likewise, Mineau did not address NRS 87.4351 which provides that: "A  
6 partnership is dissolved, and its business must be wound up, only upon the occurrence of the  
7 following events: . . . 2. In a partnership for a definite term or a particular undertaking: (a)  
8 Within 90 days after a partner's dissociation . . . 5. On application by a partner, a judicial  
9 determination that: (a) The economic purpose of the partnership is likely to be unreasonably  
10 frustrated; (b) Another partner has engaged in conduct relating the partnership business which  
11 makes it not reasonably practicable to carry on the business in partnership with that partner; or (c)  
12 It is not otherwise reasonably practicable to carry on the partnership business in conformity with  
13 the partnership agreement . . . NRS 87.4351 (emphasis added).<sup>1</sup>

14           These statutes contemplate a two-part equitable proceeding that involves a decree of  
15 dissolution and court supervision of the winding up process. This is exactly what Kvam has  
16 requested. In contrast, Mineau cited no legal authority to support his apparent belief that he is  
17 entitled to continue to run the business through the time of trial, and only then, commence the  
18 winding up process. Mineau's theory is contrary to the statutes cited above whereby the business  
19 is dissolved upon the disassociation of its partner and continues only for the purpose of winding  
20 up. NRS 87.4351, 87.4352. It matters little whether the equitable decree of dissolution is entered  
21 upon a motion or after an evidentiary hearing. Either way, 7747 May Street has been dissolved,  
22 Mineau cannot continue to operate the joint venture indefinitely, and he needs to wind up the  
23 business and account to Kvam and this Court.

24           **2. 7747 S. May Street is Governed by the UPA-1997**

25           Mineau did not rebut Kvam's legal authorities which establish that a joint venture is a  
26

---

27           <sup>1</sup> Although Mineau's Opposition brief raises the question of whether Brian Mineau was the project manager, Mineau's  
28 Declaration failed to rebut Kvam's affidavit on that issue. Likewise, Mineau did not dispute Kvam's Affidavit which  
proves that there is no completion date and the project has failed. As such, there should be no dispute that it has  
become impracticable to continue the business and the business must be wound up.

single purpose partnership which is governed by the UPA, in this case UPA-1997. Although Mineau questions whether the Terms of Agreement at issue in this case created a joint venture agreement, he offers no other interpretation, and admits that “A person who receives a share of the profits of a business is presumed to be a partner in the business . . .” (Opposition at 7:14-15). However, Mineau attempts to avoid this presumption by misquoting NRS 87.4322 when argues that the presumption does not apply if “the profits were received in payment of a debt or interest or other charge on a loan, even if the amount of the payment varies with the profits of the business.” (Opposition at 7:15-17, misciting and misquoting NRS 87.4322). NRS 87.4322 actually states that the presumption in favor of a partnership applies “unless the profits were received in payment: (1) of a debt by installments or otherwise; . . . (5) Of interest or other charge on a loan, even if the amount of payment varies with the profits of the business . . .” (NRS 87.4322) (emphasis added)

In this case, the presumption of a partnership applies, and not the exceptions. The Terms of Agreement has two (2) components: the loan agreement and the profit sharing agreement. Kvam is entitled to repayment on his loan, with interest, before profits are divided. In other words, Kvam is entitled to receive both repayment on his loan and profits, and he is not supposed to receive profits as repayment of his loan. This important distinction means that the presumption of a partnership applies, and not the exception cited by Mineau for sharing profits to repay a loan.

Mineau did not address the unfavorable portions of the Terms of Agreement, including “Initial purchase is being funded by Kvam, who is there by assigned any remedies due should the transaction fail in anyway.” Mineau lacks standing to assert defenses on behalf of 7747 S. May Street or to avoid Kvam’s remedies.

### **3. The Terms of Agreement are Not Fatally Ambiguous**

Mineau argues that the Terms of Agreement is “fatally ambiguous” and “lacks essential terms to form a contract.” Mineau seems to be making an argument for rescission which would require him to refund Kvam’s money, with interest. Kvam is willing to accept that result. However, Mineau did not include a claim for rescission among his eleven (11) counterclaims, and his arguments therefore have no legal relevance to the issues raised in the pleadings. Furthermore,

1 the cases provided by Mineau do not support a claim for rescission, even if pled in his  
2 counterclaims.

