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

JAY KVAM,

Appellant,

v.

BRIAN MINEAU; AND LEGION INVESTMENTS, LLC,

Respondents.

_____/



**Supreme Court Case No. 84443**

District Case No. CV18-00764

**Appeal from the Second Judicial District Court of the State of Nevada,**
**In and for the County of Washoe**
**The Honorable Lynne Simons, District Judge**

# RESPONDENTS' ANSWERING BRIEF

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## NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Brian Mineau

No publicly-held company owns 10% or more of Legion Investments, LLC's stock.

Attorneys from the Gunderson Law Firm have appeared for Brian Mineau and Legion Investments, LLC in this case. No partners or associates from any other law firm are expected to appear in this court.

DATED this 27th day of July, 2022.

GUNDERSON LAW FIRM

By: */s/ Austin Sweet*
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## I. STATEMENT OF THE CASE

This dispute concerns the parties' joint efforts to acquire the property located at 7747 S. May Street, Chicago, Illinois ("Property"), renovate it, and sell it for a profit. The Property was a dilapidated home in Chicago's "South Side" and was inexpensive to acquire and renovate, providing for a potentially profitable return on investment in a relatively short period. Pursuant to their agreement, the parties purchased the Property for approximately $45,000.00 and hired a contractor to perform the renovation. The contractor agreed to complete the renovation within approximately ten (10) weeks for a flat fee of $80,000.00.

From the outset, the parties agreed that if the project succeeded, the profits would first be disbursed to pay all expenses, including interest due on each partners' contribution at 7% per year, and then split among them based upon their percentage interests. The parties also agreed that if the project failed, all interest in the partnership and any remedies due would be transferred and assigned to Appellant JAY KVAM ("Kvam"). Kvam contributed $93,784.31 to the project, consisting of $44,784.31 which he wired directly to the title company to acquire the Property and $49,000.00 which he wired directly to the contractor for the renovations. BRIAN MINEAU ("Mineau") and LEGION INVESTMENTS, LLC ("Legion") contributed $27,090.31 to the partnership, consisting of $20,000.00 paid to the contractor and

$7,090.31 paid on behalf of the partnership for ongoing holding costs while Legion owned the Property, such as utility bills and insurance premiums.

The contractor was in constant communication with Legion, Mineau, and Kvam throughout the scheduled construction. Kvam regularly communicated directly with the contractor via telephone, text, and internet messaging through Slack, and the contractor sent regular updates and dozens of photographs directly to Mineau and Kvam. The contractor even came to Reno to meet with Mineau and Kvam, discussed the project at length with Mineau and Kvam, and lodged at Kvam's house during his trip.

Unfortunately, the contractor breached its contract and failed to complete the renovation. Legion and Mineau undertook reasonable and good faith efforts to compel the contractor to finish the project in compliance with the contract, but after months of excuses and broken promises from the contractor, Kvam declared "the project a failure" and demanded that Legion/Mineau "refund" Kvam's investment in the Property, plus interest. Legion and Mineau offered to assign all interest in the project to Kvam pursuant to the parties' agreement, but Kvam refused to accept such an assignment and instead maintained that Legion and Mineau were somehow obligated to personally guaranty Kvam's investment.

When efforts to resolve Kvam's concerns were unsuccessful, he initiated this action against Legion and Mineau, blaming them for the project's failure. The

district court ultimately entered summary judgment on all of the parties' claims and counterclaims over the course of three (3) different summary judgment orders, two of which are subject to the current appeal.

## II. STATEMENT OF THE FACTS

In late 2016 / early 2017, Mineau, Kvam, and Michael J. Spinola ("Spinola") began formulating a plan to purchase the Property, renovate it, and sell it for a profit. 7 JA 1034 ¶ 5.

On January 3, 2017, Legion entered into a Residential Real Estate Purchase and Sale Contract to purchase the Property for $44,000.00. 7 JA 1034 ¶ 6.

On February 13, 2017, the parties entered into a document entitled *Terms of Agreement between Legion Investments LLC (its Members) And Jay Kvam (Initial Funding Member of Same) RE: 7747 S. May Street, Chicago Illinois* ("Terms of Agreement"). 7 JA 1041. The Terms of Agreement reads, in its entirety, as follows:

> 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 J. 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 Jay 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 to Mr. Kvam for both initial funding's.

Id (all typographical errors in original). The Terms of Agreement was signed by Kvam, Mineau, and Spinola. Id. According to Kvam, he acceded to Spinola's interest and Spinola is no longer part of this joint venture. 5 JA 758 ¶ 11.

Also, on February 13, 2017, Kvam wired $44,000.00 to Citywide Title Corp, Escrow No. 719630, for the purchase of the Property. 7 JA 1043. Kvam subsequently wired an additional $784.31 to the title company to cover the buyer's portions of the closing costs. 7 JA 1045. Pursuant to the Terms of Agreement, Legion took title to the Property that same day. 7 JA 1034 ¶ 10. Legion promptly undertook efforts to identify a contractor and obtain bids to renovate the Property. Id.

On March 16, 2017, Legion's property manager in Chicago, Colleen Burke, texted to Mineau, "I have the other contractor I told you about going to May Street. I'm really liking this guy. He seems very fair and hard worker. I would like to set up a conference call with him this weekend." 7 JA 1047. That contractor turned out to be TNT Complete Facility Care Inc. ("TNT"). 7 JA 1034-35 ¶ 11. On March 19, 2017, Ms. Burke emailed Mineau the contact information for TNT's principals, Derek Cole and Todd Hartwell, along with TNT's references and Certificate of Insurance. 7 JA 1049-52.

On March 23, 2017, Legion entered into a Contractor Agreement with TNT ("Contractor Agreement"). 7 JA 1054-67. The Contractor Agreement identified

Todd Hartwell as TNT's CEO and Derek Cole as TNT's Field Operations VP. 7 JA 1064. Pursuant to the Contractor Agreement, TNT agreed to fully renovate the Property for a flat fee of $80,000.00. 7 JA 1065. Progress payments were to be made pursuant to a defined schedule. Id. TNT agreed to complete the project by June 1, 2017. Id.

On March 23, 2017, pursuant to the Terms of Agreement and the Contractor Agreement, Kvam wired $20,000.00 directly to TNT with the reference "7747 South May Street – Legion Investments – Jay Kvam." 7 JA 1069-70. This represented the required down payment "to secure permits, architect, demo." 7 JA 1065.

On April 9, 2017, TNT emailed proposed floor plans to Mineau, who forwarded them to Kvam and Spinola for review and input. 7 JA 1072-78.

On April 14, 2017, Kvam emailed Todd Hartwell (TNT's CEO) to inquire as to whether Legion had an assigned account number with TNT and the preferred way for Kvam to send TNT the next progress payment. 7 JA 1080-84. Kvam then wrote Todd Hartwell again, indicating that he had just spoken with Mr. Hartwell and that he was "heading to the bank now to set up the wire." Id. Shortly thereafter, Kvam wired another $20,000.00 directly to TNT with the reference "Second Draw Legion Investments Jay Kvam." 7 JA 1086-87.

On and around May 5, 2017, Derek Cole (TNT's Field Operations VP) came to Reno to visit with Mineau, Kvam, and others. 7 JA 1035 ¶ 18. Kvam's notes

indicate that they first met at Mineau and Spinola's office, where they discussed Mr. Cole's thoughts on development in the Chicago area, his construction experience and affiliations, his family and community background, his work ethic, and general information about how they could best work together on current and future projects in the Chicago area. 7 JA 1089-95; see also 7 JA 1035 ¶ 18. Kvam's notes indicate that the group then went to Skipolini's Pizza for dinner and continued discussing business opportunities in the Chicago area. 7 JA 1096-97. Kvam's notes indicate that, after dinner, just Kvam and Mr. Cole retired to Kvam's home and continued discussing business opportunities and general operating practices in the Chicago area. 7 JA 1098-1101. Kvam and Mr. Cole also specifically discussed the renovation of the Property, and Mr. Cole represented to Kvam that the project would be "done in early June." 7 JA 1101. Mr. Cole spent the night at Kvam's home (which Kvam offered as a vacation rental) and Kvam took Mr. Cole to the airport the next morning. Id.

