

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

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District Court Case No. CV18-00764
Elizabeth A. Brown
Clerk of Supreme Court

**PETITION FOR WRIT OF
PROHIBITION OR
ALTERNATIVELY,
MANDAMUS**

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

PETITIONER'S APPENDIX

VOLUME 13

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

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Code No. 4185

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE
THE HONORABLE JEROME M. POLAHA, DISTRICT JUDGE

-oOo-

JAY KVAM,)	
)	
Plaintiff,)	
)	
vs.)	Case No. CV18-00764
)	
)	
BRIAN MINEAU,)	Dept. No. 3
)	
Defendant.)	
_____)	

TRANSCRIPT OF PROCEEDINGS
HEARING
MONDAY, DECEMBER 17TH, 2018; 1:30 P.M.
RENO, NEVADA

Joan Dotson, NV CSR #102

A P P E A R A N C E S

For the Plaintiff: MICHAEL MATUSKA
 Attorney at Law
 Carson City, Nevada

For the Defendant: AUSTIN SWEET
 Attorney at Law
 Reno, Nevada

1 MONDAY, DECEMBER 17TH, 2018; RENO, NEVADA

2 -oOo-

3 THE COURT: Be seated please. For the record
4 this is CV18-00764, entitled Jay Kvam versus Brian
5 Mineau. This is the time set for the hearing on the
6 Motion to Dismiss the Counterclaim. So state your
7 appearances please.

8 MR. MATUSKA: Michael Matuska for the
9 plaintiff, Jay Kvam. And Jay Kvam is present with me
10 today.

11 THE COURT: All right.

12 MR. SWEET: Austin Sweet of the Gunderson Law
13 Firm on behalf of the defendants. And with me is Brian
14 Mineau.

15 THE COURT: Good afternoon. You may begin.

16 MR. MATUSKA: Do you have a preference on
17 whether I address the court from here or -- from the
18 podium?

19 THE COURT: Whatever you want to do. I don't
20 know who put that there.

21 MR. MATUSKA: This is fine for me then. Thank
22 you. May it please the court, I thought I would address
23 the chronology a little bit to explain how we get where
24 we are at today.

1 THE COURT: I read the material. So --

2 MR. MATUSKA: Okay. Well, I think the dates
3 do play a factor here. And part of the Motion to Dismiss
4 is based on the issue that the current -- First Amended
5 Counterclaim raised some of the same problems that were
6 in the first version of the Counterclaim. But, if you
7 have read the materials, your Honor, you are aware then
8 that the terms of the agreement for this investment were
9 signed in February of 2017. Mr. Kvam filed his Verified
10 Complaint on April 4th of 2018, had various causes of
11 action for declaration of a joint venture, alternative
12 claims for rescission and reformation or for breach of
13 contract, breach of covenant of good faith and accounting
14 and requested remedies including a court-supervised
15 winding up and injunctive relief and all pled as a
16 derivative action.

17 The defendants filed an Unverified Answer and
18 Counterclaims on June 5th, 2018.

19 Mr. Kvam moved to dismiss the counterclaims.
20 Also moved to dissolve this joint venture or investment
21 project, however, we wish to characterize it.

22 Actually the motion for dissolution was a
23 little bit of a misnomer. Our position is that he had
24 already withdrawn and the request was for the court just

1 to order the final accounting and the winding up.

2 But the court denied the motion for
3 dissolution on September 4th and stated that the record
4 does not support adjudication of the issues at this time.
5 And then on September 5th the court granted in part and
6 denied in part the Motion to Dismiss the original
7 rendition of the counterclaims.

8 Specifically the court dismissed the
9 allegations regarding the unrelated investment company
10 Atlas. But then on October 5th we get the new First
11 Amended Counterclaim. And that's the specific reason why
12 we are today.

13 A little bit of a side note, the First
14 Amended Counterclaims are not even a pleading. And I put
15 that in a footnote, your Honor. If it's an issue we can
16 address that. I think that there are larger issues
17 though.

18 But ostensibly those counterclaims don't even
19 put -- don't even place the issues before the court. It
20 simply is not a pleading.

21 But the First Amended Counterclaims repeats
22 many of the defects that were in the original version of
23 the counterclaims, including that they are unclear in
24 material respects. They contained two new statements of

1 fact, if you want to count them as two. One just -- one
2 just adds more specific allegations about the unrelated
3 investment company.

4 But then there was a new allegation about
5 pipes bursting. And those two allegations are repeated
6 throughout the First Amended Counterclaims.

7 First Amended Counterclaims also maintain a
8 cause of action for fraud, which is actually a cause of
9 action for fraudulent -- for fraudulent concealment. And
10 the distinction is important because fraudulent
11 concealment requires a fiduciary duty by the party being
12 accused.

13 The First Amended Counterclaims do not allege
14 a fiduciary duty on behalf of Mr. Kvam; therefore, there
15 can be no cause of action for fraudulent concealment.

16 If they tried to bootstrap this to the joint
17 venture concept, that the parties are partners in the
18 joint venture, then they are admitting the joint venture,
19 which so far they have tried not to do.

20 So that's a major problem with their
21 counterclaims.

22 There is also a cause of action that Mr. Kvam
23 breached the terms -- breached the February 2017 terms of
24 agreement. And this is -- and that he breached the terms

1 of agreement by asking for his money back.

2 And we didn't go to great lengths in our
3 Motion to Dismiss, your Honor.

4 I think it is apparent. I did bring the
5 restatement of contracts with me. Asking for money back
6 is not a breach of contract. The breach of contract is a
7 lack of performance.

8 I think what Mr. Mineau is trying to do is to
9 say that he doesn't have to perform on his end, meaning
10 repaying my client because he is trying to construct a
11 breach of contract on behalf of my client; but the only
12 breach of contract he has come up with is that my client
13 predictably asked for his money back.

14 And, again, asking for money back is not a
15 breach of contract. The breach of contract is a lack of
16 performance.

17 They did not allege that any further
18 performance is due from Mr. Kvam. You have the terms of
19 agreement before you. No further performance is due from
20 Mr. Kvam. Therefore, there can't be no breach of
21 contract.

22 Their First Amended Counterclaim contains
23 allegations regarding trespass from process servers,
24 which is confusing and difficult. Process servers are

1 not parties to this case. And I did explain in our
2 moving papers that Mr. Mineau is a resident agent for
3 Legion. He is required by law to accept service of
4 process.

5 He identified his house as the address at
6 which to receive the service of process.

7 And it is hard to see how he can concoct a
8 counterclaim against my client for refusing process at
9 the address for -- at the registered address that he has
10 on file with the Secretary of State.

11 Furthermore, there is not even an allegation
12 that the process server proceeded beyond his porch. And
13 going to someone's porch to leave process, I -- it is not
14 trespass. But it has nothing to do with Mr. Kvam anyway.

15 There are additional allegations regarding
16 conversion and trespass to chattels. Mr. Mineau now
17 identifies the chattels as copper wiring and drywall.

18 And we know that copper wiring and drywall
19 are fixtures that are part of the realty. They are not
20 chattels. And as such there can be no claim for
21 trespass, or chattels or conversion.

22 So it is not surprising that Mr. Kvam filed a
23 new -- a Motion to Dismiss these defective counterclaims.

24 And when we keep in mind the dates that I was

1 just reviewing, your Honor, that this case was filed in
2 April, we should be past the pleading stage.

3 We need to be at the prove-it stage and
4 deciding which claims are going to survive for trial.

5 It is not sufficient at this stage to rest on
6 the bare allegations of the counterclaims.

7 THE COURT: Was there any discovery done yet?

8 MR. MATUSKA: There was on our side. We made
9 our request for discovery. We got responses. If fact,
10 your Honor, the responses were not complete because they
11 objected to giving us any information about that other
12 investment company.

13 Yet it keeps showing up in their
14 counterclaims. And that's going to be a major issue.
15 And part of the reason, your Honor, why I filed this
16 Motion to Dismiss and Motion for Summary Judgment is
17 because I'm put in the position now where I have to make
18 decisions such as do I pursue discovery and motions to
19 compel regarding issues that I think are irrelevant and
20 will not get to trial.

21 So it is our goal at this stage to decide
22 which of these -- to see which of these counterclaims are
23 going to survive for trial which we will need additional
24 discovery on. And obviously, if Atlas is going to be

1 part of this, they need to provide the discovery on that.
2 But the --

3 THE COURT: The reason I ask that question --
4 and I'll ask counsel this.

5 You put in your pleadings the cutoff date on
6 the electricity from the power company --

7 MR. MATUSKA: Yes.

8 THE COURT: -- being April something, which is
9 after the alleged fraudulent or -- bad conduct of your
10 client in leaving the -- or cutting off the electricity
11 causing the pipes to freeze and break and destroy some of
12 the property inside.

13 Now, is that coming from you or is that
14 coming from them or how do you get that?

15 MR. MATUSKA: Those exhibits were exhibits
16 that I received from them through our written discovery
17 request.

18 THE COURT: So you are far along enough --

19 MR. MATUSKA: Yes.

20 THE COURT: -- to get discovery.

21 MR. MATUSKA: Yes.

22 THE COURT: And then the other one had to do
23 with the money, the \$10,000 in the Atlas account, going
24 out and coming right back in.

1 MR. MATUSKA: \$20,000.

2 THE COURT: Coming out and going right back
3 in, right?

4 MR. MATUSKA: Right.

5 THE COURT: And that's from them also?

6 MR. MATUSKA: Those bank statements were, yes,
7 your Honor. And I bring it up in those terms and relate
8 it -- my opening statements back to the timing. Again,
9 this case has been pending since April.

10 I made a deliberate point of focussing on the
11 relative burdens when moving for summary judgment and
12 responding to summary judgment.

13 And I hope that we are agreed that -- when
14 the party bears the burden of proof at trial, they can't
15 just rest on the allegations of their Complaint.

16 Jay Kvam, as the party moving against those
17 counterclaims, could have just pointed out a lack of
18 evidence in our record. The burden would have been on
19 them to come forward and affirmatively -- produce
20 admissible evidence to affirmatively support their
21 counterclaims. And they didn't do it.

22 Now on those specific issues you just
23 identified regarding the investment issue or transfer out
24 of the bank account and the pipes bursting, we have

1 affirmatively disproved that or at least disproved that
2 that was my client's fault. We did not have to do that.

3 Mr. Mineau's side has the burden of
4 persuasion. In order to avoid summary judgment, they
5 have to present admissible evidence at this stage of the
6 proceedings.

7 And, again, your Honor, we are past just the
8 allegation stage. We are at the prove-it stage. And
9 they have not offered one shred of admissible evidence to
10 support a single cause of action in the counterclaims.

11 And I would submit, your Honor -- and
12 understand, of course, that this is my viewpoint and my
13 interpretation. But I view those counterclaims as filed
14 to punish Jay Kvam for asking for --

15 MR. SWEET: Objection, your Honor. That's
16 irrelevant to the motions pending. It is argumentative.

17 MR. MATUSKA: I'm arguing. May I argue?

18 THE COURT: You put that in your pleadings --
19 or in your motion.

20 MR. MATUSKA: Right. There is no evidence to
21 support them. And I'm jumping ahead a little bit to
22 Mr. Sweet's argument, I suppose. But he did not provide
23 an affidavit from Mr. Mineau or other admissible evidence
24 with his opposition. This case has been pending since

1 April.

2 What he did instead is provide his own
3 affidavit asking for more time to conduct discovery.

4 And he did not identify why he hasn't
5 conducted discovery to date. He did not identify what
6 discovery he needs to conduct.

7 Nor is there any reason to think that
8 Mr. Kvam is going to help Mr. Mineau with those
9 allegations. The allegations in the counterclaims raise
10 issues that are within his personal knowledge.

11 Mr. Kvam is not going to be able to give him
12 anymore information about the Atlas account or when the
13 pipes burst. And if that's what his claim is based on,
14 let's just get to summary judgment and get these
15 Counterclaims dismissed so we can finish our discovery on
16 the issues that are going to trial and get the trial
17 scheduled.

18 I would add too that in our Reply brief we
19 did address a little bit -- the standards or the burden
20 that a party opposing summary judgment needs to meet in
21 order to get an extension of time or to get -- or to
22 defer the ruling on summary judgment.

23 It is not a given, just based on a request.

24 And if I can refer the court to the specific

1 cite, please.

2 THE COURT: Page nine.

3 MR. MATUSKA: Page nine of our reply? Right.
4 First of all, even if this court granted it, the court is
5 not denying our motion. It is deferring a ruling for a
6 specific time for a specific part of discovery.

7 And, even, then only on a showing of why they
8 haven't been able to produce that to date and a showing
9 that it will produce the evidence that they need to
10 oppose the summary judgment.

11 But Rule 56 F which allows additional time is
12 not a shield to block a Motion for Summary Judgment.

13 They have to do so in good faith by
14 affirmatively and demonstrating why you cannot respond or
15 why affidavits are not available. And, again, your
16 Honor, the only affidavits they need are from Mr. Mineau
17 on their counterclaims.

18 So there is no evidence to support those
19 claims. They should be dismissed at this stage. I can
20 address any further questions the court may have. But
21 I'm just going to conclude by referring right back to
22 Rule 56. Summary judgment is not -- with all due
23 respect -- it is not discretionary at this point. Rule
24 56 provides that summary judgment shall be rendered

1 forthwith if the pleadings and other evidence on file
2 demonstrate an absence of a genuine issue of material
3 fact.

4 So in the record before us Mr. Mineau failed
5 to create a genuine issue of material fact on any one of
6 his counterclaims. And in fact we have disproved the
7 majority of the allegations in those counterclaims. So
8 there really is nothing left to do except for to rule on
9 what is in our record, your Honor.

10 THE COURT: All right. Let me hear from your
11 opponent.

12 MR. SWEET: Thank you, your Honor.

13 THE COURT: Let me ask you this.

14 The electrical company's statements and the
15 bank statements, don't they take out Atlas? And, if not,
16 why not?

17 MR. SWEET: Well, they are two unrelated
18 things. Let me start with the first. The electric
19 statements, no, your Honor. The facts that are before us
20 right now is we have a property manager who contacted
21 Mr. Mineau on -- it was March 24th and said the power is
22 off. Pipes are leaking.

23 MR. MATUSKA: Objection. This is hearsay and
24 it is not in our record.

1 THE COURT: This is not in the record.

2 MR. SWEET: Your Honor, it is attached to our
3 opposition.

4 MR. MATUSKA: There is a hearsay letter
5 attached to the opposition. These other statements are
6 not in the record. And that letter is not admissible.
7 It is hearsay. There are no affidavits.

8 MR. SWEET: Well, your Honor, I'll be happy to
9 get into the 56 F issue, if you would like. But I'll
10 address the question that you asked.

11 The evidence that we have before us is as of
12 March 24th the power was off. Now, Mr. Kvam says, "I
13 didn't turn it off until April 6th." That's why we need
14 more discovery, your Honor. We don't know exactly what
15 happened.

16 THE COURT: When you say turned the power off,
17 you are talking about shutting down the meter so nothing
18 is measured as entering into the house.

19 MR. SWEET: Right.

20 THE COURT: Isn't that reflected in the power
21 company's records? Either it was or it wasn't.

22 MR. SWEET: I'm sure it will be. And once we
23 get into discovery we can --

24 THE COURT: I thought you gave that to them.

1 MR. SWEET: We went on the account and pulled
2 the bills from the company.

3 THE COURT: That's your position. You are
4 refuting that. You should have proof of that before you
5 accuse them of that.

6 MR. SWEET: Mr. Kvam admitted that he turned
7 off the power. Now the dispute is, "Well, I didn't turn
8 it off until April 6th." But the property manager said
9 that when she showed up March 24th the power was already
10 off.

11 So we don't have any information from the
12 power company as to specifically when the power was
13 turned off. We don't know that.

14 THE COURT: And you are talking -- what year
15 is this?

16 MR. SWEET: 2018.

17 THE COURT: Since March until now you don't
18 have any records of that?

19 MR. SWEET: Well, your Honor, getting back to
20 the 56 F point, we haven't started the discovery yet
21 because, contrary to what Mr. Matuska said, we are not at
22 the prove-it stage. We are at the pleading stage. They
23 have a motion to dismiss pending. We don't know what
24 facts are disputed --

1 THE COURT: Rule 11 you are supposed to have
2 information that justify the pleadings.

3 MR. SWEET: Again, your Honor, Mr. Kvam has
4 admitted that he turned off the power. Let me take a
5 step back and give you a little bit more factual history
6 about what happened.

7 THE COURT: How about the Atlas, \$20,000?

8 MR. SWEET: Your Honor, I think this might
9 be -- an error that I made. And that's something that
10 again we need to address through discovery.

11 Mr. Kvam doesn't dispute that he paid off the
12 Atlas credit card. It was my understanding from my
13 discussions with my client -- and perhaps I was wrong and
14 we need to figure that out -- that it was this \$20,000 on
15 April 6th.

16 I'm not sure. It might have been the \$18,000
17 on February 12th, which is on the same statement.

18 And, again, this is -- there is no dispute,
19 as I understand it, that Mr. Kvam paid off the Atlas
20 credit card. He is just saying, "Well, I didn't do it
21 on that day. And so your case should be thrown out
22 because you got the date wrong.'

23 THE COURT: He is saying money wasn't taken
24 out of the account.

1 MR. SWEET: No, he is not.

2 THE COURT: It is out one hour and a couple
3 hours later it was put back in. Pay the bill and get the
4 money back.

5 MR. SWEET: The transaction that I referenced
6 in my pleading occurred on March 6th.

7 He says, "I didn't do that transaction."
8 What I believe his position will be once we actually get
9 an answer is that it is the transaction on February 12th
10 that he did.

11 So what happens is -- in the original
12 pleading he said, "Well, you didn't give me a specific
13 date."

14 And then in the amended pleading we provided
15 a specific date, which perhaps was my error. And then he
16 said, "Well, I didn't do the transaction on that date."
17 He has not at all disputed that he paid off the Atlas
18 credit card. That's not disputed. What he is saying is,
19 "I didn't do it on that date."

20 THE COURT: But he was specifically accused of
21 doing such and such on a certain date.

22 MR. SWEET: And, your Honor, again this is
23 why -- we need more discovery. Because it may well have
24 been my personal misunderstanding or miscommunication

1 between myself and my client. And, if that is the case,
2 then I'll bear the responsibility for that.

3 The reason that we need discovery and that we
4 haven't started the discovery, your Honor, is we are not
5 at the prove-it stage; we are at the pleading stage.

6 And, again, this is one of those things that
7 was to my understanding and to my client's understanding
8 undisputed. And so we haven't done discovery on the
9 issue of whether Mr. Kvam turned off the power or whether
10 Mr. Kvam paid off the Atlas credit card bill, because
11 those things aren't disputed. We have e-mails from
12 Mr. Kvam saying, "Yeah, I turned off the power."

13 And it wasn't until getting the Motion to
14 Dismiss that we understood their argument that, "Well, I
15 turned off the power; but it was after all the pipes had
16 already broken. It was a week later."

17 Your Honor, that dispute of fact didn't come
18 up until their Motion to Dismiss.

19 So that's why we haven't conducted discovery,
20 and that's why discovery is necessary before a Motion for
21 Summary Judgment is decided that was filed at the same
22 time as the Motion to Dismiss.

23 We are still at the pleading stage; we are
24 not at the prove-it stage.

1 THE COURT: Based on the pleadings and the
2 admissions I heard this morning, just on the Motion to
3 Dismiss, anything having to do with Atlas is out. And
4 what was the other one?

5 MR. MATUSKA: Pipes bursting.

6 THE COURT: Yeah, the pipes.

7 MR. SWEET: The date on when he turned off the
8 power.

9 THE COURT: Based on the pleadings. You have
10 information that that's -- or they have information that
11 you can't prove that.

12 MR. SWEET: Your Honor, I disagree. The
13 credit card bill says that it went through a specific
14 billing period. But it doesn't say anywhere on there
15 when the power was turned off. And that's -- I believe
16 the disputed fact, is we have a -- property manager who
17 showed up on the property on March 24th and said, "The
18 power is turned off."

19 And we have an admission from Mr. Kvam that
20 he turned off the power. But now he is saying, "Well, I
21 didn't turn it off until April 6th."

22 And because the final bill is issued on
23 April 6th doesn't mean that the power was turned off on
24 April 6th. And I believe in this bill it doesn't say

1 anywhere in here when the power was turned off.

2 It says when the bill was issued. And that's
3 a disputed fact that needs to be resolved through further
4 discovery, once we get through the pleading stage.

5 THE COURT: Is that a genuine material issue?

6 MR. SWEET: I believe it is, your Honor.

7 THE COURT: Based on your pleading, that's
8 what you are saying is fraud and you want punitive
9 damages for, right?

10 MR. SWEET: That's one of the things, yes.

11 THE COURT: Two of the things. That's the
12 only thing I read that has anything to do with anything.

13 MR. SWEET: There is the Atlas.

14 THE COURT: Those are the specific things that
15 you allege.

16 MR. SWEET: Regarding Atlas and the power,
17 that's correct.

18 THE COURT: Anyway, I interrupted you. So go
19 ahead.

20 MR. SWEET: That's fine, your Honor. To
21 circle back, Mr. Matuska said multiple times that we are
22 at the prove-it stage; we are past the pleading stage.

23 And that's simply not true. We are at the
24 pleading stage. This is a Motion to Dismiss.

1 And the Motion to Dismiss was made against
2 claims 5, 10 and 11.

3 And I'll be happy to address those. But
4 before that I wanted to make the broader point that there
5 is no discovery deadline that's been set. There is no
6 trial date that's been set. We are not past the pleading
7 stage.

8 So the suggestion that we should have already
9 hired our experts and resolved all of these factual
10 disputes and taken all the discovery, I simply disagree
11 with, your Honor. It hasn't been something that we have
12 been dilatory regarding. We haven't got past the
13 pleading stage. And no deadline has even been set. For
14 us to start discovery when we don't even know what the
15 factual or legal disputes are --

16 THE COURT: But I have to make a decision
17 based on what's in front of me on the dismissal.

18 MR. SWEET: Let's go to that. The Motion to
19 Dismiss was filed for claims 5, 10 and 11. The Fifth
20 Claim For Relief, deceptive trade practices and the 10th
21 Claim For Relief for fraud, the argument is that we did
22 not sufficiently plead specific facts.

23 We have discussed those facts here today.
24 Your Honor I think is aware of them at this point. And I

1 believe we have adequately pled the facts that give rise
2 to those claims. And Mr. Matuska may disagree. I don't
3 want to belabor that point. If you have any questions,
4 I'll be happy to discuss them.

5 The 11th Claim For Relief, negligence, the
6 argument is that the Economic Loss Doctrine bars those
7 allegations and that only applies if there are purely
8 economic losses, not losses caused by damage to property.

9 Here we are --

10 THE COURT: Let's go back to the Fifth Claim
11 For Relief, deceptive trade practices. You are alleging
12 the Atlas checking account was paid off. How is that a
13 deceptive trade practice?

14 MR. SWEET: Your Honor --

15 THE COURT: This a partnership or joint
16 venture or what do you call this?

17 MR. SWEET: Your Honor, we call this a
18 contract.

19 THE COURT: A contract between whom?

20 MR. SWEET: It is not a partnership or joint
21 venture.

22 THE COURT: Were they joining in on the
23 expenses and were going to join in on the profits?

24 MR. SWEET: To an extent, yes.

1 THE COURT: Doesn't that make it a
2 partnership?

3 MR. SWEET: Under the law I don't think it
4 does. It requires more than that to create a legal joint
5 venture partnership under Chapter 81, I think.

6 THE COURT: So what are you saying? Three
7 guys got together and contracted to do what?

8 MR. SWEET: Well, first of all, it was two
9 guys -- it was Legion Investments, Brian Mineau and Jay
10 Kvam.

11 THE COURT: That's right.

12 MR. SWEET: And Mineau was signing on behalf
13 of Legion is our argument and they disagree.

14 THE COURT: Who is this gentleman?

15 MR. SWEET: This is Brian Mineau, who is the
16 principal of Legion and he has been sued individually as
17 well.

18 THE COURT: And he is with Atlas.

19 MR. SWEET: Atlas and Legion both.

20 THE COURT: Yes.

21 MR. SWEET: I'll step back and give a little
22 history from our standpoint. We heard Mr. Kvam's
23 standpoint. Here is ours. This was an agreement between
24 Mr. Kvam and Legion Investments to purchase this

1 property, have it improved and sell it for a profit.

2 THE COURT: So they are the broker and -- he
3 is the investor.

4 MR. SWEET: No. Your Honor, and wasn't that
5 simple. They were going in on it together. Mr. Kvam
6 invested some of the money. Mr. Mineau helped identify
7 the property and helped facilitate the process. But
8 Mr. Kvam was also the one who was directly communicating
9 with the contractor, paid the contractor directly. In
10 fact the contractor was staying in Mr. Kvam's home while
11 he was performing the construction.

12 THE COURT: As I understand it, he had the
13 money.

14 MR. SWEET: Yes. Yes, he put up the money.

15 THE COURT: How is that not a joint venture or
16 partnership?

17 MR. SWEET: Under the law a joint venture or
18 partnership requires about eight different elements and
19 one of them is pooling money. But that's not the only
20 one. There was no joint checking account.

21 THE COURT: They don't have to have all that
22 stuff. You have to have an agreement to go in together
23 on something, come up with the money and split the costs,
24 the expenses and the profits, share the profits. That's

1 what makes the partnership.

2 MR. SWEET: And, your Honor, I apologize. I
3 don't have those elements in front of me. We laid them
4 out in our opposition to the motion for dissolution. And
5 I don't have that in front of me today as far as the
6 motions that are before the court.

7 But that motion was denied. And it was our
8 position at the time and still is that a joint venture
9 has not been established. What this was, was an
10 agreement. And I understand it has elements of a joint
11 ventures, but I don't think it has all of the elements.
12 Regardless, your Honor --

13 THE COURT: Get back to the deceptive trade.

14 MR. SWEET: What we had was an agreement to
15 try to make a profit by buying, fixing up and selling
16 this property. At the end of the day the property was a
17 loss. The sale was a loss. Now, there is a dispute over
18 who caused that loss. There is a dispute over whose
19 obligations there were to do what. Mr. Kvam says, "All
20 my job was, was to front the money and, once I did that,
21 Legion Investments was in charge of everything else."

22 We absolutely disagree. This was a --
23 agreement between two parties. And, as you can see from
24 this terms of agreement, it is painfully inadequate.

1 THE COURT: Somebody gave me the agreement.
2 Where is that at?

3 MR. SWEET: It is attached to the motion as
4 Exhibit 1, your Honor.

5 THE COURT: Motion for dissolution.

6 MR. SWEET: That's pending before us. The
7 Motion to Dismiss and for summary judgment.

8 MR. MATUSKA: It was provided with the Motion
9 For Dissolution, if it's convenient for the court.

10 THE COURT: I'm right there now. It wasn't
11 Exhibit 1.

12 THE CLERK: Your Honor, it might be attached
13 to the Affidavit in Support For Motion For Dissolution.

14 THE COURT: The one paragraph thing, Is that
15 what we are talking about?

16 MR. SWEET: That's it.

17 THE COURT: Okay.

18 MR. SWEET: Which I believe is the cause of
19 most of these problems.

20 THE COURT: "All parties are entitled to
21 33.33 percent of net profit after expenses are accounted
22 for with interest and funds disbursed. Initial purchase
23 is being funded by Kvam," blah, blah, blah.