3       *In Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 379, 283 P.3d 250, 255  
4 (2012), a subcontractor asserted a mechanic's lien and pursued contract and contract related  
5 theories after it spent money on design professionals but ultimately never had a signed subcontract  
6 agreement. In contrast, this case involves a written, signed agreement whereby Kvam was to fund  
7 the initial purchase as a loan, and then fund some of the draws in return for profit sharing. Kvam  
8 performed according to the Terms of Agreement; however, the project has failed, there is no  
9 completion date, Mineau refuses to account to his partner, and Kvam therefore dissociated from  
10 the joint venture. The various questions raised by Mineau do not alter these basic facts. As a  
11 result, the joint venture has been dissolved and must be wound up.

12       Mineau makes no effort to explain the relevance of his citation to *Nevada Power Co. v.*  
13 *Public Util. Comm'n.*, 122 Nev. 821, 138 P.3d 486 (2006). In that case, the Public Utilities  
14 Commission of Nevada ("PUCN") granted in part and denied in part Nevada Power Company's  
15 request to recoup approximately \$922 million in energy purchase costs incurred from 1999-2001.  
16 PUCN disallowed \$180,082,532 of Nevada Power's claim on that basis that it could have entered  
17 into an energy purchase contract that would have been cost effective for its ratepayers. The  
18 Nevada Supreme Court applied the "prudence presumption analysis" under which Nevada  
19 Power's decision is deemed prudent, and ruled that PUCN failed to present sufficient evidence to  
20 rebut that presumption. *Nevada Power* has no relevance to the present case, except to serve as a  
21 contrast due to the lack of a signed agreement, whereas the parties to the present case signed the  
22 Terms of Agreement.

23       WHEREFORE, Kvam respectfully requests an order declaring that the unincorporated  
24 joint venture referred to as 7747 S. May Street was dissolved on Kvam's dissociation on March  
25 14, 2018 and must be wound up, ordering Mineau and Legion to provide a complete accounting  
26 and winding up plan within thirty (30) days, and scheduling a hearing on the winding up plan  
27 within approximately forty-five (45) days.  
28

## Affirmation

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

Michael L. Malachuk

MICHAEL L. MATUSKA, SBN 5711  
Attorneys for Plaintiff, JAY KVAM, individually  
and derivatively on behalf of the unincorporated  
joint venture identified as 7747

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Matuska Law Offices, Ltd. and that on the 1<sup>st</sup> day of August, 2018, I served a true and correct copy of the preceding document entitled **REPLY TO OPPOSITION TO MOTION FOR DISSOLUTION** as follows:

Austin K. Sweet, Esq.  
GUNDERSON LAW FIRM  
3895 Warren Way  
Reno, NV 89509  
[asweet@gundersonlaw.com](mailto:asweet@gundersonlaw.com)

☐ **BY U.S. MAIL:** I deposited for mailing in the United States mail, with postage fully prepaid, an envelope containing the above-identified document(s) at Carson City, Nevada, in the ordinary course of business.

☒ **BY CM/ECF:**

☐ **BY PERSONAL SERVICE:** I personally delivered the above-identified document(s) by hand delivery to the office(s) of the person(s) named above.

☐ **BY FACSIMILE:**

☐ **BY FEDERAL EXPRESS ONE-DAY DELIVERY.**

☐ **BY MESSENGER SERVICE:** I delivered the above-identified document(s) to Reno-Carson Messenger Service for delivery.

/s/ Suzette Turley  
SUZETTE TURLEY

94



reflected in the emails attached hereto as Exhibits "1" and "2".

3. As reflected in Exhibit "1," Michael Spinola drafted the Terms of Agreement and sent it via email to Brian Mineau and me on February 12, 2017 at 8:11 PM along with the following message: "Just to line it out. Everything on pager J."

4. That the assertion at 5:24 of the opposition that the signature at the bottom of the Terms of the Agreement "is a rogue notary stamp and signature" is also false based on the email exchange documented on Exhibit "2" attached hereto.

a. Michael Spinola sent an email to me on February 13, 2017 at 4:19 PM with the following message: "Hey there sir. Just got me and Brian notarized. So you can notarize yours at your convenience. I will bring the original home with me."


b. I proceeded to sign the agreement in front a notary public, and sent a copy to Michael Spinola and Brian Mineau via on February 14, 2017 at 8:29 PM with the following message: "Thanks, guys. For your records, I've attached a scanned copy of the agreement with my signature now added. I'm looking forward to this being the first in a series of ventures that we do together."

c. Brian Mineau acknowledged receipt of my notarized signature and responded on February 15, 2017 at 9:48 AM "Awesome thank you J, I agree I look forward to more deals together."