On May 9, 2017, Mineau texted Kvam and Spinola approximately nine (9) photographs of the Property which he had received from Mr. Cole. 7 JA 1103-11; 7 JA 1036 ¶ 20. Mineau also informed Kvam and Spinola that he "just got this from Derek [Cole] roof is all done at May street." Id.

On May 15, 2017, Kvam texted Derek Cole to check on him after an apparent car accident and to give Kvam's mobile telephone number to Mr. Cole. 7 JA 1113-

34. Mr. Cole responded by sending Kvam forty-six (46) photographs of the interior and exterior of the Property, purportedly showing the work TNT had completed to date and the current status of the project. Id. These pictures included the nine (9) pictures of the roof which Mineau had forwarded to Kvam on May 9, 2017. Compare 7 JA 1103-11 with 7 JA 1113-16.

On May 17, 2017, Kvam sent Mr. Cole a message on Slack indicating, "first half of the third draw on May to go out tomorrow." 7 JA 1136.

On May 18, 2017, Kvam wired $9,000.00 directly to TNT with the reference "Half of Third Installment." 8 JA 1138-40.

On May 21, 2017, Mr. Cole informed Mineau that TNT would be "installing floors this week and should be finishing very soon." 7 JA 1036 ¶ 24. Mineau forwarded this information on to Kvam. 8 JA 1142.

On or about May 26, 2017, Mr. Cole called Mineau and requested the next $20,000.00 progress payment for the project. 7 JA 1036-37 ¶ 25. Mineau was travelling at the time and was unable to promptly make direct payment; however, at Mineau's request, Spinola agreed to arrange to have the funds wired to TNT on Mineau's behalf. Id. The deposit and wire were made through an account controlled by Spinola which was owned by an entity called Criterion NV LLC. Id. Thus, on May 26, 2017, Criterion NV LLC, acting on Mineau's behalf, wired $20,000.00 directly to TNT with the reference "May Street." 8 JA 1144.

Over the course of the next week, Kvam and Mr. Cole texted regularly concerning the Property. 8 JA 1146-53.

On May 31, 2017, Kvam texted Mineau and said, "Just let me know if you ever feel that I'm overly involved with anything; I don't want to step on your toes. 😊 I just figure that billings are financial matters, so I can help shoulder some of that responsibility in my role for our properties. I can receive, process, manage, account, and pay for them as a routine matter for our acquisitions." 8 JA 1155. Mineau responded and said, among other things, "No problem at all I don't mind the help, just want to make sure we are all on the same page with everything. Perhaps you and I can get together to figure out how we want to run these projects going forward." Id. Kvam responded with, "Just wanted to apologize for inadvertently putting you in an awkward position with Derek regarding the status of our single family house rehabs. He asked me whether I needed more, and I told him that I was analyzing what we currently have this week and next. I'll play it closed to the [vest] with Derek going forward. Again, really sorry." Id.

Over the course of next month, Kvam and Mr. Cole texted regularly concerning the Property. 8 JA 1157-86. Among other things, Mr. Cole sent Kvam and Mineau dozens of pictures of the work being performed at the Property. 8 JA 1161-78. Mr. Cole also notified Kvam that "I got all the permits and paperwork back from the city last week file from [sic] my inspections as soon as they come do

those I'm two weeks after that." 8 JA 1184. In response to Kvam's inquiry, Mr. Cole explained that the inspections were "for the rough plumbing and electrical." Id.

Unfortunately, after June 20, 2017, TNT started becoming increasingly unresponsive. 7 JA 1037-38 ¶ 29. However, Kvam's records indicate that work continued to proceed at the Property. According to the City of Chicago Department of Buildings records produced by Kvam, a "DOB PLUMBING INSPECTION" occurred on July 11, 2017, and TNT received a "PARTIAL PASS." 8 JA 1188 at "INSPECTIONS" section. These records also indicate that two "ELECTRICAL PERMIT INSPECTIONS" occurred on July 17, 2017, and TNT received a "PARTIAL PASS" on both. Id.

Despite these inspections, TNT failed to complete the project. Over the course of next several months, Mineau constantly contacted Mr. Cole and Mr. Hartwell in an effort to compel TNT to finish the project. 7 JA 1037-38 ¶ 29. TNT would drop in and out of communication, but would always respond eventually by offering excuses for the delays and promises that the project would be completed within a matter of days or weeks. Id. For example, in mid-July 2017, Mr. Cole apparently went missing and neither Mr. Hartwell nor Mr. Cole's wife would tell Mineau where he was. Id. Mr. Hartwell nonetheless confirmed that TNT was working to replace Mr. Cole and that TNT would finish the project as soon as possible. Id. In late

August 2017, TNT explained that the reason Mr. Cole had suddenly gone absent was because he had suffered a heart attack, but that he had recovered and was returning to work. Id. In late September 2017, Mr. Cole informed Mineau that the Property needed a few more inspections but was nearly complete. Id. In mid-October 2017, Mr. Cole informed Mineau that TNT was "doing the final touches" and would then be ready for occupancy inspections. Id. In early November 2017, Mr. Cole represented that some of the plumbing work did not pass inspection and would need more work. Id. In mid-November 2017, Mr. Cole represented to Mineau that the project would be done in 14-17 days and would cost an additional $2,000.00, but that TNT would "eat that cost" due to the delay. Id.

By December 2017, Kvam had become frustrated with TNT's excuses and delays and indicated his fear that TNT had defrauded them. 8 JA 1196-97. Another party, Bradley Tammen, informed Mineau and Kvam that he had a friend drive by the Property and described its condition as "kind of 'condemned looking.'" 8 JA 1195. Mineau shared these concerns with Mr. Cole, who attempted to justify the street-appearance of the Property as merely security measures during the construction. 8 JA 1195-96. Nonetheless, Mineau notified Kvam that he had asked his attorney in Chicago to draft a demand letter to TNT. Id. Alternatively, Mineau offered to "sign the property over" to Kvam and Mr. Tammen, allowing them to complete the construction and keep the profit themselves. Id.

On December 31, 2017, Kvam delivered a letter to Mineau concerning the Property. 8 JA 1192-93; see also 8 JA 1201-03. In his letter, Kvam requested that Mineau "refund [his] investment to-date plus accrued interest…." Id. Kvam also expressly rejected Mineau's offer to transfer the Property to Kvam and Tammen, stating that he did not want to assume the role of managing the project and expressing concern that TNT had done little construction work for the money it had been paid. Id. Kvam further stated, "I deem the project a failure…." Id.

On February 16, 2018, Kvam's attorney, Michael L. Matuska, delivered a letter to Mineau requesting that Mineau "reimburse" Kvam for his investment in the project by no later than February 28, 2018. 8 JA 1205. After lengthy settlement discussions were unsuccessful, Kvam initiated this action on April 11, 2018. 1 JA 1-9. On June 5, 2018, Legion and Mineau filed their *Answer and Counterclaim*. 1 JA 10-23.

On September 5, 2018, the district court entered an Order dismissing two of Legion and Mineau's counterclaims and ordering a more definite statement on three other counterclaims. 1 JA 103-113. Legion and Mineau filed their *First Amended Counterclaim* on October 5, 2018 ("FACC"). 2 JA 114-127.

