IN THE SUPREME COURT OF THE STATE OF NEVADA

In the matter of:

JAY KVAM,

Appellant,

vs.

BRIAN MINEAU; and LEGION INVESTMENTS, LLC,

Respondents.

Supreme Court Case No. 84443

District Court Case No. CV18-00764

APPELLANT'S OPENING BRIEF

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons or entities described in Nev. R. App. P. 26.1(a), and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

1. Appellant Jay Kvam is an individual and currently represented by the undersigned counsel of record, Matuska Law Offices, Ltd., Michael L. Matuska.

2. Respondent Brian Mineau is an individual, and based on information and belief, is the sole member/manager of Legion Investments, LLC. Brian Mineau and Legion Investments, LLC are represented by the Gunderson Law Firm, Austin K. Sweet, Esq.

3. 7747 S. May Street is an unincorporated joint venture that was entered into between Jay Kvam, Brian Mineau and Michael Spinola who is not a party to these proceedings. 7747 S. May Street is a nominal defendant that was included for the derivative action and does not have separate representation in these proceedings.

Dated this 13th day of June, 2022.

MATUSKA LAW OFFICES, LTD.
Michael L. Matuska (SBN 5711)
Attorney for Appellant, JAY KVAM

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JURISDICTIONAL STATEMENT

This is an appeal from two orders granting partial summary judgment. The orders are appealable under NRAP 3A(b)(1).

Dates establishing the timeliness of the appeal are as follows:

Notice of entry of the June 5, 2020 order granting partial summary judgment was served on all ECF filers on June 5, 2020. [14 JA 1993].

Notice of entry of the March 10, 2022 order granting partial summary judgment on the remaining causes of action was served on all ECF filers on March 11, 2022 [14 JA 2157].

ROUTING STATEMENT

This appeal may be assigned to the Court of Appeals because it does not involve any of the issues that shall be decided and heard by the Supreme Court pursuant to NRAP 17(a).

STATEMENT OF ISSUES

1. Whether Judge Simons committed multiple errors of law and abused her discretion by granting partial summary judgment in favor of Mineau/Legion based on DA (deemed admitted) findings of fact and a sham declaration, and by failing to first rule on underlying discovery motions;

2. Whether genuine issues of fact remain for trial.

STATEMENT OF THE CASE

This case concerns a failed real estate investment whereby the parties agreed to purchase, renovate and resell a house located at 7747 S. May Street, Chicago, Illinois, essentially, a "flip" project. Appellant Jay Kvam is the plaintiff in the district court. Respondents Brian Mineau and Legion Investments, LLC (hereafter, "Mineau/Legion") are the defendants. Mineau is the sole member/manager of Legion.

On January 6, 2020, Mineau/Legion filed a *Motion for Summary Judgment* in which they requested summary judgment on all of the causes of action alleged in Kvam's SAC. [7 JA 1003]. Their motion was supported by a sham declaration from Brian Mineau [7 JA 1033]. Par. 25 of Mineau's declaration added new facts after the close of discovery, contradicted and disavowed his previous sworn declaration and discovery responses, was not credible on its face, and was not supported by the extensive record. In contrast, Kvam provided a detailed opposition that was supported by 48 exhibits including his detailed declaration and a report and declaration from his expert witness C.P.A. [10 JA 1251]. Kvam also explained in his opposition that in order to more fully respond to Mineau/Legion's *Motion for Summary Judgment*, he needed discovery that was addressed in the Discovery Commissioner's January 10, 2020 *Recommendation for Order*. [9 JA 1226].

Kvam also filed a motion requesting reconsideration of a prior discovery order

and sanctions relating to the new, fraudulent material asserted in Par. 25 of Mineau's declaration. [*See Motion for Reconsideration of Order Affirming Discovery Commissioner's Recommendation, Entered May 16, 2019, For Discovery Sanctions; and For Other Relief*, 12 JA 1518].

On June 5, 2020, Judge Simons entered the *Order Granting, in Part, and Denying, in Part, Defendants' Motion for Summary Judgment; Order Granting Summary Judgment on Claim Pursuant to Court's NRCP 56 Notice* ("Order #1") [14 JA 1948]. Essentially, in Order #1, Judge Simons granted Mineau/Legion's motion for summary judgment on Kvam's causes of action for monetary damages, leaving only Kvam's causes of action for declaration of joint venture, dissolution and winding up and accounting. In addition, Judge Simons *sua sponte* granted summary judgment in favor of Mineau/Legion on a counterclaim that was not pending.

Judge Simons largely ignored Kvam's declaration and evidence. Some of her findings of fact are not supported by any evidence to the record, and many of her findings of fact are supported only by a reference to "DA", which she explains means that the bare, conclusory allegations in Mineau/Legion's counterclaims are deemed admitted, even though most of the counterclaims had been dismissed, the pleadings had long since been superseded and no counterclaims were pending. Judge Simons did not address the Discovery Commissioner's *Recommendation for Order* or

Kvam's *Motion for Reconsideration* regarding discovery needed to address Mineau's sham declaration.

Kvam appealed Order #1 pursuant to NRAP 3A(b)(3) on June 29, 2020. [14 JA 2043]. Order #1 was affirmed [14 JA 2046] and the case was remanded to District Court. On remand, Kvam moved for and was granted summary judgment on his remaining causes of action. [*See Order Granting Plaintiff's Motion for Partial Summary Judgment*, ("Order #2) 14 JA 2147]. Unfortunately, the relief granted in Order #2 was circumscribed and limited by Order #1, and Judge Simons did not fully address the pending discovery issues.

FACTUAL BACKGROUND

I. PRE-FILING HISTORY

The following facts are set forth in the *Declaration of Jay Kvam in Support of Opposition to Defendants' Motion for Summary Judgment; and Cross-Motion for Partial Summary Judgment* [10 JA 1290-98].

1. In late December, 2016, Michael Spinola contacted Jay Kvam about a house "flip" project Brian Mineau was starting at 7747 S. May Street, Chicago, Illinois (the "Property" or the "Project") [10 JA 1291 ¶2].

2. On December 30, 2016 or January 1, 2017, Mr. Spinola introduced Kvam to Mineau at a Starbucks in Reno, Nevada. At that meeting, Spinola and Mineau prepared on outline of the project financing. Spinola took a photo of that

outline which he later sent to Kvam's email on January 7, 2017 [10 JA 1291-92 ¶2; 1301].

3. The discussions about the Project are encapsulated in the outline of project financing which indicates that the Project would cost $44,000 for the purchase price and $70,000 for repairs which would be repaid with interest at the rate of 7% per annum in (3) three months, which would be $1,995 in interest. The outline of project financing also includes $13,520 for escrow closing costs. Based on an estimated re-sale price of $169,000, the Project would generate an estimated profit of $39,485, which would be divided three (3) ways, $13,161 each. [10 JA 1292 ¶4; 1303].

4. Kvam had never engaged in a flip project before. Mineau represented that he had such experience and that he had successfully and profitably completed flip projects in Chicago. Kvam relied on Mineau's experience and the outline of project financing [10 JA 1291-92 ¶3].

5. On January 2, 2017, Mineau copied Kvam on an email that included an unsigned bid from Triple "R" Construction for $70,000. The bid stated: "THIS JOB WILL TAKE 3 MONTHS FROM START TO FINISH." [10 JA 1292 ¶5; 1307-10].

6. Mineau signed the purchase agreement for the Property on January 3, 2017 in the amount of $44,000 [10 JA 1292 ¶6; 1312-15].

7. On February 13, 2017, Kvam wired $44,000 to escrow for the purchase price and another $784.31 for miscellaneous escrow fees and escrow closed that same day [10 JA 1292 ¶7; 1317-19; 1321-24].

8. Mineau acquired title to the Property in the name of his limited liability company, Legion Investments, LLC. [10 JA 1292 ¶7; 1326-30].

9. The next day, on February 14, 2017, Kvam signed a document entitled "Terms of Agreement" which provides in its entirety as follows:

> Terms of Agreement between Legion Investments LLC (its Members) and Jay Kvam (Initial Funding Member of Same)
> Re:
> 7747 May Street, Chicago, Illinois.
>
> With Regards to acquisition of the aforementioned property, it is understood that the membership of Legion Investments LLC for this acquisition is Brian Mineau, Jay Kvam and Michael Spinola. All parties are entitled to 33.33% of net profit, after all expenses are accounted for, to include interest due on funds dispersed. Initial purchase is being funded by Kvam, who is there by assigned any remedies due should the transaction fail in anyway. Initial funder will be due a 7% annual return on any funds provided due from date of disbursement. There is expected to be 3 renovation draws necessary on this project. First draw to be funded by Mr. Kvam, Due to present and ongoing business dealings between Jay and Michael, Michael has agreed to allot %50 of his 1/3 profit for both initial funding's.
>
> [10 JA 1293 ¶8; 1332].

Mineau and Spinola had previously signed the Terms of Agreement on February 13, 2017 [*Id.*].

10. On February 17, 2017, Kvam texted Mineau to ask for wiring details to forward the first payment to the contractor. Mineau responded "Not yet, he was getting the wiring info for a separate account so he could keep May Street funds separate from other projects." [10 JA 1293 ¶9; 1334].

11. Mineau contacted a different contactor, TNT Complete Facility Care, Inc. ["TNT"] after March 16, 2017 [10 JA 1293 ¶9; 1336]. Mineau prepared the Contractor Agreement with TNT [10 JA 1293 ¶ 9; 1338] and signed the agreement on March 20, 2017 [7 JA 1054-67; 10 JA 1293 ¶11; 1340].

12. The Contractor Agreement provides that the project will be "turn key" complete by June 1, 2017 at a total cost of $80,000 [See Addendum "A" to Contractor Agreement, 7 JA 1065; 10 JA 1293 ¶10]. Addendum A specifies the payment schedule, including:

> $20,000 to secure permits, architects, demo;
> $15,000 to begin reconstruction April 17th 2017
> $15,000 due April 27th 2017
> $13,000 due May 8th 2017
> $9,000 due May 18th 2017
> Final payment of $8,000 due upon punch list completion.

