

IN THE SUPREME COURT OF THE STATE OF NEVADA

In the matter of:

JAY KVAM,

Appellant,

vs.

BRIAN MINEAU; and LEGION
INVESTMENTS, LLC,

Respondents.

Electronically Filed
Jun 10 2022 04:43 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court Case No. 84443

District Court Case No. CV18-00764

JOINT APPENDIX

VOLUME 13

Pages 1705 - 1947

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

APPELLANT'S APPENDIX ALPHABETICAL INDEX				
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94.	Reply to Opposition to Motion to Dismiss Counterclaim, or Alternatively, for a More Definite Statement	07/17/18	1	63-72
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109.	Transcript – Oral Arguments (Motion for Summary Judgment) February 11, 2020	02/11/20	15	2276-2326
110.	Transcript - Pretrial Conference January 14, 2020 (w/correction page) [Note: page 6 line 21 was corrected to reflect that the speaker was Mr. Matuska]	01/14/20	15	2232-2275
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112.	Trial Statement (Defendants)	02/24/20	10	1660-1677
113.	Trial Statement (Plaintiff)	02/26/20	10	1679-1704

1 **CODE 4050**

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 **STIPULATION TO VACATE TRIAL**

25 In light of the Court's indicated rulings at the pretrial conference conducted on February 27,
26 2020, Plaintiff / Counterdefendant JAY KVAM ("Kvam") and Defendants / Counterclaimants
27 BRIAN MINEAU ("Mineau") and LEGION INVESTMENTS, LLC ("Legion"), by and through their
28 respective counsel of record, stipulate and agree to vacate and continue the trial in this matter,

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1 currently set to commence March 2, 2020. To the extent necessary, the parties will contact the Court
2 within ten (10) days to set a new trial date.

3 **AFFIRMATION**

4 The undersigned does hereby affirm that the preceding document, **STIPULATION TO**
5 **VACATE TRIAL**, filed in the Second Judicial District Court of the State of Nevada, County of
6 Washoe, does not contain the social security number of any person.

7 DATED this 27 day of February, 2020.

DATED this 27th day of February, 2020.

8 GUNDERSON LAW FIRM

MATUSKA LAW OFFICES, LTD.

9
10 By:



Austin K. Sweet, Esq.
Nevada State Bar No. 11725
Mark H. Gunderson, Esq.
Nevada State Bar No. 2134
*Attorneys for Brian Mineau and
Legion Investments*


By:

/s/Michael Matuska

Michael L. Matuska, Esq.
Nevada State Bar No. 5711
Attorney for Jay Kvam

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Michael Matuska, Esq.
Matuska Law Offices, Ltd.
2310 South Carson Street, Suite 6
Carson City, Nevada 89701
Attorney for Jay Kvam


Kelly Gunderson

1 **CODE: 4105**

2 Michael L. Matuska, Esq. SBN 5711
3 MATUSKA LAW OFFICES, LTD.
4 2310 South Carson Street, Suite 6
5 mlm@matuskalawoffices.com
6 Carson City, NV 89701
7 (775) 350-7220

8 Attorneys for Plaintiff

9
10 **THE SECOND JUDICIAL DISTRICT COURT OF NEVADA**
11 **IN AND FOR THE COUNTY OF WASHOE**

12 JAY KVAM,

13 Plaintiff,

Case No. CV18-00764

14 v.

Dept. No. 6

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

18 Defendants.

19 **SUPPLEMENT TO PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER**
20 **AFFIRMING DISCOVERY COMMISSIONER'S RECOMMENDATION, ENTERED MAY**
21 **16, 2019; FOR DISCOVERY SANCTIONS; AND FOR OTHER RELIEF**

22 COMES NOW Plaintiff, JAY KVAM, by and through his counsel of record, Matuska
23 Law Offices, Ltd., Michael L. Matuska, Esq., hereby provides this Supplement to the
24 request for an order to show cause that was included as one of the alternative forms of
25 relief in the Motion For Reconsideration Of Order Affirming Discovery Commissioner's
26 Recommendation, Entered May 16, 2019; For Discovery Sanctions; And For Other Relief
27 that was filed on January 24, 2020 (Trans. #7704237). Defendant Brian Mineau filed his
28 Opposition on February 7, 2020 (Trans. # 7729098) and Plaintiff filed his Reply on
February 9, 2020 (Trans. # 7730082). The matter is therefore fully briefed.

However, at the hearing on February 27, 2020, the court questioned whether the
Motion for Order to Show Cause had to be filed separately pursuant to WDCR 10, at

1 which time Defendant's counsel insisted, for the first time, that it had to be filed as a
2 separate motion. In fact, WDCR 10 expressly allows alternative requests to be included
3 in the same motion. "3. Motion, Opposition, Reply. (a) Any motion, opposition, reply,
4 etc., must be filed as a separate document unless it is pleaded in the alternative." WDCR
5 10.3. Plaintiff therefore maintains that the request for an order to show cause was
6 properly included in the pending motion and has been fully briefed and submitted for
7 decision.

8 In this case, the pending motion, as filed, requests the production of Mineau's tax
9 returns as one of the forms of relief. Similarly, one of the results from the hearing on the
10 order to show cause may be for Mineau to produce his tax returns. The request for an
11 order to show cause is therefore inseparable from the rest of the pending motion. It does
12 not need to be separately stated, nor can it be separately stated without incurring
13 complete redundancy or omissions.

14 Also, this Court does not need a motion for Kvam to hold Mineau accountable for
15 false statements in his declarations and discovery responses. "If a contempt is
16 committed in the immediate view and presence of the court or judge at chambers, the
17 contempt may be punished summarily." NRS 22.030(1). "When the contempt is not
18 committed in the immediate view and presence of the court or judge, a warrant of
19 attachment may be issued to bring the person charged to answer, or, without a previous
20 arrest, a warrant of commitment may, upon notice, or upon an order to show cause, be
21 granted . . ." NRS 22.040. Mineau's false statements were presented to the court and
22 judge at chambers; as such the contempt may be punished summarily. To the extent an
23 order to show cause is necessary, it shall be issued by the court and does not require a
24 motion from Kvam. However, Kvam's request for an order to show cause was fully
25 briefed and is pending. If Mineau cannot substantiate the facts alleged in Paragraph 25
26 of his Declaration, he should be held in contempt of court and also referred for criminal
27 perjury charges pursuant to NRS 22.120.

28 ///

AFFIRMATION

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

Dated this 27th day of February, 2020.

MATUSKA LAW OFFICES, LTD.

Michael L. Matuska

By:

MICHAEL L. MATUSKA, SBN 5711
Attorneys for Plaintiff, JAY KVAM,
individually and derivatively on behalf of the
unincorporated joint venture identified as
7747

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Matuska Law Offices, Ltd. and that on the 27th day February, 2020, I served a true and correct copy of the preceding document entitled **SUPPLEMENT TO PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER AFFIRMING DISCOVERY COMMISSIONER'S RECOMMENDATION, ENTERED MAY 16, 2019, AND FOR DISCOVERY SANCTIONS; AND FOR OTHER RELIEF** 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

I:\Client Files\Litigation\Kvam\v. Mineau\Pldgs\Motion to Reconsider\Motion (Supp).doc

1 **CODE 2645**

2 GUNDERSON LAW FIRM

3 Austin K. Sweet, Esq.

4 Nevada State Bar No. 11725

asweet@gundersonlaw.com

5 Mark H. Gunderson, Esq.

Nevada State Bar No. 2134

6 mgunderson@gundersonlaw.com

3895 Warren Way

7 Reno, Nevada 89509

Telephone: 775.829.1222

Attorneys for Brian Mineau and Legion Investments

8
9 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
10 **IN AND FOR THE COUNTY OF WASHOE**

11 JAY KVAM,

Case No. CV18-00764

12 Plaintiff / Counterdefendant,

Dept. No. 6

13 vs.

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

16 Defendants / Counterclaimants.
17 _____/

18 **OPPOSITION TO PLAINTIFF'S FIRST MOTION IN LIMINE**

19 Defendants / Counterclaimants BRIAN MINEAU ("Mineau") and LEGION
20 INVESTMENTS, LLC ("Legion"), by and through their counsel of record, Austin K. Sweet, Esq.,
21 and Mark H. Gunderson, Esq., submit this Opposition to *Plaintiff's First Motion in Limine* ("Motion")
22 filed by Plaintiff / Counterdefendant JAY KVAM ("Kvam"). This Opposition is made and based
23 upon the pleadings on file in this case, and the following memorandum of points and authorities.

24 ///

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28 ///

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Legion and Mineau acknowledge that, although a written order is not yet entered, this Court
3 orally indicated at the pretrial conference on February 27, 2020, that the *Motion for Summary*
4 *Judgment* will be granted in substantial part. Consequently, Kvam's counsel indicated that he is
5 unlikely to proceed to trial on any remaining claims and the parties stipulated to vacate the trial date.
6 Kvam's Motion has therefore likely been rendered moot. However, in the event that trial does
7 proceed at some point on some issue, Legion and Mineau submit this opposition to ensure they are
8 not deemed to have conceded the merits of the Motion. Kvam's Motion should be denied as untimely
9 and seeking improper relief.

10 Pursuant to this Court's *Supplemental Uniform Pretrial Order*, entered on June 12, 2019,
11 "[a]ll motions in limine, except motions in limine to exclude an expert's testimony, must be submitted
12 for decision no later than fifteen 15 calendar days before trial." Trial was set to commence March 2,
13 2020, so motions in limine were required to be submitted for decision by no later than February 16,
14 2020. The Motion was not submitted for decision at least fifteen calendar days before trial and is
15 therefore untimely.

16 The Motion must also be denied as seeking improper relief, especially given that the jury
17 demand has been withdrawn and this matter was set to proceed as a bench trial. The Motion generally
18 seeks to preclude Legion and Mineau from "introducing offers of compromise as evidence at trial,"
19 but Kvam fails to identify any specific evidence he seeks to exclude. In light of the fact that this is a
20 bench trial, not a jury trial, there is legitimate purpose served by addressing Kvam's broad request
21 through pretrial motion practice instead of during trial when the objectionable evidence is offered.

22 NRS 48.105 prohibits a party from furnishing evidence of an offer to compromise to prove
23 liability, but allows the admission of such evidence for other purposes. Legion and Mineau have
24 offered certain demand letters from Kvam and his counsel to show that Legion and Mineau attempted
25 to assign the Property to Kvam, as required by the Terms of Agreement, but that Kvam refused, and
26 that Kvam instructed Legion and Mineau to sell the Property. Such evidence is not rendered
27 inadmissible under NRS 48.105. By generally seeking to exclude "offers of compromise" at trial,
28 Kvam seems to seek an improper order from this Court expanding the scope of NRS 48.105 into a

1 blanket prohibition on the admissibility of offers of compromise for any purpose. This Court cannot,
2 and should not, enter a blanket order precluding Legion and Mineau from “introducing offers of
3 compromise as evidence at trial.”

4 Finally, Kvam’s Motion should be denied as improperly one-sided. The Motion seeks to
5 preclude Legion and Mineau from introducing offers of compromise as evidence at trial while
6 apparently allowing Kvam to do so. Indeed, Kvam has attached ten (10) letters to his Motion, all of
7 which he claims contains offers of compromise, and all of which he apparently plans to introduce as
8 evidence at trial. Kvam is not entitled to a broad order generally precluding only Legion and Mineau
9 from introducing offers of compromise as evidence at trial while still allowing Kvam to introduce
10 such evidence.

11 Kvam’s Motion is untimely and seeks improper relief. Rather than addressing any specific
12 evidence, Kvam seeks a blanket ruling from this Court which is one-sided, inconsistent with Nevada
13 law, and entirely unnecessary in a bench trial. Any objections the parties wish to make under NRS
14 48.105 should be made at trial when such evidence is offered. The Motion should be denied.

15 **AFFIRMATION**

16 The undersigned does hereby affirm that the preceding document, filed in the Second Judicial
17 District Court of the State of Nevada, County of Washoe, does not contain the social security number
18 of any person.

19 DATED this 28 day of February, 2020.

20 GUNDERSON LAW FIRM

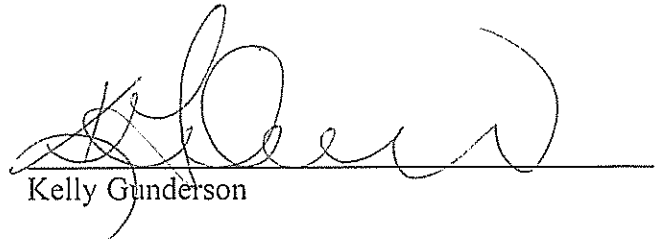
21
22
23 By: 

24 Austin K. Sweet, Esq.
25 Nevada State Bar No. 11725
26 Mark H. Gunderson, Esq.
27 Nevada State Bar No. 2134
28 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 28 day of February, 2020, I electronically filed a true and correct copy of
4 the **OPPOSITION TO PLAINTIFF'S FIRST MOTION IN LIMINE**, with the Clerk of the Court
5 by using 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
Carson City, Nevada 89701
Attorney for Jay Kvam

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12 Kelly Gunderson
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1 **CODE: 3790**

2 Michael L. Matuska, Esq. SBN 5711
3 MATUSKA LAW OFFICES, LTD.
4 2310 South Carson Street, Suite 6
5 Carson City, NV 89701
6 Attorneys for Plaintiff

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

JAY KVAM,

Plaintiff,

v.

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

Defendants.

Case No. CV18-00764

Dept. No. 6

PLAINTIFF'S REPLY TO OPPOSITION TO FIRST MOTION IN LIMINE

COMES NOW Plaintiff, JAY KVAM, by and through his counsel of record, Matuska Law Offices, Ltd., Michael L. Matuska, Esq., and hereby files this Reply to Defendants Brian Mineau and Legion Investments, LLC's Opposition to Plaintiff's First Motion in Limine.

1. Mineau's concern about timing is moot.

Mineau's concern about the timing of Kvam's First Motion in Limine is moot in light of the vacated trial date. Mineau further concedes that Kvam could still raise the objections at trial. (Opposition at 2:19-21). Moreover, Mineau's argument pre-supposes that Kvam and his counsel could have anticipated that Mineau would try to introduce the various exchanges between counsel on this case as evidence at trial, including offer letters that were exchanged after this case was filed. This case was filed on April 12, 2018 after Mineau's attorney asserted on March 8, 2018 that "Mr. Mineau, Mr. Spinola and Legion have complied with the terms of the Agreement . . ." (Motion Ex. "3"),

1 admitted on March 15, 2018 that "The project never had an anticipated completion date
2 and still does not have an anticipated completion date." (Motion Ex."6"), asserted on April
3 5, 2018 that "No aspect of NRS Chapter 87 applies to this dispute" (Motion Ex. "9") and
4 refused multiple requests for information, documents and an accounting (Motion Exs. "4",
5 "5", "7"). Kvam's counsel promptly filed the First Motion in Limine on February 14, 2020
6 after seeing the above referenced letters listed as #27 Mineau's Pre-Trial Disclosures
7 that were filed on January 31, 2020 along with another letter from Kvam's counsel dated
8 September 19, 2018. (See Kvam's First Motion in Limine Ex. "10"). The September 19,
9 2018 letter from Kvam's counsel was a response to a September 18, 2018 letter from
10 Mineau's counsel which was not previously listed. A redacted version of that letter is
11 provided herewith as Ex. "12." That letter is labeled CONFIDENTIAL SETTLEMENT
12 OFFER. This is an indication that Mineau's attorney did not intend for this letter to be
13 used as evidence, and neither should Kvam's response.

14 **2. The offer letters are not relevant.**

15 Mineau did not address Kvam's relevancy objection. "Relevant evidence" means
16 evidence having any tendency to make the existence of any fact of consequence to the
17 determination of the action more or less probable than it would be without the evidence.
18 NRS 48.015. For the prejudicial effect of evidence to substantially outweigh its probative
19 value, "the evidence must unfairly prejudice an opponent, typically by appealing to the
20 emotion and sympathetic tendencies of a jury, rather than the jury's intellectual ability to
21 evaluate evidence." *Krause, Inc. v. Little*, 117 Nev. 929, 935, 34 P.3d 566, 570 (2001). In
22 this case, Mineau is trying to prejudice the court by arguing that Kvam should be denied
23 recovery because he acted unreasonably in rejecting an offer that was made after the
24 case was filed. Offer letters exchanged by counsel after a case is filed are not admissible
25 because they are not relevant to any facts in dispute. Although Kvam is happy to attend
26 an evidentiary hearing to determine if the offer was made in good faith and to explain his
27 reasonableness in rejecting the offer, he is not required to do so and Mineau's entire line
28 of argument is improper. Suffice it to say that to this day Mineau has not explained why

1 Kvam should have been the one to sell the Property instead of Mineau.

2 Mineau tries to avoid the relevancy problem by arguing that NRS 48.105 only
3 prohibits the admission of offers of compromise to prove liability but allows the admission
4 of offers of compromise for other purposes. Essentially, Mineau interprets NRS 48.105
5 as a shield that prohibits a claimant from introducing offers of compromise from a
6 defendant to prove liability but allows the defendant to introduce offers of compromise as
7 a sword to defeat the claim of liability. NRS 48.105 says the opposite. Offers of
8 compromise are inadmissible "to prove liability for or invalidity of the claim or its amount."
9 NRS 48.105(1)(b) (emphasis added). As such, offers of compromise are inadmissible
10 whether offered in support of the claim or the defense thereof.

11 Mineau attempts to avoid the plain language of NRS 48.105 when he explains that
12 he wants to submit offers of compromise "to show that Legion and Mineau attempted to
13 assign the Property to Kvam, as required by the Terms of Agreement." This is a direct
14 reference to the September 18, 2018 letter from Mineau's counsel (Ex. "12") and creates
15 the same problem. Mineau is attempting to admit offers of compromise to explain why he
16 should not be held liable on Kvam's claims. It does not help Mineau to point to the
17 exceptions in NRS 48.105(2). Those exceptions are limited to admitting offers of
18 compromise for purposes other than liability "such as proving bias or prejudice of a
19 witness, negating a contention of undue delay, or proving an effort to obstruct a criminal
20 investigation or prosecution." Mineau is trying to admit offers of compromise as part of
21 his case-in-chief on the issue of liability. That is not permitted.

22 Ironically, the letters regarding offers of compromise do not help Mineau's case.
23 Although Mineau tries to bootstrap the offers of compromise to the Terms of Agreement,
24 the Terms of Agreement merely states: "Initial purchase is funded by Jay Kvam, who is
25 there by assigned any remedies due should the transaction fail in any way." This clause
26 is for Kvam's protection, not Mineau's. Although Mineau keeps raising this issue, he has
27 failed to provide any points and authorities to support his argument that Kvam is denied
28 recovery if he declines to accept an offer for the assignment of an unfinished, distressed

1 property in Chicago that was made after the case was filed. Likewise, although Mineau
2 wants the court to rule that accepting this property was Kvam's only recourse or that this
3 offer somehow limits Mineau's liability, Mineau has never provided any points and
4 authorities that would support such a conclusion.

5 Mineau has never even identified which of Kvam's causes of action would be
6 affected by these various offer letters. Mineau's inchoate theory, even if correct, would
7 not offer a defense to the various claims for equitable relief or the tort claims, including
8 tortious breach of the covenant of good faith, which do not require a breach of contract.
9 "We said in *Hilton Hotels v. Butch Lewis Productions*, 107 Nev. 226, 808 P.2d 919
10 (1991), that 'even though' there was no breach of contract, a plaintiff 'may still be able to
11 recover damages for breach of the implied covenant of good faith and fair dealing.' *Id.* at
12 232, 808 P.2d at 922 . . . Under the implied covenant, each party must act in a manner
13 that is faithful 'to the purpose of the contract and the justified expectations of the other
14 party.'" *Morris v. Bank of America Nevada*, 110 Nev. 1274, 866 P.2d 454 at fn. 2 (1994)
15 (quoting *Hilton v. Butch Lewis Productions*, 107 Nev. 226, 234, 808 P.2d 919, 923
16 (1991)).¹ Good faith is a question of fact. *Consol. Generator-Nevada, Inc. v. Cummins*
17 *Engine Co.*, 114 Nev. 1304, 971 P.2d 1251 (1998). As such, a determination of good
18 faith is not appropriate for summary judgment.

19 3. Conclusion

20 Mineau never assigned any rights. If he was truly obligated to assign rights under
21 the Terms of Agreement, then he should have done so before Kvam filed the complaint.
22 Rather, he waited until after the case filed and submitted an offer that was conditioned on
23 a release from Kvam. The fact that he conditioned an assignment on a release is
24 evidence that Mineau agrees that Kvam has recourse beyond any such assignment.

25
26
27 ¹ "Dynamic Duo, Lewis and King, under the implied covenant of good faith and fair dealing, had a duty to
28 promote the Hilton events in a fair manner and not to manipulate who would be or who would not be the
IBF champion and so advance their own interests in a manner that would compromise Hilton's benefits
under the contract." *Hilton Hotels Corp. v. Butch Lewis Productions, Inc.*, 107 Nev. at 234, 808 P.2d at
923.

1 Offers of compromise are not admissible, including the letters exchanged by
2 counsel after the case filed. To the extent the court decides otherwise, the entire chain of
3 letters should be admitted.