On September 18, 2018, Legion and Mineau delivered a settlement offer to Kvam. 7 JA 1038 ¶ 34. Without revealing the full extent of the confidential offer, the offer expressly included an offer to transfer the Property to Kvam and assign all

rights, claims, and causes of action against Derek Cole, Todd Hartwell, and TNT to Kvam. Id.

On September 19, 2018, Kvam responded by rejecting this offer and stating, in relevant part, "Mr. Mineau is encouraged to sell the May Street property … and any other property he needs to sell in order to satisfy Mr. Kvam's claims." 8 JA 1207.

On September 24, 2018, in reliance upon Kvam's letter, Legion entered into an Exclusive Right to Sell Listing Agreement with Miller Chicago LLC, a local brokerage firm in Chicago. 8 JA 1209-12.

On October 24, 2018, Legion entered into a Residential Real Estate Purchase and Sale Contract to sell the Property for $41,000.00. 8 JA 1214-17.

On November 16, 2018, Legion sold the Property. 8 JA 1219-21. Legion's share of prorated property taxes, closing costs, and the commission owed to the real estate brokers equaled $16,526.23. Id. The net proceeds from the closing at that time were therefore $24,473.77. Id.

On December 3, 2018, the district court entered an *Order Granting Temporary Restraining Order*, estopping Legion or Mineau from disposing of any proceeds from the sale of the Property. 3 JA 251-255. On December 12, 2018, the district court entered a *Stipulation to Deposit Funds; Order*, which authorized Legion to deposit the proceeds from the sale of the Property with the court clerk,

terminated the temporary restraining order, and withdrew the preliminary injunction without prejudice. 3 JA 256-258. The proceeds were deposited the following day. 3 JA 267-272.

On December 19, 2018, Legion's attorney in Chicago notified it that an additional $1,864.14 had been received from the sale of the Property as a result of a refund on a tax bill and a water bill. 8 JA 1039 ¶ 39. Legion and Mineau sought Kvam's stipulation to add these additional funds to the proceeds deposited with the court clerk, but Kvam declined, so Legion continued to hold these funds pending a resolution of this dispute. Id. With this refund, the total net proceeds from the sale of the Property were $26,337.91. Id.

On January 9, 2019, the district court entered an Order adjudicating all of Legion and Mineau's counterclaims except their third claim for relief for declaratory relief. 3 JA 376-378. Kvam never filed an answer to Legion and Mineau's FACC.

On January 31, 2019, Kvam filed his *First Amended Verified Complaint*. 3 JA 379-389. On February 19, 2019, Legion and Mineau filed their *Answer to First Amended Verified Complaint*. 3 JA 390-394. Legion and Mineau's pending counterclaim was not re-pled as there were no revisions to it.

On September 11, 2019, Kvam filed his *Second Amended Verified Complaint*, alleging extensive claims that Legion and Mineau committed various forms of fraud, conversion, embezzlement, and racketeering by conspiring with the contractor to

misappropriate and/or mishandle Kvam's money. 5 JA 756-768. On September 25, 2019, Legion and Mineau filed their *Answer to Second Amended Verified Complaint*. 5 JA 769-773. Legion and Mineau's pending counterclaim was not re-pled as there were no revisions to it.

After substantial third-party discovery and a forensic accounting, Kvam failed to uncover any evidence whatsoever to support his conspiracy theories. Consequently, on January 6, 2020, Legion and Mineau filed their *Motion for Summary Judgment*. 7 JA 1003 – 8 JA 1225.

On January 10, 2020, the discovery commissioner entered a *Recommendation for Order*, recommending that Kvam be allowed certain discovery relating to other projects in which Legion and Mineau were allegedly involved and for which the same contractor may have performed work ("Recommendation for Order"). 9 JA 1226-1237. On January 13, 2020, Legion and Mineau filed their *Objection to Recommendation for Order*, arguing that the discovery sought was irrelevant and confidential. 9 JA 1238-1242.

On January 14, 2020, the district court held a pretrial conference. 13 JA 1760-1788. At that pretrial conference, Kvam's attorney expressly acknowledged that Legion and Mineau's "only remaining counterclaim is for declaratory relief" and that "both parties are moving for a declaration." 13 JA 1768-1769. Kvam offered

no argument or indication of any belief that Legion and Mineau had abandoned or withdrawn their FACC. Id.

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 1518-1564.

On June 5, 2020, the district court 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* (identified in Appellant's Opening Brief as "Order #1"), properly determining that Kvam had failed to transcend the pleadings and introduce specific evidence to show a genuine issue of material fact for trial, and therefore entering summary judgment against him on the majority of his claims. 14 JA 1948-1992. The court directed the parties to contact the Judicial Assistant to set the matter for trial on the remaining claims and to "resubmit any motions previously submitted which are not made moot by reasons of this Order." 14 JA 1991 ¶¶ 15-16. Kvam did not contact the court to set the matter for trial or resubmit his Motion for Reconsideration or the Recommendation for Order; instead, he filed an interlocutory appeal as Nevada Supreme Court Case No. 81422-COA.

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On July 20, 2020, Kvam also filed a *Petition for Writ of Prohibition or, Alternatively, Mandamus*, as Nevada Supreme Court Case No. 81480. Kvam's petition was denied on August 10, 2020, and his petition for rehearing was denied on October 2, 2020.

On June 16, 2021, in Case No. 81422-COA, the Nevada Court of Appeals entered an *Order of Affirmance*, affirming the portion of Order #1 that denied Kvam's claim for injunctive relief as moot. 14 JA 2046-2048. The action was thus remitted to the district court to resolve the outstanding claims. 14 JA 2097.

Upon remand, the parties filed crossing motions for summary judgment. 14 JA 2049-2077; 14 JA 2085-2091.

On March 10, 2022, the district court entered an *Order Granting Plaintiff's Motion for Partial Summary Judgment*, disposing of the few remaining claims for relief (identified in Appellant's Opening Brief as "Order #2"). 14 JA 2147-2156.

## III. SUMMARY OF THE ARGUMENTS

As the record plainly shows, this investment failed because the contractor, TNT, failed to complete the job which he was contracted and paid to perform. Once it became clear that TNT had breached its contract, Kvam did not pursue a new contractor to finish the job and salvage the Project, nor did Kvam file suit against TNT to recover the money he paid TNT for work that TNT never performed. Rather, Kvam filed suit against Legion and Mineau, blaming them for the Project's failure.

The core of Kvam's claims throughout this lawsuit appear to arise from a belief that his investment carried no risk and, therefore, the mere fact that the Project failed proves that Legion or Mineau must have engaged in some manner of fraud or actionable misconduct. Kvam bore the burden before the district court to establish the viability of his claims in order to survive summary judgment. Kvam utterly failed to meet that burden. After discovery had closed and in the face of summary judgment, Kvam failed to identify any admissible evidence to meaningfully substantiate his claims that Legion or Mineau personally guaranteed Kvam's investment or are otherwise somehow legally responsible for the losses all parties suffered when TNT breached the Contractor Agreement. Kvam's bare and unsubstantiated allegations were insufficient to sustain his claims before the district court and are certainly insufficient to reverse the district court's decisions on appeal.

The district court did not commit reversible error and its decisions should be affirmed.

## IV. ARGUMENT

The district court properly entered summary judgment in both its Order #1 and its Order #2. Kvam's claims against Legion and Mineau were based upon conspiracy theories which never had evidentiary support, and the district court properly enforced the contractual remedy set forth in the parties' Terms of Agreement. The district court's orders should not be disturbed on appeal.

