

IN THE SUPREME COURT OF THE STATE OF NEVADA

In the matter of:

JAY KVAM,

Appellant,

vs.

BRIAN MINEAU; and LEGION
INVESTMENTS, LLC,

Respondents.

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Clerk of Supreme Court

Supreme Court Case No. 84443

District Court Case No. CV18-00764

JOINT APPENDIX

VOLUME 9

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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 Appellant

JAY KVAM

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5
6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7 IN AND FOR THE COUNTY OF WASHOE

8 * * *

9 JAY KVAM,

10 Plaintiff,

11 vs.

Case No. CV18-00764

12 BRIAN MINEAU et al.,

Dept. No. 6

13 Defendants.
14 _____/

15 BRIAN MINEAU et al.,

16 Counterclaimants,

17 vs.

18 JAY KVAM,

19 Counterdefendant.
20 _____/

21 **RECOMMENDATION FOR ORDER**

22 On June 19, 2019, Plaintiff Jay Kvam filed a motion for leave to file a second amended
23 complaint against Defendants Brian Mineau, Legion Investments, LLC ("Legion"), and 7747 S. May
24 St. (an unincorporated joint venture).¹ Essentially, Plaintiff sought leave to add two claims for relief
25 to his existing complaint²—a claim for conversion, and a claim for violation of Nevada's racketeering

26 ¹ All references to "Defendants" are to Defendants Mineau and Legion, only. The background of this action is set forth in greater detail in prior Court decisions.

² At the time of his motion for leave, Plaintiff's claims for relief were for (1) Declaration of Joint Venture; (2)

1 statutes ("RICO").³ That motion was opposed by Defendants, but in an order entered on September
2 9, 2019, the Court granted Plaintiff's motion.

3 Plaintiff filed his second amended complaint on September 11, 2019. On September 17,
4 2019, Plaintiff served Defendant Mineau with a request for admission under NRCP 36, and he also
5 served Defendants with a request for production under NRCP 34. Defendants served responses to
6 these requests on October 21, 2019. Defendant Mineau objected to each matter set forth in the
7 request for admission, and Defendants objected to each category of the request for production as
8 well.⁴ Counsel for both sides thereafter conferred about the requests and responses, but were
9 unable to reach agreement in that regard.

10 On November 26, 2019, Plaintiff filed *Plaintiff's Second Motion to Compel*. He seeks an
11 order compelling Defendant Mineau to properly respond to each of the twenty-five matters set forth
12 in his request for admission, and compelling Defendants to properly respond to Category Nos. 39
13 through 59 of the request for production. Plaintiff maintains that the information and documents
14 sought are relevant to his conversion and Nevada RICO claims. Defendants filed their *Opposition to*
15 *Plaintiff's Second Motion to Compel* on December 6, 2019. Defendants essentially argue that the
16 requests at issue are not relevant to any claim or defense and are not proportional to the needs of
17 this case. They maintain that Plaintiff is improperly seeking discovery to determine whether his new
18 claims are valid. *Plaintiff's Reply to Opposition to Plaintiff's Second Motion to Compel* was filed on
19 December 11, 2019, and the motion was submitted for decision on that same date. This motion was
20 referred to the Discovery Commissioner in an order entered on December 18, 2019.

21
22 Rescission or Reformation of Agreement; (3) Breach of Contract; (4) Breach of Contract and Tortious Breach of Implied
Covenant of Good Faith and Fair Dealing; (5) Accounting; (6) Court Supervision of Dissolution and Winding Up, and
Appointment of Receiver; (7) Temporary and Permanent Injunction; (8) Derivative Claim; and (9) fraud.

23 ³ Nevada's racketeering statutes, found at NRS 207.350 through NRS 207.520, are patterned after the federal
24 Racketeer Influenced and Corrupt Organizations, or "RICO," statutes. See Allum v. Valley Bank of Nev., 109 Nev. 280,
281 n.2, 849 P.2d 297, 298 n.2 (1993); see also 18 U.S.C.A. §§ 1961-1968 (Westlaw through P.L. 116-91) (federal RICO
statutes).

25 ⁴ Defendants further responded to two categories of the request—Category Nos. 59 and 60—by stating that they
26 have already produced all responsive documents concerning the property located at 7747 S. May St., Chicago, Illinois.
The response to Category No. 60 is not at issue.

1 Plaintiff has provided evidence⁵ that pursuant to the terms of his agreement with Legion, he
2 funded the initial \$44,000 purchase of the property located at 7747 S. May St., in Chicago, Illinois,
3 on February 13, 2017; paid \$784.31 in closing costs associated with that purchase; and funded
4 three construction draws in March, April, and May 2017, in the amounts of \$20,000, \$20,000, and
5 \$9,000, respectively.⁶ An additional \$20,000 construction draw was funded by Criterion NV, LLC, in
6 May 2017.⁷ While the funds used to pay the purchase price and closing costs were transferred to
7 Citywide Title Corp., the construction draws were wired directly to the bank account of the
8 contractor—TNT Complete Facility Care Inc. ("TNT")—who was hired by Defendants to perform all
9 construction work on the May St. renovation project. The cost of the project was \$80,000. As
10 instructed by Defendant Mineau, these funds were sent to TNT's account ending in 1855 with
11 JPMorgan Chase Bank, N.A. ("Chase").