24 Who paid the \$44,000 for the purchase price?

1 MR. SWEET: Mr. Kvam paid that directly to us.

2 THE COURT: Where is the first draw?

3 MR. SWEET: There was a payment directed to
4 the contractor by Mr. Kvam.

5 THE COURT: And that's \$64,000. Second draw,
6 \$20,000 payment. Who was that by?

7 MR. SWEET: I'm not sure what you are looking
8 at.

9 THE COURT: April 14th, 2017.

10 MR. SWEET: You are not looking at the terms
11 of the agreement?

12 THE COURT: There is an Exhibit A to it. It
13 has second draw, \$20,000.

14 MR. SWEET: Your Honor, I don't have that in
15 front of me. It wasn't part of the motion that's pending
16 before us. And what you are looking at I do not believe
17 is part of the terms of the agreement, whatever you are
18 looking at. The terms of agreement is one page.

19 THE COURT: This is the Motion For Dissolution
20 exhibits.

21 MR. MATUSKA: Your Honor, that's at affidavit
22 to the Motion For Dissolution and that's Mr. Kvam's
23 summary of what he paid.

24 THE COURT: These are all his payments?

1 MR. MATUSKA: Pardon?

2 THE COURT: These are all his payments
3 allegedly?

4 MR. MATUSKA: It is not alleged. It is
5 admitted in the discovery. We provided their admissions,
6 their discovery admissions, with our Motion for Summary
7 Judgment.

8 THE COURT: How much discovery is going on
9 here?

10 MR. SWEET: There has been one written
11 discovery request for interrogatories, I believe, and a
12 request for production.

13 THE COURT: Has there been a joint case
14 conference?

15 MR. MATUSKA: Yes. And we have made our
16 initial disclosures and they have made theirs. We
17 provided our written discovery afterwards.

18 THE COURT: That's where that stuff is coming
19 in.

20 MR. SWEET: Correct.

21 THE COURT: What I had is a pre-trial
22 conference and setting of the trial.

23 MR. SWEET: Correct. And, your Honor, from
24 our standpoint that's -- we are still at the pleading

1 stage and so -- we are trying to figure out what is going
2 to proceed into discovery. And we don't want to waste
3 everyone's time on discovery facts or issues that are
4 either irrelevant or undisputed.

5 THE COURT: So deceptive trade practice, how
6 do we get to deceptive trade practices?

7 MR. SWEET: Under the statute deceptive trade
8 practice occurs when somebody through the course of a
9 transaction uses coercion, duress or intimidation in
10 order to gain an edge. And it is our position that
11 that's what occurred here. And we have properly pled
12 that in the Complaint. That by what happened in this --
13 the facts under this case is Mr. Kvam essentially said,
14 "This is taking too long. I want to liquidate the
15 property and get my money back."

16 THE COURT: How much money did he put in at
17 that time?

18 MR. SWEET: I don't know, your Honor. I don't
19 have those facts front of me right now. Again, we
20 haven't gone through discovery.

21 THE COURT: He knows. Didn't he tell you?

22 MR. SWEET: He put up that money. We are not
23 disputing that he put up the money. The question is --

24 THE COURT: So if he asks for his money back

1 he is --

2 MR. SWEET: This was never a loan.

3 THE COURT: -- he is deceptively trading? It
4 was an investment.

5 MR. SWEET: It was an investment. And
6 investments don't happen overnight. Mr. Kvam apparently
7 thought this was going to take six weeks and be done with
8 it. When it took longer -- to give historical context,
9 which it is not in the pleading because -- it is briefly
10 mentioned in the pleading but not addressed in detail.

11 THE COURT: Chicago south side.

12 MR. SWEET: Right. And the contractor who was
13 handling this, who is working --

14 MR. MATUSKA: This is way outside of our --

15 MR. SWEET: He was arrested out of state for
16 apparently unpaid child support. So the issue is trying
17 to find a new contractor to replace him. And that's not
18 an easy thing to do on the south side of Chicago when you
19 are an out-of-state investor.

20 It took longer than what was anticipated.
21 Mr. Kvam apparently, because there was another
22 transaction that went south between these individuals and
23 Mr. Kvam --

24 MR. MATUSKA: I object again, your Honor.

1 This is pretty far abroad.

2 THE COURT: Yeah. This is outside this case.

3 MR. SWEET: Well --

4 THE COURT: What's the deceptive -- I don't
5 get the connect there.

6 MR. SWEET: It is not outside this case
7 because it is in our pleadings. What happened is Mr.
8 Kvam was upset with Mr. Mineau related to a different
9 transaction. And so Mr. Kvam said, "I want out," and
10 demanded that -- he apparently turned off the power to
11 the property, demanded to be paid off immediately, even
12 though the transaction was -- the project was still under
13 way -- and also went off and paid off that credit card
14 for Atlas which caused a cash-flow issue for Mr. Mineau
15 to be able to cover what happened with Atlas.

16 So what happened was Mr. Kvam said, "I want
17 out. And, if you are not going to pay me what I am
18 demanding, even though I'm not owed it yet and I may not
19 be owed it at all, because all we are doing is sharing
20 the proceeds, which we don't know how much those are
21 going to be yet, if you don't give me what I want right
22 now, I'm going to make your life hell."

23 THE COURT: You are telling me on the record
24 that the three of them had an agreement -- or the two of

1 them had an agreement and that agreement entailed that
2 man over there, the plaintiff, investing his money and he
3 had no claim to anything because there was no profit
4 made? Is that what I heard?

5 MR. SWEET: No, your Honor. He was entitled
6 to the proceeds.

7 THE COURT: The proceeds of what?

8 MR. SWEET: The sale of the project.

9 THE COURT: The profit.

10 MR. SWEET: If there was profit. This was an
11 investment. In this case there was no profit.

12 THE COURT: And so far every dime was invested
13 by the plaintiff, right?

14 MR. SWEET: Correct. Of cash.

15 THE COURT: And you are saying -- I still
16 don't see where there is a deceptive trade practice.

17 MR. SWEET: Your Honor, the --

18 THE COURT: Who is Atlas? What's -- did that
19 benefit Atlas to get the card paid off, if he did it?

20 MR. SWEET: No, your Honor. Atlas was another
21 company that they had been working on together in a
22 different transaction. They had essentially an
23 interest-free loan that they were using for working
24 capital. Mr. Kvam for reasons that I --

1 MR. MATUSKA: I object. This is outside of
2 our record, too. In fact, your Honor, in discovery we
3 asked for this information of Atlas and they didn't
4 provide it. So now he is trying to maintain his case
5 based on credit cards of Atlas. Where are the credit
6 cards for that company? I don't have the credit cards.
7 I don't have the signatory statements. I don't have the
8 credit card statements.

9 THE COURT: I assumed that I would be having
10 these, but I didn't see them either.

11 MR. SWEET: Your Honor -- if there is a motion
12 to compel, he would like to bring, he can bring it.

13 He didn't ask for those. What he asked for
14 was Mr. Mineau's personal financial records, things that
15 were completely unrelated to Mr. Kvam, years of tax
16 returns that were completely unrelated to everything.

17 THE COURT: Don't you have to provide
18 information that's going to help you establish your case
19 or your defenses?

20 MR. SWEET: Yes, your Honor.

21 THE COURT: Well, Atlas is mentioned
22 throughout here. So wouldn't that have caused you to
23 give them whatever it is that you are claiming happened
24 to Atlas or because of Atlas or for Atlas?

1 MR. SWEET: And we believe that we have, your
2 Honor. And, again, if there is a discovery dispute,
3 we'll be happy to address that. But that's not what's
4 before the court today. And I'm not sure what
5 Mr. Matuska believes they are entitled to that they
6 haven't received. We haven't had a meet and confer. We
7 haven't had a discovery motion. This is something that's
8 being raised right now here today. And I'm not prepared
9 to address it.

10 THE COURT: But you are prepared to address
11 the deceptive trade practices. I still haven't heard
12 what that was.

13 MR. SWEET: Well, your Honor, I believe I've
14 made my record. If you disagree, then that's certainly
15 your decision.

16 THE COURT: Okay. So we are finished with
17 five? All right. Then let's go to six, abuse of the
18 process.

19 MR. SWEET: Your Honor, that's not subject to
20 any motion. But --

21 THE COURT: You are right. It was ten.

22 MR. SWEET: Ten.

23 THE COURT: Fraud. And what's the fraud?

24 MR. SWEET: Again, your Honor, there are two

1 things. Accessing Atlas's bank accounts without any
2 authorization to do so. Causing a cash-flow problem
3 which required Legion and Mr. Mineau to use their own
4 funds to resolve that Cash-Flow problem or suffer dire
5 consequences on behalf of Atlas.

6 THE COURT: And by signing those pleadings,
7 you are affirming that that actually happened?

8 MR. SWEET: Yes, your Honor.

9 THE COURT: Okay.

10 MR. SWEET: And I believe we have the evidence
11 to prove it. And again I don't believe it is disputed.

12 THE COURT: Well, it was earlier.

13 MR. SWEET: And, again, your Honor, it is --
14 if I got the date wrong, then, again, I'll accept that I
15 got the date wrong. But Mr. Kvam, I do not believe,
16 disputes that he paid off the credit card. He is saying,
17 "I didn't make that transaction on that date." So
18 perhaps I have the date wrong. But he doesn't dispute
19 that he paid off the credit card.

20 Second, again, being turning off the --

21 THE COURT: And those are the only things that
22 are involved in the fraud, right?

23 MR. SWEET: That and turning off the power to
24 the property without notifying anybody, which we believe

1 caused the pipes to freeze.

2 THE COURT: And how is that a fraudulent act?
3 A bad act, but why is it fraud?

4 MR. SWEET: I believe that they have an
5 obligation to inform their -- they are calling them
6 business partners, joint venture partners, that, "Hey, I
7 turned the power off in the middle of winter in Chicago.
8 You should probably do something about that."

9 THE COURT: Wouldn't that hurt him as the
10 investor?

11 MR. SWEET: Yes, it would.

12 THE COURT: So he is committing financial
13 suicide is what you are saying?

14 MR. SWEET: I'm not saying it was rational,
15 but I believe it is undisputed. Mr. Kvam admits that he
16 did it. And he didn't tell anybody until Mr. Mineau
17 heard from his property manager and reached out to
18 Mr. Kvam and said, "Did you turn off the power to the
19 property," and he said, "I did."

20 THE COURT: Can you defraud yourself?

21 MR. SWEET: You can defraud your business
22 partners.

23 THE COURT: Partners?

24 MR. SWEET: Most of these allegations are

1 based on the allegation from Mr. Kvam that they were
2 business partners.

3 THE COURT: All right. So 10 and 5 seem to be
4 closely related. How about 11?

5 MR. SWEET: They arise from the same facts,
6 correct. Negligence, your Honor, again arises from the
7 same facts. That's pled in the alternative, depending on
8 whether there is evidence of Mr. Kvam intentionally
9 intending to harm somebody or negligently doing so. But
10 it arises from the same facts.

11 THE COURT: Well, if you intend to breach a
12 contract, is that negligence?

13 MR. SWEET: No, your Honor. But, again, this
14 is pled in the alternative. We don't believe that the
15 terms of the agreement constitutes a contract because it
16 is incomplete. And it is vague and ambiguous. It
17 doesn't have all the necessary elements of a contract.

18 So if the finder of fact determines that
19 there was no contract, then the negligence claim arises.

20 THE COURT: Finders of fact or the finders of
21 law?

22 MR. SWEET: Again, it depends on what the
23 issues are. I think it could be the finder of fact or
24 the finder of law, depending where the dispute arises as

1 to the terms of this agreement. The terms of agreement
2 to me are on their face vague and ambiguous and
3 incomplete. If there is extrinsic evidence that resolves
4 those ambiguities and completes the terms of the
5 contract, then perhaps there will be a contract.

6 Perhaps the finder of law would determine
7 that, because the writing itself, the terms of agreement,
8 doesn't include all the necessary terms that, regardless
9 of what the other parties intended, there is no written
10 contract; but there right be equitable remedies
11 available.

12 THE COURT: Parol evidence will supplement?

13 MR. SWEET: I believe so. So that's why we
14 have pled a claim in the alternative.

15 So, your Honor, those -- I believe that
16 covers the Motion to Dismiss. Again, I'm happy to
17 elaborate on any of those claims, but I think we've
18 discussed them at length.

19 So the Motion to Dismiss involves the fifth,
20 10th and 11th claims. We have discussed those. His
21 Motion for Summary Judgment, again, I believe it is
22 premature at this time. All the cases cited by
23 Mr. Matuska state that after adequate time for discovery
24 has occurred then he can make his argument that I don't

1 have to disprove --

2 THE COURT: Correct me if I am wrong. But
3 even your first claim demanding the payment and turning
4 off the property that, too, includes those two main
5 actions: The turning off the power and paying off Atlas.

6 MR. SWEET: It includes them, yes.

7 THE COURT: All right.

8 MR. SWEET: Are you talking about the breach
9 of contract claim?

10 THE COURT: Yes.

11 MR. SWEET: I don't believe that includes
12 paying off Atlas.

13 THE COURT: Just the turning off the power.
14 The breach of the covenant of good faith and fair dealing
15 is both of those actions, isn't it?

16 MR. SWEET: Again, I don't believe it involved
17 Atlas. It involves turning off the power and again
18 demanding performance before the property can be
19 completed, before the remodel can be completed, and the
20 project sold at a profit.

21 THE COURT: He wasn't demanding performance.
22 He was demanding his money back, right, rescision.

23 MR. SWEET: I don't believe it was rescision.
24 I believe he was demanding his money back because it was

1 an investment. Our position is that you are not entitled
2 to your money back; you are entitled to distribution of
3 the proceeds when the project is completed in accordance
4 with the distribution laid out in the terms of agreement.
5 Mr. Kvam said, "This isn't going the way I want. I am
6 treating this now as a loan. And I demand one hundred
7 percent of my money back."

8 And Mr. Mineau said, "I'm sorry. First of
9 all, this project isn't complete. We are still trying to
10 complete it and earn a profit for everybody. And,
11 second, this was never a loan. If you want to liquidate
12 the property and you can have the proceeds, then fine.
13 We'll cut our losses and we'll all go our separate ways."

14 Your Honor, the evidence will show that that
15 was a discussion that was had and that was the offer that
16 was made.

17 THE COURT: Where is title? Who has title?

18 MR. SWEET: Legion Investments had title. So
19 at the time we said, "If you just want to sell the
20 property and you can have the proceeds and we'll all go
21 our separate ways and we'll cut our losses, that's fine."
22 But Mr. Kvam said --

23 MR. MATUSKA: Now we are testifying about an
24 offer it sounds like.

1 THE COURT: All right. Do you have anything
2 else?

3 MR. SWEET: As far as the motion for summary
4 judgment goes, your Honor, I believe we have discussed
5 it.

6 I believe this is premature at this time. We
7 are still at the pleading stage, not the prove-it stage.

8 And we need discovery. And Mr. Matuska said
9 that the affidavit attached to the opposition did not
10 explain why discovery wasn't conducted or what discovery
11 was needed.

12 Look at that declaration. And absolutely it
13 explains what I have just explained to you. That we
14 haven't even gotten past the pleading stage nor discovery
15 deadline has been set. No trial has been set. That's
16 why we haven't started discovery yet. And, once we do
17 start discovery, we believe that Mr. Kvam will testify as
18 to why he paid off Atlas's credit card, what transaction
19 he believes it was, what authority he was acting under,
20 why he did it.

21 As far as the turning off the power when he
22 did it, why he did it, what authority he had to do it.
23 Why he didn't tell Legion that it had been done, what he
24 believes the terms of agreement required him to do.

1 THE COURT: Is there relevance to it if, as he
2 said and as you allege, the damage was that period in
3 March and he turned off the electricity in -- sometime in
4 April? What's the relevance of that then?

5 MR. SWEET: If that proves to be the facts,
6 your Honor, then we will need to figure out what caused
7 the pipes to burst. Because I don't know.

8 THE COURT: You are accusing him of doing it.
9 Now you are finding out that it wasn't because the power
10 was turned off.

11 MR. SWEET: I still don't think that's the
12 case. Because the property manager --

13 THE COURT: I'm saying hypothetically if that
14 is the case then what do you do?

15 MR. SWEET: We go to the property manager and
16 say, "How come the power is off? You showed up on March
17 24th and the pipes are leaking and the power was off.
18 What's your explanation?"

19 When we received that information, Mr. Mineau
20 reached out to Mr. Kvam and he said, "Yes, I turned the
21 power off."

22 So now in this Motion to Dismiss we are now
23 hearing him say, "Well, actually I didn't turn the power
24 off until week later, so those dates don't line up."

1 That's a disputed fact and a question that needs to be
2 resolved.

3 THE COURT: And my question is, if it is shown
4 that he wasn't there at the time and didn't do that, how
5 would that affect your case. And evidently it won't.

6 MR. SWEET: Well, your Honor, if -- if it is
7 determined after discovery that Mr. Kvam's action did not
8 cause the pipes to burst, then I believe that aspect of
9 the claim would be withdrawn. We are not trying to hold
10 Mr. Kvam with something he didn't do.

11 But the facts that we understood them when
12 the pleading was made and we still need discovery on were
13 as of March 21st the pipes were broken and the power was
14 off.

15 Mr. Mineau reached out to Mr. Kvam and said,
16 "Did you turn the power off," and Mr. Kvam said, "Yes."
17 Now, if there was some intervening timeline in there that
18 we don't yet know about, that's what discovery is for,
19 your Honor.

20 THE COURT: All right. Anything else?

21 MR. SWEET: To address the final issue that
22 brought us before the court today in the order for
23 hearing, your Honor requested information regarding what
24 the ultimate sale of the property would be, the impact

1 that it would have on this motion. And I don't believe
2 it has any impact. As I explained, the agreement between
3 the parties was buy the house, fix it up, sell it for a
4 profit, distribute the proceeds.

5 THE COURT: And it was \$24,000 the amount of
6 the sale proceeds?

7 MR. SWEET: Correct. After the listing agent
8 was paid and a few other things. The actual sale was
9 higher than that. But the proceeds were \$24,000. And,
10 your Honor, it was -- the offer that was made was, "You
11 get the proceeds. That's the deal. And we all go our
12 separate ways."

13 And Mr. Kvam said, "I want all of my money
14 back," and initiated this litigation.

15 So we have counterclaims related to that,
16 mandatory counterclaims that we have brought. So it is
17 our position that the maximum Mr. Kvam can recover at the
18 end of the day would be the proceeds of the sale. That
19 was the transaction. Had everything gone according to
20 plan, obviously they would have incurred a profit.

21 But we have a loss.

22 And Mr. Kvam would have receive those
23 proceeds.

24 But now we have counterclaims that could eat

1 into those proceeds and ultimately have the final
2 judgment go in favor of the defendants, not in favor of
3 Mr. Kvam.

4 And until we are able to determine where the
5 money goes, those proceeds don't affect the ultimate
6 claims at the end of the day. Any other questions I'll
7 be happy to address them.

8 THE COURT: No. I got it all. Thanks.

9 MR. SWEET: Thank you, your Honor.

10 MR. MATUSKA: May I respond?

11 THE COURT: Reply.

12 MR. MATUSKA: I want to focus the court's
13 attention to what is in the record.

14 The first thing being the term of agreement,
15 which have been Exhibit 1 to our Motion For Dissolution,
16 and again Exhibit 1 to the motion -- Motion to Dismiss
17 and Motion for Summary Judgment.

18 "All parties are entitled to 33.33 percent of
19 net profit after all expenses are accounted for, to
20 include an interest due on funds disbursed. Jay Kvam is
21 assigned any remedies. Initial funder, being Jay Kvam,
22 will be due a seven percent annual return on any funds
23 provided due from date of disbursement." So actually
24 this is a two-part agreement. It is the joint venture

1 profit sharing agreement and it is a loan agreement.

2 And Mr. Mineau's only defense to date has
3 been that the property hasn't sold and the funds were not
4 yet due.

5 Guess what? The property has sold and he
6 hasn't paid the funds. We had to find out about it on
7 our own to bring the motion for temporary restraining
8 order to prevent the conversion of those funds.

9 MR. SWEET: Objection, your Honor. That's not
10 the record. Mr. Matuska and I discussed at length the
11 stipulated injunction to hold those funds. And that
12 offer was rejected. So after the TRO was entered, we
13 deposited funds to the Court to resolve any dispute. So
14 the allegation that he had to bring a TRO to prevent us
15 from taking the funds is simply inaccurate.

16 MR. MATUSKA: Actually the record is Mr. Kvam
17 found out about that on his own and we did bring the
18 motion for temporary restraining order. And it was after
19 we got the restraining order that they offered to do a
20 stipulation.

21 Now, if we look at Exhibit 2 to the Motion to
22 Dismiss and for Summary Judgment those are the -- those
23 are the power bills.

24 It says on the face of the bill, service from

1 March 19th, 2018, through April 6th of 2018.

2 So what is Mr. Sweet -- I don't know what he
3 is arguing; that power wasn't really provided through
4 April 6th of 2018, despite what's on the face of the
5 bill?

6 And he wants discovery for what? Do you know
7 what he didn't say, your Honor, is who he wants discovery
8 against. Does he want discovery against ComEd Power? We
9 can't help him with this. We have given him as much
10 information as we have. So what's his excuse for not
11 getting more information from ComEd Power? He doesn't
12 have it.

13 This absolutely says service from March 19th
14 through April 6th. There is no other way to interpret
15 that.

16 And I believe that trying to read another
17 date into this scenario, your Honor, is exactly what we
18 are instructed not to do on summary judgment. Isn't that
19 the gossamer threads of whimsey and speculation to say
20 that power was provided through a date that's different
21 than what's on their own power bill?

22 If we look at the evidence that they
23 provided, there was a letter provided with the Opposition
24 to a Motion to Dismiss. And that letter is not

1 admissible. I pointed that out a few times. But I want
2 to rebut it anyway.

3 THE COURT: What are you talking about?

4 MR. MATUSKA: The letter that they provided
5 with their Opposition to the Motion to Dismiss. They
6 have been referring to a property manager.

7 THE COURT: Mr. Watkins?

8 MR. MATUSKA: Miss Watkins.

9 THE COURT: Is that what you are talking
10 about?

11 MR. MATUSKA: First of all, that's
12 inadmissible, hearsay. And they don't have an excuse.
13 That's their property manager.

14 They don't have an excuse for not getting an
15 affidavit from her. But all that letter says is that
16 when she went to the property in March -- I'm having a
17 hard time finding it.

18 THE COURT: It is marked Exhibit 2.

19 "On March 24th when I returned several
20 contractors were -- there were some damages that had been
21 done to the property -- we would like to bring your
22 attention to them. Electricity was not operating."

23 MR. MATUSKA: Right. Electricity wasn't
24 operating. She didn't say someone had turned it off.

1 She doesn't even say that. And they are interpreting
2 that. Now they gave us the power bills and we gave them
3 to the Court which shows service through April 6th of
4 2018.

5 That really is -- should be the end of the
6 record there. However, we went a step further.

7 And with our reply brief to the motion -- the
8 Rely Brief to the Motion to Dismiss and for Summary
9 Judgment we provided the complete set of power bills that
10 we had been provided with as well as the affidavit from
11 Jay Kvam --

12 THE COURT: That's not in my binder. I got
13 the Reply. I don't have the exhibits. So what do they
14 say?

15 MR. MATUSKA: We provided a complete set of
16 power bills which actually shows zero usage for the
17 months prior, which --

18 THE COURT: What is that January-February?

19 MR. MATUSKA: Yes. Zero usage. And we
20 provided the affidavit of Jay Kvam where he says, "I've
21 never been to the property. I called on April 6th to
22 turn off the power."

23 And then he told Mr. Mineau that a few days
24 later. So this is what's in our record on summary

1 judgment on that issue.

2 Now, the other issue was Atlas Investments.
3 I don't know what they are saying on that now. We
4 addressed what's in the Complaint. Now they are
5 admitting that they got the date wrong, but maybe
6 Mr. Kvam did something wrong on a different date?

7 I don't know. I addressed what's in the
8 Complaint. And, more than that, if they think he did
9 something wrong, then give me the -- then give me the
10 signing cards for the Atlas accounts. Give me the credit
11 cards statement. Give me the accounts for that other
12 account that the money was going in and out of that 494
13 account.

14 We don't have any of that. So they are not
15 providing discovery. He is inviting me to file a Motion
16 to Compel; but my position is, your Honor, I don't need
17 to do that.

18 I could do that. But Atlas really isn't
19 relevant. And, if they think it is, then prove it; and
20 they failed to do that. The best they did today is admit
21 that they screwed up the dates on their allegation.

22 I think we need to go through the First
23 Amended Counterclaim again and through my Motion to
24 Dismiss, because Mr. Sweet wasn't even right about what

1 the Motion to Dismiss covered.

2 On page eight --

3 -- THE COURT: Of your --

4 MR. MATUSKA: Page eight of the Motion to
5 Dismiss. Mineau's 4th and 6th claims for relief must be
6 dismissed.

7 Then the 5th, 10th and 11th claims must be
8 dismissed.

9 So I don't know why he was focussing -- what
10 was it on 5 and 10?

11 THE COURT: 5, 10 and 11.

12 MR. MATUSKA: We addressed 4 and 6. 5, 10 and
13 11 in the Motion to Dismiss, all of them are addressed on
14 summary judgment.

15 THE COURT: You just --

16 MR. MATUSKA: Oh, yes. And he also failed to
17 address how there could be a breach of contract in this
18 case. Again, I made this point in my opening statements,
19 but I want to make sure that -- that we remember it.

20 It is not a breach of contract asking for
21 your money back. Breach of contract is a failure of
22 performance. What did Mr. Kvam fail to do? What
23 Mr. Sweet is really saying, since he asked for his money
24 back before they think it is due, that would be a

1 defense; that the money -- that it isn't due yet.

2 Instead they bring it as a Counterclaim and
3 counter sue him for him asking for his money back. It
4 makes no sense.

5 But that kind of -- is the problem that's
6 pervasive throughout their COUNTERCLAIMS.

7 They didn't address the process server. They
8 didn't address anything about abuse of process.

9 There is no allegation -- their allegations
10 on fraud and unfair business practice don't apply either.

11 What have they proven in their Counterclaims?
12 They have provided zero admissible evidence on a single
13 one of their Counterclaims. That really is a starting
14 place for our decision and that's the ending place for
15 this decision.

16 They have had plenty of time to do discovery.
17 They haven't even said who they want to conduct discovery
18 against. And it looks like its ComEd Power or their
19 property manager. We can't help them on that.

20 And there is no reason why they haven't done
21 it so far. In fact, they should have done it before
22 filing their Complaint. Because then they could have
23 seen that their allegations were erroneous.

24 But they are not offering to withdraw them;

1 they just want to maintain them on the hope that they can
2 conduct some discovery and find something.

3 I'm not even clear on what they think they
4 are going to find that they could use to oppose this
5 Summary Judgment Motion. I submit there is isn't
6 anything. And certainly there is nothing in our records
7 that they can point to, to prevent the entry of Summary
8 Judgment, which, as Rule 56 says, "It shall be entered."

9 We are entitled to it. And I think we need
10 to do that so we can get on with the rest of the case and
11 get this case scheduled for trial. And thank you, your
12 Honor.