## A. The District Court Did Not Commit Reversible Error By Ruling That Legion And Mineau's Counterclaim Was Pending.

Kvam first contends that the district court committed reversible error by deeming certain facts admitted by Kvam in its Order #1. The district court's Order #1 included references to facts which were "deemed admitted" due to Kvam's failure to file an answer to Legion an Mineau's FACC. 14 JA 1961, 1963 fn. 5, & 1972. On appeal, Kvam does not dispute that he failed to file an answer to the FACC, nor does he dispute that any allegation is deemed admitted if a responsive pleading is required and the allegation is not denied. NRCP 8(b)(6). Rather, Kvam asserts that the FACC was not actually pending and could not form the basis for any undenied allegations to be "deemed admitted" because Legion and Mineau abandoned their counterclaim by not re-pleading it along with their answers to Kvam's first and second amended complaints. AOB pp. 28; 31; & 36-37. Kvam's arguments are contrary to sound public policy. Regardless, any error in this regard was harmless.

The issue of whether a defendant abandons a counterclaim when it fails to re-plead the counterclaim along with an answer to an amended complaint has never been addressed in Nevada. However, the issue has been extensively addressed in federal courts.[1] A commonly adopted approach comes from the Western District of

[1] "Federal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large

Pennsylvania, which held that a defendant is not required to replead a counterclaim in response to an amended complaint, stating:

> Rule 13, which governs counterclaims, requires only that a counterclaim be set forth in a pleading—it does not mandate that it be contained in an answer. Further, an answer responds to allegations in a complaint, a counterclaim is something independent. Revisions to a complaint do not require revisions to a counterclaim.

Dunkin' Donuts, Inc. v. Romanias, No. CIV.A.00-1886, 2002 WL 32955492, at *2 (W.D. Pa. May 29, 2002) (internal quotations omitted). This approach has been adopted by the Western District of Washington (Umouyo v. Bank of Am., N.A., No. 2:16-CV-01576-RAJ, 2019 WL 359268, at *2 (W.D. Wash. Jan. 29, 2019)), the District Court of Idaho (Ada Cty. Highway Dist. v. Rhythm Eng'g, LLC, No. 1:15-CV-00584-CWD, 2017 WL 1502791, at *7 (D. Idaho Apr. 25, 2017)), the Central District of California (AnTerra Grp. Inc. v. KiVAR Chem. Techs., No. SACV1300734JVSANX, 2014 WL 12589631, at *3 (C.D. Cal. May 23, 2014)), and the District of Maryland (Ground Zero Museum Workshop v. Wilson, 813 F. Supp. 2d 678, 706 (D. Md. 2011)), among others.

Holding that a defendant is not required to re-plead a counterclaim in response to an amended complaint is consistent with sound public policy. At best, an overly-formalistic requirement that a party re-file the same counterclaim in any answer to

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part upon their federal counterparts." Exec. Mgmt., Ltd. v. Ticor Title Ins. Co., 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (internal quotations omitted).

an amended complaint (and that the counterclaim defendant re-file the same answer to that counterclaim) would waste time, money, and judicial resources, in violation of Rule 1's policy that the rules be construed to secure the just, speedy, and inexpensive determination of every action. AnTerra, supra. At worst, a grave failure of justice could result if a plaintiff was able to nullify an unwary defendant's counterclaims simply by amending its complaint.

Furthermore, NRCP 15 requires leave to amend a pleading, including a counterclaim or an answer to a counterclaim. Requiring counterclaims (and answers to those counterclaims) to be re-filed manifests a risk that the re-filed pleadings will not be identical to the originals. An innocent mistake could create confusion concerning which version of the counterclaim (or answer to the counterclaim) is properly pending. Worse, an unscrupulous party might take advantage of this opportunity to modify its counterclaim (or answer to the counterclaim) without leave in violation of Rule 15. Either way, forcing parties to re-file pleadings that should not have been modified will require careful review and scrutiny by all to ensure that the re-filed pleadings are identical to the originals. Again, these concerns would easily be avoided by not requiring a party to re-file counterclaims (and answers to those counterclaims) when answering an amended complaint.

In his *Opening Brief*, Kvam cites a differing line of cases which held that failing to re-plead counterclaims in response to an amended complaint amounts to a

voluntary dismissal of those counterclaims. AOB pp. 23 – 24. However, this logic violates Rule 41 and creates and incredibly unclear record. A counterclaim may only be voluntarily dismissed by the claimant before a responsive pleading is served or upon a court order. NRCP 41(c)(1). Allowing a counterclaimant to voluntarily dismiss a counterclaim by simply not re-pleading it in response to an amended complaint circumvents Rule 41. Such an outcome also creates an incredibly unclear record and vast uncertainty as to when final judgment is entered in a case: if counterclaims can "simply vanish[] from the currently operative pleadings" [AOB p. 24 quoting Doe v. Williston Northampton Sch., 766 F.Supp.2d. 310, 313-14 (D. Mass. 2011)], then no clear record of their disposition will ever exist. This Court should not adopt such a policy in Nevada.

Finally, Kvam argues that the equities favor a determination that Legion and Mineau abandoned their counterclaims because, "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." AOB p. 25. Kvam goes on to state, "By all accounts, as explained above, all parties believed that no counterclaims were pending." AOB p. 26. On the contrary, the record plainly shows that Kvam knew and understood that Legion and Mineau were maintaining their FACC throughout this case. At the final pretrial conference

on January 14, 2020, Kvam's attorney expressly acknowledged that Legion and Mineau maintained a counterclaim for declaratory relief, expressly described to the court the relief sought by Legion and Mineau through that counterclaim, and gave no indication that he believed the FACC had been abandoned or superseded. 13 JA 1768-1769. Thus, Kvam was plainly aware that Legion and Mineau's FACC was pending, knew what Legion and Mineau sought through their counterclaim, and knew that Legion and Mineau intended to maintain that counterclaim. Kvam's assertion that he was somehow prejudiced by Legion and Mineau's failure to re-plead their counterclaim in response to Kvam's first and second amended complaint is simply belied by the record.

Nevada law does not, and should not, require a defendant to re-plead a counterclaim in response to an amended complaint. Legion and Mineau's FACC was properly pending before the district court. Kvam did not answer the FACC, so the district court properly deemed the undenied allegations of the FACC admitted pursuant to NRCP 8(6)(b). The district court did not commit any error in this regard.

Even if this Court assigns any error to the district court's adoption of "deemed admitted" facts (which it did not), such error was harmless and does not warrant reversing Order #1. NRCP 61. Of the seventy-four (74) Undisputed Material Facts identified in Order #1, only seven (7) of them were "deemed admitted" with no other undisputed evidence. 14 JA 1963-71, ¶¶ 8, 11, 12, 13, 19, 65, and 72. Of these,

Kvam only specifically objects to four (4), each of which is addressed specifically in Section IV(D) below. None of these "deemed admitted" facts were essential to any of the conclusions in Order #1 and even if each of these facts was disregarded from Order #1, Kvam's substantial rights would not change. Therefore, the district court did not commit reversible error in this regard.

The district court's Order #1 should be affirmed.

**B. <u>The District Court Did Not Commit Reversible Error By Issuing Order #1 Before Addressing Kvam's Motion For Reconsideration.</u>**

Kvam next argues that the district court abused its discretion by granting Legion and Mineau's Motion for Summary Judgment without first addressing Kvam's Motion for Reconsideration. The district court properly exercised its discretion in this regard.

The discovery Kvam sought in his Motion for Reconsideration is entirely irrelevant to the case and to the district court's Order #1. One of the bases of Kvam's claims in this action is that each of the three partners (Kvam, Michael Spinola, and Legion / Mineau) was supposed to fund a payment to the contractor for the renovation,[2] but that Legion / Mineau failed to do so. 5 JA 758 ¶¶ 8(b) & 15.

