

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, on relation of its  
Department of Transportation,

Petitioner,

vs.

Case No. 70098

THE EIGHTH JUDICIAL DISTRICT  
COURT, COUNTY OF CLARK, STATE OF  
NEVADA, AND THE HONORABLE  
GLORIA STURMAN, DISTRICT JUDGE,

Respondents,

and

FRED NASSIRI, individually and as trustee of  
the NASSIRI LIVING TRUST, a trust formed  
under Nevada law,

Real Party in Interest.

**APPENDIX VOLUME 2**

**TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION**

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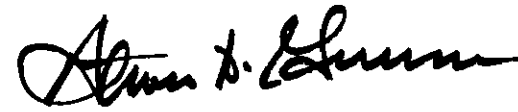
ATTORNEYS FOR PETITIONER

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

17 FRED NASSIRI, individually and as trustee  
18 of the NASSIRI LIVING TRUST, a trust  
formed under Nevada law,

19 Plaintiffs,

20 vs.

21 STATE OF NEVADA, on relation of its  
22 Department of Transportation; DOE  
GOVERNMENT AGENCIES I-X, inclusive;  
23 DOE INDIVIDUALS I-X; and DOE  
ENTITIES 1-10, inclusive,

24 Defendants.

26 THE STATE OF NEVADA, on relation of  
27 its Department of Transportation,

28 Counterclaimant,

Case No.: A672841  
Dept. No.: XXVI

**Department of Transportation's Answer  
to Amended Complaint and Counterclaim**

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1 vs.

2 FRED NASSIRI, an individual; DOES I  
3 through X; and ROE CORPORATIONS I  
4 through X, inclusive,

5 Counterdefendants.

6 Defendant State of Nevada, on relation of its Department of Transportation (the  
7 “Department of Transportation”), by and through its counsel of record, Kemp, Jones &  
8 Coulthard, LLP, and the Office of the Attorney General, hereby answers Plaintiff Fred Nassiri,  
9 individually and as trustee of the Nassiri Living Trust’s (collectively, “Nassiri”) Amended  
10 Complaint as follows:

11 **I.**

12 **The Parties, Jurisdiction and Venue<sup>1</sup>**

13 1. In answering paragraph 1, the Department of Transportation is without sufficient  
14 knowledge or information upon which to form a belief as to the truth of the allegations and  
15 therefore denies the same.

16 2. In answering paragraph 2, the Department of Transportation is without sufficient  
17 knowledge or information upon which to form a belief as to the truth of the allegations and  
18 therefore denies the same.

19 3. In answering paragraph 3, the Department of Transportation admits that it is duly  
20 created, organized, existing and acting under and by virtue of Nevada Revised Statutes Chapter  
21 408. The Department of Transportation is without sufficient knowledge or information upon  
22 which to form a belief as to the truth of the remaining allegations contained in paragraph 3 and  
23 therefore denies the same.

24  
25  
26  
27 <sup>1</sup> The Department of Transportation denies all of the allegations contained in the headings and  
28 subheadings employed by Nassiri in his Amended Complaint to the extent they can be construed as such,  
and recite them herein only for the sake of clarity.



1           10.     In answering paragraph 10, the Department of Transportation is without  
2 sufficient knowledge or information upon which to form a belief as to the truth of the  
3 allegations and therefore denies the same.

4           11.     In answering paragraph 11, the Department of Transportation is without  
5 sufficient knowledge or information upon which to form a belief as to the truth of the  
6 allegations and therefore denies the same.

7           12.     In answering paragraph 12, the Department of Transportation admits that it  
8 conveyed the Exchange Property to Nassiri by quitclaim deed, and denies that it conveyed the  
9 Exchange Property “with specific knowledge of a potential or threatened litigation by a  
10 neighboring landowner, thus exposing [Nassiri] to litigation.” The Department of  
11 Transportation is without sufficient knowledge or information upon which to form a belief as to  
12 the truth of the remaining allegations contained in paragraph 12 and therefore denies the same.

13           13.     In answering paragraph 13, the Department of Transportation is without  
14 sufficient knowledge or information upon which to form a belief as to the truth of the  
15 allegations and therefore denies the same.

16           14.     In answering paragraph 14, the Department of Transportation is without  
17 sufficient knowledge or information upon which to form a belief as to the truth of the  
18 allegations and therefore denies the same.

19           15.     In answering paragraph 15, the Department of Transportation is without  
20 sufficient knowledge or information upon which to form a belief as to the truth of the allegation  
21 that “[t]ogether with legal expenses, [Nassiri] incurred over \$7 Million in expenses in  
22 connection with the Koroghli litigation,” and therefore denies the same. The Department of  
23 Transportation denies the remaining allegations contained in paragraph 15.

24           16.     In answering paragraph 16, the Department of Transportation is without  
25 sufficient knowledge or information upon which to form a belief as to the truth of the allegation  
26 that “[i]t was not until late 2008 that [Nassiri] obtained a copy of the Department of  
27 Transportation’s 2004 Appraisal of the Exchange Property,” and therefore denies the same, and  
28 states the 2004 Appraisal speaks for itself and therefore denies any allegations that are

1 inconsistent with that document. The Department of Transportation denies the remaining  
2 allegations contained in paragraph 16.

3 17. In answering paragraph 17, the Department of Transportation denies all of the  
4 allegations contained therein.

5 18. In answering paragraph 18, the Department of Transportation denies all of the  
6 allegations contained therein.

7 **Changes in the Blue Diamond Interchange**

8 19. In answering paragraph 19, the Department of Transportation is without  
9 sufficient knowledge or information upon which to form a belief as to the truth of the  
10 allegations and therefore denies the same.

11 20. In answering paragraph 20, the Department of Transportation is without  
12 sufficient knowledge or information upon which to form a belief as to the truth of the  
13 allegations and therefore denies the same.

14 21. In answering paragraph 21, the Department of Transportation states the 2004  
15 Appraisal speaks for itself and therefore denies any allegations that are inconsistent with those  
16 documents. The Department of Transportation denies the remaining allegations contained in  
17 paragraph 21.

18 22. In answering paragraph 22, the Department of Transportation denies all of the  
19 allegations contained therein.

20 23. In answering paragraph 23, the Department of Transportation is without  
21 sufficient knowledge or information upon which to form a belief as to the truth of the  
22 allegations and therefore denies the same.

23 24. In answering paragraph 24, the Department of Transportation admits that it  
24 prepared an Environmental Assessment in October 2008. As to the remaining allegations, the  
25 Department of Transportation states the Environmental Assessment speaks for itself and  
26 therefore denies any allegations that are inconsistent with that document.

27 25. In answering paragraph 25, the Department of Transportation admits it held a  
28 public meeting on March 24, 2010, and denies that Las Vegas Paving is its agent. The

1 Department of Transportation is without sufficient knowledge or information upon which to  
2 form a belief as to the truth of the remaining allegations contained in paragraph 25 and therefore  
3 denies the same.

4 26. In answering paragraph 26, the Department of Transportation admits that Nassiri  
5 and Las Vegas Paving Corporation entered into a Ground Lease Agreement on April 15, 2010,  
6 and denies that Las Vegas Paving is the Department of Transportation's agent and partner. The  
7 Department of Transportation is without sufficient knowledge or information upon which to  
8 form a belief as to the truth of the remaining allegations contained in paragraph 26 and therefore  
9 denies the same.

10 27. In answering paragraph 27, the Department of Transportation is without  
11 sufficient knowledge or information upon which to form a belief as to the truth of the  
12 allegations and therefore denies the same.

13 28. In answering paragraph 28, the Department of Transportation is without  
14 sufficient knowledge or information upon which to form a belief as to the truth of the  
15 allegations and therefore denies the same.

16 29. In answering paragraph 29, the Department of Transportation is without  
17 sufficient knowledge or information upon which to form a belief as to the truth of the  
18 allegations and therefore denies the same.

19 30. In answering paragraph 30, the Department of Transportation is without  
20 sufficient knowledge or information upon which to form a belief as to the truth of the  
21 allegations and therefore denies the same.

22 31. In answering paragraph 31, the Department of Transportation is without  
23 sufficient knowledge or information upon which to form a belief as to the truth of the  
24 allegations and therefore denies the same.

25 32. In answering paragraph 32, the Department of Transportation is without  
26 sufficient knowledge or information upon which to form a belief as to the truth of the  
27 allegations and therefore denies the same.

28

33. In answering paragraph 33, the Department of Transportation is without sufficient knowledge or information upon which to form a belief as to the truth of the allegations and therefore denies the same.

34. In answering paragraph 34, the Department of Transportation states that the statute speaks for itself and therefore denies any allegations that are inconsistent with that statute.

35. In answering paragraph 35, the Department of Transportation denies all of the allegations contained therein.

36. In answering paragraph 36, the Department of Transportation denies all of the allegations contained therein.

### III.

## Claims for Relief

## First Claim for Relief

**(Inverse Condemnation)**

37. In answering paragraph 37, the Department of Transportation repeats and realleges its responses to the allegations contained in the preceding paragraphs as though fully set forth herein.

38. In answering paragraph 38, the Department of Transportation is without sufficient knowledge or information upon which to form a belief as to the truth of the allegations and therefore denies the same.

39. In answering paragraph 39, the Department of Transportation is without sufficient knowledge or information upon which to form a belief as to the truth of the allegations and therefore denies the same.

40. In answering paragraph 40, the Department of Transportation is without sufficient knowledge or information upon which to form a belief as to the truth of the allegations and therefore denies the same.



1           41.     In answering paragraph 41, the Department of Transportation states that the  
2 statute speaks for itself and therefore denies any allegations that are inconsistent with that  
3 statute.

4           42.     In answering paragraph 42, the Department of Transportation is without  
5 sufficient knowledge or information upon which to form a belief as to the truth of the  
6 allegations and therefore denies the same.

7           43.     In answering paragraph 43, the Department of Transportation is without  
8 sufficient knowledge or information upon which to form a belief as to the truth of the  
9 allegations and therefore denies the same.

10          44.     In answering paragraph 44, the Department of Transportation is without  
11 sufficient knowledge or information upon which to form a belief as to the truth of the  
12 allegations and therefore denies the same.

13          45.     In answering paragraph 45, the Department of Transportation denies all of the  
14 allegations contained therein.

## 15                               **Second Claim for Relief**

### 16                               **(Breach of Contract)**

17          46.     In answering paragraph 46, the Department of Transportation repeats and  
18 realleges its responses to the allegations contained in the preceding paragraphs as though fully  
19 set forth herein.

20          47.     In answering paragraph 47, the Department of Transportation admits that Nassiri  
21 and the Department of Transportation entered into a Settlement Agreement on April 28, 2005,  
22 and that the Settlement Agreement is a valid and enforceable contract. As to the remaining  
23 allegations, the Department of Transportation states the Settlement Agreement speaks for itself  
24 and therefore denies any allegations that are inconsistent with that document.

25          48.     In answering paragraph 48, the Department of Transportation is without  
26 sufficient knowledge or information upon which to form a belief as to the truth of the allegation  
27 that “[t]o complete acquisition of the Exchange Property, Plaintiffs were also required to pay an  
28 additional \$200,000 not included in the contract to address the ‘Chambers Claim,’” and



1 therefore denies the same. The Department of Transportation denies the remaining allegations  
2 contained in paragraph 48.

3 49. In answering paragraph 49, the Department of Transportation denies all of the  
4 allegations contained therein.

5 50. In answering paragraph 50, the Department of Transportation is without  
6 sufficient knowledge or information upon which to form a belief as to the truth of the allegation  
7 that “[p]rior to and, again, subsequent to [Nassiri’s] purchase of the Exchange Property, [the  
8 Department of Transportation] presented [Nassiri] with the Blue Diamond Interchange  
9 development plan” and “[t]hat plan reflected that the Exchange Property had in excess of 1,500  
10 feet of visibility from I-15,” and therefore denies the same. The Department of Transportation  
11 denies the remaining allegations contained in paragraph 50.

12 51. In answering paragraph 51, the Department of Transportation denies all of the  
13 allegations contained therein.

### 14 **Third Claim for Relief**

#### 15 **(Breach of Implied Covenant and Good Faith and Fair Dealing)**

16 52. In answering paragraph 52, the Department of Transportation repeats and  
17 realleges its responses to the allegations contained in the preceding paragraphs as though fully  
18 set forth herein.

19 53. In answering paragraph 53, the Department of Transportation admits the  
20 allegations contained therein.

21 54. In answering paragraph 54, the Department of Transportation admits the  
22 allegations contained therein.

23 55. In answering paragraph 55, the Department of Transportation admits the  
24 allegations contained therein.

25 56. In answering paragraph 56, the Department of Transportation denies the  
26 allegations contained therein.

27 57. In answering paragraph 57, the Department of Transportation denies the  
28 allegations contained therein.



1           70.     In answering paragraph 70, the Department of Transportation denies the  
2 allegations contained therein.

3           71.     In answering paragraph 71, the Department of Transportation denies the  
4 allegations contained therein.

5           72.     In answering paragraph 72, the Department of Transportation denies the  
6 allegations contained therein.

7           73.     In answering paragraph 73, the Department of Transportation denies the  
8 allegations contained therein.

9                               **Fifth Claim for Relief**  
10                              **(Negligent Misrepresentation)**

11           74.     In answering paragraphs 74-81, the Department of Transportation refers Nassiri  
12 to the Court's Order Granting in Part Defendant the Department of Transportation's Motion to  
13 Dismiss Amended Complaint for Failure to State a Claim, on file herein, wherein the Court  
14 dismissed the negligent misrepresentation claim with prejudice.

15                              **Sixth Claim for Relief**  
16                              **(Intentional Misrepresentation)**

17           75.     In answering paragraphs 82-88, the Department of Transportation refers Nassiri  
18 to the Court's Order Granting in Part Defendant the Department of Transportation's Motion to  
19 Dismiss Amended Complaint for Failure to State a Claim, on file herein, wherein the Court  
20 dismissed the intentional misrepresentation claim with prejudice.

21                              **Affirmative Defenses**

22           1.       Nassiri's Amended Complaint fails to state any claim against the Department of  
23 Transportation upon which relief can be granted.

24           2.       Nassiri's Amended Complaint fails to state ultimate facts sufficient to constitute  
25 a claim for relief.

26           3.       Nassiri has failed to commence this action within the time required by the  
27 applicable statute of limitations and his claims are therefore barred.

1           4.       By his own actions, Nassiri has waived whatever right he may have otherwise  
2 had to relief from the Department of Transportation.

3           5.       By virtue of his own conduct, Nassiri should be estopped from making any claim  
4 against the Department of Transportation.

5           6.       Nassiri's claims have been waived and/or voided as a result of the acts and the  
6 conduct of Nassiri, including but not limited to, Nassiri's own breaches of the Settlement  
7 Agreement and First Amendment.

8           7.       Nassiri has failed to allege a duty under Nevada law.

9           8.       The deprivation of a property owner's view is not a compensable "taking" that  
10 would substantiate an inverse condemnation claim.

11          9.       Nevada does not recognize an implied negative easement of view or visibility.

12          10.      The parties lack a fiduciary or special relationship.

13          11.      Any award for damages sounding in tort is limited under NRS 41.035.

14          12.      Any damages Nassiri may have incurred were proximately caused by the acts of  
15 persons other than the Department of Transportation, and therefore, Nassiri is not entitled to any  
16 relief from the Department of Transportation.

17          13.      Nassiri's damages, if any, resulted from the acts or omissions of third parties  
18 over whom the Department of Transportation had no control. The acts of such third parties  
19 constitute intervening or superseding causes of the harm, if any, suffered by Nassiri.

20          14.      Any damages Nassiri may have incurred were proximately caused by his own  
21 acts or acts of its agents, and therefore, Nassiri is not entitled to any relief from the Department  
22 of Transportation.

23          15.      Nassiri has failed to take reasonable steps to mitigate his damages, if any, thus  
24 completely or partially barring his claims.

25          16.      Nassiri's claims are barred by the doctrines of laches, waiver, and/or estoppel.

26          17.      Nassiri's claims are barred by the doctrine of unclean hands.

27          18.      The Department of Transportation's acts were privileged and justified.

28          19.      The Department of Transportation acted in good faith.

20. Any payment that the Department of Transportation received was for fair consideration.

21. Nassiri's recovery, if any must be offset by compensation already received.

22. The Department of Transportation is immune from liability under NRS 41.032 because it is a state agency and all of Nassiri's allegations challenge discretionary functions and/or duties.

23. Nassiri's inverse condemnation claim is not yet ripe due to his failure to exhaust his administrative remedies prior to filing this action.

24. Nassiri failed to comply with the requirements of NRS 408.497 prior to filing his inverse condemnation claim and is therefore not entitled to relief under this claim.

25. Any damages that Nassiri alleges to have suffered from the matters alleged in the Complaint are too remote or speculative to allow recovery.

26. Pursuant to NRCP 11, as amended, all possible affirmative defenses may not have been alleged herein insofar as sufficient facts were not available after reasonable inquiry upon the filing of the Department of Transportation's Answer and therefore the Department of Transportation reserves the right to allege additional defenses as they may become known, or as they evolve during the litigation, and to amend its Answer accordingly.

WHEREFORE, the Department of Transportation respectfully requests:

1. That Nassiri takes nothing by way of his Amended Complaint;

2. That the Department of Transportation be awarded its reasonable attorney's fees and costs in defending this action; and

3. For such other and further relief as this Court deems just and proper.

### Counterclaim

For its Counterclaim against Fred Nassiri ("Nassiri"), Defendant/Counterclaimant State of Nevada, on relation of its Department of Transportation (the "Department of Transportation"), complains and alleges as follows:



1           9.       The Department of Transportation and Nassiri also agreed that Nassiri would  
2 purchase from the Department of Transportation the Exchange Property for the fully negotiated  
3 and arms-length transaction price of \$23,239,004.50.

4           10.      After Nassiri purchased the Exchange Property, together with his previously-  
5 owned adjoining parcels, Nassiri owned a contiguous 67-acre parcel of real property.

6           11.      The agreement to resolve the Eminent Domain Action and the agreement to  
7 sell/purchase the Exchange Property were memorialized in a single Settlement Agreement and  
8 Release of All Claims dated April 28, 2005, and later amended on June 14, 2005. *See*  
9 Settlement Agreement and First Amendment attached hereto as Exhibit 1.

10          12.      Pursuant to the Settlement Agreement, the parties expressly acknowledged that  
11 the terms of their deal had “been negotiated and discussed between [the Department of  
12 Transportation] and Nassiri,” that the parties “have had the benefit and advice of counsel of  
13 their choosing,” and that the “Agreement constitute[d] the entire Agreement by and between”  
14 them. *Id.* at ¶¶ 2.19, 2.20 and (second) 2.28.

15          13.      As part of the sale of the Exchange Property, Nassiri agreed to take the property  
16 “with all faults” and without warranties via quitclaim deed. *Id.* at ¶ 2.04(a).

17          14.      As memorialized in the Settlement Agreement, Nassiri “acknowledge[d] he is  
18 aware of claims by Carolyn Ann Chambers . . . relating to an alleged reversionary interest or  
19 other right relating to the Exchange Property (the ‘Chambers Claim’), that he has performed his  
20 own investigation of the Chambers Claim, and, based upon such investigation, accepts the  
21 Exchange Property subject to any claims of Chambers, her assigns or successors.” *Id.* at ¶  
22 2.04(a).

23          15.      Nassiri promised to “indemnify and hold harmless the State of Nevada and [the  
24 Department of Transportation] . . . of and from all claims, known or unknown, asserted or  
25 unasserted of whatever nature, now existing or hereafter arising, including but not limited to  
26 claims for attorney’s fees and costs, relating in any way to the Chambers Claims.” *Id.* at ¶  
27 2.04(c).

28



1           16. Nassiri also expressly released the Department of Transportation not just for the  
2 Chambers Claims but for any and all “matters affecting” the Exchange Property’s “title or  
3 claims thereto,” and he acknowledged that this release applies, covers, and includes “all  
4 unknown, unforeseen, unsuspected, and unanticipated injuries, claims, damages, losses, and  
5 liabilities, if any.” *Id.* at ¶¶ 2.09 and 2.19(ii).

6           17. The quitclaim deed transferring the Exchange Property was executed on June 14,  
7 2005, and recorded with the Clark County, Nevada Recorder’s office on June 17, 2005. *See*  
8 Quitclaim Deed attached hereto as Exhibit 2.

9           18. Subsequent to Nassiri’s purchase of the Exchange Property, a dispute arose over  
10 the Exchange Property between Nassiri and his neighboring landowners, Alexandra Properties,  
11 LLC, Oasis Las Vegas, L.L.C., and New Horizon 2001, L.L.C, by and through their  
12 representative, Ray Koroghli (collectively, the “Oasis Landowners”).

13           19. This dispute resulted in a lawsuit filed by the Oasis Landowners against Nassiri  
14 on March 6, 2007, in the Eighth Judicial District Court, Clark County, Nevada, Case No.  
15 A537215 (the “Koroghli Action”).

16           20. In the Koroghli Action, the Oasis Landowners alleged that they had previously  
17 agreed with Nassiri to jointly purchase the Exchange Property from the Department of  
18 Transportation.

19           21. The Oasis Landowners further alleged, *inter alia*, that Nassiri breached his  
20 agreement with the Oasis Landowners to jointly purchase the Exchange Property by purchasing  
21 the Exchange Property alone.

22           22. Nassiri alleges that on or about November 17, 2008, he and the Oasis  
23 Landowners entered into a settlement agreement to resolve the Koroghli Action.

24           23. To resolve the Koroghli Action, Nassiri alleges that he and the Oasis  
25 Landowners each agreed to a mutual exchange of land, and that Nassiri was required to pay a  
26 settlement sum to the Oasis Landowners. Together with legal expenses, Nassiri alleges he  
27 incurred more than \$7 million in connection with the Koroghli Action.

28



1           24.     By 2012, Nassiri was experiencing buyer's remorse over his purchase of the  
2 Exchange Property.

3           25.     On May 29, 2012, counsel for Nassiri sent a letter to Deputy Attorney General,  
4 Keith Marcher, regarding Nassiri's demands to the Department of Transportation in connection  
5 with Nassiri's purchase of the Exchange Property.

6           26.     Nassiri demanded rescission of the entire transaction relating to his purchase of  
7 the Exchange Property, as well as additional money damages, which included more than \$7  
8 million as reimbursement for Nassiri's settlement and legal expenses in the Koroghli Action and  
9 \$200,000 as reimbursement for the Chambers Claim settlement.

10          27.     As an alternative to rescission, Nassiri offered to keep the Exchange Property  
11 and demanded total additional damages, which included \$200,000 as reimbursement for the  
12 Chambers Claim settlement.

13          28.     On November 30, 2012, more than seven years after the Settlement Agreement  
14 was executed and the land deals were completed, Nassiri filed this action, followed with an  
15 amended complaint on March 27, 2013.

16          29.     Even though Nassiri waived and released all "matters affecting" the Exchange  
17 Property's "title or claims thereto," and he acknowledged that this release applies, covers, and  
18 includes "all unknown, unforeseen, unsuspected, and unanticipated injuries, claims, damages,  
19 losses, and liabilities, if any," expressly including the Chambers Claims, Nassiri's amended  
20 complaint (at ¶ 48) seeks money damages as reimbursement for his costs incurred in connection  
21 with the Chambers Claim and Koroghli Litigation.