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

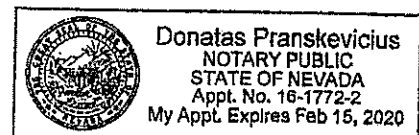
Dated this 31<sup>st</sup> day of July, 2018.

SUBSCRIBED and SWORN before me  
this 31 day of July, 2018,  
by JAY KVAM.

  
NOTARY PUBLIC

  
JAY KVAM

I:\Client Files\Litigation\Kvam\w. Mineau\Pldgs\Motion for Dissolution\Reply\Aff.Kvam.doc



## EXHIBIT INDEX

1	February 12, 2017 email from Michael Spinola
2	February 13, 2017 – February 15, 2017 email chain



FILED  
Electronically  
CV18-00764  
Jay Kvam <jkvam@yviloria.com>  
2018-08-01 02:33:40 PM  
Jacqueline Bryant  
Clerk of the Court  
Transaction # 6807270 : yviloria

## Terms of Agreement between Legion Investments LLC

11/18/2016

Michael Spinola <mspinola@onetrusthomeloans.com>

Sun, Feb 12, 2017 at 8:11 PM

To: Jay Kvam <kvam.jay@gmail.com>, Brian Mineau <Brian.t.mineau@hotmail.com>, "michael@spinolapartners.com" <michael@spinolapartners.com>

Just to line it out. Everything on paper J Also Brian, can you see who holds the current hazard insurance policy for Sonja on the property. WE NEED INSURANCE J

Michael



Terms of Agreement between Legion Investments LLC.docx

12K

## Document

**Brian Mineau** <Brian.t.mineau@hotmail.com>

Wed, Feb 15, 2017 at 9:48 AM

To: Jay Kvam <kvam.jay@gmail.com>, Michael Spinola <mspinola@onetrusthomeloans.com>

Awesome thank you J, I agree I look forward to more deals together.

v/r

Brian Mineau

---

**From:** Jay Kvam <kvam.jay@gmail.com>

**Sent:** Tuesday, February 14, 2017 8:29 PM

**To:** Michael Spinola; Brian Mineau

**Subject:** Re: Document

Thanks, guys!

For your records, I've attached a scanned copy of the agreement with my signature now added.

I'm looking forward to this being the first in a series of ventures that we do together!

kindly,

Jay

On Mon, Feb 13, 2017 at 4:19 PM, Michael Spinola <mspinola@onetrusthomeloans.com> wrote:

Hey there sir. Just got me and Brian notarized. So you can notarize yours at your convenience. I will bring the original home with me.

Michael

# Michael Spinola

Mortgage Loan Originator // NMLS #311884

775-335-2056 775-233-2241 775-201-0517

[mspinola@onetrusthomeloans.com](mailto:mspinola@onetrusthomeloans.com)

[Visit My Webpage](#)

5470 Kietzke Lane Suite 110 Reno NV 89511



[download my info](#)

[mortgage calculators](#)

[apply now!](#)

This email may contain data that is confidential, proprietary or "non-public personal information," as that term is defined in the Gramm-Leach-Bliley Act (collectively, "Confidential Information"). The Confidential Information is disclosed conditioned upon your agreement that you will treat it confidentially and in accordance with applicable law, ensure that such data isn't used or disclosed except for the limited purpose for which it's being provided and will notify and cooperate with us regarding any requested or unauthorized disclosure or use of any Confidential Information. By accepting and reviewing the Confidential Information you agree to indemnify us against any losses or expenses, including attorney's fees that we may incur as a result of any unauthorized use or disclosure of this data due to your acts or omissions. If a party other than the intended recipient receives this e-mail, you are requested to instantly notify us of the erroneous delivery and return to us all data so delivered. NMLS# 46375

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

9 **JAY KVAM,**

**Case No. CV18-00764**

10 **Plaintiff,**

**Dept. No. 3**

11 **vs.**

12 **BRIAN MINEAU; LEGION INVESTMENTS,**  
13 **LLC; 7747 S. May Street, an Unincorporated**  
14 **Joint Venture; and DOES I-X, inclusive,**