12 Thus, \$69,000 was provided to fund the renovation on the May St. property. Despite that
13 funding, the project never proceeded beyond the demolition phase, where the interior was stripped
14 down to the studs and never rehabilitated. The project manager, Colleen Burke, has testified that
15 the demolition work was "absolutely not" worth \$40,000. The property ultimately was sold in
16 November 2018 for \$24,473.77.

17 ⁵ In their opposition, Defendants assert that Plaintiff has no evidentiary support for his contention that Defendant
18 Mineau directed TNT to divert May St. project funds to projects involving other properties. However, Plaintiff was expressly
19 granted leave to amend his complaint to assert claims for conversion and Nevada RICO violations. NRCP 26(b)(1) permits
20 discovery that is relevant to an existing claim (or defense), and proportional to the needs of the case. In most cases, a
21 special evidentiary showing is not a prerequisite to discovery—merely pleading a claim will entitle the parties to conduct
22 discovery relevant and proportional to that stated claim. In exceptional circumstances—such as when a party seeking
23 punitive damages requests an opponent's tax returns or financial condition—the Court may require some factual basis for
24 the claim before permitting the requested discovery. See Cain v. Price, 134 Nev. 193, 198, 415 P.3d 25, 30 (2018); Hetter
25 v. Dist. Court, 110 Nev. 513, 520, 874 P.2d 762, 766 (1994). But through the requests presently at issue, Plaintiff is not
26 seeking Defendants' tax returns or documents stating their financial condition (e.g., banking records)—they are seeking
information and documents concerning other properties and projects. Moreover, he is not "blindly requesting all of
Legion's and Mineau's other business and financial records," as Defendants assert—with the exception of Category No.
59, the requests at issue seek limited documents concerning specified properties and projects. The Court appreciates
Defendants' argument that information about other properties and projects is unrelated to this action, but Plaintiff is
permitted reasonable discovery that will support or refute his stated claims (i.e., the extent to which the other matters are
related to events underlying this action). In any event, Plaintiff has presented some factual basis for making inquiry into
those other projects and properties, as explained in the text; thus, he is not conducting discovery to determine whether any
evidence exists to support his claims. To be clear, the factual statements set forth in the text are not findings of fact by the
Court. Rather, they are assertions made by Plaintiff for which he has provided some evidence.

25 ⁶ The construction draws were to be used to renovate the property.

26 ⁷ Criterion NV, LLC, is a company controlled by Michael Spinola, who was one of Legion's three members
(together with Plaintiff and Defendant Mineau).

1 Plaintiff's designated forensic accountant, Benjamin Charles Steele, has reviewed
2 documents obtained by Plaintiff concerning the property and project at issue. Inter alia, he has
3 concluded that Defendant Mineau never asked for documents to support project completion status
4 representations by TNT, as set forth in the agreement with TNT. Such documentation (e.g.,
5 invoices) was needed to show that TNT was actually proceeding with the renovation, thus entitling it
6 to additional construction draws. In addition, Mr. Steele concluded that existing accounting records
7 are incomplete and inadequate, and do not support the level of work completed. Mr. Steele also
8 states that "[p]roject construction funds were deposited into TNT's general account, which was used
9 for multiple projects that TNT was working on at the time." Specifically, "the May Street project
10 funds wound up in TNT's account 1855 along [with] funds designated for other projects, including
11 8744 Bishop, 8754 S. Michigan, 9919 Forest and 1404, 1408 Wyoming." Significantly, Defendant
12 Mineau did not maintain a separate bank account for the May St. project, although he represented
13 that May St. project funds would be kept separate from other projects.

14 In addition, some funds from TNT account 1855 were subsequently transferred to a TNT
15 account ending in 1220 (which is another account with Chase). Records for account 1220 also
16 show that the funds were deposited into that account in connection with properties located at 6049
17 S. Princeton Ave. and 8040 Normal Ave. in Chicago. Plaintiff has obtained copies of documents
18 purporting to be deeds showing the purchase and sale of the Princeton Ave., Normal Ave., Michigan
19 Ave., Forest Ave., Bishop St., and Wyoming St. properties. Most of these transactions involved
20 entities identified as Imperium 5, LLC ("Imperium"); Defendant Legion; and Amicus Ventures, LLC
21 ("Amicus"). With the possible exception of the Wyoming St. properties, all of the properties involved
22 in the other TNT projects were purchased before Legion's purchase of the May St. property, and
23 were sold after the deadline for completing the May St. project.

24 Plaintiff has therefore presented evidence that apart from the funds ostensibly used to
25 purchase the May St. property and associated closing costs, \$69,000 was transferred into account
26 1855 to fund renovation work that was supposed to cost \$80,000. But the only work done on that

1 project was worth less than \$40,000, leaving at least \$29,000 unaccounted for. Significantly, the
2 entire \$69,000 was transferred to an account that was also receiving and transferring funds used on
3 other TNT projects—all of these funds were commingled. A reasonable possibility exists that a
4 substantial portion of the \$69,000 was used in connection with one or more of those other TNT
5 projects. Of course, the possibility exists that no May St. project funds were misused. But Plaintiff
6 has also presented evidence that Defendant did not maintain adequate accounting records for the
7 May St. project, so Plaintiff is entitled to conduct reasonable discovery into transactions involving
8 account 1855 to see whether he can determine how the May St. funds were used. Moreover, to the
9 extent that May St. funds were improperly used on one or more of the other TNT projects, the
10 involvement of Defendants in those other projects would be relevant to Plaintiff's claims for breach of
11 the covenant of good faith and fair dealing, fraud, conversion, and Nevada RICO violations.⁸

