

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

In the Matter of:

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

JAY KVAM,  
Petitioner

vs.

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

and

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

Electronically Filed  
Aug 27 2020 11:23 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**SUPREME COURT NO. 81480**

District Court Case No. CV18-00764

**PETITION FOR REHEARING**

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

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**JAY KVAM**

## **PETITION FOR REHEARING**

COMES NOW Petitioner, Jay Kvam, by and through his counsel of record, Matuska Law Offices, Ltd., Michael L. Matuska, and hereby petitions for rehearing of the August 10, 2020 *Order Denying Petition for a Writ of Prohibition or Alternatively, Mandamus* (hereafter, “*Order Denying Petition*”) pursuant to NRAP 40 for the following reason:

The *Order Denying Petition* is based on the assumption that Kvam has an adequate remedy in the form of an appeal from a final judgment. This Court overlooked or misapprehended the fact that Kvam’s appeal is not an appeal from a final judgment, the appeal is subject to a motion to dismiss, and it is yet to be determined whether Kvam has a remedy in the form of an appeal.

### **ARGUMENT IN SUPPORT OF PETITION FOR REHEARING**

Petitioner Jay Kvam is the Plaintiff in the case below. Real Parties in Interest Brian Mineau and Legion Investments, LLC are the Defendants. Kvam filed this original proceeding on July 20, 2020 and also filed a *Notice of Appeal* in the District Court that was docketed with this Court on July 6, 2020 as No. 81422. Kvam’s Petition and Appeal challenge the same order – the June 5, 2020 *Order Granting, in Part, and Denying, in Part, Defendants’ Motion for Summary Judgment; Order Granting Summary Judgment on Claim Pursuant to Court’s NRCP 56 Notice* (hereafter, the “*District Court Order*”) [12 App 1948]. The *District Court Order*

was based on the incorrect legal theory that Kvam has somehow “deemed admitted” the general allegations of Mineau/Legion’s counterclaims, most of which were dismissed and have long since been superseded by amended pleadings. In addition, the District Court made its findings of fact and conclusions of law and granted partial summary based on a sham declaration and without ruling on pending discovery issues, including the January 10, 2020 *Recommendation for Order* from Discovery Commissioner, Wesley Ayers. Commissioner Ayers understood the developing case on conversion and RICO and explained that:

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

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

As indicated by the title of the *District Court Order*, the order is not a final judgment. It does, however, resolve the various causes of action for monetary relief in favor of Mineau/Legion and leaves only some of the equitable claims for trial. The District Court’s “deemed admitted” approach to summary judgment cannot stand, and if it is not overturned at this stage, the parties will eventually have to return to the District Court for a second trial. Kvam explains in Part V of his Petition

that a writ of mandamus is warranted because important issues of law need clarification and the interests of judicial economy will be served.

The rule cited in the *Order Denying Petition* is beyond question at this point – writ relief is generally not available where the petitioner has an adequate remedy in the form of a final appeal. *Pan v. Eighth Judicial Dist. Court*, 120 N2v. 222, 228, 88 P.3d 840, 844 (2004). In this case, however, it appears that this Court has overlooked or misapprehended the fact that Kvam did not appeal from a final judgment. *See Dow Chemical Co. v. Mahlum*, 115 Nev. 13, 16, 973 P.2d 842, 843 (1999). (“[T]his court may entertain a petition for rehearing only ‘[w]hen it appears that the court has overlooked or misapprehended a material matter in the record or otherwise’ or ‘in such other circumstances as will promote substantial justice.’”).

In Par. 26 of the Docketing Statement filed by Kvam in Case No. 81422, Kvam explained the basis for the appeal as follows:

The order is independently appealable under NRAP 3A(b)(3) as an order granting or refusing to grant an injunction. Even though the district court purported to deny Defendant/Respondent’s motion for summary judgment on Plaintiff/Appellant’s Seventh Cause of Action in the Second Amended Complaint for Temporary and Permanent Injunction, the district court actually ruled that “. . . the SAC’s Seventh Cause of Action for Temporary and Permanent Injunction is legally ineffectual based on the deposit of funds.” In fact, Plaintiff/Appellant’s Seventh Cause of Action was intended to preclude further activities pending final winding up and prevent disposition of the proceeds of sale. Regardless, the effect is a refusal to grant an injunction.

Although Kvam maintains that the *District Court Order* is independently appealable under NRAP 3(A)(b)(3), Mineau/Legion will dispute that issue. They already filed a motion to dismiss the appeal which was denied without prejudice pending completion of the NRAP 16 settlement program. Mineau/Legion are almost certain to renew their motion to dismiss, and Kvam intends to file his own motion to determine whether the *District Court Order* is an appealable order. Even if Kvam is allowed to proceed with the appeal, it is not certain that the appeal will address the underlying discovery issues and the motion for order to show cause regarding Mineau's sham affidavit.

For these reasons, Kvam submits that the Court overlooked or misapprehended the status of Kvam's appeal Case No. 81422 and requests rehearing on the *Order Denying Petition* so that any further decision on the Petition can be made after this Court has determined whether it will hear Kvam's appeal and the scope of that appeal.

Dated this 27th day August, 2020.

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

MATUSKA LAW OFFICES, LTD.  
Michael L. Matuska (SBN 5711)  
*Attorney for Petitioner*

## CERTIFICATE OF COMPLIANCE

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

☒ This brief has been prepared in a proportionally spaced typeface using Word in 14-point Times New Roman; or

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

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

☒ Proportionately spaced, has a typeface of 14 points or more, and contains 1,511 words; or

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

☐ Does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 27th day of August 2020.

MATUSKA LAW OFFICES, LTD.

By: Michael L. Matuska  
MICHAEL L. MATUSKA, SBN 5711

## CERTIFICATE OF SERVICE

I, Suzette Turley, certify that on 27th August, 2020, I electronically filed the foregoing **PETITION FOR REHEARING**, with the Clerk of the Nevada Supreme Court via the Court's e-Flex system. Service will be made by e-Flex on all registered participants. Non-eFlex participants will be served by U.S. mail, as follows.

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/s/ Suzette Turley  
An Employee of MATUSKA LAW OFFICES, LTD.