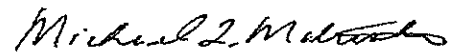
4 **AFFIRMATION**

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

7 Respectfully submitted,

8 Dated this 4th day of March, 2020.

9 MATUSKA LAW OFFICES, LTD.

10 

11 By:

12 MICHAEL L. MATUSKA, SBN 5711
13 Attorneys for Plaintiff, JAY KVAM
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Matuska Law Offices, Ltd. and that on the 4th day March, 2020, I served a true and correct copy of the preceding document entitled **PLAINTIFF'S REPLY TO OPPOSITION TO FIRST MOTION IN LIMINE** as follows:

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

☐ **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 E-MAIL OR ELECTRONIC TRANSMISSION:** 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 named 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

Exhibit Index

PLAINTIFF'S REPLY TO OPPOSITION TO FIRST MOTION IN LIMINE

EXHIBIT	DOCUMENT	NO. OF PAGES
1	Jay Kvam's letter of December 31, 2017 to Brian Mineau	3
2	Michael Matuska's letter of February 16, 2018 to Brian Mineau	3
3	Austin Sweet's letter of March 8, 2018 to Michael Matuska	1
4	Michael Matuska's letter of March 9, 2018 to Austin Sweet	1
5	Michael Matuska's letter of March 14, 2018 to Austin Sweet	2
6	Austin Sweet's letter of March 15, 2018 to Michael Matuska with redaction	1
7	Michael Matuska's letter of March 26, 2018 to Austin Sweet	1
8	Michael Matuska's letter of April 18, 2018 to Austin Sweet with redaction	2
9	Austin Sweet's letter of April 5, 2018 to Michael Matuska with redaction	1
10	Michael Matuska's letter of September 19, 2018 to Austin Sweet	1
11	Michael Matuska's letter of November 28, 2018 to Austin Sweet	1
12	Austin Sweet's letter of September 18, 2018 to Michael Matuska	2

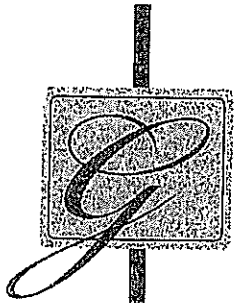
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Jacqueline Bryant
Clerk of the Court
Transaction # 7774210 : csulezic

Exhibit 12

**AUSTIN SWEET'S LETTER OF SEPTEMBER 18, 2018
TO MICHAEL MATUSKA**
(Plaintiff's Reply to Opposition to First Motion in Limine)

Exhibit 12

**AUSTIN SWEET'S LETTER OF SEPTEMBER 18, 2018
TO MICHAEL MATUSKA**
(Plaintiff's Reply to Opposition to First Motion in Limine)



Gunderson
Law Firm

From the Desk of:
Austin K. Sweet, Esq.
asweet@gundersonlaw.com

September 18, 2018

*Via Email – mlm@matuskalawoffices.com
and U.S. Mail:*

Michael L. Matuska, Esq.
2310 South Carson Street, #6
Carson City, NV 89701

Re: Kvam v. Legion Investments
CONFIDENTIAL SETTLEMENT OFFER

Dear Mr. Matuska:

In an ongoing effort to resolve this dispute without further expense, my clients make the following settlement offer, subject to reduction to a fully executed settlement agreement:

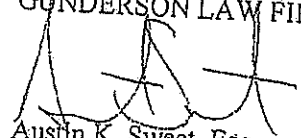
Furthermore, while we remain confident that our clients will prevail in this action, be advised that even if Mr. Kvam is successful, the defendants have no other assets which are subject to execution. Should Mr. Kvam prevail in this litigation, the defendants will declare bankruptcy and Mr. Kvam will recover nothing more than is being offered here.

This offer will expire at 5:00 p.m. PDT on September 28, 2018.

Please do not hesitate to contact our office with any questions in this regard.

Very truly yours,

GUNDERSON LAW FIRM


Austin K. Sweet, Esq.

AKS/cs

1 **CODE:**
2 Michael L. Matuska, Esq. SBN 5711
3 MATUSKA LAW OFFICES, LTD.
4 2310 South Carson Street, Suite 6
5 Carson City, NV 89701
6 Attorneys for Plaintiff

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

9 JAY KVAM,

10 Plaintiff,

Case No. CV18-00764

11 v.

Dept. No. 6

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

15 Defendants.

16 **MOTION TO DISQUALIFY JUDGE**

17 COMES NOW Plaintiff, JAY KVAM, by and through his counsel of record, Matuska Law
18 Offices, Ltd., Michael L. Matuska, and hereby moves to disqualify presiding judge Hon. Lynne
19 Simons pursuant to Nevada Code of Judicial Conduct (NCJC) 1.2, 2.2, 2.5 and 2.6. This motion is
20 made and based on the Declaration of the Plaintiff, Jay Kvam, his counsel of record, Michael L.
21 Matuska, Esq., the transcripts and exhibits submitted herewith, and the court docket.

22 **POINTS AND AUTHORITIES IN SUPPORT OF**

23 **MOTION TO DISQUALIFY JUDGE**

24 **I. INTRODUCTION**

25 Judge Simons failed to faithfully execute the duties of her office by not ruling on the
26 Discovery Commissioner's January 10, 2020 Recommendation for Order (Transaction #7679790),
27 a motion for summary judgment, and other motions preceding the trial previously scheduled to
28 commence on March 2, 2020 such that the trial had to be continued. In addition, Judge Simons
actively misrepresented that rulings were forthcoming, thereby causing the parties to continue trial

1 preparation on a trial that was almost certain to be postponed, and ordered the parties to attend a
2 settlement conference before Hon. Elliott Sattler, Dept. 10 that was predictably aborted due to the
3 lack of rulings.

4 The motion for summary judgment was heard on February 11, 2020. Judge Simons took
5 the bench late, cut off argument from Kvam's counsel, and never addressed the other pending
6 motions.

7 Judge Simons also took the bench late at the continued hearing on February 27, 2020.
8 Although Judge Simons announced a partial, tentative ruling from the bench (much of it adverse
9 to the Plaintiff), she still has not entered a written order, but rather, ordered the parties to yet
10 another futile settlement conference. In addition, Judge Simons expressed her intent to sua sponte
11 grant a counterclaim and gave Kvam one (1) day to file a response pursuant to NRCP 56(f). Aside
12 from being patently unfair to Kvam and his counsel, no counterclaims are pending.

13 At this point, Judge Simons has not only delayed Kvam's right to a trial, but his right to a
14 prompt appeal, and so eroded his confidence in Judge Simons' diligence and competence in this
15 matter that the case should be assigned to a new judge.

16 *Towbin Dodge, LLC v. Eighth Judicial District Court*, 112 P.3d 1063, 121 Nev. 251 (2005)
17 explains that "NRS 1.235 sets forth the procedure for disqualifying district judges and requires
18 that an affidavit be filed at least twenty days before trial or at least three days before any contested
19 pretrial matter is heard. . . . But when new grounds for disqualification are discovered after the
20 statutory time has passed, the Nevada Code of Judicial Conduct provides an additional,
21 independent basis for seeking disqualification through a motion under the governing court rules."
22 *Id.* In this motion, Kvam seeks to disqualify Judge Simons pursuant to the Nevada Code of
23 Judicial Conduct for her conduct and lack of diligence leading up to and following the vacated
24 trial date.

25 II. BACKGROUND

26 This case concerns a failed real estate investment. One of the primary issues is the
27 question of whether the investment should be characterized as a joint venture such that the
28 Uniform Partnership Act ("UPA") codified in Chapter 87 of the Nevada Revised Statutes should

1 apply and whether Defendant Brian Mineau owes a corresponding fiduciary duty to Kvam.¹

2 A. Pleadings

3 1. Kvam filed his Complaint on April 11, 2018. The first cause of action is entitled
4 Declaration of Joint Venture. The other causes of action include Rescission or Reformation of
5 Agreement; Breach Contract – Loan; Breach of Contract and Tortious Breach of Implied
6 Covenant of Good Faith and Fair Dealing – Joint Venture Agreement; Accounting; Court
7 Supervision and Winding Up; Appointment of Receiver; Temporary and Permanent Injunction;
8 and Derivative Claim.

9 2. The case was assigned to Dept. 3, Hon. Jerome Polaha.

10 3. Defendants filed their Answer on June 5, 2018 and included various counterclaims,
11 most of which were dismissed on Kvam's dispositive motions. (See June 5, 2018 Order
12 Transaction # 6864914 and January 9, 2019 Order Transaction # 7059540).

13 4. The operative pleading is Kvam's September 11, 2019 Second Amended
14 Complaint, which includes additional causes of action for Fraud, Fraudulent Inducement and
15 Fraudulent Concealment; Conversion; and civil Racketeer and Corrupt Organizations Act (RICO)
16 (Transaction # 7478580).

17 5. Defendants did not assert any counterclaims in their Answer to the Second
18 Amended Complaint (Transaction # 7504329).

19 6. This case was reassigned to Hon. Lynne Simons, Dept. 6. (See June 3, 2019
20 Administrative Order 2019-06 and Order Accepting Case Reassignment, Transaction # 7308883).

21 7. This case was then scheduled for trial commencing on March 2, 2020 and a pretrial
22 conference on January 14, 2020 at 9:30 a.m. (See Notice, Transaction # 7317646).

23 8. Discovery was scheduled to close on December 6, 2019 (See August 1, 2019
24 Stipulation, Transaction # 7407201).

25 B. Kvam's Second Motion to Compel

26 9. Kvam filed his Second Motion to Compel on November 26, 2019, which sought to
27

28 ¹ A joint venture is essentially a single purpose partnership and partnership law applies. See *Clark v. JDI Loans, LLC*
(In re Cay Clubs), 130 Nev. Adv. Op. 14, 319 P.3d 625, 631 (2014).

1 compel discovery on issues pertaining to the new cause of action for conversion. (Transaction #
2 7610271).

3 10. The Discovery Commissioner entered his Recommendation for Order on January
4 10, 2020 which recommended granting the motion in large part and awarding \$2,500 in attorney's
5 fees to Kvam (Transaction #7679790).

6 11. Mineau filed his Objection to Recommendation for Order on January 13, 2020
7 (Transaction # 7683168).

8 12. Kvam filed a Response to Objection to Recommendation for Order in which he
9 requested one modification to the Discovery Commissioner's Recommendation and a larger award
10 of attorney's fees (Transaction # 7696576).

11 13. The Discovery Commissioner's Recommendation for Order is still pending.

12 C. Motion for Summary Judgment, Motion for Reconsideration,
13 Motion in Limine

14 14. Defendants moved for summary judgment on all of the causes of action alleged in
15 Kvam's Second Amended Complaint on January 6, 2020 (Transaction # 7669936); however,
16 Defendants essentially conceded Kvam's first cause of action for the declaration of a joint venture
17 and admitted that Mineau owed a fiduciary duty to Kvam as set forth in the Uniform Partnership
18 Act.

19 15. Defendants' Motion for Summary Judgment identified 32 exhibits, including a
20 declaration from Brian Mineau. Par. 25 of Mineau's declaration addresses a material issue in this
21 case and stated as follows:

22 25. On or about May 26, 2017, Mr. Cole called me and requested the next
23 \$20,000.00 progress payment for the project. I was travelling at the time and was
24 unable to promptly make direct payment; however, at my request, Spinola agreed
25 to arrange to have the funds wired to TNT on my behalf. I have previously testified
26 in this action that Spinola retrieved these funds from my personal safe. However,
27 upon further reflection and consideration in preparing this Declaration and
28 preparing for trial, I believe my previous testimony was mistaken. To I now recall
that I borrowed the \$20,000 from Bradley Tammen In exchange for the short-
term loan of \$20,000, I agreed to repay Mr. Tammen a flat amount of \$28,000
(which has since been repaid in full). (Motion for Summary Judgment at Ex. "1",
emphasis added).

1 In other words, after discovery closed, Mineau invented an entirely new theory of facts
2 that disavowed his prior verified discovery responses and prior declarations on the seminal issue
3 of whether he provided his share of the funding for the project.

4 16. Kvam provided a thorough opposition to the Motion for Summary Judgment on
5 January 16, 2020 which identified 48 exhibits, including declarations from Jay Kvam and the
6 expert witness, Benjamin Charles Steele, CPA. These declarations have not been rebutted. Kvam
7 also provided evidence that Mineau has not repaid Bradley Tammen.
8

9 17. Kvam also objected to the new information provided in Paragraph 25 of Mineau's
10 declaration and explained that discovery was needed as set forth in the Discovery Commissioner's
11 Recommendation in order to allow for a complete response. Kvam also objected to certain offers
12 of judgment that were included with Defendants' Motion for Summary Judgment.
13

14 18. The issue of perjury based on Mineau's recent and prior declarations is thoroughly
15 addressed in a separate motion that was filed on January 24, 2020 entitled Plaintiff's Motion for
16 Reconsideration of Order Affirming Discovery Commissioner's Recommendation, Entered May
17 16, 2019; for Discovery Sanctions; and for Other Relief ("Motion for Reconsideration"). In that
18 motion, Kvam requests reconsideration of a prior discovery order that limited discovery on the
19 issues raised in Par. 25 of Mineau's declaration, for sanctions for Mineau's admittedly false
20 declarations and verified discovery responses, for an order to show cause why Mineau should not
21 be held in contempt for withholding information and providing perjured testimony, and for
22 potential referral for perjury charges. (See Motion for Reconsideration, Transaction # 7704237).
23

24 19. Kvam also filed a First Motion in Limine on February 14, 2020 which moved to
25 exclude the offers of judgment, or alternatively, to include the complete chain of letters and offers
26 that would place the offers in the proper context (Transaction # 7742278).

27 D. January 14, 2020 Pre-Trial Conference

28 20. The pre-trial conference took place on January 14, 2020. It was scheduled for 9:30

1 a.m. but started at 9:47 a.m.² The court set a further hearing date of February 11, 2020 at 9:30
2 a.m. for the hearing on Defendants' Motion for Summary Judgment and other pending motions
3 and February 21, 2020 for a Final Pre-Trial Conference and hearing on Pre-Trial Motions. (See
4 court minutes Transaction # 7684278 and Transcript attached hereto as Ex. "3"). The court also
5 set further dates for pre-trial matters, including identifying the portions of video depositions that
6 would be used, submitting jury instructions and marking exhibits.

7 21. The court also ordered the parties to attend a settlement conference. Defendants'
8 counsel explained that he wanted to schedule the settlement conference to take place after the
9 February 11, 2020 hearing on the pending Motion for Summary Judgment (See Transcript, Ex. "3"
10 at 28:1-15).

11 22. The settlement conference was therefore scheduled for February 24, 2020 at 9:00 in
12 Dept. 10, Hon. Elliott A. Sattler, presiding (Transaction # 7712813).

13 E. February 11, 2020 Hearing

14 23. The February 11, 2020 motions hearing was scheduled to commence at 9:30 a.m.
15 However, it started 28 minutes late at 9:58 a.m. (See Transcript, Ex. "4"). Although Judge
16 Simons explained the delay by saying "I was having word processing issues" (Transcript at 3:7-8),
17 it is unclear what word processing she was referring to. She has not entered orders on any of the
18 matters identified herein, and court staff was heard to say she had not arrived. (See Declaration of
19 Michael L. Matuska, Ex. "1" at ¶8).

20 24. Judge Simons patiently listened to the argument presented by Defendants' counsel
21 on the Motion for Summary Judgment (Transcript 4:14-19:12).

22 25. The response from Kvam's counsel is reflected in the Transcript at 19:19-65:11.

23 26. Defendants' counsel was allowed to give a rebuttal that was as long as initial
24 argument (See Transcript at 65:12-80:11). He brought up at least one new issue that was not
25 raised in the Motion for Summary Judgment or in his argument ("So the representations that Mr.
26 Mineau has made . . . aren't misrepresentations, your Honor. That is the status of what Mr.

27
28 ² The start time is not indicated on the transcript but was confirmed by the court reporter on March 24, 2020. The
hearing starting at 9:47 a.m. and concluded at 10:21 a.m. See Ex. "7").

1 Mineau has been told from the contractor.”) (Transcript at 68:10-15).

2 27. Judge Simons denied the request from Kvam’s counsel to respond to the new
3 argument (Transcript at 82:8-10).

4 28. Judge Simons directed both parties to provide proposed orders by Friday, which
5 was February 14, 2020. She further requested the proposed orders be submitted in “Arial font.”
6 (Transcript at 83:6-7). Both parties submitted timely proposed orders as directed.

7 29. The hearing concluded without addressing the Discovery Commissioner’s
8 Recommendation for Order or the perjury identified in Paragraph 25 of Brian Mineau’s
9 Declaration that is the subject of Kvam’s Motion for Reconsideration.

10 F. February 21, 2020 Hearing

11 30. Judge Simons’ judicial assistant sent an email on February 20, 2020 informing as
12 follows:

13 The Court is finalizing its Order regarding the Motions for Summary Judgment.
14 At the Pretrial Conference held on January 14, 2020 a pretrial motions hearing
15 was scheduled for Friday, February 21, at 9:30 am. At this time, the court is
16 continuing the hearing. Counsel is directed to contact the Court by 5:00 pm on
17 Friday to reschedule arguments on the pretrial motions for next week.

18 (Ex. “6”)

19 31. Based on this email, the parties expected to have a ruling on the pending motion for
20 summary judgment prior to the February 24, 2020 Settlement Conference and continued with trial
21 preparations. In fact, there is no indication that Judge Simons was (or is) finalizing the order
22 regarding the Motion for Summary Judgment or any of the other pending matters.

23 32. No mention was made of the Discovery Commissioner’s Recommendation for
24 Order, Kvam’s Motion for Reconsideration regarding the perjury that was identified in Par. 25 of
25 the Mineau’s Declaration or the pending motions in limine which have never been heard.

26 G. February 24, 2020 Settlement Conference

27 33. The parties appeared as scheduled for the settlement conference with Judge Sattler
28 at 9:00 a.m. on February 24, 2020.

34. Judge Sattler explained that it would not be productive to proceed with the

1 settlement conference without a ruling on the pending Motion for Summary Judgment. He
2 personally went to check with Dept. 6 on the status of the order and reported that it would be out
3 shortly, possibly even that same day. The court minutes report that the order would be out in two
4 (2) days (Transaction # 7756799). That proved to be inaccurate.

5 35. Kvam and his counsel expressed their frustration with the delays and the settlement
6 conference was aborted.

7 H. February 27, 2020 Hearing

8 36. The hearing on pre-trial motions was continued to February 27, 2020 at 9:30 a.m.
9 (See emails Ex. "7" and Transcript Ex. "5"). That hearing also started late at 9:43 a.m. (See
10 Transcript).

11 37. At the start of the hearing, Judge Simons acknowledged the pending motions,
12 including the Discovery Commissioner's Recommendation for Order and the objection and
13 response thereto, Defendants' Motion in Limine concerning Kvam's expert witness, Kvam's
14 Motion for Reconsideration concerning Mineau's perjury and additional discovery needed in
15 response thereto, and Kvam's First Motion in Limine to exclude offers of compromise (Transcript
16 at 2:12-3:20). Although there was limited argument regarding Kvam's Motion for
17 Reconsideration, there was no argument on the other motions and none of the motions have been
18 decided.

19 38. Regarding the anticipated order on the Motion for Summary Judgment, Judge
20 Simons stated: "There's a purpose for why it's not entered right now." (Transcript at 4:3). She
21 went on to explain that she wanted to include a ruling on a counterclaim that was not addressed in
22 the Motion for Summary Judgment. This statement suggests that the rest of the order was ready.
23 This has proven to be incorrect.

24 39. Judge Simons then purported to invoke NRCP 56(f) and gave Kvam's counsel until
25 the next morning to file a response regarding the counterclaim. (Transcript at 4:17-18).

26 40. Following some back and forth regarding whether the next morning was reasonable
27 notice, Judge Simons announced: "I am going to indicate to you how the Court is going to rule"
28

(Transcript at 9:21-22) and proceeded with her preliminary ruling, much of it adverse to Kvam. However, there is no written order.

41. Judge Simons then wanted Kvam's counsel to "stipulate to the fact that the notice I've given you today is reasonable" (Transcript at 16:2-3).

42. Due to Judge Simons' "indication" that she would grant in part Defendants' Motion for Summary Judgment, uncertainty over what issues would remain for trial, confusion over the counterclaims, and the lack of rulings on the other motions, Kvam and his counsel had no choice but to vacate the trial (Transcript at 16:17-19). Kvam's counsel then waived a response to the counterclaim in order to allow Judge Simons to enter the order forthwith, requested to continue the trial and indicated that they might prefer to withdraw any remaining claims without prejudice in order to proceed with an appeal. Judge Simons incorrectly stated in response that "in order to have a final determination in the case, you would need to have it with prejudice." (Transcript at 18:1-3).

43. The extent of the argument on Kvam's Motion for Reconsideration was for Judge Simons to question whether the motion was timely (Transcript at 19:3-7) and whether the request for an order to show cause regarding contempt should be submitted in a separate motion (Transcript at 26:20-27:5).

44. Judge Simons seemed apprehensive about invoking sanctions for Mineau's perjured declarations when she asked "I mean, you're not seeking to have him on a contempt being put in jail. Am I right?" (Transcript 25:11-12). Kvam's counsel provided the appropriate response:

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

(Transcript at 25:13-21).

45. Judge Simons concluded the hearing by stating "Okay. Well, I'm going to enter

1 my order, and then you are going to meet with Judge Sattler.” (Transcript at 29:10-12). This
2 statement indicates the order would be entered before the continued settlement conference on
3 March 2, 2020.

4 46. In fact, the parties and their counsel appeared for another settlement conference in
5 Dept. 10, Judge Sattler presiding, at 9:00 a.m. on Monday, March 2, 2020 without an order. That
6 settlement conference was no more productive than the first settlement conference, and no written
7 orders have been entered.

8 III. ARGUMENT

9 Nevada’s Code of Judicial Conduct (“NCJC”) and the comments thereto are derived from
10 the America Bar Association Model Code of Judicial Conduct. As such, this motion relies on the
11 comments and annotations to the Model Code of Judicial Conduct and some of the cases identified
12 therein. The cases cited in the annotations concern judicial discipline rather than disqualification,
13 and many of them involve chronic problems of tardiness and lack of diligence that span months or
14 years. Nonetheless, the comments, annotations and cases are relevant to explain the violations of
15 the Code of Judicial Conduct which warrant disqualification in this case. See *Towbin Dodge, LLC*
16 *v. Eighth Judicial District Court*, 112 P.3d 1063, 121 Nev. 251 (“But when new grounds for
17 disqualification are discovered after the statutory time has passed, the Nevada Code of Judicial
18 Conduct provides an additional, independent basis for seeking disqualification through a motion
19 under the governing court rules.”)

20 A. NCJC 1.2.

21 CANON 1

22 A judge shall uphold and promote the independence, integrity, and
23 impartiality of the judiciary and shall avoid impropriety and the appearance
24 of impropriety.