The Contractor Agreement also specifies that "The Owner [Legion/Mineau, ed.] will approve the percentage of work at its sole discretion" [See Addendum "B" 7 JA 1067] and "IN ORDER TO RECEIVE PAYMENT, CONTRACTOR MUST PROVIDE INVOICES . . ." [7 JA 1054-55, ¶4].

13. Mineau never gave Kvam a copy of the Contractor Agreement, so

Kvam did not know the payment schedule or amounts, and relied on Mineau. Mineau never obtained invoices from TNT, never verified that work was progressing, and instructed Kvam to make the payments without regard to the progress of construction. Kvam first obtained the Contractor Agreement through the discovery process in this lawsuit [10 JA 1293-94 ¶11].

14. On March 23, 2017, Mineau texted that "... we are ready for our first draw on May street 20k. I will email the wiring instructions to you jay and if you have time to get it out some time in the next day or two, I would appreciate it." [10 JA 1294 ¶12; 1343]. Later that morning, Mineau emailed Kvam with wire instructions as an attachment [10 JA 1345-46]. Kvam wired $20,000 to TNT that same day [10 JA 1294 ¶12; 1348-49].

15. On April 13, 2017, Mineau texted that "I spoke with Derek last night and this morning and next Tuesday or Wednesday is good for the next draw if that works for you. He said Easter pushed a few inspections back but we will be done no later than the 16th of May." [10 JA 1294 ¶13; 1351]. In reliance on that text message, Kvam sent another $20,000 on April 14, 2017 [10 JA 1352-54].

16. Kvam wired another $9,000 on May 18, 2017 [10 JA 1294 ¶14; 1356].

17. Kvam began to ask questions of Mineau on about May 21, 2017: "Have you heard from Derek recently about May Street? How's it progressing in these, as I've heard, last couple weeks of renovation?" Mineau replied: "I did actually he

called me about an hour and a half ago and told me he is installing floors this week and should be finished very soon." [10 JA 1294 ¶14; 1358].

18. Although Mineau was able to procure the property for $44,000 as planned, most of the other representations he made to Kvam have proven to be false. For instance, Kvam first discovered on July 12, 2017 that Mineau's budget for construction costs had increased from $70,000 to $80,000 only when a third-party, Bradley Tammen, forwarded a copy of an email from Mineau soliciting funds. [10 JA 1294 ¶15; 1362-63].

19. Also, Mineau never informed Kvam that he did not have his share of funding. Kvam would not have proceeded with this Project had he known that Mineau needed to borrow his share of funding as he now claims in his sham Declaration [10 JA 1295 ¶16].

20. During this litigation, Kvam began researching the permit history for the Property through the Cook County, Illinois public records. The summary report was provided as Exhibit "23" with Mineau's *Motion for Summary Judgment* [8 JA 1187-89]. The inspection history confirms that there were no inspections at the time of the second draw on April 14, 2017, and the floors were not ready to install at the time of the third draw on May 18, 2017. In fact, there was no progress beyond demolition (which should have been covered by the first draw), and the Project could not have been on track to be completed by the 16th of May. In fact, the first permit

that was issued on April 21, 2017 was for "Removal of Drywall Only." The permit for "Interior Alteration of a Single Family Residence, Architectural, Mechanical, Plumbing and Electrical Involved" was not issued until June 14, 2017 [10 JA 1295 ¶17; 8 JA 1188-89].

21. Before filing suit, Kvam sent a letter to Mineau asking for his money back and included some proposals [12 JA 1616].

22. Kvam then had his attorney send a letter to Mineau on February 16, 2018 which explained that "Unless you consider Mr. Kvam to be a member of Legion Investments, LLC, that agreement is best described as a combination loan agreement and joint venture agreement, with Mr. Kvam a lender and joint venturer, and you as the project manager and managing member of Legion Investments, LLC." [12 JA 1620].

23. Mineau/Legion's attorney responded "Mr. Mineau, Mr. Spinola, and Legion have complied with the terms of the Agreement and intend to continue doing so. The terms of the Agreement do not entitle Mr. Kvam to be 'reimbursed' or bought out on demand." [12 JA 1624].

24. Mineau/Legion's attorney later wrote that "No aspect of NRS Chapter 87 applies to this dispute." [12 JA 1638].

II. PROCEDURAL BACKGROUND

A. THE PLEADINGS

25. Kvam eventually filed suit in the court below on April 11, 2018 [1 JA 1]. The Complaint included causes of action as follows: Declaration of Joint Venture; Rescission or Reformation of Agreement; Breach of Contract – Loan; Breach of Contract and Tortious Breach of Implied Covenant of Good Faith and Fair Dealing – Joint Venture Agreement; Accounting; Court Supervision of Dissolution and Winding Up; Appointment of Receiver; Temporary and Permanent Injunction; Derivative Claim (on behalf of the unincorporated joint venture referred to as 7747 S. May Street).

26. The case was assigned to Dept. 3, Hon. Jerome Polaha [1 JA 24].

27. Mineau/Legion filed an *Answer and Counterclaim* on June 5, 2018 in which they denied the characterization of the Project as a joint venture that is governed by NRS Chapter 87 and asserted 11 counterclaims [1 JA 10].

28. Kvam filed a *Motion to Dismiss Counterclaim, or Alternatively, for a More Definite Statement* on June 25, 2018 [1 JA 24]. Judge Polaha dismissed some of the counterclaims and ordered a more definite statement regarding some of the counterclaims [1 JA 107, 112].

29. Mineau/Legion filed a document entitled *First Amended Counterclaim* on October 5, 2018 [2 JA 114]. Kvam filed a *Motion to Dismiss Counterclaim and*

for Summary Judgment on October 25, 2018 [2 JA 128]. On January 9, 2019, Judge Polaha dismissed all of Mineau/Legion's remaining counterclaims except for their third counterclaim for declaratory relief [2 JA 313, 329].

30. Mineau sold the Property at a loss with the interior demolished to Thousand Oaks Management, LLC for $41,000 on November 16, 2018 [10 JA 1296 ¶26; 11 JA 1407-09]. The sale generated net proceeds in the amount of $24,473.77 [*Id.*].

31. Kvam was left to find out about the sale on his own and moved for a temporary restraining order and preliminary injunction on November 30, 2018 to prevent the loss of the sale proceeds [10 JA 1296-97 ¶26; 2 JA 214]. The Temporary Restraining Order was entered on December 3, 2018 [3 JA 251]. Facing no other option, Mineau/Legion stipulated to deposit the proceeds of sale with the clerk of the court [10 JA 1296-97 ¶26; 3 JA 256].

32. At a subsequent hearing on February 11, 2020, Mineau/Legion's counsel acknowledged that Legion had received a refund from escrow in the amount of $1,864.14 after the temporary restraining order and after the sale proceeds had been deposited with the clerk of the court. [See Transcript, 15 JA 2281 at 19:10-12]. This refund has not been deposited with the clerk of the court.

33. On December 24, 2018, Kvam filed a *Motion for Leave to file Amended Complaint* to add claims of fraud and breach of contract against Mineau due to his

failure to fund the Project and to make other changes to the complaint to reflect the recent sale of the Property [3 JA 273]. Judge Polaha granted that motion on January 29, 2019 [3 JA 376] and Kvam filed his *First Amended Complaint* ("FAC") on January 31, 2019 [3 JA 379].

34. The answer filed by Mineau/Legion on February 19, 2019 did not contain any counterclaims [3 JA 390].

35. The case was reassigned to Dept. 6, Hon. Lynne K. Simons, on June 6, 2019 [4 JA 602].

36. On June 19, 2019, Kvam filed a *Motion for Leave to File Second Amended Complaint* [4 JA 620]. As explained in that motion:

> Through extensive discovery conducted to date, there is no evidence that Kvam's money was used to improve the Property. Based on the sale for a loss, photographs which indicate that the property was in worse shape, and newly discovered evidence that Mineau, Legion and their cohorts and colleagues were working on other projects at the same time, some of which were sold for a profit, Kvam now seeks to file the Second Amended Complaint to include causes of action for conversion/diversion of funds and RICO violations.
>
> [4 JA 622:1-6].

Judge Simons granted Kvam's motion for leave to amend [5 JA 750] and Kvam filed his *Second Amended Complaint* ("SAC") on September 11, 2019 [5 JA 756].

37. The Answer filed by Mineau/Legion on September 25, 2019 did not contain any counterclaims [5 JA 769].

B. KVAM'S SECOND MOTION TO COMPEL

38. Kvam was forced to file a *Second Motion to Compel* when Mineau/Legion resisted discovery concerning the commingling of project funds and likely diversion of funds to Mineau's other projects in Chicago. [6 JA 774].

39. Kvam's *Second Motion to Compel* was still pending when Mineau/Legion filed their *Motion for Summary Judgment* on January 6, 2020 on all causes of action alleged in Kvam's SAC [7 JA 1003].

C. MINEAU/LEGION'S MOTION FOR SUMMARY JUDGMENT

40. Mineau/Legion submitted 32 exhibits with their January 6, 2020 *Motion for Summary Judgment*, including a declaration from Brian Mineau.

41. In their *Motion for Summary Judgment*, Mineau/Legion altered their previous position and conceded that the Project should be characterized as a joint venture that is governed by NRS Chapter 87 as alleged in Kvam's First Cause of Action (Declaration of Joint Venture) [7 JA 1013-14].

42. The Discovery Commissioner, Wesley Ayers, filed his *Recommendation for Order* on January 10, 2020, which recommended granting in large part Kvam's *Second Motion to Compel* and awarding attorney's fees against Mineau/Legion in the amount of $2,500. [9 JA 1226, 1236]

43. Kvam filed his *Opposition to Defendants' Motion for Summary Judgment; and Cross-Motion for Partial Summary Judgment* ("Opposition") on

January 16, 2020 [10 JA 1251].[1] Kvam included detailed points and authorities on every cause of action and an extensive statement of facts which was supported by 48 exhibits including declarations from Jay Kvam and Benjamin Charles Steele, CPA.

44. Kvam considers Mineau's declaration to be a sham. He objected to Mineau's declaration at length [10 JA 1263-1264] and further addressed Mineau's perjured declaration in his *Motion for Reconsideration*, discussed below. [12 JA 1518].

