IN THE SUPREME COURT OF THE STATE OF NEVADA

JAY KVAM,

Appellant,

v.

BRIAN MINEAU; AND LEGION INVESTMENTS, LLC,

Respondents.

_____/

Supreme Court Case No. 81422

District Case No. CV18-00764

Appeal from the Second Judicial District Court of the State of Nevada,
In and for the County of Washoe
The Honorable Lynne Simons, District Judge

RESPONDENTS' ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Brian Mineau

No publicly-held company owns 10% or more of Legion Investments, LLC's stock.

Attorneys from the Gunderson Law Firm have appeared for Brian Mineau and Legion Investments, LLC in this case. No partners or associates from any other law firm are expected to appear in this court.

DATED this 8 day of February, 2021.

GUNDERSON LAW FIRM

By: _____

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I. INTRODUCTION

This dispute concerns the parties' joint efforts to acquire the property located at 7747 S. May Street, Chicago, Illinois ("Property"), renovate it, and sell it for a profit. The Property was a dilapidated home in Chicago's "South Side" and was inexpensive to acquire and renovate, providing for a potentially profitable return on investment in a relatively short period. Pursuant to their agreement, the parties purchased the Property for approximately $45,000.00 and hired a contractor to perform the renovation. The contractor agreed to complete the renovation within approximately ten (10) weeks for a flat fee of $80,000.00.

From the outset, the parties agreed that if the project succeeded, the profits would first be disbursed to pay all expenses, including interest due on each partners' contribution at 7% per year, and then split among them based upon their percentage interests. The parties also agreed that if the project failed, all interest in the partnership and any remedies due would be transferred and assigned to Appellant JAY KVAM ("Kvam"). Kvam contributed $93,784.31 to the project, consisting of $44,784.31 which he wired directly to the title company to acquire the Property and $49,000 which he wired directly to the contractor for the renovations. BRIAN MINEAU ("Mineau") and LEGION INVESTMENTS, LLC ("Legion") contributed $27,090.31 to the partnership, consisting of $20,000.00 paid to the contractor and

$7,090.31 paid on behalf of the partnership for ongoing holding costs while Legion owned the Property, such as utility bills and insurance premiums.

The contractor was in constant communication with Legion, Mineau, and Kvam during the course of the scheduled construction. Kvam regularly communicated directly with the contractor via telephone, text, and internet messaging through Slack, and the contractor sent regular updates and dozens of photographs directly to Mineau and Kvam. The contractor even came to Reno to meet with Mineau and Kvam, discussed the project at length with Mineau and Kvam, and even stayed at Kvam's house during his trip.

Unfortunately, the contractor breached its contract and failed to complete the renovation. Legion and Mineau undertook reasonable and good faith efforts to compel the contractor to finish the project in compliance with the contract, but after months of excuses and broken promises from the contractor, Kvam declared "the project a failure" and demanded that Legion/Mineau "refund" Kvam's investment in the Property, plus interest. Legion and Mineau offered to assign all interest in the project to Kvam pursuant to the parties' agreement, but Kvam refused to accept such an assignment and instead maintained that Legion and Mineau were somehow obligated to personally guaranty Kvam's investment.

When efforts to resolve Kvam's concerns were unsuccessful, he initiated this action against Legion and Mineau, blaming them for the project's failure. Worse,

Kvam pursued extensive claims that Legion and Mineau committed various forms of fraud, conversion, embezzlement, and racketeering by conspiring with the contractor to misappropriate and/or mishandle Kvam's money. However, after substantial third-party discovery and a forensic accounting, Kvam failed to uncover any evidence whatsoever to support his conspiracy theories. The district court properly determined that Kvam had failed to transcend the pleadings and introduce specific evidence to show a genuine issue of material fact for trial, and therefore entered summary judgment against him.

The district court's *Order Granting, in Part, and Denying, in Part Defendants' Motion for Summary Judgment; Order Granting Summary Judgment on Claim Pursuant to Court's NRCP 56 Notice* ("Order") properly enforced the written contract between the parties, was detailed and well-reasoned, and should be affirmed.

II. STATEMENT OF THE CASE

Given the interlocutory nature of this appeal, a detailed review of the relevant pleadings before the district court is necessary.

On April 11, 2018, Kvam filed his *Verified Complaint*. 1 JA 1-9. On June 5, 2018, Legion and Mineau filed their *Answer and Counterclaim*. 1 JA 10-23.

On September 5, 2018, the district court entered an *Order* dismissing two counterclaims and ordering a more definite statement on three other counterclaims.

Legion and Mineau filed their *First Amended Counterclaim* on October 5, 2018 ("FACC"). 2 JA 114-127.

On November 16, 2018, Legion sold the Property. 7 JA 1039 ¶ 38. The net proceeds from the sale were $24,473.77. Id.

On December 3, 2018, the district court entered an *Order Granting Temporary Restraining Order*, estopping Legion or Mineau from disposing of any proceeds from the sale of the Property. 3 JA 251-255. On December 12, 2018, the district court entered a *Stipulation to Deposit Funds; Order*, which authorized Legion to deposit the proceeds from the sale of the Property with the court clerk, terminated the temporary restraining order, and withdrew the preliminary injunction without prejudice. 3 JA 256-258. The proceeds were deposited the following day. 3 JA 267-272. Kvam never filed another motion seeking injunctive relief.

On December 19, 2018, Legion's attorney in Chicago notified Mineau that an additional $1,864.14 had been received from the sale of the Property. 7 JA 1039 ¶ 39. Legion and Mineau sought Kvam's stipulation to add these additional funds to the proceeds deposited with the court clerk, but Kvam declined. Id. Kvam never sought injunctive relief concerning this $1,864.14.

On January 9, 2019, the district court entered an *Order* adjudicating all of Legion and Mineau's counterclaims *except* their third claim for relief for declaratory relief. 3 JA 376-378. Kvam never filed an answer to Legion and Mineau's FACC.

On January 31, 2019, Kvam filed his *First Amended Verified Complaint*. 3 JA 379-389. On February 19, 2019, Legion and Mineau filed their *Answer to First Amended Verified Complaint*. 3 JA 390-394. Legion and Mineau's pending counterclaim was not re-pled as there were no revisions to it.

On September 11, 2019, Kvam filed his *Second Amended Verified Complaint*. 5 JA 756-768. On September 25, 2019, Legion and Mineau filed their *Answer to Second Amended Verified Complaint*. 5 JA 769-773. Legion and Mineau's pending counterclaim was not re-pled as there were no revisions to it.

On January 6, 2020, Legion and Mineau filed their *Motion for Summary Judgment*. 7 JA 1003 – 8 JA 1225.

On January 10, 2020, the discovery commissioner entered a *Recommendation for Order*, recommending that Kvam be allowed certain discovery relating to other projects in which Legion and Mineau were allegedly involved and for which the same contractor may have performed work ("Recommendation for Order"). 9 JA 1226-1237. On January 13, 2020, Legion and Mineau filed their *Objection to Recommendation for Order*, arguing that the discovery sought was irrelevant and confidential. 9 JA 1238-1242.

On January 14, 2020, the district court held a pretrial conference. 15 JA 2101-2144. At that pretrial conference, Kvam's attorney expressly acknowledged that Legion and Mineau's "only remaining counterclaim is for declaratory relief" and

that "both parties are moving for a declaration." 15 JA 2109-2110. Kvam offered no argument or indication of any belief that Legion and Mineau had abandoned or withdrawn their FACC. Id.

On January 24, 2020, Kvam filed a *Motion for Reconsideration of Order Affirming Discovery Commissioner's Recommendation, Entered May 16, 2019; For Discovery Sanctions; and For Other Relief* ("Motion for Reconsideration"). 12 JA 1518-1564.