22          30.     The Settlement Agreement provides that "[i]f any action is commenced to  
23 enforce the terms of this Agreement, the prevailing party shall be entitled to recover all of its  
24 expenses related to such action, including but not limited to, its reasonable attorney's fees and  
25 costs." Settlement Agreement at ¶ 2.18.

26     ///

27     ///

28     ///

**First Claim for Relief**  
**(Breach of Contract)**

31. The Department of Transportation repeats and realleges all previous paragraphs as though set forth fully herein.

32. The Settlement Agreement and First Amendment are valid and enforceable contracts whereby Nassiri agreed to purchase the Exchange Property from the Department of Transportation and Nassiri waived and released all “matters affecting” the Exchange Property’s “title or claims thereto,” and acknowledged that the release applies, covers, and includes “all unknown, unforeseen, unsuspected, and unanticipated injuries, claims, damages, losses, and liabilities, if any,” expressly including the Chambers Claims and implicitly including any claims arising from the Koroghli Action.

33. The Department of Transportation performed each of its obligations under the Settlement Agreement and First Amendment.

34. Nassiri materially breached the Settlement Agreement and First Amendment by filing a lawsuit against the Department of Transportation to recover damages that include reimbursements for Nassiri’s costs in connection with the waived and released Chambers Claim and Koroghli Action.

35. Nassiri’s breach of the Settlement Agreement and First Amendment has actually and proximately caused the Department of Transportation to suffer damages in an amount in excess of \$10,000.

36. As a result of Nassiri’s breach of the Settlement Agreement and First Amendment, the Department of Transportation has been required to retain the services of Kemp, Jones & Coulthard, LLP and the Office of the Attorney General to prosecute this action and is entitled to an award of attorney’s fees and costs.

**Second Claim for Relief**  
**(Breach of the Implied Covenant of Good Faith and Fair Dealing)**

37. The Department of Transportation repeats and realleges all previous paragraphs as though set forth fully herein.

1           38.     Implied in the parties' Settlement Agreement and First Amendment is a covenant  
2 of good faith and fair dealing.

3           39.     Nassiri breached this covenant by initiating a lawsuit against the Department of  
4 Transportation that included claims for damages in connection with the Chambers Claim and  
5 Koroghli Action, even though Nassiri expressly waived and released any such claims.

6           40.     As a direct and proximate result of Nassiri's breach of the implied covenant of  
7 good faith and fair dealing, the Department of Transportation has suffered damages in an  
8 amount in excess of \$10,000.

9           41.     As a result of Nassiri's breach of the implied covenant of good faith and fair  
10 dealing, the Department of Transportation has been required to retain the services of Kemp,  
11 Jones & Coulthard, LLP and the Office of the Attorney General to prosecute this action and is  
12 entitled to an award of attorney's fees and costs.

13                               **Third Claim for Relief**  
14                               **(Declaratory Relief)**

15           42.     The Department of Transportation repeats and realleges all previous paragraphs  
16 as though set forth fully herein.

17           43.     A justiciable controversy exists between the Department of Transportation and  
18 Nassiri over their respective rights and obligations under the Settlement Agreement and First  
19 Amendment, which includes whether or not Nassiri is even entitled to sue the Department of  
20 Transportation for damages that he expressly waived.

21           44.     The Department of Transportation and Nassiri's interests in this controversy are  
22 adverse.

23           45.     The Department of Transportation has a legally protectable interest in this  
24 controversy, as Nassiri has sued the Department of Transportation for millions of dollars in  
25 connection with waived and released claims and the Department of Transportation is entitled to  
26 its attorney's fees and costs for having to defend against these waived and released claims.

1           46.     The issues involved in the controversy are ripe for adjudication because they  
2 center on unavailable claims that Nassiri is presently asserting against the Department of  
3 Transportation.

4           47.     As a result of Nassiri asserting claims against the Department of Transportation  
5 that he previously agreed to waive and release, the Department of Transportation has been  
6 required to retain the services of Kemp, Jones & Coulthard, LLP and the Office of the Attorney  
7 General to prosecute this action and is entitled to an award of attorney's fees and costs.

8                                   **Fourth Claim for Relief**  
9                                   **(Attorney's Fees as Special Damages)**

10          48.     The Department of Transportation repeats and realleges all previous paragraphs  
11 as though set forth fully herein.

12          49.     As a result of Nassiri asserting claims against the Department of Transportation  
13 that he previously agreed to waive and release, the Department of Transportation has been  
14 required to retain the services of Kemp, Jones & Coulthard, LLP and the Office of the Attorney  
15 General to defend against claims that arise from Nassiri's own breach of the Settlement  
16 Agreement and First Amendment.

17          50.     The Department of Transportation's attorney's fees are foreseeable damages  
18 because Nassiri has forced the Department of Transportation to incur attorney's fees that the  
19 Department of Transportation would not have otherwise incurred in the absence of Nassiri's  
20 waived and released claims in breach of the Settlement Agreement and First Amendment.

21          51.     The Department of Transportation's additional attorney's fees are necessitated  
22 by, and the natural and probable consequence of, Nassiri's bad faith assertion of waived and  
23 released claims in breach of the Settlement Agreement and First Amendment.

24                                   **Prayer for Relief**

25          WHEREFORE, the Department of Transportation respectfully prays for judgment  
26 against Nassiri as follows:

- 27           1.     For damages in excess of \$10,000.00;  
28           2.     For reasonable attorney's fees and costs incurred herein;

3. For reasonable attorney's fees as special damages incurred in defense of Nassiri's claims related to the waived and released Chambers Claim and Koroghli Action;
4. For pre-judgment and post-judgment interest as provided by law;
5. For a declaration regarding the parties' rights and obligations with respect to the Settlement Agreement and First Amendment; and
6. For any further and additional relief that this Court may deem appropriate.

DATED this 31st day of October, 2013.

Respectfully submitted by:



William L. Coulthard, Esq. (#3927)  
Eric M. Pepperman, Esq. (#11679)  
Mona Kaveh, Esq. (#11825)  
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3800 Howard Hughes Parkway  
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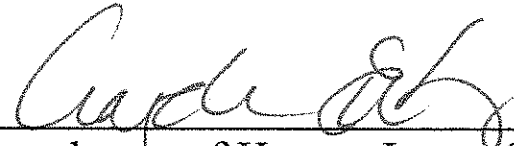
Catherine Cortez Masto, Esq. (#3926)  
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Amanda B. Kern, Esq. (#9218)  
OFFICE OF THE ATTORNEY GENERAL  
555 E. Washington Avenue, Suite 3900  
Las Vegas, Nevada 89101  
*Attorneys for Defendant/Counterclaimant*

KEMP, JONES & COULTHARD, LLP  
3800 Howard Hughes Parkway  
Seventeenth Floor  
Las Vegas, Nevada 89169  
(702) 385-6000 • Fax (702) 385-6001  
kic@kempjones.com

**Certificate of Service**

I hereby certify that on the 31st day of October, 2013, I served a true and correct copy of the **Department of Transportation's Answer to Amended Complaint and Counterclaim** via U.S. Mail, properly addressed to the following:

Eric R. Olsen, Esq.  
Dylan T. Ciciliano, Esq.  
Gordon Silver  
3960 Howard Hughes Parkway, 9<sup>th</sup> Floor  
Las Vegas, Nevada 89169  
*Attorneys for Plaintiffs*

  
An employee of Kemp, Jones & Coulthard, LLP

# EXHIBIT 1

## SETTLEMENT AGREEMENT AND RELEASE OF ALL CLAIMS

This Settlement Agreement and Release of All Claims (this "Agreement") is entered into this 28 day of April, 2005 (the "Execution Date") by and among The State of Nevada, on relation of its Department of Transportation ("NDOT" or "Plaintiff") and Fred Nassiri, a resident of Clark County, Nevada ("NASSIRI" or "Defendant", and together with NDOT, "the Parties").

### I.

#### Recitals

1.01 The Lawsuit. On or about August 31, 2004, NDOT filed its Complaint in condemnation ("Complaint") against, among others, NASSIRI, in the Eighth Judicial District Court, Clark County, Nevada, Case Number A491334 (the "Lawsuit") to acquire certain property owned by NASSIRI in fee simple and other property owned by NASSIRI for a two-year construction easement in connection with the construction and reconstruction of the interchange at I-15 and Blue Diamond Road, and the attendant widening and realignment of Blue Diamond Road (the "Project"). NDOT also named Clark County as a defendant in the Lawsuit. Clark County filed a disclaimer of any interest in the proceedings on October 13, 2004.

1.02 Funds on Deposit With Court Clerk. On September 27, 2004, NDOT deposited with the Clerk of the Court ("Clerk") the sum of FOUR MILLION EIGHT HUNDRED TEN THOUSAND and NO/100 DOLLARS (\$4,810,000.00) in connection with NDOT's motion for immediate occupancy (the "Deposit").

1.03 The Exchange Property. NDOT owns 24.41 acres (1,063,132 square feet) of land located generally southeast of the intersection of existing Blue Diamond Road and I-15 and east of NASSIRI's property, which land is more particularly described in the legal description attached hereto at Exhibit "I" and incorporated herein by this reference (the "Exchange Property"). NASSIRI desires to purchase the Exchange Property from NDOT.

1.04 Settlement. The parties hereto desire to enter into this Agreement, which among other things provides for full and final resolution of the Lawsuit, the release of the Deposit to NASSIRI, the conveyance in fee simple of certain property owned by Nassiri to NDOT by judgment, the conveyance of temporary construction easements over the Exchange Property to NDOT, and the conveyance of the Exchange Property to NASSIRI on the terms and conditions set forth herein.



## II.

### Agreement

NOW, THEREFORE, in consideration of the mutual promises and agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which the Parties acknowledge, the Parties agree as follows.

2.01 Escrow. The Parties shall establish an escrow in Las Vegas, Nevada with Nevada Title Company ("Escrow"), establishing a certified escrow officer to act as the Escrow Agent, and this Agreement shall serve as the instructions to the Escrow Agent for handling the transaction. The Escrow Agent shall not take any action contrary to this Agreement absent the express direction of both Parties in writing. Closing shall occur on the Closing Date as defined in Section 2.07, below.

2.02 Stipulated Judgment and Condemnation Proceeds. On or before the Closing Date, the Parties shall execute and deliver to Escrow a stipulation ("Stipulated Judgment") in the form attached hereto as Exhibit "2" together with an executed Final Judgment and Final Order of Condemnation attached thereto ("Final Judgment"), which Stipulated Judgment shall provide, among other matters, that the Clerk shall release the Deposit to NASSIRI, and release the balance of any funds held by the Clerk in connection with the Lawsuit to NDOT.

2.03 Vesting of Title in NDOT. The property to be conveyed to NDOT by recordation of the Final Judgment is located in unincorporated Clark County, Nevada, and consists of portions of the property generally located at the southwest corner of the intersection of Las Vegas Boulevard South and existing Blue Diamond Road, having Clark County Assessor's Parcel Number 177-08-803-002 and an address of 8011 Las Vegas Boulevard South, Las Vegas, Nevada 89123, and more specifically described in the Complaint as a 183,823 square-foot portion of NDOT Parcel No. S-160-CL-000.016 in fee simple absolute, as further described and identified in Exhibit "2" attached hereto and incorporated herein by this reference (the "Fee Acquisition"), a temporary easement on a 705 square-foot portion of NDOT Parcel No. S-160-CL-000.016 TE, also as described in Exhibit "2" (the "TE"), and a 25,419 square-foot portion of NDOT Parcel No. S-160-CL-000.015, which the Complaint requested in fee simple but the Parties have agreed will serve instead as a temporary easement (the "Teardrop TE", and together with the TE and the Fee Acquisition, the "Subject Property"). The Subject Property shall be condemned and given over to NDOT through entry with the Clerk of the Stipulated Judgment attached hereto as Exhibit "1" and the recording with the Clark County Recorder of the Final Judgment attached thereto, or such other documentation as NDOT may require to vest fee simple title to the Fee Acquisition in NDOT and secure NDOT's TE and Teardrop TE.

2.04 Conveyance of Exchange Property to NASSIRI.

(a) Quitclaim Deed. NDOT shall convey the Exchange Property to NASSIRI by quitclaim deed in the form attached hereto as Exhibit "3", without warranty, "as-is", "where-is", and

"with all faults" (the "Quitclaim Deed"). NASSIRI acknowledges that he is aware of claims by Carolyn Ann Chambers or her representatives relating to an alleged reversionary interest or other right relating to the Exchange Property (the "Chambers Claims"), that he has performed his own investigation of the Chambers Claims, and, based upon such investigation, accepts the Exchange Property subject to any claims of Chambers, her assigns or successors.

(b) Title. NASSIRI may cause Escrow Agent to issue to NASSIRI (with a copy to NDOT) a preliminary title report with respect to the Exchange Property (the "Preliminary Report") on or before the close of business on the tenth business day following the Execution Date, together with copies of all documents relating to title exceptions referred to in the Preliminary Report. NASSIRI shall give NDOT notice if the Preliminary Report contains any exceptions that are not reasonably acceptable to NASSIRI on or before the close of business on the tenth (10<sup>th</sup>) business day prior to Closing ("NASSIRI's Title Notice"). NDOT shall notify NASSIRI on or before the close of business on the fifth (5<sup>th</sup>) business day following the date of NASSIRI's Title Notice if NDOT will satisfy any requirement or remove any exception before the Closing Date ("NDOT's Title Notice"). NDOT's failure to provide NDOT's Title Notice with respect to any requirement or exception shall constitute NDOT's refusal to satisfy or remove the requirement or exception. NASSIRI shall thereafter, but not less than two (2) business days prior to the Closing Date, approve the title contingency set forth herein, or terminate this Agreement. NASSIRI's failure to give such notice of termination shall constitute NASSIRI's agreement to all title exceptions or requirements and NASSIRI's agreement to consummate the transactions contemplated by this Agreement. If notice of termination is given, this Agreement shall terminate and the parties shall be released from any and all further obligations under this Agreement, except for any such obligation which survives termination. Those exceptions to title set forth in the Preliminary Report to which NASSIRI has not objected in writing to NDOT or that NDOT has not agreed to remove pursuant to this Section 9 shall, together with any interest of Carolyn Ann Chambers, her assigns or successors, constitute the "Approved Exceptions".

(c) Chambers Representation and Indemnity. Nassiri represents and warrants as of the Closing Date that Nassiri shall have secured an assignment to Nassiri of all right, title, and interest of Carolyn Ann Chambers, her successors or assigns, in or to the Chambers Claims. Nassiri shall indemnify and hold harmless the State of Nevada and NDOT, their managers, agents, employers, employees, attorneys, insurers, successors, and assigns, and their political subdivisions and sister agencies, of and from all claims, known or unknown, asserted or unasserted of whatever nature, now existing or hereafter arising, including but not limited to claims for attorney's fees and costs, relating in any way to the Chambers Claims.

2.05 Exchange Compensation. On or before the Closing Date, NASSIRI shall deposit in Escrow the sum of TWENTY-THREE MILLION TWO HUNDRED TWENTY NINE THOUSAND FIVE HUNDRED and NO/100 DOLLARS (\$23,229,500.00) (the "Exchange Compensation") in "Cash." For purposes of this Agreement, "Cash" means immediately available United States funds transferred by certified check or wire transfer.

2.06 Exchange Property Construction Easement. On or before the Closing Date, NASSIRI shall execute and deliver to Escrow a temporary construction easement in the form attached hereto as Exhibit "4" allowing NDOT to use certain portions of the Exchange Property in connection with Project planning, staging, and construction (the "Exchange Property Easement").

2.07 Closing.

(a) Date and Location. Closing shall occur at the offices of Escrow Agent at 10:00 a.m. on the thirtieth (30th) day after the Execution Date, or at such other time or place as the Parties may agree in writing (the "Closing Date").

(b) NASSIRI Deliveries on Closing Date. Unless previously provided, NASSIRI shall deliver the following to Escrow on the Closing Date:

- (i) Executed Stipulated Judgment together with executed Final Judgment and such other documentation as NDOT may require to vest fee simple title to the Fee Acquisition in NDOT and secure NDOT's TE and Teardrop TE;
- (ii) Executed Exchange Property Easement;
- (iii) Exchange Compensation;
- (iv) Any fees for issuance by Nevada Title Company of a policy of title insurance for the Exchange Property;
- (v) 1/2 of any fees of Escrow or Escrow Agent for handling this transaction; and
- (vi) Real property transferor other taxes, if any, that apply to the recording of the Quitclaim Deed.

(c) NDOT Deliveries on Closing Date. Unless previously provided, NDOT shall deliver the following to Escrow on the Closing Date:

- (i) Executed Stipulated Judgment together with executed Final Judgment and Final Order of Condemnation; and
- (ii) The Quitclaim Deed;

(d) Actions by Escrow Agent on Closing Date. On the Closing Date, Escrow Agent shall:

- (i) Collect the deliveries required by NASSIRI and NDOT as set forth in Sections 2.07(b) and (c), above;
- (ii) If desired and paid for by NASSIRI, issue an Owner's Policy of Title Insurance for the Exchange Property subject only to the Approved Exceptions;
- (iii) Record the Quitclaim Deed and the Exchange Property Easement;
- (iv) Deliver to NDOT, less ½ any applicable Escrow or Escrow Agent fees for handling this transaction, the Exchange Compensation; and
- (v) Prepare and deliver to the Parties a closing statement.

2.08 NDOT Release. NDOT hereby fully releases and forever discharges NASSIRI and his agents, employers, employees, attorneys, insurers, successors, and assigns, of and from all claims, known or unknown, asserted or unasserted, of whatever nature, now existing or hereafter arising, including but not limited to claims for attorney's fees and costs, relating in any way to the Lawsuit, or any matters asserted therein, or which could have been asserted therein, or its subject matter.

2.09 NASSIRI Release. NASSIRI hereby releases and forever discharges: (i) the Lawsuit, or any matters asserted therein, or which could have been asserted therein, or its subject matter, including but not limited to any claims related to the location on the Property of a public highway and necessary incidents thereto, and any claims for any severance damages to the remainder of NASSIRI's property; and (ii) the physical condition of the Exchange Property as of the Execution Date or matters affecting title or claims thereto.

2.10 NDOT Ownership. NASSIRI represents and warrants that, to the best of his knowledge, no third party has any right, title, or interest in the Fee Acquisition or TE or Teardrop TE land, and Nassiri covenants that he shall take no action between the Execution Date and Closing Date that will result in any third party having any right, title, or interest in or to the Fee Acquisition, TE, or Teardrop TE.

2.11 Property Damage. NASSIRI shall be responsible for any and all risk and liability for any injury or damage to persons or personal property or for any injury or damage to the Subject Property, including but not limited to any and all repairs and/or maintenance to the Property, until the Final Judgment and Final Order of Condemnation is recorded with the Clark County, Nevada Recorder. NDOT shall be responsible for any and all risk and liability for any injury or damage to persons or personal property or for any injury or damage to the Exchange Property, including but not limited to any and all repairs and/or maintenance to the Exchange Property, until the Closing Date.

2.12 Condition of TE and Teardrop TE. NDOT shall leave the TE and Teardrop TE in as neat and presentable condition as it existed prior to NDOT's use of the TE and Teardrop TE, with

all fences, structures and other property belonging to NASSIRI that NDOT may remove or relocate in order to complete the Project to be replaced as nearly in their original condition as is reasonably possible.

2.13 Civil Rights Act. The regulations pertaining to nondiscrimination and Title VI of the Civil Rights Act of 1964, as contained in Title 23, Code of Federal Regulations Part 200, and Title 49, Code of Federal Regulations Part 21, are hereby incorporated by reference and made a part of this Agreement.

2.14 NRS Chapter 408. NDOT shall have the right to adapt and improve the whole or any part of the Property in accordance with the provisions of NRS Chapter 408, including but not limited to NRS 408.487.

2.15 Highway Engineer's Stationing. All Highway Engineer's Stationing is approximate and subject to slight adjustment as necessary to meet construction requirements. To the extent adjustments due to Highway Engineer's Stationing result in a net Fee Acquisition more than one hundred (100) square feet greater or less than 183,823 square feet, the rate of Twenty-Three dollars (\$23.00) per square foot shall be applied to such net change and a credit or invoice generated by NDOT at the conclusion of the Project or at such earlier time as the net area can be finally calculated. NDOT shall pay any credit owing Nassiri hereunder within sixty (60) days of calculating the final net Fee Acquisition, or, alternatively, Nassiri shall pay any invoice generated by NDOT hereunder within sixty (60) days of receipt.

2.16 Extension of TE and Teardrop TE Term. The termination date of the TE and Teardrop TE has been established in compliance with the best available information on the time frame needed for the Project. If NDOT determines that circumstances warrant an extension of the term of the TE and Teardrop TE to complete the Project, NASSIRI shall grant such an extension to NDOT at a rate of \$500.00 per month.

2.17 No Liability. By entering into this Agreement, no party shall be deemed to admit: (i) any liability for any claims, causes of action, or demands; (ii) any wrong doing or fault; nor (iii) violation of any law, precedent, rule, regulation, or statute. Further, nothing contained in this Agreement may be construed as an admission against the interest of any party.

2.18 Attorney's Fees. If any action is commenced to enforce the terms of this Agreement, the prevailing party shall be entitled to recover all of its expenses related to such action, including but not limited to, its reasonable attorney's fees and costs.

2.19 Acknowledgments. The parties mutually understand, agree, and warrant: (i) that NDOT and NASSIRI deny the legal liability and damages alleged in the Lawsuit, that the payment and distribution of the Condemnation Proceeds, and execution of the Judgment, as provided herein is not to be construed as admissions of liability on the part of NDOT or NASSIRI, but such payment and distribution is solely in compromise and settlement of disputed claims, and the amount of the

Condemnation Proceeds is not an admission by any party as to the fair market value of the Subject Property, or any claims for damages; (ii) that the releases contained herein extend and apply to and also cover and include all unknown, unforeseen, unsuspected, and unanticipated injuries, claims, damages, losses, and liabilities, if any, arising from the matters addressed herein; (iii) that no promise or inducement has been offered except as herein set forth; (iv) that this settlement is in good faith and is equitable; (v) that this Agreement is executed without reliance upon any statement or representation by any party or its representatives concerning the nature and extent of the claimed damages or legal liability therefor; (vi) the parties are legally competent to execute this Agreement and to accept full responsibility therefore; (vii) that this Agreement and the releases set forth herein have been carefully read in their entirety by the Parties, who have had the benefit and advice of counsel of their choosing, and this Agreement and the releases set forth herein are known by the Parties to be in full and final and complete compromise, settlement, release, accord and satisfaction, and discharge of all claims and actions as above stated; and (viii) that in entering into this Agreement and the settlement and releases that are encompassed herein, the Parties are acting freely and voluntarily and without influence, compulsion, or duress of any kind from any source, including, but not limited to, any other party or parties, their attorneys, representatives, or anyone acting or purporting to act on behalf of any party.

2.20 Integration. This Agreement constitutes the entire Agreement by and between the Parties and supersedes and replaces any and all previous agreements entered into or negotiated between the Parties.

2.21 Assignment. This Agreement shall not be assigned by NASSIRI, in whole or in part, to any third party, except to a buyer of all of the property NASSIRI owns within Parcel Number 177-08-803-002 as of the Execution Date, without the approval of NDOT in writing, and only then in the event such third party agrees to be bound by the terms herein. Any such assignment will not relieve NASSIRI of any obligations to NDOT hereunder.