D. REPORT OF BENJAMIN CHARLES STEELE, CPA

The following facts are set forth in the Declaration of Kvam's expert witness, Benjamin Charles Steele, C.P.A., which was submitted as Exhibit 40 with Kvam's *Opposition to Motion for Summary Judgment*, and his report and amended report which were submitted as Exhibits 41 and 42. [11 JA 1429-1444].

45. Mr. Steele reviewed TNT's bank records and was able to confirm that TNT was working on other projects for Mineau/Legion at the same time including 8744 Bishop, 8754 S. Michigan, 9919 Forest and 1404 and 1408 Wyoming [11 JA 1443]. The funding for these other projects went into the same bank account xxx1855 and was therefore commingled with Kvam's funding for 7747 S. May Street [*Id.*]. From there Mr. Steele reported as follows:

[1] Kvam's detailed Opposition occupies the entirety of Appendix vols. 10 and 11.

a. "I am unable to confirm how much of Kvam's funding was used on the 7747 May Street project, and whether the funding from Mineau/Criterion NV LLC was used on the project." [11 JA 1443];

b. "Based on a text from Brian Mineau to Jay Kvam on February 7, 2017, TNT Complete Care Facility 'was getting wiring info for a separate account so he could keep May Street funds separate from other projects.' This did not happen, and the May Street project funds wound up in TNT's account 1855 along with funds for other projects, including 8744 Bishop, 8754 S. Michigan, 9919 Forest and 1404 and 1408 Wyoming." [11 JA 1443];

c. "The project should have been $3,000 from punch list completion based on the above listed draws in the amount of $69,000" [11 JA 1443];

d. "The records supporting the project costs are limited or non-existent." [11 JA 1443];

e. "Paragraph 4 of the contract required the contractor and subcontractors to provide invoices furnish documents and pictures of completed work. It appears Brian Mineau directed Kvam to make payments with TNT without requesting or receiving the required documents to verify the amount of work completed." [11 JA 1444];

f. "The accounting records are incomplete and cannot support the

level of work completed." [11 JA 1444].

E. HEARING AND ORDER #1

46. Trial was scheduled to commence on March 2, 2020. [4 JA 605]

47. Judge Simons conducted a pretrial conference on January 14, 2020, at which time she indicated that she wanted to schedule a hearing on Mineau/Legion's *Motion for Summary Judgment* for February 11, 2020. [9 JA 1244].

48. Judge Simons also scheduled a hearing on pretrial motions for February 21, 2020. [9 JA 1244].

49. The February 11, 2020 hearing commenced at 9:58 a.m. and not 9:30 a.m. as scheduled. [15 JA 2277] Kvam's attorney was cut-off from rebuttal argument. [15 JA 2297 at 83:8-11]

50. The February 21, 2020 hearing on pretrial motions was continued to February 27, 2020 and was largely preempted when Judge Simons announced her decision to grant much of Mineau/Legion's *Motion for Summary Judgment*. [15 JA 2327, 2335-2340]. That announcement prompted the stipulation to vacate trial. [13 JA 1705].

51. Also at the February 27, 2020 hearing, Judge Simons announced her purported decision to invoke NRCP 56(f) when she stated: "I am, pursuant to Rule 56(f), advising all parties that I intend to grant summary judgment on defendant's third claim – counterclaim for relief on declaratory judgment." [Transcript 15 JA

2330:13-16]. She proceeded to give Kvam's counsel until the next morning to file a response [*Id.* at lines 20-21]. After some back and forth on whether that was reasonable notice, she gave Kvam's counsel until "5:00 tomorrow" [15 JA 2334:9-10] at which point Kvam's counsel responded: "I don't think it's reasonable." [*Id.* at line 14]. Not only was the timing unreasonable, but Judge Simons never explained the issues that she wanted briefed. Although Judge Simons eventually extended the response date to "Monday at 10:00 a.m." [15 JA 2335:5-6], Kvam's counsel waived any further response and stated, "So I think the Court should go ahead and enter judgment as it is, as it was suggested, and we'll go from there." [15 JA 2341:21-23].

52. On June 5, 2020, Judge Simons entered an *Order Granting, in Part, and Denying, in Part, Defendants' Motion for Summary Judgment; Order Granting Summary Judgment on Claim Pursuant to Court's NRCP 56 Notice* ("Order #1") [14 JA 1948].

53. Order #1 contained a conclusion of law in Kvam's favor on one of the major contested issues in the case: "13. Mr. Kvam, Mr. Meneau [sic] and Mr. Spinola formed a joint venture partnership pursuant to NRS 87.4322." [14 JA 1973:16-17].

54. Judge Simons also ruled that Kvam is entitled to $26,337.71, which includes the proceeds of sale on deposit with the Clerk of the Court in the amount of

$24,437.77 together with $1,864.14 that was refunded to Mineau/Legion after the close of escrow. [14 JA 1975:11-16].

55. However, much of the rest of Order #1 is adverse to Kvam.

56. Order #1 contains 74 Findings of Fact which largely ignore Kvam's declaration on contested issues. Judge Simons' Findings of Fact repeat many of the bare, conclusory allegations contained in Mineau/Legion's *First Amended Counterclaims* with a citation to "DA" which she explains means "deemed admitted due to failure to answer." [14 JA 16:1-2]. These counterclaims were dismissed in large part by Judge Polaha and were not restated in Mineau/Legion's answers to Kvam's FAC or SAC.

57. Based on her DA theory, Judge Simons proceeded to grant summary judgment in favor of Mineau/Legion on their third counterclaim (none was pending), as well as against Kvam on 7 of the 11 causes of action in his SAC.

58. Order #1 accepted Mineau's sham declaration and did not address Kvam's *Motion for Reconsideration* or Commissioner's Ayer's *Recommendation for Order*, all of which are discussed in detail, below.

F. KVAM'S INTERLOCUTORY APPEAL, REMAND AND ORDER #2

59. On June 29, 2020, Kvam noticed an appeal from Order #1 pursuant to NRAP 3A(b)(3) as an order refusing to grant an injunction. [14 JA 2043]. The case was transferred to the Court of Appeals [14 JA 2045], which affirmed Order #1 [14

JA 2046] and the case was remanded back to District Court.

60. On remand, Kvam filed a *Motion for Partial Summary Judgment* on his remaining first, fifth and sixth causes of action on June 25, 2021. [14 JA 2049]. His motion included five (5) exhibits, including declarations.

61. Mineau/Legion filed their own *Motion for Summary Judgment* on July 2, 2021. [14 JA 2085].

62. Judge Simons initially set the competing motions for a hearing on November 2, 2021 [14 JA 2140, 2141] but continued the hearing to January 4, 2022 [14 JA 2145].

63. The *Order Granting Plaintiff's Motion for Partial Summary Judgment* was entered on March 10, 2022 ("Order #2"). Essentially, Judge Simons granted the relief requested by Kvam on his remaining causes of action for declaratory relief that the parties formed a joint venture, for an accounting and for winding up and dissolution. She also ordered that Kvam was entitled to the proceeds of sale on deposit with the Clerk of the Court in the amount of $24,437.77 together with $1,864.14 that was refunded to Mineau/Legion after the close of escrow. She also denied Mineau/Legion's *Motion for Summary Judgment.* [14 JA 2147-2156].

64. The minutes and transcript from the January 4, 2022 hearing indicate that Judge Simons sustained Mineau/Legion's objection to the Discovery Commissioner's *Recommendation for Order* and denied Kvam's *Motion for*

Reconsideration; however, these rulings are not reflected in a written order. [See Minutes, 14 JA 2146 and transcript, 15 JA 2391-2393].

SUMMARY OF THE ARGUMENT

Kvam was the victim of a fraud whereby Mineau/Legion proposed a real estate investment plan, in which there were to be 3 investors, but in fact, only Kvam put up money. Mineau failed to properly manage the project and instead falsely represented that the project was proceeding through inspections in order to induce Kvam to advance funds. To make matters worse, Kvam's project funds for 7747 S. May Street were commingled with the funds for Mineau's other projects under construction by the same contractor at the same time, and it now appears that Kvam's money was used on Mineau's other projects. To date, Kvam has been denied necessary discovery regarding Mineau's claimed investment of the $20,000 in the project and the diversion of Project funds to Mineau's other projects.

Judge Simons should have rejected Mineau/Legion's *Motion for Summary Judgment* outright, sanctioned them for Mineau's sham declaration submitted in support thereof and compelled discovery as requested by Kvam and as recommended by the Discovery Commissioner. Instead, she ignored the discovery issues and granted summary judgment against Kvam on his causes of action for monetary damages. Judge Simons did so by finding that Kvam had somehow admitted the general allegations in Mineau/Legions counterclaims even though no counterclaims

were pending and by ignoring Kvam's detailed declaration, the reports of Benjamin Charles Steele, and other evidence submitted with Kvam's opposition.

Although Judge Simons later granted Kvam's *Motion for Partial Summary Judgment*, including the cause of action for accounting, Kvam has never received an accounting of whether Mineau/Legion actually advanced $20,000 for construction as claimed and whether funds intended for 7747 May Street were used for Mineau/Legion's other projects that were under construction by the same contractor at the same time.

ARGUMENT

I. NO DEEMED ADMITTED (DA) COUNTERCLAIMS

On January 9, 2019, Judge Polaha dismissed all of Mineau/Legion's remaining counterclaims except for their third counterclaim for declaratory relief [2 JA 313, 329]. Pursuant to NRCP 12(a)(4)(A) that was in effect at the time, Kvam ostensibly had 10 days "after notice of the court's action" in which to file a response to Mineau/Legion's October 5, 2018 *First Amended Counterclaim*.[2] Kvam had already filed a *Motion for Leave to file Amended Complaint* on December 24, 2018. [3 JA 273]. That motion was granted on January 29, 2019. [3 JA 376]. Kvam filed his *First Amended Complaint* ("FAC") on January 31, 2019 [3 JA 379].

[2] NRCP 12 was amended effective March 1, 2019. The amended rule offers 14 days to file a responsive pleading following a decision on a Rule 12 motion. NRCP 12(a)(3)(A).