[2] Kvam never provided any evidence of this alleged arrangement and it is disputed by Legion and Mineau. However, whether or not Legion / Mineau were

However, as Mineau repeatedly testified, he made Legion's renovation draw by causing Criterion NV LLC to wire $20,000.00 to the contractor. 3 JA 337; 7 JA 1036-37; 12 JA 1536; 12 JA 1544-45. Kvam never presented any evidence to refute that this payment was made or that it was made on Mineau's behalf. Nonetheless, Kvam repeatedly demanded independent proof of Criterion NV LLC's arrangement with Legion and further details establishing the underlying source of the funds used to make this payment. Legion and Mineau have maintained throughout this litigation that such information is completely irrelevant: what matters is *that* the payment was made, not *where Mineau obtained the money from which* the payment was made.

Despite the irrelevance of this issue, and in an effort to avoid incurring substantial litigation and discovery costs related to this issue, Mineau executed a declaration wherein he explained that the $20,000.00 had come from his personal safe at home and that, because Mineau was out of town when the contractor requested payment, he recalled that Mr. Spinola retrieved the cash from Mineau's house and wired it to the contractor through Mr. Spinola's bank. 12 JA 1544-45. When subsequently preparing the Motion for Summary Judgment and for trial,

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*contractually obligated* to fund a renovation draw is not material because Legion / Mineau *did* fund a renovation draw.

Mineau realized that his previous recollection was mistaken. 7 JA 1036-37. Although Mr. Spinola did agree to arrange the payment while Mineau was out of town, the funds did not come from Mineau's personal safe, but were borrowed from Bradley Tammen. Id. Despite the irrelevance of the source of the funds, Mineau unilaterally acknowledged and voluntarily corrected his mistake. Id.

In its Order #1, the district court made no findings of fact or conclusions of law whatsoever concerning the underlying source of these funds. Thus, the underlying source of these funds is not material to the issues or the result in Order #1. Simply put, whether Legion wired the funds directly from its own account, used cash from Mineau's personal safe, borrowed the money, or procured the funds through any other source is completely irrelevant to the merits of this dispute or the orders on appeal.

Importantly, Mineau's mistaken testimony had nothing to do with Kvam's First Motion to Compel (to which Kvam sought reconsideration) and did not cause Kvam any prejudice. Mineau's original mistaken testimony was attached to Legion and Mineau's *Reply in Support of Motion for Protective Order* [12 JA 1544-45], which had no bearing on Kvam's First Motion to Compel [3 JA 395] or Commissioner Ayers' recommendation that Kvam's First Motion to Compel be denied [4 JA 528]. Thus, Mineau's corrected testimony in this regard could not possibly form a basis for the district court to reconsider the order denying Kvam's

First Motion to Compel, and the district court could not possibly have committed reversible error by issuing Order #1 before deciding Kvam's Motion for Reconsideration.

Furthermore, Kvam claims that Legion and Mineau's tax schedules are "the only other possible source of information" concerning Mineau's loan from Bradley Tammen [AOB p. 33], but the record establishes that Kvam knew all along that Mineau had borrowed this money from Bradley Tammen. See 12 JA 1564 (establishing that Bradley Tammen told Kvam on November 15, 2017 - six months before the lawsuit was filed - that he had loaned Mineau $20,000.00 for this project). Nonetheless, Kvam never deposed Mineau, never deposed Mr. Spinola, never deposed Mr. Tammen, and never propounded written discovery specific to this issue. Thus, Kvam seemingly understood the insignificance of this issue, did not materially rely on Mineau's initial mistaken testimony, and was not unfairly prejudiced by the fact that Mineau later corrected that testimony.

Finally, and perhaps most importantly, every district court has the authority to control its own docket. See Maheu v. Eighth Judicial Dist. Court, 89 Nev. 214, 217, 510 P.2d 627, 629 (1973) (recognizing the court's inherent power to "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants"); see also Yong v. Immigration and Naturalization Service, 208 F.3d 1116, 1119 (9th Cir.2000) (holding that a court has the inherent

authority to control its own docket and calendar). The Motion for Summary Judgment was filed on January 6, 2020 [7 JA 1003] and the Motion for Reconsideration was filed January 24, 2020 [12 JA 1518]. Kvam's position that it was an abuse of discretion for the district court to hear and address the motions pending on its docket in the chronological order in which they were filed is unsupported by any argument or citation to authority and would completely strip the district court of its authority to control its own docket.

If Kvam felt that he could not present facts necessary to survive summary judgment absent the discovery sought in his Motion for Reconsideration, he was required to follow the process set forth in NRCP 56(d). Rule 56(d) relief "is appropriate only when the movant expresses how further discovery will lead to the creation of a genuine issue of material fact." Aviation Ventures, Inc. v. Joan Morris, Inc., 121 Nev. 113, 118, 110 P.3d 59, 62 (2005); see also Bakerink v. Orthopaedic Associates, Ltd., 94 Nev. 428, 431, 581 P.2d 9, 11 (1978). In opposing the Motion for Summary Judgment, Kvam asked the district court to defer ruling on his Ninth Cause of Action (Conversion) *only* and made no attempt to identify in his affidavit what facts might be obtained through the Motion for Reconsideration that were essential to justify his opposition. 10 JA 1281. Kvam therefore failed to make a proper showing under NRCP 56(d) and the district court did not abuse its discretion by entering partial summary judgment before ruling on the other motions. Further,

even if this Court determines that Kvam should have been afforded NRCP 56(d) relief, such relief could only support reversing Order #1 with respect to Kvam's Ninth Cause of Action (Conversion).

Mineau's corrected testimony simply had no impact on Kvam's ability to oppose summary judgment or the district court's decision, and absolutely nothing would have changed if the district court had addressed Kvam's Motion for Reconsideration before entering Order #1. Order #1 should be affirmed.

### C. The District Court Did Not Commit Reversible Error By Issuing Order #1 Before Addressing Kvam's Second Motion To Compel.

Kvam's *Opening Brief* next asserts that the district court committed reversible error by entering Order #1 before first addressing Commissioner Ayers' January 10, 2020 *Recommendation for Order* on Kvam's Second Motion to Compel. AOB pp. 34-36. The district court did not abuse its discretion in this regard.

Again, every district court has the authority to control its own docket. See Maheu and Yong, supra."). The *Motion for Summary Judgment* was filed on January 6, 2020 [7 JA 1003] and the Recommendation for Order was filed January 10, 2020 [9 JA 1226]. Kvam's position that it was an abuse of discretion for the district court to hear and address the items pending on its docket in the chronological order in which they were filed is unsupported by any argument or citation to authority and would completely strip the district court of its authority to control its own docket.

Regardless, as discussed above, if Kvam felt that he could not present facts necessary to survive summary judgment absent the discovery sought in the pending motions, he was required to follow the process set forth in NRCP 56(d). Again, in opposing the *Motion for Summary Judgment*, Kvam asked the district court to defer ruling on his Ninth Cause of Action (Conversion) *only* and made no attempt to identify in his affidavit what facts might be obtained through the pending Second Motion to Compel that were essential to justify his opposition. 10 JA 1281. Kvam therefore failed to make a proper showing under NRCP 56(d) and the district court did not abuse its discretion by entering partial summary judgment before ruling on the other motions.

There is nothing in the record to support a finding that the district court committed any errors of law or abused its discretion in any way by addressing the motions pending before it in the order in which they were filed. Order #1 should be affirmed.

**D. The District Court Did Not Make Any Erroneous Findings Of Fact.**

Kvam's *Opening Brief* enumerates five (5) specific findings of fact in Order #1 which Kvam argues were erroneous. AOB pp. 36-40. None of these findings was erroneous and, even if any were, reversal of Order #1 is unwarranted.