12 In his request for admission, Plaintiff asks Defendant Mineau to admit that he is the manager
13 of Imperium (Statement No. 1). Plaintiff maintains that Imperium bought (or otherwise obtained) and
14 sold the Princeton Ave., Normal Ave., and Forest Ave. properties. Plaintiff also asks Defendant
15 Mineau to admit that he was a manager of Amicus on October 5, 2016, and February 6, 2018—the
16 dates on which Plaintiff claims Amicus purchased and sold the Michigan Ave. property (Statement
17 Nos. 12 and 15). As noted above, Plaintiff is entitled to ascertain the extent to which May St. project
18 funds were used on these other TNT projects, and Defendant Mineau's direct or indirect involvement
19 on those projects is within the scope of discovery. See NRCP 26(b)(1). His involvement is relevant
20 to some of Plaintiff's claims, and the requested information is proportional to the needs of this case.

21 Plaintiff also asks Defendant Mineau to admit (a) that Imperium bought and sold the
22 Princeton Ave. property on the dates specified (Statement Nos. 2 and 4); (b) that Legion bought the
23 Normal Ave. property and quit-claimed it to Imperium, and that Imperium then sold it, on the
24 specified dates (Statement Nos. 6, 8, and 10); (c) that Amicus bought and sold the Michigan Ave.
25 property on the dates specified (Statement Nos. 13 and 16); (d) that Imperium bought and sold the

26 ⁸ Under the Nevada RICO statutes, "crimes relating to racketeering activity" may include "[t]aking property from another under circumstances not amounting to robbery." See NRS 207.360(9) (2019).

1 Forest Ave. property on the dates specified (Statement Nos. 18 and 20); and (e) that Amicus bought
2 and sold the Bishop St. property on the dates specified (Statement Nos. 22 and 24). As noted
3 above, evidence has been presented to show that TNT commingled funds that it received for the
4 May St. project with funds that it received in connection with work it was apparently performing on
5 these other properties. Defendant Mineau's direct or indirect ownership of the other properties is
6 relevant to one or more of Plaintiff's claims for relief. These requests for admission are therefore
7 within the scope of discovery under NRCP 26(b)(1).

8 In addition, Plaintiff asks Defendant Mineau to admit that copies of deeds pertaining to each
9 of the transactions described in the preceding paragraph are true and correct copies of the originals
10 (Statement Nos. 3, 5, 7, 9, 11, 14, 17, 19, 21, 23, and 25). For reasons explained above, these
11 documents are relevant and discoverable under NRCP 26(b)(1), and a party may properly use an
12 NRCP 36 request to obtain an admission concerning the genuineness of relevant documents. See
13 NRCP 36(a)(1)(B). Defendant Mineau observes that public records can be authenticated simply by
14 obtaining certified copies under NRS 52.125. However, Plaintiff was not obligated to authenticate
15 relevant documents in that manner; it is merely one available method of authentication. Further, the
16 cited statute merely creates a presumption of authenticity; an admission from Defendant Mineau
17 regarding genuineness would be binding on him for purposes of this action. See NRCP 36(b). The
18 Court finds that these requests for admission regarding the genuineness of relevant documents are
19 permissible under NRCP 36. Therefore, Plaintiff is entitled to an order compelling Defendant
20 Mineau to serve a written response, without objections, to each of the twenty-five statements in his
21 NRCP 36 request.⁹

22 In his request for production, Plaintiff asks Defendants to produce the purchase and sale
23 agreements, escrow closing statements, and deeds for the specific transactions described above

24 ⁹ Defendants contend that authenticating these documents "takes time, resources, and research." If Defendants
25 already have copies of the deeds, the Court is not persuaded that comparing their copies with those provided by Plaintiff
26 will impose a significant burden on Defendants. If Defendants do not already have possession, custody, or control of
copies of these documents, nothing in NRCP 36 requires them to independently obtain copies so that they can make the
necessary comparison. Under appropriate circumstances, NRCP 36 permits a response that is other than an unqualified
admission or denial.

1 involving the purchase of the Princeton Ave., Normal Ave., Michigan Ave., Forest Ave., and Bishop
2 St. properties by Imperium, Legion, and Amicus (Category Nos. 39, 42, 46, 49, and 52). He seeks
3 the same documents in connection with the transfer of the Normal Ave. property from Legion to
4 Imperium (Category No. 43). Each of these transactions apparently involves Imperium, Legion, or
5 Amicus, and evidence has been presented to show that funds connected with each of these
6 properties were commingled with those pertaining to the May St. project. Because these documents
7 would establish the ownership interest of these entities—which Plaintiff maintains were managed by
8 Defendant Mineau—in connection with projects for which funds were commingled with those
9 pertaining to the May St. project, they are relevant and discoverable. However, should Defendant
10 Mineau admit that these purchase or transfer transactions occurred as set forth in the request for
11 admission (i.e., Statement Nos. 2, 6, 8, 13, 18, and 22), Plaintiff's need for these documents would
12 effectively be negated. The Court does not see how the payment of a purchase price for one of
13 these properties to some person or entity other than TNT would bear on Plaintiff's desire to trace
14 what happened to the funds that he later provided to TNT in connection with the May St. project.
15 Therefore, if Defendant Mineau admits the corresponding statements of the request for admission,
16 Defendants will be relieved from having to produce these documents.