Kvam was later granted leave to file a *Second Amended Complaint* ("SAC") on September 9, 2019 [5 JA 750] which he filed on September 11, 2019. [5 JA 756] The SAC is now the operative pleading. Mineau/Legion did not re-assert their remaining counterclaim in their answer to the FAC or SAC [3 JA 390, 5 JA 769]. They did not move for summary judgment on any counterclaims nor did they mention a counterclaim in their Trial Statement [12 JA 1660]. Despite the foregoing, Judge Simons somehow concluded that Kvam had "deemed admitted" the general allegations of Mineau/Legion's dismissed, superseded and abandoned counterclaims.

The question of whether counterclaims have to be restated in subsequent pleadings has not been addressed in Nevada. Cases from other jurisdictions generally agree that counterclaims must be restated. See *Settlement Capital Corp. v. Pagan,* 649 F.Supp.2d 545, 562 (N.D. Tex. 2009) (finding that counterclaims not reasserted in defendant's amended answer were abandoned); *Bremer Bank v. John Hancock Life Ins. Co.,* 2009 WL 702009, at *12 (D. Minn. Mar. 13, 2009) (determining that defendant's failure to replead the counterclaims, coupled with nearly two years passing without discovery or any action on the counterclaims and their lack of merit as a matter of law, warranted their dismissal); *cf. Doe v. Williston Northampton Sch.,* 766 F.Supp.2d 310, 313–14 (D. Mass. 2011) (granting motion to dismiss counterclaims for failure to prosecute pursuant to Rule 41(b) where the

counterclaims were not reasserted in response to amended complaints). *Doe v. Williston Northampton Sch.* is particularly appropriate.

> An amended pleading takes precedence over an earlier pleading. *See* Wright, *et al.,* Fed. Prac. & Proc. § 1476 (3d ed. 2010) ("A pleading that has been amended under Rule 15(a) supersedes the pleading it modifies and remains in effect throughout the action unless it subsequently is modified."). Because Defendant Ryan failed to reassert any counterclaims in his answers to the first and second amended complaints, it would be possible to conclude that the counterclaims have simply vanished from the currently operative pleadings, and no need therefore exists to dismiss them.
>
> To ensure no uncertainty, however, Plaintiffs' motion to dismiss will be allowed. Thus, whether by failure to re-plead, or by operation of the court's dismissal, no counterclaims remain in this case.
>
> [766 F.Supp.2d 313-14]

Mineau/Legion will likely cite *Ground Zero Museum Workshop v. Wilson*, 813 F.Supp. 2d 678 (D. Md. 2011) in support of their argument that counterclaims do not have to be restated in subsequent pleadings. However, that case acknowledged the contrary line of cases which are more similar to the case at hand. In *Ground Zero*, the defendant answered the complaint and pled counterclaims. The defendant did not reallege counterclaims in response to the first amended complaint or the second amended complaint; however, the defendant moved for leave to file two new counterclaims shortly after answering the second amended complaint. The plaintiff opposed the motion and further argued that all counterclaims had been waived. *Id.* at 705.

The district court in *Ground Zero* ruled that the counterclaims had not been waived on the basis that plaintiff's motion to dismiss the original counterclaims was denied (*Id.*), the parties "proceeded with discovery throughout the remainder of the Fall" (*Id.*), the counterclaims "were indisputably at issue for the majority of the discovery period and Wilson repeatedly took actions to indicate his intent to pursue the counterclaims" (*Id.*), and "Wilson has not failed to prosecute them or otherwise waived his right to pursue them." *Id.* at 706. The court further granted leave to file the new counterclaims "to conform them to evidence first learned in the course of discovery." *Id.* at 707.

In contrast, the record in this case contains no reference to Mineau/Legion's counterclaims following Judge Polaha's January 1, 2019 *Order* until Judge Simons *sua sponte* resuscitated the counterclaim for declaratory relief five (5) days before trial at the hearing on Thursday, February 27, 2020. Mineau/Legion did not move for summary judgment on any counterclaims and did not even mention the counterclaim in their *Trial Statement* [12 JA 1660]. The absence of any reference to the counterclaim in Mineau/Legions briefs and *Trial Statement* should be sufficient evidence that they did not believe that any counterclaims were left and did not prosecute any remaining counterclaims.

This Court need not decide whether to follow *Ground Zero* because the argument is simply inapplicable to this case where Mineau/Legion abandoned their

remaining counterclaim in the court below and waived this argument.[3]

Although Judge Simons mentioned her intent to grant summary judgment on Mineau/Legion's counterclaim for declaratory relief at the February 27, 2020 hearing, she did not reveal her "DA" theory. As such, Judge Simons' "DA" theory in Order #1 is tantamount to a default judgment when in fact no default was ever entered and could not be entered against a plaintiff that had prosecuted its case to the eve of trial. Mineau/Legion never took Kvam's default and they could not do so without notice to Kvam's counsel. RPC 3.5(a).[4] They never requested an answer to their counterclaim and cannot now claim the benefits of a default against a plaintiff that was actively prosecuting his case. By all accounts, as explained above, all parties believed that no counterclaims were pending.

Some cases apply a "prejudice" based approach:

> We find Hughes and Davis persuasive because the Federal Rules do not speak clearly about whether counterclaims must be repleaded in subsequent answers, counterclaims are distinct from other parts of an answer, and an inflexible rule would not serve the interests of justice.

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[3] To the extent the Court chooses to address the question, Kvam advocates in favor of the rule that counterclaims that are not restated in a subsequent answer are waived. This is a bright line rule that is easy to apply, in contrast to the counter-argument which creates a trap for the unwary, especially where an amended answer might restate some, but not all, of the previous counterclaims.

[4] **Rule 3.5(a). Relations With Opposing Counsel.** When a lawyer knows or reasonably should know the identity of a lawyer representing an opposing party, he or she should not take advantage of the lawyer by causing any default or dismissal to be entered without first inquiring about the opposing lawyer's intention to proceed.

> Hughes and Davis allowed a defendant that failed to replead a counterclaim in subsequent answers to continue to assert that counterclaim unless the plaintiff could show he would suffer prejudice. A key consideration is whether the plaintiff had notice that the defendant intended to continue pursuing the counterclaim.

Sinclair Wyo. Ref. Co. v. A & B Builders, Ltd. 2021 WL 672247, 2021 U.S. App. LEXIS 5014 (10th Cir. Feb. 22, 2021). In the present case, there can be no dispute that Kvam suffered prejudice when the counterclaim was not mentioned for over one (1) year until Judge Simons *sua sponte* raised the counterclaim approximately five (5) days before trial and then used the counterclaim to justify her "DA" theory of summary judgment.

II. JUDGE SIMONS SHOULD HAVE DISREGARDED MINEAU'S SHAM DECLARATION AND GRANTED KVAM'S MOTION FOR RECONSIDERATION [5]

Kvam propounded requests for production of documents and interrogatories in order to obtain accounting information relevant to the Project and to determine whether Mineau provided his share of funding for the Project.

Kvam's *First Request for Production of Documents* was served on August 29,

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[5] "[T]he court can find an affidavit to be a sham if it contains assertions that directly contradict other assertions previously made by that same witness during discovery and the contradiction cannot otherwise legitimately be reconciled as anything but manufactured." (unpublished) *Pickett v. McCarran*, No. 77124-COA, 12-13 WL7410795 (Nev. Ct.App. Dec. 31, 2019), Tao, J. concurring, citing *Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 294-95, 257 P.3d 966, 976-77 (Ct. App. 2015). The "sham" affidavit discussed in *Pickett v. McCarran* involved the same attorney and the same judge involved in this appeal.

2018. and contained the following requests which are still at issue in this case:

> REQUEST NO. 6:
> Produce all tax returns for Legion Investments, LLC, since its creation on July 2, 2014.
>
> REQUEST NO. 7:
> Produce all schedule K-1s for Legion Investments, LLC, since its creation on July 2, 2014.
>
> REQUEST NO. 8:
> Produce all of Brian Mineau's Schedule Es relating to Legion Investments, LLC, since its creation on July 2, 2014.

[3 JA 426]. These requests were necessary because Mineau/Legion did not keep separate records for the Project and presumably reported income, losses and expenses on their tax schedules. Mineau/Legions' responses were served on October 1, 2018 [3 JA 433] and their supplemental responses were served on February 21, 2019. [3 JA 455] Their responses and supplemental responses contained numerous objections, including objections to requests 6, 7, and 8 regarding tax schedules [3 JA 435-36, 457-58]. Following an extensive effort to meet and confer, Kvam limited the time frames in the requests to 2017 and 2018 [3 JA 470]; however, Mineau/Legion persisted with their objections and Kvam filed his *First Motion to Compel* on March 15, 2019 [3 JA 395].

The Discovery Commissioner, Wesley Ayers, entered his *Recommendation for Order* on April 9, 2019 in which he recommended granting in part and denying in part Kvam's *First Motion to Compel*, with no award of attorney's fees. [4 JA

528] With regard to Request No. 6, Commissioner Ayers provided a lengthy discussion of the limited protection afforded under *Hetter v. Dist. Court*, 110 Nev. 513, 874 P.2d 762 (1994) and *Cain v. Price*, 134 Nev. 193, 415 P.3d 25 (2018) and recommended as follows: "For all of these reasons, the Court finds that Plaintiff has ***not yet*** demonstrated that he is entitled to Defendant Legion's tax returns in this case." [4 JA 538:1-9] (emphasis added). The recommendation was similar for Requests 7 and 8. Judge Polaha affirmed the *Recommendation for Order* in its entirety on May 16, 2019 [4 JA 593].

Kvam also propounded interrogatories and Mineau/Legion served their answers to his *First Set of Interrogatories* on October 1, 2018 [12 JA 1534]. Interrogatory No. 6 asked Mineau/Legion to "Identify all persons who contributed capital or funds for the purchase and improvement of the Property . . ." [12 JA 1536] After identifying the $93,000 provided by Kvam, Mineau/Legion responded:

> Criterion NV LLC
> 7560 Michaela Dr., Reno, NV 89511
> Contributions: March 26, 2017
> $20,000.00
>
> [12 JA 1536].