This Court reviews the grant or denial of summary judgment de novo. 9352 Cranesbill Tr. v. Wells Fargo Bank, N.A., 136 Nev. 76, 78, 459 P.3d 227, 229

(2020). "Summary judgment is appropriate if the pleadings and other evidence on file, viewed in the light most favorable to the nonmoving party, demonstrate that no genuine issue of material fact remains in dispute and that the moving party is entitled to judgment as a matter of law." Id. (citing Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005)). "A genuine issue of material fact exists if, based on the evidence presented, a reasonable jury could return a verdict for the nonmoving party." Id. (citing Butler v. Bayer, 123 Nev. 450, 457-58, 168 P.3d 1055, 1061 (2007)).

1. Finding of Fact # 8.

Kvam argues that the district court erroneously found that "Mr. Kvam drafted the Terms of Agreement." AOB p. 37. The record does not support a finding that the district court committed reversible error in this regard.

Kvam argues that he refuted this finding in his declaration, "wherein he explained that he merely signed the Terms of Agreement that was sent by Mr. Spinola." AOB p. 37. The record speaks for itself: Kvam testified that "on February 14, 2017, I signed a document entitled 'Terms of Agreement.' Mineau and Spinola previously signed the Terms of Agreement on February 13, 2017." 10 JA 1293. Kvam has not identified any evidence to suggest that the district court erred in making this finding of fact.

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Regardless, even if this Court assigns any error to the district court's finding in this regard, such error was harmless and does not warrant reversing Order #1. NRCP 61. The district court did not rely upon or refer to Finding of Fact # 8 in any of its conclusions, nor did the district court draw any inferences against Kvam as the drafter of the contract. Accordingly, this fact was not material to Order #1, so any error in this regard does not affect Kvam's substantial rights and should be disregarded as harmless.

Whether Kvam drafted the Terms of Agreement is therefore not a genuine issue of material fact that warrants reversal of Order #1.

2. Finding of Fact # 12.

Kvam argues that the district court erroneously found that "All parties to the Terms of Agreement knew this was a high-risk investment." AOB pp. 37-38. The record does not support a finding that the district court committed reversible error in this regard. Again, the district court properly deemed this allegation admitted for the reasons explained above.

Rather than identify any admissible evidence in the record to contradict this finding or otherwise establish a genuine issue concerning this fact, Kvam simply states, "It is unclear why Judge Simons included this finding except to advocate for some sort of assumption of the risk theory," and then goes on to argue why an assumption of the risk holding would have been improper. However, the district

court did not grant summary judgment based upon an assumption of the risk theory, making these facts simply "background facts" and rendering Kvam's entire argument concerning them moot. Kvam has utterly failed to identify how any error in this regard affected his substantial rights. NRCP 61.

Whether the parties knew this was a high-risk investment is therefore not a genuine issue of material fact that warrants reversal of Order #1.

3. Finding of Fact # 49.

Kvam asserts that the district court erroneously found that "Mr. Kvam acquired information directly from TNT and did not rely on Mr. Mineau's representations." AOB pp. 38-39. The record does not support a finding that the district court committed reversible error in this regard.

The record plainly establishes that Kvam was in direct communication with TNT regarding the status and progress of the project and that Kvam acquired information directly from TNT. See generally 7 JA 1080 - 8 JA 1184. Indeed, reviewing this finding in context reveals that the district court had just spent two pages of Order #1 enumerating all the ways in which Kvam acquired information and updates about the project directly from TNT. 14 JA 1966-68 ¶¶ 29-47. By contrast, the record is devoid of any evidence that Kvam relied upon Mineau's statements, rather than Kvam's direct communications with TNT, regarding the status of the project.

Kvam nonetheless argues that this finding was erroneous because "Many of the misrepresentations complained of occurred prior to [TNT's involvement]." AOB p. 38. However, regardless of the timing, the district court correctly determined that "Mr. Kvam identifies no specific evidence that Mr. Mineau made any affirmative misrepresentations during the Project" and "Mr. Kvam cites not [sic] evidence that Mr. Mineau supplied false information to him." 14 JA 1984 ¶¶ 74-75. Kvam's efforts to assign some error to Finding of Fact # 49 by taking it out of the proper context of the entire Order #1 are unavailing.

Kvam goes on to argue that, if the district court "meant to say that Mineau should be excused for providing false status reports based on information received from TNT, that is not a correct statement of law." AOB p. 38. The district court did not say that, so Kvam's entire argument is baseless.

There is no genuine dispute that Kvam acquired information directly from TNT and that Kvam did not rely on Mineau's representations. The district court did not commit reversible error in this regard.

4. Finding of Fact # 65.

Kvam argues that the district court erroneously found that, "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." AOB pp. 39-

40. The record does not support a finding that the district court committed reversible error in this regard.

Kvam's argument on appeal relies upon the bald statement that "there is no evidence to support the finding that the contractor is to blame" for the project's failure. AOB p. 39. On the contrary, the clear and undisputed evidence shows that the contractor agreed to complete the renovation by June 1, 2017, at a total cost of $80,000.00, that the contractor was paid $69,000.00 toward this project, and that the contractor failed to perform its obligations. 14 JA 1965-69 ¶¶ 15-58.

Kvam again attempts to misconstrue the district court's holding, arguing that if the district court was attempting to advocate for an affirmative defense of a supervening cause, it would have been error to do so. The district court did not grant summary judgment based upon the theory of supervening cause, so Kvam's entire argument is again baseless.

There is no genuine dispute that the contractor did not complete the job. The district court did not commit reversible error in this regard.

5. Finding of Fact # 72.

Last, Kvam argues that the district court erroneously found that "Mineau and Legion fulfilled all of their obligations under the Terms of Agreement." AOB p. 40. Kvam asserts that "this allegation has no evidentiary value and is disputed for all of the reasons set forth above and below." Id. Kvam offers no supported facts or

specific argument, and identifies no specific errors concerning this finding, and has therefore failed to establish that the district court committed reversible error in this regard. Regardless, even if this Court assigns any error to the district court's finding in this regard, such error was harmless and does not warrant reversing the Order because the district court did not rely upon or refer to Finding of Fact # 72 in any of its conclusions. NRCP 61.

There is nothing in the record to support a finding that the district court committed reversible error by granting partial summary judgment when genuine issues of material fact remained for trial. Order #1 should be affirmed.

## E. The District Court's Orders Do Not Contain Any Reversible Errors Of Law.

Kvam concludes his *Opening Brief* with a summary of all the conclusions of law contained in the district court's Order #1 and Order #2, some of which he argues were erroneous. AOB pp. 40-57. The district court did not commit any reversible error in its conclusions of law. Legion and Mineau will address each cause of action in turn.

### 1. Kvam's First Cause of Action and Mineau/Legion's FACC.

Despite discussing Order #1's and Order #2's conclusions concerning his First Cause of Action and Legion/Mineau's FACC at length, Kvam does not actually contend that the district court committed any reversible error in this regard. AOB

pp. 40-42. The district court did not commit any reversible error in Order #1 or Order #2 concerning Kvam's First Cause of Action or Legion/Mineau's FACC.

2. Kvam's Second Cause of Action.

The district court entered summary judgment in favor of Legion and Mineau on Kvam's Second Cause of Action based upon the conclusion that "Mr. Kvam has failed to bring forth specific evidence that the parties, at the time of contracting, shared a misconception about a vital fact upon which they based their bargain, or that the Terms of Agreement fail to conform to the true intention of the parties or the parties' previous understanding or agreement." 14 JA 1976 ¶ 28. Rather than identify any evidence in the record to refute this finding, Kvam asserts that the district court abused its discretion because it "repeat[ed] an error that was first stated in Conclusion of Law 21.f," that "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." AOB p. 42. Kvam's *Opening Brief* does not argue that the district court's actual findings concerning Kvam's Second Cause of Action were in error; thus, Kvam has identified no basis whatsoever to reverse the district court's entry of summary judgment on Kvam's Second Cause of Action.