On February 27, 2020, the district court held a pretrial conference and indicated orally that it intended to enter partial summary judgment and set the remaining issues for trial. 15 JA 2204-2208. The district court also ordered the parties to participate in a continued settlement conference before trial. Id. 2208.

On June 5, 2020, the district court entered the Order, granting summary judgment in favor of Legion and Mineau and against Kvam on most of the pending claims. 14 JA 1948-1992. The court directed the parties to contact the Judicial Assistant to set the matter for trial on the remaining claims and to "resubmit any motions previously submitted which are not made moot by reasons of this Order." 14 JA 1991 ¶¶ 15-16. Kvam did not contact the court to set the matter for trial or resubmit his Motion for Reconsideration or the Recommendation for Order; instead, he filed this appeal.

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III. STATEMENT OF THE FACTS

The Factual Background section of Kvam's *Opening Brief* omits several material facts and evidence upon which the district court's Order was based. Legion and Mineau therefore restate the full statement of undisputed facts from their *Motion for Summary Judgment* for this Court's ease of reference.

In late 2016 / early 2017, Mineau, Kvam, and Michael J. Spinola ("Spinola") began formulating a plan to purchase the Property, renovate it, and sell it for a profit. 7 JA 1034 ¶ 5.

On January 3, 2017, Legion entered into a Residential Real Estate Purchase and Sale Contract to purchase the Property for $44,000.00. 7 JA 1034 ¶ 6.

On February 13, 2017, the parties entered into a document entitled *Terms of Agreement between Legion Investments LLC (its Members) And Jay Kvam (Initial Funding Member of Same) RE: 7747 S. May Street, Chicago Illinois* ("Terms of Agreement"). 7 JA 1041. The Terms of Agreement reads, in its entirety, as follows:

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

> agreed to allot %50 of his 1/3 profit to Mr. Kvam for both initial funding's.

Id (all typographical errors in original). The Terms of Agreement was signed by Kvam, Mineau, and Spinola. Id. According to Kvam, he acceded to Spinola's interest and Spinola is no longer part of this joint venture. 5 JA 758 ¶ 11.

Also, on February 13, 2017, Kvam wired $44,000.00 to Citywide Title Corp, Escrow No. 719630, for the purchase of the Property. 7 JA 1043. Kvam subsequently wired an additional $784.31 to the title company to cover the buyer's portions of the closing costs. 7 JA 1045. Pursuant to the Terms of Agreement, Legion took title to the Property that same day. 7 JA 1034 ¶ 10. Legion promptly undertook efforts to identify a contractor and obtain bids to renovate the Property. Id.

On March 16, 2017, Legion's property manager in Chicago, Colleen Burke, texted to Mineau, "I have the other contractor I told you about going to May Street. I'm really liking this guy. He seems very fair and hard worker. I would like to set up a conference call with him this weekend." 7 JA 1047. That contractor turned out to be TNT Complete Facility Care Inc. ("TNT"). 7 JA 1034-35 ¶ 11. On March 19, 2017, Ms. Burke emailed Mineau the contact information for TNT's principals, Derek Cole and Todd Hartwell, along with TNT's references and Certificate of Insurance. 7 JA 1049-52.

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On March 23, 2017, Legion entered into a Contractor Agreement with TNT ("Contractor Agreement"). 7 JA 1054-67. The Contractor Agreement identified Todd Hartwell as TNT's CEO and Derek Cole as TNT's Field Operations VP. 7 JA 1064. Pursuant to the Contractor Agreement, TNT agreed to fully renovate the Property for a flat fee of $80,000.00. 7 JA 1065. Progress payments were to be made pursuant to a defined schedule. Id. TNT agreed to complete the project by June 1, 2017. Id.

On March 23, 2017, pursuant to the Terms of Agreement and the Contractor Agreement, Kvam wired $20,000.00 directly to TNT with the reference "7747 South May Street – Legion Investments – Jay Kvam." 7 JA 1069-70. This represented the required down payment "to secure permits, architect, demo." 7 JA 1065.

On April 9, 2017, TNT emailed proposed floor plans to Mineau, who forwarded them to Kvam and Spinola for review and input. 7 JA 1072-78.

On April 14, 2017, Kvam emailed Todd Hartwell (TNT's CEO) to inquire as to whether Legion had an assigned account number with TNT and the preferred way for Kvam to send TNT the next progress payment. 7 JA 1080-84. Kvam then wrote Todd Hartwell again, indicating that he had just spoken with Mr. Hartwell and that he was "heading to the bank now to set up the wire." Id. Shortly thereafter, Kvam wired another $20,000.00 directly to TNT with the reference "Second Draw Legion Investments Jay Kvam." 7 JA 1086-87.

On and around May 5, 2017, Derek Cole (TNT's Field Operations VP) came to Reno to visit with Mineau, Kvam, and others. 7 JA 1035 ¶ 18. Kvam's notes indicate that they first met at Mineau and Spinola's office, where they discussed Mr. Cole's thoughts on development in the Chicago area, his construction experience and affiliations, his family and community background, his work ethic, and general information about how they could best work together on current and future projects in the Chicago area. 7 JA 1089-95; see also 7 JA 1035 ¶ 18. Kvam's notes indicate that the group then went to Skipolini's Pizza for dinner and continued discussing business opportunities in the Chicago area. 7 JA 1096-97. Kvam's notes indicate that, after dinner, just Kvam and Mr. Cole retired to Kvam's home and continued discussing business opportunities and general operating practices in the Chicago area. 7 JA 1098-1101. Kvam and Mr. Cole also specifically discussed the renovation of the Property, and Mr. Cole represented to Kvam that the project would be "done in early June." 7 JA 1101. Mr. Cole spent the night at Kvam's home (which Kvam offered as a vacation rental) and Kvam took Mr. Cole to the airport the next morning. Id.

On May 9, 2017, Mineau texted Kvam and Spinola approximately nine (9) photographs of the Property which he had received from Mr. Cole. 7 JA 1103-11; 7 JA 1036 ¶ 20. Mineau also informed Kvam and Spinola that he "just got this from Derek [Cole] roof is all done at May street." Id.

On May 15, 2017, Kvam texted Derek Cole to check on him after an apparent car accident and to give Kvam's mobile telephone number to Mr. Cole. 7 JA 1113-34. Mr. Cole responded by sending Kvam forty-six (46) photographs of the interior and exterior of the Property, purportedly showing the work TNT had completed to date and the current status of the project. Id. These pictures included the nine (9) pictures of the roof which Mineau had forwarded to Kvam on May 9, 2017. Compare 7 JA 1103-11 with 7 JA 1113-16.

On May 17, 2017, Kvam sent Mr. Cole a message on Slack indicating, "first half of the third draw on May to go out tomorrow." 7 JA 1136.

On May 18, 2017, Kvam wired $9,000.00 directly to TNT with the reference "Half of Third Installment." 8 JA 1138-40.

On May 21, 2017, Mr. Cole informed Mineau that TNT would be "installing floors this week and should be finishing very soon." 7 JA 1036 ¶ 24. Mineau forwarded this information on to Kvam. 8 JA 1142.

On or about May 26, 2017, Mr. Cole called Mineau and requested the next $20,000.00 progress payment for the project. 7 JA 1036-37 ¶ 25. Mineau was travelling at the time and was unable to promptly make direct payment; however, at Mineau's request, Spinola agreed to arrange to have the funds wired to TNT on Mineau's behalf. Id. The deposit and wire were made through an account controlled by Spinola which was owned by an entity called Criterion NV LLC. Id. Thus, on

May 26, 2017, Criterion NV LLC, acting on Mineau's behalf, wired $20,000.00 directly to TNT with the reference "May Street." 8 JA 1144.

Over the course of the next week, Kvam and Mr. Cole texted regularly concerning the Property. 8 JA 1146-53.