13 THE COURT: All right. All right. I will
14 take this under submission and we will have an answer for
15 you -- it won't be until the first of the year. Now, if
16 you want, you can set the case for trial just to have
17 that done, in the event that you don't get the Summary
18 Judgment --

19 MR. MATUSKA: And, judge --

20 THE COURT: -- since you are both here.

21 MR. MATUSKA: Right. And -- and the discovery
22 deadline counts back from the trial setting, correct?

23 THE COURT: Yes.

24 MR. MATUSKA: I think we can do that.

1 THE COURT: And we'll handle that in the
2 pre-trial conference.

3 MR. MATUSKA: I guess I should ask the clerk,
4 part of the order on the stipulation was that Mr. Kvam
5 could get his bond deposit back. I need to clarify
6 how --

7 THE COURT: On the TRO?

8 MR. MATUSKA: On the TRO, yes.

9 THE COURT: Any objection?

10 MR. SWEET: No, your Honor. That's part of
11 the stipulation.

12 THE COURT: Yes. You can have that back.
13 I'll release it.

14 MR. SWEET: As for setting the trial, we're
15 happy to set a setting date right now. But I don't have
16 my trial calendar with me, so I'm not prepared to do
17 that.

18 THE COURT: Okay.

19 Well, then let's wait until January. Okay.
20 And, if we get it out sooner -- but I'm going to be gone
21 starting Friday.

22 And then I'm tied up all week. We'll get it
23 out as soon as we can.

24 MR. MATUSKA: Thank you, your Honor.

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MR. SWEET: Thank you, your Honor.

(At this time the foregoing proceedings concluded.)

1 STATE OF NEVADA)
2 COUNTY OF WASHOE)

3

4 I, Joan Marie Dotson, Certified Shorthand
5 Reporter of the Second Judicial District Court of the
6 State of Nevada, in and for the County of Washoe, do
7 hereby certify:

8 That I was present in Department No. 3 of
9 the above-entitled Court and took stenotype notes of the
10 proceedings entitled herein, and thereafter transcribed
11 the same into typewriting as herein appears;

12 That the foregoing transcript is a full,
13 true and correct transcription of my stenotype notes of
14 said proceedings.

15 DATED: At Reno, Nevada, this 23rd of
16 January, 2019.

17

18 /s/ Joan Marie Dotson

19 Joan Marie Dotson, CSR No. 102

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4 SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

5 IN AND FOR THE COUNTY OF WASHOE

6 BEFORE THE HONORABLE LYNNE K. SIMONS, DISTRICT JUDGE

7

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9 JAY KVAM, :

10 Plaintiff, : Case No. CV18-00764

11 v. : Dept. No. 6

12 BRIAN MINEAU, et al. :

13 Defendant. :

14 _____ :

15

16 PRETRIAL CONFERENCE

17 January 14, 2020

18 Reno, Nevada

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23 Job No.: 598841

24 Reported by: Carol Hummel, CCR #340

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A P P E A R A N C E S

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4

5 FOR THE PLAINTIFF:

MICHAEL L. MATUSKA
Attorney at Law
2301 South Carson St.
Carson City, Nevada

6

7

8 FOR THE DEFENDANT:

AUSTIN K. SWEET
Attorney at Law
3895 Warren Way
Reno, Nevada

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2 RENO, NEVADA; TUESDAY, JANUARY 14, 2020

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5 THE COURT: This is the time set for a
6 pretrial conference, and I am so glad I have the parties
7 before me so I can check the pronunciations of everyone's
8 name here.

9 This is case number CV18-00764, and it's Jay
10 Kvam (pronouncing).

11 MR. KVAM: Kvam (pronouncing).

12 THE COURT: Brian Mineau (pronouncing).

13 MR. MINEAU: Mineau (pronouncing).

14 THE COURT: Please state your appearances.

15 MR. MATUSKA: Michael Matuska for the
16 plaintiff, Jay Kvam.

17 MR. SWEET: Good morning, your Honor. Austin
18 Sweet with the Gunderson Law Firm. With me is Mr. Mineau.
19 In the gallery is Mrs. Mineau.

20 THE COURT: Good morning. We're here on a
21 pretrial conference. I want to go over several things
22 with you. And based on the filings that I just saw, I
23 think that I would like to set a motion hearing date to
24 argue any motions that I deem appropriate for hearing.

1 I believe, Mr. Sweet, you just filed a motion
2 for summary judgment.

3 MR. SWEET: Correct, your Honor.

4 THE COURT: Then there's at least one motion
5 in limine in the file, correct?

6 MR. SWEET: Correct, yes.

7 MR. MATUSKA: And we also started just
8 yesterday, your Honor, just yesterday filed an objection.

9 THE COURT: I saw that. I've not read it, but
10 I've seen it. And I don't know that I'll have a hearing
11 on that. I want to read it first.

12 So do you anticipate filing motions in limine,
13 counsel?

14 MR. MATUSKA: Potentially. I haven't decided
15 yet.

16 THE COURT: So let's just go back. This case
17 currently is at issue on the Second Amended Complaint
18 filed September 11th, 2018. And on the -- which we need
19 to talk about this procedurally.

20 There is a First Amended Counterclaim that was
21 filed. And based on Judge Polaha's disposition before the
22 case was transferred here, the only remaining claims on
23 that counterclaim are declaratory relief, trust chattel
24 and conversion, correct?

1 MR. SWEET: No, your Honor. The trust chattel
2 and conversion has actually been dismissed prior to that
3 order. So those were all also dismissed, all that is
4 remaining is the defendant charges.

5 THE COURT: I did not see that. I went
6 through his order carefully, so that's why I want to make
7 sure.

8 All we have on the counterclaim then is
9 declaratory relief?

10 MR. SWEET: Correct.

11 THE COURT: That is to determine whether or
12 not it is a joint venture?

13 MR. SWEET: Yes. The status in general of the
14 parties agreements, which the plaintiffs also have a
15 similar claim.

16 THE COURT: Exactly. It seems to me there has
17 to be some sort of a contract if there is a breached
18 contract, right?

19 MR. MINEAU: Correct, your Honor.

20 THE COURT: So based on the claims in the
21 Second Amended Verified Complaint, there is a declaratory
22 relief claim seeking specifically declaration of joint
23 venture, breach of contract, breach of contract and
24 tortious breach of implied covenant of good faith and fair

1 dealing, accounting, court supervision of dissolution and
2 winding up appointment of receiver, temporary affirmative
3 injunction, fraud, fraudulent inducement, fraudulent
4 concealment. Claim 9 is conversion. 10, RICO. 11,
5 claim.

6 Are all of those claims still viable for
7 trial, Counsel?

8 MR. MATUSKA: Yes, your Honor. Although I
9 would add regarding the first claim for declaration of
10 joint venture, what the defendants filed in the motion for
11 summary judgment will impact that.

12 In fact, you're probably aware a joint venture
13 is a partnership for a single purpose, and they are
14 actually arguing in their motion for summary judgment that
15 this relationship between the parties should be governed
16 by the partnership act. So that's seem to have resolved
17 that, at least in my mind.

18 THE COURT: So you're, based on their summary
19 judgment, and their position that this should be governed
20 by the partnership act, you're conceding that?

21 MR. MATUSKA: They're conceding it. They have
22 denied it, they denied it for a year and a half. But now
23 it seems that they have conceded that in a summary
24 judgment motion.

1 THE COURT: I'm sure you will discuss that in
2 your opposition.

3 MR. MATUSKA: I will, and the impact of that.

4 THE COURT: All right.

5 MR. MATUSKA: There is a potential, which
6 cause of action -- I'm not looking at the Second Amended
7 Complaint right now, but there was a cause of action for
8 dissolution.

9 THE COURT: Winding up the receiver, yes.

10 MR. MATUSKA: We should address that through
11 the summary judgment motion also.

12 The complaint is filed before the joint
13 venture property was sold. The joint venture property has
14 been sold so then winding up then would be limited to
15 disposing of --

16 THE COURT: Tax assets.

17 MR. MATUSKA: The proceeds of the sale, yes.
18 Exactly. So that potentially could even be resolved
19 before trial. It's not moot today. But, as I just
20 explained, that's really, the main focus of that was to
21 compel the dissolution of the partnership and the winding
22 up of the partnership property. It's just all in cash
23 now. In fact, the cash has been deposited with the clerk
24 of the court.

1 THE COURT: Right.

2 MR. MATUSKA: So there's not a lot to do with
3 that claim either.

4 THE COURT: Okay. So let's talk about the
5 affirmative defenses.

6 Mr. Sweet, your affirmative defenses to the
7 Second Amended Complaint is 26 of them. And are those all
8 viable at this time?

9 Before I go any further, you do need to say, I
10 usually go through my pretrial conferences, and I
11 eliminate the claims that are no longer viable. I
12 eliminate -- everyone knows when you do your first answer
13 you think of every defense you can think of. By the time
14 we're headed to trial, some of those defenses after
15 discovery don't seem to be viable.

16 I am intending to, because of the extension of
17 some of the discovery, I am intending to have another
18 pretrial conference. So if you want to reserve your right
19 to discuss affirmative defenses, yours to the Second
20 Amended Complaint, and yours to the First Amended
21 Counterclaim, correct, we can do that at a future
22 conference.

23 But I want you to know that I'm going to ask
24 you to basically indicate to the Court which affirmative

1 defense or defenses that you will not be proceeding on.

2 If you are ready to do that today, we can do it. If not,
3 we can do it at another conference.

4 MR. SWEET: Your Honor, I would prefer to
5 defer it. And frankly, I think it would be better to even
6 address that after the disposition of the summary judgment
7 motion, because that's really going to narrow down the
8 scope of whatever is remaining for trial.

9 THE COURT: So I did not read the motion
10 because I like to have the opposition and the reply before
11 I read them all. In your motion did you move not only on
12 their claim but on any of your defenses?

13 MR. SWEET: No, your Honor.

14 THE COURT: Just on their claim?

15 MR. SWEET: On their claims.

16 MR. MATUSKA: Your Honor, if I can make a
17 comment about the defending counterclaim.

18 THE COURT: Yes.

19 MR. MATUSKA: As you observed, or Mr. Sweet
20 explained, the only remaining counterclaim is for
21 declaratory relief, which really is a mirror of what's in
22 our complaint. So the way I view the counterclaim doesn't
23 add or detract from any of the issues that are already
24 added issues in this case. So that would not create

1 additional issues. It really doesn't even create
2 additional affirmative defenses.

3 THE COURT: But it's really both parties are
4 moving for a declaration?

5 MR. MATUSKA: Yes.

6 THE COURT: And seeking relief that they want,
7 and may become important down the road if anyone is
8 seeking any fees, correct? So it needs to remain you have
9 a claim, and you have a claim.

10 MR. MATUSKA: I'll grant that, your Honor.
11 But it doesn't add into facts or allegations or new
12 issues.

13 THE COURT: So we're heading to a trial date
14 of March 2nd, 2020. I don't know if you are a first set
15 or looks like we have -- you were behind another trial,
16 the week three another trial. However, that settled so
17 you are number one now on this unless a criminal trial
18 takes precedence. But I don't know whether someone will
19 invoke their 60 days.

20 Right now you will be ready to go. Let's talk
21 about some dates just to make sure that we're all on the
22 same page, and you don't have disputes about due dates.

23 I'm going to say some of these. Please
24 correct me if I'm wrong, because obviously I read a lot of

1 materials in preparation. I want to make sure with any
2 extension I'm correct.

3 So the discovery cutoff is January 17th, 2020,
4 now; is that correct?

5 MR. SWEET: Your Honor, the deposition for
6 Mr. Cabana (phonetic) is scheduled for the 20th. And that
7 is the only remaining discovery apart from the issues
8 raised.

9 THE COURT: That was pursuant to my order
10 allowing it?

11 MR. SWEET: Correct. The recommendation from
12 the discovery commissioner, I expect you haven't read it
13 yet. But if that recommendation is upheld, there will be
14 more documents produced, and we have objected to that
15 recommendation. We don't think those documents are
16 relevant.

17 THE COURT: So you've disclosed experts,
18 correct?

19 MR. MATUSKA: Yes.

20 MR. SWEET: Yes.

21 THE COURT: Any rebuttal experts have been
22 disclosed, correct?

23 MR. SWEET: Correct.

24 THE COURT: All right. The pretrial

1 disclosure date -- and the reason why I want to go over
2 this, I realize this is a leap year, and I don't want any
3 disputes regarding dates.

4 So your pretrial disclosure date 30 days
5 before trial would be February 1st, 2020. Everybody in
6 agreement?

7 MR. MATUSKA: Yes.

8 THE COURT: Any objection to pretrial
9 disclosures 14 days before trial? I didn't do that date.
10 So that would be the 17th, am I correct? 14 days before
11 trial, so it would be the 17th.

12 Submissions of motion cutoff is February 1st,
13 2020. Anybody disagree with that date?

14 MR. SWEET: No.

15 THE COURT: Submission of motions in limine
16 cutoff is February 16, 2020. Of course, I always invite
17 those to be filed earlier than the last date just because
18 of the impact on the Court.

19 We'll set a final pretrial conference date.
20 I'm going to remind you to review the pretrial order prior
21 to trial. I believe there was an initial one by Judge
22 Polaha. There is a supplemental that I issued.

23 I do need to tell you that I haven't verified
24 in the court-wide uniform pretrial order if it says five

1 days or seven days for your trial statement.

2 MR. SWEET: It says five.

3 THE COURT: I'm bringing that up at the
4 judges' retreat this Friday, that we need to correct that
5 approved order.

6 So if you are relying on the five, I'll allow
7 you -- the rules actually say seven. So do you have a
8 preference whether I set those on seven days before or
9 five before? I guess it would be on Monday, right?

10 MR. SWEET: Yes, your Honor. From my
11 standpoint I think seven days is easier. That was our
12 expectation.

13 THE COURT: So your trial statement will be
14 seven days.

15 Now, are you expecting to use any video
16 depositions?

17 MR. MATUSKA: Yes. We do have a deposition of
18 an out-of-state witness from out-of-state, so we do have a
19 video deposition.

20 THE COURT: What I would like you to do is
21 meet no later than February 1st and meet and confer
22 regarding any objections. I've had this happen before,
23 and I try to preclude it now. I don't want objections
24 right when we're trying to go forward with trial.

1 What you are going to do is if you're planning
2 to edit to drill it down a bit, opposing counsel has to be
3 able to review it, and you must meet and confer to try to
4 resolve any objections.

5 Any objections must be filed, if you are
6 unable to resolve them, by February 16th, 2000. They will
7 include case and line notations. I'm going to want the
8 written transcript. And if you have time, some sort of
9 time index on the video, also indicate that. That's the
10 same date as your motion in limine cutoff, but that gives
11 me a bit of time to review those, because it does take
12 time. And if I want any argument on them, I will.

13 But you also have, if there are objections,
14 you'll need to make arrangements to provide a written
15 transcript and a video to me so I can consider them on not
16 later than 2-26-2020. Counsel need to review any edited
17 videos prior to trial after my rulings on objections.

18 And here's why. I'll give you an example. I
19 had a case where there was some objection to the video.
20 The video was edited, but at the time of trial it was
21 somewhat of a day in the life. That's a video I don't
22 expect that here.

23 But you could really hear belabored breathing
24 of the plaintiff, which obviously the defense indicated

1 that that violated the spirit of the edited version. So I
2 want to make sure everyone knows what's on that video
3 before it's actually requested.

4 In addition, one of items I bring up in
5 pretrial conversation, it was somewhat surprising to me
6 when I came on the bench because of having more of a civil
7 background. But many of our -- is this a bench or jury
8 trial?

9 MR. SWEET: Jury.

10 THE COURT: That's what I thought. That's why
11 I bring this up. All of a sudden I had a moment.

12 So many of our potential jurors will have
13 criminal records. And customarily you will hear me, I do
14 an extensive voir dire. And what I try to do is give you
15 an opportunity to do, is to really watch the jurors so
16 that you can make your questions more effective.

17 I don't want you to ask the same questions I
18 ask. I want you to be able to take it to the next level
19 and ask them any information. But I will go into their
20 criminal record. You will see some indication of it on
21 the questionnaires, but sometimes they don't really reveal
22 it until here.

23 And there is sometimes an element of
24 serendipity. For instance, on a DUI trial one-third of

1 the panel in the entire room has DUIs. So I don't know
2 that it puts them in a better or worse position, but I
3 think it should be information you know. Particularly if
4 any of the criminal acts could be construed as monetary or
5 fraudulent. So it's just information. And I take that so
6 that they are not offended by any question that you have.

7 In addition, when I do talk with them we talk
8 about kind of a barbecue test of whether you know
9 somebody. Do you know them well enough that you would
10 invite them over for a barbecue or not. Because everybody
11 in this town knows somebody, but that doesn't mean it
12 would influence your service as a juror.

13 If I ask, and I don't know that I will in this
14 case, but in law enforcement then inevitably somebody's
15 great uncle's wife's brother was in law enforcement in New
16 Mexico or something. Which really doesn't result in what
17 you want to know. You'll hear me start moving people,
18 drilling down.

19 But it really is an opportunity, I urge you to
20 take it to really watch the jurors when I am asking
21 questions. But I don't expect you to ask the same
22 questions I do.

23 Refer to the pretrial order and the rules
24 regarding jury instructions. You need to exchange them no

1 later than five days before trial. I don't know if that's
2 different in the order.

3 And I will require that you meet and confer,
4 try to resolve all the ones you can. When I settle them,
5 I want to settle the ones that are really at issue.

6 Make sure that your jury instructions, I want
7 them in the aerial font 12, and you need to put your first
8 page, we'll have your citation and authority and please
9 indicate any deviation from the authority.

10 So in other words, if you are adding a little
11 poetic license to some form of jury instruction, tell me
12 that you have modified them, and make sure that I know the
13 date your packet is presented by.

14 If we make changes, I will do it right here on
15 the bench and print it out. And before trial I give all
16 of the jurors, before closing I give all the jurors a
17 packet of jury instructions. I tell them not to read
18 ahead when I'm reading them. But for your purposes in
19 preparing your closing, you will note that you can print a
20 page, instruction number 3. Sometimes it's a little bit
21 easier than using the technology.

22 With regard to technology. I will make my
23 courtroom available to you. This is a small courtroom,
24 and so with all the equipment in here sometimes it really

1 assists you to practice with it. I urge you to not forget
2 that sometimes just a good old fashioned easel you're
3 going to have, I imagine in this contract language, up
4 there.

5 So just think through your exhibit practice --
6 the last trial, it wasn't my trial, it was not in this
7 department, but every time the person didn't practice and
8 put down the piece of paper, didn't look up to see what
9 the jury was seeing. It looked like it was straight, but
10 it wasn't, it was like half off the page. The jury
11 couldn't see it.

12 Just ask, and we'll open the courtroom, and
13 you can practice, and you can go through it. I urge you
14 to sit in every single juror's seat so you know what they
15 are seeing. We're going to accommodate you on that. It
16 makes it smoother for everyone, including me.

17 Now, so the two things I want to make sure we
18 set today, in addition to any other matters you would like
19 to bring up, is a motion date. If I deem that I don't
20 need it, I will let you know. But I think it's better to
21 get it set. We have a bit more free time because that
22 case went off, but inevitably it also jumps around a bit.

23 Do you have your calendars, and can you do
24 that? Do you have a suggested date for that would be

1 motions in limine. Your motions in limine must be
2 submitted 15 days before. So we can set two hearing dates
3 or just set one after submission of motions in limine.

4 Seems to me you might want a summary judgment sooner?

5 MR. SWEET: Yes, your Honor. The expected
6 submission date of that motion would be January 27th. Of
7 course, the Court's going to need time to review that. So
8 my preference would be to at least have a hearing on that
9 motion, to the extent the Court would like one, as soon as
10 possible so we can prepare for trial on whatever issues
11 may remain.

12 THE COURT: That makes sense to me. And we'll
13 split the hearings. If I don't think I need a hearing
14 I'll tell you.

15 So something during -- I have a do not set
16 through the week of the 3rd. Why is that?

17 THE CLERK: We are in on February 11th.

18 THE COURT: February 11th at 9:00 A.M.?

19 MR. MATUSKA: Yes.

20 MR. SWEET: All right, your Honor.

21 THE COURT: If the trial, if I do assist
22 another department with a trial that week of the 3rd, if
23 for some reason I do not do that, we may be able to move
24 the date up. But plan on the February 11th.

1 At what time?

2 THE CLERK: 9:00 o'clock A.M.

3 THE COURT: Does that work?

4 MR. MATUSKA: Yes, your Honor.

5 THE COURT: Let's make it 9:30, please. That
6 gives me a few moments in the morning if I have to review
7 any notes.

8 And then final pretrial conference date.

9 Let's do that the same as if I want argument or motions in
10 limine. So that would be after the 16th of February.

11 THE CLERK: February 21st at 9:30.

12 THE COURT: Does that work for everyone?

13 MR. SWEET: Yes, your Honor.

14 MR. MATUSKA: Yes.

15 MR. SWEET: I'm sorry, would you say that date
16 again.

17 THE CLERK: February 21st at 9:30 A M.

18 MR. SWEET: Thank you.

19 Your Honor, do you require a client to attend
20 that hearing as well?

21 THE COURT: I usually do. If you prefer not
22 to, just make a request. I usually like that,
23 particularly right at the end.

24 Have you been ordered to participate in a

1 settlement conference? I read in your, I want to say your
2 joint case conference, there was no meetings requested.
3 Have you participated in any type of settlement
4 discussions or formal settlement conference?

5 MR. SWEET: We retained a mediator, and
6 started the process. Early on in the process before the
7 mediation occurred the mediator determined that his
8 services were not going to be useful in settling the case
9 and canceled the mediation.

10 So we started the process, but no mediation
11 actually ever occurred.

12 THE COURT: I'm inclined to require you to
13 participate in a settlement conference of some nature,
14 either with a judicial officer or a private mediator prior
15 to trial. And I will put that in an order. Your clients
16 are required to be there in person, human form, not on the
17 phone, it doesn't work.

18 I do want to admonish the parties there is a
19 rule that you cannot file a counter motion unless it is in
20 the alternative. I know in the series of motions, in
21 reviewing them I know that, Counsel, you did indicate that
22 it was in the alternative. The preference of this Court
23 is a completely separate document. It's harder for me to
24 track oppositions and replies when they are embedded in a

1 motion.

2 So going forward I don't want to see any
3 counter motions. Just file it as a separate motion. All
4 right?

5 And then, the last thing would be, as I know
6 that you're tremendous advocates for your clients. I was
7 somewhat dismayed by the tone of some of your emails to
8 each other. I would indicate that I would expect you to
9 be very professional in this Court, try to resolve what
10 you can resolve, and eliminate any personal attacks.

11 Should you be thinking of making them again,
12 opposing counsel, it goes absolutely nowhere with me.

13 Anything else we can handle today?

14 MR. MATUSKA: I do have one simple question
15 about the video deposition, your Honor. It was a fairly
16 short deposition, probably an hour, hour and 15 minutes in
17 its entirety. I would anticipate probably playing a large
18 portion of it, unless you were going to direct that we
19 should really just focus on very small parts of it.

20 But I would anticipate playing a large portion
21 of it. And obviously edit out whatever the objections are
22 that need to be filtered. Is that what you anticipated?

23 THE COURT: You can use as long of a video as
24 you want as long as it's relevant. But in my experience

1 there's usually a significant portion that really isn't
2 something you may not want to present to a jury. And
3 those objections I'll have to resolve.

4 MR. MATUSKA: Correct.

5 THE COURT: So that's what you need to talk
6 about. Sometimes in an abundance of caution in a
7 deposition you're making the objections to preserve them.
8 But your position may change. So all I'm asking is that
9 you meet and confer, try to agree on what will be
10 presented, if you can. And if there's still objections,
11 I'll decide them. And then you may have to edit the -- if
12 I preclude any questions and answers or I strike anything,
13 you're going to have to edit that out.

14 So I'm glad you made that point. Will you be
15 bringing a trial technician, will you have somebody that's
16 assisting with any technology equipment?

17 MR. MATUSKA: We're still deciding that. And
18 I will probably decide that after we get with the
19 courtroom clerk or deputy to review the technical
20 knowledge that we have here, which I still have to do.

21 THE COURT: It is in the pretrial order that
22 you have to contact our IT department.

23 MR. MATUSKA: Okay.

24 MR. SWEET: We'll anticipate using the podium

1 and having the paralegal from our office here to help us
2 with that, but no independent third party.

3 THE COURT: I require they be behind the bar
4 unless they are licensed.

5 MR. SWEET: Yes.

6 THE COURT: Make sure when you're -- you may
7 be able to utilize, I know sometimes counsel has worked
8 together to make it a little bit easier to limit the
9 number of screens and machines that are in here. Make
10 sure that I have a screen up here so that I can see what
11 is going on there.

12 There's a pretty good glare from where I sit
13 up here. I like to be able to look at it separately. I'm
14 not outfitted to do it on my laptop yet. They are trying
15 to get one up here that works all the time. And I will
16 generally ask the jury to make sure they can see. If they
17 have problems, we turn off the lights.

18 So but I would definitely meet with the IT
19 department and see what you need to provide, what they
20 will provide. I'm sure you are going to want potentially
21 monitors.

22 Are you working on an iPad?

23 MR. SWEET: Yes, your Honor.

24 THE COURT: Are you going to work off a laptop

1 or anything?

2 MR. MATUSKA: Probably a laptop.

3 THE COURT: Just make sure that there is some
4 conversation about that in advance, because I don't want
5 problems with technology to impact your cases if we can
6 eliminate that and get the smoothest presentation
7 possible. That helps everyone, most importantly the jury.

8 MR. MATUSKA: I did have one question about
9 the jury instructions. The 2018 version is the most
10 updated version, I believe, of pattern jury instructions.
11 They're actually purchased in pdf form which did a
12 terrible job of converting, makes it very difficult to
13 make any changes or use them, quite frankly.

14 Do you have an another source other than the
15 pdf version of those jury instructions? It's very
16 difficult.

17 THE COURT: It depends on the trial, and I can
18 go back and look. I probably have most of them in Word.
19 Let me just -- did you try to pull up a Pdf and convert to
20 Word?

21 MR. MATUSKA: We have done that. It is
22 excruciating. There's still a lot of formatting in there,
23 and it's difficult to make it, difficult to fully convert
24 it to be usable. And in the event that we were here

1 shortly before trial, a jury trial, trying to alter them,
2 it's very difficult with those jury instructions the way
3 that they are delivered, unfortunately.

4 THE COURT: Well, you'll have to -- I suppose,
5 your assistant may have to retype some of them because I
6 do require them in electronic form. I have many of them.
7 I would agree on as many as you can. You're going to have
8 a lot you agree on.

9 MR. MATUSKA: The standard ones at the
10 beginning, right.

11 THE COURT: Provide those. I'm not worried
12 about those coming in in a pdf as opposed to a Word
13 document.

14 But your -- any that you're going to argue
15 about, any that you have case law that you're arguing and
16 not a pattern instruction, you are going to want that in
17 Word format. I'm not hesitant to listen to argument and
18 just make a decision about what the right thing to say is.
19 I would rather it be accurate. And if I edit it up here,
20 which I've done that often, and printed off a new one, you
21 approve it or continue with the argument, and I decide it.

22 So here's how the guideline goes I would need.
23 Make it easy for the Court.

24 MR. MATUSKA: Yes.

1 THE COURT: That's usually electronic form,
2 Word, aerial font.

3 MR. MATUSKA: Yes. And I will mostly, they're
4 covered by the pattern jury instructions. Special jury
5 instructions would be in Word form. A few of the pattern
6 jury instructions probably have to be amended a little bit
7 to fit this particular case.

8 THE COURT: You are continuing with your RICO
9 claim; is that right?

10 MR. MATUSKA: Yes.

11 THE COURT: I don't know that there's
12 instructions regarding a derivative claim. I would expect
13 that you're going to need to probably get some sort of
14 instruction that tells the jury what that is.