2.22 Amendments. This Agreement may not be amended or modified except in writing and signed by each of the Parties.

2.23 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Nevada.

2.24 Counterparts. This Agreement may be executed in any number of counterparts confirmed by facsimile signatures transmitted by telephone, each of which shall be deemed a duplicate original.

2.25 Successors and Assigns. This Agreement shall be binding upon and shall inure to the benefit of the Parties hereto and their respective heirs, executors, administrators, personal representatives, successors, or assigns, as the case may be.

2.26 Notices. Any Notice required or desired to be given under this Agreement shall be

in writing and personally hand delivered, given by overnight express delivery with receipt, or given by United States registered or certified mail, postage prepaid, return receipt requested. All Notices shall be sent to the receiving party at the following address or at such other address as the party may from time to time direct in writing:

If to NASSIRI:  
6590 Bermuda Road  
Las Vegas, Nevada 89119

With a copy to:  
Michael Chapman, Esq.  
9585 Prototype Court, #C  
Reno, Nevada 89521  
Fax: (775)827-1872

If to NDOT:  
Nevada Department of Transportation  
Attn: Jeffrey Fontaine, P.E., Director  
1263 S. Stewart St.  
Carson City, Nevada 89712

With a copy to:  
Gregory J. Walch, Esq.  
Santoro, Driggs, Walch et al.  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101  
Fax: (702)791-0308

For purposes of this Agreement, Notices shall be deemed to have been given, delivered, or received upon personal delivery thereof or seventy-two (72) hours after having been deposited in the United States mail as provided herein.

2.27 Headings. All headings and subheadings employed within this Agreement are inserted only for convenience and ease of reference and shall not be considered in the construction or interpretation of any provision of this Agreement.

2.28 No Third Party Beneficiaries. This Agreement is for the benefit of the State of Nevada on relation of its Department of Transportation and NASSIRI only, and is not for the benefit of any other person or entity. Without limiting the generality of the preceding sentence, the Parties hereto agree that there are no third-party beneficiaries of this Agreement.

2.28 No Presumption Regarding Drafter. The Parties acknowledge and agree that the terms and provisions of this Agreement have been negotiated and discussed between NDOT and NASSIRI, and that this Agreement reflects their mutual agreement regarding the subject matter of this Agreement. Because of the nature of such negotiations and discussions, it would not be appropriate to deem either Party to be the drafter of this Agreement, and therefore no presumption for or against the drafter shall be applicable in interpreting or enforcing this Agreement.

...

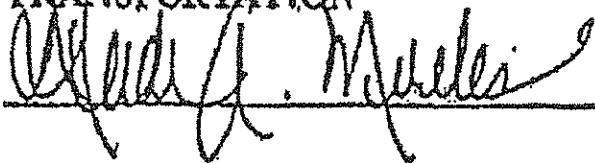
...



2.29 Time is of the Essence. The Parties acknowledge that time is of the essence in every aspect of this Agreement.

THE STATE OF NEVADA, ON  
RELATION OF ITS DEPARTMENT OF  
TRANSPORTATION

FRED NASSIRI



Date: \_\_\_\_\_

By: Heidi A. Nirelas  
Its: Chief Right-of-Way Agent  
Date: April 29, 2005

Approved as to Legality and Form:

SANTORO, DRIGGS, WALCH,  
KEARNEY, JOHNSON & THOMPSON

CHAPMAN LAW OFFICE

By: \_\_\_\_\_  
GREGORY J. WALCH, ESQ.  
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Phone: (702) 791-0308  
Attorneys for Plaintiff The State of  
Nevada, on relation of its Department  
of Transportation

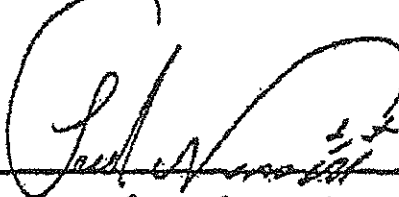
By: \_\_\_\_\_  
MICHAEL G. CHAPMAN, ESQ.  
Nevada Bar No. 1630  
9585 Prototype Court, #C  
Reno, Nevada 89521  
Phone: (775) 827-1866  
Attorney for Defendant Fred Nassiri



2.29 Time is of the Essence. The Parties acknowledge that time is of the essence in every aspect of this Agreement.

THE STATE OF NEVADA, ON  
RELATION OF ITS DEPARTMENT OF  
TRANSPORTATION

FRED NASSIRI



Date: 4-28-05

By: \_\_\_\_\_  
Its: \_\_\_\_\_  
Date: \_\_\_\_\_

Approved as to Legality and Form:

SANTORO, DRIGGS, WALCH,  
KEARNEY, JOHNSON & THOMPSON

CHAPMAN LAW OFFICE

By: \_\_\_\_\_  
GREGORY J. WALCH, ESQ.  
Nevada Bar No. 4780  
KIRBY C. GRUCHOW, JR., ESQ.  
Nevada Bar No. 6663  
400 South Fourth Street, Third Floor  
Las Vegas, NV 89101  
Phone: (702) 791-0308  
Attorneys for Plaintiff The State of  
Nevada, on relation of its Department  
of Transportation

By: \_\_\_\_\_  
MICHAEL G. CHAPMAN, ESQ.  
Nevada Bar No. 1630  
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THE STATE OF NEVADA, ON  
RELATION OF ITS DEPARTMENT OF  
TRANSPORTATION

FRED NASSIRI


\_\_\_\_\_  
By: \_\_\_\_\_  
Its: \_\_\_\_\_  
Date: \_\_\_\_\_

\_\_\_\_\_  
Date: \_\_\_\_\_

Approved as to Legality and Form:

SANTORO, DRIGGS, WALCH,  
KEARNEY, JOHNSON & THOMPSON

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THE STATE OF NEVADA, ON  
RELATION OF ITS DEPARTMENT OF  
TRANSPORTATION

FRED NASSIRI

By: \_\_\_\_\_  
Its: \_\_\_\_\_  
Date: \_\_\_\_\_


Date: \_\_\_\_\_

Approved as to Legality and Form:

SANTORO, DRIGGS, WALCH,  
KEARNEY, JOHNSON & THOMPSON

CHAPMAN LAW OFFICE

By: \_\_\_\_\_  
GREGORY J. WALCH, ESQ.  
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Attorneys for Plaintiff The State of  
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of Transportation

By:  \_\_\_\_\_  
MICHAEL G. CHAPMAN, ESQ.  
Nevada Bar No. 1630  
9535 Prototype Court, #C  
Reno, Nevada 89521  
Phone: (775) 827-1866  
Attorney for Defendant Fred Nassiri



# Nevada Title Company

## ESCROW DISCLAIMER

TO: Nevada Title Company  
ESCROW NO.: 05-05-0001-CLB  
DATE: May 8, 2005

The undersigned parties acknowledge that the Escrow Agent's function is to be a disinterested third party, taking mutual instructions from the parties to a transaction for preparation of documentation to complete the principal's prior agreements.

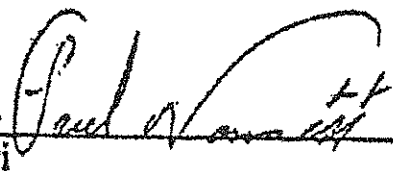
The Escrow Agent is NOT AN ATTORNEY and CANNOT ADVISE the parties as to any legal business, or tax consequences of any provisions or instrument set forth or prepared in connection with this transaction. The undersigned have read and understand each document to which we have affixed our signature and have authorized and instructed Escrow Agent in the manner in which any blanks remaining in said forms are to be completed.

With regard to any questions we may have had pertaining to the Escrow Instructions, the Escrow Agent's role or participation in the escrow, or to the roles of the Real Estate Broker, if any, we have received sufficient explanation. We understand that the subject escrow shall close in accordance with the matters set forth on the documents we have executed.

With regard to any questions we may have had pertaining to the new loan being obtained, if any, we have been made aware that the loan documents were not generated by Nevada Title Company, and that we have received sufficient explanation from the lender providing said loan.

DO NOT AFFIX YOUR SIGNATURES BELOW UNTIL YOU HAVE READ AND AGREED WITH THE MATTERS SET FORTH ABOVE. SHOULD YOU STILL HAVE QUESTIONS WITH REGARD TO THE ABOVE, YOU ARE ADVISED TO SEEK THE ADVICE OF AN INDEPENDENT LEGAL COUNSEL.

BUYERS:

  
Fred Nassiri

SELLERS:

State of Nevada Department of Transportation

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_



## Nevada Title Company

### ESCROW DISCLAIMER

TO: Nevada Title Company  
ESCROW NO.: 05-05-0001-CLB  
DATE: May 8, 2005

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BUYERS:

\_\_\_\_\_  
Fred Nassiri

SELLERS:

State of Nevada Department of Transportation

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

FIRST AMENDMENT TO SETTLEMENT AGREEMENT  
AND RELEASE OF ALL CLAIMS

This First Amendment to Settlement Agreement and Release of All Claims (the "First Amendment") is made and entered into this 17<sup>th</sup> day of June, 2005, by and among The State of Nevada, on relation of its Department of Transportation ("NDOT" or "Plaintiff") and Fred Nassiri, a resident of Clark County, Nevada ("NASSIRI" or "Defendant", and together with NDOT, "the Parties") to amend that certain Settlement Agreement and Release of All Claims (the "Settlement Agreement") entered into by the Parties on or about April 28, 2005.

I.

Recitals

1.01 The Lawsuit. On or about August 31, 2004, NDOT filed its Complaint in condemnation ("Complaint") against, among others, NASSIRI, in the Eighth Judicial District Court, Clark County, Nevada, Case Number A491334 (the "Lawsuit") to acquire certain property owned by NASSIRI in fee simple and other property owned by NASSIRI for a two-year construction easement in connection with the construction and reconstruction of the interchange at I-15 and Blue Diamond Road, and the attendant widening and realignment of Blue Diamond Road (the "Project"). NDOT also named Clark County as a defendant in the Lawsuit. Clark County filed a disclaimer of any interest in the proceedings on October 13, 2004.

1.02 Settlement Agreement. The Parties resolved the Lawsuit through the Settlement Agreement, which, among other things, provided that NDOT would convey to NASSIRI a 1,063,132 parcel of land defined therein as the "Exchange Property" and NASSIRI would pay NDOT TWENTY-THREE MILLION TWO HUNDRED TWENTY NINE THOUSAND FIVE HUNDRED AND NO/100 DOLLARS (\$23,229,500.00) (the "Exchange Compensation") in exchange. The Parties have discovered that the Exchange Property legal description should be changed as set forth in this First Amendment, and that such revised legal description will be used in both the Quitclaim Deed and Exchange Property Easement.

1.03 Settlement Agreement Survival. The Parties also desire that the Settlement Agreement be modified to set forth more clearly the Parties' intention that the representations, warranties, indemnities, and all other rights and obligations of the Settlement Agreement shall not merge with the conveyance or recording of the Quitclaim Deed or Exchange Property Easement.

II.

Agreement

NOW, THEREFORE, in consideration of the mutual promises and agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which the Parties acknowledge, the Parties agree as follows.

2.01 Defined Terms. All capitalized terms used but not otherwise defined herein shall have the meaning ascribed to such terms in the Settlement Agreement.

2.02 Exchange Property Legal Description. The Exchange Property shall be the 1,063,570 square foot property set forth in the legal description and diagram attached hereto as Exhibit A-1 and incorporated herein by this reference. The legal description set forth in Exhibit A-1 shall be attached to and incorporated into the Quitclaim Deed and the Exchange Property Easement.

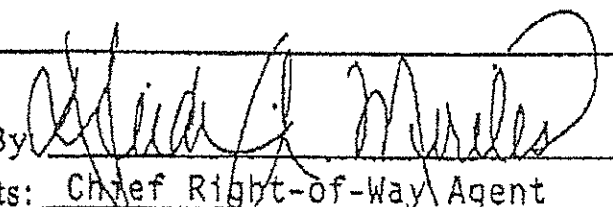
2.03 Exchange Compensation. The Exchange Compensation shall be TWENTY-THREE MILLION TWO HUNDRED THIRTY-NINE THOUSAND FOUR AND 05/100 DOLLARS (\$23,239,004.50) rather than TWENTY-THREE MILLION TWO HUNDRED TWENTY NINE THOUSAND FIVE HUNDRED and NO/100 DOLLARS (\$23,229,500.00) to reflect the additional square footage included in the Exchange Property legal description attached hereto as Exhibit A-1 at TWENTY-ONE AND 85/100 DOLLARS (\$21.85) per square foot.

2.04 Survival. The representations, warranties, indemnities, and all other rights and obligations provided in the Settlement Agreement shall not merge with the conveyance or recording of the Quitclaim Deed or Exchange Property Easement, or with the entry or recording of the Final Judgment.

This First Amendment shall be effective as of the date first written above.

THE STATE OF NEVADA, ON  
RELATION OF ITS DEPARTMENT OF  
TRANSPORTATION

FRED NASSIRI

By:   
Its: Chief Right-of-Way Agent  
Date: June 14, 2005

Date: \_\_\_\_\_

II.

Agreement

NOW, THEREFORE, in consideration of the mutual promises and agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which the Parties acknowledge, the Parties agree as follows.

2.01 Defined Terms. All capitalized terms used but not otherwise defined herein shall have the meaning ascribed to such terms in the Settlement Agreement.

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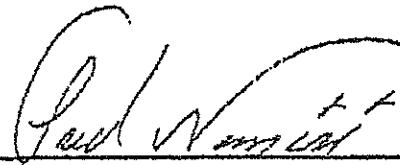
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This First Amendment shall be effective as of the date first written above.

THE STATE OF NEVADA, ON  
RELATION OF ITS DEPARTMENT OF  
TRANSPORTATION

FRED NASSIRI



Date: 8-7-05

By: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_



Approved as to Legality and Form:

SANTORO, DRIGGS, WALCH,  
KEARNEY, JOHNSON & THOMPSON

By: 

GREGORY J. WALCH, ESQ.

Nevada Bar No. 4780

KIRBY C. GRUCHOW, JR., ESQ.

Nevada Bar No. 6663

400 South Fourth Street, Third Floor

Las Vegas, NV 89101

Phone: (702) 791-0308

Attorneys for Plaintiff The State of  
Nevada, on relation of its Department  
of Transportation

CHAPMAN LAW OFFICE

By: \_\_\_\_\_

MICHAEL G. CHAPMAN, ESQ.

Nevada Bar No. 1630

9585 Prototype Court, #C

Reno, Nevada 89521

Phone: (775) 827-1866


Attorney for Defendant Fred Nassiri

Approved as to Legality and Form:

SANTORO, DRIGGS, WALCH,  
KEARNEY, JOHNSON & THOMPSON

CHAPMAN LAW OFFICE

By: \_\_\_\_\_  
GREGORY J. WALCH, ESQ.  
Nevada Bar No. 4780  
KIRBY C. GRUCHOW, JR., ESQ.  
Nevada Bar No. 6663  
400 South Fourth Street, Third Floor  
Las Vegas, NV 89101  
Phone: (702) 791-0308  
Attorneys for Plaintiff The State of  
Nevada, on relation of its Department  
of Transportation

By:  \_\_\_\_\_  
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Nevada Bar No. 1630  
9585 Prototype Court, #C  
Reno, Nevada 89521  
Phone: (775) 827-1866  
Attorney for Defendant Fred Nassiri

# **EXHIBIT 2**



20050617-0003561

Fee: \$20.00 RPTT: \$118,521.45  
N/C Fee: \$25.00

06/17/2005 14:19:00  
T20050111257

Requestor:  
NEVADA TITLE COMPANY

Frances Deane PUN  
Clark County Recorder Pgs: 7

AFTER RECORDING RETURN TO:  
MICHAEL CHAPMAN, ESQ.  
9585 Prototype Court, #C  
Reno, Nevada 89521

26

AND SEND TAX NOTICES TO:  
FRED NASSIRI  
6590 Bermuda Road  
Las Vegas, Nevada 89119

LEGAL DESCRIPTION PREPARED BY:  
HEIDI A. MIRELES  
NEVADA DEPT. OF TRANSPORTATION  
RIGHT-OF-WAY DIVISION  
1263 S. STEWART ST.  
CARSON CITY, NV 89712

(C)

Ptn. of APNs: 177-08-799-011 177-08-899-002, -003, -005, -009, -010 & -011	Project: I-015-1(6)28 E.A. 70090 All of Parcels: I-15-CL-000170 (Old Parcel No. 140) I-15-CL-000171 (Old Parcel No. 141) I-15-CL-000172 (Old Parcel No. 142) I-15-CL-000179 (Old Parcel No. 149) I-15-CL-000180 (Old Parcel No. 150) I-15-CL-000181 (Old Parcel No. 151)
All of APNs 177-08-799-012, -013, -014, -015, -016, & -017 177-08-899-004, -006, -014, & -015	Ptn. of Parcels: I-15-CL-000159 (Old Parcel No. 133) I-15-CL-000160 (Old Parcel No. 41-N) I-15-CL-000161 (Old Parcel No. 134) I-15-CL-000169 (Old Parcel No. 139) I-15-CL-000178 (Old Parcel No. 147)

QUITCLAIM DEED

The STATE OF NEVADA, acting by and through its Department of Transportation ("Grantor"), hereby conveys all of Grantor's right, title, and interest in and to the following described real property to FRED NASSIRI ("Grantee"), a resident of Clark County, Nevada:

See Exhibit "A-1", Legal Description, attached hereto and incorporated herein by this reference (the "Property").

The Property shall have no access in and to Interstate Route 15.

GRANTOR,  
THE STATE OF NEVADA  
ON RELATION OF ITS DEPARTMENT  
OF TRANSPORTATION

By: [Signature]  
Printed Name: Heidi A. Mireles  
Its: Chief Right-of-Way Agent  
Date: June 14, 2005

STATE OF Nevada )  
County of Carson ) SS

On this 4<sup>th</sup> day of June, 2005, before me a Notary Public personally appeared Heidi A. Mireles personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to this instrument and acknowledged that he (she or they) executed it.

Maraput E. Oaci  
Notary Public

GRANTEE,  
FRED NASSIRI

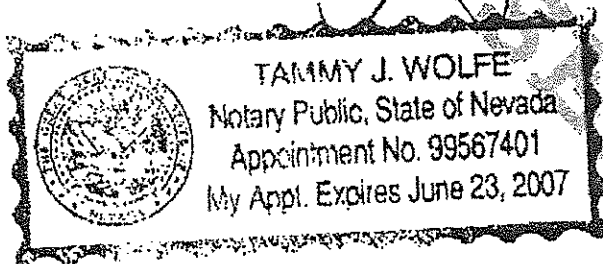
*Fred Nassiri* <sup>++</sup>

Date: 6/15/05

STATE OF                    }  
                                  }SS  
County of                 }

On this 15 day of June, 2005, before me a Notary Public personally appeared Fred Nassiri personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to this instrument and acknowledged that he (she or they) executed it.

*Tammy J. Wolfe*  
Notary Public



FOR SIGNATURE - IN COPY

### EXHIBIT A – 1: LEGAL DESCRIPTION

Said real property situate, lying and being in the County of Clark, State of Nevada, and more particularly described as being a portion of GOVERNMENT LOTS 30, 31, 32, 33, 35, 38, 39, 40, all of GOVERNMENT LOT 34 and a portion of the E 1/2 of the SE 1/4, all in Section 8, T. 22 S., R. 61 E., M.D.M., and more fully described by metes and bounds as follows, to wit:

COMMENCING at a found R/R Spike with punch mark, located at the intersection of Las Vegas Boulevard and Mesa Verde Lane, accepted as being the south one-sixteenth corner common to said Section 8 and Section 9, T. 22 S., R. 61 E., M.D.M., shown and delineated as a "R/R SPIKE" on that certain RECORD OF SURVEY for CLARK COUNTY, No. 00414, filed for record on June 27, 1997, File 089, Page 0086 of SURVEYS, Official Records Book No. 970627, Clark County, Nevada Records; thence S. 0°13'50" E., along the east line of said Section 8, a distance of 1,322.43 feet, (record N. 0°00'27" E. - 1,322.49 feet per said RECORD OF SURVEY), to a found R/R Spike with punch mark, located at the intersection of Las Vegas Boulevard and Windmill Lane, accepted as being the corner common to Sections 8, 9, 17, and 16, T. 22 S., R. 61 E., M.D.M., shown and delineated as a "R/R SPIKE" on said RECORD OF SURVEY; thence N. 69°42'39" W. a distance of 1,702.09 feet to the POINT OF BEGINNING; said point of beginning described as being on the right or easterly right-of-way line of IR-15, 845.66 feet right of and at right angles to Highway Engineer's Station "LNe" 364+79.89 P.O.T.; thence along said right or easterly right-of-way line the following three (3) courses and distances:

- 1) N. 85°40'00" W. - 300.00 feet;
- 2) from a tangent which bears the last described course, curving to the right with a radius of 260.00 feet, through an angle of 80°26'12", an arc distance of 365.01 feet;
- 3) N. 5°13'48" W. - 984.40 feet to the former right or easterly right-of-way line of said IR-15;

thence along said former right or easterly right-of-way line the following three (3) courses and distances:

- 1) from a tangent which bears S. 30°05'59" E., curving to the left with a radius of 600.00 feet, through an angle of 86°41'24", an arc distance of 907.82 feet;
- 2) N. 63°12'37" E. - 500.00 feet;
- 3) N. 63°05'14" E. - 441.62 feet;

thence S. 29°09'04" E. a distance of 215.92 feet to the former right or easterly right-of-way line of said IR-15; thence along said former right or easterly right-of-way line the following five (5) courses and distances:

- 1) S. 58°42'57" W. - 499.31 feet;
- 2) from a tangent which bears the last described course, curving to the left with a radius of 600.00 feet, through an angle of 36°52'12", an arc distance of 386.10 feet;
- 3) S. 21°50'45" W. - 336.79 feet;
- 4) from a tangent which bears the last described course, curving to the right with a radius of 800.00 feet, through an angle of 30°06'10", an arc distance of 420.31 feet;
- 5) S. 51°56'55" W. - 76.01 feet to the point of beginning;

said parcel contains an area of 24.42 acres (1,063,570 square feet).

The Basis of Bearing for this description is the NEVADA STATE PLANE COORDINATE SYSTEM, NAD 83/94 DATUM, East Zone as determined by the State of Nevada, Department of Transportation.

The above described parcel shall have no access in and to IR-15.

SUBJECT TO any and all existing utilities, whether of record or not.