15 **Defendants.**  
16 \_\_\_\_\_/

17 **ORDER**

18 Currently before this Court is Plaintiff/Counter-Defendant JAY KVAM'S (hereinafter  
19 "KVAM") MOTION FOR DISSOLUTION (hereinafter "Motion") filed on July 11, 2018.  
20 Defendant/Counterclaimant BRIAN MINEAU and LEGION INVESTMENTS (hereinafter  
21 collectively, "Mineau") filed an OPPOSITION on July 26, 2018. Defendants filed a REPLY on  
22 August 1, 2018. The Motion was submitted to the Court the same day.  
23

24  
25 Kvam presents to the Court the Terms of Agreement between Legion Investments LLC (its  
26 Members) and Jay Kvam (Initial Funding Member of Same) Re: 7747 May Street, Chicago, Illinois.  
27 Affidavit in Support, Exhibit 1. Although he acknowledges that the Agreement is "not a model of  
28


1 clarity," he argues that it is joint venture agreement between himself and Mineau. Kvam requests an  
2 order declaring that the "unincorporated joint venture referred to as 7747 S. May Street was  
3 dissolved on Kvam's dissociation on March 14, 2018 and must be wound up, ordering Mineau and  
4 Legion to provide a complete accounting and winding up plan within thirty (30) days, and  
5 scheduling a hearing on the winding up plan within approximately forty-five (45) days."

6  
7 This request is essentially a request for summary judgment, and is therefore premature due  
8 to the lack of discovery between the parties. As Kvam himself notes, the document is not so clear  
9 that the Court may decide from the text alone what the nature of the Agreement is. Further, the  
10 Agreement and its contents are an important issue in case before the Court. Therefore, any decisions  
11 as to the contents of the Agreement or the Agreement itself represent an adjudicative decision on  
12 one of the issues of the case. The record does not support an adjudication of the issues at this time.  
13

14 Accordingly, and good cause appearing,

15 IT IS HEREBY ORDERED that Plaintiff/Counter-Defendant's Motion for Dissolution is  
16 DENIED.  
17

18 Dated this 31<sup>st</sup> day of August, 2018.

19  
20   
21 JEROME POLAHA  
22 DISTRICT JUDGE  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF MAILING**

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 4 day of ~~August~~ <sup>Sept</sup>, 2018, I did the following:

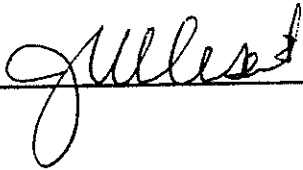
☒ Electronically filed with the Clerk of the Court, using the eFlex system which constitutes effective service for all eFiled documents pursuant to the eFile User Agreement:

AUSTIN K. SWEET, ESQ. for LEGION INVESTMENTS, LLC, BRIAN MINEAU

MARK HARLAN GUNDERSON, ESQ. for LEGION INVESTMENTS, LLC, BRIAN MINEAU

MICHAEL L. MATUSKA, ESQ. for JAY KVAM

☐ Transmitted document to the Second Judicial District Court mailing system in a sealed envelope for postage and mailing by Washoe County using the United States Postal Service in Reno, Nevada:

\_\_\_\_\_



1 **CODE: 2540**

2 Michael L. Matuska, Esq. SBN 5711  
3 MATUSKA LAW OFFICES, LTD.  
4 2310 South Carson Street, Suite 6  
5 Carson City, NV 89701  
6 Attorneys for Plaintiff

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

9 JAY KVAM,

Plaintiff,

Case No. CV18-00764

10 v.

Dept. No. 3

11 BRIAN MINEAU; LEGION INVESTMENTS,  
12 LLC; 7747 S. May Street, an Unincorporated  
13 Joint Venture; and DOES I-X, inclusive,

Defendants.

14 **NOTICE OF ENTRY OF ORDER**

15 PLEASE TAKE NOTICE that on September 5, 2018, the Court entered its Order in the  
16 above-mentioned matter, a copy of which is attached hereto as Exhibit 1.

17 The undersigned does hereby affirm that the preceding document does not contain the  
18 social security number of any person.

19 Dated this 6th day of September 2018.

20  
21 MATUSKA LAW OFFICES, LTD.

