

IN THE SUPREME COURT OF THE STATE OF NEVADA

In the Matter of

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

JAY KVAM,  
Petitioner

vs.

THE SECOND JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF  
WASHOE; AND THE HONORABLE  
LYNNE K. SIMONS,  
Respondents,

and

BRIAN MINEAU and LEGION  
INVESTMENTS, LLC,  
Real Parties in Interest

Electronically Filed  
Jul 20 2020 04:05 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

District Court Case No. CV18-00764

**MOTION FOR LEAVE TO  
EXCEED PAGE LIMIT (RE:  
[PROPOSED] PETITION FOR  
WRIT OF PROHIBITION OR  
ALTERNATIVELY, MANDAMUS**

Concerning the District Court,  
Department 6 (Hon. Lynne Simons),  
Second Judicial District

MATUSKA LAW OFFICES, LTD.  
Michael L. Matuska (SBN 5711)  
2310 S. Carson Street, #6  
Carson City, Nevada 89701  
(775) 350-7220 (T) / (775) 350-7222 (F)

*Attorney for Petitioner*  
JAY KVAM

Comes now Petitioner, Jay Kvam, by and through his counsel of record, Matuska Law Offices, Ltd., Michael L. Matuska, Esq., and hereby moves to exceed the 7,000 word limit imposed by ADKT 553, which amends NRAP 21. This motion is made and based on the Declaration of Michael L. Matuska, Esq. attached hereto as Exhibit “1” and incorporated herein, the [Proposed] *Petition for Writ of Prohibition or Alternatively, Mandamus* submitted herewith, and the certification required by NRAP 32(a)(9)C) as to the word count attached thereto. Good cause exists to exceed the new word limit for the reasons set forth below.

Kvam’s *Petition for Writ of Prohibition or Alternatively, Mandamus* (“Petition”) seeks relief from an order that was entered in the district court on June 5, 2020 entitled *Order Granting, in Part, and Denying, in Part, Defendants’ Motion for Summary Judgment; Order Granting Summary Judgment on claim Pursuant to Court’s NRCPP 56 Notice* (the “Order”) [12 App 1948]. ADKT 553 went into effect approximately two (2) days later, and as of today, the changes to NRAP 21 do not appear in Michie’s Revised States Annotated (Court Rules Vol. 1) or on the Nevada Legislature Law Library website. Kvam’s counsel promptly started work on the Petition under the prior version of NRAP 21 and diligently worked to eliminate any extraneous material in order to comply with the previous 14,000 word limit. Rejecting Kvam’s Petition based on a rule that went into effect after the Order was entered is an unduly harsh result, and Kvam’s counsel could not reasonably comply

with the work limit without omitting essential issues from the Petition. It would be a reasonable accommodation in this instance to allow this Petition under the prior version of NRAP 21 because it challenges a lengthy Order that was entered prior to the effective date of ADKT 553.

Kvam's Petition is "concise, presented with accuracy, . . . and free from burdensome, irrelevant, immaterial or scandalous matters." *Blandino v. Eighth Judicial District Court*, (unpublished) Nevada Supreme Court No. 81431, LEXIS 679, WL 3868832 (July 8, 2020) (quoting NRAP 28(j)). Kvam's Petition, as currently presented to the Court, saves judicial resources because it addresses at least six (6) separate, but overlapping, issues in a single Petition. The interest of judicial economy would be served by addressing all these issues at the same time. These issues are summarized as follows:

1. The District Court granted summary judgment on a counterclaim that was not pending. Kvam is the plaintiff in the court below. The operative pleading is Kvam's *Second Amended Complaint* that was filed on September 11, 2019 [5 App 756]. The real parties in interest to this Petition are Brian Mineau and his limited liability company, Legion Investments, LLC. Mineau/Legion filed eleven (11) counterclaims in response to Kvam's original complaint. After an initial Rule 12 motion, some amendments to the counterclaims and another round of motions, Hon. Jerome Polaha dismissed ten (10) of Mineau/Legion's eleven (11) counterclaims,

leaving only the third counterclaim for declaratory relief. Shortly thereafter, Judge Polaha granted Kvam's motion for leave to file a *First Amended Complaint*, and after the case was transferred to Hon. Lynne K. Simons, Kvam requested and was granted leave to file a *Second Amended Complaint*. Mineau/Legion did not file any counterclaims in response to Kvam's *First Amended Complaint* or *Second Amended Complaint*; as such, Kvam did not answer the old counterclaims. Despite the pleading history in this case, Judge Simons' June 5, 2020 Order sua sponte granted summary judgment on Mineau/Legion's superseded third counterclaim for declaratory relief.

2. To make matters worse, the District Court incorporated the bare allegations of Mineau/Legion's counterclaims into the Findings of Fact, notwithstanding that all but one of the counterclaims had been dismissed and no counterclaims were alleged in the subsequent pleadings. The District Court did so on the novel theory that the allegations in Mineau/Legions *First Amended Counterclaim* were deemed admitted, which she identified in her Findings of Fact as "DA."