State of Nevada

Declaration of Value

1. Assessor Parcel Number(s)

a) 177-08-799-011, 177-08-799-012, 177-08-799-013, 177-08-799-014, 177-08-799-015, 177-08-799-016, 177-08-799-017, 177-08-899-002, 177-08-899-003, 177-08-899-004, 177-08-899-005, 177-08-899-006, 177-08-899-009, 177-08-899-010, 177-08-899-011, 177-08-899-014, 177-08-899-015

b) \_\_\_\_\_  
c) \_\_\_\_\_  
d) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

2. Type of Property:

- ☒ a) Vacant Land ☐ b) Sgl. Fam. Residence  
☐ c) Condo/Twnhse ☐ d) 2-4 Plex  
☐ e) Apt. Bldg. ☐ f) Comm'l/Ind'l  
☐ g) Agricultural ☐ h) Mobile Home  
☐ i) Other \_\_\_\_\_

FOR RECORDER'S OPTIONAL USE ONLY	
Document/Instrument #:	_____
Book:	Page: _____
Date of Recording:	_____
Notes:	_____

3. Total Value/Sales Price of Property

\$23,239,004.50

Deed in Lieu of Foreclosure Only (value of property)

Transfer Tax Value:

\$23,239,004.50

Real Property Transfer Tax Due

\$118,521.45

4. If Exemption Claimed:

a. Transfer Tax Exemption, per NRS 375.090, Section: \_\_\_\_\_

b. Explain Reason for Exemption: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

5. Partial Interest: Percentage being transferred: 100 %

The undersigned declare(s) and acknowledges, under penalty of perjury, pursuant to NRS 375.060 and NRS 375.110, that the information provided is correct to the best of their information and belief, and can be supported by documentation if called upon to substantiate the information provided herein. Furthermore, parties agree that disallowance of any claimed exemption, or other determination of additional tax due, may result in a penalty of 10% of the tax due plus interest at 1% per month. Pursuant to NRS 375.030, the Buyer and Seller shall be jointly and severally liable for any additional amount owed.

Signature: Carla L. Burchard, Escrow Agent

Capacity: GRANTOR/SELLER

Signature: Carla L. Burchard, Escrow Agent

Capacity: GRANTEE/BUYER

SELLER (GRANTOR) INFORMATION  
(REQUIRED)

BUYER (GRANTEE) INFORMATION  
(REQUIRED)

Print Name: State of Nevada Department of Transportation

Print Name: Fred Nassiri

Address: 1263 South Stewart Street

Address: 6590 Bermuda Road

City/State/Zip: Carson City, NV 89712

City/State/Zip: Las Vegas, NV 89119

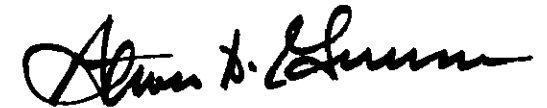
COMPANY/PERSON REQUESTING RECORDING (required if not seller or buyer)

Cont  
3561

Print Name: Nevada Title Company Esc. #: 05-05-0001-CLB  
Address: 2500 N Buffalo, Suite 150  
City: Las Vegas State: NV Zip: 89128  
(AS A PUBLIC RECORD THIS FORM MAY BE RECORDED/MICROFILMED)

ASSESSOR'S COPY

3561



CLERK OF THE COURT

CCAN  
GORDON SILVER  
ERIC R. OLSEN  
Nevada Bar No. 3127  
Email: eolsen@gordonsilver.com  
DYLAN T. CICILIANO  
Nevada Bar No. 12348  
Email: dciciliano@gordonsilver.com  
3960 Howard Hughes Pkwy., 9th Floor  
Las Vegas, Nevada 89169  
Tel: (702) 796-5555  
Fax: (702) 369-2666  
Attorneys for FRED NASSIRI and  
The NASSIRI LIVING TRUST

DISTRICT COURT

CLARK COUNTY, NEVADA

FRED NASSIRI, an individual; NASSIRI  
LIVING TRUST, a trust formed under Nevada  
law,

Plaintiff,

vs.

STATE OF NEVADA, on relation of its  
Department of Transportation; DOE  
GOVERNMENT AGENCIES I-X, inclusive;  
DOE INDIVIDUALS I-X; and DOE ENTITIES  
1-10, inclusive,,

Defendants.

THE STATE OF NEVADA, on relation of its  
Department of Transportation,

Counterclaimant,

vs.

FRED NASSIRI, an individual; DOES I through  
X; and ROE CORPORATIONS I through X,  
inclusive,

Counterdefendants.

CASE NO. A672841  
DEPT. XXVI

**NASSIRI'S ANSWER TO DEPARTMENT  
OF TRANSPORTATION'S  
COUNTERCLAIM**

COMES NOW Plaintiffs, Fred Nassiri and Nassiri Living Trust (collectively "Nassiri"),  
by and through their counsel, the law firm of Gordon Silver, and hereby files this Answer to

1 Department of Transportation's ("NDOT") Counterclaim.

2 **COUNTERCLAIM**

3 1. Answering Paragraph 1 of NDOT's Counterclaim, Nassiri admits each and every  
4 allegation contained therein.

5 2. Answering Paragraph 2 of NDOT's Counterclaim, Nassiri admits each and every  
6 allegation contained therein.

7 3. Answering Paragraph 3 of NDOT's Counterclaim, Nassiri states that they do not  
8 have sufficient knowledge or information upon which to base a belief as to the truth of the  
9 allegations contained therein and upon such ground denies each and every allegation contained  
10 therein.

11 4. Answering Paragraph 4 of NDOT's Counterclaim, Nassiri admits each and every  
12 allegation contained therein.

13 **General Allegations**

14 5. Answering Paragraph 5 of NDOT's Counterclaim, Nassiri admits each and every  
15 allegation contained therein.

16 6. Answering Paragraph 6 of NDOT's Counterclaim, Nassiri admits each and every  
17 allegation contained therein.

18 7. Answering Paragraph 7 of NDOT's Counterclaim, Nassiri admits each and every  
19 allegation contained therein.

20 8. Answering Paragraph 8 of NDOT's Counterclaim, Nassiri admits each and every  
21 allegation contained therein.

22 9. Answering Paragraph 9 of NDOT's Counterclaim, Nassiri admits each and every  
23 allegation contained therein, save and except that the purchase was "fully negotiated" or "arms  
24 length."

25 10. Answering Paragraph 10 of NDOT's Counterclaim, Nassiri admits each and every  
26 allegation contained therein.

27 ...

28 ...

1           11.     Answering Paragraph 11 of NDOT's Counterclaim, Nassiri states that the  
2 provisions of the reference document speak for themselves, and Nassiri admits only that the  
3 referenced provision says what NDOT alleges them to say, and denies the other allegations.

4           12.     Answering Paragraph 12 of NDOT's Counterclaim, Nassiri states that the  
5 provisions of the reference document speak for themselves, and Nassiri admits only that the  
6 referenced provision says what NDOT alleges them to say, and denies the other allegations.

7           13.     Answering Paragraph 13 of NDOT's Counterclaim, Nassiri states that the  
8 provisions of the reference document speak for themselves, and Nassiri admits only that the  
9 referenced provision says what NDOT alleges them to say, and denies the other allegations.

10          14.     Answering Paragraph 14 of NDOT's Counterclaim, Nassiri states that the  
11 provisions of the reference document speak for themselves, and Nassiri admits only that the  
12 referenced provision says what NDOT alleges them to say, and denies the other allegations.

13          15.     Answering Paragraph 15 of NDOT's Counterclaim, Nassiri states that the  
14 provisions of the reference document speak for themselves, and Nassiri admits only that the  
15 referenced provision says what NDOT alleges them to say, and denies the other allegations.

16          16.     Answering Paragraph 16 of NDOT's Counterclaim, Nassiri states that the  
17 provisions of the reference document speak for themselves, and Nassiri admits only that the  
18 referenced provision says what NDOT alleges them to say, and denies the other allegations.

19          17.     Answering Paragraph 17 of NDOT's Counterclaim, Nassiri admits each and every  
20 allegation contained therein.

21          18.     Answering Paragraph 18 of NDOT's Counterclaim, Nassiri admits each and every  
22 allegation contained therein.

23          19.     Answering Paragraph 19 of NDOT's Counterclaim, Nassiri admits each and every  
24 allegation contained therein.

25          20.     Answering Paragraph 20 of NDOT's Counterclaim, Nassiri admits each and every  
26 allegation contained therein.

27          21.     Answering Paragraph 21 of NDOT's Counterclaim, Nassiri admits each and every  
28 allegation contained therein.

1           22.     Answering Paragraph 22 of NDOT's Counterclaim, Nassiri admits each and every  
2 allegation contained therein.

3           23.     Answering Paragraph 23 of NDOT's Counterclaim, Nassiri admits each and every  
4 allegation contained therein.

5           24.     Answering Paragraph 24 of NDOT's Counterclaim, Nassiri denies each and every  
6 allegation contained therein.

7           25.     Answering Paragraph 25 of NDOT's Counterclaim, Nassiri admits each and every  
8 allegation therein, but objects to the averment as the referenced communication was an offer of  
9 compromise as defined in NRS 48.105 and therefore is not evidence. Nassiri will further seek to  
10 strike the averment pursuant to Nev. R. Civ. P. 12(f), as the averment is immaterial, impertinent,  
11 and scandalous.

12           26.     Answering Paragraph 26 of NDOT's Counterclaim, Nassiri admits each and every  
13 allegation therein, save and except Nassiri denies he is seeking either the \$200,000 from the  
14 Chambers payment or damages for the \$7,000,000 lost on the Koroghli Litigation, and he objects  
15 to the averment as the referenced communication was an offer of compromise as defined in NRS  
16 48.105 and therefore is not evidence. Nassiri will further seek to strike the averment pursuant to  
17 Nev. R. Civ. P. 12(f), as the averment is immaterial, impertinent, and scandalous.

18           27.     Answering Paragraph 27 of NDOT's Counterclaim, Nassiri Nassiri admits each  
19 and every allegation therein, save and except Nassiri denies he is seeking either the \$200,000  
20 from the Chambers payment or damages for the \$7,000,000 lost on the Koroghli Litigation, and  
21 he objects to the averment as the referenced communication was an offer of compromise as  
22 defined in NRS 48.105 and therefore is not evidence. Nassiri will further seek to strike the  
23 averment pursuant to Nev. R. Civ. P. 12(f), as the averment is immaterial, impertinent, and  
24 scandalous.

25           28.     Answering Paragraph 28 of NDOT's Counterclaim, Nassiri admits each and every  
26 allegation contained therein.

27           29.     Answering paragraph 29 of NDOT's Counterclaim, Nassiri denies that he is  
28 seeking monetary reimbursement for his costs incurred in connection with the Chambers Claim

1 provisions of the referenced document speak for themselves, and Nassiri admits only that the  
2 referenced provision says what NDOT alleges them to say, and denies the other allegations.

3 30. Answering Paragraph 30 of NDOT's Counterclaim, Nassiri states that the  
4 provisions of the reference document speak for themselves, and Nassiri admits only that the  
5 referenced provision says what NDOT alleges them to say, and denies the other allegations.

6 **First Claim for Relief**

7 **(Breach of Contract)**

8 31. Answering Paragraph 31 of NDOT's Counterclaim, Nassiri realleges their  
9 answers to Paragraphs 1 through 30 of the Counterclaim as though fully set forth herein.

10 32. Answering Paragraph 32 of NDOT's Counterclaim, Nassiri states that the  
11 provisions of the reference document speak for themselves, and Nassiri admits only that the  
12 referenced provision says what NDOT alleges them to say, and denies the other allegations.

13 33. Answering Paragraph 33 of NDOT's Counterclaim, Nassiri denies each and every  
14 allegation contained therein.

15 34. Answering paragraph 34 of NDOT's Counterclaim, Nassiri denies that he is  
16 seeking to recover damages in connection with the Chambers Claim and Koroghli Litigation, to  
17 every other allegation contained there Nassiri states that the provisions of the referenced  
18 document speak for themselves, and Nassiri admits only that the referenced provision says what  
19 NDOT alleges them to say, and denies the other allegations.

20 35. Answering Paragraph 35 of NDOT's Counterclaim, Nassiri denies each and every  
21 allegation contained therein.

22 36. Answering Paragraph 36 of NDOT's Counterclaim, Nassiri denies each and every  
23 allegation contained therein; Nassiri further objects on the grounds that attorneys' fees are not  
24 recoverable as special damages pursuant to a breach of contract.

25 **Second Claim for Relief**

26 **(Breach of the Implied Covenant of Good Faith and Fair Dealing)**

27 37. Answering Paragraph 37 of NDOT's Counterclaim, Nassiri realleges their  
28 answers to Paragraphs 1 through 36 of the Counterclaim as though fully set forth herein.

1           38.     Answering Paragraph 38 of NDOT's Counterclaim, Nassiri admits each and every  
2 allegation contained therein.

3           39.     Answering paragraph 39 of NDOT's Counterclaim, Nassiri denies that he is  
4 seeking to recover damages in connection with the Chambers Claim and Koroghli Litigation, to  
5 every other allegation contained there Nassiri states that the provisions of the referenced  
6 document speak for themselves, and Nassiri admits only that the referenced provision says what  
7 NDOT alleges them to say, and denies the other allegations.

8           40.     Answering Paragraph 40 of NDOT's Counterclaim, Nassiri denies each and every  
9 allegation contained therein.

10          41.     Answering Paragraph 41 of NDOT's Counterclaim, Nassiri denies each and every  
11 allegation contained therein; Nassiri further objects that attorneys' fees are not recoverable as  
12 special damages pursuant to a breach of the implied covenant of good faith and fair dealing.

13                               **Third Claim for Relief**

14                               **(Declaratory Relief)**

15          42.     Answering Paragraph 42 of NDOT's Counterclaim, Nassiri realleges their  
16 answers to Paragraphs 1 through 41 of the Counterclaim as though fully set forth herein.

17          43.     Answering Paragraph 43 of NDOT's Counterclaim, Nassiri denies each and every  
18 allegation contained therein.

19          44.     Answering Paragraph 44 of NDOT's Counterclaim, Nassiri admits each and every  
20 allegation contained therein.

21          45.     Answering Paragraph 45 of NDOT's Counterclaim, Nassiri denies each and every  
22 allegation contained therein.

23          46.     Answering Paragraph 46 of NDOT's Counterclaim, Nassiri denies each and every  
24 allegation contained therein.

25          47.     Answering Paragraph 47 of NDOT's Counterclaim, Nassiri denies each and every  
26 allegation contained therein; Nassiri further objects that attorneys' fees are not recoverable as  
27 special damages pursuant to a cause of action for Declaratory Relief.

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**Fourth Claim for Relief**  
**(Attorney's Fees for Special Damages)**

48. Answering Paragraph 48 of NDOT's Counterclaim, Nassiri realleges their answers to Paragraphs 1 through 47 of the Counterclaim as though fully set forth herein.

49. Answering Paragraph 49 of NDOT's Counterclaim, Nassiri denies each and every allegation contained therein.

50. Answering Paragraph 50 of NDOT's Counterclaim, Nassiri denies each and every allegation contained therein.

51. Answering Paragraph 51 of NDOT's Counterclaim, Nassiri denies each and every allegation contained therein.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Nassiri alleges that the averments contained in NDOT's Counterclaim fail to state a claim against Nassiri upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

It has been necessary for Nassiri to retain the services of an attorney to defend this action and a reasonable sum should be allowed Nassiri as for attorney's fees, together with their costs expended in this action.

THIRD AFFIRMATIVE DEFENSE

Nassiri alleges that the negligence of NDOT exceeds that of Nassiri, if any, and that NDOT is thereby barred from any recover.

FOURTH AFFIRMATIVE DEFENSE

Nassiri alleges that NDOT fails to name a party necessary for full and adequate relief essential in this action.

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FIFTH AFFIRMATIVE DEFENSE

Nassiri has not sought damages based on the Chambers Claim and Koroghli Litigation and therefore NDOT's counterclaim fails to state a claim against Nassiri upon which relief can be granted.

SIXTH AFFIRMATIVE DEFENSE

NDOT is constrained from invoking equitable jurisdiction and an equitable remedy because it has not come before this Court with clean hands.

SEVENTH AFFIRMATIVE DEFENSE

Nassiri alleges that at the time and place averred in the Counterclaim, NDOT failed to pay any consideration for the agreement which it now claims is breached.

EIGHTH AFFIRMATIVE DEFENSE

Nassiri alleges that at all times relevant hereto the alleged agreement entered into between NDOT and Nassiri was unenforceable and in violation of the Statue of Frauds and therefore void.

NINTH AFFIRMATIVE DEFENSE

NDOT has failed to mitigate damages.

TENTH AFFIRMATIVE DEFENSE

In order to induce Nassiri to enter into the alleged contract, NDOT represented to Nassiri an overpass design, which representations were false and fraudulent and were known to NDOT to be false and fraudulent when made, but which Nassiri believed to be true, and which induced Nassiri to enter into the contract which they would not have entered into had they known the truth regarding those representations.

ELEVENTH AFFIRMATIVE DEFENSE

NDOT is estopped from asserting any cause of action whatever against Nassiri.

TWELFTH AFFIRMATIVE DEFENSE

NDOT is barred from recovering any special damages herein for failure to specifically allege the items of special damage claimed, pursuant to Nevada Rules of Civil Procedure 9(g).

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THIRTEENTH AFFIRMATIVE DEFENSE

NDOT is barred by the Economic Loss Doctrine from bringing tort claims for purely economic damages and losses.

FOURTEENTH AFFIRMATIVE DEFENSE

The liability, if any, of Nassiri must be reduced by the percentage of fault of others, including NDOT.

FIFTEENTH AFFIRMATIVE DEFENSE

The damages, if any, suffered by Nassiri must be reduced by the amount of monies owed by NDOT to Nassiri.

SIXTEENTH AFFIRMATIVE DEFENSE

NDOT materially breached its contractual obligations to Nassiri, thereby excusing any further performance by Nassiri of their contractual obligations.

SEVENTEENTH AFFIRMATIVE DEFENSE

The claim of breach is barred as a result of NDOT's failure to satisfy conditions subsequent.

EIGHTEENTH AFFIRMATIVE DEFENSE

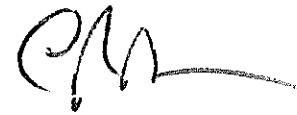
Pursuant to NRCP 11, as amended, all possible affirmative defenses may not have been alleged herein insofar as sufficient facts were not available after reasonable inquiry upon the filing of Nassiri's answer, and therefore, Nassiri reserves the right to amend this answer to allege additional affirmative defenses if subsequent investigation warrants.

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1 WHEREFORE, Nassir prays that NDOT take nothing by way of its Counterclaim on file  
2 herein and that Nassiri be awarded reasonable attorney's fees and costs and such other and  
3 further relief as the Court may deem just and proper for having to defend against NDOT's  
4 Counterclaim.

5 Dated this 25<sup>th</sup> day of November, 2013.

6 GORDON SILVER

7 

8 ERIC R. OLSEN

9 Nevada Bar No. 3127

10 DYLAN T. CICILIANO

11 Nevada Bar No. 12348

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13 Las Vegas, Nevada 89169

14 (702) 796-5555

15 Attorneys for FRED NASSIRI and

16 The NASSIRI LIVING TRUST

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, on relation of its  
Department of Transportation,

Petitioner,

vs.

Case No. 70098

THE EIGHTH JUDICIAL DISTRICT  
COURT, COUNTY OF CLARK, STATE OF  
NEVADA, AND THE HONORABLE  
GLORIA STURMAN, DISTRICT JUDGE,

Respondents,

and

FRED NASSIRI, individually and as trustee of  
the NASSIRI LIVING TRUST, a trust formed  
under Nevada law,

Real Party in Interest.

**APPENDIX VOLUME 1, part 3**

**TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION**

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<b>Document Description</b>	<b>Volume Number</b>	<b>Bates Number</b>
Amended Complaint	1	PA00015-054
Answer to Amended Complaint and Counterclaim	2	PA00233-282
Answer to the State's Counterclaim	2	PA00283-292
Appendix to Nassiri's Opposition to Motion to Exclude Nassiri's Damages Evidence or Strike His Expert, Keith Harper, MAI	10	PA01841-2091
Appendix to Nassiri's Opposition to Motion to Exclude Nassiri's Damages Evidence or Strike His Expert, Keith Harper, MAI...	11	PA02092-2281
Appendix to Nassiri's Opposition to the State's MPSJs Re Inverse Claim and Contract Claims	5	PA00808-977
Appendix to Nassiri's Opposition to the State's MPSJs Re Nassiri's Inverse Claim and Contract Claims...	6	PA00978-1150
Appendix to the State's Motion for Partial Summary Judgment on Nassiri's Contract Claims	4	PA00504-695
Complaint	1	PA00001-014
Hearing Transcript (4-1-15 Hearing on the State's MPSJ on Nassiri's Inverse Claim and Contract Claims)	13	PA02460-2540
Hearing Transcript (5-19-15 Transcript of Closing Arguments at Bench Trial)	13	PA02541-2634
Hearing Transcript (Motion to Dismiss)	1	PA00156-224
Hearing Transcript (MPSJ on Prayer for Rescission)	7	PA01391-1451
Hearing Transcript (MPSJ Re Rescission Based on Bench Trial Ruling)	9	PA01763-1812
Hearing Transcript.1 (Motion to Exclude Damages Evidence or Strike Harper-Oral Arguments)	12	PA02389-2455
Hearing Transcript.2 (Motion to Exclude Damages Evidence or Strike Harper-Announcement of Ruling)	12	PA02349-2388
Motion for Partial Summary Judgment on Nassiri's Contract Claims	4	PA00596-726
Motion for Partial Summary Judgment on Nassiri's	5	PA00727-754

Prayer for Rescission		
Motion for Partial Summary Judgment on Nassiri's Rescission Claim Based on the Court's Trial Ruling	8	PA01598-1614
Motion for Summary Judgment on Nassiri's Claim for Inverse Condemnation (with Appendix)	3	PA00293-503
Motion to Bifurcate/Confirm the May 4, 2015, Trial as a Bench Trial	7	PA01306-1339
Motion to Dismiss Filed by the State	1	PA00055-108
Motion to Exclude Nassiri's Damages Evidence or Strike His Expert, Keith Harper, MAI	9	PA01649-1746
Notice of Supplemental Authority Re MPSJs Filed by the State	7	PA01239-1249
Opposition to the State's Motion to Bifurcate/Confirm the May 4, 2015, Trial as a Bench Trial	7	PA01340-1390
Opposition to the State's Motion to Dismiss	1	PA00108-136
Opposition to the State's Motion to Exclude Nassiri's Damages Evidence or Strike His Expert, Keith Harper, MAI	9	PA01813-1840
Opposition to the State's MPSJ on Nassiri's Claim for Inverse Condemnation	5	PA00775-807
Opposition to the State's MPSJ on Nassiri's Contract Claims	5	PA00755-774
Opposition to the State's MPSJ on Nassiri's Prayer for Rescission	6	PA01151-1170
Opposition to the State's MPSJ on Nassiri's Rescission Claim Based on Trial Ruling	8	PA01615-1648
Order Re Motion to Bifurcate/Confirm May 4, 2015, Trial as Bench Trial	8	PA01552-1555
Order Re Motion to Exclude Nassiri's Damages Evidence or Strike His Expert, Keith Harper, MAI	12	PA02456-2457
Order Re MPSJ on Nassiri's Claim for Inverse Condemnation	8	PA01536-1543
Order Re MPSJ on Nassiri's Contract Claims	8	PA01526-1535
Order Re MPSJ on Nassiri's Prayer for Rescission	8	PA01544-1551
Order Re MPSJ on Nassiri's Rescission Claim Based on Trial Ruling	12	PA02458-2459
Order Re the State's Motion to Dismiss	1	PA00225-232
Reply in Support of the State's Motion to Dismiss	1	PA00137-155

Reply in Support of the State's Motion to Exclude Nassiri's Damages Evidence or Strike His Expert, Keith Harper, MAI	12	PA02282-2348
Reply in Support of the State's MPSJ on Contract Claims	6	PA01171-1201
Reply in Support of the State's MPSJ on Nassiri's Claim for Inverse Condemnation	7	PA01202-1238
Reply in Support of the State's MPSJ on Nassiri's Prayer for Rescission	7	PA01250-1305
Reply in Support of the State's MPSJ on Nassiri's Rescission Claim Based on Trial Ruling	9	PA01747-1762
Supplemental Trial Brief Filed by Nassiri	8	PA01505-1525
Supplemental Trial Brief Filed by the State	8	PA01494-1504
Trial Brief Filed by Nassiri	8	PA01479-1493
Trial Brief Filed by the State	8	PA01452-1478
Trial Ruling	8	PA01577-1597
Trial Ruling (with Handwritten Changes)	8	PA01556-1576



1        *embodying in whole or in part an agreement*, the court at the request of the  
2        recipient may reform the writing to express the terms of the agreement as  
3        asserted,

4        (a)     if the recipient was justified in relying on the misrepresentation, . . .