15 MR. MATUSKA: Yes. The conversion claim and
16 RICO claim would have special instructions.

17 THE COURT: Okay. Well, I will see you, if
18 not before, I will see you on the 11th. I would talk
19 right after this if you are going to speak settlement
20 conference with a judicial officer. Obviously, the
21 benefit is you don't have to pay for it. But scheduling
22 time is somewhat difficult.

23 And if you do go do a private mediator, I
24 would try to get some dates on-line right away.

1 MR. SWEET: I agree, your Honor. To that
2 point, obviously not trying to get you to commit to
3 anything, because you haven't even read the MSJ yet. But
4 I think we're going to have a lot more success with the
5 mediation after the summary judgment motion, because in my
6 experience, especially given the last attempt to mediate,
7 chances are both sides are going to be convinced that they
8 are going to prevail in this.

9 THE COURT: I think there is a value sometimes
10 with the MSJ binding, but there's also sometimes value to
11 be decided. I agree with you in this case. If I can
12 agree that would affect your settlement hugely.

13 So that gives you a time frame to plan, to try
14 to get a date.

15 We'll be in recess.

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1 STATE OF NEVADA)

2 COUNTY OF WASHOE)

3

4

5 I, CAROL HUMMEL, Official Reporter of the
6 Second Judicial District Court of the State of Nevada, in
7 and for the County of Washoe, DO HEREBY CERTIFY:

8 That I was present in Department No. 6 of the
9 within-entitled court on January 14, 2020, and took
10 stenotype notes of the proceedings entitled herein and
11 thereafter transcribed them into typewriting as therein
12 appears;

13 That the foregoing transcript is a full, true
14 and correct transcription of my stenotype notes of said
15 hearing.

16 Dated this 23rd day of March 2020.

17

18

19



20

s/s Carol Hummel, CCR #340

21

22

23

24

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1 Code No. 4185
SUNSHINE LITIGATION SERVICES
2 151 Country Estates Circle
Reno, Nevada 89511
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6 SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE
8 HONORABLE LYNNE K. SIMONS, DISTRICT JUDGE
9 JAY KVAM,
10 Plaintiff,
11 vs. Case No. CV18-00764
12 BRIAN MINEAU, et al., Department No. 6
13 Defendant.
14 _____/
TRANSCRIPT OF PROCEEDINGS
15 ORAL ARGUMENTS
16 (MOTION FOR SUMMARY JUDGMENT)
17 February 11, 2020
18 Reno, Nevada
19
20
21
22 STENOGRAPHICALLY REPORTED BY:
23 DEBORA L. CECERE, NV CCR #324, RPR
24 JOB NO.: 605507

<p style="text-align: right;">Page 2</p> <p>1</p> <p>2</p> <p>3 APPEARANCES</p> <p>4</p> <p>5 FOR THE PLAINTIFF:</p> <p>6 MATUSKA LAW OFFICES, LTD.</p> <p>7 BY: MICHAEL MATUSKA, ESQ.</p> <p>8 2310 South Carson St, #6</p> <p>9 Carson City, NV 89701</p> <p>10 (775) 350-7220</p> <p>11 Mlm@matuskalawoffices.com</p> <p>12</p> <p>13 FOR THE DEFENDANT:</p> <p>14 GUNDERSON LAW FIRM</p> <p>15 BY: AUSTIN K. SWEET, ESQ.</p> <p>16 3895 Warren Way</p> <p>17 Reno, NV 89509</p> <p>18 775-829-1222</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p>	<p style="text-align: right;">Page 3</p> <p>1 FEBRUARY 11, 2020, TUESDAY, 9:58 A.M., RENO, NEVADA</p> <p>2 -ooo-</p> <p>3</p> <p>4 THE COURT: Good morning. Please be seated.</p> <p>5 MR. SWEET: Good morning.</p> <p>6 MR. MATUSKA: Good morning.</p> <p>7 THE COURT: Sorry about the delay. I was having</p> <p>8 some word processing issues. And I'm squared away.</p> <p>9 This is Case No. CV18-00764. Jay Kvam vs. Brian</p> <p>10 Mineau.</p> <p>11 Did I pronounce that correctly? Thank you.</p> <p>12 Please state your appearances.</p> <p>13 MR. MATUSKA: Mike Matuska for the plaintiff Jay</p> <p>14 Kvam, and Jay Kvam with me today.</p> <p>15 MR. SWEET: Austin Sweet with Gunderson Law Firm</p> <p>16 on behalf of the defendants. And with me is Mr. Brian</p> <p>17 Mineau.</p> <p>18 THE COURT: Okay. So you couldn't settle it</p> <p>19 while you were waiting?</p> <p>20 MR. SWEET: Not yet.</p> <p>21 MR. MATUSKA: We've been referred for settlement</p> <p>22 conference on, you saw that, on the 24th.</p> <p>23 THE COURT: Yes. So a couple of things.</p> <p>24 Thank you for the well-done briefing. Going</p>
<p style="text-align: right;">Page 4</p> <p>1 forward, I do not want countermotions in the same, in your</p> <p>2 opposition. It's not allowed under the rules, but it also</p> <p>3 makes it very hard.</p> <p>4 And so I will tell you this, Mr. Matuska, I do</p> <p>5 not attach any negativity to the fact that you did a</p> <p>6 cross-motion, but I don't want to see it in the future.</p> <p>7 MR. MATUSKA: Very well.</p> <p>8 THE COURT: It's not allowed under the rules,</p> <p>9 and it just makes it hard. But I have sorted everything</p> <p>10 out.</p> <p>11 So I'm going to talk with you, Mr. Sweet. I do</p> <p>12 have some questions, but I am going to allow you to go</p> <p>13 ahead and do your argument.</p> <p>14 MR. SWEET: Thank you, your Honor. And I will</p> <p>15 keep my argument brief as the motion has been extensively</p> <p>16 briefed, as you mentioned.</p> <p>17 Your Honor, this project was an investment. And</p> <p>18 investments carry risk. In this case the parties</p> <p>19 anticipated that the project would go smoothly, and that</p> <p>20 they would have received a relatively large return in a</p> <p>21 relatively short amount of time.</p> <p>22 To that end, they executed the terms of</p> <p>23 agreement that set forth how the proceeds would be</p> <p>24 distributed when they succeeded with this project, hoping</p>	<p style="text-align: right;">Page 5</p> <p>1 that they would.</p> <p>2 As set forth in the terms of the agreement,</p> <p>3 first they would pay all the expenses to third parties,</p> <p>4 then they would repay Mr. Kvam's investment, plus 7 percent</p> <p>5 interest. And then what was left over, the profits would</p> <p>6 be split among the partners equally. If the project had</p> <p>7 gone according to plan they would have succeeded, and they</p> <p>8 would have made a fair amount of money.</p> <p>9 Unfortunately, that didn't go according to plan.</p> <p>10 The contractor that they hired to renovate the project</p> <p>11 breached his obligations, didn't finish the renovation,</p> <p>12 didn't perform the services he was paid to perform. The</p> <p>13 project failed.</p> <p>14 The parties had anticipated that risk, your</p> <p>15 Honor. In terms of the agreement the contract says that if</p> <p>16 the transaction should fail in any way, all interest and</p> <p>17 remedies available to the joint venture would be assigned</p> <p>18 to Mr. Kvam.</p> <p>19 THE COURT: And he would also receive the</p> <p>20 percentage interest of the defendant, correct?</p> <p>21 MR. SWEET: Correct. So the deal was if it</p> <p>22 succeeds, pay off the third-party expenses, Mr. Kvam gets</p> <p>23 his investment back plus 7 percent. What's left over, the</p> <p>24 profits get split up equally among the parties.</p>

<p style="text-align: right;">Page 6</p> <p>1 If it fails, Mr. Spinella gets nothing, Legion 2 Investments gets nothing and Mr. Mineau gets nothing. 3 Whatever is left goes to Mr. Kvam. That was the deal. 4 Your Honor, that is all that we're trying to enforce here 5 today. That's what we seek in our motion, and that's what 6 we believe the proper result of this litigation should be. 7 Now, it's important to remember the burden that 8 we're dealing with as we go through the analysis. Although 9 this is the defendant's motion, we are the defendants at 10 the trial coming up in a few weeks. Mr. Kvam bears the 11 burden under Nevada law. That means that Mr. Kvam bears 12 the burden of proving his case through this motion. 13 Mr. Kvam must present admissible evidence, 14 sufficient to establish each element of his claims, and he 15 must transcend the pleadings and introduce the specific 16 facts that show a genuine issue for trial. Mr. Kvam has 17 not done so here. There is nothing left to go to trial on 18 in this case, your Honor. 19 Generally speaking, I'm not going to go through 20 the claims one by one, that's in the briefing, but 21 Mr. Kvam's claims can be broken into three general 22 categories. 23 First, Mr. Kvam claims that his investment 24 should be returned by Mr. Mineau and Legion Investments</p>	<p style="text-align: right;">Page 7</p> <p>1 because it wasn't really an investment. It was really a 2 loan. Well, there's no written promissory note or express 3 loan agreement in this case. And Mr. Kvam's claim is only 4 based upon the terms of the agreement where it provides 5 that he is to receive a 7 percent return on his investment 6 out of the proceeds of the project. 7 Your Honor, that's a standard investment payoff 8 structure. You pay off the debt. Investors get their 9 money back, maybe a little bit of interest, and then 10 whatever money is left over, the profits get split among 11 the partners. 12 That interest that's attached to repayment of 13 the investment does not convert the investment into a loan. 14 In fact, it contradicts the terms of the agreement because 15 the terms of the agreement does not say if the project 16 fails then Mr. Mineau is going to write Mr. Kvam a check 17 and pay the difference and make him whole. It says that if 18 the project fails Mr. Mineau gets nothing, Legion 19 Investments gets nothing, Mr. Kvam gets whatever is left. 20 That was the deal that they made. 21 And, in fact, if there is some sort of a loan 22 agreement, we don't have all the essential terms, your 23 Honor. There's no maturity date, which a loan should have 24 a maturity date, and more importantly, there's no borrower.</p>
<p style="text-align: right;">Page 8</p> <p>1 Who owes the money; who borrowed the money? 2 There's no evidence whatsoever that even if 3 Mr. Kvam, thought this was a loan somehow, that Mr. Mineau 4 is the one who should be paying it back, or Legion 5 Investments should be paying it back. Or Mr. Spinella, who 6 is not even a party to this case, or the partnership as a 7 whole. 8 There is no evidence of how this loan supposedly 9 was structured and who is obligated to pay it back. And 10 therefore Mr. Kvam has failed to meet his burden that 11 Mr. Mineau or Legion Investments somehow breached the loan 12 agreement. So that's the first category. 13 The second category, are Mr. Kvam's claims that 14 Legion Investments and Mineau are somehow responsible for 15 the failure of this project and therefore should reimburse 16 Mr. Kvam's investment. Again, your Honor, there's no 17 evidence of that. 18 The evidence shows that Legion Investments 19 acquired the property, that they hired a contractor who 20 came recommended by their property manager in Chicago. 21 They signed a contract with that contractor requiring the 22 renovation would be completed for a flat fee within a set 23 number of months. 24 The contractor proceeded with the project. He</p>	<p style="text-align: right;">Page 9</p> <p>1 sent regular updates. Sent dozens of pictures, as you've 2 seen in the evidence. Was in constant communication with 3 Mr. Mineau and with Mr. Kvam directly. In fact, during the 4 project he came out to Reno, spent the afternoon and 5 evening talking about projects in Chicago, including this 6 one, even spent the evening at Mr. Kvam's house where they 7 again talked about this project, and the contractor told 8 Mr. Kvam that we're going to be done in May. 9 And after that Mr. Kvam wired another \$9,000 to 10 the contractor as payment under the renovation. 11 So your Honor, the project appeared to be 12 progressing as all parties intended and expected, until, 13 unfortunately, about late June, early July, when that 14 stopped happening. The contractor stopped returning phone 15 calls, stopped providing updates, was missing the deadlines 16 for completion and ultimately breached his obligations 17 under the contract and did not complete performance. 18 Your Honor, I think it's important to note that 19 no additional funds were paid to the contractor after the 20 trouble started. Mr. Mineau did not pick up the phone and 21 say hey, Mr. Kvam, I know that the contractor is not doing 22 what he's supposed to be doing, but we need to give him 23 more money. Nothing like that happened. There's no 24 evidence of that.</p>

<p style="text-align: right;">Page 10</p> <p>1 So the project was being managed in the way that</p> <p>2 Mr. Mineau thought that he was supposed to be doing it.</p> <p>3 Mr. Kvam was actively involved at all times. And there is</p> <p>4 no legal obligation or duty that has been breached by</p> <p>5 Mr. Mineau or Legion Investments that would entitle</p> <p>6 Mr. Kvam to reach into their pocket to get his investment</p> <p>7 back.</p> <p>8 THE COURT: So it doesn't in your mind then --</p> <p>9 let's go on the fourth claim, which I think is, is in your</p> <p>10 second group, correct?</p> <p>11 MR. SWEET: Yes.</p> <p>12 THE COURT: And, but wasn't Mr. Mineau in a</p> <p>13 superior position and an entrusted position, and so doesn't</p> <p>14 that -- does it or does it not impose a special element of</p> <p>15 reliance in addition to any future duties.</p> <p>16 You're saying that they were equal and that he</p> <p>17 wasn't in a superior position?</p> <p>18 MR. SWEET: Well, there's, there's a few</p> <p>19 different things going on here, your Honor.</p> <p>20 First of all, for the fourth cause of action,</p> <p>21 it's very broad. So I'm not sure if you're talking about</p> <p>22 contractual duties or legal duties.</p> <p>23 There was no contractual obligation whatsoever</p> <p>24 that Mr. Mineau would manage the project or, you know,</p>	<p style="text-align: right;">Page 11</p> <p>1 guarantee performance of the project.</p> <p>2 So there are statutory duties that Mr. Mineau,</p> <p>3 on behalf of the partnership, would carry out his efforts</p> <p>4 on behalf of the partnership under a statutory duty of care</p> <p>5 and duty of loyalty. So that's true. I don't have any</p> <p>6 dispute about that.</p> <p>7 And Mr. Mineau was the one who was taking the</p> <p>8 lead on the construction. He identified the property. He</p> <p>9 identified the contractor. He signed the contract. That's</p> <p>10 not disputed.</p> <p>11 THE COURT: But does that -- if that's the case,</p> <p>12 does that preclude summary judgment on that claim?</p> <p>13 MR. SWEET: It doesn't, your Honor, because</p> <p>14 there may have been a duty under those statutory duties,</p> <p>15 but there's no evidence of the breach of that duty.</p> <p>16 THE COURT: So the issue is yes, you agree on</p> <p>17 the law that applies, but no, there aren't any facts to</p> <p>18 meet those elements, that you were the only one has brought</p> <p>19 forth facts.</p> <p>20 MR. SWEET: Correct. There's no facts, there's</p> <p>21 no evidence to show that -- so the duty of loyalty is a</p> <p>22 standard of gross negligence which, first of all, your</p> <p>23 Honor, hasn't been pled in the fourth cause of action, so</p> <p>24 I'm not sure if that's what the claim is.</p>
<p style="text-align: right;">Page 12</p> <p>1 What was alleged in the opposition to our motion</p> <p>2 for summary judgment was tortious breach of the covenant of</p> <p>3 good faith and fair dealing.</p> <p>4 That requires proof of grievous and perfidious</p> <p>5 misconduct. There's been no evidence that Mr. Mineau's</p> <p>6 conduct was even negligent, but certainly not grossly</p> <p>7 negligent, which wasn't even pled. But there's no evidence</p> <p>8 whatsoever of grievous or perfidious misconduct, which is</p> <p>9 the element that Mr. Kvam has to prove to get to trial on</p> <p>10 that claim for tortious breach of the covenant of good</p> <p>11 faith and fair dealing.</p> <p>12 So that's the second claim, your Honor.</p> <p>13 Mr. Mineau never made any promises that he was going to</p> <p>14 ensure that this project could be completed, would be</p> <p>15 profitable, would succeed, that Mr. Kvam would get his</p> <p>16 money back and then some on top of it.</p> <p>17 That was certainly the intention. Mr. Mineau</p> <p>18 acted in good faith and pursued the project, but</p> <p>19 unfortunately, the contractor breached his contract. And</p> <p>20 the fact that the contractor breached the contract does not</p> <p>21 in and of itself establish that Mr. Mineau breached some</p> <p>22 duty to Mr. Kvam or to the partnership.</p> <p>23 The third category of claims, your Honor, are</p> <p>24 the intentional tort claims. Fraud, conversion and RICO.</p>	<p style="text-align: right;">Page 13</p> <p>1 Again, there's no evidence of this, your Honor. There's no</p> <p>2 evidence of misrepresentations. There's no evidence that</p> <p>3 Legion Investments or Mr. Mineau ever exercised any control</p> <p>4 over Mr. Kvam's funds.</p> <p>5 The evidence shows that Mr. Kvam paid the title</p> <p>6 company directly, paid the contractor directly. The last</p> <p>7 two years we've been going through these conspiracy</p> <p>8 theories that somehow Mr. Mineau was in cahoots with the</p> <p>9 contractor and had Mr. Kvam's money used on another</p> <p>10 project.</p> <p>11 They subpoenaed countless records. They hired a</p> <p>12 forensic accountant. The forensic accountant came back and</p> <p>13 said there's no evidence of that. I can't find anything.</p> <p>14 There's no evidence whatsoever that there was some sort of</p> <p>15 fraud or conversion, certainly not racketeering that can</p> <p>16 take this claim through trial.</p> <p>17 Your Honor, the bottom line is Mr. Kvam claims</p> <p>18 that he was entitled to a substantial return on his</p> <p>19 investment without doing any work or apparently taking any</p> <p>20 risk.</p> <p>21 If he wants to come to this Court and say that</p> <p>22 that was the deal, that's what he was entitled to, he</p> <p>23 should have some evidence to support that. And he doesn't</p> <p>24 have any. All we have is the terms of the agreement that</p>

<p style="text-align: right;">Page 14</p> <p>1 says if the project succeeds, we pay off the debts, 2 Mr. Kvam gets his money back, plus 7 percent, everybody 3 splits the profit, and we all make a lot of money. 4 If the project fails, Legion Investments gets 5 nothing, Mr. Mineau gets nothing, Mr. Kvam gets what's 6 left. That was the deal. 7 There is no evidence to proceed to trial on 8 anything beyond that which is what we're trying to seek 9 through our motion for summary judgment. 10 Your Honor, last, I would like to point to the 11 Supreme Court case from last year. Boesiger vs. Desert 12 Appraisals where the Supreme Court of the State of Nevada 13 discussed summary judgment. They said: 14 Summary judgment is an important 15 procedural tool by which factually 16 insufficient claims may be isolated 17 and prevented from going to trial 18 with the attendant, unwarranted 19 consumption of public and private 20 resources. 21 It went on to say, that: 22 In dispensing with frivolous actions 23 through summary judgment, courts 24 promote the important policy and</p>	<p style="text-align: right;">Page 15</p> <p>1 objectives of sound judicial economy, 2 and enhance the judiciary's capacity 3 to effectively and efficiently 4 adjudicate legitimate claims. 5 That's what we're doing here today, your Honor. 6 Summary judgment is appropriate at this time of Mr. Kvam's 7 claims, a motion should be granted to enforce the terms of 8 agreement as they were written, and there's no reason to 9 proceed to trial at this time. 10 THE COURT: Let me go to your fifth claim. It's 11 an accounting claim. And I just want to make -- they're 12 seeking an accounting from Mr. Mineau, and he -- and they 13 attribute the obligation to do that, as a, a partner's duty 14 of loyalty. 15 So is it your position that summary judgment 16 should be granted on this claim as well? It seems to me 17 that -- are you agreeing that an accounting should be done, 18 or you're indicating that the remedies are limited in a 19 time of loss, rather than profit, they're limited to what 20 the agreement says? 21 MR. SWEET: Correct, your Honor. We don't have 22 a problem with the accounting. We've provided that. 23 There's no question about what the money is and where the 24 money went. Mr. Kvam knows what he wired.</p>
<p style="text-align: right;">Page 16</p> <p>1 There may be a dispute as to the source of the 2 funds that Mr. Mineau used to pay his draw to the 3 contractor, but that doesn't matter, because at the end of 4 the day, everything that Mr. Mineau and Legion Investments, 5 all their interest in this partnership, goes to Mr. Kvam. 6 So whether it's a, you know, 20 percent interest 7 or 30 percent interest or zero percent interest, doesn't 8 matter. It all goes to Mr. Kvam. At the end of the day 9 Mr. Kvam has a hundred percent interest in this 10 partnership, which is the proceeds of the sale at this 11 point. 12 THE COURT: Your position is that his claim 13 fails because you've already provided it? 14 MR. SWEET: Exactly. There is no question as to 15 what money has been put into the partnership and what money 16 has come out of the partnership. It's set forth in our 17 motion and the exhibits, what money was put in, what money 18 is available, where the money went. 19 The only question is what did TNT do with the 20 money that they were paid. We don't know. That's not part 21 of Mr. Mineau's duty to account as to what the vendors that 22 were paid did with that money. Mr. Mineau's duty, if any, 23 would be to say here's how much we paid the contractor 24 under the contractor agreement, which is undisputed. It's</p>	<p style="text-align: right;">Page 17</p> <p>1 very clear what happened. 2 It's not at all clear to me, your Honor, what 3 additional information is being sought through an 4 accounting. What more do you think that Legion Investments 5 or Mr. Mineau has to provide that has not yet been 6 provided? 7 THE COURT: So the -- and as it goes to your 8 Claims Six and Seven, it would just be that, you know, you, 9 your position would be that there's no dispute, 10 essentially, where the monies are, or the interest that 11 would go back to Mr. Kvam? 12 MR. SWEET: Correct. 13 THE COURT: And -- okay. 14 MR. SWEET: So we agree that there should be a 15 dissolution, that Mr. Kvam would be entitled to the 16 proceeds of the sale. 17 And, again, as I said in the motion, we do 18 intend to file a motion for attorney's fees at the end of 19 this. So we request that the funds not be released, what 20 is being held with the clerk, until the motion for 21 attorney's fees is heard. But, you know -- 22 THE COURT: And under the contract there is, if 23 everything goes to Mr. Kvam, why does there have to be a 24 dissolution? I mean, why can't Mr. Kvam do whatever he</p>

<p style="text-align: right;">Page 18</p> <p>1 wants with it at that point?</p> <p>2 MR. SWEET: We have no problem with that. It's</p> <p>3 his claim. We're not disputing the claim.</p> <p>4 If he decides not to dissolve the partnership at</p> <p>5 that point, I don't fundamentally object to that.</p> <p>6 I'm not sure that at that point there is legally</p> <p>7 a partnership since this is an unincorporated partnership,</p> <p>8 and now you only have one person, and as a matter of law,</p> <p>9 it would probably effectively no longer be a partnership</p> <p>10 regulated by NRS Chapter 87. But, you know, I'm not sure</p> <p>11 that that's something that we need to deal with here today.</p> <p>12 THE COURT: Well, it precludes the claim. It</p> <p>13 would preclude the claim.</p> <p>14 MR. SWEET: And fair enough, your Honor. To me</p> <p>15 this isn't something that needs to go to trial. Whether</p> <p>16 the entity is judicially dissolved at final judgment or</p> <p>17 whether it is simply assigned to Mr. Kvam, and that</p> <p>18 inherently creates a judicial dissolution because now you</p> <p>19 only have one partner, so it's not a partnership anymore,</p> <p>20 or whether Mr. Kvam wants to, you know, take some other</p> <p>21 steps outside of this courtroom to dissolve the entity once</p> <p>22 he has pure ownership of it, I don't really care. Frankly.</p> <p>23 That doesn't affect the claims in this case or</p> <p>24 the outcome that is going to be adjudicated.</p>	<p style="text-align: right;">Page 19</p> <p>1 Of course it needs to be resolved one way or</p> <p>2 another. I think since Mr. Kvam certainly doesn't intend</p> <p>3 to just take the money and proceed with some sort of</p> <p>4 partnership with himself, I don't see any reason why</p> <p>5 dissolution would not be entered to wrap this up and end</p> <p>6 the partnership formerly and cleanly. But if Mr. Kvam</p> <p>7 wants to do something else, we don't object.</p> <p>8 THE COURT: What is the current amount that is</p> <p>9 with the clerk?</p> <p>10 MR. SWEET: The amount with the clerk is</p> <p>11 \$24,473.77. And there is an additional amount that was</p> <p>12 received after those funds were deposited of \$1,864.14.</p> <p>13 THE COURT: Okay.</p> <p>14 Counsel -- so counsel, I actually -- you</p> <p>15 counsel -- when I did it, now I've made a note of how</p> <p>16 Mr. Sweet organized his claims. I actually organized it by</p> <p>17 claims. And I'm not going to preclude you from arguing it</p> <p>18 in any fashion that you want.</p> <p>19 MR. MATUSKA: Okay.</p> <p>20 THE COURT: Because you don't have to follow</p> <p>21 what he did.</p> <p>22 MR. MATUSKA: Is it okay if I remove this and</p> <p>23 remain at the table?</p> <p>24 THE COURT: Yes, but you need to stand.</p>
<p style="text-align: right;">Page 20</p> <p>1 MR. MATUSKA: Yes. What we just heard for the</p> <p>2 past 15 minutes or so, your Honor, basically is an</p> <p>3 encapsulation of the story that they've been giving us</p> <p>4 throughout this case and even prior to the time that we</p> <p>5 filed the case.</p> <p>6 What you just heard from Mr. Sweet was not at</p> <p>7 all responsive to the opposition. To the extent it is the</p> <p>8 burden of the plaintiff to come forward with the actual</p> <p>9 evidence to support the allegations of the complaint, we</p> <p>10 provided 48 exhibits, only one of which was mentioned by</p> <p>11 Mr. Sweet. And the Court will have about twice that many</p> <p>12 at the time of trial. In fact, the story that he's giving</p> <p>13 is, is legally irrelevant.</p> <p>14 His first argument that an investment carries</p> <p>15 risk, that's not even a legal argument, your Honor. What</p> <p>16 does that mean in the context of this case and the context</p> <p>17 of summary judgment? It's a rhetorical question. It means</p> <p>18 nothing.</p> <p>19 We all know that possibly the, the real estate</p> <p>20 market changes. And maybe these parties don't realize</p> <p>21 quite the profit that they anticipated. Maybe the house</p> <p>22 doesn't sell for quite as much as they anticipated, or</p> <p>23 maybe it sells for more. That's the kind of risk that you</p> <p>24 assume in a variable real estate market.</p>	<p style="text-align: right;">Page 21</p> <p>1 You don't assume the risk that you will be lied</p> <p>2 to, that the funds will be missing, that the project will</p> <p>3 not be completed, and that the contractor will work on the</p> <p>4 other projects for Mr. Mineau. That risk was never</p> <p>5 assumed, and we need to get to that as the core point.</p> <p>6 We're also here defending a summary judgment</p> <p>7 motion without the benefit of discovery of the other</p> <p>8 projects this contractor was working on.</p> <p>9 And I want to be clear on this, too. Although</p> <p>10 Mr. Sweet and Mr. Mineau will continue to blame that</p> <p>11 contractor, that contractor was working on Mr. Mineau's</p> <p>12 other projects, which as far as we can tell, were brought</p> <p>13 to a successful and a profitable conclusion. That's the</p> <p>14 discovery that they're objecting to, that's the discovery</p> <p>15 that we've been requesting, and that's the discovery that</p> <p>16 was the subject of the, of the recommendation from the</p> <p>17 discovery commissioner. We need that.</p> <p>18 This idea that the blame rests with the</p> <p>19 contractor is legally irrelevant, and it's false.</p> <p>20 Mr. Mineau stuck with that contractor on his other</p> <p>21 projects. That's why he's not giving us the, the evidence</p> <p>22 of it.</p> <p>23 And, also, your Honor, this idea that he wants</p> <p>24 to blame the contractor, we've looked through extensive</p>