17 A similar request for production concerns the purchase of the Wyoming St. properties by an
18 entity identified as Wyoming Partners, LLC (Category No. 55). As noted above, evidence has been
19 presented to show that funds pertaining to those properties were commingled with those transferred
20 in connection with the May St. project. The record is not clear as to whether Defendants were
21 involved in the purchase of those properties, any subsequent construction work on those properties,
22 or the sale of those properties. However, because of the commingling of funds, the Court finds that
23 Plaintiff is entitled to seek these documents to ascertain whether Defendants were involved directly
24 or indirectly with that project when the commingling of funds occurred. Defendants must therefore
25 produce the requested documents to the extent that they are within their possession, custody, or
26 control.

1 Plaintiff also asks that Defendants produce the purchase and sale agreements, escrow
2 closing statements, and deeds for the specific transactions described above involving the sale of the
3 Princeton Ave., Normal Ave., Michigan Ave., Forest Ave., and Bishop St. properties by Imperium
4 and Amicus (Category Nos. 40, 44, 47, 50, and 53). The commingling of funds for the May St.
5 project with funds concerning these other properties, together with the lack of adequate accounting
6 records, raises a reasonable possibility that May St. funds were improperly diverted to projects
7 involving these other properties. If that occurred, then Plaintiff could have a claim on proceeds
8 realized from the sale of those properties to the extent that they were received by Defendants
9 directly or indirectly. The requested agreements and closing statements would bear on the extent to
10 which Defendants received sale proceeds, and are therefore discoverable. As explained previously,
11 if Defendant Mineau admits that the copies of deeds pertaining to these sale transactions are
12 genuine, production of those deeds would be obviated. With regard to an identical request for
13 documents concerning the sale of the Wyoming St. properties (Category No. 56), Plaintiff is entitled
14 to all requested documents, for reasons explained above.

15 In addition, Defendants are asked to produce all contracts and invoices for construction work
16 performed on the Princeton Ave., Normal Ave., Michigan Ave., Forest Ave., Bishop St., and
17 Wyoming St. properties (Category Nos. 41, 45, 48, 51, 54, and 57). Those documents reasonably
18 could be expected to identify construction-related draws that would be paid to TNT and the sources
19 of those funds, and reasonably might reveal the extent of Defendants' involvement in transactions
20 and activities involving these other properties.¹⁰ The invoices might also be useful to Plaintiff in
21 tracing the extent to which May St. property funds were used on other projects.¹¹ The Court finds

23 ¹⁰ Defendants observe that these categories are not limited to contracts and invoices concerning TNT and its
24 work, but extend to contractors other than TNT. However, the categories are limited to work performed on the Princeton
25 Ave., Normal Ave., Michigan Ave., Forest Ave., Bishop St., and Wyoming St. properties, all of which are relevant for
26 reasons explained in the text. The extent to which TNT might have used subcontractors to perform work on these
properties is unknown, but payment of other contractors by TNT using funds from account 1855 is relevant to one or more
of Plaintiff's claims, especially in light of the evidence of commingling discussed in the text.

¹¹ Defendants maintain that contracts and invoices will not allow Plaintiff to trace funds from TNT's accounts or to
show that May St. project funds were diverted to other projects. Conceivably, a comparison of funds deposited for specific
projects with expenditures on those specific projects could support an inference that May St. project funds were diverted to
other projects. Alternatively, after reviewing these documents and attempting to trace what happened to May St. project

1 that these documents are relevant to one or more of Plaintiff's claims, and are proportional to the
2 needs of this action. Therefore, Defendants must produce all of these documents.

3 In Category No. 58, Plaintiff asks Defendants to produce "[a]ny and all contracts and
4 agreements between (a) Wyoming Partners LLC and (b) Brian Mineau, Legion Investments, LLC, or
5 any other entity in which Brian Mineau or Legion Investments, LLC have an ownership interest or
6 management authority as an officer, director, officer, member or manager." Plaintiff maintains that
7 Wyoming Partners, LLC, bought and sold the Wyoming St. properties described above, and funds
8 pertaining to those properties were commingled with May St. funds. Through this category, Plaintiff
9 is attempting to ascertain whether Wyoming Partners, LLC, has a business relationship with
10 Defendants, either directly or indirectly. The Court finds that this is a proper subject for discovery in
11 this action, since evidence of such a relationship could implicate them in any improper diversion of
12 May St. funds toward the Wyoming St. properties.

13 In Category No. 59, Plaintiff asks Defendants to produce "[a]ll other contracts and invoices
14 for construction work performed by TNT Complete Facility Care, Inc. on any property owned in
15 whole or in part by Brian Mineau or by any entity in which Brian Mineau or Legion Investments, LLC
16 have an ownership interest." Defendants produced all contracts and invoices for TNT's work on the
17 May St. property, but they object that documents pertaining to TNT's work on other properties is
18 beyond the scope of proper discovery. As explained above, the Court agrees that TNT construction
19 work on the Princeton Ave., Normal Ave., Michigan Ave., Forest Ave., Bishop St., and Wyoming St.
20 properties is discoverable because Plaintiff has presented some evidence that TNT commingled
21 May St. funds with funds pertaining to those other properties. This category effectively seeks
22 documents pertaining to TNT's work on any other property owned by Defendants directly or
23 indirectly. Significantly, TNT's principals—Derek Cole and Todd Hartwell—are identified as
24 witnesses in the parties' joint case conference report. The Court finds that the full extent of TNT's
25 past and present contractual relationships with Defendants is relevant to the credibility of these

26

funds, Plaintiff may argue that the commingling of May St. project funds with funds for other projects precludes such an allocation, and that Defendants are ultimately responsible for the inability to trace or otherwise account for May St. funds.