25 * * * *

26 **Rule 1.2. Promoting Confidence in the Judiciary.** A judge shall act at
27 all times in a manner that promotes public confidence in the independence,
28 integrity, and impartiality of the judiciary and shall avoid impropriety and the
appearance of impropriety.

COMMENT

* * * *

[3] Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms.

* * * *

[5] Actual improprieties include violations of law, court rules, or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge. Ordinarily, judicial discipline will not be premised upon appearance of impropriety alone, but must also involve the violation of another portion of the Code as well.

Canon 1.2 is an "exacting standard" that applies both to a judge's professional and personal life. (Annotated Model Code at p. 34). Comments 3 and 5, quoted above, deserve special attention. Kvam does not have to prove that Judge Simons has an actual bias against him or his attorney. Rather, the question is whether her actions (and inaction) have undermined confidence in her ability to preside over this case and whether Kvam could reasonably question her honesty, impartiality, temperament and fitness to continue to serve as the judge on this case.

In re Inquiry Concerning McCormick, 639 N.W.2d 12, 16 (Iowa 2002) upheld the public censure of a judge who endorsed a candidate for sheriff and then misrepresented how the endorsement came about. That case stressed the need for truth and honesty. "Truth and honesty lie at the heart of the judicial system, and judges who conduct themselves in an untruthful manner contradict this most basic ideal. Consequently, a judge who misrepresents the truth tarnishes the dignity and honor of his or her office." *Id.* at 16. "Misrepresentation, on the other hand, is a more serious violation. A dishonest judge directly threatens public confidence in the judicial system and tarnishes its respect and integrity. The harm is extensive. Even a single incident can have grave consequences. *Id.* at 17 (emphasis added, internal citations omitted). "The court system and the public [it] serve[s] are damaged when our officers play fast and loose with the truth. Clearly,

1 these same observations we have made about lawyers apply to judges. Likewise, the resulting
2 sanctions should typically be comparable.” *Id.* (internal citations omitted).

3 Similarly, in *Disciplinary Counsel v. O’Neill*, 103 Ohio St. 3d 204 (2004), the Ohio
4 Supreme Court upheld discipline against a judge on multiple counts, including Count IV for
5 repeated misrepresentations to lawyers, other judges and court personnel in the course of her
6 duties.
7

8 As the board concluded, these multiple misrepresentations, when considered with
9 the additional misrepresentations found to violate DR 1–102(A)(4) in Counts I
10 and V, represent “the most serious charges” against respondent. Respondent’s
11 continued denials of this misconduct were contradicted by the evidence, and the
12 board properly concluded that her testimony was not credible. And these
13 misrepresentations were not innocuous. For example, she sought to have the court
14 reporter disciplined for supposedly leaving early without permission.

15 By misrepresenting events that occurred in court proceedings and in the court
16 itself, respondent failed to treat other judges, litigants, attorneys, and court
17 personnel with courtesy, respect, and honesty and thus undermined public
18 confidence in the integrity of the judicial system. As the Supreme Court of Iowa
19 recently observed, “a judge who misrepresents the truth tarnishes the dignity and
20 honor of his or her office” because “[t]ruth and honesty lie at the heart of the
21 judicial system, and judges who conduct themselves in an untruthful manner
22 contradict this most basic ideal.” *In re Inquiry Concerning McCormick (Iowa*
23 *2002)*, 639 N.W.2d 12, 16. And by engaging in conduct “that would appear to an
24 objective observer to be unjudicial and prejudicial to the public esteem for the
25 judicial office,” respondent acted in a manner prejudicial to the administration of
26 justice, as prohibited by DR 1–102(A)(5). *Cleveland Bar Assn. v. Cleary (2001)*,
27 *93 Ohio St.3d 191, 206, 754 N.E.2d 235.*

28 (*Id.* at 210-11).

29 In this case, Judge Simons has not acted in a manner that promotes confidence in the
30 integrity and impartiality of the judiciary. She started every hearing late. The February 11, 2020
31 hearing started 28 minutes late and Judge Simons offered an explanation that does not seem
32 credible. She has repeatedly indicated since February 20, 2020 that a ruling is imminent, however,
33 to date, there are no rulings on the pending motions. She repeated these statements not only to the
34 parties, but to Judge Sattler who was assigned as the settlement judge. She “indicated” a ruling

1 from the bench, when in fact, she was not ready to rule. She has not acted on the Report and
2 Recommendation from the Discovery Commissioner.

3 The February 11, 2020 hearing was supposed to be a hearing on pending motions. In fact,
4 Judge Simons only heard argument on Defendants' Motion for Summary Judgment. She allowed
5 Defendants' attorney to raise a new argument in his rebuttal but denied Kvam's attorney an
6 opportunity to respond. Judge Simons has not acted in a manner that promotes the impartiality of
7 the judiciary. She has avoided ruling on issues that favor Kvam, including: i) the Discovery
8 Commissioner's January 10, 2020 Recommendation for Order which recommends that Kvam
9 should be allowed more discovery and for sanctions against Defendants; and ii) Kvam's Motion
10 for Reconsideration which is focused on Mineau's perjury. Judge Simons' stated intent to grant
11 summary judgment without allowing the recommended discovery and based on a perjured
12 declaration indicates that she is not impartial and undermines the integrity of the judicial system.
13 These issues need to be resolved before a ruling on Defendants' Motion for Summary Judgment.
14

15 Judge Simons has failed to take any action regarding Mineau's perjury even though Brian
16 Mineau admitted in Paragraph 25 of the Declaration he submitted in support of the Defendants'
17 Motion for Summary Judgment that his previous declarations and discovery responses were
18 incorrect, and his latest declaration cannot be substantiated, either. Rather, Judge Simons seemed
19 to trivialize the matter when she dismissively asked "I mean, you're not seeking to have him on a
20 contempt being put in jail. Am I right?" (Transcript, Ex. "4" at 25:11-12).
21

22 Some of the other comments from Judge Simons, standing alone, may not warrant
23 mention, but raise significant questions about her impartiality when viewed in the context set forth
24 above. Her decision to give Kvam's attorney one (1) day to respond to her oral decision to grant
25 Defendants' counterclaim is alarming, especially when no counterclaims were asserted in response
26 to Kvam's Second Amended Complaint, which is the operative pleading in this case.
27
28

1 Through it all, Judge Simons forced the parties to continue preparing for trial and
2 attendings settlement conferences while knowing that trial could not go forward without the
3 additional discovery and rulings on the pending motions and that the rulings were anticipated
4 before the settlement conferences. She repeatedly indicated that a ruling was imminent, however,
5 to date, there are no rulings on the pending motions. For these reasons, it is reasonable for Kvam
6 to assert that Judge Simons has undermined the integrity of the court and created reasonable
7 doubts about her honesty, impartiality and ability to preside over this case.
8

9 **B. NCJC 2.2**

10 **CANON 2**

11 **A judge shall perform the duties of judicial office impartially, competently,**
12 **and diligently.**

13 * * * *

14 **Rule 2.2. Impartiality and Fairness.** A judge shall uphold and apply the
15 law, and shall perform all duties of judicial office fairly and impartially.

16 **COMMENT**

17 [1] To ensure impartiality and fairness to all parties, a judge must be
18 objective and open-minded

19 Rule 2.2 repeats the requirement for impartiality (which is measured by an objective,
20 reasonable person standard discussed above) and adds additional requirements to apply the law in
21 a fair and open-minded manner. This rule links “the judge’s obligation to decide cases with the
22 impartiality to a corresponding duty to apply the law.” (Annotated Model Code at p. 105 (citing
23 Matter of Inquiry Concerning a Judge, 462 S.E.2d 728 (Ga. 1995))).

24 The record set forth above is unfair to Kvam in multiple ways. It is unfair for Judge
25 Simons to consider Defendants’ Motion for Summary Judgment while ignoring the Discovery
26 Commissioner’s January 10, 2020 Recommendation for Order which recommends that Kvam
27 should be allowed more discovery. It is also unfair for Judge Simons to ignore Kvam’s Motion
28 for Reconsideration which is focused on Mineau’s perjury. Judge Simons has to maintain an open

1 mind and apply the law regarding perjury, especially when it occurs in her court room. It was also
2 unfair for Judge Simons only to hear Defendants' Motion for Summary Judgment at the February
3 11, 2020 hearing, and it was unfair for her to deny Kvam's attorney the ability to respond to new
4 matters raised in the rebuttal from Mineau's attorney, especially after she was late to the hearing.

5 Overall, it has been unfair for Judge Simons to expect the parties to continue to prepare for
6 trial while her rulings are delayed, announce a partial ruling from the bench when the ruling was
7 not ready and has never been followed up with a written order, cause the trial to be continued, and
8 twice refer the parties to a settlement conference which were ineffective due to her delays.

9 **C. Rule 2.5**

10 **Rule 2.5. Competence, Diligence, and Cooperation.**

11 (A) A judge shall perform judicial and administrative duties competently and
12 diligently.

13 (B) A judge shall cooperate with other judges and court officials in the
14 administration of court business.

15 **COMMENT**

16 * * * *

17 [3] Prompt disposition of the court's business requires a judge to devote
18 adequate time to judicial duties, to be punctual in attending court and expeditious
19 in determining matters under submission, and to take reasonable measures to
20 ensure that court officials, litigants, and their lawyers cooperate with the judge to
21 that end.

22 [4] In disposing of matters promptly and efficiently, a judge must
23 demonstrate due regard for the rights of parties to be heard and to have issues
24 resolved without unnecessary cost or delay. A judge should monitor and supervise
25 cases in ways that reduce or eliminate dilatory practices, avoidable delays, and
26 unnecessary costs.

27 Rule 2.5 and Comments [3] and [4] incorporate requirements of competence, diligence,
28 efficiency and punctuality and stress the need to avoid delays and unnecessary costs.

Rule 2.5(A) requires judges to perform judicial and administrative duties
competently and diligently. Comment [1] states that "Competence in the
performance of judicial duties requires the legal knowledge, skill, thoroughness,
and preparation reasonably necessary to perform a judge's responsibilities of
judicial office."

* * *

In addition to performing their administrative and judicial duties competently,
Rule 2.5(A) requires judges to do so diligently.

(Annotated Model Code at 146-47) (some internal citations omitted).

Tardiness undermines the integrity of the court and is grounds for judicial discipline. In the case of *In re Merlo*, 619 Pa. 1, 58 A.3d 1 (2012), the Supreme Court of Pennsylvania upheld the Court of Judicial Discipline's decision to remove a judge from office due to chronic tardiness and absenteeism. In considering whether Appellant's conduct brought the judicial office into disrepute, the CJD reflected extensively on its findings in the earlier case of *In re Lokuta*, 964 A.2d 988 (Pa.Ct.Jud.Disc. 2008), aff'd 608 Pa. 223, 11 A.3d 427 (2011):

[Lokuta's] custom of arriving 15, 20 minutes, or a half hour or an hour late for scheduled court sessions is the quintessential discourtesy to litigants, jurors, witnesses and lawyers. When it is commonplace, as here, it takes on the character of arrogance and disrespect for the judicial system itself, as well, of course, disrespect for those who, bidden by the court to be in court at a time chosen by the court, wait, sometimes in a "packed courtroom," for the arrival of the judge.

* * *

These considerations lead us to a contemporaneous finding that this conduct is such that brings the judicial office into disrepute which subjects [Lokuta] to discipline under Article V, § 18(d)(1) of the Pennsylvania Constitution.

* * *

We note that for most of the occupants of the benches in [Lokuta's] courtroom—the litigants, the jurors and the witnesses—this is a once-in-a-lifetime experience, their only exposure to the judicial system; and what they take away will be based largely, if not predominantly, on the conduct of the judge.

* * *

Certainly the reasonable expectations of the public would include the expectation that the judicial officer act with the same respect for the court as those members of the public did by obeying the court's scheduling order;

(*Id.* at 11, 18 quoting *Lokuta*, 964 A.2d at 1005-06).

Judge Simons' lack of punctuality is also apparent from the record set forth above. Every hearing started late. Her lack of diligence is also evident. There have been no orders entered on

1 the pending matters despite her representations to the parties, their counsel and Judge Sattler that
2 rulings were imminent. These delays resulted in unnecessary costs to prepare for a trial which
3 was sure to be continued and an aborted settlement conference.

4 Although many of the reported cases of lack of diligence concern delays that spanned
5 months or years, the cases also demonstrate that a lack of diligence can be based on a failure to
6 rule on a routine motion in a timely manner. In the case of *In re Emanuel*, 755 So.2d 862, 867-68
7 (1999), the Supreme Court of Louisiana upheld the public censure of a judge on various counts,
8 including refusal to timely sign routine ex parte orders. In the present case, additional concerns
9 about diligence and competence arise from Judge Simons' delay in ruling on the Discovery
10 Commissioner's January 10, 2020 Recommendation for Order which recommended additional
11 discovery and sanctions against the Defendants. Such Recommendations are typically adopted
12 without delay in as little as one (1) month and do not require a hearing. Regarding Kvam's first
13 Motion to Compel, the Discovery Commissioner's Recommendation for Order was entered on
14 April 9, 2019 and the Order Affirming Master's Recommendation was timely entered on May 16,
15 2019. Regarding Defendants' Motion to Compel, the Discovery Commissioner's
16 Recommendation for Order was entered on October 2, 2019 and the Order Confirming the
17 Discovery Commissioner's Recommendation for Order was entered on October 21, 2019. In
18 contrast, approximately three (3) months have elapsed since the Discovery Commissioner entered
19 his Report and Recommendation on January 10, 2020 concerning Kvam's Second Motion to
20 Compel. Judge Simons' failure to adopt that order has materially prejudiced Kvam's case
21 because it prevented the additional discovery that was needed to prepare for trial, which had to be
22 continued, and to fully oppose Defendants' Motion for Summary Judgment.

23 The concerns about competence also arise from Judge Simons' sua sponte decision to
24 invoke NRCP 56(f) to give Kvam's attorney one day to respond to a counterclaim that is not even
25
26
27
28

1 pending and her belief that dismissal on any claims would have to be with prejudice in order to
2 create an appealable record.

3 These concerns about diligence and competence also arise from Judge Simons' stated
4 intent to resolve Defendants' Motion for Summary Judgment without addressing the Discovery
5 Commissioner's outstanding Recommendation for Order and Mineau's perjured affidavit that was
6 submitted in support of Defendants' Motion for Summary Judgment. It is likewise not clear why
7 Judge Simons would need so long to rule on Defendants' Motion for Summary Judgment. Kvam
8 provided a thorough opposition to the Motion for Summary Judgment on January 16, 2020 which
9 identified 48 exhibits, including declarations from Jay Kvam and his expert witness, Benjamin
10 Charles Steele, CPA. These declarations have not been rebutted. Her request for Arial font when
11 she cannot decide a summary motion and allows perjury indicates that she is more concerned
12 about the trivial rather than the complex and substantive issues pending in her court.
13
14

15 **D. Rule 2.6**

16 **Rule 2.6. Ensuring the Right to Be Heard.**

17 (A) A judge shall accord to every person who has a legal interest in a
18 proceeding, or that person's lawyer, the right to be heard according to law.

19 (B) A judge may encourage parties to a proceeding and their lawyers to settle
20 matters in dispute but shall not act in a manner that coerces any party into
21 settlement.

22 **COMMENT**

23 [1] The right to be heard is an essential component of a fair and impartial
24 system of justice. Substantive rights of litigants can be protected only if
25 procedures protecting the right to be heard are observed.

26 [2] The judge plays an important role in overseeing the settlement of disputes,
27 but should be careful that efforts to further settlement do not undermine any
28 party's right to be heard according to law. The judge should keep in mind the
effect that the judge's participation in settlement discussions may have, not only
on the judge's own views of the case, but also on the perceptions of the lawyers
and the parties if the case remains with the judge after settlement efforts are
unsuccessful. Among the factors that a judge should consider when deciding upon
an appropriate settlement practice for a case are whether: (1) the parties have
requested or voluntarily consented to a certain level of participation by the judge
in settlement discussions, (2) the parties and their counsel are relatively

sophisticated in legal matters, (3) the case will be tried by the judge or a jury, (4) the parties participate with their counsel in settlement discussions, (5) any parties are unrepresented by counsel, and (6) the matter is civil or criminal.

[3] Judges must be mindful of the effect settlement discussions can have, not only on their objectivity and impartiality, but also on the appearance of their objectivity and impartiality. Despite a judge's best efforts, there may be instances when information obtained during settlement discussions could influence a judge's decision making during trial, and, in such instances, the judge should consider whether disqualification may be appropriate. See Rule 2.11(A)(1).

Rule 2.6 and the comments thereto emphasize the point that the right to be heard is an essential component of fairness and impartiality which as discussed above are measured by an objective, reasonable person standard. Kvam's right to be heard has been abridged in multiple instances. Although Defendants were afforded a full and thorough hearing on their Motion for Summary Judgment on February 11, 2020, Kvam's attorney was not allowed to respond to new matters that were raised at the hearing. Kvam has never been heard on the Discovery Commissioner's January 10, 2020 Recommendation for Order (which recommends additional discovery and sanctions against the Defendants) or his Motion for Reconsideration which is focused on Mineau's perjury. By giving Kvam's attorney one day to respond, Kvam was denied the ability to be heard in any meaningful sense to Judge Simon's stated intent to grant a counterclaim that is not even pending. Ultimately, due to the delays and lack of rulings, Kvam has not only been denied his right to a trial but has also been denied the ability to appeal from a potentially adverse ruling.

Rule 2.6 and the comments thereto also address the potential impact of settlement discussions on the impartiality of the presiding judge. These concerns are most pronounced when the presiding judge is also the settlement judge. Although Judge Simons did not preside over the settlement conferences in this case, she twice ordered the parties to attend a settlement conference in Dept. 10 and created the appearance that she wanted the parties to settle in order that she would not have to discharge her duties. Further, Defendants submitted offers of settlement as Exhibits

1 24-27 to their Motion for Summary Judgment in an effort to argue that the offers discharged their
2 contractual and partnership duties. These exhibits include offers made while this case was
3 pending. Kvam objected to these settlement offers in his response and addressed the matter in
4 greater detail in his First Motion in Limine that was filed on February 14, 2020 (Transaction #
5 7742278). Kvam reasonably believes that these offers have further confused and biased Judge
6 Simons.
7

8 IV. CONCLUSION

9 To date, there have been no additional orders entered in this case. Judge Simons has
10 undermined the confidence and integrity of her court by appearing late for hearings, stating
11 numerous times that ruling are imminent when no rulings have been forthcoming and indicating a
12 ruling from the bench when in fact the ruling was not ready. She caused the parties to incur
13 significant additional expenses by delaying rulings leading up to trial and forcing them to attend a
14 settlement conference that was supposed to take place after the ruling on summary judgment.
15 Judge Simons has created reasonable doubts about whether she is impartial in this case by
16 announcing an oral ruling on Defendants' Motion for Summary Judgment without addressing the
17 issue of Mineau's perjury and without ruling on the Discovery Commissioner's Report and
18 Recommendation. She seemed to cross the line into becoming an advocate for the Defendants
19 when she announced her intent to sua sponte grant summary judgment on a counterclaim that was
20 no longer pending, argued with Kvam's counsel that one day (or one day and the weekend) was
21 reasonable time to respond, argued for dismissal of any remaining claims with prejudice and
22 expressed her reluctance to enforce her contempt powers against Brian Mineau for the perjury
23 committed in her courtroom.
24
25

26 Kvam and his counsel are uncertain whether and when Judge Simons will ever rule, and if
27 she does, whether the written order will reflect what she announced from the bench or whether
28

1 that was a strategy to force the case into a settlement posture rather than discharge her duties. For
2 the reasons set forth above, Hon. Lynne Simons should be disqualified and this case should be
3 assigned to a different district judge or a senior judge.

4 [Kvam and his counsel are aware of Administrative Orders 2020-2 and 2020-5 which
5 suspend civil trials and in person appearances and require other alterations to normal court
6 procedures that have been necessitated by the Coronavirus outbreak. However, the matters
7 complained of in this motion occurred before those Administrative Orders were entered. The
8 issues have been fully briefed, hearings have already been conducted and the Coronavirus
9 outbreak should not have prevented the timely resolution of issues pending in this case. To the
10 extent the Coronavirus outbreak has had an impact on the timely resolution of pending matters,
11 that would be a further reason to reassign this case to a different department or to a senior judge].

12
13 **AFFIRMATION**

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

16 Respectfully submitted,

17 Dated this 7th day of April, 2020.

18
19 MATUSKA LAW OFFICES, LTD.

20 *Michael L. Matuska*

21 By:

22 MICHAEL L. MATUSKA, SBN 5711
23 Attorneys for Plaintiff, JAY KVAM,
24
25
26
27
28

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Matuska Law Offices, Ltd. and that on the 7th day of April, 2020, I served a true and correct copy of the preceding document entitled **MOTION TO DISQUALITY JUDGE** as follows:

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

☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION:** 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 named above.

Hon. Lynne Simons, Dept. 6
SECOND JUDICIAL DISTRICT COURT
Civil/Criminal Division
75 Court Street
Reno, Nevada 89501
Heidi.Boe@washocourts.us

☒ **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 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

Exhibit Index
MOTION TO DISQUALIFY JUDGE

EXHIBIT	DOCUMENT	NO. OF PAGES
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2	Declaration of Jay Kvam of March 30, 2020	2
3	Hearing transcript of January 14, 2020	29
4	Hearing transcript of February 11, 2020	84
5	Hearing transcript of February 27, 2020	30
6	Judicial Assistant Heidi Boe's emails of February 20-21, 2020	4
7	Court Reporter Carol Hummel's email of March 24, 2020	1

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2020-04-07 11:58:46 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 7824985 : nmason

Exhibit 1

DECLARATION OF MICHAEL L. MATUSKA OF APRIL 7, 2020
(Motion to Disqualify Judge)

Exhibit 1

DECLARATION OF MICHAEL L. MATUSKA OF APRIL 7, 2020
(Motion to Disqualify Judge)

CODE: 1520

Michael L. Matuska, Esq. SBN 5711
MATUSKA LAW OFFICES, LTD.
2310 South Carson Street, Suite 6
Carson City, NV 89701
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.