22 *Michael L. Matuska*

23 By:

24 MICHAEL L. MATUSKA, SBN 5711  
25 Attorneys for Plaintiff, JAY KVAM,  
26 individually and derivatively on behalf of  
27 the unincorporated joint venture identified  
28 as 7747

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Matuska Law Offices, Ltd. and that on the 6th day of September 2018, I served a true and correct copy of the preceding document entitled **NOTICE OF ENTRY OF ORDER** as follows:

Austin K. Sweet, Esq.  
GUNDERSON LAW FIRM  
3895 Warren Way  
Reno, NV 89509

**[X] BY E-MAIL OR ELECTRONIC TRANSMISSION.** I electronically filed a true and correct copy of the above-identified document with the Clerk of the Court by using the electronic filing system which will send a notice of electronic filing to the person named above.

**[ ] BY U.S. MAIL:** I deposited for mailing in the United States mail, with postage fully prepaid, an envelope containing the above-identified document(s) at Carson City, Nevada, in the ordinary course of business.

**[ ] BY PERSONAL SERVICE:** I personally delivered the above-identified document(s) by hand delivery to the office(s) of the person(s) named above.

**[ ] BY FACSIMILE**

**[ ] BY FEDERAL EXPRESS ONE-DAY DELIVERY.**

**[ ] BY MESSENGER SERVICE:** I delivered the above-identified document(s) to Reno-Carson Messenger Service for delivery.

/s/ SUZETTE TURLEY  
**SUZETTE TURLEY**

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## EXHIBIT INDEX

NO.	DOCUMENT
1	Order

MATUSKA LAW OFFICES, LTD.

2310 S. Carson Street, #6

Carson City, NV 89701

(775) 350-7220

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**EXHIBIT 1**  
**ORDER**

**ORDER**  
**EXHIBIT 1**

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

9 **JAY KVAM,**

**Case No. CV18-00764**

10 **Plaintiff,**

**Dept. No. 3**

11 **vs.**

12 **BRIAN MINEAU; LEGION INVESTMENTS,**  
13 **LLC; 7747 S. May Street, an Unincorporated**  
14 **Joint Venture; and DOES I-X, inclusive,**

15 **Defendants.**  
16 \_\_\_\_\_ /

17 **ORDER**

18 Currently before this Court is Plaintiff/Counter-Defendant JAY KVAM'S (hereinafter  
19 "KVAM") MOTION TO DISMISS COUNTERCLAIM, OR ALTERNATIVELY, FOR A MORE  
20 DEFINITE STATEMENT (hereinafter "Motion") filed on June 25, 2018.

21 Defendant/Counterclaimant BRIAN MINEAU and LEGION INVESTMENTS (hereinafter  
22 collectively, "Mineau") filed an OPPOSITION on July 12, 2018. Defendants filed a REPLY on July  
23 17, 2018. The matter was submitted to this Court August 1, 2018.

24 Under Nevada Rule of Civil Procedure 12(b)(5), a complaint will not be dismissed for  
25 failure to state a claim unless "it appears beyond a reasonable doubt that the plaintiff could prove no  
26  
27  
28

1 set of facts which, if accepted by the trier of fact, would entitle him or her to relief.” *Simpson v.*  
2 *Mars Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997); *Vacation Village v. Hitachi America*, 110  
3 Nev. 481, 484, 874 P.2d 744, 746 (1994). There is a strong presumption against dismissing an  
4 action for failure to state a claim. *Gilligan v. Jamco Development Corp.*, 108 F.3d 246, 249 (9th Cir.  
5 1997). When determining whether to grant a moving party’s motion to dismiss, all factual  
6 allegations of the complaint must be accepted as true. *Vacation Village, Inc.*, 110 Nev. at 484, 874  
7 P.2d at 746. The court must construe the pleading liberally and draw every fair inference in favor of  
8 the nonmoving party. *Id.* at 484, 874 P.2d at 746. A motion to dismiss should not be granted unless  
9 it appears beyond a doubt that a party could prove no set of facts that would entitle them to relief.  
10 *Pankopf v. Peterson*, 124 Nev. 43, 45, 175 P.3d 910, 912 (2008) (citing *Vacation Village*, 110 Nev.  
11 at 484). Specifically, “the test for determining whether the allegations of a complaint are sufficient  
12 to assert a claim for relief is whether the allegations give fair notice of the nature and basis of a  
13 legally sufficient claim and the relief requested.” *Id.* at 485.  
14  
15  
16