The responses from Mineau/Legion were verified by Mineau, individually and as Manager of Legion Investments, on personal knowledge. Criterion NV LLC is not a party to the Terms of Agreement, and Kvam interpreted this response as an admission that Mineau did not provide his required funding. That admission

prompted Kvam to file the FAC, discussed above.

On January 14, 2019, Mineau/Legion submitted a declaration with their *Opposition to Motion for Leave to File Amended Complaint* in which Mineau claimed that the payment from Criterion NV LLC was actually made on his behalf. Mineau's declaration contained the following statement:

> 5. In 2017, Michael Spinola and I caused Criterion NV LLC to contribute $20,000 to the project at 7747 S. May Street, Chicago, Illinois ("Property") on behalf of Legion.
>
> [3 JA 337]

Mineau submitted another Declaration made under penalty of perjury with his February 25, 2019 *Reply in Support of Motion for Protective Order* in which he testified that:

> 9. In late May 2017, TNT's owner Derek Cole called me and requested a $20,000.00 construction draw for the project at the Property. I was travelling at the time and was unable to promptly make direct payment; however, I had sufficient cash on hand in my personal safe at home to make this payment. At my request, Michael Spinola agreed to arrange to pick up the cash and have it wired to TNT.
>
> 10. Mr. Spinola met my wife at our house, where my wife handed Mr. Spinola the cash from our safe, and Mr. Spinola took it to his bank to have it wired to TNT. The deposit and wire were made through Criterion NV LLC's account.
>
> [12 JA 1544-45]

Mineau cleverly described the transaction between he and Criterion as a cash transaction, thus, there is no documentary support for this transaction.

Mineau then submitted a fraudulent declaration in support of Mineau/Legion's *Motion for Summary Judgment* with the following paragraph 25:

> 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 with whom I had done a variety of other business transactions. 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).
>
> [7 JA 1036-37] (emphasis added).

The discovery deadline in this case expired on December 6, 2019 [5 JA 744]. Mineau's declaration was provided after the close of discovery and reflected a material change from his three (3) prior, sworn statements. Essentially, Mineau's statement shifted from Criterion NV LLC provided $20,000 in funding, to Criterion NV LLC provided $20,000 in funding on behalf of Legion, to Mineau's wife gave Michael Spinola $20,000 from their home safe, to Mineau borrowed $20,000 from Bradley Tammen which has been repaid in full with $8,000 in interest.

Despite the evidence of Mineau's fraudulent and sham declaration, Judge Simons accepted Mineau's declaration at face value and incorporated the declaration into Finding of Fact 43 in Order #1:

> *43. On May 26, 2017, Criterion NV LLC, acting on Mr. Mineau's behalf, wired $20,000 directly to TNT with reference 'May Street.' Motion, Ex. 1 ¶25, Ex. 19.*
>
> [14 JA 1968].

Although the referenced wire transfer contains a reference to May Street [8 JA 1144], there is no evidence that this money was sent on Mineau's behalf or that it was used on the 7747 May Street Project instead of Mineau's other projects.

Lacking any documentation of the alleged loan from Bradley Tammen to Brian Mineau or the repayment thereof with $8,000 interest, Kvam renewed his request for Mineau and Legion's tax schedules. On January 24, 2020 Kvam filed a *Motion for Reconsideration of Order Affirming Discovery Commissioner's Recommendation, Entered May 16, 2019; for Discovery Sanctions; and for Other Relief* ("Motion for Reconsideration") [12 JA 1518]. Kvam's *Motion for Reconsideration* referenced the report from Benjamin Charles Steele, CPA, that was submitted in opposition to Mineau/Legion's Motion for Summary Judgment and explained the need for the tax schedules as follows:

> I have reviewed Brian Mineau's January 6, 2020 declaration that was provided as Exhibit "1" to the Motion for Summary Judgment, wherein he testifies at Par. 25 that he borrowed $20,000 from Bradley Tammen to fund his share of the construction draws, and repaid $28,000. He did not identify the date of the repayment, and the records provided do not include evidence of this loan or the repayment. Lacking documentation for this loan and repayment, the only other evidence would be Legion Investments, LLC's tax return or Mr. Mineau tax return. The tax returns are necessary to determine how Mr. Mineau

> reported the transaction with Mr. Tammen related to the investment contribution and expenses paid toward the May Street Property. The returns should report the loan of $20,000 from Mr. Bradley Tammen and the repayment of the loan in the amount of $28,000.
> [11 JA 1430 ¶4].

Mineau never provided evidence of a loan or the repayment thereof, and his sham declaration therefore places the subject tax schedules at issue as the only other possible source of information. Discovery of the tax schedules is therefore allowed under *Hetter v. Dist. Court*, 110 Nev. 513, 874 P.2d 762 and *Cain v. Price*, 134 Nev. 193, 415 P.3d 25. The requested tax schedules are also relevant to Kvam's case for punitive damages.

Although tax returns are not to be had for the" mere asking," *Cain v. Price*, 134 Nev. 193, 198, 415 P.3d 25, 30, discovery should encompass financial information to assess the appropriate amount of punitive damages. In *Cain v. Price,* the Nevada Supreme Court reversed the lower court's order denying a motion to compel tax returns. The Nevada Supreme Court ruled that "While that evidence might not amount to 'clear and convincing evidence' that Price and Shackelford committed 'oppression, fraud, or malice,' NRS 42.005(1), such alleged misuse of funds contrary to the [joint venture agreement] constitutes 'some factual basis' for those claims such that discovery was property." *Id.* at 199, 31. *Cain v. Price* relied on the earlier case of *Hetter v. Dist. Court*, 110 Nev. 513, 520, 874 P.2d 762, 766.

The case for production of the requested records in the instant case is even

more compelling than in *Cain v. Price* and *Hetter v. Eighth Judicial District Court* in which the requested discovery was solely for the case on punitive damages. In this case, the evidence of a loan from Bradley Tammen and repayment thereof is also relevant to the case-in-chief on the question of whether Mineau provided his share of the Project financing.

Commissioner Ayers and Judge Polaha ruled that Kvam "has ***not yet*** demonstrated that he is entitled to Defendant Legion's tax returns in this case." [4 JA 538:1-9] (emphasis added). That ruling allowed Kvam to revisit the request as more information became available. At the time Commissioner Ayers and Judge Polaha ruled on Kvam's *First Motion to Compel*, they did not have the benefit of the report from Benjamin Charles Steele, CPA that was prepared on September 24, 2019 [11 JA 1429-44] or Mineau's perjured declaration that was provided with his January 6, 2020 *Motion for Summary Judgment* [7 JA 1034-39]. This is sufficient new information to warrant reconsideration, and it was an abuse of discretion for Judge Simons to accept Mineau's sham declaration and grant summary judgment without addressing Kvam's *Motion for Reconsideration.*

III. JUDGE SIMONS IGNORED THE DISCOVERY COMMISSIONER'S RECOMMENDATION FOR ORDER

Following the filing of Kvam's SAC with the cause of action for conversion, Kvam issued his *First Set of Requests for Admission* [6 JA 874] and *Fourth Set of Requests for Production of Documents* [6 JA 940] which requested information

about other projects that Mineau was working on in Chicago. Mineau/Legion's responses contained mostly objections [6 JA 951, 962]. Following efforts to meet and confer by Kvam's counsel, Kvam filed his *Second Motion to Compel* on November 26, 2019. [6 JA 774].

Kvam's *Second Motion to Compel* contains a detailed factual history and included extensive exhibits to explain the developing case regarding comingling of funds and conversion. Kvam's *Second Motion to Compel* was supported by 22 exhibits, including declarations, bank statements for TNT account 1855 showing the commingled funds [6 JA 855-863], and the expert witness disclosure and report of Benjamin Charles Steele, CPA. [6 JA 845-852]. Mr. Steele reported that: "the May Street project funds wound up in TNT's account 1855 along with funds for other projects, including 8744 Bishop, 8754 S. Michigan, 9919 Forest and 1404 and 1408 Wyoming." [11 JA 1443].

Mineau/Legion filed their *Motion for Summary Judgment* on January 6, 2020 [7 JA 1003] while Kvam's November 26, 2019 *Second Motion to Compel* was still pending before the Discovery Commissioner

On January 10, 2020, Commissioner Ayers entered his *Recommendation for Order* which recommended granting Kvam's *Second Motion to Compel* (except for the request for invoices from TNT for projects other than those shown in the bank statements) and for an award of attorney's fees to Kvam in the amount of $2,500 [9

JA 1226, 1234-36]. Commissioner Ayers understood the developing case on conversion and RICO and explained that:

> Plaintiff has therefor presented evidence that apart from the funds ostensibly used to purchase the May St. property and associated closing costs, $69,000 was transferred into account 1855 to fund renovation work that was supposed to cost $80,000. But the only work done on that project was worth less than $40,000, leaving at least $29,000 unaccounted for. Significantly, the entire $69,000 was transferred to an account that was also receiving and transferring funds used on other TNT projects – all of these funds were commingled. A reasonable possibility exists that a substantial portion of the $69,000 was used in connection with one or more of those other TNT projects.
>
> [9 App 1229-30] (emphasis in original)

Kvam filed his opposition to Mineau/Legion's *Motion for Summary Judgment* 6 days later, on January 16, 2020. Kvam included much of this same evidence, and more, in his opposition to Mineau/Legion's *Motion for Summary Judgment* and reminded the Court that "Discovery is outstanding on those other projects" and that "such ruling should be deferred until the outstanding discovery information is supplied and Mr. Steele has been given an opportunity to supplement his report." [10 JA 1280:28-1281:3].

It was an abuse of discretion for Judge Simons to grant summary judgment without addressing Commissioner Ayers' January 10, 2020 *Recommendation for Order*.

IV. ERRONEOUS FINDINGS OF FACT

The errors caused by Judge Simons' "DA" theory and Mineau's perjured

declaration so permeate Order #1 that the entire order should be reversed for those reasons, alone. Kvam nevertheless takes this opportunity to address some other, specific findings and conclusions that must be reversed.