**DECLARATION OF MICHAEL L. MATUSKA, ESQ.
IN SUPPORT OF PLAINTIFF'S MOTION TO DISQUALIFY JUDGE**

I, MICHAEL L. MATUSKA, am the attorney of record for the Plaintiff, JAY KVAM, in the present case, and do hereby declare as follows:

1. That I am now and at all times mentioned herein have been the attorney of record for the Plaintiff, Jay Kvam.

2. That I was admitted to practice law in the State of California in 1994 and the State of Nevada in 1995. I have at all times since those admission dates been a member in good standing of the State Bar of Nevada and the State Bar of California. I am currently admitted to practice in all state courts in Nevada and California. I am also admitted to practice in the following federal courts: United States District Court of Nevada; United States District Court for the Northern District of California; United States District Court for the Eastern District of

1 California; United States District Court for the Central District of California; United States Court
2 of Appeals, Ninth Circuit; United States Supreme Court.

3 3. That I am also a certified mediator and a contract mediator, referee and arbitrator
4 for the Nevada Real Estate Division, Office of the Ombudsman, a hearing officer for the Nevada
5 State Board of Medical Examiners, an arbitrator for the Court Annexed Arbitration Program and a
6 mentor for the Nevada State Bar Transition Into Practice (TIP) program.

7
8 4. That I have never filed a motion to disqualify a judge prior to filing the motion
9 provided herewith. I hereby certify that the motion filed herewith is filed in good faith and is not
10 interposed for the purpose of delay. Rather, the motion is filed as the result of undue delays and
11 other problems observed to date in this case.

12 5. That this case was filed on April 11, 2018 and assigned to Dept. 3, Hon. Jerome
13 Polaha presiding. Judge Polaha presided over the case with all anticipated and appropriate
14 dispatch until the case was assigned to Dept. 6, Hon. Lynne Simons, on June 3, 2019.

15
16 6. That the Discovery Commissioner has entered three Reports and Recommendations
17 for Orders in this case as follows: April 9, 2019 (Transaction # 7210304 regarding Plaintiff's First
18 Motion to Compel); October 2, 2019 (Transaction # 7516657 regarding Defendants' First Motion
19 to Compel); January 10, 2020 (Transaction # 7679790 regarding Plaintiff's Second Motion to
20 Compel). Although I have filed objections to some of the details contained in these Reports and
21 Recommendations for Orders, there is no question that the Recommendations for Orders were
22 prepared in a timely and considerate manner. The Recommendations for Order were promptly
23 adopted by the Court, except for the last Recommendation for Order which has not been addressed
24 by Judge Simons.

25
26 7. That to date, Judge Simons has only entered one written order, to wit, the
27 December 30, 2019 Order Granting Motion to Extend Discovery Deadline for Limited Purpose of
28

1 Deposing Jay Kvam (Transaction # 7659276).

2 8. That Defendants filed their Motion for Summary Judgment on January 6, 2020
3 (Transaction # 7669936). That motion was supported by a declaration from Brian Mineau which
4 disavowed his prior declarations and verified discovery responses as follows:
5

6 25. On or about May 26, 2017, Mr. Cole called me and requested the next
7 \$20,000.00 progress payment for the project. I was travelling at the time and was
8 unable to promptly make direct payment; however, at my request, Spinola agreed
9 to arrange to have the funds wired to TNT on my behalf. I have previously testified
10 in this action that Spinola retrieved these funds from my personal safe. However,
11 upon further reflection and consideration in preparing this Declaration and
12 preparing for trial, I believe my previous testimony was mistaken. I now recall that
13 I borrowed the \$20,000 from Bradley Tammen In exchange for the short-term
14 loan of \$20,000, I agreed to repay Mr. Tammen a flat amount of \$28,000 (which
15 has since been repaid in full). (Motion for Summary Judgment at Ex. "1",
16 emphasis added).

17 In fact, there is no evidence that Mineau ever repaid Bradley Tammen; rather, in his
18 Opposition to Motion for Summary Judgment, Kvam submitted emails that Bradley Tammen had
19 not been repaid as of the date of the emails. These perjury issues are addressed in greater detail in
20 Kvam's motion that was filed on January 24, 2020 entitled *Plaintiff's Motion for Reconsideration*
21 *of Order Affirming Discovery Commissioner's Recommendation, Entered May 16, 2019; For*
22 *Discovery Sanctions; And for Other Relief* (Transaction # 7704237).

23 9. That Judge Simons has held three hearings in this matter as follows: January 14,
24 2020 Pretrial Conference; February 11, 2020 motions hearing; February 27, 2020 continued
25 Pretrial Conference/motions hearing. Each hearing started late.

26 10. Defendants' Motion for Summary Judgment was heard on February 11, 2020. That
27 hearing started 28 minutes late. Judge Simons stated that she was having word processing
28 problems. That statement suggests she was working on an order; however, no orders have been
entered since that date and court staff was heard to say that she had not yet arrived. At that
hearing, Judge Simons did not address the Discovery Commissioner's outstanding Report and

1 Recommendation for Order and terminated the hearing without allowing a response from Kvam's
2 counsel to new matters raised by Defendants' counsel in his rebuttal argument.

3 11. Judge Simons also ordered the parties to attend a settlement conference which was
4 scheduled with Judge Sattler, Dept. 10. The parties scheduled the settlement conference for
5 February 24, 2020 which was after they expected the ruling from Judge Simons. Judge Simons'
6 judicial assistant had previously notified the parties via email that "The Court is finalizing its
7 Order regarding the Motions for Summary Judgment." (Ex. "6"). The settlement conference
8 was aborted because Judge Simons had not yet entered her order. Judge Sattler personally went to
9 check on the status of the order and reported that it would be entered very soon, possibly that same
10 day. The court minutes from the settlement conference indicate that the order would be out in two
11 (2) days (Transaction # 7756799). This did not happen.

12 12. At the continued hearing on February 27, 2020, Judge Simons stated: "There's a
13 purpose for why it's not entered right now." (Transcript, Ex. "5" at 4:3). She went on to explain
14 that she wanted to include a ruling on a counterclaim that was not addressed in the Motion for
15 Summary Judgment. This statement suggests that the rest of the order was ready. She gave
16 Kvam's counsel one day to file a response regarding the counterclaim and then proceeded to read
17 her preliminary ruling. Judge Simons then wanted Kvam's counsel to "stipulate to the fact that the
18 notice I've given you today is reasonable" (Transcript at 16:2-3). Kvam's counsel then waived a
19 response to the counterclaim in order to allow Judge Simons to enter the order forthwith,
20 requested to continue the trial and indicated that they might prefer to withdraw any remaining
21 claims without prejudice in order to proceed with an appeal. Judge Simons incorrectly stated in
22 response that "in order to have a final determination in the case, you would need to have it with
23 prejudice." (Transcript, Ex. "5" at 18:1-3). The hearing concluded with Judge Simons saying:
24 "Okay. Well, I'm going to enter my order, and then you are going to meet with Judge Sattler."
25 (Transcript at 29:10-12).

26 13. The parties and their counsel again appeared in Dept. 10 for a settlement
27
28

1 conference on March 2, 2020. There was still no order.

2 14. To date, there have been no additional orders entered in this case. Judge Simons
3 has undermined the confidence and integrity of her court by appearing late for hearings, stating
4 numerous times that rulings are imminent when no rulings have been forthcoming and indicating a
5 ruling from the bench when in fact the ruling was not ready. She has caused the parties to incur
6 significant additional expenses by delaying rulings leading up to trial and forcing them to attend a
7 settlement conference that was supposed to take place after the ruling on summary judgment.
8 Judge Simons has created reasonable doubts about whether she is impartial in this case by
9 announcing an oral ruling on Defendants' Motion for Summary Judgment without addressing the
10 issue of Mineau's perjury and without ruling on the Discovery Commissioner's Report and
11 Recommendation. She seemed to cross the line into becoming an advocate for the Defendants
12 when she wanted Kvam's counsel to stipulate that one day (or one day and the weekend) was
13 reasonable time to respond to her stated intent to grant summary judgment on a counterclaim and
14 argued for a dismissal with prejudice of any remaining claims. Kvam and his counsel are
15 uncertain whether and when Judge Simons will ever rule, and if she does, whether the written
16 order will reflect what she announced from the bench or whether that was a strategy to force the
17 case into a settlement posture rather than discharge her duties.
18

19
20 15. That the January 14, 2020 Transcript attached hereto as Ex. "3" is a true and correct
21 copy, except that page 6, line 21 should reflect that the speaker is Mr. Matuska instead of Mr.
22 Sweet. This error has been brought to the attention of the court reporter. That transcript does not
23 indicate the start time. However, the court reporter confirmed that the hearing started at 9:47 a.m.
24 and concluded at 10:21 a.m. (See Ex. "7").
25

26 16. That the February 11, 2020 Transcript attached hereto as Ex. "4" is a true and
27 correct copy.
28

1 17. That the February 27, 2020 Transcript attached hereto as Ex. "5" is a true and
2 correct copy.

3 18. That the email attached hereto as Ex "6" is a true and correct copy.

4 19. That the email attached hereto as Ex. "7" is a true and correct copy.

5 I declare under penalty of perjury under the laws of the State of Nevada that the foregoing
6 is true and correct.

7
8 **AFFIRMATION**

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

11 Executed this 7th day of April 2020, at Carson City, Nevada.

12 Respectfully submitted,

13 MATUSKA LAW OFFICES, LTD.

14 *Michael L. Matuska*

15 By:

16 MICHAEL L. MATUSKA, SBN 5711
17 Attorneys for Plaintiff, JAY KVAM,
18 individually and derivatively on behalf of the
19 unincorporated joint venture identified as 7747
20
21
22
23
24
25
26

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2020-04-07 11:58:46 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 7824985 : nmason

Exhibit 2
DECLARATION OF JAY KVAM OF MARCH 30, 2020
(Motion to Disqualify Judge)

Exhibit 2
DECLARATION OF JAY KVAM OF MARCH 30, 2020
(Motion to Disqualify Judge)

CODE: 1520

Michael L. Matuska, Esq. SBN 5711
MATUSKA LAW OFFICES, LTD.
2310 South Carson Street, Suite 6
Carson City, NV 89701
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.

**DECLARATION OF JAY KVAM IN SUPPORT OF
MOTION TO DISQUALITY JUDGE**

I, JAY KVAM, do hereby declare as follows:

1. That I am the Plaintiff in the above encaptioned action. I have first-hand knowledge of the facts recited herein, I am competent to testify to these facts, and the same are true and correct to the best of my knowledge, information and belief.

2. That I attended all three (3) hearings scheduled by Judge Simons in this matter, including January 14, 2020 Pretrial Conference; February 11, 2020 motions hearing; February 27, 2020 continued Pretrial Conference/motions hearing.

3. I also attended settlement conferences before Judge Sattler in Department 10 on February 24, 2020 and February 27, 2020.

4. I no longer have confidence that Judge Simons truthfully conveys information to the parties nor even to her own clerks or settlement judges with regard to orders pending for my case.

1 On multiple occasions, Judge Simons has, either directly from the bench or indirectly through clerks
2 and the settlement judge, indicated her intent to enter an order on the Motion for Summary
3 Judgment. Those statements combined with the elapse of time has proven them to be false.

4 5. Considering all the statements that Judge Simons has made regarding the status,
5 timing, and content of her order on the Motion for Summary Judgment, and reading her intended
6 ruling from the bench when the order was not in fact ready, I now believe that she did so in attempt
7 to compel me to settle my case.

8 6. I no longer have confidence in Judge Simons' fairness and impartiality. She has gone
9 out of her way to indicate her intended ruling on a counterclaim that is not pending, gave my attorney
10 one (1) day to file a response, and has avoided or delayed a ruling on the Discovery Commissioners'
11 January 10, 2020 Recommendation for Order and other motions which address perjury by the
12 Defendant, Brian Mineau.

13 7. The lack of rulings from Judge Simons had the effect of forcing the parties into
14 stipulating to continue trial a mere 4 days before trial had been scheduled, after wasting considerable
15 time preparing for trial, including by filing their pre-trial statements. Judge Simons' conduct has
16 denied me my right to have my case fairly heard before a Nevada court, or in the event of an adverse
17 decision, to pursue an appeal to the Nevada Supreme Court.

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

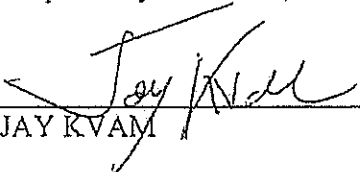
20 AFFIRMATION

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

23 Executed this 30th day of March, 2020, at Carson City, Nevada.

24 Respectfully submitted,

25 By:

26 
JAY KVAM

27 \\Matuska-dc\Company\Client Files\Litigation\Kvam\l. Mineau\Pldgs\Motion to Disqualify Judge\Dec.JK.docx
28

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2020-04-07 11:58:46 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 7824985 : nmason

Exhibit 3
HEARING TRANSCRIPT OF JANUARY 14, 2020
(Motion to Disqualify Judge)

Exhibit 3
HEARING TRANSCRIPT OF JANUARY 14, 2020
(Motion to Disqualify Judge)

1 4185

2

3

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

8

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

19

20

21

22

23 Job No.: 598841

24 Reported by: Carol Hummel, CCR #340

1

2

A P P E A R A N C E S

3

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

9

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1 -oOo-

2 RENO, NEVADA; TUESDAY, JANUARY 14, 2020

3 -oOo-

4

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. SWEET: 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

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19



20

s/s Carol Hummel, CCR #340

21

22

23

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FILED
Electronically
CV18-00764
2020-04-07 11:58:46 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 7824985 : nmason

Exhibit 4
HEARING TRANSCRIPT OF FEBRUARY 11, 2020
(Motion to Disqualify Judge)

Exhibit 4
HEARING TRANSCRIPT OF FEBRUARY 11, 2020
(Motion to Disqualify Judge)

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

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A P P E A R A N C E S

4

5 FOR THE PLAINTIFF:

6 MATUSKA LAW OFFICES, LTD.
7 BY: MICHAEL MATUSKA, ESQ.
8 2310 South Carson St, #6
9 Carson City, NV 89701
10 (775) 350-7220
11 Mlm@matuskalawoffices.com .

12 FOR THE DEFENDANT:

13 GUNDERSON LAW FIRM
14 BY: AUSTIN K. SWEET, ESQ.
15 3895 Warren Way
16 Reno, NV 89509
17 775-829-1222

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1 FEBRUARY 11, 2020, TUESDAY, 9:58 A.M., RENO, NEVADA

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4 THE COURT: Good morning. Please be seated.

5 MR. SWEET: Good morning.

6 MR. MATUSKA: Good morning.

7 THE COURT: Sorry about the delay. I was having
8 some word processing issues. And I'm squared away.

9 This is Case No. CV18-00764. Jay Kvam vs. Brian
10 Mineau.

11 Did I pronounce that correctly? Thank you.

12 Please state your appearances.

13 MR. MATUSKA: Mike Matuska for the plaintiff Jay
14 Kvam, and Jay Kvam with me today.

15 MR. SWEET: Austin Sweet with Gunderson Law Firm
16 on behalf of the defendants. And with me is Mr. Brian
17 Mineau.

18 THE COURT: Okay. So you couldn't settle it
19 while you were waiting?

20 MR. SWEET: Not yet.

21 MR. MATUSKA: We've been referred for settlement
22 conference on, you saw that, on the 24th.

23 THE COURT: Yes. So a couple of things.

24 Thank you for the well-done briefing. Going

1 forward, I do not want countermotions in the same, in your
2 opposition. It's not allowed under the rules, but it also
3 makes it very hard.

4 And so I will tell you this, Mr. Matuska, I do
5 not attach any negativity to the fact that you did a
6 cross-motion, but I don't want to see it in the future.

7 MR. MATUSKA: Very well.

8 THE COURT: It's not allowed under the rules,
9 and it just makes it hard. But I have sorted everything
10 out.

11 So I'm going to talk with you, Mr. Sweet. I do
12 have some questions, but I am going to allow you to go
13 ahead and do your argument.

14 MR. SWEET: Thank you, your Honor. And I will
15 keep my argument brief as the motion has been extensively
16 briefed, as you mentioned.

17 Your Honor, this project was an investment. And
18 investments carry risk. In this case the parties
19 anticipated that the project would go smoothly, and that
20 they would have received a relatively large return in a
21 relatively short amount of time.

22 To that end, they executed the terms of
23 agreement that set forth how the proceeds would be
24 distributed when they succeeded with this project, hoping

1 that they would.

2 As set forth in the terms of the agreement,
3 first they would pay all the expenses to third parties,
4 then they would repay Mr. Kvam's investment, plus 7 percent
5 interest. And then what was left over, the profits would
6 be split among the partners equally. If the project had
7 gone according to plan they would have succeeded, and they
8 would have made a fair amount of money.

9 Unfortunately, that didn't go according to plan.
10 The contractor that they hired to renovate the project
11 breached his obligations, didn't finish the renovation,
12 didn't perform the services he was paid to perform. The
13 project failed.

14 The parties had anticipated that risk, your
15 Honor. In terms of the agreement the contract says that if
16 the transaction should fail in any way, all interest and
17 remedies available to the joint venture would be assigned
18 to Mr. Kvam.

19 THE COURT: And he would also receive the
20 percentage interest of the defendant, correct?

21 MR. SWEET: Correct. So the deal was if it
22 succeeds, pay off the third-party expenses, Mr. Kvam gets
23 his investment back plus 7 percent. What's left over, the
24 profits get split up equally among the parties.

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

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.

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

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.

1 So the project was being managed in the way that
2 Mr. Mineau thought that he was supposed to be doing it.
3 Mr. Kvam was actively involved at all times. And there is
4 no legal obligation or duty that has been breached by
5 Mr. Mineau or Legion Investments that would entitle
6 Mr. Kvam to reach into their pocket to get his investment
7 back.

8 THE COURT: So it doesn't in your mind then --
9 let's go on the fourth claim, which I think is, is in your
10 second group, correct?

11 MR. SWEET: Yes.

12 THE COURT: And, but wasn't Mr. Mineau in a
13 superior position and an entrusted position, and so doesn't
14 that -- does it or does it not impose a special element of
15 reliance in addition to any future duties.

16 You're saying that they were equal and that he
17 wasn't in a superior position?

18 MR. SWEET: Well, there's, there's a few
19 different things going on here, your Honor.

20 First of all, for the fourth cause of action,
21 it's very broad. So I'm not sure if you're talking about
22 contractual duties or legal duties.

23 There was no contractual obligation whatsoever
24 that Mr. Mineau would manage the project or, you know,

1 guarantee performance of the project.

2 So there are statutory duties that Mr. Mineau,
3 on behalf of the partnership, would carry out his efforts
4 on behalf of the partnership under a statutory duty of care
5 and duty of loyalty. So that's true. I don't have any
6 dispute about that.

7 And Mr. Mineau was the one who was taking the
8 lead on the construction. He identified the property. He
9 identified the contractor. He signed the contract. That's
10 not disputed.

11 THE COURT: But does that -- if that's the case,
12 does that preclude summary judgment on that claim?

13 MR. SWEET: It doesn't, your Honor, because
14 there may have been a duty under those statutory duties,
15 but there's no evidence of the breach of that duty.

16 THE COURT: So the issue is yes, you agree on
17 the law that applies, but no, there aren't any facts to
18 meet those elements, that you were the only one has brought
19 forth facts.

20 MR. SWEET: Correct. There's no facts, there's
21 no evidence to show that -- so the duty of loyalty is a
22 standard of gross negligence which, first of all, your
23 Honor, hasn't been pled in the fourth cause of action, so
24 I'm not sure if that's what the claim is.

1 What was alleged in the opposition to our motion
2 for summary judgment was tortious breach of the covenant of
3 good faith and fair dealing.

4 That requires proof of grievous and perfidious
5 misconduct. There's been no evidence that Mr. Mineau's
6 conduct was even negligent, but certainly not grossly
7 negligent, which wasn't even pled. But there's no evidence
8 whatsoever of grievous or perfidious misconduct, which is
9 the element that Mr. Kvam has to prove to get to trial on
10 that claim for tortious breach of the covenant of good
11 faith and fair dealing.

12 So that's the second claim, your Honor.
13 Mr. Mineau never made any promises that he was going to
14 ensure that this project could be completed, would be
15 profitable, would succeed, that Mr. Kvam would get his
16 money back and then some on top of it.

17 That was certainly the intention. Mr. Mineau
18 acted in good faith and pursued the project, but
19 unfortunately, the contractor breached his contract. And
20 the fact that the contractor breached the contract does not
21 in and of itself establish that Mr. Mineau breached some
22 duty to Mr. Kvam or to the partnership.

23 The third category of claims, your Honor, are
24 the intentional tort claims. Fraud, conversion and RICO.

1 Again, there's no evidence of this, your Honor. There's no
2 evidence of misrepresentations. There's no evidence that
3 Legion Investments or Mr. Mineau ever exercised any control
4 over Mr. Kvam's funds.

5 The evidence shows that Mr. Kvam paid the title
6 company directly, paid the contractor directly. The last
7 two years we've been going through these conspiracy
8 theories that somehow Mr. Mineau was in cahoots with the
9 contractor and had Mr. Kvam's money used on another
10 project.

11 They subpoenaed countless records. They hired a
12 forensic accountant. The forensic accountant came back and
13 said there's no evidence of that. I can't find anything.
14 There's no evidence whatsoever that there was some sort of
15 fraud or conversion, certainly not racketeering that can
16 take this claim through trial.

17 Your Honor, the bottom line is Mr. Kvam claims
18 that he was entitled to a substantial return on his
19 investment without doing any work or apparently taking any
20 risk.

21 If he wants to come to this Court and say that
22 that was the deal, that's what he was entitled to, he
23 should have some evidence to support that. And he doesn't
24 have any. All we have is the terms of the agreement that

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

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.

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

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

1 wants with it at that point?