3. The District Court further compounded the problem when it accepted a sham declaration from Brian Mineau which was submitted after the close of discovery, is not credible on its face and which disavowed his prior sworn statements on one of the most important factual issues in the case, to wit, whether Mr. Mineau

provided financing for the joint venture.

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

[Declaration of Brian Mineau, Exhibit “1” in Support of *Motion for Summary Judgment*, 7A App 1036-37].

In fact, there is no record of a loan or Mineau’s repayment thereof. This issue remains a central factual dispute in this case.

4. To date, the District Court has limited Kvam’s ability to discover whether Mineau funded the joint venture, and whether he actually borrowed \$20,000 from Bradley Tammen, and whether the loan has been repaid with interest as stated in Mineau’s declaration. Lacking any other evidence of such funding, Kvam sought to discover Mineau/Legion’s tax schedules. This resulted in Kvam’s *First Motion to Compel* which was referred to the Discovery Commissioner, Wesley Ayers. In what can fairly be called a split decision, Commissioner Ayers wrote: “For all of these reasons, the Court finds that Plaintiff has not yet demonstrated that he is entitled to Defendant Legion’s tax returns in this case.” [April 9, 2019 *Recommendation for Order*, 4 App 528, 538:1-9] (emphasis added). Commissioner

Ayer's *Recommendation for Order* was adopted by Judge Polaha as the order of the court; however, Commissioner Ayers and Judge Polaha did not have the benefit the declaration that Mr. Mineau submitted with his later *Motion for Summary Judgment* on January 6, 2020. Predictably, upon receiving Mineau's declaration, Kvam filed a motion entitled *Motion for Reconsideration of Order Affirming Discovery Commissioner's Recommendation, Entered May 16, 2019; for Discovery Sanctions; and for Other Relief* ("Motion for Reconsideration") [7 App 1518]. In that motion, Kvam renewed his request for Mineau/Legion's tax schedules and also requested an order to show cause why Mineau should not be held in contempt of court for perjury and for other sanctions.

Despite the problems with Mr. Mineau's declaration, Judge Simons accepted the sham declaration in her June 5, 2020 Order and never ruled on Kvam's *Motion for Reconsideration*.

5. The District Court never ruled on Kvam's *Second Motion to Compel* or the Discovery Commissioner's *Recommendation for Order* to grant the same with attorney's fees, which sought discovery in support of the causes of action for conversion and RICO as alleged in the *Second Amended Complaint*. These causes of action were included based on the growing evidence that Mr. Mineau used funds intended for the joint venture on his other projects. Mineau/Legion refused to provide discovery on these other projects and Kvam filed a *Second Motion to*

*Compel* on November 26, 2019. [6 App 774]. That motion contains an extensive factual record and a report from Kvam's expert witness, Benjamin Charles Steele, CPA [6 App 845]. Commissioner Ayers understood the developing case on conversion and RICO and explained that:

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

[January 10, 2020 *Recommendation for Order*, 8 App 1229-30] (emphasis in original)].

Commissioner Ayers therefore recommended granting Kvam's *Second Motion to Compel* and awarding attorney's fees in his favor. The District Court did not rule on Kvam's *Second Motion to Compel* or Commissioner Ayer's *Recommendation for Order*, even though Kvam needed the discovery to fully oppose Mineau/Legion's *Motion for Summary Judgment*.

6. The Petition also addresses some of the seventy-four (74) most problematic Findings of Fact and ninety-seven (97) Conclusion of Law that were contained in the June 5, 2020 Order.

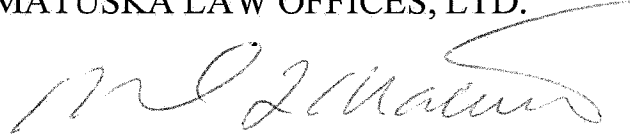
Wherefore, Kvam respectfully submits that the interest of judicial economy

will be served by considering the various issued identified above in a single Petition and accepting Kvam's Petition which contains 13,898 words.

Respectfully submitted this 20th day of July, 2020.

MATUSKA LAW OFFICES, LTD.

By:

A handwritten signature in dark ink, appearing to read "M L Matuska", written over a horizontal line.

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



## CERTIFICATE OF SERVICE

I, Suzette Turley, certify that on 20th July, 2020, I electronically filed the foregoing **MOTION FOR LEAVE TO EXCEED PAGE LIMIT (RE: [PROPOSED] PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS**, with the Clerk of the Nevada Supreme Court via the Court's e-Flex system. Service will be made by e-Flex on all registered participants. Non-eFlex participants will be served by U.S. mail, 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

Hon. Lynne K. Simons, Dept. 6  
Second Judicial District Court  
75 Court Street  
Reno, NV 89501  
By U.S. Mail

/s/ SUZETTE TURLEY  
An Employee of MATUSKA LAW OFFICES, LTD.