5        Restatement (Second) of Contracts, Section 166. The party seeking rescission, however, need not  
6        demonstrate that it was reasonable in relying upon the misrepresentation, if the misrepresentation  
7        was made intentionally by the other party or was fraudulent. *Pac. Maxon, Inc. v. Wilson*, 96 Nev.  
8        867, 870-71, 619 P.2d 816, 817-18 (1980). The Court is clear that it will not allow a party who  
9        knowingly deceives another to profit from its credibility or the negligence of the party who relies  
10       on the representations. *Id.* Similarly, “a recipient's fault in not knowing or discovering the facts  
11       before making the contract does not make his reliance unjustified unless it amounts to a failure to  
12       act in good faith and in accordance with reasonable standards of fair dealing.” *Yee v. Weiss*, 110  
13       Nev. 657, 662, 877 P.2d 510, 513 (1994).

14       The rule adduced in Section 166 “applies when one party is mistaken and the other party,  
15       aware of the mistake, remains silent, because his silence ‘is equivalent to an assertion that the  
16       writing is as the other understands it to be.’” Restatement (Second) of Contracts, Section 166, at  
17       cmt a. Silence to a fact is a declaration that the fact does not exist:

18       (b) where [the silent party] knows that disclosure of the fact would correct a  
19       mistake of the other party as to a basic assumption on which that party is making  
20       the contract and if non-disclosure of the fact amounts to a failure to act in good  
21       faith and in accordance with reasonable standards of fair dealing.

22       (c) where [the silent party] knows that disclosure of the fact would correct a  
23       mistake of the other party as to the contents or effect of a writing, evidencing or  
24       embodying an agreement in whole or in part.

25       Restatement (Second) of Contracts, Section 161.

26       When recognizing unilateral mistake, the Nevada Courts look for “misrepresentation[s]  
27       or fraud by a party with *unequal knowledge* or bargaining skills.” *Pepe v. Eighth Judicial Dist.*  
28       *Court*, 124 Nev. 1499, 238 P.3d 845 (2008) (emphasis added). In *NOLM, LLC*, the Court  
reformed a deed agreement when Clark County, a sophisticated and represented party,  
mistakenly calculated the boundaries of land that had been deeded to the plaintiff, and plaintiff  
knew of the error. 120 Nev. at 740, 100 P.3d at 661. In doing so it relied almost exclusively on

1 Sections 161 and 166 of the Second Restatement of Contracts.

2 This principle applies equally to releases. A release is not valid if it is not fairly and  
3 knowingly made. *Oh v. Wilson*, 112 Nev. 38, 40, 910 P.2d 276, 277 (1996). Rescission or  
4 reformation of a release can be obtained if “the other party had reason to know of the mistake or  
5 his fault caused the mistake.” *Home Savers*, 103 Nev. 357, 358-59, 741 P.2d 1355, 1356-57  
6 (1987). Nevada Court’s explicitly recognize that releases may be rescinded based on inadequate  
7 consideration, the circumstances surrounding the release, or the actual presence of liability.  
8 *Wilson*, 112 Nev. at 39-40, 910 P.2d at 277; *see also Chwialkowski v. Sachs*, 108 Nev. 404, 834  
9 P.2d 405 (1992). The inquiry into consideration is relevant in determining the presence of fraud,  
10 or mistake. *Wilson*, 112 Nev. at 42, 910 P.2d at 279.

11 Furthermore, in determining whether there is a mutual mistake, unilateral mistake or  
12 inadequate consideration, the Court can consider parol evidence, such that an integration  
13 clause—as argued by NDOT (Motion to Dismiss, at p. 18)—does not preclude the Court’s  
14 consideration of extrinsic evidence. *Russ v. Gen. Motors Corp.*, 111 Nev. 1431, 1438, 906 P.2d  
15 718, 723 (1995). In fact, the Nevada Supreme Court declares that a “court should provisionally  
16 receive all credible evidence concerning a party’s intentions to determine whether the language  
17 of a release is reasonably susceptible to the interpretation urged by the party.” *Id.* at 1439, 906  
18 P.2d at 723.

19 Further, discovery must occur before a Court can determine whether rescission or  
20 reformation is appropriate. For instance, the Court in *NOLM, LLC* reformed the contract only  
21 after making a finding of fact that the buyer “knew before purchasing the property that the legal  
22 description was wrong, he intended to take advantage of the County’s error by using it as a  
23 “bargaining chip” if the County opposed his application for an adult use permit on the property”  
24 *NOLM, LLC*, 120 Nev. at 739, 100 P.3d at 660. Consistently, the Court in *Tropicana Pizza, Inc.*  
25 did not reform a sales agreement only after a thorough review of the record revealed that while  
26 Advo should have known of Tropicana Pizza’s mistake belief in the contractual provision,  
27 Advo’s conduct did not rise to the level of a blatant failure to disclose. 124 Nev. 1514, 238 P.3d  
28 861. Likewise, evidence of a unilateral mistake in signing a release is a question of fact. *See*

1 *generally, Wilson*, 112 Nev. at 39, 910 P.2d at 277.

2 Here, NDOT's motion to dismiss cannot be granted based on waiver because there are  
3 ample facts alleged, which if proven, would serve a basis for the rescission or reformation of the  
4 agreements, such that Plaintiffs would not waive their first four causes of action. Under NRCP  
5 12(b)(5), the Court need only consider whether a set of facts could exist that would allow for  
6 reformation or rescission of the agreements.

7 The complaint sets forth several examples of NDOT's fraud and misrepresentation.  
8 Foremost, the consideration paid by Plaintiffs does not reflect the risk associated with the  
9 liability of the property. Even under NDOT's set of facts, Plaintiffs paid an ultra-premium rate  
10 (46.5% above market) for the Exchange Property; a premium rate that NDOT's secret appraisal  
11 attributed in part to un-obscured visibility from the freeway. Now, of course, that value has been  
12 destroyed by the detrimental impact of the "fly-over," over which NDOT had exclusive control  
13 of planning and constructing. More to the point as far as the waivers, it does not account for the  
14 liability associated with claims raised by third-parties. These are all factors that impacted  
15 Plaintiffs' basic assumptions when acquiring the Exchange Property from NDOT and when  
16 executing the releases. NDOT was aware of the risk of liability posed by third-parties,  
17 particularly Alexandria, et al. Plaintiffs were not. Thus, a set of facts does exist that can  
18 maintain equitable relief for rescission or reformation.

19 The State repeatedly uses the term "sophisticated party" when referring to Plaintiffs.  
20 That is a factual assertion with no basis in the Amended Complaint. NDOT, of course, fails to  
21 acknowledge the undisputed roles of the parties, those of citizen and trusted government agency  
22 tasked with serving the people. NDOT is not excused from concealing, misrepresenting, or  
23 remaining silent on the value of the property, of the known risk of liability. Plaintiffs have a right  
24 to trust and rely upon the State's credibility and forthrightness in evaluating the terms of the  
25 agreements. Here, the State, by and through the provided Blue Diamond Interchange Plans,  
26 represented that the Exchange Property would have unabridged visibility from the freeway. The  
27 State also knew the value that visibility gave the Exchange Property. Additionally, NDOT was in  
28 exclusive possession of knowledge regarding the "fly-over," as it was the planning and

1 constructing party. Not only did NDOT conceal this project at the time of the property exchange.  
2 It also concealed this project all the way through 2010, and fostered this concealment when it  
3 provided Plaintiffs, through its agent, with a diagram of construction that omitted the “fly-over.”  
4 It was not until the 60-foot “fly-over” was actually constructed, years after the property  
5 exchange, but that Plaintiffs could have reasonably known of NDOT’s intentions and plans, such  
6 that the releases are the result of unilateral mistake and should be rescinded.

7 **2. The releases are unenforceable as to claims created by NDOT.**

8 NDOT asserts that Plaintiffs released it of any liability “**with respect to any matter**  
9 **affecting the Property.**” (Motion to Dismiss, at p. 11)(emphasis added). The notion that the “as-  
10 is” language of the quitclaim deed and Settlement Agreement acts as a waiver of the primary  
11 claims of this case, i.e. concealment of value, concealment of plans for the property, and third  
12 party claims, is absurd. Clearly, this language applies only to the condition of the property, not  
13 to the State’s concealment of facts. Further, to enforce this term as interpreted by NDOT would  
14 read into the agreement an absurd result. Simply put, it is unconscionable to relieve NDOT of  
15 any liability from concealment, misrepresentation, or caused by NDOT after the property  
16 exchange, and unknown by Plaintiffs at the time of the property exchange.

17 Even assuming that NDOT did not know of the “fly-over,” which is not an analysis that  
18 the Court can consider on NDOT’s NRCP 12(b)(5) motion, the terms are subject to rescission if  
19 they are inherently unfair. Here, NDOT’s ridiculous interpretation of the provisions would allow  
20 NDOT to do anything it pleased to destroy the value of the property without compensation,  
21 including but not limited to the actual taking of the property. This absurdity is magnified if  
22 interpreted to mean that NDOT, by the plain terms of this clause, has the right to act with  
23 impunity and without fear of recourse. As such, there must be a reasonable interpretation of the  
24 “waivers” to exclude instances of NDOT’s unilateral and unanticipated actions after the  
25 exchange of the property. The language clearly refers to condition of the property and nothing  
26 else.

27 ...

28 ...

1                   **3. Under NDOT's interpretation, Plaintiffs received no consideration for the**  
2                   **waiver of third party claims.**

3                   In addition to the arguments raised above, Plaintiffs received no compensation for its  
4                   waiver of rights against third-party claims. As is undisputed by NDOT, including the cost of  
5                   known third-party claims, Plaintiffs spent over \$30 million dollars as a result of acquiring the  
6                   Exchange Property, a property valued by NDOT at \$23 million. Plaintiffs did not pay a  
7                   discounted value that reflected any risk associated with third party claims. The only way that  
8                   NDOT could claim that Plaintiffs received value in excess of the purchase price and "known"  
9                   third-party claims is if the Property somehow had value exceeding \$30 million.

10                  A set of facts exists where this is possible: where the value of the visibility of the  
11                  Exchange Property provides value beyond the purchase price. The State, however, destroyed that  
12                  value when it removed the visibility through the construction of an undisclosed "fly-over." As  
13                  such, it destroyed any consideration that Plaintiffs received for waiving third-party claims, such  
14                  that it invalidated the releases. Therefore, the releases must be rescinded.

15                  **C. THE DISCRETIONARY-ACT IMMUNITY DOCTRINE DOES NOT APPLY**  
16                  **BECAUSE THE DOCTRINE NEITHER RELIEVES NDOT OF THE DUTY TO**  
17                  **EXERCISE REASONABLE CARE OR FROM LIABILITY ARISING FROM**  
18                  **INTENTIONAL TORTS.**

19                  Nevada Revised Statute 41.032(2) provides qualified immunity to state agencies in the  
20                  performance of discretionary acts. *State, Univ. & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 980-  
21                  81, 103 P.3d 8, 14 (2004). NRS 31.032(2), mirroring the Federal Tort Claims Act (FTCA)  
22                  waives sovereign immunity to "to compensate victims of government negligence in  
23                  circumstances like those in which victims of private negligence would be compensated. . . . [The  
24                  act] necessarily protects only those decisions "grounded in social, economic, and political  
25                  policy.'" *Martinez v. Maruszczak*, 123 Nev. 433, 444, 168 P.3d 720, 727-28 (2007).<sup>3</sup>

26                  To be discretionary, the act must involve an "element of judgment or choice." *Id.* at 445,  
27                  168 P.3d at 728. If the act involves an element of judgment or choice, the court must consider

28                  

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<sup>3</sup> See also *Frank Briscoe Co., Inc. v. Clark Cnty.*, 643 F. Supp. 93, 97 (D. Nev. 1986) *aff'd*, 857  
F.2d 606 (9th Cir. 1988)(finding U.S. Supreme Court cases and federal cases interpreting FTCA  
to be precedent in the construction of NRS 41.032(2)).

1 “whether [the] judgment is of the kind that the discretionary-function exception was designed to  
2 shield.” *Id.* at 446, 168 P.3d at 729. It is only if “the injury-producing conduct is an *integral*  
3 *part of governmental policy-making or planning*, if the imposition of liability might jeopardize  
4 the quality of the governmental process, or if the legislative or executive branch's power or  
5 responsibility would be usurped” that immunity will likely attach. *Id.* Government actions which  
6 fail to meet the second requirement remain unprotected by NRS 41.032(2). *Id.* at 447, 168 P.3d  
7 at 729.

8 The Court has later clarified that “while policy decisions involving the consideration of  
9 competing economic, social, and political factors are subject to discretionary-act immunity,  
10 operational level decisions are not.” *Warner v. City of Reno*, 52728, 2010 WL 3791493, at \*2  
11 (Nev. Sept. 28, 2010). “Operational level decisions are those involved in the day-to-day  
12 operations of government and those required to implement the discretionary policy decisions.”  
13 *Id.* The Court has specifically noted that while some amount of discretion is employed by every  
14 action of a government employee, immunity still does not extend to operational decisions. *State*  
15 *v. Webster*, 88 Nev. 690, 694-95, 504 P.2d 1316, 1319-20 (1972).

16 The *Martinez* decision provided further insight into the distinction between discretionary  
17 and operational decisions. There, the Court explained that the decision to create a public hospital  
18 was discretionary, but a State doctor's administration of medicine does not involve policy  
19 considerations, and thus is operational. 123 Nev. at 447, 168 P.3d at 729. Similarly, the State's  
20 decision to construct a highway between two points is a policy determination but subsequent  
21 decisions as to the highway are operational ones, such that the State had to use due care,  
22 otherwise it would be subject to liability. *State v. Webster*, 88 Nev. 690, 693-94, 504 P.2d 1316,  
23 1319 (1972); *Andolino v. State*, 97 Nev. 53, 55, 624 P.2d 7, 9 (1981).

24 Additionally, immunity does not apply when the State acts in bad faith or when an  
25 intentional tort is committed. Specifically, an agent of the State does not have the discretion to  
26 act in bad faith. *Falline v. GNLV Corp.*, 107 Nev. 1004, 1009, 823 P.2d 888, 891-92 (1991). The  
27 United State Supreme Court has further stated that the Discretionary-Act Immunity Doctrine  
28 does not allow Nevada's “agencies to claim immunity for discretionary acts taken in bad faith, or

1 for intentional torts committed in the course and scope of employment.” *Franchise Tax Bd. of*  
2 *California v. Hyatt*, 538 U.S. 488, 493-94 (2003); *see also Kohlrautz v. Oilmen Participation*  
3 *Corp.*, 441 F.3d 827, 835 (9th Cir. 2006).

4 Plaintiffs’ claims premised on bad-faith or intentional torts are exempt from the  
5 Discretionary-Act Immunity Doctrine. Their claims for breach of the implied covenant of good  
6 faith and fair dealing and intentional misrepresentation are not barred by the Discretionary-Act  
7 Immunity Doctrine.

8 The State’s Motion advocates an overly broad notion of discretion that would seemingly  
9 cover any action by NDOT. Nevada’s Supreme Court has been clear that this immunity only  
10 applies when “the injury-producing conduct is an *integral part of governmental policy-making*  
11 *or planning*.” *Martinez*, 123 Nev. at 444, 168 P.3d at 727-28 (emphasis added). The specific  
12 acts complained of here are not an “integral part of government policy making or planning.”

13 Broadly, there are two sets of actions by the State in the facts of this case. The first is the  
14 transaction by which the State acquired the condemned property of Plaintiffs and Plaintiffs  
15 acquired the Exchange Property. To be clear, NDOT condemned a piece of Plaintiffs’ property to  
16 expand a highway. The decision to expand the highway is one of policy making, and  
17 discretionary. Plaintiffs’ claims, however, do not arise from the decision to condemn that  
18 property. Rather, in negotiating that property condemnation, NDOT and Plaintiffs agreed to  
19 transact for a separate property, unaffected by the condemnation. This is removed from NDOT’s  
20 policy making discretion. Even if the decision to sell the Exchange Property could be considered  
21 policy-making, and discretionary, Plaintiffs’ claims do not arise from NDOT’s decision to sell  
22 that property. Rather, Plaintiffs’ claims arise from the knowledge the State had and how it  
23 carried out the decision; that is a “day-to-day” operation of the government that does not require  
24 it to implement its discretionary policy function. *See Warner v. City of Reno*, 52728, 2010 WL  
25 3791493, at \*2 (Nev. Sept. 28, 2010).<sup>4</sup> Furthermore, discretionary-act immunity does not apply  
26 to NDOT’s failure to exercise reasonable care in making disclosures material to the terms of the  
27

28 <sup>4</sup> Surely the NDOT is not arguing a decision to hide information from its citizen is a policy.



1 agreement, and its representations. Misrepresentations are never discretionary. If they were, the  
2 State would be free to make any representation to the public, so long as there was planning or  
3 policy somehow involved.

4 The second set of actions relate to the "fly-over." While NDOT attempts to distance the  
5 two actions from one another, they are inextricable connected. The State took the first step in this  
6 relationship by condemning Plaintiffs' property. It was able to achieve that goal and settle the  
7 matter by selling the Exchange Property (a land-locked, pork chip shaped piece of ground) to  
8 Plaintiffs, and it was able to do this (for a certain price) because the Exchange Property was  
9 visible from the I-15. From its own appraisal (kept from Plaintiffs) NDOT specifically knew that  
10 the visibility of the Exchange Property was key to its having value. At the same time, NDOT  
11 represented to Plaintiffs that this value would be preserved by showing Plaintiffs plans that did  
12 not block it from view. This representation too was an operational decision related to the  
13 purchase of Exchange Property. While NDOT arguably made a discretionary decision in  
14 expanding the interchange and perhaps constructing the "fly-over," its discretionary decision  
15 does not somehow transform a previous representation into a question of government policy  
16 making or planning. Thus, it is not immune from tort for prior operational decisions.

17 **D. AN AFFIRMATIVE EASEMENT WAS CREATED BY AND BETWEEN NDOT**  
18 **AND PLAINTIFFS.**

19 Again, NDOT attempts to separate entirely the construction of the "fly-over" acquisition  
20 of the Exchange Property by Plaintiffs. These two events, however, cannot be separated, because  
21 NDOT sold the Exchange Property to Plaintiffs, the same Exchange Property that it later  
22 devalued when it created the visibility-destroying "fly-over." As such, the right to visibility was  
23 a positive easement for which Plaintiffs provided NDOT valuable consideration.

24 The State relies exclusively on *Probasco v. City of Reno*, 85 Nev. 563, 564, 459 P.2d 772  
25 (1969) for its proposition that Plaintiffs inverse condemnation cause of action is prohibited.  
26 NDOT neglects to explore, or perhaps disclose, the legal significance of the terms used by the  
27 Court in that case. 85 Nev. at 564, 459 P.2d at 773. One must note that *Probasco* was a zoning  
28 case and, most importantly, that property at issue was not acquired from the State. Moreover,



1 *Probasco* actually says that “for eminent domain purposes there is a difference in treatment  
2 between positive easements . . . restrictive covenants, and the implied negative easements,”  
3 concluding that positive easements and restrictive covenants are compensable under the Fifth  
4 Amendment to the constitution. *Id.* The Court also states that “normally [a positive easement] is  
5 created by a legal instrument.” *Id.*, at 565, 459 P.2d at 773. There is, however, no legal  
6 requirement that a positive easement be recorded by legal instrument. Such recording will only  
7 impact the enforceability of the covenant against a subsequent purchaser of the servient estate.

8 At law, a positive easement, also known as affirmative easements, is “an easement that  
9 forces the servient-estate owner to permit certain actions by the easement holder.” Black's Law  
10 Dictionary (9th ed. 2009), easement. “Easements are described as being “affirmative” easements  
11 when they convey privileges on the part of one person or owner of land (the “dominant tract”) to  
12 use the land of another (the “servient tract”) in a particular manner or for a particular purpose.”  
13 *United States v. Blackman*, 613 S.E.2d 442, 445 (Va. 2005). Contrastingly, an easement that  
14 prohibits the servient-estate owner from doing something, such as building an obstruction is a  
15 negative easement. Black's Law Dictionary (9th ed. 2009), easement.

16 Here, there are several facts that distinguish the easement here from a prohibited implied  
17 negative easement. First among these, NDOT granted the Exchange Property to Plaintiffs and is  
18 the owner of the adjacent road, over which Plaintiffs claim an easement. As such, there is privity  
19 between Plaintiffs and NDOT, such that NDOT is bound by implied easements between the  
20 parties. Second, and related to this, NDOT’s appraisal noted that the Exchange Property “would  
21 include and/or benefit from direct visibility along the Interstate 15 right-of-way,” and  
22 specifically established that the visibility had value.<sup>5</sup> (Amended Complaint, at ¶ 21). NDOT  
23 knew the only way it could make the exchange was in granting Plaintiffs the right to unimpeded  
24 visibility of the Exchange Property across NDOT’s servient estate, the road. In fact, NDOT  
25 required that Plaintiffs purchase the property at a value reflecting its visibility to I-15, for the  
26 land-locked, oddly shaped parcel. Furthermore, NDOT knew the value of the visibility to

27 <sup>5</sup> Despite NDOT language, this is not a question of “view”, i.e. what can be seen from the Property, but visibility,  
28 i.e. seeing property from the State’s property.

1 Plaintiffs.

2 As a result of sets of facts in which Plaintiffs purchased the property with the implied or  
3 express use of its visibility across the granting and servient estate, NDOT could have granted  
4 Plaintiffs an affirmative easement to visibility across the road. As affirmative easements are  
5 compensable under an inverse condemnation action, Plaintiffs could prevail on this theory.

6 **E. NDOT IS LIABLE FOR BREACH OF CONTRACT WHEN IT CONSTRUCTED**  
7 **THE BLUE DIAMOND ROAD INTERCHANGE PLANS**

8 The requisite elements of a contract are an agreement which creates an obligation: intent,  
9 offer, acceptance, consideration, mutuality of agreement and obligation. *Matter of Estate of*  
10 *Kern*, 107 Nev. 988, 994, 823 P.2d 275, 278 (1991) (citing Restatement of Contracts §§ 19–24  
11 (1932)). NDOT breached its obligation when it failed to provide Plaintiffs with consideration.  
12 *See generally Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000).