17 Kvam moves this Court for an order dismissing Mineau's Fourth through Eleventh Causes of  
18 Action in Mineau’s Answer and Counterclaim. The relevant claims are for: 4) Intentional  
19 interference with prospective economic advantage; 5) Deceptive trade practices, 6) Abuse of  
20 process; 7) Trespass; 8) Trespass to chattels; 9) Conversion; 10) Fraud; 11) Negligence.  
21

22 The factual allegations made against Kvam are that Kvam accessed the funds of an unrelated  
23 investment company, Atlas Investors Southside LLC (“Atlas”), without authorization, causing  
24 Atlas’ operating account to be overdrawn and interfering with Mineau’s accounts with that  
25 company; that Kvam turned off the power to the property at issue, which caused flooding at the  
26 property; and that Kvam caused process servers to harass and threaten Mineau’s wife in the course  
27 of their attempt to serve process on Mineau.  
28

1                   **I.       Intentional Interference with Prospective Economic Advantage**

2           The elements required for a claim of intentional interference with prospective economic  
3 advantage are: (1) a prospective contractual relationship between the plaintiff and a third party; (2)  
4 knowledge by the defendant of the prospective relationship; (3) intent to harm the plaintiff by  
5 preventing the relationship; (4) the absence of privilege or justification by the defendant; and (5)  
6 actual harm to the plaintiff as a result of the defendant's conduct. *In re Amerco Derivative Litig.*,  
7 127 Nev. 196, 226, 252 P.3d 681, 702 (2011).  
8

9  
10          Kvam argues that no specific third-party purchasers could possibly be identified by the  
11 allegations in the Counterclaim. However, Nevada is a notice pleading state. It is sufficient for  
12 Mineau to identify the theory and basic facts of the claim. The facts alleged in the Counterclaim are  
13 sufficient to survive a Motion to Dismiss.  
14

15                   **II.       Deceptive Trade Practices and Fraud**

16  
17          Actions for deceptive trade practices are actions that sound in fraud. NRS 41.600(2)(e). In  
18 pleading a claim for fraud, a heightened standard is used: "The circumstances that must be detailed  
19 include averments to the time, the place, the identity of the parties involved, and the nature of the  
20 fraud or mistake. Malice, intent, knowledge and other conditions of the mind of a person may be  
21 averred generally." *Brown v. Kellar*, 97 Nev. 582, 583-84, 636 P.2d 874, 874 (1981) (internal  
22 citations omitted).  
23  
24

25          Mineau does not meet this elevated standard regarding his pleadings for his fifth cause of  
26 action. He further does not meet this standard for his tenth cause of action, which also sounds in  
27 fraud. There are no specifics of time or place, nor descriptions of precisely the conduct involved.  
28

1 Therefore, this Court orders that Mineau submit a more definite statement complying with the  
2 standards for pleading fraud regarding claims five and ten.

3  
4 **III. Abuse of Process**

5 Mineau's Counterclaim alleges that "Kvam is using the statutes and laws of the State of  
6 Nevada for an ulterior purpose and for private gain by wrongfully initiating, prosecuting, and  
7 otherwise using this action not to resolve a legitimate legal dispute, but instead to force Mineau and  
8 Legion to buy him out of the Agreement, pay him more than he is entitled under the Agreement,  
9 and/or pay sooner than he is entitled under the Agreement." 9:1-5.

10  
11  
12 Kvam argues that the filing of a complaint does not constitute an abuse of process, and that  
13 Mineau does not support his allegation with any facts.

14  
15 However, a motion to dismiss should not be granted unless it appears beyond a doubt that a  
16 party could prove no set of facts that would entitle them to relief. *Pankopf*, 124 Nev. at 45, 175  
17 P.3d at 912. At this stage, it would be premature to dismiss the claim.