1 witnesses, and that Plaintiff is therefore entitled to the contracts requested in Category No. 59. With
2 regard to invoices, however, no evidence has been presented to suggest that May St. funds were
3 ever diverted to some other, unidentified property. Moreover, the request contains no temporal
4 limitation, so it would encompass work that was started and completed on properties before the May
5 St. property was even purchased by Legion. Under these circumstances, Defendants are not
6 required to produce the invoices requested in Category No. 59.

7 Plaintiff also seeks an award of the reasonable expenses incurred in bringing this motion.
8 Our rules of civil procedure provide that "[i]f the motion [to compel] is granted in part and denied in
9 part, the court . . . may, after giving an opportunity to be heard, apportion the reasonable expenses
10 for the motion." See NRCP 37(a)(5)(C). In addition, expenses may be awarded in connection with a
11 motion to determine the sufficiency of an objection to a request for admission. See NRCP 36(a)(6).
12 For reasons explained previously, the Court finds that Plaintiff is entitled to an order compelling
13 Defendant Mineau to provide a substantive response to the request for admission, and compelling
14 Defendants to produce most of the documents sought by Plaintiff in his request for production.
15 Under these circumstances, Plaintiff is entitled to an apportioned award of expenses.¹²

16 ACCORDINGLY, *Plaintiff's Second Motion to Compel* should be GRANTED in part, and
17 DENIED in part.

18 IT SHOULD, THEREFORE, BE ORDERED that Defendant Brian Mineau serve upon
19 Plaintiff, without objections and no later than January 24, 2020, a substantive response to the
20 request for admission previously served upon him on September 17, 2019.

21 IT SHOULD FURTHER BE ORDERED that Defendants Brian Mineau and Legion
22 Investments, LLC, produce for inspection and copying by Plaintiff, without objections and no later
23 than January 24, 2020, all documents within their possession, custody, or control that are
24 responsive to Category Nos. 39 through 59 of the request for production previously served upon
25 them on September 17, 2019, to the extent required by and in accordance with this decision.

26 ¹² Plaintiff provided an itemization of the attorney fees incurred in connection with his motion and his reply brief,
and the Court has considered that information in determining the reasonable expenses incurred by Plaintiff.

1 IT SHOULD FURTHER BE ORDERED that with respect to any category of the request for
2 production, if Defendants maintain that one or more responsive documents never existed, no longer
3 exist, or are only within the possession, custody, or control of some other person or entity, then they
4 must serve upon Plaintiff, without objections and no later than January 24, 2020, a written response,
5 under oath, in which they provide this information to Plaintiff (including, as appropriate, an
6 explanation as to why they no longer exist, or an identification of the other person or entity who has
7 possession, custody, or control of the requested documents).

8 IT SHOULD FURTHER BE ORDERED that Defendants pay to Plaintiff the sum of \$2,500, as
9 and for an apportioned award of the reasonable expenses incurred by Plaintiff in connection with this
10 motion.

11 DATED: This 10th day of January, 2020.

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13 
14 WESLEY M. AYRES
15 DISCOVERY COMMISSIONER
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CERTIFICATE OF SERVICE

CASE NO. CV18-00764

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 10th day of January, 2020, I electronically filed the **RECOMMENDATION FOR ORDER** with the Clerk of the Court by using the ECF system.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

Electronically filed with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

MICHAEL L. MATUSKA, ESQ. for JAY KVAM

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

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

Deposited in the Washoe County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada: [NONE]


Danielle Spinella
Administrative Secretary

1 **CODE 2630**

2 GUNDERSON LAW FIRM

3 Austin K. Sweet, Esq.

4 Nevada State Bar No. 11725

5 asweet@gundersonlaw.com

6 Mark H. Gunderson, Esq.

7 Nevada State Bar No. 2134

8 mgunderson@gundersonlaw.com

9 3895 Warren Way

10 Reno, Nevada 89509

11 Telephone: 775.829.1222

12 *Attorneys for Brian Mineau and Legion Investments*

13
14 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
15 **IN AND FOR THE COUNTY OF WASHOE**

16 JAY KVAM,

Case No. CV18-00764

17 Plaintiff / Counterdefendant,

Dept. No. 6

18 vs.

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

22 Defendants / Counterclaimants.
23 _____/

24 **OBJECTION TO RECOMMENDATION FOR ORDER**

25 Defendants / Counterclaimants BRIAN MINEAU ("Mineau") and LEGION
26 INVESTMENTS, LLC ("Legion"), by and through their counsel of record, Austin K. Sweet, Esq.,
27 and Mark H. Gunderson, Esq., file this *Objection* to the *Recommendation for Order*
28 ("Recommendation") submitted by the discovery commissioner on January 10, 2020, concerning
Plaintiff / Counterdefendant JAY KVAM ("Kvam")'s *Second Motion to Compel* ("Motion"). This
Objection is made and based upon NRCP 16.3, the briefing pertaining to the Motion, the pleadings
on file in this case, and any oral argument this court wishes to entertain.