<p style="text-align: right;">Page 22</p> <p>1 records in this case. Mr. Sweet provided extensive 2 exhibits with his motion and I provided extensive exhibits 3 with my opposition. 4 Where is one letter from Mr. Mineau to the 5 contractor saying you did something wrong, or I want my 6 money back. It's not there, because Mr. Mineau had an 7 ongoing relationship with this contractor. The story 8 you're being fed is patently false. And we have some false 9 representations in this record, and we need to discuss 10 those also, but that's one of them. 11 Mr. Mineau had an ongoing relationship with this 12 contractor and had no intention of, of getting crossways 13 with this contractor who was working on his other projects. 14 THE COURT: And, so, counsel, if you point to 15 specifically the evidence that will support what you're 16 saying, can you identify specific documents that would 17 reflect an ongoing relationship with the contractor? 18 The point is that you're maintaining that 19 Mr. Mineau had a relationship with the contractor, that 20 that was his focus, that the projects that that contractor 21 did were successful, and this one was not? 22 MR. MATUSKA: Yes, I can, your Honor. 23 THE COURT: Okay. Go ahead. 24 MR. MATUSKA: I can point to that.</p>	<p style="text-align: right;">Page 23</p> <p>1 May I make one side point in addition to that 2 first, though? 3 THE COURT: Yes. 4 MR. MATUSKA: As a matter of law, though, it 5 doesn't matter if the contractor did something wrong. He's 6 not a defendant in this case. 7 Mr. Mineau is the defendant. This case is about 8 his duties. They've now admitted to the joint venture 9 agreement which up until January 6th was denied, your 10 Honor. 11 They denied that this was a partnership or joint 12 venture until January 6th of 2020. And they admit that. 13 They also admit that as a result of the joint venture 14 Mr. Mineau owes fiduciary duties to the partnership and to 15 the partners, including my client Jay Kvam. 16 Once we have this acknowledgment that Mr. Mineau 17 owes a fiduciary duty, the other duties follow -- the duty 18 of care, the duty of loyalty, the duty to account. 19 And although, as a general manner of speaking, 20 Mr. Sweet is correct, plaintiff has the burden of coming 21 forth with specific evidence. It's not that simple in this 22 case because we have the record, and we do not see that 23 Mr. Mineau fulfilled his fiduciary duty. We do not see a 24 duty of care. We do not see a duty of loyalty. We do not</p>
<p style="text-align: right;">Page 24</p> <p>1 see an accounting. We do not have any of that. 2 With regard to the fourth cause of action 3 tortious breach, tortious breach of a covenant of good 4 faith, he's got a duty to fulfill the contract. So there's 5 nothing in here that would show that he fulfilled the 6 contract. But yes, we do have the evidence of his other 7 projects and the evidence of how he interfered with the 8 fulfillment of this contract. 9 I think the best evidence of the other projects 10 are the bank statements. I need the number in the motion. 11 THE COURT: So you've identified bank 12 statements. Anything else? 13 MR. MATUSKA: The bank statements show deposits 14 going into that TNT account for properties. This May 15 Street property, property of Michigan Avenue, South Bishop, 16 about five properties. All of which are the subject of 17 the, of the discovery motion. We also have Mr. Steel's 18 report, which I'm finding more readily than, than the bank 19 statements, but Mr. Sweet -- 20 THE COURT: Is that your forensic accountant? 21 MR. MATUSKA: Yes, and he reviewed the bank 22 statements. And those are Exhibits 41 and 42 to the 23 opposition to the motion for summary judgment. And 24 Mr. Steel reviewed the bank records and confirmed that --</p>	<p style="text-align: right;">Page 25</p> <p>1 he confirmed that the -- that the funds for this May Street 2 project went into the same account as the funds for a 3 series of other projects. 4 THE COURT: How does that support the claim for 5 breach of contract or tortious breach of a covenant of good 6 faith and fair dealing? It seems to me that there has to 7 be additional, not just that it happened, but it happened 8 plus, because it's not unusual for people to have multiple 9 projects going on. 10 MR. MATUSKA: I was just pointing out as the 11 evidence that he had other projects going on. And that is 12 the subject of discovery. 13 It goes to the fiduciary duty, also, which 14 encompasses the duty of loyalty and the duty of care. He 15 is not being loyal to this project, and he's prioritizing 16 his other projects ahead of it, your Honor. That's the 17 simple answer. 18 THE COURT: But do you have evidence that 19 there -- that they were not simultaneous, or that they -- I 20 mean, what is it that requires this project to be number 1 21 in line? His, his duty of loyalty? Is that your, what you 22 maintain? 23 MR. MATUSKA: Well, yes. Yes, with the duty of 24 loyalty, he can't prioritize the other projects ahead of</p>

<p style="text-align: right;">Page 26</p> <p>1 this.</p> <p>2 But let's, let's go back to square 1, then, and</p> <p>3 I think that this is important. Mr. Sweet keeps pointing</p> <p>4 to the terms of agreement. He says it's deficient, and it</p> <p>5 doesn't have this, and it doesn't have that. Let's go back</p> <p>6 to square 1.</p> <p>7 Please, let's go to the exhibits in the</p> <p>8 opposition to the motion for summary judgment. Let's go to</p> <p>9 Exhibit Number 2.</p> <p>10 THE COURT: To his motion?</p> <p>11 MR. MATUSKA: No, to our, our opposition.</p> <p>12 THE COURT: Okay. So let's step back for one</p> <p>13 minute.</p> <p>14 This is the problem with a cross-motion. So are</p> <p>15 you moving for summary judgment on each and every claim?</p> <p>16 MR. MATUSKA: No, your Honor. I'm sorry. I</p> <p>17 meant to be clear about that. They've admitted to the</p> <p>18 first claim for relief.</p> <p>19 THE COURT: Right.</p> <p>20 MR. MATUSKA: That's the only thing I moved for</p> <p>21 summary judgment on. I didn't argue that. I just said</p> <p>22 they've acknowledged that now.</p> <p>23 THE COURT: Okay.</p> <p>24 MR. MATUSKA: That is no longer in dispute.</p>	<p style="text-align: right;">Page 27</p> <p>1 Actually, I thought their motion was confusing.</p> <p>2 They wanted summary judgment on the first claim for relief,</p> <p>3 but they're admitting to our first claim for relief. So it</p> <p>4 seems appropriate just to point that out, that they are now</p> <p>5 admitting that this is, is a joint venture governed by the</p> <p>6 Partnership Act. That's the extent of the cross-motion.</p> <p>7 THE COURT: Okay. So as far as your</p> <p>8 cross-motion then, it's only as to claim 1, but claims 2</p> <p>9 through 11, your position is that you have provided, and</p> <p>10 you have shown material facts in this field?</p> <p>11 MR. MATUSKA: Yes. And I'd like to review some</p> <p>12 of these exhibits now that we submitted with our</p> <p>13 opposition. In fact, I think we should just go through</p> <p>14 them.</p> <p>15 Exhibit Number 1 is a declaration from Jay Kvam.</p> <p>16 But starting with Exhibit Number 2, it's the</p> <p>17 email from Michael Spinola to Jay Kvam. That's how he was</p> <p>18 introduced to the project.</p> <p>19 It identifies a contractor bid of \$70,000 and a</p> <p>20 probable listing price of \$169,900. That's on December</p> <p>21 29th, 2016.</p> <p>22 A couple of days later, approximately the first</p> <p>23 day of January, Mr. Kvam was introduced to Mr. Mineau at a</p> <p>24 Starbucks. And Exhibit 3 is the result of that meeting.</p>
<p style="text-align: right;">Page 28</p> <p>1 And Exhibit 3 is actually, is actually the</p> <p>2 breakdown of the financing. It starts on the top of the</p> <p>3 listing price of \$169,000. Starts with the listing price</p> <p>4 of \$169,000, \$70,000 for the repairs. \$44,000 for the</p> <p>5 purchase. All in at \$114,000, plus interest at 7 percent.</p> <p>6 Interest estimated for three months, this was estimated to</p> <p>7 be a three-month project. Profits, \$39,485 divided by</p> <p>8 three. It's right there.</p> <p>9 This is really the agreement that they reached</p> <p>10 in January.</p> <p>11 And then we go forward a little bit. Exhibit</p> <p>12 Number 5. Then Mr. Kvam is provided with the bid, the</p> <p>13 contractors bid for \$70,000 on January 2nd. That bid is</p> <p>14 from Triple R Construction, curiously not TNT, which is the</p> <p>15 one that Mr. Mineau chose.</p> <p>16 Last page of the bid, this job will take three</p> <p>17 months. So, again, we have the three-month estimate.</p> <p>18 And at the same time Mr. Mineau represented to</p> <p>19 Mr. Kvam that he had had successful projects in the Chicago</p> <p>20 area. He did not represent that he had projects ongoing.</p> <p>21 He represented that he had experience.</p> <p>22 And that's important, too, because if he had</p> <p>23 explained he had projects ongoing, more of an effort would</p> <p>24 have been made to prioritize this project and keep the</p>	<p style="text-align: right;">Page 29</p> <p>1 project funds separate. So that was false.</p> <p>2 The agreement that they reached on January 1st</p> <p>3 was that all the parties would put in money here.</p> <p>4 Mr. Mineau, now we have a great dispute on whether</p> <p>5 Mr. Mineau put money in. That's the subject of a separate</p> <p>6 motion. We still don't have good evidence that Mr. Mineau</p> <p>7 put his funding into this project. He's coming up with</p> <p>8 changeable stories of where an additional \$20,000 came</p> <p>9 from.</p> <p>10 But going forward, Exhibit No. 6 is the purchase</p> <p>11 contract, \$44,000.</p> <p>12 Exhibit No. 7, Jay Kvam wires his \$44,000 for</p> <p>13 the purchase price.</p> <p>14 Exhibit 8, he wires another \$784.31 for escrow</p> <p>15 costs.</p> <p>16 Exhibit 9 is the settlement statement on escrow</p> <p>17 close. Escrow closed February 13th, 2017.</p> <p>18 THE COURT: So, Counsel, if we, if we drill down</p> <p>19 on your representations, which obviously I looked at all</p> <p>20 these documents of fraud, have -- like I said, some of your</p> <p>21 allegations I think move into your eighth claim, some of</p> <p>22 your argument is -- have you met the burden that's required</p> <p>23 to maintain a claim of fraud? Have you in your opposition</p> <p>24 provided facts to support that there are material facts in</p>

<p style="text-align: right;">Page 30</p> <p>1 dispute as to that claim?</p> <p>2 MR. MATUSKA: The --</p> <p>3 THE COURT: Because the way that it's pled, it's</p> <p>4 too broad, in your, in your complaint. And that's why when</p> <p>5 it's tested on summary judgment like it is here, that's</p> <p>6 your time to come forward and tell the Court, here's the</p> <p>7 evidence that I have that we've discerned through discovery</p> <p>8 that supports my claim for fraud, fraudulent inducement and</p> <p>9 fraudulent concealment.</p> <p>10 So you have the representation that the project</p> <p>11 was supposed to come down with a \$13,000 profit. Did I</p> <p>12 hear you say that was really the agreement, or was this</p> <p>13 really doodling on a pad of paper and doing an estimate?</p> <p>14 So I have that representation. I think that's what you're</p> <p>15 saying.</p> <p>16 And then 2, we have the three-month estimate</p> <p>17 which there's some correspondence that it may take later.</p> <p>18 Then we have what you indicated was a</p> <p>19 representation that Mr. Mineau had successful experience in</p> <p>20 Chicago.</p> <p>21 MR. MATUSKA: The inducement really is that</p> <p>22 Mr. Mineau had successful experience in Chicago, and that</p> <p>23 all of the partners would be contributing money.</p> <p>24 The project, the layout of the project financing</p>	<p style="text-align: right;">Page 31</p> <p>1 that we looked at is important to supply the terms of the</p> <p>2 agreement. But the representations, essential</p> <p>3 representations that I'm looking at is that all the parties</p> <p>4 were supposed to contribute money and that Mr. Mineau had</p> <p>5 experience.</p> <p>6 And there are, are, are other representations as</p> <p>7 we go forward, your Honor, through the record and other</p> <p>8 matters of concealment. And please keep in mind the</p> <p>9 \$70,000 bid that we already looked at and that was part of</p> <p>10 the estimates when they outlined this project.</p> <p>11 Going forward then to Exhibit 11. Escrow closed</p> <p>12 February 13th. Mr. Kvam actually signed the terms of</p> <p>13 agreement the next day on February 14th, so after they, he</p> <p>14 had already put money up and it had already closed.</p> <p>15 And, really, if we look closely at the terms of</p> <p>16 agreement, the terms of the agreement are for Mr. Kvam to</p> <p>17 take over a share of Mr. Spinola's funding, and I think</p> <p>18 that's important because, again, that supports the point</p> <p>19 that all three partners were supposed to provide funding.</p> <p>20 Mr. Spinola was having trouble with some of his</p> <p>21 funding, assigned that draw to Mr. Kvam, a proportionate</p> <p>22 share of the return. And that, that was agreeable. That's</p> <p>23 also why Mr. Spinola is on the sideline at this point.</p> <p>24 But let -- if we could look at Exhibit No. 11,</p>
<p style="text-align: right;">Page 32</p> <p>1 the terms of the agreement, please.</p> <p>2 THE COURT: I have it.</p> <p>3 MR. MATUSKA: And if we look at the very top,</p> <p>4 terms of agreement between Legion Investments, LLC, its</p> <p>5 members -- and I'm focusing on the next line, and Jay Kvam,</p> <p>6 initial funding member of same. Because when we go through</p> <p>7 the terms of agreement, the fourth and fifth line:</p> <p>8 Initial purchase is being funded by</p> <p>9 Jay Kvam --</p> <p>10 That's correct. That's the \$44,000.</p> <p>11 -- who was thereby assigned any</p> <p>12 remedies due should the transaction</p> <p>13 fail in any way.</p> <p>14 And the next sentence is the crucial one.</p> <p>15 Initial funder -- initial funder was identified</p> <p>16 above as Jay Kvam.</p> <p>17 Initial funder will be due a 7</p> <p>18 percent annual return on any funds</p> <p>19 provided due from date of</p> <p>20 disbursement.</p> <p>21 No conditions whatsoever.</p> <p>22 There is expected to be three renovation draws,</p> <p>23 and then Mr. Spinola is assigning some of his interest to</p> <p>24 Mr. Kvam.</p>	<p style="text-align: right;">Page 33</p> <p>1 So this, this is a, this adds to the project</p> <p>2 financing outline that we looked at. It doesn't change it,</p> <p>3 however.</p> <p>4 And this is a situation, your Honor, and we</p> <p>5 explained this at pretty great length in our opposition,</p> <p>6 you will be hard-pressed to look at one of the documents</p> <p>7 and say this is the entire agreement because it doesn't</p> <p>8 exist.</p> <p>9 These documents have to be read together, along</p> <p>10 with the oral agreements and representations of the</p> <p>11 parties. And if we ever get to the point that none of that</p> <p>12 adds up to an agreement that we're talking about rescission</p> <p>13 and reformation, which is also at, at issue in our, in our</p> <p>14 complaint.</p> <p>15 But the terms of agreement are not complete --</p> <p>16 THE COURT: And does this Exhibit 11, where does</p> <p>17 it say that -- or in any other document that anyone other</p> <p>18 than Mr. Kvam or is going to provide the monies. This says</p> <p>19 that he is the -- initial purchase is being funded by</p> <p>20 Mr. Kvam, and that there's expected to be three renovation</p> <p>21 draws, the first one by Mr. Kvam, and then we don't see</p> <p>22 about the other two in this particular document.</p> <p>23 MR. MATUSKA: We don't need to because that was</p> <p>24 the agreement of the parties. This agreement, again, is</p>

<p style="text-align: right;">Page 34</p> <p>1 more focused on what's happening between Mr. Spinola and 2 Mr. Kvam.</p> <p>3 And, actually, though if you go to the bottom 4 and see what Mr. Kvam and Mr. Spinola are agreeing to, you 5 can infer from that Mr. Kvam originally is not the only one 6 providing funding. Here Mr. Spinola and Mr. Kvam are 7 reaching an agreement on Mr. Spinola's share of the 8 funding, which infers again that all the parties were 9 supposed to provide funding. You need to go to the oral -- 10 well, the simple answer is that Mr. Kvam testified to that 11 in the declaration he provided.</p> <p>12 And, actually, I don't think it's disputed that 13 Mr. Mineau was supposed to provide funding. He's given us 14 four different answers to the question of how he provided 15 funding, but he's not disputing that he was supposed to 16 provide funding. And if we go back to Exhibit Number 3, 17 which is the cost breakdown, that's, that's what, that's 18 why they're dividing profits three ways.</p> <p>19 So this terms of agreement was actually after 20 close, and is more focused on Mr. Spinola. It does however 21 state without conditions that Mr. Kvam is supposed to be 22 returned his investment plus 7 percent interest, without 23 condition. There's no condition stated.</p> <p>24 THE COURT: What does the language mean, Who is</p>	<p style="text-align: right;">Page 35</p> <p>1 thereby assigned any remedies due should the transaction 2 fail in any way?</p> <p>3 MR. MATUSKA: I don't know. I mean, it's vague, 4 really. And it's an issue that all the parties will have 5 to deal with.</p> <p>6 But it doesn't -- what that terms of agreement 7 does not say, your Honor, it does not say that it is an 8 integration of all the prior discussions. It does not say 9 that it is the only sole agreement between the parties and 10 it is not. It does not say that that assignment is an 11 exclusive remedy. It is not. And even if it were, that 12 would be contractual remedies. He would never be barred 13 from his tort remedies for fraud and breach of fiduciary 14 duties.</p> <p>15 THE COURT: I understand that.</p> <p>16 MR. MATUSKA: That doesn't even say that it's 17 the sole contractual remedy.</p> <p>18 My, my best explanation, your Honor, would be 19 that it was intended as some sort of security or assurance 20 to Mr. Kvam. It probably sounded good at the time.</p> <p>21 When we get to this point we ask what does it 22 really mean, and we have to be honest, there's no detail to 23 it. It doesn't mean much at this point. It's not an 24 exclusive remedy.</p>
<p style="text-align: right;">Page 36</p> <p>1 And of course it would not have been a practical 2 remedy at the time because why would he want -- why would 3 he want the project assigned to him when they've already 4 spent \$69,000 on it, stripped to the bone, and is in worse 5 shape? It's not really security at that point. It's a 6 liability at that point, really.</p> <p>7 But there's nothing in there that would preclude 8 the remedies that he's seeking in court. And we've had 9 this situation again throughout this case.</p> <p>10 Mr. Sweet will raise these factual issues 11 without stating the legal relevance or without providing 12 points and authorities on the legal relevance of that.</p> <p>13 I know he's pointed to this a couple of times, 14 but he hasn't explained why this would have any effect on 15 our case. And in fact it, it really doesn't.</p> <p>16 THE COURT: When you say that, you're talking 17 about Exhibit 11.</p> <p>18 MR. MATUSKA: I'm talking specifically that he's 19 mentioned a couple of times that Exhibit 11, yes, says that 20 Mr. Kvam is assigned any remedies, but he's never followed 21 that through with any points and authorities on how that 22 would affect this case at all. And it doesn't.</p> <p>23 THE COURT: Remind me who drafted this.</p> <p>24 MR. MATUSKA: It was sent by email to Mr. Kvam.</p>	<p style="text-align: right;">Page 37</p> <p>1 Who drafted it, I don't know specifically.</p> <p>2 Well, Mr. Kvam I think testified in the 3 declaration that Mr. Spinola probably drafted it to him and 4 sent to it him. But Mr. Mineau signed it before Mr. Kvam 5 did. So obviously he had reviewed it.</p> <p>6 And if I can go forward to Exhibit No. 12, 7 please. This is more on the representation and why the 8 other projects are relevant.</p> <p>9 Exhibit No. 12 is one of the early text messages 10 between Mr. Kvam and Mr. Mineau. At the top, Mr. Kvam: 11 Did the wire details come through? 12 They're talking about the first, first deposit 13 to a contractor. Mr. Mineau responds: 14 Not yet. He was getting the wiring 15 info for a separate account.</p> <p>16 And that never happened. It's acknowledged in 17 this case, it's not disputed, that there was not a separate 18 account for May Street. May Street funds were wired into 19 the same account that Mr. Mineau was using for his other 20 projects.</p> <p>21 MR. SWEET: Objection, your Honor. That is a 22 misstatement. It was not wired into an account that 23 Mr. Mineau was using. It was wired to the contractor.</p> <p>24 MR. MATUSKA: It doesn't matter. And can I -- I</p>

<p style="text-align: right;">Page 38</p> <p>1 finish, please? I did not interrupt him.</p> <p>2 THE COURT: Why don't we just settle down.</p> <p>3 Here's what I want.</p> <p>4 I want -- I read all your documents. What I</p> <p>5 want is for you to tie it up for me and tell me exactly</p> <p>6 where there are genuine issues of material fact. What's</p> <p>7 really clear to me is both sides have a interpretation of</p> <p>8 what happened between these people. And that clearly they</p> <p>9 went into a deal, and thought that it was going to be</p> <p>10 profitable. It was not. And so we're here because it was</p> <p>11 not.</p> <p>12 But this is the time to test each and every one</p> <p>13 of your claims and for me to determine whether or not there</p> <p>14 is sufficient evidence produced by you, who will bear the</p> <p>15 burden at trial, to defeat the summary judgment motion.</p> <p>16 So I want to -- I've looked at all this. I want</p> <p>17 you to tell me exactly what matches --</p> <p>18 MR. MATUSKA: I am. I'm, I'm telling by</p> <p>19 reference to the exhibits.</p> <p>20 Right here in Exhibit 12 is a representation</p> <p>21 that there will be a separate account for the May Street</p> <p>22 funds. That did not happen.</p> <p>23 THE COURT: And so which claim do you maintain</p> <p>24 that that supports as a genuine issue of material fact?</p>	<p style="text-align: right;">Page 39</p> <p>1 MR. MATUSKA: It's relevant to multiple</p> <p>2 claims -- to the duty of loyalty, to the duty of care, to</p> <p>3 the fiduciary duty, to the accounting, to the fraud, of</p> <p>4 course. And there are many species of fraud.</p> <p>5 And I'm going to go further in the record and</p> <p>6 show you some of the concealments also. The RICO. We've</p> <p>7 discussed the fraudulent inducement right now where</p> <p>8 Mr. Mineau was going to put up funds and he had experience.</p> <p>9 He concealed that he had other projects going on. He</p> <p>10 represented that the funds would be placed in a separate</p> <p>11 account. That never happened.</p> <p>12 We go through the record, and we see more</p> <p>13 misrepresentations about the status of the project. I</p> <p>14 think what's helpful, though, is to view those</p> <p>15 representations in relations to the timing of when Mr. Kvam</p> <p>16 is forwarding funds for, for, for the project.</p> <p>17 If we look at Exhibit No. 13, that's a text</p> <p>18 message between Mr. Mineau and the real estate agent on</p> <p>19 March 16th. He's saying, now he's saying I'm going to have</p> <p>20 a contractor go to May Street, which is very curious,</p> <p>21 because we already looked at the bid that he had for</p> <p>22 \$70,000. We go a step further, on Exhibit 14, and</p> <p>23 Mr. Mineau is providing the construction contract for TNT.</p> <p>24 The construction contract is Exhibit 7 in their motion for</p>
<p style="text-align: right;">Page 40</p> <p>1 summary judgment. The construction contract is for \$80,000</p> <p>2 now. And he concealed that the construction contract price</p> <p>3 went up.</p> <p>4 And there's no explanation of why he changed</p> <p>5 from that RND to TNT Construction, although we can infer</p> <p>6 from this record that that's because he was using TNT</p> <p>7 Construction on his other projects. And all the money went</p> <p>8 to the same account. So this was no longer kept separate.</p> <p>9 And he concealed the fact that the money was all</p> <p>10 going to the same account and that TNT was working on the</p> <p>11 other projects and not keeping a separate account.</p> <p>12 THE COURT: So the representation regarding the</p> <p>13 contractor, you're maintaining would go to the fraud</p> <p>14 claims. But there was no contractual term that required</p> <p>15 Mr. Mineau to go with a particular contractor?</p> <p>16 MR. MATUSKA: We agree with that. And, in fact,</p> <p>17 Mr. Kvam was not involved to that extent anyway.</p> <p>18 THE COURT: That was really the province of</p> <p>19 Mr. Mineau.</p> <p>20 MR. MATUSKA: Yes, it was, your Honor. In</p> <p>21 theory, there's no problem with Mr. Mineau, well, to some</p> <p>22 extent Mr. Kvam was relying on Mr. Mineau to select a</p> <p>23 contractor.</p> <p>24 But he already provided a bid for \$70,000 from</p>	<p style="text-align: right;">Page 41</p> <p>1 one contractor, and now we've got a contract for \$80,000</p> <p>2 with this referred contractor who is working on his other</p> <p>3 projects and all the money going to the same account. So</p> <p>4 it is a problem because of that.</p> <p>5 And more than that, your Honor, this contract,</p> <p>6 and I would submit that this is standard procedure,</p> <p>7 Exhibit 4 of the contract -- excuse me, paragraph 4 of the</p> <p>8 construction contract, which starts on the first page and</p> <p>9 continues onto the second page, requires the contractor to</p> <p>10 provide invoices prior to being paid. We do not have a</p> <p>11 single invoice for this project.</p> <p>12 THE COURT: But were you supposed to be provided</p> <p>13 invoices or Mr. Mineau was?</p> <p>14 MR. MATUSKA: Mr. Mineau. But he doesn't have</p> <p>15 them, or at least he hasn't provided them to us. He never</p> <p>16 demanded, requested, or obtained invoices. But as we look</p> <p>17 through the record, he, twice more he asked Mr. Kvam to</p> <p>18 provide funds, even though he didn't have actual invoices</p> <p>19 and never had confirmation of the construction.</p> <p>20 If we go to addendum A -- and this all relates</p> <p>21 to his fiduciary duty, his duty of care, his duty to</p> <p>22 disclose.</p> <p>23 THE COURT: So if he, you're maintaining that he</p> <p>24 did not disclose all of this, and that your client</p>

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1 sustained damages as a result. Right?

2 MR. MATUSKA: Well, in a nutshell, yes. Yes,

3 your Honor.

4 THE COURT: So your damages would have to result

5 from two ways. One you're saying the absolute 7 percent

6 interest income, and 2 is on the fraud claims, right? Is

7 that in a nutshell?

8 MR. MATUSKA: Contractually he's entitled to a 7

9 percent return on, on his investment plus profits on top of

10 that. So we're talking about 7 percent return on the

11 investment and lost profits, and, actually, those are two

12 different categories. But they are both available under

13 these claims, yes.

14 THE COURT: So the 7 percent, what does that

15 total?

16 MR. MATUSKA: Well, he invested \$93,741 plus 7

17 percent interest on that from February of 2017. And then

18 another anticipated \$13,000 in lost profits.

19 THE COURT: So you don't have that total of 7

20 percent?