On May 31, 2017, Kvam texted Mineau and said, "Just let me know if you ever feel that I'm overly involved with anything; I don't want to step on your toes. 😊 I just figure that billings are financial matters, so I can help shoulder some of that responsibility in my role for our properties. I can receive, process, manage, account, and pay for them as a routine matter for our acquisitions." 8 JA 1155. Mineau responded and said, among other things, "No problem at all I don't mind the help, just want to make sure we are all on the same page with everything. Perhaps you and I can get together to figure out how we want to run these projects going forward." Id. Kvam responded with, "Just wanted to apologize for inadvertently putting you in an awkward position with Derek regarding the status of our single family house rehabs. He asked me whether I needed more, and I told him that I was analyzing what we currently have this week and next. I'll play it closed to the [vest] with Derek going forward. Again, really sorry." Id.

Over the course of next month, Kvam and Mr. Cole texted regularly concerning the Property. 8 JA 1157-86. Among other things, Mr. Cole sent Kvam and Mineau dozens of pictures of the work being performed at the Property. 8 JA

1161-78. Mr. Cole also notified Kvam that "I got all the permits and paperwork back from the city last week file from [sic] my inspections as soon as they come do those I'm two weeks after that." 8 JA 1184. In response to Kvam's inquiry, Mr. Cole explained that the inspections were "for the rough plumbing and electrical." Id.

Unfortunately, after June 20, 2017, TNT started becoming increasingly unresponsive. 7 JA 1037-38 ¶ 29. However, Kvam's records indicate that work continued to proceed at the Property. According to the City of Chicago Department of Buildings records produced by Kvam, a "DOB PLUMBING INSPECTION" occurred on July 11, 2017, and TNT received a "PARTIAL PASS." 8 JA 1188 at "INSPECTIONS" section. These records also indicate that two "ELECTRICAL PERMIT INSPECTIONS" occurred on July 17, 2017, and TNT received a "PARTIAL PASS" on both. Id.

Despite these inspections, TNT failed to complete the project. Over the course of next several months, Mineau constantly contacted Mr. Cole and Mr. Hartwell in an effort to compel TNT to finish the project. 7 JA 1037-38 ¶ 29. TNT would drop in and out of communication, but would always respond eventually by offering excuses for the delays and promises that the project would be completed within a matter of days or weeks. Id. For example, in mid-July 2017, Mr. Cole apparently went missing and neither Mr. Hartwell nor Mr. Cole's wife would tell Mineau where

he was. Id. Mr. Hartwell nonetheless confirmed that TNT was working to replace Mr. Cole and that TNT would finish the project as soon as possible. Id. In late August 2017, TNT explained that the reason Mr. Cole had suddenly gone absent was because he had suffered a heart attack, but that he had recovered and was returning to work. Id. In late September 2017, Mr. Cole informed Mineau that the Property needed a few more inspections but was nearly complete. Id. In mid-October 2017, Mr. Cole informed Mineau that TNT was "doing the final touches" and would then be ready for occupancy inspections. Id. In early November 2017, Mr. Cole represented that some of the plumbing work did not pass inspection and would need more work. Id. In mid-November 2017, Mr. Cole represented to Mineau that the project would be done in 14-17 days and would cost an additional $2,000.00, but that TNT would "eat that cost" due to the delay. Id.

By December 2017, Kvam had become frustrated with TNT's excuses and delays and indicated his fear that TNT had defrauded them. 8 JA 1196-97. Another party, Bradley Tammen, informed Mineau and Kvam that he had a friend drive by the Property and described its condition as "kind of 'condemned looking.'" 8 JA 1195. Mineau shared these concerns with Mr. Cole, who attempted to justify the street-appearance of the Property as merely security measures during the construction. 8 JA 1195-96. Nonetheless, Mineau notified Kvam that he had asked his attorney in Chicago to draft a demand letter to TNT. Id. Alternatively, Mineau

offered to "sign the property over" to Kvam and Mr. Tammen, allowing them to complete the construction and keep the profit themselves. Id.

On December 31, 2017, Kvam delivered a letter to Mineau concerning the Property. 8 JA 1192-93; see also 8 JA 1201-03. In his letter, Kvam requested that Mineau "refund [his] investment to-date plus accrued interest…." Id. Kvam also expressly rejected Mineau's offer to transfer the Property to Kvam and Tammen, stating that he did not want to assume the role of managing the project and expressing concern that TNT had done little construction work for the money it had been paid. Id. Kvam further stated, "I deem the project a failure…." Id.

On February 16, 2018, Kvam's attorney, Michael L. Matuska, delivered a letter to Mineau requesting that Mineau "reimburse" Kvam for his investment in the project by no later than February 28, 2018. 8 JA 1205. After lengthy settlement discussions were unsuccessful, Kvam initiated this action on April 11, 2018. 1 JA 1-9.

On September 18, 2018, while litigation was proceeding, Legion and Mineau delivered a settlement offer to Kvam. 7 JA 1038 ¶ 34. Without revealing the full extent of the confidential offer, the offer expressly included an offer to transfer the Property to Kvam and assign all rights, claims, and causes of action against Derek Cole, Todd Hartwell, and TNT to Kvam. Id.

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On September 19, 2018, Kvam responded by rejecting this offer and stating, in relevant part, "Mr. Mineau is encouraged to sell the May Street property … and any other property he needs to sell in order to satisfy Mr. Kvam's claims." 8 JA 1207.

On September 24, 2018, in reliance upon Kvam's letter, Legion entered into an *Exclusive Right to Sell Listing Agreement* with Miller Chicago LLC, a local brokerage firm in Chicago. 8 JA 1209-12.

On October 24, 2018, Legion entered into a *Residential Real Estate Purchase and Sale Contract* to sell the Property for $41,000.00. 8 JA 1214-17.

On November 16, 2018, escrow closed on the Property. 8 JA 1219-21. Legion's share of prorated property taxes, closing costs, and the commission owed to the real estate brokers equaled $16,526.23. Id. The net proceeds from the closing were therefore $24,473.77. Id.

On December 12, 2018, the parties entered into a *Stipulation to Deposit Funds; Order* in the district court, pursuant to which Legion deposited the $24,473.77 of net proceeds from the sale with the clerk of court. 3 JA 256-258.

On December 19, 2018, Legion's attorney in Chicago notified it that an additional $1,864.14 had been received from the sale of the Property as a result of a refund on a tax bill and a water bill. 8 JA 1039 ¶ 39. Kvam declined Legion's requested stipulation to add these funds to the proceeds deposited with the clerk of

court, so Legion continues to hold these funds pending a resolution of this dispute. Id. With this refund, the total net proceeds from the sale of the Property are $26,337.91. Id.

IV. SUMMARY OF THE ARGUMENTS

This interlocutory appeal comes before this Court pursuant to NRAP 3A(b)(3). Kvam bore the burden before the district court to establish the viability of his claims, including his right to injunctive relief, in order to survive summary judgment. Kvam utterly failed to meet that burden. Specifically concerning injunctive relief, Kvam has not affirmatively sought injunctive relief and has never articulated with specificity the acts he seeks to have restrained. Pursuant to the district court's Order, the joint venture has no assets, the joint venture has no ongoing business, and all interests and rights in the joint venture have been assigned to Kvam. Further, the bulk of the proceeds from the sale have been deposited with the clerk of court, and the remaining $1,864.14 has not been deposited with the clerk because Kvam refused to stipulate to allow Legion/Mineau to do so. Accordingly, there is simply nothing left to restrain or enjoin and the district court properly determined that Kvam's Seventh Cause of Action is legally ineffectual.