The discovery sought by Kvam relates to other projects in which Defendants were allegedly
involved at or about the same time as the May St. project, and for which the same contractor, TNT
Complete Facility Care Inc. ("TNT"), may have performed work. As explained in Defendants'

1 *Opposition to Plaintiff's Second Motion to Compel* ("Opposition"), this discovery is completely
2 irrelevant to the facts and claims at issue in this case.

3 In his Recommendation¹, the discovery commissioner appears to conflate Defendants and
4 their purported duties with TNT and its purported duties. The Recommendation states that TNT
5 deposited construction funds for the May Street project into its general account, which was used for
6 multiple projects that TNT was working on at that time. Recommendation at 4:7-9. The
7 Recommendation further states that, "Significantly, Defendant Mineau did not maintain a separate
8 bank account for the May St. project, although he represented that May St. project funds would be
9 kept separate from other projects." *Id.* at 4:11-13. The Recommendation goes on to rely heavily on
10 the conclusion that the May St. project funds were comingled with TNT's other projects. However,
11 these statements of fact do not support the Recommendation's conclusions. As acknowledged in the
12 Recommendation, Kvam wired all relevant funds directly to TNT. *Id.* at 3:1-9. Kvam does not allege,
13 and the Recommendation does not conclude, that Mineau ever had care, custody, or control over
14 TNT's bank account or that *Mineau's* alleged failure to maintain a separate bank account for the May
15 St. project had any impact whatsoever on *TNT's* commingling of funds. TNT is not a party to this
16 dispute, and there is simply no connection whatsoever between TNT's commingling of funds and
17 Kvam's claims against Mineau or Legion. Defendants therefore object to the Recommendation's
18 conclusion that, because *TNT* comingled funds, then Kvam is entitled to discovery concerning
19 *Defendants'* unrelated business and financial records.

20 Defendants also object to the Recommendation's conclusion that the discovery is warranted
21 because Kvam "is entitled to conduct reasonable discovery into transactions involving [TNT's
22 account] to see whether he can determine how the May St. funds were used." *Id.* at 5:7-8. Defendants
23 do not dispute that Kvam was entitled to conduct reasonable discovery into transactions involving
24 TNT's bank account. Indeed, Kvam subpoenaed substantial documents from TNT and TNT's
25 banking institutions to do just that, and Defendants did not object to such discovery. However, as
26 explained in Defendants' Opposition, the discovery at issue here has nothing to do with TNT's bank

27 ¹ Various statements of fact are made throughout the Recommendation. The discovery commissioner
28 expressly indicated that these statements were recitations of the assertions made by Kvam and are not
findings of fact. Thus, although Defendants adamantly dispute many of these allegations, such issues
need not be addressed here.

1 account. Rather, Kvam seeks discovery concerning the purchase price and terms for various other
2 properties, construction contracts and invoices related to those properties, and the sales price and
3 terms for those properties. If produced, the requested documents would not show construction-related
4 draws, sources of funds used to pay the contractors, amounts paid by TNT to subcontractors, or other
5 payments to or expenditures from TNT's bank account. Thus, even accepting the discovery
6 commissioner's conclusion that Kvam "is entitled to conduct reasonable discovery into transactions
7 involving [TNT's account] to see whether he can determine how the May St. funds were used," the
8 discovery at issue in the Motion is not reasonably related to transactions involving TNT's general
9 operating account. Such discovery is therefore irrelevant and should not be allowed.

10 Finally, the Recommendation allows discovery which is, at the very least, premature. The
11 discovery commissioner determined that "to the extent that May St. funds were improperly used on
12 one or more of the other TNT projects, the involvement of Defendants in those projects would be
13 relevant to Plaintiff's claims for breach of the covenant of good faith and fair dealing, fraud,
14 conversion, and Nevada RICO violations." Recommendation at 5:8-11. Similarly, the discovery
15 commissioner determined that "if [May St. funds were improperly diverted to projects involving these
16 other properties], then Plaintiff could have a claim on proceeds realized from the sale of those
17 properties to the extent that they were received by Defendants directly or indirectly." Id. at 8:6-9.
18 Thus, documents which would bear on the extent to which Defendants received sale proceeds are
19 discoverable. Id. at 8:9-10. This conclusion, however, puts the proverbial cart before the horse. By
20 acknowledging that such information is only relevant "if" and "to the extent that" May St. funds were
21 improperly used on one or more of the other TNT projects, the discovery commissioner is inherently
22 acknowledging that such information is irrelevant unless project funds were improperly diverted.
23 Since Kvam has not uncovered any evidence whatsoever that any of the May St. project funds were
24 improperly diverted to other projects, discovery into other entities' business and financial records
25 concerning other projects should not be allowed. At the very least, such discovery is premature at

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1 this time and should be deferred until such time, if ever, that Kvam is able to establish the condition
2 precedent to the relevance of this discovery: that May St. project funds were improperly diverted to
3 these other projects.

4 For these reasons, Defendants object to the Recommendation pursuant to NRCP 16.3.

5 **AFFIRMATION**

6 The undersigned does hereby affirm that the preceding document, **OBJECTION TO**
7 **RECOMMENDATION FOR ORDER**, filed in the Second Judicial District Court of the State of
8 Nevada, County of Washoe, does not contain the social security number of any person.

9 DATED this 13 day of January, 2020.

10 GUNDERSON LAW FIRM

11
12
13 By: 

Austin K. Sweet, Esq.

Nevada State Bar No. 11725

Mark H. Gunderson, Esq.