13 NDOT agreed to provide good and valuable consideration to Plaintiffs, in exchange for  
14 \$24 million. (Amended Complaint, at Ex. 2). From the State's appraisal the Court can see that a  
15 material portion of that consideration was the visibility of the Exchange Property from I-15. Not  
16 only was this explicitly considered by NDOT when it calculated the sale price of the Exchange  
17 Property to Plaintiffs, but it was reaffirmed to the Plaintiffs when they were provided a diagram  
18 of the improvement of Blue Diamond Road showing no impairment of visibility.

19 Because NDOT recognized the value Plaintiffs received from the visibility of the project,  
20 then destroyed that value, it cannot now claim to have given consideration for the \$24 million  
21 Plaintiffs paid for the Exchange Property. NDOT received Plaintiffs' value of the visibility, then,  
22 in 2010, the same party deprived Plaintiffs of the consideration by destroying the visibility, for  
23 which it was paid. This constitutes a breach of contract for which Plaintiffs can recover.

24 Furthermore, the construction violated an easement for visibility in breach of the contract  
25 between Plaintiffs and NDOT. Plaintiffs' position is that the easement for visibility is not an  
26 implied, negative easement as discussed in *Probasco*, but even if it were *Probasco* could not  
27 preclude a claim for breach of such a covenant as a matter of contract, as opposed to  
28 condemnation.

1 **F. NDOT BREACHED THE COVENANT OF GOOD FAITH AND FAIR DEALING**  
2 **WHEN IT FAILED TO DISCLOSE MATERIAL FACTS AND WHEN IT**  
3 **DESTROYED THE PROPERTY VALUE.**

4 “It is well established that all contracts impose upon the parties an implied covenant of  
5 good faith and fair dealing, which prohibits arbitrary or unfair acts by one party that work to the  
6 disadvantage of the other.” *Nelson v. Heer*, 123 Nev. 217, 226, 163 P.3d 420, 427 (Nev. 2007)  
7 (citing *University & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 989, 103 P.3d 8, 19 (2004);  
8 *Frantz v. Johnson*, 116 Nev. 455, 465 n. 4, 999 P.2d 351, 358 n. 4 (2000); *Consolidated*  
9 *Generator-Nevada v. Cummins Engine*, 114 Nev. 1304, 1311, 971 P.2d 1251, 1256 (1998).

10 Here, NDOT concealed or otherwise failed to disclose material facts to Plaintiffs that  
11 would have helped them fairly evaluate the Settlement Agreement. Foremost, the Settlement  
12 Agreement was built on NDOT’s purchase of property from Plaintiffs and Plaintiffs purchase of  
13 the Exchange Property from NDOT. The State assessed the value of those properties and gave  
14 the terms upon which it would purchase Plaintiffs’ property and Plaintiffs would purchase the  
15 Exchange Property. While NDOT is now known to have charged a premium assemblage value,  
16 NDOT seemingly did not place an increased value on the property it purchased from Plaintiffs  
17 for its own assemblage. If the price of the property was based on the relative value it provided  
18 the respective party then Plaintiffs property should have included a premium, much like NDOT  
19 assessed to Plaintiffs for the exchange property. NDOT’s failure to do so, which in part would  
20 have been disclosed had they disclosed the appraisal, amounts to an arbitrary and unfair act, as is  
21 its failure to disclose.

22 Additionally, NDOT was aware that Plaintiffs derived value of the exchange parcel from  
23 its visibility to I-15 and traffic flows. NDOT was also aware that Plaintiffs were cognizant of  
24 development of the Blue Diamond Interchange. NDOT provided Plaintiffs with diagrams  
25 illustrating that the Blue Diamond Interchange. Nothing in the diagrams impaired visibility of the  
26 Property, none included a “fly-over”. In fact, the diagram of interchange plans was intended to  
27 show benefit to the Subject Property. Even after NDOT approved the “fly-over” it represented to  
28 Plaintiffs through Las Vegas Paving that there would be no “fly-over.” The knowledge and  
affirmation of the value of the Exchange Property to Plaintiffs and subsequent damage to the

1 value amounts to a breach of the covenant of good faith and fair dealing.

2 NDOT's response seems to be that there is no evidence that NDOT contemplated the  
3 final construction of the "fly-over" at the time of the Settlement Agreement. NDOT's argument  
4 is flawed. On a motion to dismiss, the question is whether any set of facts could satisfy the  
5 elements of the claim. Here, knowledge of the interchange would satisfy the elements of a  
6 breach. NDOT also does not go so far as to say that it was unaware of plans for a "fly-over," just  
7 that it was unaware of the final construction of the "fly-over." In either case, whether the "fly-  
8 over" was a foregone conclusion or merely an idea, given the fact that NDOT charged Plaintiffs  
9 a premium for the visibility, NDOT was obligated to inform Plaintiffs of any consideration of  
10 fly-over. Whether it did is a fact question.

11 Beyond that, the construction of the fly-over destroyed the value of visibility for which  
12 NDOT specifically received consideration. Regardless of what was contemplated in 2005, the  
13 construction of the fly-over violated a covenant as to visibility (whether or not implied) in the  
14 contract. This act of bad faith does not hinge upon what the State planned or foresaw in 2005.

15 **G. NDOT TORTIOUSLY BREACHED THE COVENANT OF GOOD FAITH AND**  
16 **FAIR DEALING BECAUSE THE GOVERNMENT HAS A SPECIAL**  
**RELATIONSHIP WITH PLAINTIFFS.**

17 Under a heightened Summary Judgment standard, the Court would be tasked with  
18 determining whether "a reasonable jury could conclude that a reasonable person would impart  
19 special confidence in the other party and whether that other party would reasonably know of this  
20 confidence." *Hernandez v. Creative Concepts, Inc.*, 862 F. Supp. 2d 1073, 1091 (D. Nev. 2012).  
21 (quoting *Yerington Ford, Inc. v. Gen. Motors Acceptance Corp.*, 359 F.Supp.2d 1075, 1088  
22 (D.Nev.2004) (emphasis omitted), *overruled on other grounds by Giles v. Gen. Motors*  
23 *Acceptance Corp.*, 494 F.3d 865, 881 (9th Cir.2007)).

24 "A "confidential or fiduciary relationship" exists when one reposes a special confidence  
25 in another so that the latter, in equity and good conscience, is bound to act in good faith and with  
26 due regard to the interests of the one reposing the confidence." *Perry v. Jordan*, 111 Nev. 943,  
27 947, 900 P.2d 335, 337 (1995). The Nevada Supreme Court finds that a special relationship may  
28 arise when one party imposes confidence in the other because of that person's position. *Id.*

1 Here a reasonable person would conclude; under a set of facts in which NDOT was  
2 acquiring property through condemnation for the good of the public, then entered into a contract  
3 to resolve the condemnation (including sale of property by the State); that NDOT is bound to act  
4 in good faith toward its citizen. A reasonable person would certainly conclude that a citizen  
5 dealing with the government that exists to serve him and his fellow citizens could be trusted and  
6 that he could place confidence in NDOT's representation and its fair dealing, and that he would  
7 have no reason to believe an entity that serves the people would be anything but candid with the  
8 people. NDOT, in short, cannot argue with a straight fact that it does not have a special  
9 relationship of trust.

10 Plaintiffs can maintain their claim. NDOT had considered or contemplated a Blue  
11 Diamond Interchange at the time of the Settlement Agreement. It showed Plaintiffs what that  
12 would look like. Despite knowing that a "fly-over" would destroy the value of the Exchange  
13 Property, and that a "fly-over" was in fact contemplated, NDOT sold the Exchange Property to  
14 Plaintiffs for an increased price and failed to disclose the potential "fly-over." Even if not  
15 contemplated at the time, the State knew the value of the visibility, and was paid for it.  
16 Expressly or implicitly it agreed to preserve the value, but destroyed it instead. By doing so, and  
17 actually hiding the fact, the State acted in bad faith. Perhaps NDOT will say it simply ignored  
18 Plaintiffs and the agreement they entered. NDOT can never say in this case that it did the right  
19 thing. Therefore, Plaintiffs tortious breach of the covenant of good faith and fair dealing cannot  
20 be dismissed.

21 **H. PLAINTIFFS CLAIM FOR NEGLIGENT MISREPRESENTATION MUST NOT**  
22 **BE DISMISSED BECAUSE NDOT ACTIVELY MISREPRESENTED FACTS TO**  
23 **PLAINTIFFS.**

24 Nondisclosure can also form the basis for a misrepresentation claim. A duty to disclose  
25 arises when "(1) the material fact is known to (or accessible only to) the defendant and (2) the  
26 defendant knows the plaintiff is unaware of the fact and cannot reasonably discover the  
27 undisclosed fact." *Canadian Commercial Workers Indus. Pension Plan v. Alden*, CIV.A. 1184-  
28 N, 2006 WL 456786 (Del. Ch. Feb. 22, 2006) (emphasis added.) Thus, a duty of disclosure may  
exist "when one party to a transaction has sole knowledge or access to material facts and knows

1 that such facts are not known to or reasonably discoverable by the other party.” *Walker v. KFC*  
2 *Corp.*, 728 F.2d 1215, 1221-22 (9th Cir. 1984); *Villalon*, 70 Nev. at 467–68, 273 P.2d at 415  
3 (concluding that in arms-length transactions no duty arises unless the party is in exclusive control  
4 of a material fact); *see also Dow Chem. Co.*, 114 Nev. at 1487, 970 P.2d at 110; *Goodman v.*  
5 *Kennedy*, 18 Cal. 3d 335, 347, 556 P.2d 737, 745 (1976).

6 Here, it is without dispute that NDOT controls development of roads in Nevada, and  
7 that NDOT failed to disclose its development of the Blue Diamond Interchange to Plaintiffs. In  
8 fact, in 2010 NDOT specifically represented, by and through its agents, to Plaintiffs that it was  
9 not developing a “fly-over,” by giving Plaintiffs a plan for the Interchange that did not include  
10 the “fly-over”. At that time NDOT was undeniably developing a “fly-over.” As Plaintiffs did not  
11 learn of the development until after the construction in 2010, they brought their claim within the  
12 three-year period of the Statute of Limitations.

13 Furthermore, NDOT specifically knew and charged Plaintiffs an increased price for the  
14 Exchange Property based on the visibility of the project. A set of facts exists that NDOT  
15 contemplated or otherwise anticipated that it would build a “fly-over” that would in turn  
16 devastate the value of the exchange property. As NDOT had sole access to the information  
17 regarding the potential “fly-over” it was negligent in not disclosing the information to Plaintiffs.  
18 Therefore, Plaintiffs may maintain their action for negligent misrepresentation.

19 **I. LIKE NEGLIGENT MISREPRESENTATION, PLAINTIFFS CAN SUSTAIN A**  
20 **CLAIM FOR INTENTIONAL MISREPRESENTATION BASED ON NDOT’S**  
**FAILURE TO DISCLOSE MATERIAL FACTS KNOWN TO NDOT.**

21 Under Nevada law, a claim for fraudulent misrepresentation generally cannot be based on  
22 nondisclosure. *See Tai-Si Kim v. Kearney*, 838 F. Supp. 2d 1077, 1097 (D. Nev. 2012); (citing  
23 *Epperson v. Roloff*, 102 Nev. 206, 719 P.2d 799, 803–04 (1986) (noting the “general rule” that  
24 “an action in deceit will not lie for nondisclosure”)). Only when a relationship exists would the  
25 suppression or omission of a material fact be equivalent to a false representation. *Nelson v. Heer*,  
26 123 Nev. 217, 163 P.3d 420, 426 (2007). Here, facts exist demonstrating a special relationship  
27 exists between NDOT, a State agency, and members of the tax-paying public.

28 To prevail on this claim at the motion to dismiss stage, Plaintiffs must show that a

1 material fact was available to NDOT and that Plaintiffs were unaware of that fact. As to value,  
2 Plaintiffs were unaware that there had been charged a 46.5% premium for "assemblage."  
3 Arguably, they could have become aware of that in late 2008 when they first obtained a copy of  
4 the State's appraisal. Precisely when they became aware of the secret premium is a question of  
5 fact. In any event, the premium became truly important to Plaintiffs only when the value of the  
6 Property was destroyed by the fly-over's construction in 2010. NDOT would have been aware of  
7 its plans for the development of the Blue Diamond Interchange. When NDOT assessed a  
8 premium to the purchase price of the property for visibility, NDOT represented to Plaintiffs that  
9 the visibility had value. NDOT was aware that Plaintiffs could not know NDOT's plans for the  
10 Blue Diamond Interchange. Therefore, by failing to disclose those facts to Plaintiffs, NDOT can  
11 be liable for intentional misrepresentation.

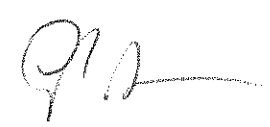
12 As with negligent misrepresentation, Plaintiffs did not become aware of the "fly-over"  
13 and subsequent destruction of the value of their land until after NDOT began constructing the  
14 "fly-over." Even just prior to that time, NDOT represented to Plaintiffs that its Blue Diamond  
15 Interchange would not include a "fly-over." Therefore, not only was NDOT concealing a  
16 relevant fact but it also misled Plaintiffs, at least negligently, in 2010. The action is not time  
17 barred.

### 18 III. 19 CONCLUSION

20 Based on the foregoing, Plaintiffs respectfully requests the Court deny Defendants'  
21 Motion to Dismiss, and issue an order reflecting the same.

22 Dated this 12<sup>th</sup> day of July, 2013.

23 GORDON SILVER

24   
25 ERIC R. OLSEN  
26 Nevada Bar No. 3127  
27 DYLAN T. CICILIANO  
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**EXHIBIT 1**



1        DECLARATION OF DYLAN T. CICILIANO, ESQ. IN SUPPORT OF PLAINTIFFS'  
2        OPPOSITION TO DEFENDANT NDOT'S (1) MOTION TO DISMISS AMENDED  
3        COMPLAINT AND/OR QUASH SERVICE OF THE SUMMONS AND AMENDED  
4        COMPLAINT FOR INSUFFICIENCY OF SERVICE OF PROCESS, OR ALTERNATIVELY,  
5        (2) MOTION TO DISMISS AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM,  
6        AND (3) MOTION TO STRIKE THE PRAYER FOR PUNITIVE DAMAGES

7        I, Dylan Cicilano, make this Declaration in support of Plaintiffs' Opposition to Defendant  
8        NDOT's (1) Motion to Dismiss Amended Complaint and/or Quash Service of the Summons and  
9        Amended Complaint for Insufficiency of Service of Process, or Alternatively, (2) Motion to  
10       Dismiss Amended Complaint for Failure to State a Claim, and (3) Motion to Strike the Prayer for  
11       Punitive Damages:

12       1.    I am competent to testify to the matters asserted herein, of which I have personal  
13       knowledge, except as to those matters stated upon information and belief. As to those matters  
14       stated upon information and belief, I believe them to be true.

15       2.    I am an associate with the law firm of Gordon Silver, and I am counsel of record  
16       for Plaintiffs.

17       3.    On April 22, 2013, I participated, on behalf of Plaintiffs, in a hearing on  
18       Plaintiffs' Motion to Extend Time for Service on Order Shortening Time. Judge Allf granted  
19       Plaintiffs' request to Extend Time for the Service of the Amended Complaint. A minute order,  
20       attached hereto as "Exhibit 1-A," was entered reflecting the same.

21       4.    Plaintiffs' prepared an Order granting Plaintiffs' Motion to Extend Time for  
22       Service on Order Shortening Time on May 6, 2013. I recall signing the Order Granting  
23       Plaintiffs' Motion to Extend Time for Service on Order Shortening Time, on or about May 6,  
24       2013. Furthermore, our file maintenance system corroborates that the Order was created and last  
25       altered on May 6, 2013.

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

28       Executed this 12<sup>th</sup> day of July, 2013.

  
DYLAN CICILIANO

## **EXHIBIT 1A**

REGISTER OF ACTIONS

CASE No. A-12-672841-C

Fred Nassiri, Plaintiff(s) vs. Nevada State of, Defendant(s)§§§§§§

Case Type: Breach of Contract  
Other  
Subtype: Contracts/Acc/Judgment  
Date Filed: 11/30/2012  
Location: Department 26  
Conversion Case Number: A672841

PARTY INFORMATION		
Defendant	Nevada State of	Lead Attorneys William L Coulthard Retained 7023856000(W)
Plaintiff	Nassiri Living Trust	Eric R. Olsen Retained 7027965555(W)
Plaintiff	Nassiri, Fred	Eric R. Olsen Retained 7027965555(W)

EVENTS & ORDERS OF THE COURT	
04/22/2013	<div>Motion (11:00 AM) (Judicial Officer Allf, Nancy) Motion to Extend Time for Service on Order Shortening Time</div> <div>Minutes 04/22/2013 11:00 AM - Mr. Ciciliano appeared telephonically. At request of counsel, COURT ORDERED, Motion to Extend Time for Service is GRANTED. Mr. Ciciliano advised that service w as effectuated on 4/17/13.</div> <div><u>Parties Present</u> <u>Return to Register of Actions</u></div>

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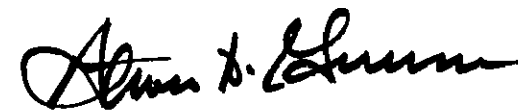
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15 DISTRICT COURT

16 CLARK COUNTY, NEVADA

17 FRED NASSIRI, individually and as trustee  
18 of the NASSIRI LIVING TRUST, a trust  
formed under Nevada law,

19 Plaintiffs,

20 vs.

21 STATE OF NEVADA, on relation of its  
22 Department of Transportation; DOE  
GOVERNMENT AGENCIES I-X,  
23 inclusive; DOE INDIVIDUALS I-X; and  
DOE ENTITIES 1-10, inclusive,

24 Defendants.

Case No.: A672841  
Dept. No.: XXVI

**Defendant NDOT's Reply in Support of:  
(1) Motion to Dismiss Amended Complaint  
and/or Quash Service of the Summons and  
Amended Complaint for Insufficiency of  
Service of Process, or Alternatively, (2)  
Motion to Dismiss Amended Complaint for  
Failure to State a Claim, and (3) Motion to  
Strike the Prayer for Punitive Damages**

Date of Hearing: July 31, 2013  
Time of Hearing: 9:00 a.m.

26 ///

27 ///

I.

Introduction

Clearly unhappy with the deal he struck with NDOT over eight years ago in April 2005 (in large part due to the economic recession and corresponding decreases in real property values all across the city), Nassiri seeks by his Opposition to save his wholly unsupported claims from dismissal with over-the-top rhetoric and hyperbole. Nassiri's belated revisionary tactic is a tacit admission that the claims he pled in his Amended Complaint lack any merit and must be dismissed. And Nassiri's Opposition only magnifies the several fatal deficiencies in his Amended Complaint:

- **Failure to serve the Complaint within the statutory period:** Nassiri offers no valid justification for failing to timely serve his Amended Complaint and timely file his ex parte motion for enlargement of time;
- **Express waiver of claims:** Although Nassiri asserts a new theory that the Settlement Agreement and any waivers therein should be rescinded based on unilateral mistake, he fails to state what the unilateral mistake actually is;
- **Governmental immunity:** Nassiri does not, and cannot, dispute that all of his claims center around NDOT's decisions regarding the sale of the Exchange Property and the ultimate construction of the "fly over." Both are discretionary policy decisions that immunize NDOT from any tort liability under NRS 41.032;
- **Failure to state a claim for relief under NRCP 12(b)(5):**
  - **Inverse condemnation:** Nassiri provides no legal authority or analysis in support of his new theory that he has an affirmative easement for visibility. He is essentially claiming that NDOT was prohibited from constructing the "fly over," but Nevada law does not recognize a negative easement for view or visibility;
  - **Breach of contract:** Nassiri fails to identify any contractual obligation that NDOT breached. With no contractual obligation to breach, there can be no breach of contract;
  - **Breach of the implied covenant:** Nassiri cannot identify any acts that contravene the spirit of the parties' agreement;
  - **Tortious bad faith:** Nassiri fails to cite any legal authority to contest NDOT's position that the parties lack a fiduciary or special relationship. With no showing, this claim likewise fails;
  - **Misrepresentation claims:** Nassiri's new theory that NDOT charged him a visibility premium rather than an assemblage premium and withheld that information from him is unsupported by the facts alleged in his Amended Complaint;

- 1 • **Statutes of limitations have run:** Nassiri fails to fully address NDOT's  
2 argument that all but his inverse condemnation claim are time-barred by their  
3 applicable statutes of limitations; and
- 4 • **Punitive damages are statutorily prohibited:** Nassiri offers no opposition  
5 whatsoever to NDOT's argument that NRS 41.035(1) precludes the recovery of  
6 punitive damages from NDOT, thereby conceding its merits.

7 Given the insufficiency of Nassiri's arguments, his incorporation of new theories of liability that  
8 are unsupported by the facts alleged in his Amended Complaint, and his failure to respond to  
9 several of NDOT's arguments, the Court should quash the service of the Summons and  
10 Amended Complaint as untimely, dismiss Nassiri's Amended Complaint in its entirety, or, at a  
11 minimum, dismiss individual claims and strike Nassiri's punitive damages prayer.

## 12 II.

### 13 Argument

#### 14 A. **Nassiri's Admitted Failure to Properly Serve His Amended Complaint and File His 15 Ex Parte Motion Before the Expiration of 120 Days Warrants Dismissal of this 16 Action.**

17 Nassiri failed to timely serve NDOT and his Amended Complaint must be dismissed  
18 accordingly. Nevada law requires Nassiri to serve the Director of NDOT, the Attorney General,  
19 or a person designated by the Attorney General, and the Chair of the Board of Directors of the  
20 Department of Transportation. *See* NEV. REV. STAT. §§ 408.116 and 41.031. Nassiri admittedly  
21 failed to serve these parties within the 120-day time period set forth in NRCP 4(i). *See* Nassiri's  
22 July 12, 2013, Opp. at 7:16-23. Although Nassiri filed an Ex Parte Motion to Extend Time for  
23 Service on Shortened Time ("Ex Parte Motion"), he filed it after the 120-day period had  
24 expired, he didn't provide any notice to NDOT of the Ex Parte Motion, and further failed to  
25 demonstrate the good cause required by *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 245 P.3d  
26 1198 (Nev. 2010) for filing his Ex Parte Motion late. Therefore, Nassiri's allegations that  
27 NDOT was properly served are wrong.

28 Also meritless are Nassiri's contentions that NDOT had "record notice" of his Ex Parte  
Motion and did not move the Court for reconsideration. Opp. at 8:1-2. E.D.C.R. 2.24(b)  
permits a party to seek reconsideration of a ruling of the court "within 10 days **after service of  
written notice of the order or judgment.**" (Emphasis added). Nassiri failed to serve the Ex

1 Parte Motion on NDOT, giving NDOT no opportunity to oppose the Ex Parte Motion or be  
2 heard on it. And NDOT could not formally move for reconsideration of the Ex Parte Motion as  
3 no order granting the Ex Parte Motion was ever entered.<sup>1</sup>

4 Furthermore, NDOT's discovery of the Ex Parte Motion several weeks after it was filed  
5 and heard does not void NDOT's peremptory challenge or serve as a waiver of any challenge to  
6 the Court's decision on the Ex Parte Motion. Opp. at p.8:13-15. The April 22, 2013, hearing  
7 wherein the Court heard and granted Nassiri's Ex Parte Motion was indeed a hearing on an  
8 uncontested matter because Nassiri failed to provide NDOT with notice of the Ex Parte Motion,  
9 the hearing or the ruling—*there was no possible way that NDOT could have contested the Ex*  
10 *Parte Motion at that time because NDOT did not know of its existence.* Notably, the term "ex  
11 parte" means "done or made at the instance and for the benefit of one party only, and without  
12 notice to, or argument by, any person adversely interested; of or relating to court action taken by  
13 one party without notice to the other." Black's Law Dictionary (9th ed. 2009). Therefore, by  
14 the title of Nassiri's own motion, the "ex parte" hearing that commenced on April 22, 2013, was  
15 on an uncontested matter; any objection to NDOT's peremptory challenge is unwarranted.