21 MR. MATUSKA: Well, I could run it. Actually,

22 it's easy. It's three years, almost three years to the

23 day. If we say 7 percent for a year on a, on a hundred

24 thousand dollars for three years, it's approximately

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1 Yet I want to keep going through our record, because even

2 though Mr. Mineau is not doing that, he comes back and asks

3 Mr. Kvam for more money, or instructs Mr. Kvam to forward

4 more money.

5 In fact, he does that at the same time he's

6 giving Mr. Kvam false information about the status of the

7 project. And he tells Mr. Kvam that permits are issued,

8 waiting for inspection, forward the next money. We

9 provided the inspection reports, and permits weren't even

10 pulled until July after the money was sent.

11 So we've got this great conflict in this case,

12 your Honor, what was Mr. Kvam forwarding the money for?

13 Because it didn't go to this project.

14 THE COURT: And he made specific requests of

15 Mr. Mineau for that information, and he traveled to Chicago

16 and looked at the project?

17 MR. MATUSKA: No, Mr. Kvam has never looked at

18 the project. He was relying -- he relied on Mr. Mineau.

19 And when Mr. Mineau said it's time to forward more money,

20 Mr. Kvam forwarded more money.

21 I'd like to point you specifically to

22 Exhibit 19. Just to complete our record, Exhibit Number 18

23 is where Mr. Mineau wired the first \$20,000, thinking it

24 was going to go to a separate account. It didn't.

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1 \$21,000.

2 THE COURT: Okay.

3 MR. MATUSKA: This contract also, the payment

4 terms, on, on addendum 8 to the contract, well, this is

5 important, too, the payment terms show that \$20,000 down to

6 secure the permits and the demolition. This never went

7 beyond demolition, yet Mr. Kvam was asked to pay more

8 money.

9 The payment terms also say the owner, which is

10 Mr. Mineau through Legion Investments, the owner of the

11 project will approve the percentage of the work.

12 Mr. Mineau never did that, so we're talking

13 about duty of care, fiduciary duty, duty of loyalty,

14 concealment, he never did these basic steps to get invoices

15 and to approve the percentage of work.

16 And that's why I started out by saying it's easy

17 to say that the defendant has the burden of proof to come

18 forward with affirmative -- excuse me, that our side, the

19 plaintiff, has the affirmative burden to come forward with

20 evidence to show a triable issue of fact.

21 But we have to be a little careful with that

22 because a lot of what we're talking about is what we don't

23 have. We do not have Mr. Mineau requesting invoices and

24 inspecting the percentage of the work to approve payment.

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1 That Mr. Kvam wired his first payment of

2 \$20,000, Exhibit -- Exhibit 18, thinking it was going to a

3 separate account. It did not go to a separate account. He

4 did not know that.

5 THE COURT: But he had the wiring information,

6 right?

7 MR. MATUSKA: Yes, but he didn't know that they

8 were using the same account for all of Mr. Mineau's other

9 projects. In fact, he didn't know about the other projects

10 at that time.

11 Exhibit Number 19. Brian Mineau at the top --

12 more text messages. Brian Mineau at the tops says:

13 Good morning, Jay. I spoke with

14 Derek last night and this morning,

15 and next Tuesday or Wednesday is good

16 for the next draw. If that works for

17 you, he said Easter pushed back a few

18 inspections, but we will be done no

19 later than the 16th of May.

20 Your Honor, they didn't even have permits at

21 this time. And they had not progressed beyond that

22 demolition phase. More payment was not due. But we have

23 the next exhibit, of course, because Mr. Kvam is relying on

24 this, Exhibit 20 is when Mr. Kvam forwards the next payment

<p style="text-align: right;">Page 46</p> <p>1 of \$20,000.</p> <p>2 And we go on like this with the</p> <p>3 misrepresentations about the status of the project and the</p> <p>4 status of inspections. And we provided the inspection</p> <p>5 reports.</p> <p>6 THE COURT: And Exhibit 21 shows that \$9,000</p> <p>7 wire, correct?</p> <p>8 MR. MATUSKA: Yes.</p> <p>9 THE COURT: And that was made after the original</p> <p>10 estimated date, wasn't the original estimated date of</p> <p>11 completion 5/16?</p> <p>12 MR. MATUSKA: Well, the original estimate was</p> <p>13 the three-month project.</p> <p>14 In the, in the last text that we just looked at</p> <p>15 Mr. Mineau -- we will be done no later than the 16th of</p> <p>16 May.</p> <p>17 So, yes, we do have another \$9,000 being</p> <p>18 forwarded on May, on May 18th, correct.</p> <p>19 And appreciate, too, that Mr. Kvam was put in a</p> <p>20 position, at what point is he supposed to pull the plug on</p> <p>21 this.</p> <p>22 Is he supposed to ride it out, put a little more</p> <p>23 money in --</p> <p>24 THE COURT: Doesn't he have an obligation to</p>	<p style="text-align: right;">Page 47</p> <p>1 mitigate his damages?</p> <p>2 MR. MATUSKA: Yes. But that isn't really part</p> <p>3 of their summary judgment. The issue of mitigation is</p> <p>4 pretty complicated when you're talking about fraud</p> <p>5 misrepresentation. We don't put the affirmative duty on</p> <p>6 the defrauded party, you know, to discover the fraud and</p> <p>7 undo it.</p> <p>8 He put up \$44,000 for the original purchase.</p> <p>9 The first installment to the contractor in March, \$20,000,</p> <p>10 second installment to the contractor of \$20,000 in April.</p> <p>11 That second \$20,000 was the one that he agreed to do for</p> <p>12 Spinola. That was what the terms of agreement was.</p> <p>13 THE COURT: And then he did the half of the</p> <p>14 third at \$9,000.</p> <p>15 MR. MATUSKA: Yes, because there was, because</p> <p>16 there, because they still weren't coming up with more</p> <p>17 money. So he did put \$9,000 more up, yes. Yes.</p> <p>18 But it was still based on the representations</p> <p>19 that the project is proceeding, we have inspections</p> <p>20 pending, it was just absolutely false, your Honor. We've</p> <p>21 never even been able to tell what days the contractor was</p> <p>22 at the project.</p> <p>23 Mr. Mineau did nothing to supervise the course</p> <p>24 of, of construction. Another kind of a fine point, your</p>
<p style="text-align: right;">Page 48</p> <p>1 Honor, but these, these second payments of \$20,000 and</p> <p>2 \$9,000 don't even match with the payment schedule in the</p> <p>3 construction contract. It's not even clear how they're</p> <p>4 coming up with these numbers. Keep in mind, too, that this</p> <p>5 was explained in the declaration. Mr. Kvam did not have</p> <p>6 the construction contract. We got that as part of this</p> <p>7 case.</p> <p>8 Initially, and he doesn't really need to. He's</p> <p>9 not supervising the construction. But he didn't know what</p> <p>10 the payment schedule was in the contract. He's paying what</p> <p>11 Mr. Mineau advises him to pay. And Mr. Mineau concealed</p> <p>12 that he had changed contractors and that the, the price of</p> <p>13 the project had, had gone up.</p> <p>14 We're going forward. Then Exhibit 24. Suddenly</p> <p>15 there's a new investor involved with the project.</p> <p>16 THE COURT: But as of June 2017, Mr. Kvam knew</p> <p>17 that there was some problems on the project.</p> <p>18 MR. MATUSKA: Well, he knew it hadn't been</p> <p>19 complete -- you know, not really. He knew it hadn't been</p> <p>20 completed on time, but the reports were still rosy. The</p> <p>21 reports or inspections have been pushed back, we're still</p> <p>22 working on getting final inspections. But in truth they</p> <p>23 didn't even have the permit at that time. And let's ask</p> <p>24 the basic question. Why was Mr. Mineau having Mr. Kvam</p>	<p style="text-align: right;">Page 49</p> <p>1 wiring Mr. Mineau any money before they had permits?</p> <p>2 But then we get to Exhibit 24. There's a new</p> <p>3 investor. Apparently Mr. Mineau decided he wasn't going to</p> <p>4 put his own money in. He had another investor put his</p> <p>5 money in -- if it's true, which we don't have confirmation</p> <p>6 of.</p> <p>7 This goes back to the fraudulent inducement, the</p> <p>8 fraud, the concealment, the misrepresentation. July, Jay</p> <p>9 Kvam gets an email from Brad Tammen, that he put \$20,000</p> <p>10 in, into the project. We don't know where that money went</p> <p>11 either. I mean, we know what account it went into, but we</p> <p>12 don't have any confirmation that it was used on May Street.</p> <p>13 This email, though, Exhibit 24, at the bottom,</p> <p>14 Mr. Mineau confirms that, actually going on to the next</p> <p>15 page, Jay put up the purchase capital and was getting 7</p> <p>16 percent on that. And then we are going to split the profit</p> <p>17 after all expenses are paid back. Actually, Mr. Mineau,</p> <p>18 even this email to a different party is confirming the 7</p> <p>19 percent to Mr. Kvam.</p> <p>20 And we know, your Honor, that in those instances</p> <p>21 when a contract is ambiguous, sometimes we look to the</p> <p>22 subsequent acts of the parties to determine how they</p> <p>23 intended to fulfill the contract. And this is relevant for</p> <p>24 that purpose.</p>

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1 Let me flip ahead to the inspection reports.
2 Exhibit 32. Actually, let me use Exhibit 33.
3 Inspection for the permit, renovation,
4 alteration of a single-family residence, architectural,
5 mechanical, plumbing and electrical. This has a permit
6 date of July 17th, 2017.
7 THE COURT: Is that a completion permit or
8 preliminary?
9 MR. MATUSKA: I don't know if they are making
10 that distinction. That is the permit for the, for the
11 alteration, for the interior alteration of a single-family
12 residence. July 17th, 2017.
13 Mr. Mineau concealed that they were that far
14 behind on, on the permitting process, that he was having
15 Mr. Kvam, and maybe Bradley Tammen pay money for the
16 project anyway. There's no justifiable reason for that,
17 and it goes to the essential fraud, breach of duty of care,
18 breach of fiduciary duties.
19 So we go on, your Honor, and not, not in here,
20 but prelitigation, too. 2018, they told us they still do
21 not have a budget or estimated completion date to complete
22 the project.
23 So I know that Mr. Sweet wants to put the burden
24 on Mr. Kvam to do something at some point in time. He's

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1 The only document from their motion was the
2 contract agreement, their Exhibit 7, and then the escrow
3 closing statement. Escrow closed November 16th, when they
4 sold it November 16th of 2018. The project sold for
5 \$40,000. That was after buying it for \$44,000 and putting
6 up \$69,000 for renovation. It sold for less. It sold in a
7 demolished condition.
8 And I'm -- that doesn't -- that's not just a bad
9 investment or the result of the market. That's
10 mismanagement and, quiet frankly, your Honor, fraud and
11 breach of fiduciary duty.
12 To have that project sold at that time in an
13 unfinished state, is a breach of all of the duties that
14 we've identified. And even more than that, Mr. Mineau did
15 not even inform Mr. Kvam of the sale.
16 Mr. Kvam was doing his own research on, on
17 public records available online through Cook County,
18 Chicago and was able to find the sale. And then we had to
19 get a temporary restraining order to prevent the
20 disposition of those funds.
21 And that is part of the ongoing fraud,
22 concealment, and breach of fiduciary duty.
23 And we never got a straight answer on why those
24 funds weren't released to Mr. Kvam.

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1 not specific. Mr. Kvam doesn't have that burden. And,
2 actually, affirmative defenses are not an issue in this
3 motion for summary judgment. Mr. Kvam rode this out as
4 long as he could, and he was perfectly justified in saying
5 that, in determining that the project has failed. And it
6 has.
7 You know what? We need to go a step further,
8 too. The sale in 2018 is a problem.
9 THE COURT: And you're saying that the sale in
10 2018 goes to what claim?
11 MR. MATUSKA: More of the breach of fiduciary
12 duty, duty of care, duty of loyalty, bad faith and fraud.
13 The, the escrow closing record must be in their
14 motion for summary judgment.
15 THE COURT: Okay. So any other documents that
16 you are, wanted the -- other than what's been attached, and
17 you provided argument to the Court in many instances sort
18 of generally that a finding to attribute to as supporting a
19 claim and establishing that there's a genuine issue of
20 material fact, and so you're, you're asking the Court to
21 analyze both your documents and their documents, correct?
22 MR. MATUSKA: The only document that we really
23 referenced was the contractor agreements and the escrow
24 closing statement.

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1 THE COURT: On which funds?
2 MR. MATUSKA: The sale funds. The ones that are
3 on deposit with the clerk of the court.
4 THE COURT: There's a lesser amount, right?
5 MR. MATUSKA: The sale was \$40,000. The net was
6 \$24,000 and change. Yes, your Honor.
7 But we never got an explanation on, first of
8 all, why that wasn't disclosed to Mr. Kvam, and second of
9 all why that wasn't paid to Mr. Kvam.
10 And Mr. Sweet gave a curious argument this
11 morning, that he wants to now pay those to Mr. Kvam but
12 claim attorney's fees relating to what, I'm not sure but --
13 THE COURT: I think his position is that if he
14 prevails he's going to ask for attorney's fees in this
15 matter, correct?
16 MR. SWEET: (Nods head.)
17 MR. MATUSKA: First of all, they've admitted our
18 first cause of action.
19 THE COURT: So even, I don't know what Mr. Sweet
20 is going to do, but if the Court were to find that you
21 prevailed on the first claim, and then the clerk can --
22 there's law that provides for how the court will do an
23 analysis of who actually --
24 MR. MATUSKA: And I appreciate it, but I don't

<p style="text-align: right;">Page 54</p> <p>1 think it's realistic. I'm just pointing out that we had to 2 file this lawsuit to get those funds and others. But today 3 he's agreeing that those should have been paid to Mr. Kvam. 4 The point is they didn't pay those to him. So we've 5 prevailed on the first cause of action. He's already 6 admitted that those funds should have been paid to 7 Mr. Kvam. I'm just a little curious or cautious -- 8 THE COURT: I think you can have that 9 conversation separate and apart with Mr. Sweet because 10 that's not the basis here this morning for the summary 11 judgment motion. 12 MR. MATUSKA: I'd like to address the accounting 13 and RICO causes of action specifically also. Accounting, 14 in reference to the Partnership Act -- 15 THE COURT: So it's not -- so your position is 16 that the information that Mr. Sweet maintains complied, and 17 the information was conveyed, your position is that it 18 wasn't done in a format required under the Partnership Act? 19 MR. MATUSKA: I'm saying they haven't provided 20 any accounting, your Honor. Where in this record is an 21 accounting? I know he says that. I know he says we have 22 everything. There's nothing. You've got a hundred 23 exhibits in relation to this summary judgment. Where's the 24 accounting? It's not here. That statement is -- I hate to</p>	<p style="text-align: right;">Page 55</p> <p>1 say it, but it's true; it's false. There's misdirection. 2 There's no accounting. 3 THE COURT: So if monies are contributed by 4 Mr. Kvam into the partnership, you have what monies those 5 are, correct? 6 You have the monies that are paid out of the 7 partnership. Correct? 8 MR. MATUSKA: We really have to start the 9 accounting issue by reference to the Partnership Act. 10 THE COURT: But the point is -- 11 MR. MATUSKA: These parties are charged with 12 capital accounts. That's the start of a partnership 13 accounting. And that comes up in multiple places. 14 THE COURT: But what I want to make sure is that 15 you're not expecting an accounting from the contractor. 16 In the partnership -- the entity, you have the 17 monies that come in, and the monies that are paid out. But 18 it seems to me part of the concern that Mr. Kvam has is 19 what the contractor did or did not do with monies that were 20 paid to him. But that's not required under the Partnership 21 Act. 22 MR. MATUSKA: It is, your Honor. And we can go 23 through the accounting required in the Partnership Act. 24 And we do not have any record of monies paid out. We have</p>
<p style="text-align: right;">Page 56</p> <p>1 record of wires to a contractor. We do not have a single 2 invoice for this project. And we probably won't get one at 3 this point because Mr. Mineau never asked for invoices. 4 And that's a problem. That goes as a breach of 5 fiduciary duty and duty of care. But that doesn't excuse 6 them from the accounting. 7 What the Partnership Act requires, each partner 8 is deemed to have an account that is credited with an 9 amount equal to the money plus the value of any property 10 that the partner contributed to the partnership. 11 Do we know how much Mr. Mineau contributed to 12 the partnership? We don't. That's where we really have to 13 start, and that's why this issue of whether he contributed 14 money, or Criterion NV contributed money, or whether he 15 borrowed it from Bradley Tammen, contributed money. That's 16 the very first step of the accounting. 17 And we don't have that issue. We do know how 18 much Mr. Kvam wired to the contractor. That's the only 19 thing we know. We don't know what the expenses were in 20 relation to this project, and we may not have that because 21 of the lack of records from Mr. Mineau. 22 But we have to have an accounting, 87.433, an 23 accounting of the, of the money that Mr. Mineau contributed 24 to the partnership. And we don't have it.</p>	<p style="text-align: right;">Page 57</p> <p>1 THE COURT: Okay. So your position is that the 2 lack of evidence supports that there's a genuine issue of 3 material fact? 4 MR. MATUSKA: Yes. Specifically on the 5 accounting issue. We don't have an accounting. 6 Mr. Sweet keeps -- he keeps saying we don't need 7 it, because we know how much Jay wired. That's not the 8 accounting. That's a very small portion of it. 9 One thing to be aware of under NRS 87.4352, the 10 partnership continues after dissolution until it is wound 11 up. We are not wound up yet. 12 As part of the winding up we have to settle the 13 accounts. 87.4357, winding up partnerships business, 14 assets of the partnership, including the contributions of 15 the partners must be applied to discharge the obligations 16 to creditors, including any partners who are creditors. 17 Each partner is entitled to a settlement of all of the 18 partnership accounts. We don't have any of that, your 19 Honor. 20 We don't really -- and if we don't get detailed 21 records, that's part of the essential causes of action 22 here. 23 The fraud and the concealment that Mr. Mineau 24 was putting together a real estate investment project,</p>

<p style="text-align: right;">Page 58</p> <p>1 having Mr. Kvam invest money without any, any accounting 2 for the funds. And without getting, without reviewing the, 3 the progress of the project, and without getting invoices 4 from, from the contractor.</p> <p>5 It's one of the essential reasons why we want 6 the records on his other project. We wanted to see if he 7 was getting invoices on his other projects.</p> <p>8 THE COURT: Did you file a Rule 56 F motion? 9 MR. MATUSKA: I did not. I included those 10 issues in the response, your Honor.</p> <p>11 THE COURT: But did you -- I did not recall the 12 specific language in your opposition --</p> <p>13 MR. MATUSKA: Well, it specifically comes up in 14 our discussion of the cause of action for conversion, that 15 we do not have all of the records yet.</p> <p>16 THE COURT: But you don't -- I don't recall that 17 you specifically identified in your opposition the items 18 that, I thought you stated them rather generally.</p> <p>19 MR. MATUSKA: I did by reference to the 20 discovery commissioner's order.</p> <p>21 THE COURT: Okay.</p> <p>22 MR. MATUSKA: Yes. Yes.</p> <p>23 And, actually, your Honor, when we were going 24 through the briefing, I was addressing the relevance of</p>	<p style="text-align: right;">Page 59</p> <p>1 those records primarily in relation to the cause of action 2 for conversion, and they obviously are, because that would 3 give us some indication of whether Mr. Kvam's money or 4 Mr. Tammen's money, whoever's money was spent on the other 5 projects, it also though, I want to emphasize it also goes 6 to the cause of action for fraud and breach of fiduciary 7 duty.</p> <p>8 Because once they admit there is a fiduciary 9 duty, encompassed within the fiduciary duty is the duty of 10 loyalty. And absolutely, your Honor, it's our contention 11 that if Mr. Mineau is having the same contractor work on 12 his other projects ahead of the May Street project, that is 13 a breach of the duty of loyalty, yes.</p> <p>14 And if Mr. Mineau is paying other investors 15 ahead of Mr. Kvam, that is a breach of his duty of loyalty.</p> <p>16 There's been some comments about the conversion. 17 And I know there's always a question about control and 18 dominion. And I think Mr. Sweet is arguing that since 19 Mr. Kvam wired funds directly to the contractor, Mr. Mineau 20 did not have dominion over the funds. That's not a correct 21 recitation of the law on conversion. Actually, the concept 22 of conversion is more flexible than that. The idea of 23 dominion and control is whether one party participated in 24 the act of conversion. And it doesn't have to be a</p>
<p style="text-align: right;">Page 60</p> <p>1 specific intent crime. It's not a crime. It doesn't have 2 to be a -- it doesn't require a specific level of intent.</p> <p>3 But we know that Mr. Mineau participated in the 4 commingling of funds. He allowed it. And he benefited 5 from it.</p> <p>6 So we know that he participated. That's the 7 dominion and control that's, that's required for a cause of 8 action for conversion. We know that he participated in it 9 because originally he had the R & D contractor lined up. 10 Then he switched to TNT without telling Mr. Kvam. Then he 11 told Mr. Kvam that the funds would be kept in a separate 12 account. And that did not happen.</p> <p>13 So yes, Mr. Mineau absolutely participated in 14 the commingling resulting in the conversion of funds. And 15 he's responsible for that.</p> <p>16 The RICO cause of action, we were fortunate, 17 your Honor, that we had a Nevada reported case that 18 explained the distinctions between our state RICO statutes 19 and the Federal RICO statutes in sufficient detail. And 20 there's little doubt that this type of a, of a record 21 supports a claim for a conversion.</p> <p>22 Mr. Sweet seemed to think you needed two 23 separate, completely separate records to support a claim 24 for RICO. That might be true under Federal RICO. Under</p>	<p style="text-align: right;">Page 61</p> <p>1 state RICO it absolutely is not. It only requires two of 2 the predicate acts.</p> <p>3 THE COURT: And you're referring to Siragusa vs. 4 Brown?</p> <p>5 MR. MATUSKA: Yes, your Honor. It only requires 6 two of the predicate acts, and we have them.</p> <p>7 In fact, your Honor, we've got fraud and 8 misrepresentation continuing even as part of this case. I 9 don't know if you've had a chance to see our latest motion 10 yet. Mr. Mineau testified in paragraph 25 of the 11 declaration in support of the motion for summary judgment 12 that he borrowed \$20,000 from Bradley Tammen, and you 13 looked at an email on that, and also that he paid it back.</p> <p>14 No evidence that he ever paid it back. In fact, 15 the subsequent communications with Mr. Tammen is that it's 16 never been paid back. These misrepresentations are 17 continuing.</p> <p>18 THE COURT: How does that misrepresentation harm 19 Mr. Kvam?</p> <p>20 MR. MATUSKA: We don't know who the investors 21 are in this project.</p> <p>22 THE COURT: How does that matter? If he 23 borrowed money from anyone, but the money is provided to 24 the project --</p>

<p style="text-align: right;">Page 62</p> <p>1 MR. MATUSKA: We explained it.</p> <p>2 First of all, we don't know that the money was</p> <p>3 provided to the project.</p> <p>4 THE COURT: Okay. So that's the issue, not who</p> <p>5 he borrowed it from.</p> <p>6 MR. MATUSKA: That's one issue. It goes back to</p> <p>7 the fraudulent inducements on January 1st, 2017, when all</p> <p>8 of these investors were supposed to put up money in the</p> <p>9 project.</p> <p>10 And Mr. Kvam testified to this in his</p> <p>11 declaration. He would not do an investment with somebody</p> <p>12 who wasn't invested in the project. To put it bluntly, if</p> <p>13 Mr. Mineau, if he doesn't have skin in the game, he has no,</p> <p>14 no incentive to finish the project. And that probably is</p> <p>15 the story behind the story.</p> <p>16 THE COURT: Well, I don't need "probablys" here.</p> <p>17 I need specific facts that show that, that there's a</p> <p>18 genuine issue of material fact. And I have what you said</p> <p>19 so far, and we just hit the RICO claim.</p> <p>20 And did you want to address the 11, the</p> <p>21 derivative claim at all?</p> <p>22 MR. MATUSKA: I don't need to because that is</p> <p>23 just confirming what is in partnership statutes, that a</p> <p>24 partnership can sue on his own behalf or on the part of the</p>	<p style="text-align: right;">Page 63</p> <p>1 partnership. To the extent that any of these claims belong</p> <p>2 to the partnership Mr. Kvam has asserted those.</p> <p>3 But, your Honor, this idea that Mr. Mineau put</p> <p>4 up his own money is material, and actually the Court can</p> <p>5 draw reasonable inferences from, from, from the record.</p> <p>6 And the record is that Mr. Mineau set up this</p> <p>7 project, was supposed to have three investors. In fact, he</p> <p>8 did not put up his own money. He's doing an investment.</p> <p>9 He's trying to get profit from an investment that he's</p> <p>10 doing with other people's money. That wasn't how this was</p> <p>11 set up.</p> <p>12 The inducement was three partners, each putting</p> <p>13 up -- Mr. Kvam putting up the purchase price, that's a</p> <p>14 given, but then each of the partners putting up one of the</p> <p>15 three construction draws. Mr. Mineau did not do that.</p> <p>16 That was a material misrepresentation from day</p> <p>17 one. And Mr. Kvam testified in declaration that he</p> <p>18 submitted in opposition to the motion for summary judgment,</p> <p>19 that was concealed from him, and he would not have invested</p> <p>20 with Mr. Mineau if he knew that Mr. Mineau was not putting</p> <p>21 money into the project. He doesn't want to be invested in</p> <p>22 a project where the leader of the project is not also</p> <p>23 invested in the project.</p> <p>24 THE COURT: Okay.</p>
<p style="text-align: right;">Page 64</p> <p>1 MR. MATUSKA: And the reason is what we just</p> <p>2 said, in that circumstance Mr. Mineau has no financial</p> <p>3 incentive to, to complete the project. He's not out money.</p> <p>4 It's Mr. Kvam who is out money.</p> <p>5 That's why we have to keep in mind this is not</p> <p>6 about the contractor. This is not about whether Mr. Kvam</p> <p>7 talked to the contractor in May, which he did. It doesn't</p> <p>8 matter. This is about since Mr. Mineau was taking this</p> <p>9 money and leaving this project and signing all the</p> <p>10 documents for the project, and he now admits he had the</p> <p>11 fiduciary duty to Mr. Kvam. That fiduciary duty includes,</p> <p>12 encompasses a duty of loyalty, a duty of care. There's</p> <p>13 also the contractual duty to exercise good faith, to</p> <p>14 fulfill the terms of the contract to fulfill the intended</p> <p>15 purpose of the contract.</p> <p>16 And, again, even though it's our burden to come</p> <p>17 forward with specific evidence, we do have to look at the</p> <p>18 absence of evidence in this situation also. What did</p> <p>19 Mr. Mineau do to fulfill his obligations? Fiduciary duty</p> <p>20 of care, fiduciary duty of loyalty. He did nothing. He</p> <p>21 didn't put up his own money, he didn't ask for invoices</p> <p>22 from the contractor.</p> <p>23 In fact, he gave false information to, to</p> <p>24 Mr. Kvam. What did Mr. Mineau do to move this project</p>	<p style="text-align: right;">Page 65</p> <p>1 forward in a timely manner. He did nothing. We know that</p> <p>2 it wasn't moving forward. The main permit wasn't even</p> <p>3 issued until July 17th, after Mr. Kvam had already put his</p> <p>4 money up.</p> <p>5 So what was Mr. Mineau doing to fulfill the</p> <p>6 intended purpose of this agreement? What was he doing to</p> <p>7 exercise his duty of care with regard to the project of my</p> <p>8 client? Nothing. And we have, and we have the false</p> <p>9 misrepresentations.</p> <p>10 THE COURT: All right. Thank you.</p> <p>11 MR. MATUSKA: Thank you, your Honor.</p> <p>12 THE COURT: Mr. Sweet, I want to know</p> <p>13 specifically if, if on summary judgment, that the Court can</p> <p>14 consider the lack of evidence. Maintaining that there's an</p> <p>15 affirmative duty on the part of Mr. Mineau to provide</p> <p>16 evidence. Counsel is saying that the failure to provide</p> <p>17 evidence supports that he didn't do anything.</p> <p>18 MR. SWEET: Your Honor, I think the hard part is</p> <p>19 I'm not really sure after that whole discussion what</p> <p>20 exactly argument goes to what claim.</p> <p>21 So if we can walk through the claims, I'm not</p> <p>22 entirely sure where the supposed lack of evidence ties into</p> <p>23 any specific claim.</p> <p>24 THE COURT: I'm comfortable that I understand</p>