Many of Judge Simons' Findings of Fact were supported only by a reference to "DA," and at least one of her Findings of Fact was not supported by any reference to the record. Some such findings include the following:

"*8. Mr. Kvam drafted the Terms of Agreement. DA, ¶ 3.*" [14 JA 1963]. Kvam refuted this finding in ¶ 8 of his declaration wherein he explained that he merely signed the Terms of Agreement that was sent by Mr. Spinola [10 JA 1292, 1331].

"12. All parties to the Terms of Agreement knew this was a high-risk investment. DA, ¶ 9." [14 JA 1964]. It is unclear why Judge Simons included this finding except to advocate for some sort of assumption of the risk theory. In fact, Kvam never admitted any such thing and disputes this statement. He never assumed the risk that Mineau would not complete the project and likely divert funds to his other projects. It is hard to understand how Mineau could have purchased a house for $44,000, spent at least $69,000 on the remodel, and then sold the house with the interior demolished for $41,000 [See closing statement 11 JA 1407]. Moreover, although comparative negligence or assumption of risk may be an affirmative defense to a negligence claim, it is not a defense to claims of breach of contract,

fraud, breach of fiduciary duty or other intentional torts alleged by Kvam. See NRS 41.141.

"49. Mr. Kvam acquired information directly from TNT and did not rely on Mr. Mineau's representations." [14 JA 1968]. Judge Simons failed to cite any support for this finding and rejected Kvam's declaration wherein he testified that: "I relied on Mineau's experience and the information that he provided to me [10 JA 1291-92 ¶ 3]. Judge Simons largely ignored or misunderstood the extensive record that Kvam provided to her. The parties put this plan together in January, 2017 and escrow closed on the purchase of the Property on February 13, 2017 [10 JA 1291-93 ¶s1-9]. TNT was not involved until approximately March 20, 2017. [See Contractor Agreement 7 JA 1054]. Many of the misrepresentations complained of occurred prior to that time.

To the extent Judge Simons meant to say that Mineau should be excused for providing false status reports because Kvam also received information directly from Derek Cole, an employee of TNT, that is not a correct statement of the law. A misrepresentation is fraudulent based on knowledge or belief on the part of the defendant that the representation was false or that he had an insufficient basis of information to make the representation. *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 447, 956 P.2d 1382, 1386 (1998); *Blanchard v. Blanchard*, 108 Nev. 908, 911, 839 P.2d 1320, 1322 (1992). Mineau owed a duty of care that required him to supervise

the project and to exercise reasonable care or competence in obtaining or communicating information to Kvam.

> In *Bill Stremmel Motors, Inc. v. First Nat'l Bank of Nevada*, we adopted the RESTATEMENT (SECOND) OF TORTS § 552 definition of the tort of negligent misrepresentation: (1) One who in the course of his business, profession, or employment or in any other action in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Barmettler v. Reno Air, Inc., 114 Nev. 441, 448-49, 956 P.2d 1382, 1387. Findings of Fact 50-59 are incorrect and irrelevant for these same reasons.

"65. For reasons beyond any of the parties' knowledge, control or expectation, the contractor hired to perform the renovations did not or was not able to complete the job. DA ¶ 11." [14 JA 1970]. Although the parties concede as they must that the Project did not progress beyond the demolition phase, there is no evidence to support the finding that the contractor is to blame. Rather, Kvam's extensive opposition demonstrates why the job was not completed and involves Mineau's misrepresentation, failure to supervise the project, commingling May Street funds with funds for other projects and likely diversion of funds.

To the extent Judge Simons is attempting to advocate for an affirmative defense of a supervening cause, that affirmative defense does not appear in any of Mineau/Legion's pleadings or briefs. Moreover, the question of supervening cause

creates an issue of fact and would not offer Mineau a defense in this case.

> [W]here an unforeseeable supervening cause intervenes between a defendant's negligence and a plaintiff's injury, the defendant is relieved of liability. However, where a third party's intervening intentional act is reasonably foreseeable, a negligent defendant is not relieved of liability. Further, the question of foreseeability is generally one for the jury.

Dakis v. Scheffer, 111 Nev. 817, 820, 898 P.2d 116, 118 (1995) citing *El Dorado Hotel v. Brown*, 100 Nev. 622, 628-29, 691 P.2d 436, 441 (1984) (citations omitted), *overruled on other grounds by Vinci v. Las Vegas Sands, Inc.,* 115 Nev. 243, 245, 984 P.2d 750, 752 (1999). As such, the defense of a supervening cause is only a defense to a negligence cause of action. Moreover, any wrongdoing by the contractor was foreseeable in light of Mineau's failure to segregate the project funds and failure to supervise the Project.

"72. Mineau and Legion fulfilled all of their obligations under the Terms of Agreement. DA ¶ 22." [14 JA 1971]. This is not a finding of fact, but rather a conclusory allegation taken straight from Mineau/Legions *First Amended Counterclaims* [2 JA 116 ¶ 22]. This allegation has no evidentiary value and is disputed for all of the reasons set forth above and below.

V. ERRONEOUS CONCLUSIONS OF LAW

A. KVAM'S FIRST CAUSE OF ACTION FOR DECLARATORY RELIEF AND MINEAU/LEGION'S COUNTERCLAIM FOR DECLARATORY RELIEF

Judge Simons' first 22 conclusions of law in Order #1, concern Kvam's First

Cause of Action for Declaratory Relief. [14 JA 1971-75]. Judge Simons denied Mineau/Legion's *Motion Summary Judgment* on that cause of action. Although most of her conclusions address her "DA" theory, conclusion 13 states as follows: "Mr. Kvam, Mr. Meneau [sic] and Mr. Spinola formed a joint venture/partnership pursuant to NRS 87.4322." [14 JA 1973 ¶13]. This is essentially a declaration in Kvam's favor, and later, in Order #2, Judge Simons actually granted declaratory relief in favor of Kvam [14 JA 2147-56].

The conclusion that the relationship between the parties in this case is governed by the Uniform Partnership Act, NRS Chapter 87, is instrumental and should have informed the remainder of Judge Simons' decision. As a partner, Mineau owed fiduciary duties to Kvam and the partnership/joint venture including the duty of loyalty and the duty of care. NRS 87.4336(1). Mineau's fiduciary duty also includes the duty to account to the partnership and to hold as trustee any property or benefit derived. NRS 87.4336(2)(a). Mineau also has a duty to refrain from competing with the partnership. NRS 87.4336(2)(b). These duties must be exercised consistently with the obligation of good faith and fair dealing. Nevada cases likewise consider a partner to be a fiduciary with the corresponding duties to disclose, exercise due care, loyalty, and to account (See *Nevada Power Co. v. Monsanto Co.*, 891 F.Supp. 1406, 1416 and n.3 (D. Nev. 1995) quoting *Mackintosh v. Matthews & Co.*, 109 Nev. 628, 634, 855 P.2d 549, 553 (1993)).

In this case, Mineau/Legion breached their fiduciary duty by failing to supervise and manage the project, commingling funds intended for different projects, failing to account to Kvam, failing to monitor the expenditure of funds intended for the Project, and competing against the partnership by having the contractor work on Mineau's other projects and likely diverting funds to those other projects.

B. KVAM'S SECOND CAUSE OF ACTION (RESCISSION OR REFORMATION OF AGREEMENT)

Conclusions of Law 23-29 address Kvam's Second Cause of Action (Rescission or Reformation of Agreement) [14 JA 1975-76]. However, these conclusions of law repeat an error that was first stated in Conclusion of Law 21.f regarding Mineau/Legions' counterclaim for Declaratory Relief: "There was no meeting of the minds regarding any other provisions to the Terms of Agreement except those written and contained in the Terms of Agreement." [14 JA 1974:21-23]. This conclusion constitutes an abuse of discretion because it is based on Judge Simons' earlier discussion of Mineau/Legion's counterclaim that was not pending and ignores Kvam's declaration and the other evidence he submitted.

Kvam explained that the Terms of Agreement came after escrow had already closed on the purchase of the Property. The Terms of Agreement address the obligations between Kvam and Spinola and "does not purport to encapsulate all of the discussions between the parties, and it does not encapsulate all of the discussions

between the parties." [10 JA 1293 ¶8]. Mineau/Legion admit, as they must that "the Terms of Agreement are incredibly unclear." [1 JA 79:22].

The Terms of Agreement does not contain an integration clause and omits essential terms, such as: Mineau was to manage the Project; the amount and timing of the construction draws; the amount to be contributed by each party; the contractor and renovation costs; and the anticipated completion date of the Project. These missing terms were agreed upon prior to the close of escrow and are encapsulated in the outline of project financing, the subsequent Contractors Agreement and the texts from Mineau about segregating funds for the May Street project from funds dedicated to his other projects. This is explained above and in Kvam's Declaration: "In general, our discussions about the project are encapsulated in Ex. "3" . . . and ¶ 5." [10 JA 1292 ¶ 4]. Exhibits 3 and 5 identified by Kvam refer to the project costs breakdown [10 JA 1301-1303] and the January 2, 2017 email from Brian Mineau attaching the $70,000 proposal from Triple "R" Construction. [10 JA 1306-1310].

Rescission is a remedy, equitable in nature, that allows an aggrieved party to a contract to abrogate totally, or cancel, the contract, with the final result that the parties are returned to the position they occupied prior to formation of the contract. *See Bergstrom v. Estate of DeVoe*, 109 Nev. 575, 577, 854 P.2d 860, 861 (1993) citing *Crowley v. Lafayette Life Ins. Co.,* 106 Idaho 818, 821, 683 P.2d 854, 857 (1984); *Breuer–Harrison, Inc. v. Combe,* 799 P.2d 716, 731 (Utah Ct.App.1990);

Nervik v. Transamerica Title Ins. Co., 38 Wash.App. 541, 547-48, 687 P.2d 872, 876 (1984).

Similarly, the remedy of reformation is available to relieve a party to a contract of a mistake. *See Grand Hotel Gift Shop v. Granite State Ins. Co.*, 108 Nev. 811, 817, 839 P.2d 399, 599, 603 (1992); 1 Restatement (Second) of Contracts § 158 (1979); 2 Restatement (Second) of Contracts § 204 (1979).