Nevada State Bar No. 2134

3895 Warren Way

Reno, Nevada 89509

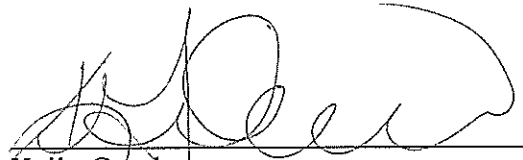
Telephone: 775.829.1222

*Attorneys for Brian Mineau and Legion
Investments*

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of the law office of Gunderson Law
3 Firm, and that on the 13 day of January, 2020, I electronically filed a true and correct copy of the
4 **OBJECTION TO RECOMMENDATION FOR ORDER**, with the Clerk of the Court by using
5 the electronic filing system which will send a notice of electronic filing to the following:

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

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13 Kelly Gunderson
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**DATE, JUDGE
OFFICERS OF
COURT PRESENT****APPEARANCES-HEARING****CONT'D TO**

1/14/2020
HONORABLE
LYNNE K. SIMONS
DEPT. NO. 6
J. Martin
(Clerk)
C. Hummel
(Reporter)

PRE-TRIAL CONFERENCE

Plaintiff Jay Kvam was present with counsel Michael Matuska, Esq. Defendant Brian Mineau was present with counsel Austin Sweet, Esq.

COURT reviewed the procedural history of the matter and indicated it would like to set a hearing on Pre-Trial Motions.

Counsel Sweet stated the only remaining claim included in the Counterclaim is declaratory relief.

Counsel Matuska stated the Defendants have conceded the first cause of action, declaration of joint venture, in the Motion for Summary Judgment. Counsel Matuska further stated that the joint venture property has been sold and the winding up would be limited to the cash assets and would possibly be resolved prior to Trial. Counsel Matuska stated the cash assets have been deposited with the Clerk of the Court.

COURT directed the parties to be prepared to identify which defenses would not be proceeding at the subsequent Pre-Trial Conference.

Counsel Sweet requested the defenses be discussed after the Court renders its decision on the Motion for Summary Judgment.

Counsel Matuska argued the declaratory relief sought in the counterclaim is a mirror of the Plaintiffs relief and therefore does not add or distract from what is at issue in the matter.

Discussion ensued regarding discovery.

Counsel Sweet stated the deposition of Mr. Kvam is scheduled for January 21, 2020, and that is the only remaining discovery. Counsel Sweet indicated he has filed an objection to the Discovery Commissioner's recommendation and argued the documents subject to that recommendation are not relevant.

Respective counsel indicated they have disclosed their expert witnesses and rebuttal expert witnesses.

COURT indicated the pre-trial discovery cut off would be February 1, 2020, all objections cut off is February 17, 2020, submissions deadline is February 1, 2020, and the deadline for submissions of Motions in Limine is February 16, 2020; Trial Statements due no later than seven (7) days prior to Trial.

Counsel Matuska stated he anticipates using a video deposition of an out of state witness.

COURT directed the parties to meet and confer regarding video depositions no later than February 1, 2020; any objections remaining to the video depositions should be presented to the Court no later than February 16, 2020; Counsel shall provide transcripts of video depositions and clearing notate the objections to the Court; Respective counsel will review any edited videos no later than February 26, 2020.

Discussion ensued regarding Jury selection.

COURT directed Respective counsel to meet and confer regarding Jury Instruction no later than five (5) days prior to Trial; Jury Instructions should include any deviation in authority and be presented to the Court in Word format and Arial 12 point font.

Discussion ensued regarding the use of technology during Trial.

**DATE, JUDGE
OFFICERS OF
COURT PRESENT****APPEARANCES-HEARING****CONT'D TO**

1/14/2020
HONORABLE
LYNNE K. SIMONS
DEPT. NO. 6
J. Martin
(Clerk)
C. Hummel
(Reporter)

Counsel Sweet stated the parties had retained a mediator however, after review of the matter the mediator determined the matter would not benefit from mediation and canceled the scheduled mediation.

Counsel Matuska stated he intends to play the majority of the video deposition. Further discussion ensued regarding technology and Jury Instructions.

COURT directed Respective counsel to avoid filing countermotions and requested separate motion work for issues arising; Court admonished Respective counsel regarding the tone of their communications with each other.

COURT ORDERED Motion for Summary Judgment set for hearing on February 11, 2020, at 9:30 a.m.; final Pre-Trial Conference and Pre-Trial Motions to be heard February 21, 2020, at 9:30 a.m.; Parties shall participate in a Settlement Conference with a mediator or a Judicial Officer prior to Trial and all parties are ordered to be present and participate in the Settlement Conference.

1 CODE NO. 3370
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5 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
6 IN AND FOR THE COUNTY OF WASHOE
7

8 JAY KVAM,

9 Plaintiff,

Case No. CV18-00764

Dept. No. 6

10 vs.

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

14 Defendants.
15 _____/

16 **ORDER AFTER PRETRIAL CONFERENCE**

17 The Court held a pretrial conference in this matter on January 14, 2020. Plaintiff Jay
18 Kvan was present with his counsel Michael L. Matuska, Esq. Defendant Brian Mineau was
19 present with his counsel Austin K. Sweet, Esq.