2 MR. SWEET: We have no problem with that. It's
3 his claim. We're not disputing the claim.

4 If he decides not to dissolve the partnership at
5 that point, I don't fundamentally object to that.

6 I'm not sure that at that point there is legally
7 a partnership since this is an unincorporated partnership,
8 and now you only have one person, and as a matter of law,
9 it would probably effectively no longer be a partnership
10 regulated by NRS Chapter 87. But, you know, I'm not sure
11 that that's something that we need to deal with here today.

12 THE COURT: Well, it precludes the claim. It
13 would preclude the claim.

14 MR. SWEET: And fair enough, your Honor. To me
15 this isn't something that needs to go to trial. Whether
16 the entity is judicially dissolved at final judgment or
17 whether it is simply assigned to Mr. Kvam, and that
18 inherently creates a judicial dissolution because now you
19 only have one partner, so it's not a partnership anymore,
20 or whether Mr. Kvam wants to, you know, take some other
21 steps outside of this courtroom to dissolve the entity once
22 he has pure ownership of it, I don't really care. Frankly.

23 That doesn't affect the claims in this case or
24 the outcome that is going to be adjudicated.

1 Of course it needs to be resolved one way or
2 another. I think since Mr. Kvam certainly doesn't intend
3 to just take the money and proceed with some sort of
4 partnership with himself, I don't see any reason why
5 dissolution would not be entered to wrap this up and end
6 the partnership formerly and cleanly. But if Mr. Kvam
7 wants to do something else, we don't object.

8 THE COURT: What is the current amount that is
9 with the clerk?

10 MR. SWEET: The amount with the clerk is
11 \$24,473.77. And there is an additional amount that was
12 received after those funds were deposited of \$1,864.14.

13 THE COURT: Okay.

14 Counsel -- so counsel, I actually -- you
15 counsel -- when I did it, now I've made a note of how
16 Mr. Sweet organized his claims. I actually organized it by
17 claims. And I'm not going to preclude you from arguing it
18 in any fashion that you want.

19 MR. MATUSKA: Okay.

20 THE COURT: Because you don't have to follow
21 what he did.

22 MR. MATUSKA: Is it okay if I remove this and
23 remain at the table?

24 THE COURT: Yes, but you need to stand.

1 MR. MATUSKA: Yes. What we just heard for the
2 past 15 minutes or so, your Honor, basically is an
3 encapsulation of the story that they've been giving us
4 throughout this case and even prior to the time that we
5 filed the case.

6 What you just heard from Mr. Sweet was not at
7 all responsive to the opposition. To the extent it is the
8 burden of the plaintiff to come forward with the actual
9 evidence to support the allegations of the complaint, we
10 provided 48 exhibits, only one of which was mentioned by
11 Mr. Sweet. And the Court will have about twice that many
12 at the time of trial. In fact, the story that he's giving
13 is, is legally irrelevant.

14 His first argument that an investment carries
15 risk, that's not even a legal argument, your Honor. What
16 does that mean in the context of this case and the context
17 of summary judgment? It's a rhetorical question. It means
18 nothing.

19 We all know that possibly the, the real estate
20 market changes. And maybe these parties don't realize
21 quite the profit that they anticipated. Maybe the house
22 doesn't sell for quite as much as they anticipated, or
23 maybe it sells for more. That's the kind of risk that you
24 assume in a variable real estate market.

1 You don't assume the risk that you will be lied
2 to, that the funds will be missing, that the project will
3 not be completed, and that the contractor will work on the
4 other projects for Mr. Mineau. That risk was never
5 assumed, and we need to get to that as the core point.

6 We're also here defending a summary judgment
7 motion without the benefit of discovery of the other
8 projects this contractor was working on.

9 And I want to be clear on this, too. Although
10 Mr. Sweet and Mr. Mineau will continue to blame that
11 contractor, that contractor was working on Mr. Mineau's
12 other projects, which as far as we can tell, were brought
13 to a successful and a profitable conclusion. That's the
14 discovery that they're objecting to, that's the discovery
15 that we've been requesting, and that's the discovery that
16 was the subject of the, of the recommendation from the
17 discovery commissioner. We need that.

18 This idea that the blame rests with the
19 contractor is legally irrelevant, and it's false.
20 Mr. Mineau stuck with that contractor on his other
21 projects. That's why he's not giving us the, the evidence
22 of it.

23 And, also, your Honor, this idea that he wants
24 to blame the contractor, we've looked through extensive

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.

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

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 --

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

1 this.

2 But let's, let's go back to square 1, then, and
3 I think that this is important. Mr. Sweet keeps pointing
4 to the terms of agreement. He says it's deficient, and it
5 doesn't have this, and it doesn't have that. Let's go back
6 to square 1.

7 Please, let's go to the exhibits in the
8 opposition to the motion for summary judgment. Let's go to
9 Exhibit Number 2.

10 THE COURT: To his motion?

11 MR. MATUSKA: No, to our, our opposition.

12 THE COURT: Okay. So let's step back for one
13 minute.

14 This is the problem with a cross-motion. So are
15 you moving for summary judgment on each and every claim?

16 MR. MATUSKA: No, your Honor. I'm sorry. I
17 meant to be clear about that. They've admitted to the
18 first claim for relief.

19 THE COURT: Right.

20 MR. MATUSKA: That's the only thing I moved for
21 summary judgment on. I didn't argue that. I just said
22 they've acknowledged that now.

23 THE COURT: Okay.

24 MR. MATUSKA: That is no longer in dispute.

1 Actually, I thought their motion was confusing.
2 They wanted summary judgment on the first claim for relief,
3 but they're admitting to our first claim for relief. So it
4 seems appropriate just to point that out, that they are now
5 admitting that this is, is a joint venture governed by the
6 Partnership Act. That's the extent of the cross-motion.

7 THE COURT: Okay. So as far as your
8 cross-motion then, it's only as to claim 1, but claims 2
9 through 11, your position is that you have provided, and
10 you have shown material facts in this field?

11 MR. MATUSKA: Yes. And I'd like to review some
12 of these exhibits now that we submitted with our
13 opposition. In fact, I think we should just go through
14 them.

15 Exhibit Number 1 is a declaration from Jay Kvam.

16 But starting with Exhibit Number 2, it's the
17 email from Michael Spinola to Jay Kvam. That's how he was
18 introduced to the project.

19 It identifies a contractor bid of \$70,000 and a
20 probable listing price of \$169,900. That's on December
21 29th, 2016.

22 A couple of days later, approximately the first
23 day of January, Mr. Kvam was introduced to Mr. Mineau at a
24 Starbucks. And Exhibit 3 is the result of that meeting.

1 And Exhibit 3 is actually, is actually the
2 breakdown of the financing. It starts on the top of the
3 listing price of \$169,000. Starts with the listing price
4 of \$169,000, \$70,000 for the repairs. \$44,000 for the
5 purchase. All in at \$114,000, plus interest at 7 percent.
6 Interest estimated for three months, this was estimated to
7 be a three-month project. Profits, \$39,485 divided by
8 three. It's right there.

9 This is really the agreement that they reached
10 in January.

11 And then we go forward a little bit. Exhibit
12 Number 5. Then Mr. Kvam is provided with the bid, the
13 contractors bid for \$70,000 on January 2nd. That bid is
14 from Triple R Construction, curiously not TNT, which is the
15 one that Mr. Mineau chose.

16 Last page of the bid, this job will take three
17 months. So, again, we have the three-month estimate.

18 And at the same time Mr. Mineau represented to
19 Mr. Kvam that he had had successful projects in the Chicago
20 area. He did not represent that he had projects ongoing.
21 He represented that he had experience.

22 And that's important, too, because if he had
23 explained he had projects ongoing, more of an effort would
24 have been made to prioritize this project and keep the

1 project funds separate. So that was false.

2 The agreement that they reached on January 1st
3 was that all the parties would put in money here.
4 Mr. Mineau, now we have a great dispute on whether
5 Mr. Mineau put money in. That's the subject of a separate
6 motion. We still don't have good evidence that Mr. Mineau
7 put his funding into this project. He's coming up with
8 changeable stories of where an additional \$20,000 came
9 from.

10 But going forward, Exhibit No. 6 is the purchase
11 contract, \$44,000.

12 Exhibit No. 7, Jay Kvam wires his \$44,000 for
13 the purchase price.

14 Exhibit 8, he wires another \$784.31 for escrow
15 costs.

16 Exhibit 9 is the settlement statement on escrow
17 close. Escrow closed February 13th, 2017.

18 THE COURT: So, Counsel, if we, if we drill down
19 on your representations, which obviously I looked at all
20 these documents of fraud, have -- like I said, some of your
21 allegations I think move into your eighth claim, some of
22 your argument is -- have you met the burden that's required
23 to maintain a claim of fraud? Have you in your opposition
24 provided facts to support that there are material facts in

1 dispute as to that claim?

2 MR. MATUSKA: The --

3 THE COURT: Because the way that it's pled, it's
4 too broad, in your, in your complaint. And that's why when
5 it's tested on summary judgment like it is here, that's
6 your time to come forward and tell the Court, here's the
7 evidence that I have that we've discerned through discovery
8 that supports my claim for fraud, fraudulent inducement and
9 fraudulent concealment.

10 So you have the representation that the project
11 was supposed to come down with a \$13,000 profit. Did I
12 hear you say that was really the agreement, or was this
13 really doodling on a pad of paper and doing an estimate?
14 So I have that representation. I think that's what you're
15 saying.

16 And then 2, we have the three-month estimate
17 which there's some correspondence that it may take later.

18 Then we have what you indicated was a
19 representation that Mr. Mineau had successful experience in
20 Chicago.

21 MR. MATUSKA: The inducement really is that
22 Mr. Mineau had successful experience in Chicago, and that
23 all of the partners would be contributing money.

24 The project, the layout of the project financing

1 that we looked at is important to supply the terms of the
2 agreement. But the representations, essential
3 representations that I'm looking at is that all the parties
4 were supposed to contribute money and that Mr. Mineau had
5 experience.

6 And there are, are, are other representations as
7 we go forward, your Honor, through the record and other
8 matters of concealment. And please keep in mind the
9 \$70,000 bid that we already looked at and that was part of
10 the estimates when they outlined this project.

11 Going forward then to Exhibit 11. Escrow closed
12 February 13th. Mr. Kvam actually signed the terms of
13 agreement the next day on February 14th, so after they, he
14 had already put money up and it had already closed.

15 And, really, if we look closely at the terms of
16 agreement, the terms of the agreement are for Mr. Kvam to
17 take over a share of Mr. Spinola's funding, and I think
18 that's important because, again, that supports the point
19 that all three partners were supposed to provide funding.

20 Mr. Spinola was having trouble with some of his
21 funding, assigned that draw to Mr. Kvam, a proportionate
22 share of the return. And that, that was agreeable. That's
23 also why Mr. Spinola is on the sideline at this point.

24 But let -- if we could look at Exhibit No. 11,

1 the terms of the agreement, please.

2 THE COURT: I have it.

3 MR. MATUSKA: And if we look at the very top,
4 terms of agreement between Legion Investments, LLC, its
5 members -- and I'm focusing on the next line, and Jay Kvam,
6 initial funding member of same. Because when we go through
7 the terms of agreement, the fourth and fifth line:

8 Initial purchase is being funded by

9 Jay Kvam --

10 That's correct. That's the \$44,000.

11 -- who was thereby assigned any
12 remedies due should the transaction
13 fail in any way.

14 And the next sentence is the crucial one.

15 Initial funder -- initial funder was identified
16 above as Jay Kvam.

17 Initial funder will be due a 7
18 percent annual return on any funds
19 provided due from date of
20 disbursement.

21 No conditions whatsoever.

22 There is expected to be three renovation draws,
23 and then Mr. Spinola is assigning some of his interest to
24 Mr. Kvam.

1 So this, this is a, this adds to the project
2 financing outline that we looked at. It doesn't change it,
3 however.

4 And this is a situation, your Honor, and we
5 explained this at pretty great length in our opposition,
6 you will be hard-pressed to look at one of the documents
7 and say this is the entire agreement because it doesn't
8 exist.

9 These documents have to be read together, along
10 with the oral agreements and representations of the
11 parties. And if we ever get to the point that none of that
12 adds up to an agreement that we're talking about rescission
13 and reformation, which is also at, at issue in our, in our
14 complaint.

15 But the terms of agreement are not complete --

16 THE COURT: And does this Exhibit 11, where does
17 it say that -- or in any other document that anyone other
18 than Mr. Kvam or is going to provide the monies. This says
19 that he is the -- initial purchase is being funded by
20 Mr. Kvam, and that there's expected to be three renovation
21 draws, the first one by Mr. Kvam, and then we don't see
22 about the other two in this particular document.

23 MR. MATUSKA: We don't need to because that was
24 the agreement of the parties. This agreement, again, is

1 more focused on what's happening between Mr. Spinola and
2 Mr. Kvam.

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.

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.

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.

24 THE COURT: What does the language mean, Who is

1 thereby assigned any remedies due should the transaction
2 fail in any way?

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.

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.

15 THE COURT: I understand that.

16 MR. MATUSKA: That doesn't even say that it's
17 the sole contractual remedy.

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.

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.

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.

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.

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.

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.

16 THE COURT: When you say that, you're talking
17 about Exhibit 11.

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.

23 THE COURT: Remind me who drafted this.

24 MR. MATUSKA: It was sent by email to Mr. Kvam.

1 Who drafted it, I don't know specifically.

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.

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.

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.

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.

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.

24 MR. MATUSKA: It doesn't matter. And can I -- I

1 finish, please? I did not interrupt him.

2 THE COURT: Why don't we just settle down.

3 Here's what I want.

4 I want -- I read all your documents. What I
5 want is for you to tie it up for me and tell me exactly
6 where there are genuine issues of material fact. What's
7 really clear to me is both sides have a interpretation of
8 what happened between these people. And that clearly they
9 went into a deal, and thought that it was going to be
10 profitable. It was not. And so we're here because it was
11 not.

12 But this is the time to test each and every one
13 of your claims and for me to determine whether or not there
14 is sufficient evidence produced by you, who will bear the
15 burden at trial, to defeat the summary judgment motion.

16 So I want to -- I've looked at all this. I want
17 you to tell me exactly what matches --

18 MR. MATUSKA: I am. I'm, I'm telling by
19 reference to the exhibits.

20 Right here in Exhibit 12 is a representation
21 that there will be a separate account for the May Street
22 funds. That did not happen.

23 THE COURT: And so which claim do you maintain
24 that that supports as a genuine issue of material fact?

1 MR. MATUSKA: It's relevant to multiple
2 claims -- to the duty of loyalty, to the duty of care, to
3 the fiduciary duty, to the accounting, to the fraud, of
4 course. And there are many species of fraud.

5 And I'm going to go further in the record and
6 show you some of the concealments also. The RICO. We've
7 discussed the fraudulent inducement right now where
8 Mr. Mineau was going to put up funds and he had experience.
9 He concealed that he had other projects going on. He
10 represented that the funds would be placed in a separate
11 account. That never happened.

12 We go through the record, and we see more
13 misrepresentations about the status of the project. I
14 think what's helpful, though, is to view those
15 representations in relations to the timing of when Mr. Kvam
16 is forwarding funds for, for, for the project.

17 If we look at Exhibit No. 13, that's a text
18 message between Mr. Mineau and the real estate agent on
19 March 16th. He's saying, now he's saying I'm going to have
20 a contractor go to May Street, which is very curious,
21 because we already looked at the bid that he had for
22 \$70,000. We go a step further, on Exhibit 14, and
23 Mr. Mineau is providing the construction contract for TNT.
24 The construction contract is Exhibit 7 in their motion for

1 summary judgment. The construction contract is for \$80,000
2 now. And he concealed that the construction contract price
3 went up.

4 And there's no explanation of why he changed
5 from that RND to TNT Construction, although we can infer
6 from this record that that's because he was using TNT
7 Construction on his other projects. And all the money went
8 to the same account. So this was no longer kept separate.

9 And he concealed the fact that the money was all
10 going to the same account and that TNT was working on the
11 other projects and not keeping a separate account.

12 THE COURT: So the representation regarding the
13 contractor, you're maintaining would go to the fraud
14 claims. But there was no contractual term that required
15 Mr. Mineau to go with a particular contractor?

16 MR. MATUSKA: We agree with that. And, in fact,
17 Mr. Kvam was not involved to that extent anyway.

18 THE COURT: That was really the province of
19 Mr. Mineau.

20 MR. MATUSKA: Yes, it was, your Honor. In
21 theory, there's no problem with Mr. Mineau, well, to some
22 extent Mr. Kvam was relying on Mr. Mineau to select a
23 contractor.

24 But he already provided a bid for \$70,000 from

1 one contractor, and now we've got a contract for \$80,000
2 with this referred contractor who is working on his other
3 projects and all the money going to the same account. So
4 it is a problem because of that.

5 And more than that, your Honor, this contract,
6 and I would submit that this is standard procedure,
7 Exhibit 4 of the contract -- excuse me, paragraph 4 of the
8 construction contract, which starts on the first page and
9 continues onto the second page, requires the contractor to
10 provide invoices prior to being paid. We do not have a
11 single invoice for this project.

12 THE COURT: But were you supposed to be provided
13 invoices or Mr. Mineau was?

14 MR. MATUSKA: Mr. Mineau. But he doesn't have
15 them, or at least he hasn't provided them to us. He never
16 demanded, requested, or obtained invoices. But as we look
17 through the record, he, twice more he asked Mr. Kvam to
18 provide funds, even though he didn't have actual invoices
19 and never had confirmation of the construction.

20 If we go to addendum A -- and this all relates
21 to his fiduciary duty, his duty of care, his duty to
22 disclose.

23 THE COURT: So if he, you're maintaining that he
24 did not disclose all of this, and that your client

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

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.

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.

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

1 of \$20,000.

2 And we go on like this with the
3 misrepresentations about the status of the project and the
4 status of inspections. And we provided the inspection
5 reports.

6 THE COURT: And Exhibit 21 shows that \$9,000
7 wire, correct?

8 MR. MATUSKA: Yes.

9 THE COURT: And that was made after the original
10 estimated date, wasn't the original estimated date of
11 completion 5/16?

12 MR. MATUSKA: Well, the original estimate was
13 the three-month project.

14 In the, in the last text that we just looked at
15 Mr. Mineau -- we will be done no later than the 16th of
16 May.

17 So, yes, we do have another \$9,000 being
18 forwarded on May, on May 18th, correct.

19 And appreciate, too, that Mr. Kvam was put in a
20 position, at what point is he supposed to pull the plug on
21 this.

22 Is he supposed to ride it out, put a little more
23 money in --

24 THE COURT: Doesn't he have an obligation to

1 mitigate his damages?

2 MR. MATUSKA: Yes. But that isn't really part
3 of their summary judgment. The issue of mitigation is
4 pretty complicated when you're talking about fraud
5 misrepresentation. We don't put the affirmative duty on
6 the defrauded party, you know, to discover the fraud and
7 undo it.

8 He put up \$44,000 for the original purchase.
9 The first installment to the contractor in March, \$20,000,
10 second installment to the contractor of \$20,000 in April.
11 That second \$20,000 was the one that he agreed to do for
12 Spinola. That was what the terms of agreement was.

13 THE COURT: And then he did the half of the
14 third at \$9,000.

15 MR. MATUSKA: Yes, because there was, because
16 there, because they still weren't coming up with more
17 money. So he did put \$9,000 more up, yes. Yes.

18 But it was still based on the representations
19 that the project is proceeding, we have inspections
20 pending, it was just absolutely false, your Honor. We've
21 never even been able to tell what days the contractor was
22 at the project.

23 Mr. Mineau did nothing to supervise the course
24 of, of construction. Another kind of a fine point, your

1 Honor, but these, these second payments of \$20,000 and
2 \$9,000 don't even match with the payment schedule in the
3 construction contract. It's not even clear how they're
4 coming up with these numbers. Keep in mind, too, that this
5 was explained in the declaration. Mr. Kvam did not have
6 the construction contract. We got that as part of this
7 case.

8 Initially, and he doesn't really need to. He's
9 not supervising the construction. But he didn't know what
10 the payment schedule was in the contract. He's paying what
11 Mr. Mineau advises him to pay. And Mr. Mineau concealed
12 that he had changed contractors and that the, the price of
13 the project had, had gone up.

14 We're going forward. Then Exhibit 24. Suddenly
15 there's a new investor involved with the project.

16 THE COURT: But as of June 2017, Mr. Kvam knew
17 that there was some problems on the project.

18 MR. MATUSKA: Well, he knew it hadn't been
19 complete -- you know, not really. He knew it hadn't been
20 completed on time, but the reports were still rosy. The
21 reports or inspections have been pushed back, we're still
22 working on getting final inspections. But in truth they
23 didn't even have the permit at that time. And let's ask
24 the basic question. Why was Mr. Mineau having Mr. Kvam

1 wiring Mr. Mineau any money before they had permits?

2 But then we get to Exhibit 24. There's a new
3 investor. Apparently Mr. Mineau decided he wasn't going to
4 put his own money in. He had another investor put his
5 money in -- if it's true, which we don't have confirmation
6 of.

7 This goes back to the fraudulent inducement, the
8 fraud, the concealment, the misrepresentation. July, Jay
9 Kvam gets an email from Brad Tammen, that he put \$20,000
10 in, into the project. We don't know where that money went
11 either. I mean, we know what account it went into, but we
12 don't have any confirmation that it was used on May Street.

13 This email, though, Exhibit 24, at the bottom,
14 Mr. Mineau confirms that, actually going on to the next
15 page, Jay put up the purchase capital and was getting 7
16 percent on that. And then we are going to split the profit
17 after all expenses are paid back. Actually, Mr. Mineau,
18 even this email to a different party is confirming the 7
19 percent to Mr. Kvam.

20 And we know, your Honor, that in those instances
21 when a contract is ambiguous, sometimes we look to the
22 subsequent acts of the parties to determine how they
23 intended to fulfill the contract. And this is relevant for
24 that purpose.

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

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.

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.

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

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

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

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.

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,

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.

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.

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.

11 THE COURT: But did you -- I did not recall the
12 specific language in your opposition --

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.