18  
19 **IV. Trespass**

20  
21 Mineau's Counterclaim alleges that "Kvam intentionally caused his agents to physically  
22 enter Mineau's property without permission, after they had been instructed to leave Mineau's  
23 property, and without legal purpose or justification. Kvam's agents acted intentionally and at  
24 Kvam's direction to invaded [sic] Mineau's property." 9:19-23. Said alleged agents were the process  
25 servers hired by Kvam's counsel in order to serve the Summons and Complaint  
26  
27  
28



1           “Process server” means a person, other than a peace officer of the State of Nevada, who  
2 engages in the business of serving legal process within this State. NRS 648.014. The process servers  
3 here were licensed process servers from NOW! Services, Inc., not employees of Kvam or his  
4 retained firm. Unlike employees, independent contractors are not ordinarily agents. *United States v.*  
5 *Bonds*, 608 F.3d 495, 505 (9th Cir. 2010). However, an independent contractor may be an agent in  
6 limited circumstances in which he acts subject to the principal's overall control and direction. *Id.*  
7

8           In a Motion to Dismiss, all inferences should be drawn in favor of the nonmoving party. At  
9 this stage, it would be premature to dismiss the claim.  
10

#### 11           **V.       Trespass to Chattels and Conversion**

12

13           A trespass to a chattel may be committed by intentionally dispossessing another of the  
14 chattel, or using or intermeddling with a chattel in the possession of another. Restatement (Second)  
15 of Torts § 217 (1965). Chattel consists only of personal property, not of real property. Black's Law  
16 Dictionary 236 (6<sup>th</sup> ed. 1990). Conversion is “a distinct act of dominion wrongfully exerted over  
17 another's personal property in denial of, or inconsistent with his title or rights therein *or* in  
18 derogation, exclusion, or defiance of such title or rights.” *M.C. Multi-Family Dev., L.L.C. v.*  
19 *Crestdale Assocs., Ltd.*, 124 Nev. 901, 910, 193 P.3d 536, 542 (2008). Both, therefore, are crimes  
20 against personal property rather than real property.  
21  
22

23           Mineau's main allegations in this claim are that there was deprivation of the use and value  
24 of real property, which does not fall under the umbrella of conversion. Further, Mineau pleads that  
25 Kvam converted Atlas' assets. As stated in the Counterclaim, Atlas is an “unrelated investment  
26 company” and is further not a party to this action. Answer and Counterclaim, 4:25-27. Under these  
27 theories, Mineau cannot maintain a claim for conversion.  
28

1 However, Mineau does allege that there was personal property within the house, and that  
2 Kvam interfered with Mineau's rights to the property and impaired the condition of the personal  
3 property within the house. This is sufficient to assert a claim for conversion and trespass to chattels.  
4

5 Therefore, Mineau's claims for conversion and trespass to chattels regarding real property  
6 and Atlas' assets are dismissed.  
7

8 **VI. Negligence**

9 While Mineau alleges that Kvam "owed Mineau and Legion a duty to act with reasonable  
10 care to avoid damaging Mineau, Legion, or their property," it does not allege sufficient facts to put  
11 Kvam on notice of what the claim actually refers to.  
12

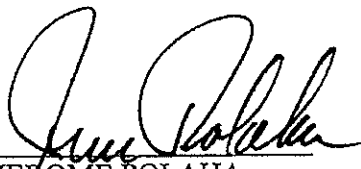
13 Therefore, this Court orders that Mineau submit a more definite statement that will comply  
14 with Nevada's notice pleading standards.  
15

16 Accordingly, and good cause appearing,  
17

18 IT IS HEREBY ORDERED that Plaintiff/Counter-Defendant's Motion to Dismiss is  
19 GRANTED with regards to the claims for conversion and trespass to chattels regarding real  
20 property and Atlas' assets, and DENIED with regards to the other claims.  
21

22 IT IS HEREBY ORDERED that Plaintiff/Counter-Defendant's Motion for a More Definite  
23 Statement is GRANTED with regards to claims Five, Ten, and Eleven.  
24

25 Dated this 29<sup>th</sup> day of August, 2018.

26   
27 JEROME POLAHA  
28 DISTRICT JUDGE

**CERTIFICATE OF MAILING**

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 5 day of ~~August~~ <sup>Sept</sup>, 2018, I did the following:

☒ Electronically filed with the Clerk of the Court, using the eFlex system which constitutes effective service for all eFiled documents pursuant to the eFile User Agreement:

AUSTIN K. SWEET, ESQ. for LEGION INVESTMENTS, LLC, BRIAN MINEAU

MARK HARLAN GUNDERSON, ESQ. for LEGION INVESTMENTS, LLC, BRIAN MINEAU

MICHAEL L. MATUSKA, ESQ. for JAY KVAM

☐ Transmitted document to the Second Judicial District Court mailing system in a sealed envelope for postage and mailing by Washoe County using the United States Postal Service in Reno, Nevada:

  
Jerrine Ulleseit