> Under the rule stated in § 204, when the parties have not agreed with respect to a term that is essential to a determination of their rights and duties, the court will supply a term that is just in the circumstances.
>
> 1 Restatement (Second) of Contracts § 158, Comment c.
>
> Or they may have expectations but fail to manifest them, either because the expectation rests on an assumption which is unconscious or only partly conscious, or because the situation seems to be unimportant or unlikely, or because discussion of it might be unpleasant or might produce delay or impasse.
>
> *Id.* at § 204, Comment c.
>
> The fact that an essential term is omitted may indicate that the agreement is not integrated or that there is a partial rather than complete integration. In such cases, the omitted term may be supplied by prior negotiations or a prior agreement.
>
> *Id.* at § 204, Comment e.

The February 14, 2017 Terms of Agreement is not a complete, integrated contract. The Terms of Agreement needs to be supplemented by the oral agreements between the parties and additional writings. To the extent the parties did not have a meeting of the minds or their agreement is otherwise characterized by fraud or

mistake, it should be rescinded or reformed.

C. KVAM'S THIRD CAUSE OF ACTION (BREACH OF CONTRACT – LOAN)

Kvam has described the Terms of Agreement as a hybrid loan agreement and profit-sharing agreement. This interpretation is supported by the face of the Terms of Agreement: "All parties are entitled to 33% of net profit, after all expenses are accounted for . . . Initial funder (Kvam, ed.) will be due a 7% annual return on any funds provided due from date of disbursement." [10 JA 1332]. This interpretation is also supported by Kvam's declaration and evidence. Despite the foregoing, Judge Simons concluded: "34. Kvam has not identified any evidence of a loan agreement and thus cannot establish a breach" and "35. The terms of Agreement provide Mr. Kvam will receive 7% annual return on any funds provided ***if the project was profitable.***" [14 JA 1977-78] (emphasis added). Judge Simons misread the Terms of Agreement and Kvam's testimony relating thereto and injected an entirely new condition of profitability into the Terms of Agreement. Pursuant to the Terms of Agreement, Kvam was due a 7% annual return on any funds provided due from date of disbursement" without any conditions. [10 JA 1332].

Moreover, Judge Simons twice ruled that Kvam was entitled to the proceeds of sale on deposit with the Clerk of the Court in the amount of $24,437.77 together with $1,864.14 that was refunded to Mineau/Legion after the close of escrow. In Order #1, Judge Simons found as follows:

m. The parties agreed all interests in the partnership and any remedies due to the partnership, ***including the proceeds from the sale of the Property in the amount of $26,337.71, should be assigned to Mr. Kvam*** *and the partnership dissolved. Motion, Ex. 1, ¶ 38-39; Opposition, p. 20, Stipulation to Deposit Funds, December 12, 2018.*

[14 JA 1975:11-15] (emphasis added).

In Order #2, Judge Simons found and ordered as follows:

"Mineau/Legion did not inform Kvam about the sale or pay the foregoing amount ($24,473.77) to Kvam; rather, Kvam was left to find out about the sale on his own." [Finding of Fact 17 at 14 JA 2150]

"The winding up of 7747 S. May Street will be complete when Kvam receives the funds on deposit with the Clerk of the Court in the amount of $24,473.77 plus $1,864.14 that Mineau/Legion received later." [Conclusion of Law 4 at 14 JA 2154]

"2. All funds held on deposit with the Clerk of the Court shall be released to Kvam.

3. Mineau/Legion shall pay to Kvam the $1,864.14 escrow refund." [Judgment at 14 JA 2155]

It is inconsistent for Judge Simons to rule that Mineau/Legion have to pay Kvam while dismissing his breach of contract claim.

D. KVAM'S FOURTH CAUSE OF ACTION (BREACH OF CONTRACT AND TORTIOUS BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING)

Kvam's Fourth Cause of Action actually asserted two related but separate claims – breach of the joint venture agreement and tortious breach of the covenant of good faith and fair dealing implied therein. Judge Simons' conclusions of law 37-47 do not adequately address either claim. As explained above, Mineau breached the joint venture agreement by failing to supervise the project, failing to complete the project, failing to provide his share of financing, and failing to pay Kvam from the proceeds of sale.

Under the implied covenant of good faith and fair dealing, a party must act in good faith to accomplish the intended purpose of the contract and cannot advance their own interests in a manner that would compromise the contract. See *Hilton Hotels Corp. v. Butch Lewis Productions, Inc.*, 107 Nev. 226, 234, 808 P.2d 919, 922-23 (1991). A plaintiff may recover damages for breach of the implied covenant of good faith and fair dealing even where there has not been a breach of contract. *Morris v. Bank of Am. Nevada*, 110 Nev. 1274, 1278, 886 P.2d 454, 457 (1994). Good faith is a question of fact. *Consol. Generator-Nevada, Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998).

Where a fiduciary relationship or other special relationship exists, a breach of the covenant of good faith and fair dealing is tortious. A partnership is a special relationship. *Great Amer. Ins. Co. v. Gen. Builders, Inc.*, 113 Nev. 346, 354, 934 P.2d 257, 263 (1997); *K-Mart Corp. v. Ponsock*, 103 Nev. 39, 49, 732 P.2d 1364, 1371 (1987) abrogated on other grounds by *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990). Judge Simons' concluded that the parties formed a partnership. [14 JA 1973]. Mineau therefore owed a special and fiduciary duty to Kvam such that Kvam's cause of action for tortious breach of the covenant of good faith should have survived summary judgment.

E. KVAM'S FIFTH CAUSE OF ACTION – ACCOUNTING

Judge Simons' various rulings and conclusions with regard to an accounting are contradictory and inadequate. In Order #1, Judge Simons denied Mineau/Legions' *Motion for Summary Judgment* on Kvam's Fifth Cause of Action for accounting [14 JA 1981, ¶55]. In Order #2, Judge Simons granted Kvam's *Motion for Partial Summary Judgment* on Kvam's fifth cause of action. [14 JA 2155]. However, the accounting provided to date is inadequate.

Mineau is a fiduciary and is required to account to Kvam pursuant to NRS Chapter 87. This includes information sufficient to determine if Mineau actually provided funding to the project as alleged in his latest declaration, and whether the commingled Project funds were diverted to his other projects. Because the discovery

issues remain unresolved, Kvam still does not have an accounting of any amounts contributed to the joint venture by Mineau, whether any such funds were borrowed from Bradley Tammen and whether they were repaid, and whether funds intended for the Project were used on Mineau's other projects.

F. KVAM'S SIXTH CAUSE OF ACTION – COURT SUPERVISION OF DISSOLUTION AND WINDING UP, AND APPOINTMENT OF RECEIVER

In Order #1, Judge Simons denied Mineau/Legion's *Motion for Summary Judgment* on Kvam's Sixth Cause of Action [14 JA 1982, ¶61]. In Order #2, Judge Simons granted Kvam's *Motion for Partial Summary Judgment* on this cause of action. "The winding up of 7747 S. May Street will be complete when Kvam receives the funds on deposit with the Clerk of the Court in the amount of $24,473.77 plus $1,864.14 that Mineau/Legion received later." [Conclusion of Law 4 at 14 JA 2154]

G. KVAM'S SEVENTH CAUSE OF ACTION (TEMPORARY AND PERMANENT INJUNCTION)

This cause of action will be moot pursuant to Order #2 when Mineau/Legion pay the remaining $1,864.14 and the joint venture is finally wound up.

H. KVAM'S EIGHTH CAUSE OF ACTION (FRAUD, FRAUDULENT INDUCEMENT AND FRAUDULENT CONCEALMENT)

In Order #1, Judge Simons' Conclusions of Law 66-78 address Kvam's Eighth Cause of action for Fraud, Fraudulent Concealment and Fraudulent

Inducement. Judge Simons' conclusions are encapsulated in the conclusion that "Mr. Kvam has not established that he relied on any false information to his detriment." [14 JA 1984, ¶76]. Many of Judge Simons' other conclusions repeat the argument, explained above, that Mineau is not liable for fraudulent information that he allegedly conveyed from the contractor.

Aside from obvious problems of lack of proof and hearsay for most of Judge Simons' conclusion, Judge Simons ignored or rejected Kvam's declaration wherein he testified that: "I relied on Mineau's experience and the information that he provided to me." [10 JA 1292:4-5]. Judge Simons also misunderstands the extensive record that was provided to her. The parties put this plan together in January, 2017 and escrow closed on the purchase of the Property on February 13, 2017. [10 JA 1292-93, ¶1-9]. Many of the misrepresentations complained of occurred before Mineau even contacted TNT about the project on approximately March 20, 2017 [7 App 1054]. Moreover, Mineau was required by the Contractor Agreement to obtain invoices, inspect the status of work and supervise the project. He failed to do so.

Also, a misrepresentation is fraudulent based on knowledge or belief on the part of the defendant that the representation was false or that he had an insufficient basis of information to make the representation. *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 956 P.2d 1382; *Blanchard v. Blanchard*, 108 Nev. 908, 839 P.2d 1320. There was no basis for Mineau to repeatedly report that the Project was almost

complete when he had not inspected the Project and permits had not even been issued.

Kvam's Declaration is sufficient to establish his reliance on the information provided by Mineau before Kvam advanced any funds. "Mineau represented to me that he had experience with flip projects in Chicago. I relied on Mineau's experience and the information that he provided to me, including the outline of the project financing. We never discussed that I would have any involvement with this Project beyond as a mere investor." [10 JA 1292, ¶ 3]. The outline of project financing was provided as Exhibit "3" to Kvam's opposition and shows three investors. [10 JA 1303]. This outline of project financing is an integral part of the agreement between the parties. "I would not have proceeded with this Project had I known that he needed to borrow his share of funding as he now claims in the Declaration." [10 JA 1295, ¶ 16]. Simply put, Kvam would not have invested with Mineau if Mineau was not also invested in the Project (so to speak, "skin-in-the-game") and committed to managing the Project. Likewise, Kvam would not have invested with Mineau if Mineau had disclosed that he had current projects pending that could draw the contractor's time and financial resources away from the Project at 7747 S. May Street.