The core of Kvam's claims throughout this lawsuit appear to arise from a belief that his investment carried no risk and, therefore, the mere fact that the real estate project failed evidences that Legion or Mineau must have engaged in some

manner of fraud or actionable misconduct. However, after discovery had closed and in the face of summary judgment, Kvam failed to identify any admissible evidence to meaningfully substantiate his claims that Legion or Mineau personally guaranteed Kvam's investment or are otherwise somehow legally responsible for the losses all parties suffered in this investment when TNT breached the Contractor Agreement. Kvam's bare and unsubstantiated allegations were insufficient to sustain his claims before the district court and are certainly insufficient to reverse the district court's decisions on appeal.

The district court did not commit reversible error and its decisions should be affirmed.

V. ARGUMENT

Kvam's *Opening Brief* identifies four specific issues on appeal. AOB p. 1. However, the body of Kvam's brief does not clearly set forth his contentions concerning these issues and the reasons for them, so the specific bases for Kvam's appeal are unclear. Legion and Mineau will therefore address the four identified issues on appeal first and then address the litany of other issues raised in the body of Kvam's *Opening Brief*.

A. The District Court Properly Granted Partial Summary Judgment.

Kvam's first identified issue on appeal is whether the district court committed multiple errors of law and abused its discretion by granting partial summary

judgment in favor of Mineau/Legion based on "deemed admitted" findings of fact and a "sham" declaration, and by failing to first rule on underlying discovery motions. AOB p. 1. The specific legal bases for Kvam's appeal are unclear. Regardless, the district court did not commit reversible error in this regard.

This Court reviews the grant or denial of summary judgment de novo. 9352 Cranesbill Tr. v. Wells Fargo Bank, N.A., 136 Nev. 76, 78, 459 P.3d 227, 229 (2020).

1. The district court did not commit reversible error by including "deemed admitted" facts in its Order.

The district court's Order included reference to facts which were "deemed admitted" due to Kvam's failure to file an answer to Legion an Mineau's FACC. 14 JA 1961, 1963 fn. 5, & 1972. On appeal, Kvam does not dispute that he failed to file an answer to the FACC, nor does he dispute that any allegation is deemed admitted if a responsive pleading is required and the allegation is not denied. NRCP 8(b)(6). Rather, Kvam asserts that Legion and Mineau abandoned their counterclaim by not re-pleading it along with their answers to Kvam's first and second amended complaints; thus, Kvam contends that the FACC was not actually pending and could not form the basis for any undenied allegations to be "deemed admitted." AOB pp. 28; 31; & 36-37. Kvam's position is unsupported by any argument or citation to authority. Id.

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The issue of whether a defendant abandons its counterclaim when it fails to re-plead it along with an answer to an amended complaint has never been addressed in Nevada. However, the issue has been extensively addressed in federal courts.[1] A commonly adopted approach comes from the Western District of Pennsylvania, which held that a defendant is not required to replead a counterclaim in response to an amended complaint, stating:

> Rule 13, which governs counterclaims, requires only that a counterclaim be set forth in a pleading—it does not mandate that it be contained in an answer. Further, an answer responds to allegations in a complaint, a counterclaim is something independent. Revisions to a complaint do not require revisions to a counterclaim.

Dunkin' Donuts, Inc. v. Romanias, No. CIV.A.00-1886, 2002 WL 32955492, at *2 (W.D. Pa. May 29, 2002) (internal quotations omitted). This approach has been adopted by the Western District of Washington (Umouyo v. Bank of Am., N.A., No. 2:16-CV-01576-RAJ, 2019 WL 359268, at *2 (W.D. Wash. Jan. 29, 2019)), the District Court of Idaho (Ada Cty. Highway Dist. v. Rhythm Eng'g, LLC, No. 1:15-CV-00584-CWD, 2017 WL 1502791, at *7 (D. Idaho Apr. 25, 2017)), the Central District of California (AnTerra Grp. Inc. v. KiVAR Chem. Techs., No. SACV1300734JVSANX, 2014 WL 12589631, at *3 (C.D. Cal. May 23, 2014)), and

[1] "Federal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts." Exec. Mgmt., Ltd. v. Ticor Title Ins. Co., 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (internal quotations omitted).

the District of Maryland (Ground Zero Museum Workshop v. Wilson, 813 F. Supp. 2d 678, 706 (D. Md. 2011)), among others. This approach avoids the overly-formalistic requirement that a party re-file the same counterclaim in any answer to an amended complaint and therefore promotes Rule 1's policy that the rules be construed to secure the just, speedy, and inexpensive determination of every action. AnTerra, supra. Indeed, a grave failure of justice could result if a plaintiff was able to nullify a defendant's counterclaims simply by amending its complaint.

Furthermore, Kvam plainly knew and understood that Legion and Mineau were maintaining their FACC throughout this case. As late as the final pretrial conference, conducted just a few weeks before trial was scheduled to commence, Kvam's attorney expressly acknowledged that Legion and Mineau maintained a counterclaim for declaratory relief and gave no indication that he believed the FACC had been abandoned or superseded. 15 JA 2109-2110. Thus, Kvam plainly knew that Legion and Mineau intended to maintain their FACC.

Nevada law does not, and should not, require a defendant to re-plead a counterclaim in response to an amended complaint. Legion and Mineau's FACC was properly pending before the district court. Kvam did not answer the FACC, so the district court properly deemed the undenied allegations of the FACC admitted pursuant to NRCP 8(6)(b). The district court did not commit any error in this regard.

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Even if this Court assigns any error to the district court's adoption of "deemed admitted" facts, such error was harmless and does not warrant reversing the Order. NRCP 61. Of the seventy-four (74) Undisputed Material Facts identified in the Order, only seven (7) of them were "deemed admitted" with no other undisputed evidence. 14 JA 1963-71, ¶¶ 8, 11, 12, 13, 19, 65, and 72. Of these, Kvam only specifically objects to four (4), each of which is addressed specifically in Section V(B) below. None of these "deemed admitted" facts were essential to any of the conclusions in the Order and even if each of these facts was disregarded from the Order, Kvam's substantial rights would not change. Therefore, the district court did not commit reversible error in this regard.

2. The district court did not commit reversible error by relying upon the undisputed facts set forth in Mineua's declaration.

Throughout his *Opening Brief*, Kvam refers to the *Declaration of Brian Mineau* attached as Exhibit 1 to the *Motion for Summary Judgment* as a "sham declaration." Kvam claims that Mineau's declaration is a "sham" because, in Paragraph 25 of his declaration, Mineau voluntarily corrected certain testimony contained in a previous declaration. 7 JA 1036-1037. Consequently, Kvam apparently believes that the district court erred and abused its discretion by not simply disregarding Mineau's declaration in its entirety. Again, Kvam's position is unsupported by any legal argument or citation to authority.

One of the bases of Kvam's claims in this action is that each of the three partners (Kvam, Michael Spinola, and Legion / Mineau) was supposed to fund a payment to the contractor for the renovation,[2] but that Legion / Mineau failed to do so. 5 JA 758 ¶¶ 8(b) & 15. However, as Mineau repeatedly testified, he made Legion's renovation draw by causing Criterion NV LLC to wire $20,000.00 to the contractor. 3 JA 337; 7 JA 1036-37; 12 JA 1536; 12 JA 1544-45. Kvam never presented any evidence to refute that this payment was made or that it was made on Mineau's behalf. Nonetheless, Kvam repeatedly demanded independent proof of Criterion NV LLC's arrangement with Legion and further details establishing the underlying source of the funds used to make this payment. Legion and Mineau maintained throughout this litigation that this information is completely irrelevant: what matters is *that* the payment was made, not *how* the payment was made.