Regardless, Kvam argues that the district court's "Conclusion of Law 21.f" was erroneous because it "ignores Kvam's declaration and the other evidence he submitted." AOB p. 42. Specifically, Kvam points to his testimony that the Terms

of Agreement "does not purport to encapsulate all of the discussions between the parties, and it does not encapsulate all of the discussions between the parties," and that other "discussions about the project are encapsulated in [the outline of project financing]." AOB pp. 42-43. Although Kvam offered evidence of *discussions* between the parties which were not encapsulated in the Terms of Agreement, he has never offered any evidence of *agreements* between the parties which were not encapsulated in the Terms of Agreement. *Discussions* are not *agreements*. There is nothing in the record to support a finding that the district court abused its discretion in concluding that the parties did not reach an *agreement* regarding any other provisions to the Terms of Agreement except those written and contained in the Terms of Agreement.

The district court did not commit any reversible error in granting summary judgment in Legion and Mineau's favor on Kvam's Second Cause of Action.

3. Kvam's Third Cause of Action.

Kvam argues that, by concluding that "The Terms of Agreement provide Mr. Kvam will receive 7% annual return on any funds provided if the project was profitable," the district court "misread the Terms of Agreement and Kvam's testimony relating thereto and injected an entirely new condition of profitability into the Terms of Agreement." AOB p. 45. Kvam argues that the Terms of Agreement actually provided that Kvam was due a 7% annual return on any funds provided due

from the date of disbursement, without any conditions. Id. Kvam's arguments again fall short of establishing reversible error.

The Terms of Agreement states, in relevant part, "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 the date of disbursement." 7 JA 1041. This express language is clear: if the transaction should fail in any way, Kvam's remedy is to be assigned all interests and remedies in the partnership. Therefore, the subsequent language about a 7% annual return would only apply if the transaction did not fail, i.e. if the project was profitable. The district court made no error in this regard.

Furthermore, Kvam has never identified any evidence, and none exists, establishing any other necessary elements of a loan agreement, such as a borrower or a maturity date. Even if Kvam could establish that he was due an unconditional 7% annual return on his investment, Kvam has never introduced any evidence, and none exists, establishing *who* would be obligated to make that payment if the project was not profitable. The fact that the Terms of Agreement includes an interest rate is grossly insufficient to establish that the Terms of Agreement constitute a loan which Legion and/or Mineau were personally obligated to repay.

Finally, Kvam argues that the district court awarded him the proceeds of the sale, and that it "is inconsistent for Judge Simons to rule that Mineau/Legion have

to pay Kvam while dismissing his breach of contract claim." AOB pp. 46-47. This is not inconsistent at all, because Legion and Mineau did not breach the contract. The record plainly establishes that Legion and Mineau repeatedly attempted to comply with the Terms of Agreement and assign the Property (and subsequently the proceeds of the sale of the Property) to Kvam, but Kvam refused to accept such assignment. Thus, the district court properly entered a declaratory judgment that the proceeds of the sale should be disbursed to Kvam and that Legion and Mineau did not breach the parties' contract.

The district court did not commit any reversible error in granting summary judgment in Legion and Mineau's favor on Kvam's Third Cause of Action.

4. Kvam's Fourth Cause of Action.

Kvam argues that the district court erred concerning his Fourth Cause of Action because "Mineau … 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." AOB p. 48. Of course, the district court agreed that Mineau owed a special and fiduciary duty to Kvam, but found that Kvam failed to set forth evidence supporting his contention that Mineau or Legion breached such duties. 14 JA 1979-80. Kvam's allegation that the district court erred by failing to find that Mineau owed a special and fiduciary duty is therefore entirely meritless.

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Kvam also states that his Fourth Cause of Action included a claim for "breach of the joint venture agreement." AOB p. 47. Kvam asserts that 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. Id. p. 47. Once again, Kvam provides no citation to the record to establish that Mineau had any contractual agreement to undertake any of those tasks, and no such evidence exists. Regardless, Kvam does not contend that the district court committed any reversible error in this regard.

The district court did not commit any reversible error in granting summary judgment in Legion and Mineau's favor on Kvam's Fourth Cause of Action.

5. Kvam's Fifth Cause of Action.

In Order #1, the district court properly stated that "a partner must account to the partnership for any property, profit or benefit derived by the partners from a use by the partner of partnership property, including the appropriation of a partnership opportunity." 14 JA 1980. The district court determined that, "The only partnership property over which Mineau/Legion had custody was the Property itself, and the proceeds from the sale of that Property." Id. The district court concluded at that time that a genuine issue of material fact existed concerning the accuracy of the amount of net proceeds from the sale of the Property and therefore denied summary judgment. Id. at 1981.

In Order #2, the district court confirmed the accuracy of the amount of net proceeds from the sale of the Property and entered judgment in Kvam's favor on his fifth cause of action. 14 JA 2150-51. Indeed, Kvam affirmed in his own *Motion for Partial Summary Judgment* that the accuracy of the amount of net proceeds from the sale of the Property was undisputed. See 14 JA 2051. The district court did not commit any reversible error in this regard.

In his *Opening Brief*, Kvam argues that "the accounting provided to date is inadequate." AOB p. 48. However, Kvam does not dispute that Legion and Mineau have failed to adequately account for the net proceeds from the sale of the Property. Rather, Kvam argues that Legion and Mineau have failed to provide Kvam with "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 this other projects." Id. Of course, Legion and Mineau have provided ample, undisputed evidence that they contributed $27,090.31 to the partnership, consisting of $20,000.00 paid to the contractor [3 JA 337; 7 JA 1036-37; 12 JA 1536; 12 JA 1544-45] and $7,090.31 paid on behalf of the partnership for ongoing holding costs while Legion owned the Property, such as utility bills and insurance premiums [7 JA 1039; 8 JA 1223 & 1225]. Furthermore, the record has plainly established that Legion and Mineau never had possession of or control over Kvam's funds and therefore cannot account to Kvam as to how those funds were

spent: the only person who knows how TNT spent the $69,000.00 it was paid to renovate the Property is TNT.

Legion and Mineau have provided a full accounting to Kvam in compliance with the district court's orders and Nevada law. If Kvam wants an accounting from TNT, he must file suit against TNT. The district court did not make any reversible error in this regard.

6. Kvam's Sixth and Seventh Causes of Action.

Kvam's *Opening Brief* summarizes the district court's conclusions concerning Kvam's Sixth and Seventh Causes of Action but does not actually contend that the district court committed any reversible error in this regard. AOB p. 49. The district court did not commit any reversible error in Order #1 or Order #2 concerning Kvam's Sixth or Seventh Causes of Action.

7. Kvam's Eighth Cause of Action.

Kvam's arguments concerning his Eighth Cause of Action are indicative of why the district court entered summary judgment against him. The district court correctly ruled that "Mr. Kvam has not established that he relied on any false information to his detriment." 14 JA 1982 ¶ 76. To refute this conclusion, Kvam provides a laundry list of alleged fraudulent misrepresentations *without any specific citations to evidence or the record whatsoever*. AOB pp. 50-52. Kvam has failed to identify any aspect of the record that supports his appeal.

As the district court properly held, "A district court is not obligated to wade through and search the entire record for some facts which might support the nonmoving party's claim." 14 JA 1962 (quoting Jaurequi v. Carter Mfg. Co., Inc., 173 F.3d 1076, 1084 (8th Cir. 1999)). "Requiring the district court to search the entire record, even though the adverse party's response does not set out the specific facts or disclose where in the record the evidence for them can be found, is unfair." Id. (quoting Carmen v. San Francisco Unified School Dist., 237 F.3d 1026, 1031 (9th Cir. 2001)). Kvam cannot simply produce forty-eight (48) exhibits to the district court, or a 2,400-page appellate record to this Court, and then summarily state that Mineau made various misrepresentations. Kvam has failed to provide or specifically identify a shred of evidence to meaningfully substantiate his claims.