20 A jury trial is set in this matter for March 2, 2020. After discussion regarding the
21 status of the case, and certain other oral rulings were made, and good cause appearing
22 therefor,
23

24 IT IS HEREBY ORDERED:

25 1. The parties shall participate in a mandatory settlement conference before a
26 judicial officer of this Court, or a private mediator. The settlement conference or mediation
27 shall occur after the Court's ruling on Defendants' Motion for Summary Judgment and
28 before the date set for trial.

1 2. Any insurance carrier that is a party or is contractually required to defend or to pay
2 damages, if any, assessed within its policy limits in this case must have a fully authorized
3 settlement representative present in person and NOT by telephone. Such representative
4 must have final settlement authority to commit the carrier to pay, in the representative's own
5 discretion, an amount up to policy limits without any further internal approvals required. The
6 purpose of this requirement is to have in attendance a representative who has both the
7 authority to exercise his or her own discretion, and the realistic freedom to exercise such
8 discretion without negative consequences, in order to settle the case during the settlement
9 conference/mediation without consulting someone else who is not present.
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12 3. Counsel appearing at the settlement conference or mediation without his client
13 and/or insurance company representatives, authorized as described above, will cause the
14 settlement conference/mediation to be cancelled or rescheduled. The non-complying party,
15 attorney, or both, may be assessed the costs and expenses incurred by other parties and
16 the Court as a result of such cancellation, as well as any additional sanctions deemed
17 appropriate by the Court, including but not limited to contempt proceedings.
18

19 Dated this 15th day of January, 2020.

20
21 
22 DISTRICT JUDGE
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CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT;
that on the 15th day of January, 2020, I electronically filed the foregoing with the Clerk
of the Court system which will send a notice of electronic filing to the following:

AUSTIN K. SWEET, ESQ.

MICHAEL L. MATUSKA, ESQ.

MARK GUNDERSON, ESQ.

And, I deposited in the County mailing system for postage and mailing with the
United States Postal Service in Reno, Nevada, a true and correct copy of the attached
document addressed as follows:

Hadi Bae

CODE: 2490

Michael L. Matuska, Esq. SBN 5711
MATUSKA LAW OFFICES, LTD.
2310 South Carson Street, Suite 6
Carson City, NV 89701
(775) 350-7220
mlm@matuskalawoffices.com

Attorneys for Plaintiff

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

JAY KVAM,

Plaintiff,

Case No. CV18-00764

v.

Dept. No. 6

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

Defendants.

MOTION FOR LEAVE TO EXCEED PAGE LIMIT

Plaintiff, JAY KVAM, by and through his counsel of record, Matuska Law Offices, Ltd., Michael L. Matuska, pursuant to Section VI (C) of the Supplemental Pretrial Order (Trans. # 7317747) entered June 12, 2019, hereby requests leave to file Plaintiff's Opposition to Motion for Summary Judgment in excess of the page limit. Kvam's Opposition is thirty-five (35) pages. Good cause exists for an opposition brief of such length, in light of (1) the excess length of the Motion for Summary Judgment filed by Defendants, and (2) the requirement that any opposition to the Motion present the specific evidence on all eleven (11) causes of action alleged the Second Amended Complaint. Kvam's Opposition is supported by 47 exhibits and argument on all eleven (11) causes of action.

1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
2 **MOTION FOR LEAVE TO EXCEED PAGE LIMIT**

3 Defendants filed their Motion for Summary Judgment in the present case on January 6,
4 2020 (the "Motion"). The Motion, exclusive of exhibits, is 26 pages in length. The Motion, in
5 numerous places, alleges a lack of evidence to support Plaintiff's claims.

6 The Court's Pretrial Order entered June 3, 2019, at page 8, Section VI (C), limits
7 opposition pleadings to 20 pages in length, provides for the filing of opposition pleadings of up to
8 25 pages in length which are accompanied by a certification of counsel that good cause exists for a
9 pleading of such length, and requires prior leave for the filing of pleadings exceeding 25 pages.

10 Here, the Motion filed January 6, 2020 is 26 pages in length, and casts the burden on
11 Plaintiff to respond by citing the evidence that exists precluding summary judgment in favor of the
12 Defendants.

13 Plaintiff therefore respectfully requests that he be granted leave to file an opposition brief
14 to the Motion that exceeds 25 pages in length. Kvam's Opposition is thirty-five (35) pages. Good
15 cause exists for an opposition brief of such length, in light of (1) the excess length of the Motion
16 for Summary Judgment filed by Defendants, and (2) the requirement that any opposition to the
17 Motion present the specific evidence on all eleven (11) causes of action alleged the Second
18 Amended Complaint. Kvam's Opposition is supported by 47 exhibits and argument on all eleven
19 (11) causes of action.

20 **AFFIRMATION**

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

23 Dated this 16th day of January, 2020.

24 MATUSKA LAW OFFICES, LTD.

25 

26 By:

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

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Matuska Law Offices, Ltd. and that on the 16th day of January, 2020, I served a true and correct copy of the preceding document entitled **MOTION FOR LEAVE TO EXCEED PAGE LIMIT** as follows:

Austin K. Sweet, Esq.
GUNDERSON LAW FIRM
3895 Warren Way
Reno, NV 89509
asweet@gundersonlaw.com

☒ **BY CM/ECF:** I electronically filed a true and correct copy of the above-identified document with the Clerk of the Court by using the electronic filing system which will send a notice of electronic filing to the person(s) named above.

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

☐ **BY EMAIL:** (as listed above)

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

☐ **BY FACSIMILE:**

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

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

/s/ SUZETTE TURLEY
SUZETTE TURLEY