Despite the irrelevance of this issue, and in an effort to avoid incurring substantial litigation and discovery costs related to this issue, Mineau executed a declaration wherein he explained that the $20,000.00 had come from his personal safe at home and that, because Mineau was out of town when the contractor

[2] Kvam never provided any evidence of this alleged arrangement and it is disputed by Legion and Mineau. However, whether or not Legion / Mineau were *contractually obligated* to fund a renovation draw is not material because Legion / Mineau *did* fund a renovation draw.

requested payment, he recalled that Mr. Spinola retrieved the cash from Mineau's house and wired it to the contractor through Mr. Spinola's bank. 12 JA 1544-45. When subsequently preparing the *Motion for Summary Judgment* and for trial, Mineau realized that his previous recollection was mistaken. 7 JA 1036-1037. Although Mr. Spinola did agree to arrange the payment while Mineau was out of town, the funds did not come from Mineau's personal safe, but were borrowed from Bradley Tammen. Id. Despite the irrelevance of the source of the funds, Mineau unilaterally acknowledged and voluntarily corrected his mistake. Id.

The district court made no findings of fact or conclusions of law whatsoever in the Order concerning the underlying source of these funds. Thus, the underlying source of these funds is not material to the issues or the Order. Simply put, whether Legion wired the funds directly from its own account, used cash from Mineau's personal safe, borrowed the money, or procured the funds through any other source is completely irrelevant to the merits of this dispute or the Order on appeal.

Importantly, Kvam does not claim that this corrected testimony caused him some unfair prejudice or prevented him from timely presenting the evidence he needed to survive summary judgment. Kvam's *Opening Brief* and the record establish that Kvam knew all along that Mineau had borrowed this money from Bradley Tammen. See AOB p. 26; see also 12 JA 1564 (establishing that Bradley Tammen told Kvam on November 15, 2017 - six months before the lawsuit was filed

- that he had loaned Mineau $20,000.00 for this project). Nonetheless, Kvam never deposed Mineau, never deposed Mr. Spinola, never deposed Mr. Tammen, and never propounded written discovery specific to this issue. Thus, Kvam seemingly understood the insignificance of this issue, did not materially rely on Mineau's initial mistaken testimony, and was not unfairly prejudice by the fact that Mineau later corrected that testimony. Mineau's corrected testimony simply had no impact on Kvam's ability to oppose summary judgment or the district court's Order.

Kvam has presented no argument or authority, and none exists, that Mineau's voluntary correction renders the entirety of Mineau's testimony perjured or warrants disregarding Mineau's entire declaration as a "sham." As such, the district court did not commit reversible error by relying in part on Mineau's declaration.

3. The district court did not commit reversible error by granting partial summary judgment before ruling on underlying discovery motions.

Every district court has the authority to control its own docket. See Maheu v. Eighth Judicial Dist. Court, 89 Nev. 214, 217, 510 P.2d 627, 629 (1973) (recognizing the court's inherent power to "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants"); see also Yong v. Immigration and Naturalization Service, 208 F.3d 1116, 1119 (9th Cir.2000) (holding that a court has the inherent authority to control its own docket and calendar). The *Motion for Summary Judgment* was filed on January 6, 2020 [7 JA

1003]; the Recommendation for Order was filed January 10, 2020 [9 JA 1226]; and the Motion for Reconsideration was filed January 24, 2020 [12 JA 1518]. Kvam's position that it was an abuse of discretion for the district court to hear and address the motions pending on its docket in the chronological order in which they were filed is unsupported by any argument or citation to authority and would completely strip the district court of its authority to control its own docket.

Regardless, if Kvam felt that he could not present facts necessary to survive summary judgment absent the discovery sought in the pending motions, he was required to follow the process set forth in NRCP 56(d). Rule 56(d) relief "is appropriate only when the movant expresses how further discovery will lead to the creation of a genuine issue of material fact." Aviation Ventures, Inc. v. Joan Morris, Inc., 121 Nev. 113, 118, 110 P.3d 59, 62 (2005); see also Bakerink v. Orthopaedic Associates, Ltd., 94 Nev. 428, 431, 581 P.2d 9, 11 (1978). In opposing the *Motion for Summary Judgment*, Kvam asked the district court to defer ruling on his Ninth Cause of Action (Conversion) *only* and made no attempt to identify in his affidavit what facts might be obtained through the pending discovery motions that were essential to justify his opposition. 10 JA 1281. Kvam therefore failed to make a proper showing under NRCP 56(d) and the district court did not abuse its discretion by entering partial summary judgment before ruling on the other motions. Further, even if this Court determines that Kvam should have been afforded NRCP 56(d)

relief, such relief could only support reversing the Order with respect to Kvam's Ninth Cause of Action (Conversion).

There is nothing in the record to support a finding that the district court committed any errors of law or abused its discretion in any way by granting partial summary judgment. The Order should be affirmed.

B. No Genuine Issues Of Material Fact Remain That Would Support Reversal Of The Order.

Kvam's second identified issue on appeal is whether genuine issues of fact remain for trial. AOB p. 1. Kvam's *Opening Brief* enumerates six (6) specific findings of fact which Kvam argues were erroneous. Id. pp. 31-36. None of these findings was erroneous and, even if any were, reversal of the Order is unwarranted.

This Court reviews the grant or denial of summary judgment de novo. 9352 Cranesbill Tr., supra. "Summary judgment is appropriate if the pleadings and other evidence on file, viewed in the light most favorable to the nonmoving party, demonstrate that no genuine issue of material fact remains in dispute and that the moving party is entitled to judgment as a matter of law." Id. (citing Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005)). "A genuine issue of material fact exists if, based on the evidence presented, a reasonable jury could return a verdict for the nonmoving party." Id. (citing Butler v. Bayer, 123 Nev. 450, 457-58, 168 P.3d 1055, 1061 (2007)).

1. Finding of Fact # 8.

Kvam argues that the district court erroneously found that "Mr. Kvam drafted the Terms of Agreement." AOB p. 31. The record does not support a finding that the district court committed reversible error in this regard.

Kvam first argues that this fact should not have been "deemed admitted" because Legion and Mineau's FACC was never re-plead in subsequent pleadings. AOB p. 31. As explained in Section V(A)(1) above, Kvam's the FACC was not superseded because a defendant is not required to re-plead a counterclaim in response to an amended complaint. Thus, the district court properly "deemed admitted" all allegations in the FACC which Kvam failed to deny. NRCP 8(b)(6).

Regardless, even if this Court assigns any error to the district court's finding in this regard, such error was harmless and does not warrant reversing the Order. NRCP 61. The district court did not rely upon or refer to Finding of Fact # 8 in any of its conclusions, nor did the district court draw any inferences against Kvam as the drafter of the contract. Accordingly, any error in this regard do not affect Kvam's substantial rights and should be disregarded as harmless.

Whether Kvam drafted the Terms of Agreement is therefore not a genuine issue of material fact that warrants reversal of the Order.

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2. Finding of Fact # 12.

Kvam argues that the district court erroneously found that "All parties to the Terms of Agreement knew this was a high-risk investment." AOB p. 32. The record does not support a finding that the district court committed reversible error in this regard. Again, the district court properly deemed this allegation admitted for the reasons explained above.

Rather than identify any admissible evidence in the record to establish a genuine issue concerning this fact, Kvam simply states, "It is unclear why Judge Simons included this finding except to advocate for some sort of assumption of the risk theory," and then goes on to argue why an assumption of the risk holding would have been improper. However, the district court did not grant summary judgment based upon an assumption of the risk theory, making these facts simply "background facts" and rendering Kvam's entire argument concerning them moot. Kvam has utterly failed to identify how any error in this regard affected his substantial rights. NRCP 61.

Whether the parties knew this was a high-risk investment is therefore not a genuine issue of material fact that warrants reversal of the Order.

3. Finding of Fact # 43.

Kvam argues that the district court erroneously found that, "On May 26, 2017, Criterion NV LLC, acting on Mr. Mineau's behalf, wired $20,000 directly to TNT

with reference 'May Street.'" AOB pp. 32-33. The record does not support a finding that the district court committed reversible error in this regard.