Kvam argues that Mineau's misrepresentations include statements that he had experience with flip projects in Chicago, [AOB p. 51], but Kvam offers no evidence that this statement was false. Kvam argues he would not have proceeded with this project had he known that Minuea needed to borrow his share of funding [id.], but Kvam offers no evidence that Mineau made any misrepresentations in this regard. Kvam argues that he 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 Property [id.], but the record establishes that the

contractor came to Reno to meet with Mineau and Kvam for the express purpose of discussing the Property *and other projects*. 7 JA 1089-1101.

Kvam bore the burden of proof before the district court. He failed to meet that burden. His summary, conclusory allegations of fraud are far from sufficient to reverse the district court's Order #1. The district court did not commit reversible error in granting summary judgment in Legion and Mineau's favor on Kvam's Eighth Cause of Action.

8. Kvam's Ninth Cause of Action.

Kvam argues that the district court erred by entering summary judgment against Kvam on his conversion claim on the basis that Kvam's funds were paid to the contractor rather than to Mineau, directly. AOB p. 52. The district court found that "Mr. Kvam has not identified disputed facts regarding any distinct act of dominion that Mineau or Legion wrongfully exerted over Kvam's personal property, or the funds delivered to the title company and TNT." 14 JA 1985 ¶ 82.

"Conversion is a distinct act of dominion wrongfully exerted over another's personal property in denial of, or inconsistent with his title or rights therein or in derogation, exclusion, or defiance of such title or rights." 14 JA 1985 (quoting M.C. Multi-Family Dev., L.L.C. v. Crestdale Assocs., Ltd,, 124 Nev. 901, 910, 193 P.3d 536, 542 (2008)). "Conversion generally is limited to those severe, major, and important interferences with the right to control personal property that justify

required the actor to pay the property's full value." Id. (quoting Edwards v. Emperor's Garden Rest., 122 Nev. 317, 328-29, 130 P.3d 1280, 1287 (2006)). Given the undisputed evidence that neither Legion nor Mineau ever had possession of or control over Kvam's funds, the district court's entry of summary judgment was proper.

Kvam argues that his conversion claim is "premised on project funds being commingled with funds for Mineau's other projects…." AOB pp. 52-53. Again, the undisputed evidence presented to the district court established that Kvam wired his money directly to the contractor, who deposited the funds into its general operating account. The apparent fact that the contractor commingled the project funds with the rest of the contractor's money does not constitute conversion, at least certainly not *by Legion or Mineau*.

Kvam argues that his conversion claim is also premised on "the growing evidence that project funds were used on [Mineau's] other projects." AOB p. 53. Kvam again fails to point to any such evidence in the record and no such evidence exists. Furthermore, as discussed above, Kvam failed to make an adequate showing under NRCP 56(d) to justify deferring a ruling until the Recommendation for Order was resolved. Regardless, even assuming *arguendo* that Kvam discovered some evidence to suggest that *the contractor* diverted project funds to Mineau's other projects, Kvam would still be unable to establish that *Mineau* was somehow

responsible for *the contractor's* actions. Kvam's continued allegation that some of his funds were used on Mineau's other projects has simply never been supported by any evidence whatsoever.

Finally, Kvam argues that Legion/Mineau committed conversion by "withholding the proceeds of sale." AOB p. 54. As discussed above, the majority of the proceeds of sale were held by the clerk of the court and Kvam refused to stipulate to allow the remaining $1,864.14 to be deposited. Regardless, final judgment has been entered awarding Kvam the proceeds from the sale of the Property and that judgment has been satisfied in full. It is therefore indisputable that the proceeds of the sale have not been converted as a matter of fact and law and that Kvam has suffered no prejudice in this regard.

Again, Kvam bore the burden of proof before the district court. He failed to meet that burden. The district court did not commit reversible error in granting summary judgment in Legion and Mineau's favor on Kvam's Ninth Cause of Action.

9. Kvam's Tenth Cause of Action.

The district court determined that "Mr. Kvam has not identified specific evidence of racketeering activity, or any activities between Mineau/Legion that resemble the type of activities required to support the elements of this claim." 14 JA 1987. In his *Opening Brief*, Kvam repeats his failure before the district court by

simply identifying a list of alleged predicate RICO acts *without any citation to evidence or the record on appeal whatsoever*. AOB pp. 55-56.

Kvam states that Mineau obtained Kvam's signatures on the Terms of Agreement and on wire transfers 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." AOB p. 56. Kvam offers no citation to the record establishing that any such representations were made (or were false when made), and the record contains no such evidence whatsoever.

Again, Kvam bore the burden of proof before the district court. He failed to meet that burden. The district court did not commit reversible error in granting summary judgment in Legion and Mineau's favor on Kvam's Tenth Cause of Action.

10. Kvam's Eleventh Cause of Action.

The district court determined that "Mr. Kvam conceded the partnership does not hold any independent claims for relief against Mineau/Legion." 14 JA 1988. Kvam argues that he "never conceded any such thing and it is not clear what Judge Simons is referring to," then proceeds to quote from his opposition where he conceded this fact. AOB pp. 56-57. Kvam argued to the district court that his derivative claim was plead only "to prevent any argument from Mineau that the rights asserted belong to the joint venture, rather than Kvam," but that "Mineau did

not raise that argument." Id. Thus, Kvam conceded that the partnership does not hold any independent claims for relief against Mineau/Legion. Critically, Kvam does not argue on appeal that the partnership does hold independent claims for relief or that the district court committed any reversible error in this regard.

The district court did not commit reversible error in granting summary judgment in Legion and Mineau's favor on Kvam's Eleventh Cause of Action.

## V. CONCLUSION

"Summary judgment is an important procedural tool by which factually insufficient claims or defenses may be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources." Boesiger v. Desert Appraisals, LLC, 135 Nev. 192, 194, 444 P.3d 436, 438 (2019) (internal quotations omitted). "[I]n instances such as this, where an action is brought with practically no evidentiary basis to support it, summary judgment can be a valuable tool to discourage protracted and meritless litigation of factually insufficient claims." Id. at 198, 441. "In dispensing with frivolous actions through summary judgment, courts promote the important policy objectives of sound judicial economy and enhance the judiciary's capacity to effectively and efficiently adjudicate legitimate claims." Id.

Kvam failed to specifically identify a shred of evidence to meaningfully substantiate his claims. Kvam's bare and unsubstantiated allegations were

insufficient to sustain his claims before the district court and are certainly insufficient to reverse the district court's decisions on appeal. The district court properly entered summary judgment against him on the majority of his claims.

The district court did not commit reversible error and its decisions should be affirmed.

## AFFIRMATION

The undersigned does hereby affirm that the preceding document, **RESPONDENTS' ANSWERING BRIEF**, filed in the Supreme Court of the State of Nevada, County, does not contain the social security number of any person.

DATED this 27th day of July, 2022.

GUNDERSON LAW FIRM

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## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 395 in Times New Roman font size 14.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7), it does not contain more than 14,000 words. *Respondents' Answering Brief* contains 11,613. words based on the word count of Microsoft Office 365 Word Version 2206 used to prepare the brief.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. I further certify that this brief complies with all applicable Nevada Rules of Civil Procedures and Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying

brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 27th day of July, 2022.

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## CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c), I certify that I am an employee of the law office of Gunderson Law Firm, and that on the 27th day of July, 2022, I electronically filed a true and correct copy of the **RESPONDENTS' ANSWERING BRIEF**, with the Clerk of the Court by using the electronic filing system which will send a notice of electronic filing to the following:

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