Exhibit Index

**MOTION FOR LEAVE TO EXCEED PAGE LIMIT; DECLARATION OF  
MICHAEL L. MATUSKA, ESQ.; [PROPOSED] *PETITION FOR WRIT OF  
PROHIBITION OR ALTERNATIVELY, MANDAMUS***

<b>EXHIBIT</b>	<b>DOCUMENT</b>	<b>NO. OF PAGES</b>
1	Declaration of Michael L. Matuska	5

Exhibit 1

**DECLARATION OF MICHAEL L. MATUSKA**

(Declaration of Michael L. Matuska, Esq. In Support of Motion For Leave To  
Exceed Page Limit)

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**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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and

BRIAN MINEAU and LEGION  
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Real Parties in Interest

District Court Case No. CV18-00764

**DECLARATION OF MICHAEL  
L. MATUSKA, ESQ. IN  
SUPPORT OF MOTION FOR  
LEAVE TO EXCEED PAGE  
LIMIT**

Concerning the District Court,  
Department 6 (Hon. Lynne Simons),  
Second Judicial District

MATUSKA LAW OFFICES, LTD.  
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*Attorney for Petitioner*  
JAY KVAM

I, MICHAEL L. MATUSKA, Esq., hereby declare as follows:

1. I am counsel of record for Petitioner JAY KVAM in the present action, and make the statements in this Declaration based upon my own personal knowledge, unless otherwise identified as based upon information and belief, and in support of JAY KVAM'S *Motion for Leave to Exceed Page Limit*.

2. That the [Proposed] *Petition for Writ of Prohibition or Alternatively, Mandamus* seeks to address six (6) problems in connection with the *Order Granting, in Part, and Denying, in Part, Defendants' Motion for Summary Judgment; Order Granting Summary Judgment on claim Pursuant to Court's NRCP 56 Notice* that was entered by the District Court on June 5, 2020 [12 App 1948] (the "Order") including:

i. The Order granted summary judgment on the third cause of action for declaratory relief in Mineau/Legion's *First Amended Counterclaim*, even though the pleadings had twice been amended and no counterclaims were pending.

ii. The Order adopted as its Findings of Fact the bare allegations in Mineau/Legion's *First Amended Counterclaim* even though most of the counterclaims had been dismissed and the pleadings had twice been amended and no counterclaims were pending. The District Court did so on the novel theory that the allegations in Mineau/Legions *First Amended Counterclaim* were deemed admitted, which she identified in her Findings of Fact as "DA."

iii. The Order adopted the allegations in a sham declaration that was submitted by Brian Mineau after the close of discovery, which disavowed his prior sworn testimony about whether and how he funded the joint venture and was not credible on its face.

iv. To date, the District Court has limited Kvam's ability to conduct discovery on the issue raised in the sham declaration about whether and how Mr. Mineau funded the joint venture. Specifically, the District Court did not rule on Kvam's *Motion for Reconsideration of Order Affirming Discovery Commissioner's Recommendation, Entered May 16, 2019; for Discovery Sanctions; and for Other Relief* ("Motion for Reconsideration") [10 App 1518].

v. To date, the District Court has not ruled on the Discovery Commissioner's *Recommendation for Order* [8 App 1226] which recommended granting Kvam's *Second Motion to Compel* [6 App 774] which sought to compel discovery regarding the likely diversion of funds to Mr. Mineau's other projects. This information is relevant to Kvam's causes of action for conversion and RICO as well as the likely breach of Mr. Mineau's overriding fiduciary duties. This discovery is necessary to fully oppose Mineau/Legion's *Motion for Summary Judgment*.

vi. The Petition also addresses some of the most problematic Findings of Fact and Conclusion of Law in the Order.

3. The Order is forty-four (44) pages long and contains seventy-four (74)

Findings of Fact and ninety-seven (97) Conclusions of Law. I diligently edited the Petition to comply with the prior word limit of 14,000 words. I was not able to address all of the disputed Findings of Fact and Conclusions of Law in the Petition, but thought it important to address some of the most exemplary and problematic findings and conclusions. It would not be feasible to edit the Petition down to 7,000 words without omitting the discussion on the objectionable Findings of Fact and Conclusions of Law and severely limiting or possibly omitting the discussion on the pending discovery motions.

4. The Petition is intended to further the interest of judicial economy for the District Court as well as the Supreme Court by addressing all these issues in a single brief. This will avoid the possibility of multiple petitions to the Supreme Court and will also avoid the possible result whereby the Order is overturned but the matter is remanded back to the District Court without instructions on the underlying discovery issues or the erroneous Findings of Fact and Conclusions of Law.

5. All other recitations of fact stated in the foregoing *Motion for Leave to Exceed Word Limit*, including citations to the record, are true and accurate and are incorporated herein.

Pursuant to NRS 53.045, I declare under penalty of perjury under the laws of the State of Nevada, and of the United States of America, that the foregoing is true and correct.

**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.

Respectfully submitted this 20th day of July, 2020.

MATUSKA LAW OFFICES, LTD.

By:

A handwritten signature in black ink, appearing to read "M. L. Matuska", written over a horizontal line.

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