Kvam contends that this is a genuinely disputed material fact because "there is no evidence that this money was sent on Mineau's behalf…." AOB p. 32. On the contrary, Mineau expressly testified that this money was sent on his behalf.[3] 7 JA 1036-37. Furthermore, Kvam's own evidence shows that Mr. Tammen lent this money to Mineau. See AOB p. 26; see also 12 JA 1564. Kvam points to no evidence in the record to refute these facts, and no such evidence exists. Thus, although Kvam has repeatedly theorized, without basis, that this money was not sent on Mineau's behalf, he has failed to provide a shred of evidence to meaningfully substantiate this claim. Cuzze v. University and Community College System of Nevada, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007) ("[I]n order to defeat summary judgment, the nonmoving party must transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact.").

Kvam concludes his argument with, "Ironically, it does not help Mineau to claim that he invested $20,000 in the Project." AOB p. 33. In that case, as Kvam admits, any error in this regard is harmless. NRCP 61.

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[3] Although Mineau admittedly corrected his testimony concerning the underlying source of these funds, Mineau has consistently testified that this money was sent on his behalf.

There is no genuine dispute as to whether Criterion NV LLC, acting on Mr. Mineau's behalf, wired $20,000.00 directly to TNT with reference "May Street." The district court did not commit reversible error in this regard.

4. Finding of Fact # 49.

Kvam asserts that the district court erroneously found that "Mr. Kvam acquired information directly from TNT and did not rely on Mr. Mineau's representations." AOB p. 33. The record does not support a finding that the district court committed reversible error in this regard.

The record plainly establishes that Kvam was in direct communication with TNT regarding the status and progress of the project and that Kvam acquired information directly from TNT. See generally 7 JA 1080 - 8 JA 1184. Indeed, reviewing this finding in context reveals that the district court had just spent two pages of the Order enumerating all the ways in which Kvam acquired information and updates about the project directly from TNT. 14 JA 1966-68 ¶¶ 29-47. By contrast, the record is devoid of any evidence that Kvam relied upon Mineau's statements, rather than Kvam's direct communications with TNT, regarding the status of the project.

Kvam nonetheless argues that this finding was erroneous because "Many of the misrepresentations complained of occurred prior to [TNT's involvement]." AOB p. 34. However, regardless of the timing, the district court correctly determined that

"Mr. Kvam identifies no specific evidence that Mr. Mineau made any affirmative misrepresentations during the Project" and "Mr. Kvam cites not [sic] evidence that Mr. Mineau supplied false information to him." 14 JA 1984 ¶¶ 74-75. Kvam's efforts to assign some error to Finding of Fact # 49 by taking it out of the proper context of the entire Order are unavailing.

Kvam goes on to argue that, if the district court "meant to say that Mineau should be excused for providing false status reports based on information received from TNT, that is not a correct statement of law." AOB p. 34. The district court did not say that, so Kvam's entire argument is baseless.

There is no genuine dispute that Kvam acquired information directly from TNT and that Kvam did not rely on Mineau's representations. The district court did not commit reversible error in this regard.

5. Finding of Fact # 65.

Kvam argues that the district court erroneously found that, "For reasons beyond any of the parties' knowledge, control or expectation, the contractor hired to perform the renovations did not or was not able to complete the job." AOB p. 35. The record does not support a finding that the district court committed reversible error in this regard.

Kvam's argument on appeal relies upon the bald statement that "there is no evidence to support the finding that the contractor is to blame" for the project's

failure. AOB p. 35. On the contrary, the clear and undisputed evidence shows that the contractor agreed to complete the renovation by June 1, 2017, at a total cost of $80,000.00, that the contractor was paid $69,000.00 toward this project, and that the contractor failed to perform its obligations. 14 JA 1965-69 ¶¶ 15-58.

Kvam again attempts to misconstrue the district court's holding, arguing that if the district court was attempting to advocate for an affirmative defense of a supervening cause, it would have been error to do so. The district court did not grant summary judgment based upon the theory of supervening cause, so Kvam's entire argument is again baseless.

There is no genuine dispute that the contractor did not complete the job. The district court did not commit reversible error in this regard.

7. Finding of Fact # 72.

Last, Kvam argues that the district court erroneously found that "Mineau and Legion fulfilled all of their obligations under the Terms of Agreement." AOB p. 36. Kvam asserts that "this allegation has no evidentiary value and is disputed for all of the reasons set forth above and below." Kvam offers no supported facts or specific argument, and identifies no specific errors concerning this finding, and has therefore failed to establish that the district court committed reversible error in this regard. Regardless, even if this Court assigns any error to the district court's finding in this regard, such error was harmless and does not warrant reversing the Order because

the district court did not rely upon or refer to Finding of Fact # 72 in any of its conclusions. NRCP 61.

There is nothing in the record to support a finding that the district court committed reversible error by granting partial summary judgment when genuine issues of material fact remained for trial. The Order should be affirmed.

C. The District Court Did Not Abuse Its Discretion By Failing To Rule On The Recommendation For Order Or The Motion For Reconsideration.

Kvam's third and fourth identified issues on appeal are whether the district court abused its discretion by failing to rule on the Recommendation for Order or the Motion for Reconsideration. AOB p. 2. The district court did not commit reversible error in this regard.

Kvam's argument exemplifies the problems inherent with his attempt to greatly expand the scope of this limited interlocutory appeal. In its Order, the district court expressly directed the parties "to resubmit any motions previously submitted which are not made moot by reason of this Order." 14 JA 1991. Rather than follow the district court's direction, Kvam filed this appeal. It is simply incredible for Kvam to now complain that the district court abused its discretion by failing to rule on motions which Kvam never submitted.

Furthermore, it is entirely unclear what relief Kvam seeks concerning these issues. The district court has not ruled on these motions because Kvam filed this

appeal instead of resubmitting them as directed. The only relief this Court could afford Kvam would be to remand this matter to the district court for a ruling. Of course, the district court would have ruled on these motions long ago had Kvam resubmitted them, per the district court's direction, instead of filing this appeal. By filing an interlocutory appeal based in part on the district court's failure to rule on pending motions, Kvam has created a circular, procedural mess which has accomplished nothing but wasting more time and resources chasing recourse for a failed project.

There is nothing in the record to support a finding that the district court committed some manner of reversible error by "failing to rule" on the Recommendation for Order or the Motion for Reconsideration. This interlocutory appeal should be dismissed and this matter remanded so the district court can finish adjudicating this case.

D. <u>The District Court's Order Does Not Contain Any Reversible Errors Of Law.</u>

Kvam concludes his *Opening Brief* with a list of all the conclusions of law contained in the district court's Order which he argues were erroneous. AOB pp. 36-49. The district court did not commit reversible error in this regard. Legion and Mineau will address each alleged error in turn.

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1. Kvam's First Cause of Action and Mineau/Legion's FACC.

Kvam does not contend that the district court committed any reversible error concerning his First Cause of Action or Legion/Mineau's FACC. However, Kvam does repeat his argument that the FACC had been superseded because Legion and Mineau did not re-plead their counterclaims in their answers to Kvam's amended complaints. AOB pp. 36-37. For the reasons discussed in Section V(A)(1) above, a defendant is not required to re-plead a counterclaim in response to an amended complaint.

The district court did not commit any reversible error in granting summary judgment in Legion and Mineau's favor on their FACC.