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.

19 MR. MATUSKA: I did by reference to the
20 discovery commissioner's order.

21 THE COURT: Okay.

22 MR. MATUSKA: Yes. Yes.

23 And, actually, your Honor, when we were going
24 through the briefing, I was addressing the relevance of

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.

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.

14 And if Mr. Mineau is paying other investors
15 ahead of Mr. Kvam, that is a breach of his duty of loyalty.

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

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.

3 But we know that Mr. Mineau participated in the
4 commingling of funds. He allowed it. And he benefited
5 from it.

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.

13 So yes, Mr. Mineau absolutely participated in
14 the commingling resulting in the conversion of funds. And
15 he's responsible for that.

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.

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

1 state RICO it absolutely is not. It only requires two of
2 the predicate acts.

3 THE COURT: And you're referring to Siragusa vs.
4 Brown?

5 MR. MATUSKA: Yes, your Honor. It only requires
6 two of the predicate acts, and we have them.

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.

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.

18 THE COURT: How does that misrepresentation harm
19 Mr. Kvam?

20 MR. MATUSKA: We don't know who the investors
21 are in this project.

22 THE COURT: How does that matter? If he
23 borrowed money from anyone, but the money is provided to
24 the project --

1 MR. MATUSKA: We explained it.

2 First of all, we don't know that the money was
3 provided to the project.

4 THE COURT: Okay. So that's the issue, not who
5 he borrowed it from.

6 MR. MATUSKA: That's one issue. It goes back to
7 the fraudulent inducements on January 1st, 2017, when all
8 of these investors were supposed to put up money in the
9 project.

10 And Mr. Kvam testified to this in his
11 declaration. He would not do an investment with somebody
12 who wasn't invested in the project. To put it bluntly, if
13 Mr. Mineau, if he doesn't have skin in the game, he has no,
14 no incentive to finish the project. And that probably is
15 the story behind the story.

16 THE COURT: Well, I don't need "probablys" here.
17 I need specific facts that show that, that there's a
18 genuine issue of material fact. And I have what you said
19 so far, and we just hit the RICO claim.

20 And did you want to address the 11, the
21 derivative claim at all?

22 MR. MATUSKA: I don't need to because that is
23 just confirming what is in partnership statutes, that a
24 partnership can sue on his own behalf or on the part of the

1 partnership. To the extent that any of these claims belong
2 to the partnership Mr. Kvam has asserted those.

3 But, your Honor, this idea that Mr. Mineau put
4 up his own money is material, and actually the Court can
5 draw reasonable inferences from, from, from the record.

6 And the record is that Mr. Mineau set up this
7 project, was supposed to have three investors. In fact, he
8 did not put up his own money. He's doing an investment.
9 He's trying to get profit from an investment that he's
10 doing with other people's money. That wasn't how this was
11 set up.

12 The inducement was three partners, each putting
13 up -- Mr. Kvam putting up the purchase price, that's a
14 given, but then each of the partners putting up one of the
15 three construction draws. Mr. Mineau did not do that.

16 That was a material misrepresentation from day
17 one. And Mr. Kvam testified in declaration that he
18 submitted in opposition to the motion for summary judgment,
19 that was concealed from him, and he would not have invested
20 with Mr. Mineau if he knew that Mr. Mineau was not putting
21 money into the project. He doesn't want to be invested in
22 a project where the leader of the project is not also
23 invested in the project.

24 THE COURT: Okay.

1 MR. MATUSKA: And the reason is what we just
2 said, in that circumstance Mr. Mineau has no financial
3 incentive to, to complete the project. He's not out money.
4 It's Mr. Kvam who is out money.

5 That's why we have to keep in mind this is not
6 about the contractor. This is not about whether Mr. Kvam
7 talked to the contractor in May, which he did. It doesn't
8 matter. This is about since Mr. Mineau was taking this
9 money and leaving this project and signing all the
10 documents for the project, and he now admits he had the
11 fiduciary duty to Mr. Kvam. That fiduciary duty includes,
12 encompasses a duty of loyalty, a duty of care. There's
13 also the contractual duty to exercise good faith, to
14 fulfill the terms of the contract to fulfill the intended
15 purpose of the contract.

16 And, again, even though it's our burden to come
17 forward with specific evidence, we do have to look at the
18 absence of evidence in this situation also. What did
19 Mr. Mineau do to fulfill his obligations? Fiduciary duty
20 of care, fiduciary duty of loyalty. He did nothing. He
21 didn't put up his own money, he didn't ask for invoices
22 from the contractor.

23 In fact, he gave false information to, to
24 Mr. Kvam. What did Mr. Mineau do to move this project

1 forward in a timely manner. He did nothing. We know that
2 it wasn't moving forward. The main permit wasn't even
3 issued until July 17th, after Mr. Kvam had already put his
4 money up.

5 So what was Mr. Mineau doing to fulfill the
6 intended purpose of this agreement? What was he doing to
7 exercise his duty of care with regard to the project of my
8 client? Nothing. And we have, and we have the false
9 misrepresentations.

10 THE COURT: All right. Thank you.

11 MR. MATUSKA: Thank you, your Honor.

12 THE COURT: Mr. Sweet, I want to know
13 specifically if, if on summary judgment, that the Court can
14 consider the lack of evidence. Maintaining that there's an
15 affirmative duty on the part of Mr. Mineau to provide
16 evidence. Counsel is saying that the failure to provide
17 evidence supports that he didn't do anything.

18 MR. SWEET: Your Honor, I think the hard part is
19 I'm not really sure after that whole discussion what
20 exactly argument goes to what claim.

21 So if we can walk through the claims, I'm not
22 entirely sure where the supposed lack of evidence ties into
23 any specific claim.

24 THE COURT: I'm comfortable that I understand

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?

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.

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.

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.

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

1 invoice, therefore we can assume that no invoice was
2 obtained.

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.

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.

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.

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

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.

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.

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.

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

1 weren't there in person.

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.

6 THE COURT: All right. Anything further?

7 MR. SWEET: Your Honor, I don't believe I need
8 to go through all the documents that Mr. Matuska did.

9 If you have any questions on those, I'd be happy
10 to address them.

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.

14 MR. SWEET: Okay. There are a few points that I
15 would like to make.

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.

23 That isn't evidence of problems. Mr. Matuska
24 argued that if there is evidence that Mr. Mineau told the

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

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.

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 --

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

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,

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

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

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. Mienau 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 --

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

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

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

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

1 tomorrow.

2 THE COURT: I don't want to put that much
3 pressure on you. I don't know that I can look at it
4 tomorrow.

5 MR. MATUSKA: Well, you know, I could and I
6 would, because in a manner of speaking we have to, because
7 we have other issues to prepare for trial.

8 Anyway, your Honor, would you accommodate me to
9 respond to some of this because this is --

10 THE COURT: I can't because -- no, I can't. I
11 have your papers but I have to be in a meeting at noon.

12 And I understand what you disagree with. I
13 absolutely do. I know the points that you were going to
14 raise. I'm comfortable that I know what --

15 MR. MATUSKA: Thank you, your Honor.

16 THE COURT: -- your opposition is.

17 MR. MATUSKA: Okay.

18 THE COURT: So I'm not sure that argument would
19 help at this point. I mean it's --

20 MR. MATUSKA: Understood.

21 THE COURT: -- very clear to me that there's oil
22 and water in perception.

23 So why don't you have it to me by -- is this a
24 three-day weekend, or is it the following weekend that is a

1 three-day weekend?

2 THE CLERK: It's this one, your Honor. The
3 17th.

4 THE COURT: Have it to me by Friday morning.
5 Just email it.

6 If you really want to make me happy, put it in
7 Aerial font.

8 We'll be in recess.

9

10 (Whereupon the proceedings were
11 concluded.)

12 -oOo-

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

4 I, DEBORA L. CECERE, an Official Stenographic
5 Reporter of the State of Nevada, in and for Washoe County,
6 DO HEREBY CERTIFY:

7 That I was present at the times, dates, and
8 places herein set forth, and that I reported in shorthand
9 notes the proceedings had upon the matter captioned within,
10 and thereafter transcribed them into typewriting as herein
11 appears;

12 That the foregoing transcript, consisting of
13 pages 1 through 84, is a full, true and correct
14 transcription of my stenotype notes of said proceedings.

15 DATED: At Reno, Nevada, this 5th day of
16 March, 2020.

17 /s/ Debora Cecere

18 _____
19 DEBORA L. CECERE, CCR #324,
20 Certified Stenographic Court Reporter
21
22
23
24

FILED
Electronically
CV18-00764
2020-04-07 11:58:46 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 7824985 : nmason

Exhibit 5
HEARING TRANSCRIPT OF FEBRUARY 27, 2020
(Motion to Disqualify Judge)

Exhibit 5
HEARING TRANSCRIPT OF FEBRUARY 27, 2020
(Motion to Disqualify Judge)

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

vs.

12

BRIAN MINEAU, ET. AL.,

13

Defendant.

14

15

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

16

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

1 -000-
RENO, NEVADA, THURSDAY, FEBRUARY 27, 2020, 9:43 A.M.
2 -000-

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

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

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

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

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

22 MR. SWEET: Correct.

23 THE COURT: The second matter is defendant's
24 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.

20 -o0o-

21

22

23

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

FILED
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CV18-00764
2020-04-07 11:58:46 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 7824985 : nmason

Exhibit 6
JUDICIAL ASSISTANT HEIDI BOE'S EMAILS OF FEBRUARY 20-21, 2020
(Motion to Disqualify Judge)

Exhibit 6
JUDICIAL ASSISTANT HEIDI BOE'S EMAILS OF FEBRUARY 20-21, 2020
(Motion to Disqualify Judge)

Michael Matuska

From: Boe, Heidi <Heidi.Boe@washoecourts.us>
Sent: Friday, February 21, 2020 11:26 AM
To: Austin Sweet; Michael Matuska
Cc: Kelly Gunderson
Subject: RE: Kvam v. Mineau, et al.

Counsel –

I have been directed to schedule the pretrial conference/motions hearing on Thursday, 2/27, at 9:30 am. And, yes, your clients need to attend the hearing.

Heidi

From: Austin Sweet <asweet@gundersonlaw.com>
Sent: Friday, February 21, 2020 10:04 AM
To: Michael Matuska <mlm@matuskalawoffices.com>; Boe, Heidi <Heidi.Boe@washoecourts.us>
Cc: Kelly Gunderson <kgunderson@gundersonlaw.com>
Subject: RE: Kvam v. Mineau, et al.

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Good morning Heidi,

I am available Thursday morning. I have another appointment scheduled for 1:30 on Wednesday, but will of course accommodate the court's schedule if that's when we need to hold the hearing.

Are clients required to attend? This was originally set as a continued Pretrial Conference as well as a hearing on the pending motions, so it was my understanding that my client's attendance was mandatory. If so, I will need to coordinate with my client's schedule before confirming.

Thank you,
Austin

Austin K. Sweet, Esq.
Gunderson Law Firm
(775) 829-1222
-- This message is confidential --

From: Michael Matuska <mlm@matuskalawoffices.com>
Sent: Friday, February 21, 2020 9:50 AM
To: Boe, Heidi <Heidi.Boe@washoecourts.us>; Austin Sweet <asweet@gundersonlaw.com>
Cc: Kelly Gunderson <kgunderson@gundersonlaw.com>
Subject: RE: Kvam v. Mineau, et al.

I am available both days, but would prefer Wednesday.

Thank you.

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



www.matuskalawoffices.com

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From: Boe, Heidi <Heidi.Boe@washoecourts.us>
Sent: Friday, February 21, 2020 9:41 AM
To: Austin Sweet <asweet@gundersonlaw.com>; Michael Matuska <mlm@matuskalawoffices.com>
Cc: Kelly Gunderson <kgunderson@gundersonlaw.com>
Subject: RE: Kvam v. Mineau, et al.

Counsel -

Judge Simons has time available at 1:30 pm on Wednesday, Feb 26 or Thursday, Feb 27 at 9:30 am for a hearing. Please let me know your availability.

Heidi

From: Austin Sweet <asweet@gundersonlaw.com>
Sent: Thursday, February 20, 2020 1:22 PM
To: Boe, Heidi <Heidi.Boe@washoecourts.us>; mlm@matuskalawoffices.com
Cc: Kelly Gunderson <kgunderson@gundersonlaw.com>
Subject: RE: Kvam v. Mineau, et al.

[NOTICE: This message originated outside of Second Judicial District Court, State of Nevada -- DO NOT CLICK on links or open attachments unless you are sure the content is safe.]

Good afternoon Ms. Boe,

Apart from a lunch meeting, my schedule is wide open tomorrow. Please let me know your preferred time for a telephonic setting and we will call in.

Thank you,
Austin

Austin K. Sweet, Esq.
Gunderson Law Firm
(775) 829-1222
-- This message is confidential --

From: Boe, Heidi <Heidi.Boe@washoecourts.us>
Sent: Thursday, February 20, 2020 1:15 PM
To: Austin Sweet <asweet@gundersonlaw.com>; mlm@matuskalawoffices.com
Subject: Kvam v. Mineau, et al.

Counsel --

The Court is finalizing its Order regarding the Motions for Summary Judgment. At the Pretrial Conference held on January 14, 2020, a pretrial motions hearing was scheduled for Friday, February 21, at 9:30 am. At this time, the court is continuing this hearing. Counsel is directed to contact the Court by 5:00 pm on Friday to reschedule arguments on the pretrial motions for next week.

Heidi

Heidi Boe
Judicial Assistant to the
Honorable Lynne K. Simons
Heidi.Boe@washoecourts.us
(t) 775-328-3176
(f) 775-328-3532

The Nevada Judiciary is one of three branches of government; the other two are the Executive and Legislative branches. The Nevada Judiciary has the responsibility to provide impartial, efficient, and accessible dispute resolution in legal matters and to operate as an equal, independent, and effective branch of government.

The mission of the Second Judicial District Court is to provide timely, fair and efficient administration of justice under the law, in a manner that instills and sustains the public's confidence in the judicial system. The mission of the Second Judicial District Court's Family Division is to provide fair, efficient, accessible justice under the law, which encourages alternative and non-adversarial dispute resolution in a manner that serves the public and sustains confidence in the judicial branch of government.



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Clerk of the Court
Transaction # 7824985 : nmason

Exhibit 7
COURT REPORTER CAROL HUMMEL'S EMAIL OF MARCH 24, 2020
(Motion to Disqualify Judge)

Exhibit 7
COURT REPORTER CAROL HUMMEL'S EMAIL OF MARCH 24, 2020
(Motion to Disqualify Judge)

Suzette Turley

From: Carol hummel <chummel@charter.net>
Sent: Tuesday, March 24, 2020 2:36 PM
To: Suzette Turley
Subject: RE: Job #598841

Ms. Turley –

It was nice speaking with you this afternoon. The information you need on the Kvam transcript is starting time of 9:47 A.M., with an ending time of 10:21 A.M. I hope this answers your questions. Take care and stay well.

Best regards,
Carol Hummel

From: Suzette Turley [mailto:sturley@matuskalawoffices.com]
Sent: Tuesday, March 24, 2020 1:56 PM
To: chummel@charter.net
Subject: FW: Job #598841

Carol,

I found your email address online and am forwarding the email below, intended for you. Please call us with the information as soon as you are able. Thank you!

Kindly,

Suzette Turley

Legal Assistant
MATUSKA LAW OFFICES, LTD.
2310 South Carson Street, #6
Carson City NV 89701
(T) (775) 350-7220
(F) (775) 350-7222



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1 Code:
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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,

Case No.: CV18-00764

11 vs.
12

Dept. No: 6

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

15 Defendants.
16 _____/

17 BRIAN MINEAU and LEGION
18 INVESTMENTS, LLC,

19 Counterclaimant,

20 vs,
21

22 JAY KVAM,

23 Counterdefendant
24 _____/

25 **ANSWER TO PLAINTIFF'S MOTION TO DISQUALIFY JUDGE**

26 Plaintiff/Counterdefendant JAY KVAM ("Mr. Kvam") filed his *Motion to Disqualify*
27 *Judge* ("DQ Motion") and supporting documents on April 7, 2020, by and through his
28 counsel, Matuska Law Offices.

1 The procedures for disqualification of a judge for actual or implied bias or
2 prejudice are codified at NRS 1.235. NRS 1.235(1)(a) and (b) provide deadlines for the
3 filing of such a motion.

4 The Court is concerned the Motion to Disqualify does not comport with NRS
5 1.235(1); however, this Court is prohibited from determining this issue. *See generally*,
6 NRS 1.235(5).¹

7
8 The Court responds to the allegations as follows:²

9 1. This *Answer to Motion to Disqualify Judge* is timely filed within five (5)
10 judicial days of the filing of the *DQ Motion*.

11 2. The Court has no implied bias or prejudice, nor does this Court possess
12 any actual bias or prejudice for or against any of the parties or their counsel to this
13 action. The Court has made its decisions in these proceedings based on the facts, the
14 law, and the procedural history of the case.

15 3. I have faithfully, impartially and diligently executed the duties of my office.

16 4. This action involves an agreement to purchase, restore, and resell a house
17 in Chicago ("the Project"). Mr. Kvam provided funding for the house. Terms were
18 provided for return on Mr. Kvan's investment if investment was profitable and also if it was
19
20
21

22 ¹ The Court was not personally served with the DQ Motion as required by NRS 1.235. However,
23 Mr. Matuska's assistant emailed the Court's Judicial Assistant re the *DQ Motion* and a copy was
24 received by the Court's mailroom located at 1 South Sierra. Pursuant to Administrative Order
25 2020-05, In the Administrative Matter of Temporarily Closing In-Person Public Access to the
26 Second Judicial District Court, issued by Chief Judge Scott N. Freeman, the Court has been
27 closed since March 18, 2020 and access to Department 6 was not available to personally serve
28 the Court.

² "A judge may challenge an affidavit alleging bias or prejudice by filing a written answer with the clerk of the court within 5 judicial days after the affidavit is filed, admitting or denying any or all of the allegations contained in the affidavit and setting forth any additional facts which bear on the question of the judge's disqualification." NRS 1.235(6).

1 not, which is the case. Mr. Kvam anticipated an approximate \$13,000 profit. When the
2 project was unsuccessful, he filed an action.

3 5. During the litigation, Mr. Kvam's original *Complaint* evolved into his *Second*
4 *Amended Verified Complaint* which was filed on September 11, 2019, asserting: (1)
5 Declaration of Joint Venture; (2) Rescission or Reformation of Agreement; (3) Breach of
6 Contract - Loan; (4) Breach of Contract and Tortious Breach of Implied Covenant of Good
7 Faith and Fair Dealing; (5) Accounting; (6) Court Supervision of Dissolution and Winding
8 Up, and Appointment of Receiver; (7) Temporary and Permanent Injunction; (8) Fraud,
9 Fraudulent Inducement and Fraudulent Concealment; (9) Conversion; (10) RICO; and,
10 (11) Derivative Claim. SAC, p. 4-10. On September 25, 2019, Defendants filed their
11 *Answer to Second Amended Verified Complaint*. The claims that remained viable before
12 this Court were Mr. Kvam's SAC (1) – (11) claims set forth in the SAC and Defendants'
13 counterclaim (3) Declaratory Judgment.

14 6. This action was transferred from Department 3 to Department 6. This
15 Court entered its *Order Accepting Reassignment* on June 6, 2019. The *DQ Motion* was
16 filed approximately 307 days later.

17 7. Mr. Kvam seeks to disqualify the Court, making assertions of unfairness and
18 lack of diligence and competence. The Court notes the issue arose after the Court
19 entered its oral ruling on the Defendant's *Motion for Summary Judgment*, and after the
20 Court gave notice, as required by NRCP 56(f), of its intention to grant declaratory relief on
21 Defendant's claim for Declaratory Relief.

22 8. Mr. Kvam, through his counsel, misrepresents what is contained in the
23 transcripts of hearings and their context. He misconstrues, at best, the Court's intent.
24
25
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28

1 9. In their *Motion for Summary Judgment*, Defendants requested summary
2 judgment on Mr. Kvam's eleven (11) claims. *MSJ*, p. 11. Defendants did not seek
3 summary judgment on their counterclaim (3) Declaratory Judgment. *MSJ*, p. 11. Mr.
4 Kvam filed his *Opposition to Defendants' Motion for Summary Judgment; and Cross*
5 *Motion for Partial Summary Judgment*³. Defendants filed a *Reply in Support of Motion*
6 *for Summary Judgment* ("Reply"). The *Reply* did not address the merits of the
7
8 countermotion portion of the *Opposition* but does request that the Court strike it.⁴
9 Thereafter, the matter was submitted for decision. The Court directed the parties to set
10 the matter for hearing.

11 10. The parties set the hearing for February 11, 2020. At the oral arguments
12 hearing on the *MSJ*, the Court listened to counsel and asked questions on specific issues.
13 The transcript reflects the relative time, via number of pages, that each counsel argued
14 and was given the opportunity allowed to address the Court. *Transcript of Proceedings,*
15 *Oral Arguments (Motion for Summary Judgment), February 11, 2020.* The Court
16 requested counsel to provide proposed orders, and the matter was taken under
17 advisement. Counsel provided proposed orders but at least one was unusable as
18 provided.
19

20 11. At the Pre-trial Conference and Pre-trial Motions hearing, the Court
21 rendered its oral ruling regarding the *MSJ*, including NRCP 56(f) notice, the specific
22 claims on which it was granting summary judgment, the claims on which it was denying
23
24

25 ³The Court admonished counsel in a pretrial conference on January 14, 2020, that cross
26 motions are not allowed under applicable court rules. WDCR 10(3)(a). At the February 11, 2020
27 hearing on the *Motion* and *Opposition*, the Court again admonished counsel of the same. Some
28 issues identified in *DQ Motion* are the result of Mr. Matuska's misunderstanding or
misapplication of the WDCR and NRCP 56.

⁴ Filings related to the *MSJ* are collectively referred to as "*MSJ*".

summary judgment, such as the Accounting claim, and the claims it was holding a ruling in abeyance, i.e. the dissolution claim and request for appointment of a receiver.