16 NDOT's peremptory challenge is valid and does not work to divest NDOT of the right  
17 to challenge Nassiri's untimely service of the Amended Complaint. Nassiri failed to comply  
18 with his service obligations and NDOT's motion to dismiss this action and/or quash service  
19 should be granted.

20 **B. The Express Waivers Are Valid and Enforceable.**

21 **1. No valid ground for rescission or reformation exists.**

22 Realizing his Settlement Agreement waivers are fatal to many of his claims, Nassiri  
23 belatedly seeks rescission and/or reformation of these negotiated 2005 contract provisions.  
24 Nassiri's arguments are misplaced.

25 The law on rescission and/or reformation of a contract based on unilateral mistake is  
26 somewhat similar. "Rescission is an equitable remedy which totally abrogates a contract and  
27

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28 <sup>1</sup> Nassiri filed his Notice of Entry of Order Granting Motion to Extend Time for Service of Amended

1 which seeks to place the parties in the position they occupied prior to executing the contract.”  
2 *Bergstrom v. Estate of DeVoe*, 854 P.2d 860, 861 (Nev. 1993). “[U]nilateral mistake can be the  
3 basis for a rescission if the other party **had reason to know of the mistake** or his fault caused  
4 the mistake.” *Oh v. Wilson*, 910 P.2d 276, 277-78 (Nev. 1995) (internal quotations and citations  
5 omitted) (emphasis added). On the other hand, “[t]he remedy of reformation is available against  
6 a party to a written contract to correct mistakes of fact made in the drafting of the agreement so  
7 as to reflect the intentions of the parties.” *25 Corp., Inc. v. Eisenman Chemical Co.*, 709 P.2d  
8 164, 170 (Nev. 1985). “Reformation of an agreement can be awarded if one party **has**  
9 **knowledge that the other party suffers from a unilateral mistake**,” *Graber v. Comstock*  
10 *Bank*, 905 P.2d 1112, 1116 (Nev. 1995), and should only “**be used to correct errors in**  
11 **expressing the terms of a contract and should not be used to create new ones.**” *Eisenman*,  
12 709 P.2d at 171. (Emphasis added). Neither remedy is appropriate here.

13 *a. Nevada law prohibits partial rescission of the Settlement Agreement.*

14 Nassiri asserts the releases in the Settlement Agreement and Quitclaim Deed “are the  
15 result of unilateral mistake and should be rescinded.” Opp. at 13:6. But there can be no partial  
16 rescission of a contract. *Bergstrom*, 854 P.2d at 861 (holding “a contract is either valid or void  
17 *in toto*” and that “there can be no partial rescission” of a contract). Nassiri’s present request to  
18 partially rescind the Settlement Agreement only as to the waivers and releases contained therein  
19 must, therefore, be denied.

20 *b. Nassiri fails to allege any mistake.*

21 Despite the fact that there can be no partial rescission of a contract, Nassiri fills his  
22 Opposition with numerous pages of the law on unilateral mistake and uses that as his basis for  
23 seeking rescission and/or reformation of the waiver provisions in the Settlement Agreement.  
24 Opp. at 9:1-13:6. But Nassiri fails to identify what the mistake actually is and whether NDOT  
25 knew of that mistake, and without these facts, Nassiri has no basis for seeking such remedies.  
26  
27



1 A party seeking rescission or reformation based on a unilateral mistake must actually  
2 plead facts identifying the mistake. Nassiri's Amended Complaint does not. Nassiri fails to  
3 allege that there was a mistake in the sales price of the Exchange Property or that NDOT knew  
4 of the mistake or had knowledge that Nassiri suffered from a unilateral mistake. Nassiri also  
5 fails to allege any facts to establish there was any sort of mistake between the parties at the time  
6 they were negotiating the terms of the Settlement Agreement in 2005 with respect to the "fly  
7 over." Nassiri never alleges that NDOT knew of the final plans for the "fly over" in 2005 and  
8 withheld those plans from him or that NDOT knew, at that time, that Nassiri believed the  
9 Exchange Property would indefinitely enjoy an unobstructed view or visibility from I-15.  
10 Given that there are no factual allegations in the Amended Complaint to support Nassiri's new  
11 unilateral mistake theory, there is no basis to rescind or reform the Settlement Agreement's  
12 written waivers and the terms therein, the waivers bar Nassiri's first four claims for relief, and  
13 these claims must be dismissed.

14 *c. Rescission or reformation based on fraud is not an available remedy.*

15 If Nassiri is instead attempting to seek rescission or reformation of the Settlement  
16 Agreement based on fraud, his request must still be denied as he has not alleged any facts to  
17 support such a remedy. To establish fraud in the inducement of a contract, a party must prove,  
18 *inter alia*, "that the other party made a false representation that was material to the transaction."  
19 *Awada v. Shuffle Master, Inc.*, 173 P.3d 707, 713 (Nev. 2007). No such facts have been pled,  
20 nor do they exist here.

21 Nassiri continues to misconstrue the facts alleged in his own Amended Complaint in a  
22 misguided attempt to salvage his fraud claims. Although this claim is in large part premised on  
23 the "assemblage" premium Nassiri was charged by NDOT, he now claims he was charged a  
24 premium based on "visibility" instead. Opp. at 12:9-11. With respect to his claims regarding  
25 the "fly over," there are no facts in the Amended Complaint to demonstrate that NDOT knew of  
26 the final plans for the "fly over" at the time the parties were negotiating the Settlement  
27 Agreement and that NDOT withheld that information from Nassiri in order to fraudulently  
28 induce him into signing the Settlement Agreement. There are also no facts demonstrating that

1 NDOT fraudulently induced Nassiri into purchasing the Exchange Property by making a  
2 material false representation regarding future plans of the project or that his property would  
3 have unobstructed visibility from I-15. Without such allegations, his fraud claim fails as a  
4 matter of law.

5 Moreover, alleged representations made to Nassiri by a separate entity, Las Vegas  
6 Paving, several years after the parties entered into the Settlement Agreement have no relevancy  
7 to whether or not NDOT fraudulently induced Nassiri to enter into the Settlement Agreement in  
8 2005. Opp. at 13:2-3. Nevertheless, a review of Exhibit 4 to Nassiri's Amended Complaint, the  
9 very diagram that Nassiri claims omitted the "fly over," clearly depicts the "fly over" that was  
10 planned at that time. See Attachment "A" of Exhibit 4 to Nassiri's Amended Complaint on file  
11 herein. Any mention throughout Nassiri's Opposition that the 2010 diagram did not show a "fly  
12 over" or somehow concealed it must, therefore, be disregarded and cannot form the basis for  
13 any of his claims. See Opp. at 13:2-3; 23:7-10; 24:14-15. Given that there are simply no facts  
14 alleged in the Amended Complaint to support rescission of the Settlement Agreement based on  
15 fraud, Nassiri's first four claims for relief must be dismissed.

16  
17 **2. Nassiri was clearly aware of third-party claims and expressly released NDOT  
from any liability arising out of those claims.**

18 Nassiri's attempt to seek damages from NDOT for third-party claims involving the  
19 Exchange Property is nothing short of ludicrous. Clearly realizing the difficulty in attempting  
20 to invalidate the express releases in the Settlement Agreement and Quitclaim Deed wherein he  
21 released NDOT from any liability arising out of third-party claims, Nassiri asserts a new theory  
22 in his Opposition: that he was unaware of these third-party claims. Opp. at 12:16-17. But the  
23 language of the releases and waivers completely belies this new theory.<sup>2</sup>

24 Nassiri was clearly aware of third-party claims prior to entering into the Settlement  
25 Agreement and expressly waived his right to recover any expenses from NDOT related to those  
26

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27 <sup>2</sup> Nassiri also agreed in the Settlement Agreement to obtain a title report for the Exchange Property and  
28 the Settlement Agreement allowed him to terminate the purchase if the report found any exceptions that  
NDOT was unable or unwilling to remove from the property. See Settlement Agreement at ¶ 2.04(b)

1 claims in multiple provisions of the Settlement Agreement and Quitclaim Deed. *See* NDOT’s  
2 Motion to Dismiss at 12:15-13:16. Nassiri expressly acknowledged in both documents that he  
3 was aware of claims by Carolyn Ann Chambers and released NDOT from any liability arising  
4 out of those claims. *See* Settlement Agreement at ¶¶ 2.04(a)-(c); *see also* Quitclaim Deed at 2  
5 attached as Exhibit B to NDOT’s Motion to Dismiss. The same is true for the Koroghli claims.  
6 In the Settlement Agreement, Nassiri “release[d] and forever discharge[d]” all claims relating to  
7 “the physical condition of the Exchange Property as of the Execution Date or **matters affecting**  
8 **title or claims thereto,**” and further acknowledged that he intended this release to “apply to and  
9 also cover and include all unknown, unforeseen, unsuspected, and unanticipated injuries,  
10 claims, damages, losses, and liabilities . . . .” Settlement Agreement at ¶ 2.19(ii) (emphasis  
11 added); *see also* Quitclaim Deed at 2. Therefore, any claims by Nassiri against NDOT for  
12 recovery of third-party expenses are barred by the Settlement Agreement and Quitclaim Deed.

13 Any argument that the construction of the “fly over” “destroyed any consideration that  
14 Nassiri received for waiving third-party claims” and that the releases must, therefore, be  
15 rescinded also fails. *Opp.* at 14:10-13. Although Nassiri voluntarily and contractually accepted  
16 this price while knowing the existence of third-party claims and received his bargained-for  
17 exchange (i.e. the Exchange Property), there can be no partial rescission of the Settlement  
18 Agreement, so this argument fails. *See Bergstrom*, 854 P.2d at 861.

19 **3. The language of the waivers is clear and unambiguous.**

20 Although Nassiri states it is unconscionable to relieve NDOT of any liability from  
21 concealment or misrepresentation, *see Opp.* at 13:14-15, NDOT never makes such an assertion  
22 in its Motion to Dismiss and recognizes Nevada’s prohibition on contractual waiver of  
23 misrepresentation claims, *see* NDOT’s Motion to Dismiss at 11:27-28 fn. 6. The language of  
24 the Settlement Agreement and Quitclaim Deed could not be any clearer. Nassiri purchased and  
25 accepted the Exchange Property “as is, where is, and with all faults” and acknowledged that  
26 NDOT made no “express or implied [warranties] of any kind with respect to any matter  
27

28 attached as Exhibit A to NDOT’s Motion to Dismiss and Exhibit 2 to Nassiri’s Amended Complaint.

1 affecting the [Exchange] Property.” Quitclaim Deed at p.2. Each of Nassiri’s first four claims  
2 for relief relate to the effects of the “fly over” or the price that he paid for the Exchange  
3 Property. He clearly waived his right to bring these claims as they each relate to the Exchange  
4 Property. Nassiri’s first four claims must, therefore, be dismissed.

5 **C. NDOT’s Alleged Acts are Discretionary, Barring Nassiri’s Tort Claims.**

6 Despite Nassiri’s bald rhetoric to the contrary, NDOT’s actions of selling the Exchange  
7 Property and designing and building the I-15/Blue Diamond roadway improvements are  
8 discretionary functions. Since these are discretionary acts involving the exercise of  
9 discretionary functions or the performance of discretionary duties, Nassiri’s tort claims are  
10 barred under NRS 41.032(2).

11 Nassiri alleges his claims arise from the knowledge NDOT had and how it carried out its  
12 decision to sell the Exchange Property, as well as NDOT’s actions relating to the “fly over.”  
13 Opp. at 16:22-23; 17:4. But NDOT’s decision to sell the Exchange Property to Nassiri for a  
14 certain negotiated and agreed-upon price and its later developed plans to construct the “fly  
15 over” years after the parties entered into the Settlement Agreement are discretionary functions,  
16 not “day-to-day” operations of the government. Both involve an element of individual  
17 judgment or choice and are based on considerations of social, economic, or political policy.  
18 *Martinez v. Maruszczak*, 168 P.3d 720, 729 (Nev. 2007); *see also* NDOT’s Motion to Dismiss at  
19 14:10-15:4.

20 Furthermore, NRS 41.032(2) immunizes NDOT “whether or not the discretion involved  
21 is abused.” NEV. REV. STAT. § 41.032(2). “[A]n abuse of discretion necessarily involves at  
22 least two factors: (1) the authority to exercise judgment or discretion in acting or refusing to act  
23 on a given matter; and (2) a lack of justification for the act or inaction decided upon.” *Falline v.*  
24 *GNLC Corp.*, 823 P.2d 888, 891 fn. 3 (Nev. 1991). In comparing an abuse of discretion with  
25 bad faith, “abuse of discretion occurs within the circumference of authority, and an act or  
26 omission of bad faith occurs outside the circumference of authority.” *Id.* In other words, “an  
27 abuse of discretion is characterized by an application of unreasonable judgment to a decision  
28

1 that is within the actor's rightful prerogatives, whereas an act of bad faith has no relationship to  
2 a rightful prerogative even if the result is ostensibly within the actor's ambit of authority." *Id.*

3 Therefore, Nassiri's contentions that NDOT withheld the Appraisal from Nassiri and did  
4 not disclose the "assemblage" premium to him, or that NDOT's later-developed plans to  
5 construct the "fly over" negatively impacted his property, cannot amount to bad faith. Both  
6 were within NDOT's circumference of authority. At the most, they might be characterized by  
7 Nassiri as an abuse of discretion that would not remove NDOT from the protections of NRS  
8 41.032(2). Accordingly, NRS 41.032(2) bars Nassiri's claims for tortious breach of the implied  
9 covenant of good faith and fair dealing, negligent misrepresentation, and intentional  
10 misrepresentation, and NDOT's Motion to Dismiss should be granted as to such claims.

11 **D. Nassiri's Affirmative Easement Theory Fails as a Matter of Law.**

12 Nassiri's interpretation that the *Probasco* case somehow suggests that he has an  
13 affirmative easement is likewise misguided. He alleges no facts in his Amended Complaint  
14 suggesting that he had "a positive easement" for "the right to visibility," and he offers no legal  
15 support or analysis in his Opposition demonstrating how an affirmative easement was created  
16 between the parties. *See* Opp. at 17:17-19:5. Indeed, based on Nassiri's own definition of an  
17 affirmative easement, it is clear that it does not apply here and his claim for inverse  
18 condemnation must be partially dismissed for failure to state a claim.<sup>3</sup>

19 Although Nassiri alleges in his Opposition that he has a positive easement, there are  
20 simply no facts alleged in the Amended Complaint to support such an outlandish theory. In  
21 actuality, Nassiri's facts support a completely opposite theory. A positive or affirmative  
22 easement "indicates the affirmative use of land," while a negative easement "connotes the  
23 power to restrict another's use of land." *Probasco v. City of Reno*, 459 P.2d 772, 774 fn. 1  
24 (Nev. 1969). A major part of Nassiri's action is premised upon NDOT's construction of the  
25 "fly over" that negatively impacted his property. Nassiri is essentially claiming that NDOT  
26

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27 <sup>3</sup> NDOT acknowledges that Nassiri's inverse condemnation claim as to negative impacts to access, if  
28 any, to the Exchange Property remains a claim and is not subject to the present Motion to Dismiss.  
NDOT does, however, reserve all defenses to such claim.

1 should not have constructed the “fly over” because it allegedly impacted the Exchange  
2 Property’s visibility. Therefore, Nassiri is claiming he has an implied negative easement by  
3 attempting to “restrict another’s use of land.” This theory is expressly not recognized in  
4 Nevada.

5 Although Nassiri attempts to salvage his bogus claim by asserting that “this is not a  
6 question of ‘view’, i.e. what can be seen from the Property, but visibility, i.e. seeing property  
7 from the State’s property,” Opp. at 18:27-28 fn. 5, the *Probasco* Court makes no distinction  
8 between compensation for impairment of visibility looking inward and the view looking  
9 outward when it “expressly repudiate[d] the doctrine of implied negative easements [of light,  
10 air, and view] in the context of eminent domain.” *Probasco v. City of Reno*, 459 P.2d 771, 774  
11 (Nev. 1969). Notably, Nassiri fails to cite any Nevada case law permitting compensation for  
12 loss of visibility looking inward.

13 In line with *Probasco*, courts in other jurisdictions have also expressly denied  
14 compensation for loss of visibility. See, e.g., *State ex rel. Missouri Highway and Transp.*  
15 *Com’n v. Dooley*, 738 S.W.2d 457, 469 (Mo.App. 1987) (holding “[c]hange of grade and loss of  
16 visibility is founded on the principle that the state may exercise its police power in changing the  
17 grade and . . . an abutting owner has no property right to be visible by traffic”); *State ex rel.*  
18 *State Highway Commission v. Lavasek*, 385 P.2d 361, 361 (N.M. 1963) (holding “[t]he state  
19 may construct a highway in any manner not inconsistent with or prejudicial to its use for  
20 highway purposes and the mere disturbance of the visibility of an abutter’s property from the  
21 highway by such construction or reconstruction does not give rise to a compensable damage in  
22 the abutter”); *Acme Theaters v. State of New York*, 258 N.E.2d 912 (N.Y. 1970) (holding “there  
23 is no right to be located adjacent to a public highway or to have traffic pass by one’s property.  
24 Our courts have consistently refused to award consequential damages because the owner’s  
25 property is no longer visible to passing motorists”).

26 The holdings in these cases, which are consistent with *Probasco*, should be followed in  
27 the present action. There is no recorded easement for visibility, no express right to visibility in  
28 the Settlement Agreement, no facts alleged to imply that NDOT granted Nassiri any sort of



1 easement for visibility, and no facts alleged that any part of Nassiri's land was physically taken  
2 by the construction of the "fly over." Therefore, Nassiri's visibility theory fails and his claim  
3 for inverse condemnation must be partially dismissed as a matter of Nevada law.

4 **E. Because There is No Mention of Preserving Visibility in the Settlement Agreement,  
5 There is No Breach of Contract.**

6 **1. Nassiri continually fails to identify any contractual obligation that NDOT did  
7 not fulfill.**

8 Nassiri's allegations that NDOT breached the Settlement Agreement by failing to  
9 provide him good and valuable consideration are undermined by the plain and ambiguous terms  
10 of the Settlement Agreement. Opp. at 19:12-22. Nassiri's entire argument in his Opposition is  
11 premised on "the visibility of the Exchange Property from I-15." Opp. at 19:14. But the  
12 Settlement Agreement contains no language regarding the preservation of any view or visibility  
13 or the right to an easement for visibility. There can simply be no breach of the Settlement  
14 Agreement if there is no express contractual obligation for NDOT to preserve the visibility of  
15 Nassiri's Exchange Property.

16 Nassiri's reliance on the language of the Appraisal is also misplaced. Opp. at 18:13-14.  
17 Nassiri admits that he never saw the Appraisal until 2008, long after the 2005 Settlement  
18 Agreement was executed by the parties. Nassiri fails to allege any facts in his Amended  
19 Complaint that the parties ever had any negotiations or discussions regarding the preservation of  
20 any view or visibility prior to entering into the Settlement Agreement. Amended Complaint at ¶  
21 16. Even if they did have such negotiations, "[i]t is well settled, by a long line of decisions of  
22 this court, that, when the parties reduce their contract to writing, all oral negotiations and  
23 stipulations are merged therein." *Gage v. Phillips*, 26 P. 60, 61 (Nev. 1891). The integration  
24 clause in the Settlement Agreement also prohibits Nassiri from alleging that he relied upon any  
25 extrinsic evidence prior to entering into the Settlement Agreement. See Settlement Agreement  
26 at ¶ 2.20. There is also nothing alleged in the Amended Complaint to suggest that there were  
27 any implied terms in the Settlement Agreement, including an implied easement for visibility.  
28 Therefore, any claim that NDOT breached the Settlement Agreement or violated an easement  
for visibility cannot stand and requires dismissal of this claim.

1  
2           **2.       *Nassiri abandons his theory that NDOT's alleged withholding of the 2004 Appraisal amounts to a breach of the Settlement Agreement.***

3           One of the main allegations in Nassiri's Amended Complaint is that NDOT was to  
4 convey the Exchange Property for a just and reasonable price and it failed to do so by  
5 withholding the 2004 Appraisal of the Exchange Property and failing to disclose that it had  
6 charged Nassiri a 45.65% assemblage premium. Amended Complaint at ¶¶ 48-49. Nassiri  
7 completely abandons this theory in his Opposition and instead argues that NDOT charged  
8 Nassiri for visibility and then took it away from him by constructing the "fly over." This new  
9 theory is not pled in the Amended Complaint and should not now be considered by this Court.  
10 There are no allegations in the Amended Complaint that NDOT charged Nassiri a "visibility"  
11 premium. Rather, Nassiri alleges that NDOT charged an "assemblage" premium. *See, e.g.,*  
12 Amended Complaint at ¶ 16 ("[t]he appraisal also concluded that the Exchange Property had a  
13 premium 'assemblage value'"); ¶ 17 (acknowledges "being charged an 'assemblage  
14 premium'"); ¶ 78 ("Defendant, unbeknownst to Plaintiffs, charged Plaintiffs a premium of 46%  
15 based on assemblage"); *see also* pgs. 2-3 of Appraisal attached to Nassiri's Amended Complaint  
16 at Exhibit 3 (stating the valuation of the parcel when taking Nassiri's adjoining parcel into  
17 consideration). Nassiri's recent fabrication of wholly new arguments in his Opposition should  
18 not work to defeat the Motion to Dismiss as to those allegations actually pled in the Amended  
19 Complaint. Nassiri's breach of contract claim must be dismissed.

20           **3.       *Nassiri fails to respond to NDOT's argument that this claim is time-barred.***

21           Nassiri does not deny that his claims that NDOT withheld the Appraisal or written  
22 summary of the basis for amount established as just compensation are time barred by the six-  
23 year limitation period for contract actions in Nevada. Nassiri's failure to respond to this  
24 argument likewise requires dismissal of his breach of contract claim. *See* E.D.C.R. 2.20(e)  
25 ("Failure of the opposing party to serve and file written opposition may be construed as an  
26 admission that the motion . . . is meritorious and a consent to granting the same").  
27  
28



**F. None of Nassiri's Allegations Support a Breach of Implied Covenant of Good Faith and Fair Dealing Claim.**

In a wasted attempt to cure his failure to allege any acts that contravene the spirit of the parties' Settlement Agreement, Nassiri now offers new facts that are neither relevant nor preclude dismissal. NDOT's purchase of property from Nassiri has no relevance to this instant matter. That different piece of property is not the subject of this litigation. The details of those negotiations and whether or not Nassiri requested NDOT pay an assemblage premium for that property were not alleged in the Amended Complaint and cannot form the basis of Nassiri's contractual breach of covenant claim. Nassiri also fails to point to any provision of the Settlement Agreement or point to any law that required NDOT to provide him with a copy of the Appraisal or to reveal the justification for its asking price for the Exchange Property.