<p style="text-align: right;">Page 66</p> <p>1 from his argument. I just want to talk about the basic 2 principle of law. Is it his -- can he utilize an absence 3 of evidence to meet his obligation in opposing a summary 4 judgment motion?</p> <p>5 MR. SWEET: I don't think so, your Honor, 6 because He bears the burden at trial. We're now three 7 weeks away.</p> <p>8 If this was the beginning of the case, maybe. 9 He might be able to say we need more evidence, we need to 10 look into this, we need to subpoena some records and find 11 out more information.</p> <p>12 But we're three weeks from trial now. That time 13 has passed. They've subpoenaed every record they can get 14 their hands on, they've analyzed it with their forensic 15 accountants, and all of the evidence that they have 16 available is what they have to use to prove their case at 17 trial in three weeks, your Honor.</p> <p>18 Now if they're arguing that there is a lack of 19 evidence because Mr. Mineau has an affirmative obligation 20 to obtain an invoice, and since there is no invoice that 21 has been produced then we can infer that Mr. Mineau did not 22 obtain that invoice, I think that might be sufficient from 23 a legal standpoint to say if there was an affirmative 24 obligation to obtain an invoice, and we don't have an</p>	<p style="text-align: right;">Page 67</p> <p>1 invoice, therefore we can assume that no invoice was 2 obtained.</p> <p>3 The problem with that application in this case, 4 your Honor, is there is substantial evidence of direct 5 communications and evidence of the progression of the 6 project from the contractor.</p> <p>7 No, we don't have invoices but we have dozens 8 and dozens and dozens of pictures. We have representations 9 from the contractor. We have direct conversations between 10 Mr. Kvam and the contractor, between Mr. Mineau and the 11 contractor. The contractor came out here in in person and 12 spent an entire afternoon and evening talking to these 13 parties about the various projects. Mr. Kvam claims there 14 was a concealment that there were other projects going on; 15 that was the whole purpose of the meeting, was to talk 16 about May Street and other projects.</p> <p>17 So he flew all the way out here to Reno from 18 Chicago to discuss a variety of projects, including May 19 Street, not just May Street.</p> <p>20 Your Honor, there is also direct evidence we've 21 attached to our motion which I'm happy to point out, that 22 Mr. Kvam spoke with TNT before making the second and third 23 wires. So there was direct communication and conversations 24 between Mr. Kvam and the contractor throughout this</p>
<p style="text-align: right;">Page 68</p> <p>1 project. So to say that there's a lack of evidence that 2 Mr. Mineau was overseeing the project or ensuring that the 3 project was progressing is simply inaccurate.</p> <p>4 Now looking back on it, was TNT telling the 5 truth? I don't know. It seems like when they said we have 6 an inspection scheduled for next week and then the evidence 7 shows that the inspection may have happened in July, we 8 don't know what happened in the meantime because TNT is not 9 here.</p> <p>10 So the representations that Mr. Mineau has made 11 throughout all of these claims attached to the opposition 12 are, I spoke to the contractor and he said this; I talked 13 to Derek, and he said that. Those aren't 14 misrepresentations, your Honor. That is the status of what 15 Mr. Mineau has been told from the contractor. He doesn't 16 say, I flew out to Chicago and the project is almost done; 17 or I have affirmative evidence that the contractor is 18 telling the truth.</p> <p>19 Mr. Kvam knows that Mr. Mineau lives in Reno. 20 And Mr. Kvam lives in Reno. And they were working on the 21 project in Chicago. And that's why they were -- they had 22 Slack messages with the contractor. They were getting 23 pictures from the contractor. They were in constant 24 electronic communications with the contractor. But they</p>	<p style="text-align: right;">Page 69</p> <p>1 weren't there in person.</p> <p>2 To say that there's no evidence that Mr. Mineau 3 was overseeing this project and that Mr. Kvam was the 4 silent investor who was just along for the ride is simply 5 not supported by the record.</p> <p>6 THE COURT: All right. Anything further?</p> <p>7 MR. SWEET: Your Honor, I don't believe I need 8 to go through all the documents that Mr. Matuska did.</p> <p>9 If you have any questions on those, I'd be happy 10 to address them.</p> <p>11 THE COURT: No, I spent quite a bit of time with 12 your documents. I'm comfortable with interpreting them. 13 I -- I think I'm okay.</p> <p>14 MR. SWEET: Okay. There are a few points that I 15 would like to make.</p> <p>16 As you pointed out, Mr. Kvam has argued that 17 there was some impropriety because there were multiple 18 projects going on. That's not unusual. And, and it wasn't 19 hidden from Mr. Kvam. He knew full well, it's in his 20 notes, that there were multiple projects going on in May 21 Street -- excuse me -- in Chicago, including the May Street 22 project.</p> <p>23 That isn't evidence of problems. Mr. Matuska 24 argued that if there is evidence that Mr. Mineau told the</p>

<p style="text-align: right;">Page 70</p> <p>1 contractor to prioritize one project over another, that 2 could be a breach of the duty of loyalty. Maybe, but there 3 is no evidence that that happened. And it didn't happen. 4 So they've made an argument, again, here we are 5 three weeks away from trial, but there's no evidence to 6 support the conspiracy theory that they put together that 7 Mr. Mineau was somehow in cahoots with TNT to prevent the 8 May Street project from being completed. Even if they were 9 to get the records that they're asking for showing purchase 10 price and construction agreements and sales price of other 11 projects that Mr. Mineau might have had going in Chicago 12 about the same time, it's not going to show that TNT 13 misused Mr. Kvam's funds or that TNT was prioritizing one 14 project or another or that Mr. Mineau somehow instructed 15 TNT to use the money that Mr. Kvam transferred to TNT for 16 this project on some other project. There's just no 17 evidence of that, your Honor. 18 Exhibit 3, I think you pointed this out, 19 Exhibit 3 to the opposition is the pro forma notes that 20 were taken at Starbucks. 21 Mr. Matuska made the argument that this was the 22 agreement. There's no evidence of that, your Honor. That 23 was the discussion. That was the plan. That was the 24 expectation. But the terms of agreement, was the</p>	<p style="text-align: right;">Page 71</p> <p>1 agreement. The terms of the agreement says if this project 2 fails, then Mr. Kvam is assigned all remedies. 3 And your Honor, you asked what that provision 4 meant, according to Mr. Kvam. And Mr. Matuska testified 5 that he wasn't sure. 6 But your Honor, if you go back to the complaint, 7 second amended verified complaint, paragraph 8E 8 specifically says that: 9 If the project fails, all rights and 10 remedies are assigned to Mr. Kvam. 11 That's what it means. That's what Mr. Kvam has 12 said from the very outset of this dispute. So that's the 13 interpretation that he has set forth. We're perfectly fine 14 with that. That's the deal. The project didn't succeed, 15 so Mr. Kvam gets the funds. That was the, that was the 16 agreement. 17 There was a lot of discussion about whether 18 Mr. Mineau put up his own money, whether he was obligated 19 to, whether he said he would, whether Mr. Kvam relied upon 20 that. 21 Your Honor, I think it's very important to note 22 that there is no evidence whatsoever that Mr. Mineau ever 23 said that he would put up his own money from his own 24 account.</p>
<p style="text-align: right;">Page 72</p> <p>1 It's not in Mr. Matuska's -- excuse me -- 2 Mr. Kvam's declaration. He doesn't say that Brian Mineau 3 promised he was going to use his own money, he was going to 4 pay me, he was going to take money out of his savings 5 account to make this construction job. 6 If that was a material portion or consideration 7 for Mr. Kvam in entering into this transaction, it should 8 say that in the terms of agreement. 9 As you noted, it doesn't say that. It says, 10 Mr. Kvam will make the first draw. It doesn't say who is 11 going to make the other two draws. 12 Mr. Mineau did make the draw. Where he got the 13 money, as you point out, is his own business -- whether he 14 took it out of his personal savings account, a safe at his 15 house, borrowed it from his parents, borrowed it from a 16 friend. Wherever he got the money, he used that money and 17 paid it towards the May Street property. 18 There was a conversation or a question as to 19 whether there was any evidence that that money was paid for 20 May Street, and if you come back to our motion for summary 21 judgment, Exhibit 19 to our motion for summary judgment, is 22 the wire transfer at issue. 23 And it specifically says: 24 Under Special Instructions --</p>	<p style="text-align: right;">Page 73</p> <p>1 Receiving Customer Information. 2 Special Instructions. May Street. 3 Purpose of wire. Construction draw. 4 So there is evidence that that's what it was 5 for. Mr. Mineau made the construction draw that he, 6 according to Mr. Kvam, was obligated to make. There was no 7 actual obligation to make it, but that's what he did, 8 because he wanted to fund the projects, and he wanted to 9 proceed. 10 Again, your Honor, I think it's important to 11 note the timing of this. Mr. Kvam had made both of his 12 \$20,000 draws and the \$9,000 draw before Mr. Mineau made 13 the \$20,000 draw for May Street. If Mr. Mineau was 14 involved in some sort of a conspiracy to divert funds from 15 May Street to help some other project, why would he have 16 given the contractor \$20,000 for May Street? It doesn't 17 make any sense. 18 There was also discussion about a representation 19 that funds would be put in a separate account. 20 The only evidence that Mr. Matuska has pointed 21 to to support that claim is a text message from Mr. Mineau 22 saying that the first contractor was setting up an account 23 to allow that to happen. 24 That is not an affirmative representation that</p>

<p style="text-align: right;">Page 74</p> <p>1 Mr. Mineau would ensure that whatever contractor ultimately 2 was hired for the project would set up a separate account. 3 That was a representation that the contractor that we 4 currently have is being -- is setting up a separate 5 account. 6 Regardless, your Honor, there's no evidence 7 whatsoever of damages. Even if there was some affirmative 8 obligation or representation that the funds would not be 9 commingled by the contractor, the fact that the contractor 10 commingled the funds and put them in, apparently, the 11 general operating account is not what caused the damages. 12 Did not cause Mr. -- or excuse me -- did not cause TNT to, 13 to not finish renovating the project. If they put it into 14 a separate account and then wired it into their general 15 operating account, or done whatever it is that the 16 contractor did with the monies, whether it was in a 17 separate account to begin with or not would not have 18 changed the outcome. 19 And to suggest that by allowing the contractor 20 to commingle funds, Mr. Mineau converted those funds is 21 simply not supported by the law. Conversion requires a 22 distinct act of dominion over someone else's property. 23 Allowing Mr. Kvam to wire funds to TNT, knowing that those 24 funds from TNT were not being held in a separate account,</p>	<p style="text-align: right;">Page 75</p> <p>1 even if Mr. Kvam could prove all that, that in and of 2 itself was not a conversion, especially when Mr. Kvam was 3 in direct communication with TNT throughout this whole 4 process. If that was so important to him, when Derek Cole 5 is sitting in his house in May, how come he didn't say, 6 Hey, Mr. Mineau told me that all this money was being held 7 in a separate account, and, gee, this is really important 8 to me, is it being held in a separate account? Are you 9 sending him invoices? How -- what's the status of the 10 project? 11 He had that opportunity. There's no evidence 12 whatsoever that he took that opportunity to ensure that the 13 expectations -- which are not in writing, that Mr. Kvam 14 apparently had, that were very important to him, despite 15 the fact that they're not in writing, he had the 16 opportunity to verify those, and he didn't do it. 17 Moving on to the sale in 2018. Mr. Matuska made 18 the argument that it was a breach of, of Mr. Mineau's 19 fiduciary duty to sell the property in the condition that 20 it was in. 21 First of all, it was in, in very poor condition 22 because there was a flood on the property, which is the 23 subject of our counterclaims that were dismissed by the 24 prior judge in this action. I won't get into it that at</p>
<p style="text-align: right;">Page 76</p> <p>1 this point, but Mr. Kvam had the utilities set up in his 2 name -- 3 MR. MATUSKA: I'm going to object, your Honor. 4 This is complete hearsay, outside the scope of the motion, 5 and was already dismissed on summary judgment. There's no 6 evidence to support this. 7 MR. SWEET: Your Honor, Mr. Matuska in his 8 argument said that there was no explanation as to why the 9 property was sold in the condition that it was in. 10 THE COURT: All right. So I -- 11 MR. MATUSKA: I didn't. I -- 12 THE COURT: -- I understand with regard to, the 13 property was sold, and there was an amount, to the extent 14 that you claim that the reduced amount resulted in damages 15 to your client, it is relevant. Whether or not it's 16 relevant to the motion for summary judgment, I'll sort 17 through. I'm just taking this as context. 18 I mean, you still have the -- I don't know that 19 it goes to any exact fact or lack thereof that you've 20 asserted. But I understand that there was something that 21 occurred, and your position would be that it resulted in a 22 decreased value of the property. 23 MR. SWEET: Correct, your Honor. 24 And we have a letter from Mr. Matuska saying</p>	<p style="text-align: right;">Page 77</p> <p>1 sell the property. So that's what they did. 2 And so the argument that it was a breach of 3 fiduciary duty to sell the property in the condition it was 4 in without finishing the project is simply disingenuous to 5 the facts of this case. 6 And, your Honor, that, again, is attached to our 7 motion. 8 Mr. Matuska also argued that that -- that 9 Mr. Kvam had to file suit in order to enforce what we are 10 now agreeing should be the actual remedy, and that's, 11 again, not true. 12 The evidence attached to the motion for summary 13 judgment was back in December of 2017. Mr. Mineau said, Do 14 you think this project is a failure; you can have the 15 property; I'll sell it to you, or I'll assign it to you, 16 which was what was agreed in the terms of the agreement. 17 If the project is a failure, everything gets assigned to 18 Mr. Kvam. 19 Mr. Mineau offered to do that in 2017. Mr. Kvam 20 said no, I don't want the project, I want my money back. 21 Mr. Mineau said that was not the deal, so I'm not going to 22 give you your money back; I'm not going to write you a 23 check. So that's what led to the litigation. 24 Moving on to the accounting -- the --</p>

<p style="text-align: right;">Page 78</p> <p>1 Mr. Matuska said that we've never provided accounting. 2 Well, that's Exhibit 31 and 32 to our motion. As you 3 pointed out, there's no question as to where the money went 4 or who provided money into the project or out of the 5 project. 6 If Mr. Matuska thinks that Mr. Mineau is now 7 able to provide some sort of accounting as to what TNT did 8 with that money, I think it has been very well-established 9 that we don't have that information. Nobody has that 10 information. 11 We don't know what TNT did with the money. So 12 that accounting is not going to occur. And Mr. Kvam 13 subpoenaed all the records. They had a forensic accountant 14 go through and review the records. Couldn't determine what 15 happened with the money. 16 Regardless, it's not Legion or Mr. Mineau's 17 responsibility to account for how TNT spent the funds. 18 It's their duty to account for the property that they held, 19 which was the property itself -- and there is no question 20 as to how the funds were moved in and out of the 21 partnership for the property itself, and then the proceeds 22 of the sale, which are now being held with the clerk of the 23 court. 24 Now Mr. Matuska says we need an accounting to</p>	<p style="text-align: right;">Page 79</p> <p>1 establish where the original source of the \$20,000 wire 2 from Criterion came from. Where did that money come from? 3 Well, your Honor, first of all, as I discussed 4 already, it doesn't matter. 5 Second, even if it does matter, if you're trying 6 to determine how much money is in Mr. Mineau or Legion 7 Investments' capital account for this partnership, that 8 doesn't matter either, because per the terms of the 9 agreement everything gets assigned to Mr. Kvam. 10 So whether there's \$7,000 or \$20,000 or \$27,000 11 in Legion Investments' capital account, it all gets 12 assigned to Mr. Kvam, and it doesn't matter what the 13 numbers are. 14 The only way that that would matter, your Honor, 15 is if the contract is rescinded, and rather than having the 16 remedies set forth in the terms of agreement, which is 17 Mr. Mineau and Legion Investments get zero, Mr. Kvam gets 18 everything, we're going to split it up, and say okay, under 19 the partnership agreement you distribute the assets 20 pursuant to capital accounts and partnership ownership. 21 So then Mr. Mineau gets a portion of it. So the 22 question is how much of a portion does he get? So if 23 Mr. Kvam is making that argument that Mr. Mineau is 24 entitled to a portion, because the terms of agreement</p>
<p style="text-align: right;">Page 80</p> <p>1 should be rescinded and not enforced, then we can go 2 through the full accounting, which, again, is attached as 3 Exhibit 31 and 32 to our motion. 4 That accounting establishes that Legion 5 Investments put \$27,000 -- I'll give you the exact 6 number -- \$27,090.31 into the project. So they have the 7 accounting. There's nothing else that is relevant that 8 might be provided through an accounting. 9 Your Honor, I believe I've touched on everything 10 that we've gone through. I'm happy to address any 11 additional specific questions that you have. 12 THE COURT: I think I asked you the ones that I 13 have, and I definitely asked Mr. Matuska about some of the 14 issues that I was focusing on. 15 What I would like each of you to do is to 16 prepare a draft order in support of your position with 17 regard to the summary judgment and email it to my 18 assistant, Ms. Boe, and you will email it to my law clerk 19 as well. And he'll give you that information after. 20 Now, I'm thinking about timing, because we are 21 coming up on the trial, and my goal would be that at a 22 minimum, that -- and I haven't made a decision. It was 23 really important to hear the arguments today -- to, if 24 there are any claims that should be disposed of by summary</p>	<p style="text-align: right;">Page 81</p> <p>1 judgment, I intend to do it. 2 And, similarly, if there's claims that need to 3 be tried, that's what we're going to do. So I would like 4 you to submit your orders. 5 You're going to settlement on the 24th, did you 6 say? 7 MR. SWEET: I don't have it in front of me, but 8 it's the week before trial, yes. 9 THE COURT: Okay. So do you want to provide 10 those orders before that time? And that's only 10, that's 11 like 12 days, right? 12 MR. SWEET: Your Honor, I can get it done 13 tomorrow, because, to me, the sooner we get this issue 14 resolved, the better, because we're spending money getting 15 ready for trial. 16 THE COURT: I know. And I want, I want to -- 17 and that would be the other comment that I would just say 18 is that everybody keep your eye on the ball of what is at 19 issue here, and the dollars that are at issue, and the 20 dollars that are being spent in the courtroom, and -- in 21 preparing. 22 So how long would it take you to prepare a 23 proposed order? 24 MR. MATUSKA: I would endeavor to have that done</p>

<p style="text-align: right;">Page 82</p> <p>1 tomorrow.</p> <p>2 THE COURT: I don't want to put that much</p> <p>3 pressure on you. I don't know that I can look at it</p> <p>4 tomorrow.</p> <p>5 MR. MATUSKA: Well, you know, I could and I</p> <p>6 would, because in a manner of speaking we have to, because</p> <p>7 we have other issues to prepare for trial.</p> <p>8 Anyway, your Honor, would you accommodate me to</p> <p>9 respond to some of this because this is --</p> <p>10 THE COURT: I can't because -- no, I can't. I</p> <p>11 have your papers but I have to be in a meeting at noon.</p> <p>12 And I understand what you disagree with. I</p> <p>13 absolutely do. I know the points that you were going to</p> <p>14 raise. I'm comfortable that I know what --</p> <p>15 MR. MATUSKA: Thank you, your Honor.</p> <p>16 THE COURT: -- your opposition is.</p> <p>17 MR. MATUSKA: Okay.</p> <p>18 THE COURT: So I'm not sure that argument would</p> <p>19 help at this point. I mean it's --</p> <p>20 MR. MATUSKA: Understood.</p> <p>21 THE COURT: -- very clear to me that there's oil</p> <p>22 and water in perception.</p> <p>23 So why don't you have it to me by -- is this a</p> <p>24 three-day weekend, or is it the following weekend that is a</p>	<p style="text-align: right;">Page 83</p> <p>1 three-day weekend?</p> <p>2 THE CLERK: It's this one, your Honor. The</p> <p>3 17th.</p> <p>4 THE COURT: Have it to me by Friday morning.</p> <p>5 Just email it.</p> <p>6 If you really want to make me happy, put it in</p> <p>7 Aerial font.</p> <p>8 We'll be in recess.</p> <p>9</p> <p>10 (Whereupon the proceedings were</p> <p>11 concluded.)</p> <p>12 -c00-</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p>
<p style="text-align: right;">Page 84</p> <p>1 STATE OF NEVADA)</p> <p>2) ss.</p> <p>3 WASHOE COUNTY)</p> <p>4</p> <p>5 I, DEBORA L. CECERE, an Official Stenographic</p> <p>6 Reporter of the State of Nevada, in and for Washoe County,</p> <p>7 DO HEREBY CERTIFY:</p> <p>8 That I was present at the times, dates, and</p> <p>9 places herein set forth, and that I reported in shorthand</p> <p>10 notes the proceedings had upon the matter captioned within,</p> <p>11 and thereafter transcribed them into typewriting as herein</p> <p>12 appears;</p> <p>13 That the foregoing transcript, consisting of</p> <p>14 pages 1 through 84, is a full, true and correct</p> <p>15 transcription of my stenotype notes of said proceedings.</p> <p>16 DATED: At Reno, Nevada, this 5th day of</p> <p>17 March, 2020.</p> <p>18 /s/ Debora Cecere</p> <p>19 _____</p> <p>20 DEBORA L. CECERE, CCR #324,</p> <p>21 Certified Stenographic Court Reporter</p> <p>22</p> <p>23</p> <p>24</p>	<p style="text-align: right;">Page 85</p> <p>1 HEALTH INFORMATION PRIVACY & SECURITY: CAUTIONARY NOTICE</p> <p>2 Litigation Services is committed to compliance with applicable federal</p> <p>3 and state laws and regulations ("Privacy Laws") governing the</p> <p>4 protection and security of patient health information. Notice is</p> <p>5 hereby given to all parties that transcripts of depositions and legal</p> <p>6 proceedings, and transcript exhibits, may contain patient health</p> <p>7 information that is protected from unauthorized access, use and</p> <p>8 disclosure by Privacy Laws. Litigation Services requires that access,</p> <p>9 maintenance, use, and disclosure (including but not limited to</p> <p>10 electronic database maintenance and access, storage, distribution/</p> <p>11 dissemination and communication) of transcripts/exhibits containing</p> <p>12 patient information be performed in compliance with Privacy Laws.</p> <p>13 No transcript or exhibit containing protected patient health</p> <p>14 information may be further disclosed except as permitted by Privacy</p> <p>15 Laws. Litigation Services expects that all parties, parties'</p> <p>16 attorneys, and their HIPAA Business Associates and Subcontractors will</p> <p>17 make every reasonable effort to protect and secure patient health</p> <p>18 information, and to comply with applicable Privacy Law mandates,</p> <p>19 including but not limited to restrictions on access, storage, use, and</p> <p>20 disclosure (sharing) of transcripts and transcript exhibits, and</p> <p>21 applying "minimum necessary" standards where appropriate. It is</p> <p>22 recommended that your office review its policies regarding sharing of</p> <p>23 transcripts and exhibits - including access, storage, use, and</p> <p>24 disclosure - for compliance with Privacy Laws.</p> <p>25 © All Rights Reserved. Litigation Services (rev. 6/1/2019)</p>

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1 CODE: 4185
NICOLE J. HANSEN, CCR 446
2 Sunshine Litigation Services
151 Country Estates Circle
3 Reno, Nevada 89511
(775) 323-3411
4 Court Reporter

5

6 SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE
8 THE HONORABLE LYNNE K. SIMONS, DISTRICT JUDGE
--oOo--
9

10 JAY KVAM, Case No. CR18-00764
11 Plaintiff, Dept. No. 6
12 vs.
13 BRIAN MINEAU, ET. AL.,
14 Defendant.

15 TRANSCRIPT OF PROCEEDINGS
16 PRE-TRIAL CONFERENCE & PRE-TRIAL MOTIONS
THURSDAY, FEBRUARY 27, 2020

17

APPEARANCES:

18

19 For the Plaintiff: MICHAEL L. MATUSKA, ESQ.
2310 S. Carson St. #6
20 Carson City, Nevada 89701

21

22 For the Defendant: AUSTIN K. SWEET, ESQ.
3895 Warren Way
23 Reno, Nevada 89509

24 Job No.: 608713

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RENO, NEVADA, THURSDAY, FEBRUARY 27, 2020, 9:43 A.M.

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4

THE COURT: This is the time set for a pretrial motions in Jay Kvam versus Brian Mineau, et al., Case Number CV18-00764. Please state your appearances.

7

MR. MATUSKA: Michael Matuska, with the plaintiff, Jay Kvam.

9

MR. SWEET: Good morning, Your Honor. Austin Sweet, with Gunderson Law Firm. And with me is Brian Mineau, on behalf of himself and Legion Investments.

12

THE COURT: So I know that I want to talk about an agenda for today on what we're going to discuss, and then I need to provide some notice to you, and we're going to go from there.

16

So before us today is first, we have the recommendation for order by Commissioner Ayers, filed on January 10th, 2020; defendant's objection to that recommendation for order that was filed on 1-13-2020. Plaintiff filed a response on 1-21-2020. That objection is before the Court for consideration; correct?

22

MR. SWEET: Correct.

23

THE COURT: The second matter is defendant's motion in limine number one to exclude expert opinion.

1 That was filed on behalf of the defendants on 1-10-2020.
2 It was opposed on 1-21-2020, and then supplement to the
3 opposition was filed on 1-22-2020.

4 The defendants filed a reply in support of
5 the motion in limine number one on 1-28-2020. In
6 addition, there is the motion for leave to extend page
7 limit. I did not make a note of whether I ruled on that
8 or not, but I considered all of the items that were filed
9 with regard to the motions for summary judgment. So I
10 think that's moot at this point.

11 In addition, plaintiff's motion for
12 reconsideration of order affirming Discovery
13 Commissioner's recommendation that was entered on May
14 16th, 2019, for discovery sanctions and other relief.
15 That order was entered by Judge Polaha.

16 So those are the four matters before the
17 Court as well as plaintiff's first motion in limine that
18 was filed 2-14-2020, and seeks to preclude defendants
19 from introducing offers in compromise. There's no
20 opposition. I'm assuming you're stipulating to that.

21 MR. SWEET: No, Your Honor. The opposition
22 date is actually tomorrow.

23 THE COURT: Oh, okay. All right. So that
24 one is not ripe. Okay. So first, those are what we're

1 outlining. What I need to advise you of is the
2 following. I know you've been waiting for my order.
3 There's a purpose for why it's not entered right now.

4 In reviewing the motion for summary judgment
5 as well as the cross motion for summary judgment, I noted
6 that Mr. Mineau and defendants moved for summary judgment
7 on the plaintiff's claims; outstanding after tracing all
8 of the claims and the orders that were previously entered
9 by Judge Polaha. I noted that the defendants did not
10 move for declaratory relief on their third claim.
11 Rather, you've moved for summary judgment on plaintiff's
12 claim for declaratory judgment.