Transcript of Proceedings, Pre-trial Conference & Pretrial Motions, 2/27/2020 ("Tr."), p. 9-

13. The Court specifically indicated it wanted to give Mr. Matuska the time he needed

See e.g., Tr., pp. 5-9. The Court indicated it would await Mr. Matuska's response and

entered a minute order that based on the Court's anticipated ruling, the parties would

participate in a continued settlement conference. *Tr., p. 13.*

12. The Court discussed the remaining pending motions, including the *Recommendation* of Discovery Commissioner Ayres, and whether they were moot in light of the Court's ruling on the *MSJ*, and what should be filed as a new and separate motion, i.e. the assertions of perjury against Mr. Mineau. *Tr., p. 4.*

13. The Court indicated the trial would commence after the settlement conference on the remaining claims that were not disposed of by summary judgment. The Court further noted this would affect the number of documents that would be marked. *Tr., p.13.*

14. Mr. Matuska changed course during the hearing and wanted to withdraw the Accounting claim requested that the trial date be continued. *Tr., p. 15-18.*

15. In the Court's experience as a practitioner and as a judicial officer, a pending ruling on summary judgment provides counsel with the ability to effectively evaluate settlement values.

16. The Honorable Elliott A. Sattler conducted the settlement conference sessions in this matter. Mr. Matuska's representation of Judge Sattler's comments at the settlement conferences do not completely comport with Judge Sattler's observations

1 made to the Court after the trial was continued at Mr. Matuska's request and the
2 continued settlement conference was completed.

3 17. The Court had prepared a draft order regarding the *MSJ* prior to the
4 February 27, 2020 hearing. However, as a result of that hearing, citations to evidence
5 were rechecked and other changes were made to the draft order which is within the
6 Court's province. In addition, the Court's law clerk and the Court conducted additional
7 legal research and the Court enhanced significant portions of the order.
8

9 18. The additional work required on the draft order took more time than the
10 Court originally and optimistically thought it would require to complete the order. In
11 addition, other matters on the Court's docket required the Court's attention.
12

13 19. Hearings started later than the time set in some instances in this action.
14 Prior to each hearing, the Court prepares a matrix. The Court uses it as an outline for all
15 oral arguments heard. After the Court's IT department worked on Department 6's
16 equipment, both staff and the Court had difficulties printing out materials. For the oral
17 arguments on the Defendants' *MSJ*, the Court recalls the updated hearing matrix would
18 not print and it delayed at least one hearing.
19

20 20. The Court's order, with the exception of a final hardcopy read-through is
21 complete, along with a draft order addressing whether the remaining all of the motions,
22 many of which are moot in light of the Court's ruling on the *MSJ* and the Court intended to
23 file the orders prior to April 10, 2020.
24

25 21. With the evolving COVID-19 crisis and then pandemic and the resulting
26 time involved endeavors to establish remote operations of Second Judicial District
27 Court, and in particular to this Court, Department 6, delays have ensued courtwide. The
28 final order has not been filed as a result of other matters requiring the Court's attention

1 and the Court has managed its docket accordingly. This Court has the inherent
2 authority to control its own docket and calendar. Yong v. Immigration and Naturalization
3 Service, 208 F.3d 1116, 1119 (9th Cir. 2000); Maheu v. Eighth Judicial Dist. Court, 89
4 Nev. 214, 217, 510 P.2d 627, 629 (1973) (recognizing the court's inherent power to
5 "control the disposition of the causes on its docket with economy of time and effort for
6 itself, for counsel, and for litigants").
7

8 22. Mr. Kvam's and Mr. Matuska's perceptions of an appropriate timeline do
9 not establish the Court's timeline and does not render inappropriate the Court's time
10 taken to craft a thorough and revised order and the derivative order following the *MSJ*
11 order while managing its court docket as a whole.
12

13 23. Pursuant to NRS 1. 235(5), after the *DQ Motion* was filed, the Court has
14 proceeded no further with any matters in this action.

15 DATED this 14th day of April, 2020.
16

17
18 
19 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 14th day of April, 2020, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

MICHAEL MATUSKA, ESQ.

AUSTIN SWEET, 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 as follows:

Hadi Bre

CODE:

Michael L. Matuska, Esq. SBN 5711
MATUSKA LAW OFFICES, LTD.
2310 South Carson Street, Suite 6
Carson City, NV 89701
Attorneys for Plaintiff

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

JAY KVAM,

Plaintiff,

v.

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

Defendants.

Case No. CV18-00764

Dept. No. 6

REPLY TO ANSWER TO MOTION TO DISQUALIFY JUDGE

COMES NOW Plaintiff, JAY KVAM, by and through his counsel of record, Matuska Law Offices, Ltd., Michael L. Matuska, and hereby replies to the Answer to Plaintiff's Motion to Disqualify Judge filed by Hon. Lynne Simons on April 14, 2020 (Transaction # 7835218).

1. NRCP 1.235 Does Not Apply

Judge Simons continues her advocacy in this case by arguing that Kvam's Motion to Disqualify Judge "does not comport with NRS 1.235(1)." (Answer at 2:4-5). It appears that Judge Simons did not fully read Kvam's motion. He carefully explained twice that the Motion is brought pursuant to *Towbin Dodge, LLC v. Eighth Judicial District Court*, 112 P.3d 1063, 121 Nev. 251 (2005) and the Nevada Rules of Judicial Conduct rather than NRS 1.235(1). (See Motion at 2:16-24 and 10:15-19). Also, Judge Simons' references to what she intended to do and when (See e.g. Answer 6:23-24) do not address the Rules of Judicial Conduct or the comments thereto which explain that her conduct must be measured by the objective, reasonable person standard.

2. The Answer Does Not Deny the Material Allegations

To the extent Judge Simons wants to follow the procedures set forth in NRS 1.235, she was to “file a written answer with the clerk of the court within 5 judicial days after the affidavit is filed, admitting or denying an or all of the allegations . . .” (NRS 1.235(6)). Judge Simons failed to deny most of the allegations contained in Kvam’s motion and the declarations submitted therewith.

a. Lack of Fairness, Lack of Competency, Advocacy – Counterclaim

Judge Simons devoted much of her answer to addressing a counterclaim that was not raised in Defendants’ Motion for Summary Judgment and is not even pending (See Answer at Pars. 7, 9, 11). In fact, she raised that issue sua sponte at the hearing on February 27, 2020 and gave Kvam’s counsel one (1) day to reply. It appears that Judge Simons is attempting to use this sequence to justify her lack of diligence when she writes: “The Court indicated that it would await Mr. Matuska’s response . . .” (Answer at 5:5-6). Such is not the case. Kvam’s counsel’s clearly and unmistakably waived any response in order to allow the order to be entered forthwith. (See Transcript, Ex. “5” at 16:5-7).

b. Lack of Punctuality

Judge Simons did not deny the late start to the hearings or her excuse at the February 11, 2020 hearing that “I was having word processing issues” (Transcript at 3:7-8) when in fact, court staff was heard to say she had not arrived. (See Declaration of Michael L. Matuska, Ex. “1” at ¶8).

c. Lack of Diligence, Lack of Fairness, Lack of Competency by Failing to Rule on Pending Motions

Judge Simons did not deny her lack of diligence and lack of fairness by failing to act on the Discovery Commissioner’s January 10, 2020 Recommendation for Order (Transaction #7679790) or Kvam’s Motion for Reconsideration of Order Affirming Discovery Commissioner’s Recommendation, Entered May 16, 2019; for Discovery Sanctions; and for Other Relief (“Motion for Reconsideration”) which addresses perjury that occurred in Par. 25 of Brian Mineau’s declaration in support of his Motion for Summary Judgment.

Judge Simons continues her advocacy when she dismissively addresses the perjury as “assertions of perjury against Mr. Mineau.” (Answer at 5:13). In fact, Mineau admitted that his prior sworn declarations and discovery responses were inaccurate.

25. On or about May 26, 2017, Mr. Cole called me and requested the next \$20,000.00 progress payment for the project. I was travelling at the time and was unable to promptly make direct payment; however, at my request, Spinola agreed to arrange to have the funds wired to TNT on my behalf. I have previously testified in this action that Spinola retrieved these funds from my personal safe. However, upon further reflection and consideration in preparing this Declaration and preparing for trial, I believe my previous testimony was mistaken. I now recall that I borrowed the \$20,000 from Bradley Tammen . . . In exchange for the short-term loan of \$20,000, I agreed to repay Mr. Tammen a flat amount of \$28,000 (which has since been repaid in full). (Motion for Summary Judgment at Ex. “1”, emphasis added).

(See Declaration of Brian Mineau attached as Ex. “1” to Defendants’ Motion for Summary Judgment)

Judge Simons also seems to miss the central issue. This declaration was submitted after the close of discovery in support of Defendants’ Motion for Summary Judgment. Kvam was therefore denied the opportunity to conduct discovery on Mineau’s new factual assertions regarding the loan from Bradley Tammen and the repayment thereof. That is why Kvam had to request reconsideration of a prior discovery order which inhibited his ability to obtain Mineau’s financial information which would prove that Brian Mineau never repaid Bradley Tammen. Kvam also requested a show cause hearing for Mineau to produce evidence of the alleged repayment or be held in contempt of court. It is patently unfair for Judge Simons to consider Mineau’s declaration in support of Defendants’ Motion for Summary Judgment without allowing the discovery requested in Kvam’s Motion for Reconsideration.

d. Lack of Diligence and Attempts to Compel Settlement

Judge Simons’ did not deny Mr. Kvam’s observation in Par. 5 of his declaration that:

5. Considering all the statements that Judge Simons has made regarding the status, timing, and content of her order on the Motion for Summary Judgement, and reading her intended ruling from the bench when the order was not in fact ready, I now believe that she did so in attempt to compel me to settle my case.

1 Rather, Judge Simons' acknowledges such when she comments:

2 15. In the Court's experience as a practitioner and as a judicial officer,
3 a pending ruling on summary judgment provides counsel with the ability
4 to effectively evaluate settlement values. (Answer at 5:21-24).

5 Unfortunately, there was no ruling on summary judgment and Judge Simons' charge was
6 to decide the pending motion, not attempt to compel the parties into settlement.

7 Judge Simons did not deny that she was biased by the settlement offers submitted by the
8 Defendants with their Motion for Summary Judgment.

9 e. Misrepresentations to the Parties and to Court Staff

10 Judge Simons did not deny that she made multiple misrepresentations to the parties, their
11 attorneys and the settlement judge regarding the status of a ruling. Rather, she attempts to deflect
12 this issue when she states:

13 22. Mr. Kvam's and Mr. Matuska's perceptions of an appropriate
14 timeline do not establish the Court's timeline and does not render
15 inappropriate the Court's time taken to craft a thorough and revised order
16 and the derivative order following the MSJ order while managing its court
17 docket as a whole. (Answer at 7:8-12).

18 This comment misses the point entirely. Kvam and his counsel did not impose timelines on
19 Judge Simons. Rather, she repeatedly stated that the order was almost ready. Those statements
20 have proven to be false and have undermined the integrity of the court. More than 90 days have
21 elapsed since the Discovery Commissioner entered his Recommendation for Order. Judge
22 Simons' failure to rule on that recommendation is unreasonable under any timeline. Her oblique
23 reference to the Recommendation for Order as moot (Answer. Par. 20) is shocking in light of the
24 fact that the discovery addressed therein is relevant to Defendant's Motion for Summary Judgment
25 and to the issues remaining for trial. The same is true for Kvam's Motion for Reconsideration. A
26 reasonable person can question Judge Simons' fairness, impartiality, diligence and competence by
27 her stated intent to rule on Defendants' Motion for Summary Judgment while completely ignoring
28 the underlying discovery issues.

To make matters worse, Judge Simons stated her “intention” from the bench to enter a decision when an order was not ready in an attempt to compel the parties to settle. There is no MSJ order and it is not clear what Judge Simons is talking about in this passage when she references a revised order and a derivative order. Judge Simons states that she “intended to file the order prior to April 10, 2020.” (Answer at 6:23-24). This is doubtful but should be construed as an admission that the order was not almost ready when she stated her intent to rule from the bench on February 27, 2020. She provided a partial, tentative, split decision that was intended to force the case into a settlement posture. That is why she apparently needs to modify what she stated as her intention through so-called “revised orders” and “derivative orders.” This is not only confusing but further undermines the integrity of the court and creates additional grounds for a reasonable person to question whether this case is being handled in a competent manner.

Through it all, Judge Simons does not address the fact that she had the parties continue to prepare for trial knowing that it would have to be continued due to unresolved discovery issues. To the extent Judge Simons’ docket as a whole has impeded her ability to devote the proper attention to this case, the case should be referred to a different department or a senior judge.

3. Footnotes and Other Comments

Judge Simons’ various footnotes are also troubling. In footnote 1, she comments that NRS 1.235 requires personal service on the judge to be disqualified, even though she acknowledges later in the same footnote the court has been closed to access.

Judge Simons references various admonishments in footnote 3 regarding cross-motions. This is a side issue that Kvam elected not address in his motion. Judge Simons’ admonishments are misplaced and she frequently invokes WDCR 10(3)(a) in an apparent attempt to justify her lack of rulings.

Judge Simons explains in Par. 10 of her Answer that she had the parties submit proposed

orders "but at least one was unusable as provided." (Answer at 4:19-20). This was never conveyed to the parties and Judge Simons is intentionally vague as to which party submitted an unusable order. It is unclear why she included this statement without offering an explanation.

Judge Simons states that "Mr. Kvam, through his counsel, misrepresents what is contained in the transcripts of the hearings and their context." (Answer at 3:26-28). This statement is also intentionally vague and she does not state what is misrepresented. In fact, Kvam's summary of the record is a faithful recitation of the proceedings reflected in the transcripts and Judge Simons' recitation of the record is very similar to Kvam's.

Judge Simons then states that "Mr. Matuska's representation of Judge Sattler's comments at the settlement conferences do not completely comport with Judge Sattler's observations made to the Court after the trial was continued at Mr. Matuska's request and the continued settlement conference was completed." (Answer at 5:26-6:2). This passage is intentionally vague but suggests that Judge Simons had a discussion with Judge Sattler after the settlement conference. This would be improper and would be its own grounds for disqualification. Also, Judge Simons does not say what representations are not correct. She was not present at the settlement conference. Mr. Matuska and his client, Jay Kvam, were present with Judge Sattler. Judge Sattler prepared his minutes immediately following the settlement conference in which he noted, after checking with Dept. 6, that:

[T]here is also a pending Motion for Summary Judgment, which should be decided in two (2) business days.

* * *

COURT noted that a decision on the Motion for Summary Judgment is imminent, and spending today working on settling the case, knowing that an order could be filed in the very near future that could drastically change things, would not be an efficient use of everyone's time.

(Minutes Transaction # 7756799).

A reasonable observer must objectively conclude at this point that there never was an imminent

1 order, despite what may have been Judge Simons' earnest, subjective intentions. "Even a single
2 incident [of misrepresentation, ed.] can have grave consequences." *In re Inquiry Concerning*
3 *McCormick*, 639 N.W.2d 12, 17 (Iowa 2002).

4 It is not clear why Judge Simons felt the need to defend her actions by commenting that
5 "the trial was continued at Mr. Matuska's request." Kvam had no choice but to continue the trial
6 due to the lack of rulings on the Discovery Commissioner's January 10, 2020 Recommendation for
7 Order and Kvam's Motion for Reconsideration as well as Judge Simons confused, stated intended
8 ruling on Defendants' Motion for Summary Judgment which she now has to correct with "revised
9 orders" and "derivative orders," whatever those are.

11 4. Conclusion

12 The seminal allegations in Kvam's Motion to Disqualify are supported by the record, have
13 not been denied and cannot be denied. Judge Simons has multiple times expressed her intention to
14 rule on Defendants' Motion for Summary Judgment while ignoring the Discovery Commissioner's
15 Recommendation for Order and Kvam's Motion for Reconsideration which addresses Brian
16 Mineau's perjury and need for additional discovery in light thereof. Judge Simons has also seen fit
17 to emphasize a counterclaim that is not pending. A reasonable person could therefore question her
18 fairness, impartiality and competence. Every hearing has started late and there are no rulings to
19 date. Rather, Judge Simons has made multiple statements about when the rulings would be issued
20 and another statement about why the ruling has not been issued, none of which have been accurate.
21 Her lack of punctuality and lack of diligence are manifest on the record, and the multiple,
22 inaccurate statements have undermined the integrity of the court. Judge Simons seems to concede
23 that she prematurely announced an incomplete, partial ruling in order to impact the settlement
24 posture of the case. The statements in Par. 22 of her answer about an MSJ order, revised order and
25 derivative order are simply made up at this point and appear to be a concession that she has to
26
27
28

1 make changes to the prematurely announced order For these reasons and the other reasons
2 identified above and in Kvam's Motion to Disqualify Judge, this case should be assigned to a
3 different department or to a senior judge.

4 **AFFIRMATION**

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

7 Respectfully submitted,

8 Dated this 22nd day of April, 2020.

9 MATUSKA LAW OFFICES, LTD.

10 

11 By:

12 MICHAEL L. MATUSKA, SBN 5711
13 Attorneys for Plaintiff, JAY KVAM,
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Matuska Law Offices, Ltd. and that on the 22nd day of April, 2020, I served a true and correct copy of the preceding document entitled **MOTION TO DISQUALITY JUDGE** as follows:

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

☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION:** 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 named above with a copy to:

Hon. Lynne Simons, Dept. 6
SECOND JUDICIAL DISTRICT COURT
Civil/Criminal Division
75 Court Street
Reno, Nevada 89501
Heidi.Boe@washoecourts.us

☐ **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 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/ MICHAEL L. MATUSKA
MICHAEL L. MATUSKA

Code: 3370

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

JAY KVAM

Plaintiff,

vs.

BRIAN MINEAU; LEGION INVESTMENTS LLC;
7747 S. May Street, an Unincorporated Joint Venture
et.al.

Defendant.

Case No.: CV18-00764

Dept. No.: 6

ORDER DENYING MOTION TO DISQUALIFY THE PRESIDING JUDGE

The Court is in receipt of Plaintiff JAY KVAM's ("KVAM") *Motion to Disqualify the Presiding Judge* filed April 7, 2020. Honorable Lynn K. Simons ("Judge Simons") filed her *Answer to Motion to Disqualify the Presiding Judge* on April 14, 2020. Plaintiff filed a reply on April 22, 2020.

Upon careful review of the motion, answer, reply and record, the Court finds good cause appears to deny the motion to disqualify Honorable Lynne K. Simons for the below following reasons.¹

STANDARD OF REVIEW

Interestingly the Plaintiff has titled and styled his pleading as a "Motion to Disqualify Judge"

Seemingly invoking the provisions under Nevada Revised Statutes sections 1.230 and 1.235, wherein a party to an action may seek to disqualify a judge for actual or implied bias. However, while conceding Judge Simons harbors no actual nor implied bias, has filed a motion to disqualify

¹ The parties and the Second Judicial District Court are extremely familiar with the facts of this case. As such, this Court will not reiterate the facts here.

1 citing to *Towbin Dodge LLC v Eighth Judicial District* 121 Nev.251 (2005) which allows for a
2 motion for Disqualification pursuant to the Nevada Code of Judicial Conduct.

3 Pursuant to long-standing Nevada case law, “a judge is presumed impartial and the party
4 asserting the challenge carries the burden of establishing sufficient factual grounds warranting
5 disqualification.” *Rippo v. State*, 113 Nev. 1239, 1248, 946 P.2d 1017, 1022 (1997).
6 Disqualification may not be based on mere speculation and must be grounded on specific facts. *Id*;
7 *PETA v. Bobby Berosini*, 111 Nev. 431, 437, 894 P.2d 337, 341 (1995). Further, “a judge has an
8 obligation not to recuse himself where there is no occasion to do so.” *Goldman v. Bryan*, 104 Nev.
9 644, 649, 764 P.2d 1296, 1299 (1988). “A judge’s decision not to recuse [her]self voluntarily is
10 given ‘substantial weight’ and will be affirmed absent an abuse of discretion.” *Kirksey v. State*, 112
11 Nev. 980, 1005-1006, 923 P.2d 1102, 1118 (1996). Whether a judge’s impartiality might
12 reasonably be questioned is an objective test. *Ybarra v. State*, 127 Nev. 47, 51, 247 P.3d 269, 272
(2011).

13 DISCUSSION

14 Under the Nevada Code of Judicial Conduct, judges have a duty to “act at all times in a
15 manner that promotes public confidence in the independence, integrity, and impartiality of the
16 judiciary and shall avoid impropriety and the appearance of impropriety.” NCJC 1.2. *See also*
17 NCJC 2.1. Further, a judge is prohibited from manifesting bias or prejudice in the performance of
judicial duties. NCJC 2.3.

18 Plaintiff has cited in support of his motion alleged violations of NCJC 1.2, 2.2,2.5, and 2.6.;;
19 and in doing so he clearly identifies his issue elsewhere in his motion:

20 “,,, [T]he question is whether her actions (and inaction) have undermined confidence in her
21 ability to preside over this case and whether Kvam could reasonably question could reasonably
22 question her honesty, impartiality, temperament and fitness to continue to serve as a judge in this
23 case’ (motion p.11,lines 14-17)

24 Upon careful review of the motion and record, this Court finds Judge Simons has followed
25 Nevada law and has continued to uphold her duties under the Nevada Code of Judicial Conduct
26 throughout the entirety of the case at hand. Kvam has not met his burden of establishing sufficient
27 factual and legal grounds to warrant disqualification pursuant to the Nevada Code of Judicial
Conduct.

28 Kvam alleges Judge Simons has violated the NCJC sufficient to require her disqualification
for a failure to promptly act and in essence, failing to decide pending matters timely which

1 frustrated the smooth timely administration of Justice. Upon careful review of the entire record and
2 Kvam's motion, the Court finds his assertions lack merit.

3 Judge Simons responds and explains specifically in her answer by relevant numbered
4 paragraph recounted and quoted as follows:

5 7. Mr. Kvam seeks to disqualify the Court, making assertions of unfairness and lack of
6 diligence and competence. The Court notes the issue arose after the Court entered its oral ruling on
7 the Defendant's Motion for Summary Judgment, and after the Court gave notice, as required by
8 NRCp 56(f), of its intention to grant declaratory relief on Defendant's claim for Declaratory Relief.