2. Kvam's Second Cause of Action.

The district court entered summary judgment in favor of Legion and Mineau on Kvam's Second Cause of Action based upon the conclusion that "Mr. Kvam has failed to bring forth specific evidence that the parties, at the time of contracting, shared a misconception about a vital fact upon which they based their bargain, or that the Terms of Agreement fail to conform to the true intention of the parties or the parties' previous understanding or agreement." 14 JA 1976 ¶ 28. Rather than identify any evidence in the record to refute this finding, Kvam asserts that the district court abused its discretion because it "repeat[ed] an error that was first stated in Conclusion of Law 21.f," that "There was no meeting of the minds regarding any

other provisions to the Terms of Agreement except those written and contained in the Terms of Agreement." AOB p. 37. Kvam's *Opening Brief* does not argue that the district court's actual findings concerning Kvam's Second Cause of Action were in error; thus, Kvam has identified no basis whatsoever to reverse the district court's entry of summary judgment on Kvam's Second Cause of Action.

Regardless, Kvam argues that the district court's "Conclusion of Law 21.f" was erroneous because it "ignores Kvam's declaration and the other evidence he submitted." AOB p. 37. Specifically, Kvam points to his testimony that the Terms of Agreement "does not purport to encapsulate all of the discussions between the parties, and it does not encapsulate all of the discussions between the parties," and that other "discussions about the project are encapsulated in [the outline of project financing]." AOB pp. 37-38. Although Kvam offered evidence of *discussions* between the parties which were not encapsulated in the Terms of Agreement, he never offered any evidence of *agreements* between the parties which were not encapsulated in the Terms of Agreement. *Discussions* are not *agreements*. There is nothing in the record to support a finding that the district court abused its discretion in this regard.

The district court did not commit any reversible error in granting summary judgment in Legion and Mineau's favor on Kvam's Second Cause of Action.

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3. Kvam's Third Cause of Action.

Kvam argues that, by concluding that "The Terms of Agreement provide Mr. Kvam will receive 7% annual return on any funds provided if the project was profitable," the district court "misread the Terms of Agreement and Kvam's testimony relating thereto and injected an entirely new condition of profitability into the Terms of Agreement." AOB pp. 39-40. Kvam argues that the Terms of Agreement actually provided that Kvam was due a 7% annual return on any funds provided due from the date of disbursement, without any conditions. Id. Kvam's arguments again fall short of establishing reversible error.

The Terms of Agreement states, in relevant part, "Initial purchase is being funded by Kvam, who is there by assigned any remedies due should the transaction fail in anyway. Initial funder will be due a 7% annual return on any funds provided due from the date of disbursement." 7 JA 1041. This express language is clear: if the transaction should fail in any way, Kvam's remedy is to be assigned all interests and remedies in the partnership. Therefore, the subsequent language about a 7% annual return would only apply if the transaction did not fail, i.e. if the project was profitable. The district court made no error in this regard.

Furthermore, Kvam has never identified any evidence, and none exists, establishing any other necessary elements of a loan agreement, such as a borrower or a maturity date. Even if Kvam could establish that he was due an unconditional

7% annual return on his investment, Kvam has never introduced any evidence, and none exists, establishing *who* would be obligated to make that payment if the project was not profitable. The fact that the Terms of Agreement includes an interest rate is grossly insufficient to establish that the Terms of Agreement constitute a loan which Legion and/or Mineau were personally obligated to repay.

The district court did not commit any reversible error in granting summary judgment in Legion and Mineau's favor on Kvam's Third Cause of Action.

4. Kvam's Fourth Cause of Action.

Kvam argues that the district court erred concerning his Fourth Cause of Action because "Mineau … owed a special and fiduciary duty to Kvam such that Kvam's cause of action for tortious breach of the covenant of good faith should have survived summary judgment." AOB pp. 40-41. Of course, the district court agreed that Mineau owed a special and fiduciary duty to Kvam, but found that Kvam failed to set forth evidence supporting his contention that Mineau or Legion breached such duties. 14 JA 1979-80. Kvam's allegation that the district court erred by failing to find that Mineau owed a special and fiduciary duty is therefore entirely meritless.

Kvam also states that his Fourth Cause of Action included a claim for "breach of the joint venture agreement." AOB p. 40. Kvam asserts that Mineau breached the joint venture agreement by failing to supervise the project, failing to complete the project, failing to provide his share of financing, and failing to pay Kvam from

the proceeds of sale. Id. pp. 40-41. Once again, Kvam provides no citation to the record to establish that Mineau had any contractual agreement to undertake any of those tasks, and no such evidence exists. Regardless, Kvam does not contend that the district court committed any reversible error in this regard.

The district court did not commit any reversible error in granting summary judgment in Legion and Mineau's favor on Kvam's Fourth Cause of Action.

5. Kvam's Seventh Cause of Action.

In his Seventh Cause of Action, Kvam sought to enjoin Legion and Mineau from conducting any business on behalf of the joint venture or incurring any liabilities in furtherance of the joint venture except as approved by the Court and necessary to preserve the proceeds of sale. 5 JA 762. In the Order, the Court assigned all interest in the joint venture to Kvam and acknowledged that the proceeds of sale were held with the clerk of court. 14 JA 1989. There is simply nothing left to enjoin: the joint venture has no business and owns no assets; Mineau and Legion have no interest in the joint venture; and Mineau and Legion have no access to or control over the funds deposited with the clerk of court. Accordingly, the district court properly held that there was simply no relief which could be afforded pursuant to Kvam's Seventh Cause of Action, rendering it legally ineffectual. 14 JA 1962. The district court did not commit any reversible error in this regard.

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Kvam argues that, to the extent the district court's decision "is based on the premise that Kvam was only seeking injunctive relief to prevent Mineau from absconding with the proceeds of sale, this is mistaken," because "Kvam is seeking an injunction pending final winding up to prevent Mineau from conducting any further business on behalf of the joint venture." AOB p. 43. Despite this claim, Kvam never actually sought such an injunction. Regardless, Kvam offers no explanation as to what form such an injunction might take should he ever actually seek one: the joint venture has no assets, the joint venture conducts no business, and Mineau has no interest in the joint venture. Thus, it is entirely unclear what "further business" Mineau could possibly conduct, or be restrained from conducting, on behalf of the joint venture, rendering injunctive relief impossible. NRCP 65(d)(1)(C) ("Every order granting an injunction … must describe in reasonable detail… the act or acts retrained or required.").

Finally, Kvam argues that the district court erred in finding his Seventh Cause of Action legally ineffectual because he "needs to be able to pursue a second motion for injunctive relief" for the remaining $1,864.14 in sale proceeds which has not been deposited with the clerk of court. AOB p. 43. Kvam's assertion is grossly disingenuous: Mineau requested Kvam's stipulation to deposit these funds with the clerk of court in December 2018, but Kvam refused. 7 JA 1039. Thereafter, this action was pending before the district court for another eighteen (18) months before

Kvam filed this appeal, during which time Kvam never filed a motion for injunctive relief concerning these funds. Kvam's suggestion that an interlocutory appeal *on the eve of trial* was necessary to preserve Kvam's potential right to pursue a preliminary injunction concerning $1,864.14, *which he refused to stipulate to be deposited with the clerk of court*, and despite the fact that *eighteen months had passed* with no effort to pursue such a motion, strains the bounds of Rule 11. If Kvam wanted injunctive relief concerning the $1,864.14, he need only have asked. He did not. In fact, he refused Legion's request to stipulate to deposit these funds with the clerk of court.

The district court did not commit any reversible error concerning Kvam's Seventh Cause of Action.

6. Kvam's Eighth Cause of Action.

Kvam's arguments concerning his Eighth Cause of Action are indicative of why the district court entered summary judgment against him. The district court correctly ruled that "Mr. Kvam has not established that he relied on any false information to his detriment." 14 JA 1982 ¶ 76. To refute this conclusion, Kvam provides a laundry list of alleged fraudulent misrepresentations *without any specific citations to evidence or the record whatsoever*. AOB pp. 43-45. Kvam has failed to identify any aspect of the record that supports his appeal.