Mineau's many misrepresentations are recited in the statement of facts, above. Mineau: (i) misrepresented that he would provide funding to the project and

concealed that he was unable to provide funding and had to borrow money (if that actually happened); (ii) mispresented that he had successfully completed flip projects in Chicago (past tense) and concealed that the same contractor was working on his other projects that could take time and resources away from the Project at 7747 S. May Street; (iii) misrepresented his intention to supervise the Project and concealed his lack of project supervision; (iv) misrepresented that Kvam's project funds would be placed in a separate account and concealed that the funds were commingled with funds for Mineau's other projects; (v) concealed that the contract price had increased from $70,000 to $80,000; (vi) concealed that he transferred his partnership interest to Bradley Tammen (if that is what happened); (vii) concealed the sale of the Property; (viii) made multiple misrepresentations concerning the status of the project when he instructed Kvam to make payment and thereafter; and (ix) likely used May Street funds on his other projects.

I. KVAM'S NINTH CAUSE OF ACTION (CONVERSION)

In Order #1, Conclusions of Law 79-85 address Kvam's Ninth Cause of Action for Conversion. Judge Simons granted Mineau/Legions' *Motion for Summary Judgment* largely on the basis that the project funds were paid to the contractor rather than to Mineau, directly [14 JA 1985, ¶83]. This point is irrelevant to any of the causes of action, including the cause of action for conversion, which is premised on project funds being commingled with funds for Mineau's other projects

and the growing evidence that project funds were used on those other projects. The extent of the diversion of funds is the subject of *Kvam's Second Motion to Compel* discussed above and it was an abuse of discretion for Judge Simons to grant summary judgment without ruling on the Discovery Commissioner's *Recommendation for Order*. The claim of conversion is also predicated on the proven fact that Legion received the sale proceeds, and later refund from escrow, which were not paid to Kvam.

The tort of conversion focuses on the distinct act of dominion rather than the question of who received the illicit proceeds. Personal liability attaches when a person participates in conversion, even if that person does not personally benefit from the conversion. *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428, 434 (6th Cir. 2012), rehearing and rehearing denied; *Binder v. Disability Group, Inc.*, 772 F.Supp.2d 1172, 1182 (C.D. Cal. 2011); *In re American Home Mortgage Holding*, 458 B.R. 161, 170 (Bankr. D. Del. 2011); Knepper & Bailey *Liability of Corporate Officers and Directors* § 6.07[2] (8th ed.) ("It is not necessary that the property be converted for their own personal benefit."). "Further, conversion is an act of general intent, which does not require wrongful intent and is not excused by care, good faith, or lack of knowledge." *Evans v. Dean Witter Reynolds*, 116 Nev. 598, 606, 5 P.3d 1043, 1048 (2000) citing *Bader v. Cerri,* 96 Nev. 352, 357 n. 1, 609 P.2d 314, 317 n. 1 (1980), *overruled on other grounds by Evans*, 116 Nev. At 608, 611, 5 P.3d at

1050, 1051. "Whether a conversion has occurred is generally a question of fact for the jury." *Id.* At 606, 1048.

It is undisputed that Mineau and Legion took title to the Property. It is also undisputed that Mineau represented that the project funds would be held in a "separate account so he could keep May street funds separate from other projects." [10 JA 1293, ¶ 9; 10 JA 1334]. This did not happen. The conversion consists of diverting Project funds and withholding the proceeds of sale. The focus is on Mineau's actions in derogation of the rights of Kvam and the joint venture to have the Project funds applied to the Project. It does not matter who ultimately received the funds, so long as Mineau participated in the conversion, which he did by allowing Project funds to be commingled with other funds. As for the proceeds of sale, there is no dispute that Mineau kept those from Kvam and is still holding the $1,864.14 refund that needs to be paid to Kvam. Mineau no longer denies the diversion of funds, and the record demonstrates that he did not pay the proceeds of sale to Kvam.

Kvam's discovery requests seeking information regarding the diversion of Project funds to Mineau's other projects was the subject of the Discovery Commissioner's January 10, 2020 *Recommendation for Order*. It was an abuse of discretion for the Judge Simons to grant summary on Kvam's cause of action for conversion without addressing the outstanding discovery regarding Mineau's other projects.

J. KVAM'S TENTH CAUSE OF ACTION (RICO)

In Order #1, Conclusions of Law 86-97 address Kvam's Tenth Cause of Action for violation of Nevada's Racketeering Influenced and Corrupt Organizations Act (RICO) [14 JA 1986-88]. Racketeering is defined as follows:

> **NRS 207.390 "Racketeering activity" defined.** "Racketeering activity" means engaging in at least two crimes related to racketeering that have the same or similar pattern, intents, results, accomplices, victims or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated incidents, if at least one of the incidents occurred after July 1, 1983, and the last of the incidents occurred within 5 years after a prior commission of a crime related to racketeering.

The required crimes (predicate acts) are listed in NRS 207.360. The crimes (predicate acts) relevant to Kvam's case include: "9. Taking property from another not under circumstances amounting to robbery; 27. Embezzlement of money or property valued at $650 or more; 28. Obtaining possession of money or property valued at $650 or more, or obtaining a signature by means of false pretense; 29. Perjury or subornation of perjury; 30. Offering false evidence." NRS 207.360.

Siragusa v. Brown, 114 Nev. 1384, 1399, 971 P.2d 801, 810-11 (1998) explains that there is no continuity requirement in Nevada as there is under federal RICO statutes. Racketeering under Nevada law simply means engaging in at least two crimes identified in NRS 207.360 related to racketeering as defined in NRS 207.390.

Mineau has not denied the predicate acts, nor can he at this point. Mineau obtained signatures from Kvam on the Terms of Agreement and wire transfers and obtained money under false pretenses, including the representations that Mineau would provide his share of project financing, the money would be placed in a separate account, that work and inspections were progressing, and that Kvam should send additional payments. Although the construction draws were not paid directly to Mineau, they were paid for the benefit of Property owned by his company, Legion Investments, LLC, and Mineau later obtained possession of the proceeds of sale. Mineau also took money from Kvam and the joint venture when he used Project funds on his other projects. The false evidence and perjury are now evident based on Mineau's multiple, false and contradictory verified interrogatory responses and sworn declarations, that are the subject of Kvam's *Motion for Reconsideration.*

K. KVAM'S ELEVENTH CAUSE OF ACTION (DERIVATIVE CLAIM)

Conclusions of Law 95-97 address Kvam's Eleventh Cause of Action for a derivative claim. [14 JA 1988] Judge Simons granted Mineau/Legion's *Motion for Summary Judgment* on this cause of action based on the conclusion that "Mr. Kvam conceded the partnership does not hold any independent claims for relief against Mineau/Legion." [14 JA 2038, ¶ 96]. Kvam never conceded any such thing and it is not clear what Judge Simons is referring to. Kvam's brief opposition regarding this cause of action is repeated in its entirety as follows:

> Mineau seems to misunderstand the nature of a derivative claim and has not cited any legal authorities to support his motion for summary judgment regarding Kvam's Eleventh Cause of Action. "A partnership may maintain an action against a partner for a breach of the partnership agreement, or for the violation of a duty to the partnership, causing harm to the partnership." NRS 87.4335(1) [Should be NRS 87.4337(1), ed.]. Also, "A partner may maintain an action against the partnership or another partner for legal or equitable relief . . ." This is exactly what Kvam has asserted. All of the aforementioned claims are asserted on his own behalf and on behalf of the joint venture. This is to prevent any argument from Mineau that the rights asserted belong to the joint venture, rather than Kvam. Mineau did not raise that argument in this motion for summary judgment.
>
> [10 JA 1284:19-28]

CONCLUSION

Judge Simons' findings and conclusions in Order #1 are erroneous and constitute an abuse of discretion for a number of reasons including: i) The findings and conclusions are based upon an erroneous legal theory that Kvam is deemed to have admitted the general allegations in Mineau/Legion's counterclaims; ii) the findings and conclusions are based on Mineau's perjured declaration; iii) the various findings were rebutted by the lengthy, detailed declaration and other evidence that Kvam submitted in opposition to Mineau/Legion's Motion for Summary Judgment; and iv) the various conclusions are erroneous as a matter of law. The problems created by Judge Simon's unlawful deemed admitted theory, reliance on a non-existent counterclaim and disregard for Kvam's declaration so permeate Order #1 that the entire Order must be reversed.

It was also an abuse of discretion for the Judge Simons to consider Mineau/Legion's *Motion for Summary Judgment* without addressing the outstanding discovery issues, including Commissioner Ayers' January 10, 2020 *Report and Recommendation* regarding Kvam's *Second Motion to Compel* and Kvam's *Motion for Reconsideration* regarding discovery of Mineau/Legion's tax schedules.

Wherefore, Appellant Jay Kvam respectfully requests an order reversing the June 5, 2020 *Order Granting, in Part, and Denying, in Part, Defendants' Motion for Summary Judgment; Order Granting Summary Judgment on Claim Pursuant to Court's NRCP 56 Notice* [14 JA 1948] in its entirety; reversing the March 10, 2022 *Order Granting Plaintiff's Motion for Partial Summary Judgment* to the extent that it limited the information that Mineau was required to provide pursuant to Kvam's Fifth Cause of Action for an accounting; and granting such other and further relief consistent with the foregoing, including relief on the discovery and accounting issues.

Respectfully submitted this 13th day of June, 2022.

MATUSKA LAW OFFICES, LTD.

By: _____

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

CERTIFICATE OF COMPLIANCE

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

[**X**] This brief has been prepared in a proportionally spaced typeface using Word Times New Roman 14-point font size.

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

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

[**X**] Proportionately spaced, has a typeface of 14 points or more, and contains 13,852 words: or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[ ] Does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable

Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 13th day of June 2022.

MATUSKA LAW OFFICES, LTD.

By: 

MICHAEL L. MATUSKA, SBN 5711
Matuska Law Offices, Ltd.
Attorney for Appellant, JAY KVAM

CERTIFICATE OF SERVICE

I certify that on the 13th day of June 2022, **APPELLANT'S OPENING BRIEF** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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Dated this 13th day of June 2022.

Suzette Turley, an employee of
Matuska Law Offices, Ltd.