9 8. Mr. Kvam, through his counsel, misrepresents what is contained in the transcripts of
10 hearings and their context. He misconstrues, at best, the Court's intent.

11 9. In their Motion for Summary Judgment, Defendants requested summary judgment
12 on Mr. Kvam's eleven (11) claims. MSJ, p. 11. Defendants did not seek summary judgment on
13 their counterclaim (3) Declaratory Judgment. MSJ, p. 11. Mr. Kvam filed his Opposition to
14 Defendants' Motion for Summary Judgment; and Cross Motion for Partial Summary Judgment .
15 Defendants filed a Reply in Support of Motion for Summary Judgment ("Reply"). The Reply did
16 not address the merits of the countermotion portion of the Opposition but does request that the
17 Court strike it. Thereafter, the matter was submitted for decision. The Court directed the parties to
18 set the matter for hearing.

19 10. The parties set the hearing for February 11, 2020. At the oral arguments hearing on
20 the MSJ, the Court listened to counsel and asked questions on specific issues. The transcript
21 reflects the relative time, via number of pages, that each counsel argued and was given the
22 opportunity allowed to address the Court. Transcript of Proceedings, Oral Arguments (Motion for
23 Summary Judgment), February 11, 2020. The Court requested counsel to provide proposed orders,
24 and the matter was taken under advisement. Counsel provided proposed orders but at least one was
25 unusable as provided.

26 11. At the Pre-trial Conference and Pre-trial Motions hearing, the Court rendered its oral
27 ruling regarding the MSJ, including NRCp 56(f) notice, the specific claims on which it was
28 granting summary judgment, the claims on which it was denying summary judgment, such as the
Accounting claim, and the claims it was holding a ruling in abeyance, i.e. the dissolution claim and
request for appointment of a receiver. Transcript of Proceedings, Pre-trial Conference & Pretrial
Motions, 2/27/2020 ("Tr."), p. 9-13. The Court specifically indicated it wanted to give Mr.
Matuska the time he needed See e.g., Tr., pp. 5-9. The Court indicated it would await Mr.

1 Matuska's response and entered a minute order that based on the Court's anticipated ruling, the
2 parties would participate in a continued settlement conference. Tr., p. 13.

3 12. The Court discussed the remaining pending motions, including the Recommendation
4 of Discovery Commissioner Ayres, and whether they were moot in light of the Court's ruling on the
5 MSJ, and what should be filed as a new and separate motion, i.e. the assertions of perjury against
6 Mr. Mineau. Tr., p. 4.

7 13. The Court indicated the trial would commence after the settlement conference on the
8 remaining claims that were not disposed of by summary judgment. The Court further noted this
9 would affect the number of documents that would be marked. Tr., p.13.

10 14. Mr. Matuska changed course during the hearing and wanted to withdraw the
11 Accounting claim requested that the trial date be continued. Tr., p. 15-18.

12 15. In the Court's experience as a practitioner and as a judicial officer, a pending ruling
13 on summary judgment provides counsel with the ability to effectively evaluate settlement values.

14 16. The Honorable Elliott A. Sattler conducted the settlement conference sessions in this
15 matter. Mr. Matuska's representation of Judge Sattler's comments at the settlement conferences do
16 not completely comport with Judge Sattler's observations made to the Court after the trial was
17 continued at Mr. Matuska's request and the continued settlement conference was completed.

18 17. The Court had prepared a draft order regarding the MSJ prior to the February 27,
19 2020 hearing. However, as a result of that hearing, citations to evidence were rechecked and other
20 changes were made to the draft order which is within the Court's province. In addition, the Court's
21 law clerk and the Court conducted additional legal research and the Court enhanced significant
22 portions of the order.

23 18. The additional work required on the draft order took more time than the Court
24 originally and optimistically thought it would require to complete the order. In addition, other
25 matters on the Court's docket required the Court's attention.

26 19. Hearings started later than the time set in some instances in this action. Prior to each
27 hearing, the Court prepares a matrix. The Court uses it as an outline for all oral arguments heard.
28 After the Court's IT department worked on Department 6's equipment, both staff and the Court had
difficulties printing out materials. For the oral arguments on the Defendants' MSJ, the Court recalls
the updated hearing matrix would not print and it delayed at least one hearing.

20. The Court's order, with the exception of a final hardcopy read-through is complete,
along with a draft order addressing whether the remaining all of the motions, many of which are

1 moot in light of the Court's ruling on the MSJ and the Court intended to file the orders prior to
2 April 10, 2020.

3 21. With the evolving COVID-19 crisis and then pandemic and the resulting time
4 involved endeavors to establish remote operations of Second Judicial District Court, and in
5 particular to this Court, Department 6, delays have ensued courtwide. The final order has not been
6 filed as a result of other matters requiring the Court's attention and the Court has managed its
7 docket accordingly. This Court has the inherent authority to control its own docket and calendar.
8 *Yong v. Immigration and Naturalization Service*, 208 F.3d 1116, 1119 (9th Cir. 2000); *Maheu v.*
9 *Eighth Judicial Dist. Court*, 89 Nev. 214, 217, 510 P.2d 627, 629 (1973) (recognizing the court's
10 inherent power to "control the disposition of the causes on its docket with economy of time and
11 effort for itself, for counsel, and for litigants").

12 22. Mr. Kvam's and Mr. Matuska's perceptions of an appropriate timeline do not
13 establish the Court's timeline and does not render inappropriate the Court's time taken to craft a
14 thorough and revised order and the derivative order following the MSJ order while managing its
15 court docket as a whole.

16 Judge Simons was necessarily required to reveal her thought process in the preceding
17 paragraphs 7-22 in her answer from her perspective of which the parties would ordinarily NOT be
18 entitled, to defend and explain why she should not be disqualified. This Court finds her explanation
19 is reasonable, appropriate and adopts her explanation when compared to a careful review of the
20 allegations made by Plaintiff.

21 It should be briefly addressed and dispatched that part of Kvam's frustration is that Judge
22 Simons on more than one occasion did not rule in his favor on some matters as he thought she
23 should. A Court is under no obligation to rule in favor of a party if the party has not followed
24 procedure, established sufficient legal grounds, or complied with applicable local rules. *See Allum*
25 *v. Valley Bank of Nevada*, 112 Nev. 591, 594, 915 P.2d 895, 897 (1996) ("a judge is not
26 disqualified merely because of his or her judicial rulings."); *Liteky v. United States*, 510 U.S. 540,
27 544, 114 S. Ct. 1147, 1157 (1997) (stating "judicial rulings alone almost never constitute [a] valid
28 basis for a bias or partiality motion." (alteration in quotation)).

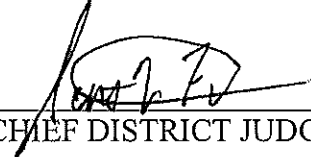
Moreover in response to another allegation that Judge Simons did not address a request for
sanctions by plaintiff, a court is under no obligation to grant sanctions if the movant has not
established sufficient factual and legal grounds to warrant the sanctions. NRS 7.085; NRCP 11;

1 *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 995, 860 P.2d 720, 724 (1993). Kvam's allegations of
2 violations of the Nevada Code of Judicial Conduct fail accordingly.
3 Finally, this motion has not been joined by the Defense. Their silence on the allegations of NCJC
4 violations is appropriately noted by the Court.

5 Upon careful review of the record, this Court finds Judge Simons has treated all parties fairly
6 and impartially pursuant to Nevada Law and the Nevada Code of Judicial Conduct.

7 THEREFORE, and good cause appearing, the Court HEREBY DENIES Plaintiff JAY
8 KVAM's *Motion to Disqualify the Presiding Judge Simons*

9 DATED: this 23rd day of April, 2020.

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12 CHIEF DISTRICT JUDGE
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[NONE]

MICHAEL MATUSKA, ESQ. for JAY KHAM
MARK GUNDERSON, ESQ. for BRIAN MINEAU, LEGION INVESTMENTS, LLC
AUSTIN SWEET, ESQ. for BRIAN MINEAU, LEGION INVESTMENTS, LLC

Bill

Judicial Assistant

1 **CODE 2540**

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 **NOTICE OF ENTRY OF ORDER**

24 PLEASE TAKE NOTICE that an *Order Denying Motion to Disqualify the Presiding Judge*
25 was entered on April 23, 2020, a copy of which is attached as Exhibit "1."

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AFFIRMATION

The undersigned does hereby affirm that the preceding document. **NOTICE OF ENTRY OF ORDER**, filed in the Second Judicial District Court of the State of Nevada, County of Washoe, does not contain the social security number of any person.

DATED this 27th day of April, 2020.

GUNDERSON LAW FIRM

By: /s/ Austin Sweet
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 27th day of April, 2020, I electronically filed a true and correct copy of the
4 **NOTICE OF ENTRY OF ORDER**, with the Clerk of the Court by using the electronic filing system
5 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 Kvan*

12 /s/ Kelly Gunderson
13 Kelly Gunderson
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EXHIBIT LIST

Exhibit #	Description	Pages
Exhibit "1"	Order Denying Motion to Disqualify the Presiding Judge	7

FILED
Electronically
CV18-00764
2020-04-27 04:01:30 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 7851883

Exhibit “1”

Exhibit “1”

Code: 3370

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

JAY KVAM

Plaintiff,

vs.

BRIAN MINEAU; LEGION INVESTMENTS LLC;
7747 S. May Street, an Unincorporated Joint Venture
et.al.

Defendant.

Case No.: CV18-00764
Dept. No.: 6

ORDER DENYING MOTION TO DISQUALIFY THE PRESIDING JUDGE

The Court is in receipt of Plaintiff JAY KVAM's ("KVAM") *Motion to Disqualify the Presiding Judge* filed April 7, 2020. Honorable Lynn K. Simons ("Judge Simons") filed her *Answer to Motion to Disqualify the Presiding Judge* on April 14, 2020. Plaintiff filed a reply on April 22, 2020.

Upon careful review of the motion, answer, reply and record, the Court finds good cause appears to deny the motion to disqualify Honorable Lynne K. Simons for the below following reasons.¹

STANDARD OF REVIEW

Interestingly the Plaintiff has titled and styled his pleading as a "Motion to Disqualify Judge"

Seemingly invoking the provisions under Nevada Revised Statutes sections 1.230 and 1.235, wherein a party to an action may seek to disqualify a judge for actual or implied bias. However, while conceding Judge Simons harbors no actual nor implied bias, has filed a motion to disqualify

¹ The parties and the Second Judicial District Court are extremely familiar with the facts of this case. As such, this Court will not reiterate the facts here.

1 citing to *Towbin Dodge LLC v Eighth Judicial District* 121 Nev.251 (2005) which allows for a
2 motion for Disqualification pursuant to the Nevada Code of Judicial Conduct.

3 Pursuant to long-standing Nevada case law, “a judge is presumed impartial and the party
4 asserting the challenge carries the burden of establishing sufficient factual grounds warranting
5 disqualification.” *Rippo v. State*, 113 Nev. 1239, 1248, 946 P.2d 1017, 1022 (1997).
6 Disqualification may not be based on mere speculation and must be grounded on specific facts. *Id*;
7 *PETA v. Bobby Berosini*, 111 Nev. 431, 437, 894 P.2d 337, 341 (1995). Further, “a judge has an
8 obligation not to recuse himself where there is no occasion to do so.” *Goldman v. Bryan*, 104 Nev.
9 644, 649, 764 P.2d 1296, 1299 (1988). “A judge’s decision not to recuse [her]self voluntarily is
10 given ‘substantial weight’ and will be affirmed absent an abuse of discretion.” *Kirksey v. State*, 112
11 Nev. 980, 1005-1006, 923 P.2d 1102, 1118 (1996). Whether a judge’s impartiality might
12 reasonably be questioned is an objective test. *Ybarra v. State*, 127 Nev. 47, 51, 247 P.3d 269, 272
(2011).

13 DISCUSSION

14 Under the Nevada Code of Judicial Conduct, judges have a duty to “act at all times in a
15 manner that promotes public confidence in the independence, integrity, and impartiality of the
16 judiciary and shall avoid impropriety and the appearance of impropriety.” NCJC 1.2. *See also*
17 NCJC 2.1. Further, a judge is prohibited from manifesting bias or prejudice in the performance of
judicial duties. NCJC 2.3.

18 Plaintiff has cited in support of his motion alleged violations of NCJC 1.2, 2.2,2.5, and 2.6.;
19 and in doing so he clearly identifies his issue elsewhere in his motion:

20 “,, [T]he question is whether her actions (and inaction) have undermined confidence in her
21 ability to preside over this case and whether Kvam could reasonably question could reasonably
22 question her honesty, impartiality, temperament and fitness to continue to serve as a judge in this
23 case’ (motion p.11,lines 14-17)

24 Upon careful review of the motion and record, this Court finds Judge Simons has followed
25 Nevada law and has continued to uphold her duties under the Nevada Code of Judicial Conduct
26 throughout the entirety of the case at hand. Kvam has not met his burden of establishing sufficient
27 factual and legal grounds to warrant disqualification pursuant to the Nevada Code of Judicial
28 Conduct.

Kvam alleges Judge Simons has violated the NCJC sufficient to require her disqualification
for a failure to promptly act and in essence, failing to decide pending matters timely which

1 frustrated the smooth timely administration of Justice. Upon careful review of the entire record and
2 Kvam's motion, the Court finds his assertions lack merit.

3 Judge Simons responds and explains specifically in her answer by relevant numbered
4 paragraph recounted and quoted as follows:

5 7. Mr. Kvam seeks to disqualify the Court, making assertions of unfairness and lack of
6 diligence and competence. The Court notes the issue arose after the Court entered its oral ruling on
7 the Defendant's Motion for Summary Judgment, and after the Court gave notice, as required by
8 NRCP 56(f), of its intention to grant declaratory relief on Defendant's claim for Declaratory Relief.

9 8. Mr. Kvam, through his counsel, misrepresents what is contained in the transcripts of
10 hearings and their context. He misconstrues, at best, the Court's intent.

11 9. In their Motion for Summary Judgment, Defendants requested summary judgment
12 on Mr. Kvam's eleven (11) claims. MSJ, p. 11. Defendants did not seek summary judgment on
13 their counterclaim (3) Declaratory Judgment. MSJ, p. 11. Mr. Kvam filed his Opposition to
14 Defendants' Motion for Summary Judgment; and Cross Motion for Partial Summary Judgment .
15 Defendants filed a Reply in Support of Motion for Summary Judgment ("Reply"). The Reply did
16 not address the merits of the countermotion portion of the Opposition but does request that the
17 Court strike it. Thereafter, the matter was submitted for decision. The Court directed the parties to
18 set the matter for hearing.

19 10. The parties set the hearing for February 11, 2020. At the oral arguments hearing on
20 the MSJ, the Court listened to counsel and asked questions on specific issues. The transcript
21 reflects the relative time, via number of pages, that each counsel argued and was given the
22 opportunity allowed to address the Court. Transcript of Proceedings, Oral Arguments (Motion for
23 Summary Judgment), February 11, 2020. The Court requested counsel to provide proposed orders,
24 and the matter was taken under advisement. Counsel provided proposed orders but at least one was
25 unusable as provided.

26 11. At the Pre-trial Conference and Pre-trial Motions hearing, the Court rendered its oral
27 ruling regarding the MSJ, including NRCP 56(f) notice, the specific claims on which it was
28 granting summary judgment, the claims on which it was denying summary judgment, such as the
Accounting claim, and the claims it was holding a ruling in abeyance, i.e. the dissolution claim and
request for appointment of a receiver. Transcript of Proceedings, Pre-trial Conference & Pretrial
Motions, 2/27/2020 ("Tr."), p. 9-13. The Court specifically indicated it wanted to give Mr.
Matuska the time he needed See e.g., Tr., pp. 5-9. The Court indicated it would await Mr.

1 Matuska's response and entered a minute order that based on the Court's anticipated ruling, the
2 parties would participate in a continued settlement conference. Tr., p. 13.

3 12. The Court discussed the remaining pending motions, including the Recommendation
4 of Discovery Commissioner Ayres, and whether they were moot in light of the Court's ruling on the
5 MSJ, and what should be filed as a new and separate motion, i.e. the assertions of perjury against
6 Mr. Mineau. Tr., p. 4.

7 13. The Court indicated the trial would commence after the settlement conference on the
8 remaining claims that were not disposed of by summary judgment. The Court further noted this
9 would affect the number of documents that would be marked. Tr., p.13.

10 14. Mr. Matuska changed course during the hearing and wanted to withdraw the
11 Accounting claim requested that the trial date be continued. Tr., p. 15-18.

12 15. In the Court's experience as a practitioner and as a judicial officer, a pending ruling
13 on summary judgment provides counsel with the ability to effectively evaluate settlement values.

14 16. The Honorable Elliott A. Sattler conducted the settlement conference sessions in this
15 matter. Mr. Matuska's representation of Judge Sattler's comments at the settlement conferences do
16 not completely comport with Judge Sattler's observations made to the Court after the trial was
17 continued at Mr. Matuska's request and the continued settlement conference was completed.

18 17. The Court had prepared a draft order regarding the MSJ prior to the February 27,
19 2020 hearing. However, as a result of that hearing, citations to evidence were rechecked and other
20 changes were made to the draft order which is within the Court's province. In addition, the Court's
21 law clerk and the Court conducted additional legal research and the Court enhanced significant
22 portions of the order.

23 18. The additional work required on the draft order took more time than the Court
24 originally and optimistically thought it would require to complete the order. In addition, other
25 matters on the Court's docket required the Court's attention.

26 19. Hearings started later than the time set in some instances in this action. Prior to each
27 hearing, the Court prepares a matrix. The Court uses it as an outline for all oral arguments heard.
28 After the Court's IT department worked on Department 6's equipment, both staff and the Court had
difficulties printing out materials. For the oral arguments on the Defendants' MSJ, the Court recalls
the updated hearing matrix would not print and it delayed at least one hearing.

20. The Court's order, with the exception of a final hardcopy read-through is complete,
along with a draft order addressing whether the remaining all of the motions, many of which are

1 moot in light of the Court's ruling on the MSJ and the Court intended to file the orders prior to
2 April 10, 2020.

3 21. With the evolving COVID-19 crisis and then pandemic and the resulting time
4 involved endeavors to establish remote operations of Second Judicial District Court, and in
5 particular to this Court, Department 6, delays have ensued courtwide. The final order has not been
6 filed as a result of other matters requiring the Court's attention and the Court has managed its
7 docket accordingly. This Court has the inherent authority to control its own docket and calendar.
8 *Yong v. Immigration and Naturalization Service*, 208 F.3d 1116, 1119 (9th Cir. 2000); *Maheu v.*
9 *Eighth Judicial Dist. Court*, 89 Nev. 214, 217, 510 P.2d 627, 629 (1973) (recognizing the court's
10 inherent power to "control the disposition of the causes on its docket with economy of time and
11 effort for itself, for counsel, and for litigants").

12 22. Mr. Kvam's and Mr. Matuska's perceptions of an appropriate timeline do not
13 establish the Court's timeline and does not render inappropriate the Court's time taken to craft a
14 thorough and revised order and the derivative order following the MSJ order while managing its
15 court docket as a whole.

16 Judge Simons was necessarily required to reveal her thought process in the preceding
17 paragraphs 7-22 in her answer from her perspective of which the parties would ordinarily NOT be
18 entitled, to defend and explain why she should not be disqualified. This Court finds her explanation
19 is reasonable, appropriate and adopts her explanation when compared to a careful review of the
20 allegations made by Plaintiff.

21 It should be briefly addressed and dispatched that part of Kvam's frustration is that Judge
22 Simons on more than one occasion did not rule in his favor on some matters as he thought she
23 should. A Court is under no obligation to rule in favor of a party if the party has not followed
24 procedure, established sufficient legal grounds, or complied with applicable local rules. *See Allum*
25 *v. Valley Bank of Nevada*, 112 Nev. 591, 594, 915 P.2d 895, 897 (1996) ("a judge is not
26 disqualified merely because of his or her judicial rulings."); *Liteky v. United States*, 510 U.S. 540,
544, 114 S. Ct. 1147, 1157 (1997) (stating "judicial rulings alone almost never constitute [a] valid
basis for a bias or partiality motion." (alteration in quotation)).

27 Moreover in response to another allegation that Judge Simons did not address a request for
28 sanctions by plaintiff, a court is under no obligation to grant sanctions if the movant has not
established sufficient factual and legal grounds to warrant the sanctions. NRS 7.085; NRCP 11;

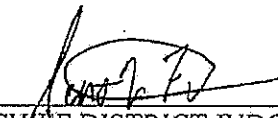
1 *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 995, 860 P.2d 720, 724 (1993). Kvam's allegations of
2 violations of the Nevada Code of Judicial Conduct fail accordingly.

3 Finally, this motion has not been joined by the Defense. Their silence on the allegations of NCJC
4 violations is appropriately noted by the Court.

5 Upon careful review of the record, this Court finds Judge Simons has treated all parties fairly
6 and impartially pursuant to Nevada Law and the Nevada Code of Judicial Conduct.

7 THEREFORE, and good cause appearing, the Court HEREBY DENIES Plaintiff JAY
8 KVAM's *Motion to Disqualify the Presiding Judge* Simons

9 DATED: this 23rd day of April, 2020.

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11 _____
12 CHIEF DISTRICT JUDGE
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CERTIFICATE OF SERVICE

Pursuant to NRCF 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 23rd day of April, 2020, I deposited for mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

[NONE]

Further, I certify that on the 23rd day of April, 2020, I electronically filed the foregoing with the Clerk of the Court electronic filing system, which will send notice of electronic filing to the following:

MICHAEL MATUSKA, ESQ. for JAY KVAM
MARK GUNDERSON, ESQ. for BRIAN MINEAU, LEGION INVESTMENTS, LLC
AUSTIN SWEET, ESQ. for BRIAN MINEAU, LEGION INVESTMENTS, LLC



Judicial Assistant