13 I am, pursuant to Rule 56 (f), advising all
14 parties that I intend to grant summary judgment on
15 defendant's third claim -- counterclaim for relief on
16 declaratory judgment.

17 Pursuant to Rule 56 (f), I have to give you
18 reasonable notice of the Court's intent to do that. You
19 have an opportunity to respond. What I think is -- and
20 I'm going to give you until tomorrow morning, if you
21 wish, or towards the end of the day, or you can orally
22 respond.

23 Here's the reality. Both of you filed
24 declaratory relief claims. They seek slightly different

1 actually declaratory relief. So I'm anticipating, in
2 this unique circumstance, that reasonable notice is
3 relatively short because it's a matter of granting
4 summary judgment on declaratory relief on defendant's
5 third claim on the counterclaim, which is the only claim,
6 I believe, is remaining.

7 MR. SWEET: Correct.

8 THE COURT: Rather than on the plaintiff's
9 claim for declaratory relief. Does everyone understand
10 what I'm saying?

11 MR. SWEET: Yes, Your Honor.

12 THE COURT: Okay. Do you wish to address
13 that? Anybody? I'm giving you the reasonable notice
14 right now.

15 MR. MATUSKA: Well, I'm at a little bit of a
16 disadvantage. Admittedly, I haven't looked at their
17 third counterclaim for relief in some time, and I'd
18 really have to look at that to see.

19 THE COURT: Okay. So do you want to look at
20 it by the end of today or tomorrow? What would you like
21 to do?

22 MR. MATUSKA: Well, of course I'll look at
23 it, but what does that mean? Do I file a written
24 objection to it or?

1 THE COURT: Well, you're familiar with Rule
2 56 (f); correct? And the language of it.

3 MR. MATUSKA: In general, yes, but I haven't
4 -- that really wasn't one of the issues I reviewed for
5 today. So as I said, this is new information, so --

6 THE COURT: Okay. Well, under Rule 56 (f),
7 the Court must give reasonable notice if I am going to
8 grant summary judgment on a claim that's not moved for or
9 grant summary judgment in favor of the non-moving party.
10 And I'm giving you that notice.

11 What's unique about this is just that they're
12 both claims for declaratory relief. So I will give you
13 the time that you need to respond to that if you would
14 like. I'm also going to advise you right now how I'm
15 ruling. It's a matter of detailing. So how much time do
16 you need to respond?

17 MR. MATUSKA: It depends on whether I'm going
18 to have to prepare a written response or not, Your Honor.
19 And I acknowledge that in our previous hearing on
20 February 11th, I believe, I made the general comment that
21 I didn't think that counterclaim for declaratory relief
22 added or detracted anything from what was already at
23 issue.

24 THE COURT: Right.

1 MR. MATUSKA: And if that's the case, it's a
2 pretty simple matter. But I do want the opportunity to
3 satisfy myself on it.

4 THE COURT: Okay. So here's the issue at
5 hand. I am happy to give you the time you need. I will
6 be -- that is only one portion of my order that I can
7 adjust. But obviously, your trial date is fast upon us.
8 But I have had some experience with providing this type
9 of notice, which is why I want to make sure that you have
10 the time that you need.

11 MR. MATUSKA: Thank you.

12 THE COURT: Despite what you identified
13 before exactly. I recalled what you said.

14 MR. MATUSKA: Yes.

15 THE COURT: But it really is a matter of, I
16 think, your complaint goes a little bit farther on the
17 declaratory relief. That's requested. Most of the items
18 are similar, but yours just asks for a bit more.

19 MR. MATUSKA: It's possible there's nothing
20 for me to do.

21 THE COURT: Right.

22 MR. MATUSKA: I just need to be thorough and
23 do that, Your Honor.

24 THE COURT: Right. So as you stand here

1 today, what would you identify as reasonable notice for
2 you to do what you need to do?

3 MR. MATUSKA: Again, it depends on whether
4 I'm going to need to prepare a written response. It
5 doesn't -- it sounds like possibly I don't need to, but
6 if I need to prepare a written response, I have to have
7 time to prepare a written response, and this is on top of
8 our trial, so --

9 THE COURT: So I'm going to allow you until
10 5:00 o'clock tomorrow. Will that work?

11 MR. MATUSKA: Okay.

12 THE COURT: I mean, if you don't think that's
13 reasonable, tell me now.

14 MR. MATUSKA: I don't think it's reasonable.

15 THE COURT: Okay. How much time do you need?

16 MR. MATUSKA: I think I would need until next
17 week to do it, but this is also on top of preparing for a
18 trial. And I should inform the Court that I'm also a
19 hearing officer myself on some medical board cases, and I
20 promised to get an order out tomorrow also. And I've
21 been postponing that because of the continued proceedings
22 in this case, so I'm obligated on some other matters
23 also.

24 It's quite possible that there's nothing to

1 do on that counterclaim, and I'm kind of anticipating
2 that, but we've been at this case since April of 2018,
3 and I think my client deserves that I have time to review
4 that and prepare a response as necessary.

5 THE COURT: All right. You will have until
6 Monday at 10:00 a.m. to file a response. Okay. And I'm
7 going to orally indicate to you -- all right. I need to
8 move it back. It's going to be Monday at 9:00 a.m.

9 As I said, I'm familiar with the requirements
10 of Rule 56 (f), and the notice that the Court must give,
11 and that is why I'm giving you time.

12 However, as I indicated, that under the
13 unusual situation regarding the declaratory relief claims
14 being very similar, I am going to find that that time
15 until Monday at 9:00 a.m. is reasonable based on your
16 request and acknowledgment of your schedule. That gives
17 you the rest of today, tomorrow, and over the weekend to
18 do that.

19 Now, on the motion for summary judgment, I
20 will await to actually file it until you've had an
21 opportunity on that notice. But I am going to indicate
22 to you how the Court is going to rule.

23 On the declaration, Mr. Kvam's first cause of
24 action is the declaration in the second amended complaint

1 is a declaration of joint venture. I am withholding my
2 ruling on that part, anticipating that I'm going to rule
3 on the counterclaim for declaratory relief.

4 Second, on the rescission or reformation of
5 agreement, the Court finds -- and this will be in a
6 written order -- that no genuine issue of material fact
7 exists for trial on the second claim and that defendants
8 are entitled to judgment as a matter of law on this
9 claim.

10 On the breach of contract, which is
11 Mr. Kvam's third claim for relief in his second amended
12 complaint, the Court again finds that no genuine issue of
13 material fact exists for trial on the third claim for
14 relief, and the defendants are entitled judgment as a
15 matter of law on that issue.

16 With regard to the breach of contract and
17 tortious breach of implied covenant of good faith and
18 fair dealing, the Court -- even in viewing all of the
19 information that was raised by defendants -- the Court
20 finds that the defendants have not demonstrated that
21 there is a genuine issue of material fact. Excuse me.
22 The plaintiffs have not -- let me state this again.

23 So in looking at this and finding that the
24 plaintiff has not come forth with evidence to establish

1 that there's a genuine issue of material fact and
2 therefore, the defendants have established that there is
3 no genuine issue of material fact and they are entitled
4 to judgment as a matter of fact on that claim.

5 As to the accounting, Mr. Kvam's fifth claim
6 for -- cause of action in his second amended complaint,
7 although the Court had to dig through the documents and
8 the issue of fact was not set forth in a manner
9 sufficient for purposes of summary judgment, the Court
10 does find that based on the declaration of Benjamin
11 Charles Steel and the attached written report, and
12 specifically viewing the evidence in a light most
13 favorable to Mr. Kvam, I find that a genuine issue of
14 material fact exists as to whether a sufficient
15 accounting was provided. And therefore, summary judgment
16 is denied on the accounting claim.

17 On the Court's supervision of dissolution of
18 lining up an appointment of receiver, I'm going to hold
19 my ruling in abeyance until after the determination on
20 the declaratory relief claim.

21 On the temporary and permanent injunction
22 claims, which is Mr. Kvam's seventh claim for relief in
23 his second amended complaint, the Court finds that these
24 are moot and legally ineffectual at this time. That will

1 be based on my anticipated ruling on the declaratory
2 relief.

3 On the fraud, fraudulent inducement and
4 fraudulent concealment claims, this is contained in
5 Mr. Kvam's eighth cause of action in his second amended
6 complaint, I have reviewed all of the information that's
7 been provided, and the Court finds that even viewing the
8 evidence in a light most favorable to Mr. Kvam that the
9 defendants have demonstrated that no genuine issue of
10 material fact exists, and the defendants are entitled to
11 judgment as a matter of law on that claim.

12 In addition, Mr. Kvam's ninth cause of action
13 in his second amended complaint is for conversion. After
14 reviewing the matter, the Court finds that the defendants
15 have demonstrated that no genuine issue of material fact
16 exists, and the defendants are entitled to judgment as a
17 matter of law on this claim.

18 With regard to RICO, which is Mr. Kvam's
19 tenth claim for relief in this action, the Court finds
20 that the defendants have established that no genuine
21 issue of material fact exists, and they are entitled to
22 judgment as a matter of law in this claim.

23 With regard to the derivative claim, the
24 eleventh claim for relief, the Court finds that no

1 genuine issue of material fact exists on this claim and
2 that defendants are entitled to judgment as a matter of
3 law.

4 What this comes down to, Counsel, is that
5 this is an accounting case of a partnership. I will
6 await the response that you have. However, my order is
7 going to further require -- and I am going to do a minute
8 order at this time -- that based on the Court's
9 anticipated ruling that you will participate in a
10 continued settlement conference on Monday on the
11 accounting issue.

12 If the case is not resolved, pursuant to the
13 settlement, then trial will start on Tuesday on the
14 remaining claims that have not been disposed of by
15 summary judgment at that time.

16 In addition, we will withhold marking
17 exhibits until late on Monday or first thing Tuesday
18 because I can move the time to start. This will affect
19 significantly the documents that you will be marking for
20 exhibits, and it will be much less than what you've
21 indicated.

22 Okay. So with that, let's move to the
23 additional pretrial issues. What I'm going to ask you to
24 do is, in light of what the Court's ruling is going to

1 be, it could change on the declaratory relief. That's
2 really the one area that may change. If I am persuaded
3 if Mr. Matuska files something and I decide to grant it
4 on his claim for non-moving party, so I assume in saying
5 that, I'm also giving you notice that I am going to
6 decide on those claims because when I went through it and
7 figured out that that one was still outstanding, I think
8 it's appropriate to resolve the entire case. And I'm
9 going to give you the opportunity to advise the Court and
10 frankly, I suppose, you should have that opportunity as
11 well, Mr. Sweet.

12 So let's go to the recommendation for order
13 by Commissioner Ayers. Now, with regard to this, I'm
14 going to let you -- I know you need a few minutes to
15 digest what I just said, so I'm fine if you need more
16 time to address this or to indicate to the Court that
17 it's become moot.

18 MR. SWEET: Your Honor, I believe it's become
19 moot to the extent that the recommendation itself has
20 become moot. Our objection, I think, still stands. But
21 the discovery sought, I think, has now been rendered
22 moot, and if you'd like me to discuss the merits of the
23 objection, I'm happy to do that as well. But in my
24 opinion, the discovery sought is now rendered moot, and

1 that resolves the issues.

2 THE COURT: So the only issue remaining is
3 the \$2,500. Didn't Commissioner Ayers direct the
4 defendants to pay to the plaintiff the sum of \$2,500? So
5 that would remain at issue.

6 MR. SWEET: Yes, Your Honor.

7 THE COURT: Okay. Mr. Matuska?

8 MR. MATUSKA: Well, you know, honestly, it's
9 not moot because it probably goes to the accounting
10 issue, but that really is the tail of the dog here.

11 My suggestion is that I will waive my 56 (f)
12 objection. The Court can enter judgment. That leaves
13 only the accounting issue, which quite frankly doesn't --
14 I would ask to continue the trial to see if we really
15 need a trial on the accounting issue. And certainly,
16 that would be such a different trial that we wouldn't
17 be --

18 THE COURT: Right.

19 MR. MATUSKA: We'd be redoing our exhibit
20 binders anyway. We wouldn't have that done by Tuesday.
21 That's not realistic. So I think the Court should go
22 ahead and enter judgment as it is, as it was suggested,
23 and we'll go from there.

24 THE COURT: All right. So if I hear you

1 correctly, what you're indicating is that you will
2 stipulate to the fact that the notice that I've given you
3 today is reasonable?

4 MR. MATUSKA: Yes.

5 THE COURT: And that you waive the
6 opportunity to file anything in writing or otherwise --

7 MR. MATUSKA: Yes.

8 THE COURT: -- on the notice that I gave
9 regarding the declaratory relief claims.

10 MR. MATUSKA: Yes.

11 THE COURT: Mr. Sweet, do you as well?

12 MR. SWEET: Yes, Your Honor.

13 THE COURT: Okay. So I can go ahead.

14 MR. MATUSKA: And if I'm understanding, that
15 means that only leaves the --

16 THE COURT: Accounting.

17 MR. MATUSKA: -- fifth cause of cause of
18 action for accounting, which doesn't warrant a trial next
19 week, and I would ask to vacate that trial at this time.

20 THE COURT: So let me just finish here. I'm
21 going to consider that. This would result in a denial of
22 your motion in limine to exclude his expert opinion
23 because it's -- I indicated that his expert established a
24 genuine issue of material fact.

1 MR. SWEET: Yes. I was going to get to that,
2 but it sounds like --

3 THE COURT: So that's a denial. Okay. So
4 you understand it's a denial of -- he was going to try to
5 preclude Mr. Steel's testimony and information. I'm
6 denying that because I would allow it because it's not
7 necessary on the accounting claim.

8 MR. MATUSKA: In fact, I would suggest that
9 would the Court entertain an oral motion to withdraw the
10 fifth cause of action for accounting without prejudice?
11 And then we could have this order become final. I would
12 rather just have a final order than one inequitable
13 accounting cause of action being the only remaining cause
14 of action.

15 THE COURT: I understand what you want, but
16 you need to understand what I found and what I'm
17 determining. So your proposition is that you would
18 stipulate that there's no genuine issue of material fact?

19 MR. MATUSKA: No. I would withdraw the
20 accounting -- fifth cause of action for accounting
21 without prejudice, and that would result in --

22 THE COURT: How does a without prejudice
23 resolve the case?

24 MR. MATUSKA: It's withdrawn.

1 THE COURT: So wouldn't it -- in order to
2 have a final determination in the case, you would need to
3 have it with prejudice.

4 MR. MATUSKA: I would have to respectfully
5 disagree with that.

6 THE COURT: Okay.

7 MR. MATUSKA: If it's withdrawn -- for
8 purposes of finality, it's either withdrawn or it's not.
9 I'm suggesting a withdrawal without prejudice on that.
10 And then we have a final order and obviously, you know
11 the reason, Your Honor.

12 THE COURT: Right.

13 MR. MATUSKA: And then the whole thing is
14 appealable instead of in parts, which is --

15 THE COURT: Right. And I think judicial
16 economy, that makes some sense. And frankly, this is
17 written. It's not final yet, but it is written in a
18 manner that I understood both of you to seek relief down
19 the line. So I understand that.

20 Let's talk about -- I just want to make sure
21 that anything that's pending the last -- and I'm going to
22 circle back to what you've indicated. The plaintiff's
23 motion for reconsideration. This is on -- I think this
24 is with regard to Judge Polaha's order, and I think there

1 are multiple legal hurdles that can't be surpassed on
2 that.

3 First is that the time limit is you have to
4 do it within 14 days after notice of entry. The second
5 preclusion is under Nevada law, I'm precluded from
6 changing another judge's order. So this, I was going to
7 deny. And I don't know if you want to address that.

8 MR. MATUSKA: I do, Your Honor. It becomes
9 relevant as of January 6th, 2020, when Mr. Mineau
10 provided declaration to change his prior testimony.

11 THE COURT: Okay. I understand. I'm going
12 to hold that in abeyance then. Okay? And I will, in
13 light of -- I understood that it was a change in
14 testimony that you indicated.

15 I just still think that there's a legal
16 preclusion to this Court -- so you're arguing that
17 basically, kind of a date of discovery type of argument,
18 that you learned of this when he filed his what you
19 identified as a change in testimony and that that
20 extended that what is now 14 days.

21 MR. MATUSKA: You know, partially, Your
22 Honor. It can be a motion for reconsideration, but it
23 crosses that boundary anyway. And it asks for various
24 forms of relief, all of which stem from that changed

1 testimony.

2 But the Discovery Commissioner's order, as I
3 explained, was based on the fact that -- well, and I'll
4 refer to it. This is from the Discovery Commissioner's
5 order. For all of these reasons, the Court finds the
6 plaintiff has not yet demonstrated that he is entitled to
7 this discovery and invites -- almost invites revisiting
8 that issue as more information becomes available. So
9 that's really the basis for it.

10 But more than that, Your Honor, it really was
11 a motion for order to show cause regarding contempt of
12 court. And I would submit that that motion has life even
13 beyond granting the summary judgment motion because it
14 goes to the very -- the integrity of these proceedings.
15 And I did provide a lot of information on contempt itself
16 in that motion, but I would like to make some comments
17 about that.

18 THE COURT: But I want you to make sure that
19 you're addressing it in light of the order on top of the
20 recommendation. So you have Judge Polaha's May 16th,
21 2019, order affirming that. So I think on a
22 reconsideration, I need to -- the first step would be on
23 the judge's order, if I can legally do that.

24 MR. MATUSKA: And I would offer it. It's not

1 just reconsideration. It is a new issue at this point in
2 time. It is a new issue. And the prior orders, I would
3 submit, even allow the opportunity to revisit that as
4 more information becomes available. But and again, the
5 request for order to show cause regarding contempt has
6 nothing to do with the prior order.

7 That has to do with, quite frankly, what
8 we've described as perjury in the declarations that have
9 been submitted. And perjury and misrepresentations on a
10 sworn statement is a form of contempt under NRS 22.010
11 and 22.040. So I would submit to this Court this Court
12 can and should enforce the contempt rules and sanction
13 perjury regardless of what happens --

14 THE COURT: On the --

15 MR. MATUSKA: -- on the summary judgment.

16 THE COURT: So let me look at when if we go
17 to the recommendation at page 22, there's a request for
18 expenses; correct? And this is where he finds that each
19 side should bear its own costs, and then he recommends
20 that. And then on Judge Polaha's order at 7 and 8, he
21 affirms that.

22 Now, with regard to this other issue on
23 contempt, it seems to me that this is really separate and
24 apart from what your argument is here.

1 MR. MATUSKA: Yes, Your Honor.

2 THE COURT: You agree?

3 MR. MATUSKA: Yes. It stems from the changed
4 testimony, but yes. I've asked for different forms of
5 relief, all stemming from that changed testimony. Yes.

6 THE COURT: And I think it should be
7 considered separate and apart; correct?

8 MR. MATUSKA: It can be.

9 THE COURT: So does it make more sense to
10 allow you to -- I agree it's separate and apart from the
11 summary judgment. But does it make sense for you to
12 allow you to re-file that under these changed
13 circumstances or live with it as it is?

14 I think it's in addition to what was really
15 between -- even if the Court finds that it can make
16 changes to that based on your representation, it almost
17 seems that this relief is really bigger than what that
18 recommendation and Judge Polaha.

19 MR. MATUSKA: I agree. Yes

20 THE COURT: So does it make sense to address
21 it as a new motion and not tie it to that? I may not
22 have the same legal hurdles in a separate motion. And if
23 you're doing it on my reconsidering Judge Polaha's order,
24 like I said, I have some legal hurdles I have to get by.

1 MR. MATUSKA: And I appreciate the
2 explanation on that. I actually asked for six different
3 forms of relief. And some do relate back to that order
4 and some don't. The first one is for reconsideration of
5 the order. The second one was an order that defendants
6 provide the tax returns. They made them relevant again,
7 even outside of the prior order.

8 And alternatively, we asked for a discovery
9 sanction for bringing up new material after the close of
10 discovery that contradicts their prior discovery, but
11 number four, we asked for an order for Mr. Mineau to show
12 cause why he should not be held in contempt of Court for
13 filing a present false statement. That is not even
14 dependent on the prior.

15 THE COURT: That's completely separate.

16 MR. MATUSKA: It is, Your Honor. Yes. Yes.
17 So I think that has vitality regardless of the prior
18 orders, and quite frankly, regardless of what happens on
19 summary judgment because that statement --

20 THE COURT: I understand.

21 MR. MATUSKA: -- it appears to be false and
22 came up for the first time after discovery and has never
23 been supported, especially the part where he says that he
24 repaid the \$28,000. Where is the evidence?

1 THE COURT: So the Court would be required to
2 give -- to actually hold a separate hearing on an OSC.

3 MR. MATUSKA: Yes.

4 THE COURT: You agree?

5 MR. MATUSKA: Yes. And we asked for an order
6 to show cause, which would schedule an OSC hearing.

7 THE COURT: So I think what's required is to
8 parse out what relates to that prior recommendation and
9 order based on what I've identified to you in this
10 circumstance where it's another judge's order but then to
11 consider the relief that does not tie back to that
12 separate and apart and schedule an appropriate hearing.

13 MR. MATUSKA: I would agree with that to some
14 extent, Your Honor. Her's where it gets cloudy. And
15 frankly, it does relate back to summary judgment even
16 though you have indicated already the ruling on that.
17 But he raised this in his motion for summary judgment,
18 and the information appears to be false. So we should
19 have been entitled to this discovery as part of the
20 opposition to summary judgment, so we were disadvantaged
21 in that regard. But your ruling is what it is on this.
22 But the OSC hearing is a separate hearing --

23 THE COURT: Yeah, I agree.

24 MR. MATUSKA: -- is the bottom line.

1 THE COURT: I think that in those
2 circumstances, we have protocol that we go through on an
3 OSC. So I don't think this affects my ruling on the
4 summary judgment. I know you think otherwise.

5 So what I am going to do is I want to go back
6 and read yours again. I have an outline of the relief,
7 but I think I'm going to contemplate whether I will have
8 a further hearing on the ESC as I balance it with the
9 summary judgment order. That would end up -- the relief
10 that you're seeking is ultimately monetary; correct? I
11 mean, you're not seeking to have him on a contempt being
12 put in jail. Am I right?

13 MR. MATUSKA: You know, the relief we're
14 seeking is to get to the truth, Your Honor. And I think
15 that to some extent, this Court has to defend its own
16 processes. And we did ask for monetary relief and
17 sanctions, potentially, in terms of striking the
18 pleadings, but eventually, this Court has to defend its
19 processes also. And like I said, this does have vitality
20 outside of what happens on summary judgment or a final
21 order.

22 THE COURT: All right. I'll take that under
23 advisement.

24 MR. SWEET: Your Honor, if I may. From a

1 procedural standpoint, the local rules require separate
2 motions be filed separately, and this was a motion for
3 reconsideration. So I appreciate the mechanical issues
4 that you face and the relief that Mr. Matuska sought in
5 his motion for reconsideration. But if he wants to file
6 a motion for order to show cause, it needs to be a
7 separate motion, and then he needs to establish that
8 there is a basis to have a hearing, have a show cause
9 hearing.

10 So I think procedurally, even if the Court is
11 going to entertain the process, what the process is, is
12 requiring the plaintiff to file a separate motion for
13 order to show cause, give us the opportunity to respond,
14 and then if the Court believes that the plaintiffs have
15 established a basis to hold a show cause hearing, then
16 proceed in that manner. But that's the process that we
17 need to go through to actually get to a hearing. And I
18 don't think we get there through the motion for
19 reconsideration.

20 THE COURT: So this is the same issue. And I
21 don't know if they handle it differently in Carson, but
22 our Rule 10 precludes each motion, opposition and reply
23 has to be set separately. You can't have counter
24 motions. We've talked about this several times, so I

1 understand his position. I think it's cleaner for any
2 relief if you were to direct it just to an OSC. I don't
3 want to create more attorney's fees in this when you're
4 facing -- what I'm hearing -- an appeal.

5 MR. MATUSKA: I would just offer, Your Honor,
6 that it is an order to show cause. They have responded.
7 We can clarify today. They can file a further response
8 to this order to show cause.

9 Your Honor can issue your own order to show
10 cause anyway. They have plenty of notice of what the
11 issue is, and this pretty much reaffirms why we filed the
12 motion. This is the second time we've been in this
13 courtroom, and we talked about the declaration of
14 Mr. Mineau. Neither time have they said that it's
15 truthful and accurate. And by all accounts, it's not.

16 THE COURT: But the declaration itself does.

17 MR. MATUSKA: Let's just ask him today if he
18 repaid \$28,000, Your Honor.

19 THE COURT: Okay. I'm not going to do that.

20 MR. MATUSKA: If they want to file a further
21 opposition, they can, knowing that this is going to be
22 treated as an order show to cause, that he can. This
23 Court can also issue an order to show cause, but there
24 has to be repercussions for the declaration that they

1 submitted.

2 THE COURT: Okay. So here is -- I am going
3 to decide how I'm going to handle that. You already know
4 how I feel about combined motions and counter motions, so
5 I'm going to think about that one a bit more. I am still
6 going to require you to participate in a settlement
7 conference on Monday. All right?

8 MR. MATUSKA: Okay.

9 THE COURT: And I want to move to this issue
10 procedurally on the finding of a genuine issue of
11 material fact on the accounting claim.

12 So I think what's appropriate is that the
13 Court enters its order as it sees fit. And then if you
14 wish to file something afterwards indicating that you do
15 not wish to go forward on that claim at trial, and
16 instead you want it certified as a final order, then for
17 purposes of appeal, I think that's the right procedural
18 mechanism.

19 MR. MATUSKA: I would agree with that, Your
20 Honor. And we have the anomaly in state court -- I think
21 federal rules are different -- but state court rules are
22 only certify finality when there are multiple parties not
23 for separate causes of action.

24 THE COURT: Right.

1 MR. MATUSKA: And so we're left with that
2 choice, really, do we elect to go to trial on an
3 equitable cause of action or not. And it's quite likely
4 at that point that we move to dismiss it without
5 prejudice. And that would allow the finality.

6 THE COURT: Okay.

7 MR. SWEET: And, Your Honor, to speed things
8 along potentially, we would stipulate to having it
9 dismissed without prejudice.

10 THE COURT: Okay. Well, I'm going to enter
11 my order, and then you are going to meet with Judge
12 Sattler.

13 Obviously, a significant part of this is the
14 transactional costs involved and what you're facing. You
15 are going to have to go to another settlement conference
16 once if you go forward with appeal, but I think it's
17 important to sit down and talk about this now. So I will
18 notify him that you will be there at 9:00 a.m.

19 MR. MATUSKA: Thank you, Your Honor.

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24

1 STATE OF NEVADA)
2 COUNTY OF WASHOE) ss.
3

4 I, NICOLE J. HANSEN, Certified Court
5 Reporter in and for the State of Nevada, do hereby
6 certify:

7 That the foregoing proceedings were taken by
8 me at the time and place therein set forth; that the
9 proceedings were recorded stenographically by me and
10 thereafter transcribed via computer under my supervision;
11 that the foregoing is a full, true and correct
12 transcription of the proceedings to the best of my
13 knowledge, skill and ability.

14 I further certify that I am not a relative
15 nor an employee of any attorney or any of the parties,
16 nor am I financially or otherwise interested in this
17 action.

18 I declare under penalty of perjury under the
19 laws of the State of Nevada that the foregoing statements
20 are true and correct.

21 Dated this February 27, 2020.

22
23 Nicole J. Hansen

24 Nicole J. Hansen, CCR #446, RPR

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