As the district court properly held, "A district court is not obligated to wade through and search the entire record for some facts which might support the

nonmoving part's claim." 14 JA 1962 (quoting Jaurequi v. Carter Mfg. Co., Inc., 173 F.3d 1076, 1084 (8th Cir. 1999)). "Requiring the district court to search the entire record, even though the adverse party's response does not set out the specific facts or disclose where in the record the evidence for them can be found, is unfair." Id. (quoting Carmen v. San Francisco Unified School Dist., 237 F.3d 1026, 1031 (9th Cir. 2001)). Kvam cannot simply produce forty-eight (48) exhibits to the district court, or a 2,000-page appellate record to this Court, and then summarily state that "Kvam's Declaration and other evidence demonstrate" the viability of his claims. AOB p. 44. Kvam has failed to provide or specifically identify a shred of evidence to meaningfully substantiate his claims.

Kvam bore the burden of proof before the district court. He failed to meet that burden. His summary, conclusory allegations of fraud are far from sufficient to reverse the district court's Order. The district court did not commit reversible error in granting summary judgment in Legion and Mineau's favor on Kvam's Eighth Cause of Action.

7. Kvam's Ninth Cause of Action.

Kvam argues that the district court erred by entering summary judgment against Kvam on his conversion claim on the basis that Kvam's funds were paid to the contractor rather than to Mineau, directly. AOB p. 45. The district court found that "Mr. Kvam has not identified disputed facts regarding any distinct act of

dominion that Mineau or Legion wrongfully exerted over Kvam's personal property, or the funds delivered to the title company and TNT." 14 JA 1985 ¶ 82.

"Conversional is a distinct act of dominion wrongfully exerted over another's personal property in denial of, or inconsistent with his title or rights therein or in derogation, exclusion, or defiance of such title or rights." 14 JA 1985 (quoting M.C. Multi-Family Dev., L.L.C. v. Crestdale Assocs., Ltd., 124 Nev. 901, 910, 193 P.3d 536, 542 (2008)). "Conversion generally is limited to those severe, major, and important interferences with the right to control personal property that justify required the actor to pay the property's full value." Id. (quoting Edwards v. Emperor's Garden Rest., 122 Nev. 317, 328-29, 130 P.3d 1280, 1287 (2006)). Given the undisputed evidence that neither Legion nor Mineau ever had possession of or control over Kvam's funds, the district court's entry of summary judgment was proper.

Kvam argues that his conversion claim is "premised on project funds being commingled with funds for Mineau's other projects…." AOB p. 45. Again, the undisputed evidence presented to the district court established that Kvam wired his money directly to the contractor, who deposited the funds into its general operating account. The apparent fact that the contractor commingled the project funds with the rest of the contractor's money does not constitute conversion, at least certainly not *by Mineau*.

Kvam argues that his conversion claim is also premised on "the growing evidence that project funds were used on [Mineau's] other projects." AOB p. 45. Kvam again fails to point to any such evidence in the record and no such evidence exists. Furthermore, as discussed above, Kvam failed to make an adequate showing under NRCP 56(d) to justify deferring a ruling until the Recommendation for Order was resolved. Regardless, even assuming *arguendo* that Kvam discovered some evidence to suggest that the contractor diverted project funds to Mineau's other projects, Kvam would still be unable to establish that *Mineau* was somehow responsible for *TNT's* actions. Kvam's continued allegation that some of his funds were used on Mineau's other projects has simply never been supported by any evidence whatsoever.

Finally, Kvam argues that Legion/Mineau committed conversion by "withholding the proceeds of sale." AOB p. 47. As discussed above, the majority of the proceeds of sale are being held by the clerk of the court and Kvam refused to stipulate to allow the remaining $1,864.14 to be deposited. It is therefore indisputable that these funds have not been converted as a matter of fact and law.

Again, Kvam bore the burden of proof before the district court. He failed to meet that burden. The district court did not commit reversible error in granting summary judgment in Legion and Mineau's favor on Kvam's Ninth Cause of Action.

8. Kvam's Tenth Cause of Action.

The district court determined that "Mr. Kvam has not identified specific evidence of racketeering activity, or any activities between Mineau/Legion that resemble the type of activities required to support the elements of this claim." 14 JA 1987. Kvam argues on appeal that the district court "did not consider the predicate acts identified by Kvam." AOB p. 47. Kvam then repeats his failure before the district court by identifying a list of alleged predicate RICO acts *without any citation to evidence or the record on appeal whatsoever*. AOB pp. 47-48.

Again, Kvam bore the burden of proof before the district court. He failed to meet that burden. The district court did not commit reversible error in granting summary judgment in Legion and Mineau's favor on Kvam's Tenth Cause of Action.

9. Kvam's Eleventh Cause of Action.

The district court determined that "Mr. Kvam conceded the partnership does not hold any independent claims for relief against Mineau/Legion." 14 JA 1988. Kvam argues that he "never conceded any such thing," then proceeds to quote from his opposition where he conceded this fact. AOB p. 49. Kvam argued to the district court that his derivative claim was plead only "to prevent any argument from Mineau that the rights asserted belong to the joint venture, rather than Kvam," but that "Mineau did not raise that argument." Id. Thus, Kvam conceded that the partnership does not hold any independent claims for relief against Mineau/Legion.

The district court did not commit reversible error in granting summary judgment in Legion and Mineau's favor on Kvam's Eleventh Cause of Action.

V. CONCLUSION

"Summary judgment is an important procedural tool by which factually insufficient claims or defenses may be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources." Boesiger v. Desert Appraisals, LLC, 135 Nev. 192, 194, 444 P.3d 436, 438 (2019) (internal quotations omitted). "[I]n instances such as this, where an action is brought with practically no evidentiary basis to support it, summary judgment can be a valuable tool to discourage protracted and meritless litigation of factually insufficient claims." Id. at 198, 441. "In dispensing with frivolous actions through summary judgment, courts promote the important policy objectives of sound judicial economy and enhance the judiciary's capacity to effectively and efficiently adjudicate legitimate claims." Id.

Kvam failed to specifically identify a shred of evidence to meaningfully substantiate his claims. Kvam's bare and unsubstantiated allegations were insufficient to sustain his claims before the district court and are certainly insufficient to reverse the district court's decisions on appeal. The district court properly entered summary judgment against him on the majority of his claims.

///

The district court did not commit reversible error and its decisions should be affirmed.

AFFIRMATION

The undersigned does hereby affirm that the preceding document, **RESPONDENT'S ANSWERING BRIEF**, filed in the Supreme Court of the State of Nevada, County, does not contain the social security number of any person.

DATED this 8 day of February, 2021.

GUNDERSON LAW FIRM

By: _____

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 395 in Times New Roman font size 14.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7), it does not contain more than 14,000 words. *Respondents' Answering Brief* contains 11,292 words based on the word count of Microsoft Office 365 Word Version 1902 used to prepare the brief.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. I further certify that this brief complies with all applicable Nevada Rules of Civil Procedures and Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying

brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 8 day of February, 2021.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c), I certify that I am an employee of the law office of Gunderson Law Firm, and that on the 8 day of February, 2021, I electronically filed a true and correct copy of the **RESPONDENTS' ANSWERING BRIEF**, with the Clerk of the Court by using the electronic filing system which will send a notice of electronic filing to the following:

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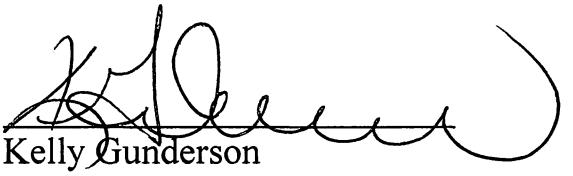

Kelly Gunderson