Because nothing in the Settlement Agreement requires NDOT to preserve any visibility or view, Nassiri's conclusory assertion that "NDOT was aware that [Nassiri] derived value of the exchange property from its visibility to I-15 and traffic flows" is also meritless. Opp. at 20:21-22. Nassiri has not alleged any facts to demonstrate that NDOT knew about the final construction of the "fly over" at the time the parties negotiated the terms of the Settlement Agreement. There is also no mention in the Settlement Agreement regarding the Blue Diamond Road Interchange development plan, the "fly over," or the preservation of any view or visibility. Any representation made by Las Vegas Paving years after the parties entered into the Settlement Agreement is, therefore, irrelevant. Opp. at 20:26-27 (stating the diagram provided by Las Vegas Paving showed no "fly over"). Although irrelevant at the time the parties were negotiating the Settlement Agreement, the Las Vegas Paving diagram provided to Nassiri in 2010 indeed shows the "fly over" that was planned at that time. *See* Exhibit 4 to Nassiri's Amended Complaint. Therefore, Nassiri's faulty allegations must be disregarded and cannot form the basis for any of his claims.

Lastly, whether he misinterprets the terms of the Appraisal, or is attempting to mislead this Court, nowhere in the Appraisal does it state that "NDOT charged Plaintiffs a premium for the visibility." Opp. at 21:7-10. In fact, Nassiri does not even allege this in his Amended

1 Complaint and raises this theory for the first time in his Opposition. The second scenario in the  
2 Appraisal clearly states the valuation of the parcel when taking Nassiri's adjoining parcel into  
3 consideration. *See* Appraisal at 2-3; NDOT's Motion to Dismiss at 17:4-12. This is the  
4 "assemblage premium" that Nassiri references multiple times throughout his Amended  
5 Complaint. *See, e.g.,* Amended Complaint at ¶¶ 16-17, 78. Any new theory regarding a  
6 "visibility premium" cannot form the basis of this claim. Nassiri's claim for breach of implied  
7 covenant of good faith and fair dealing must be dismissed.

8  
9 **G. Nassiri Offers No Legal Authority in Support of His Position That a Special Relationship Exists Between Him and NDOT.**

10 Nassiri fails to cite any legal authority demonstrating that a "special element of reliance  
11 or fiduciary duty" exists between the parties, requiring dismissal of this claim. *Great Am. Ins.*  
12 *Co. v. General Builders, Inc.*, 934 P.2d 257, 263 (Nev. 1997). This was an arm's length  
13 transaction between two unrelated and sophisticated parties for the purchase of a piece of  
14 property. No fiduciary obligations exist between the parties, there was no inequality of  
15 bargaining power, and the parties expressly acknowledged that the negotiation and drafting  
16 process was a mutual one, that the parties "had the benefit and advice of counsel of their  
17 choosing," and were "acting freely and voluntary." *See* Settlement Agreement at ¶¶ 2.28 and  
18 2.19. In fact, Nassiri had the benefit of Michael G. Chapman, Esq., as his counsel in the  
19 condemnation action that gave rise to the April 2005 Settlement Agreement. Therefore, in  
20 addition to a special relationship lacking between the parties, this "rare and exceptional" claim  
21 should also be dismissed for all of the same reasons as the contractual breach of covenant claim.

22 **H. Nassiri's Negligent Misrepresentation Claim Fails.**

23 **1. Nassiri alleges no facts to support this claim for relief.**

24 Nassiri alleges in his Opposition that "NDOT failed to disclose its development of the  
25 Blue Diamond Interchange to [Nassiri]." Opp. at 23:7. Yet, Nassiri does not allege that NDOT  
26 had final plans to construct the "fly over" at the time the parties entered into the Settlement  
27 Agreement in 2005. If the "fly over" was not designed at that time, then NDOT could not have  
28 made any misrepresentations to Nassiri regarding the "fly over." NDOT simply had no duty to

1 disclose information to Nassiri if that information was unknown to NDOT. Moreover, as Nassiri  
2 argues in his Opposition, a duty to disclose may arise under a circumstance where defendant  
3 knows plaintiff is unaware of a material fact and cannot reasonably discover that fact. *Id.* at  
4 22:23-23:1-5. Here, even if NDOT planned for the “fly over” at the time of Nassiri’s purchase,  
5 Nassiri asserts no facts to suggest that NDOT knew Nassiri was unaware of the “fly over,” and  
6 no facts to suggest that information about the “fly over” was not reasonably discoverable.  
7 Nassiri was admittedly well aware of the Blue Diamond Interchange project. He could have  
8 and should have reasonably inquired as to the long range plans for the project.

9       There is also no term in the Settlement Agreement or any facts alleged in the Amended  
10 Complaint to support Nassiri’s new allegation that NDOT charged him an increased price for  
11 the Exchange Property based on visibility. Opp. at 23:13-14. The parties negotiated the sales  
12 price of the Exchange Property and Nassiri voluntarily and contractually accepted this price.  
13 Nassiri failed to allege facts to support this negligent misrepresentation claim for relief and it  
14 must also be dismissed.

15       **2. *Nassiri fails to respond to NDOT’s argument that this claim is time-barred.***

16       Nassiri again fails to respond to NDOT’s argument that any claim that NDOT did not  
17 accurately disclose the fair market value of the Exchange Property and the 2004 Appraisal is  
18 time-barred by the three-year limitation period for fraud actions. NEV. REV. STAT. §  
19 11.190(3)(d). Nassiri’s failure to respond requires dismissal of this claim. *See* E.D.C.R.  
20 2.20(e).

21       **I. Nassiri’s Intentional Misrepresentation Claim Fails.**

22       **1. *No special relationship exists between NDOT and Nassiri.***

23       Nassiri admits that the only way that his intentional misrepresentation claim can survive  
24 is if a special relationship exists between NDOT and Nassiri. Opp. at 23:21-27. Yet, Nassiri  
25 fails to cite any legal authority demonstrating that any special relationship exists between the  
26 parties. Like the negligent misrepresentation claim, this claim also fails because Nassiri has not  
27 alleged any facts demonstrating that NDOT was aware of material facts that were not accessible  
28 to him, that NDOT had a duty of disclosure to Nassiri, and that NDOT intentionally withheld

1 those facts from him at the time the parties were negotiating the terms of the Settlement  
2 Agreement. Without these predicate facts being properly alleged in the Amended Complaint,  
3 this claim fails and must be dismissed.

4 **2. *The limitation period for fraud actions accrues upon the discovery of the facts***  
5 ***constituting the alleged fraud, not when the facts become “truly important” to***  
6 ***the aggrieved party.***

7 Like the negligent misrepresentation claim, any alleged intentional misrepresentation  
8 made by NDOT regarding the value of the Exchange Property is barred by the three-year  
9 limitation period for bringing a fraud action. *See* NEV. REV. STAT. § 11.190(3)(d). Nassiri’s  
10 own allegations in the Amended Complaint state he discovered that NDOT charged him an  
11 assemblage premium in late 2008. Amended Complaint at ¶ 16. In his Opposition, he states  
12 that “the premium became truly important to [him] only when the value of the Property was  
13 destroyed by the fly-over’s construction in 2010.” Opp. at 24:5-6. That, however, is not the  
14 standard for calculating the limitation period for fraud actions. Fraud actions are “deemed to  
15 accrue upon the discovery by the aggrieved party of the facts constituting the fraud.” NEV. REV.  
16 STAT. § 11.190(3)(d). Because Nassiri admits that he discovered the alleged fraud in 2008, the  
17 three-year limitation period for this claim for relief ran out in 2011. This claim was not timely  
18 brought and must now be dismissed as a matter of law.

19 **J. Nassiri Failed to Respond to NDOT’s Motion to Strike the Prayer for Punitive**  
20 **Damages, Tacitly Conceding its Merits.**

21 Nassiri offers no opposition whatsoever to NDOT’s argument that NRS 41.035(1)  
22 precludes the recovery of punitive damages from NDOT. Pursuant to E.D.C.R. 2.20(e),  
23 “[f]ailure of the opposing party to serve and file written opposition may be construed as an  
24 admission that the motion . . . is meritorious and a consent to granting the same.” Nassiri’s  
25 failure to oppose NDOT’s motion is a tacit admission of its merits, and this Court should grant  
26 NDOT’s motion to strike Nassiri’s prayer for punitive damages. *See* E.D.C.R. 2.20(e).  
27  
28

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III.

Conclusion

For the foregoing reasons, NDOT respectfully requests this Court quash the service of the Summons and Amended Complaint as untimely and dismiss Nassiri's Amended Complaint in its entirety. In the alternative, this Court should dismiss Nassiri's Amended Complaint in its entirety for failure to state a claim upon which relief can be granted and also strike Nassiri's punitive damages prayer.

DATED this 24th day of July, 2013.

Respectfully submitted, by:



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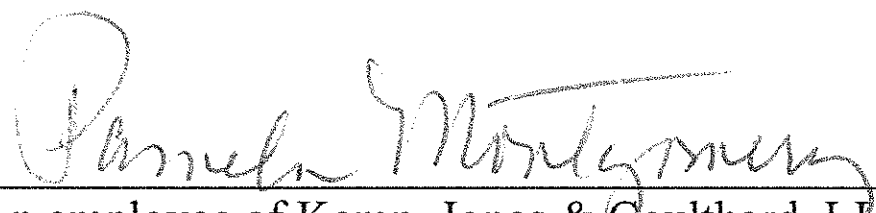
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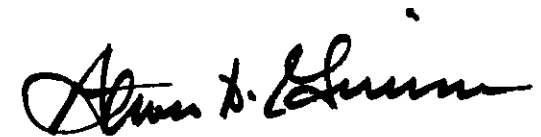
**Certificate of Service**

I hereby certify that on the 24th day of July, 2013, I served a true and correct copy of the above and foregoing Defendant NDOT's Reply in Support of: (1) Motion to Dismiss Amended Complaint and/or Quash Service of the Summons and Amended Complaint for Insufficiency of Service of Process, or Alternatively, (2) Motion to Dismiss Amended Complaint for Failure to State a Claim, and (3) Motion to Strike the Prayer for Punitive Damages via U.S. Mail, properly addressed to the following:

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RTRAN



CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

FRED NASSIRI,

Plaintiff,

v.

NEVADA STATE OF DEPARTMENT OF  
TRANSPORTATION,

Defendant.

CASE NO. A-672841

DEPT. XXVI

BEFORE THE HONORABLE GLORIA STURMAN, DISTRICT COURT JUDGE

WEDNESDAY, JULY 31, 2013

**RECORDER'S TRANSCRIPT  
MOTION TO DISMISS**

APPEARANCES:

For the Plaintiff: WILLIAM L. COULTHARD, ESQ.  
AMANDA KERN, ESQ.  
MONA KAVEH, ESQ.  
Kemp Jones & Coulthard

For the Defendant: ERIC R. OLSEN, ESQ.  
Gordon Silver

RECORDED BY: KERRY ESPARZA, COURT RECORDER

WEDNESDAY, JULY 31, 2013, 10:32 A.M.

1 MR. OLSEN: Eric Olsen for the Plaintiff.

2 MR. COULTHARD: Morning, Your Honor, Bill Coulthard, Mona  
3 Kaveh and Amanda Kern on behalf of the State of Nevada and  
4 Nevada Department of Transportation.

5 THE COURT: Okay.

6 MR. OLSEN: Your Honor, I can only assume their argument  
7 is really, really long because they're coming after us.

8 MR. COULTHARD: Your Honor, it is the State's motion --  
9 Defendant's, NDOT's motion to dismiss -- and really has three  
10 parts. If you want me to try and tackle these issues, I'll be  
11 happy to.

12 THE COURT: Okay.

13 MR. COULTHARD: Your Honor, really our -- the three parts  
14 to the motion. First part, probably, we should deal with is  
15 the motion to quash service of process based upon it being  
16 untimely, and I would suggest, if the Courts rules upon that  
17 then that's dispositive, statutes provide -- the action should  
18 be dismissed without prejudice; that would end today's  
19 arguments. So if it's appropriate, I'll go there first.

20 THE COURT: Okay.

21 MR. COULTHARD: Your Honor, the -- Mr. Nassiri's  
22 Complaint was filed on November 30th, 2012. An Amended  
23 Complaint was filed on March 27th and that -- the original  
24 Complaint was not served, it was filed but not served.



1           And the Amended Complaint was filed on March 27th,  
2 2013, and on March 28th, the day after, they served -- the  
3 Plaintiff served the director of the Nevada Department of  
4 Transportation, and they only served the director of NDOT.

5           However, NRS 408.116 requires that the Complaint  
6 must be personally served upon both the director and the chair  
7 of the Board of the Department of Transportation and/or, in  
8 the absence of the director or chair, then they may be served  
9 alternatively, upon the Secretary of State or one of the  
10 deputy directors. So, they were deficient in that they served  
11 only one of the parties as required under NRS 408.

12           Additionally, 41.031, in an action against the State  
13 of Nevada, a copy of the Complaint must also be served upon  
14 the Attorney General, and they failed to serve, timely serve  
15 that upon the Attorney General.

16           And so, essentially they served NDOT director and no  
17 one else within the 120 days. Shortly -- and the 120 days ran  
18 on April 1st, 2013 and they had failed to effectuate service.  
19 So Ms. Kern, on behalf of NDOT, sent a letter, I believe on  
20 April 12th, 12 days after the expiration of the 120 days,  
21 advising the Plaintiff that they had not properly served NDOT  
22 and citing the statutes that were applicable, that we just  
23 went through, saying you need to effectuate service.

24           Again, we're after now, I believe, 16 days late, the  
25 Plaintiffs file an ex parte motion to enlarge the 120 days and

1 it's clearly, under the rules, an untimely motion. And under  
2 the applicable case law we've cited, the Saavedra v. Sandoval  
3 action, we pointed out the deficiencies in that motion.

4 Number one, it was an ex parte motion. They knew Ms. Kern was  
5 representing NDOT at that juncture and did not provide her  
6 with a copy of the ex parte motion.

7 They had a telephonic conference. We have now seen  
8 the minutes of that hearing, and apparently your predecessor,  
9 Judge Allf, did rule upon that and ruled that the time to  
10 enlarge, the motion to enlarge the 120 days, was granted.

11 However, I think what she did not do and believe the  
12 basis for our challenge, when we look at Saavedra v. Sandoval  
13 is, the Court -- the District Court needed to determine that  
14 there was a basis for allowing the untimely filing of the  
15 motion to enlarge and there are no findings.

16 And there is a request to enlarge that timeframe but  
17 there are no specific findings that there was a basis for  
18 filing that motion to enlarge untimely, which is what the  
19 Court, what the Nevada Supreme Court says that is the primary  
20 consideration for the District Court.

21 In enlarging it, they've got to consider whether  
22 there was a legitimate basis for filing that motion on an  
23 untimely basis and there was no, based upon the motion we've  
24 seen and the affidavit, no evidence to support the untimely  
25 basis. No finding that it was.

1           So you can't then go to the next step under Saavedra  
2 v. Sandoval. So I think that the Court skipped a step, it's  
3 an important step. And because of that, under the statutes,  
4 the case, service of process must be quashed and the motion  
5 should be -- and the Complaint should be dismissed without  
6 prejudice.

7           So that's the first prong of our motion, Your Honor,  
8 and at this point, I guess I would defer to Mr. Olsen to  
9 address that --

10         THE COURT: Okay, Mr. Olsen, respond.

11         MR. COULTHARD: -- because I think we need to get through  
12 the jurisdictional issues.

13         THE COURT: Okay. Great.

14         MR. OLSEN: Your Honor, it's true that the State of  
15 Nevada, NDOT, was served within 120 days. It is also true  
16 that the AG and the governor, who's the director of the board  
17 that needs to be served, were not served. We -- the AG  
18 obviously had notice because Ms. Kern contacted us afterwards  
19 and said: You know, you haven't served the AG or the  
20 governor.

21           She didn't specify, she said we had to serve them  
22 from the statute. We immediately did that and we also filed a  
23 motion to extend the time for service. Your Honor, that  
24 motion's been granted. An order was entered on July 23rd and  
25 I -- we haven't done a notice of entry yet. We just got it

1 last week, but the motion was granted.

2 If counsel wants to file a motion to set aside that  
3 order, then they're going to have to do that. At this point,  
4 their argument for dismissal is moot based on 120 days service  
5 because it's now been granted, service is proper, based on  
6 that order, you know, so it really is a moot issue.

7 You know, we also -- well we can get into those  
8 issues again if -- it's filed. If such a motion is filed.  
9 For now, we submit it on that. We think it should be --

10 THE COURT: Okay, well I -- as Mr. Coulthard cited to  
11 Saavedra Sandoval v. Wal-Mart, that's where the time has run.  
12 I mean there's Scrimmer or Scrimmer, however that's  
13 pronounced, and then this Saavedra Sandoval they're -- they  
14 kind of address slightly different aspects of 4(i).

15 So, I -- what exactly has Judge, you know, the Court  
16 was transferred to this Court. What exactly did Judge Allf  
17 state in her order extending the time?

18 MR. OLSEN: Well, the order -- it's true the order  
19 doesn't specify her findings with respect to the -- to the  
20 motion, Your Honor.

21 THE COURT: Uh-huh.

22 MR. OLSEN: It just simply says: Motion to extend is  
23 granted. That was signed -- interestingly, it was signed on  
24 June 25th apparently, but the Court did not file it until July  
25 23rd.

1 THE COURT: Uh-huh.

2 MR. OLSEN: There's another issue and that is if the --  
3 at that point the Judge had made a determination. I don't  
4 recall exactly when they filed their preempt. It was after,  
5 you know, there was an issue. It was after June 23rd. Well,  
6 she's made a determination on the record --

7 THE COURT: Right.

8 MR. OLSEN: Is that a determination for -- that would  
9 preclude their preempt? That's a separate issue. Again, if  
10 they want to bring a motion to set aside the order we can then  
11 brief that issue as well.

12 THE COURT: Because I think it has to be a contested  
13 ruling. I mean, I think --

14 MR. OLSEN: Well, now they're saying it's contested. Now  
15 they're saying had they been given an opportunity to appear  
16 they would have contested it. By the way, it was sent -- it  
17 was served, not served, it was ex parte. Because even though  
18 we'd known of Ms. Kern's existence, because of negotiations  
19 over the last year and a half, no one had made an appearance  
20 in the case.

21 THE COURT: Correct.

22 MR. OLSEN: So if they were going to appear I don't think  
23 they were going to appear -- object. I mean if they --  
24 someone doesn't appear, I don't think I'm obligated to send  
25 them notice so they can come in.

1 THE COURT: That's my point, is that, I think that you  
2 can request ex parte to extend the time for service.

3 MR. OLSEN: Yes.

4 THE COURT: But Mr. Coulthard's point is that there needs  
5 to be a finding, specific finding that says, as in this case,  
6 that there was good cause for granting an extension of time;  
7 that there was good cause also for the untimely motion to  
8 enlarge.

9 MR. OLSEN: Yeah.

10 THE COURT: I mean, they say, basically, the Court  
11 reached the right conclusion for the wrong -- for the wrong  
12 reason. And it's certainly appropriate to extend time but you  
13 have to like say so and --

14 MR. OLSEN: Well, Your Honor, I think --

15 THE COURT: So I just -- you know, what were the grounds  
16 cited were --

17 MR. OLSEN: -- a preview, I guess a preview of opposition  
18 to their motion would be, certainly we served the Department  
19 of Transportation.

20 THE COURT: Right.

21 MR. OLSEN: We served the State. We agree that other  
22 entities need to be served on the statute, however, the State  
23 of Nevada was aware of the claim. The Attorney General's  
24 office was aware of the Complaint. There's -- it was  
25 inadvertence that led to failure to serve the other two

1 branches of the State government, however, there's certainly  
2 no prejudice to the State. I think the -- Judge Allf saw  
3 that, certainly. She didn't make a finding, but that's a  
4 preview of what our response is.

5 THE COURT: Okay. Thanks.

6 MR. COULTHARD: Your Honor, and I should have probably  
7 mentioned the history on the order. Of course it wasn't a  
8 contested hearing because despite the fact that Ms. Kern, on  
9 behalf of NDOT, had sent a letter to the opposing counsel's  
10 law firm saying she was involved. They didn't serve us with a  
11 copy. They didn't serve Ms. Kern with a copy of the motion  
12 so, it was an ex parte motion and we did not -- it was not  
13 contested.

14 THE COURT: Right and they've done away with the special  
15 appearance kind of thing so --

16 MR. COULTHARD: Right.

17 THE COURT: -- once you appear, you appear. So she's not  
18 been involved here in appearance.

19 MR. COULTHARD: Exactly, Your Honor. And then no order  
20 was entered.

21 THE COURT: Right.

22 MR. COULTHARD: We filed our motion to quash service of  
23 process, and I believe that motion, the date of filing that  
24 was the 24th of this -- of June, June 24th, 2013 when we  
25 highlight this issue --

1 THE COURT: Uh-huh.

2 MR. COULTHARD: -- that there's been no order. And that  
3 in our motion to quash then -- and we had, at that point,  
4 filed a preemptory challenge and the case had been transferred  
5 to Your Honor.

6 THE COURT: Uh-huh.

7 MR. COULTHARD: Then Plaintiff's Counsel immediately sent  
8 a letter over to Your Honor enclosing a copy of the order  
9 saying: Oh, we know what happened with it. He thinks he  
10 submitted it to a prior department, but it never gotten  
11 entered so, we hadn't seen it.

12 Then on -- and on the following day, we sent a  
13 letter to Your Honor saying -- and apparently you executed it,  
14 I believe, that day.

15 THE COURT: Uh-huh.

16 MR. COULTHARD: I believe that letter came over, I've got  
17 a copy of it, on June 25th, 2013. The following day we object  
18 and ask Your Honor, in light of our motion to quash, to hold  
19 off signing the letter, but I think, based upon the email  
20 correspondence and the execution date of the order, you signed  
21 it on the 25th. You didn't see our letter till the 26th. So  
22 it's a bit of which came first, the chicken or the egg.

23 THE COURT: Right.

24 MR. COULTHARD: You know, importantly, they've admitted  
25 they haven't complied with the statute to serve within 120



1 days as required. They served one of the three parties. They  
2 then don't have the required basis under the Saavedra case  
3 which requires them to provide a basis for why their motion to  
4 enlarge is untimely filed.

5 THE COURT: Right.

6 MR. COULTHARD: We know it was untimely filed. The order  
7 doesn't address it. There are no specific findings. I didn't  
8 participate in that -- no one from our -- the Defense side  
9 participated in the telephone conversation. We don't know  
10 what was presented other than the motion but, the order  
11 actually says: The failure of any party to file a timely  
12 opposition thereto, the Court finds good cause, as follows,  
13 that the motion should be granted.

14 So there's no specific findings as required by  
15 Saavedra and we think it's a basis now mandated by the Nevada  
16 Supreme Court that the Complaint needs to be dismissed without  
17 prejudice. So and until they -- until that issue's addressed,  
18 Your Honor, which I think there is appropriate basis to  
19 dismiss it, it should be dismissed. Thank Your Honor. If you  
20 have any questions.

21 THE COURT: All right. Well, the timing of this case is,  
22 case was filed November 30th, 2012. There are -- there's been  
23 an Amended Complaint. This is where we get in this whole  
24 problem of, as I told the other gentleman: You've got an  
25 Amended Complaint, you've got to serve that Complaint.

1 MR. OLSEN: That is what we served, Your Honor.

2 MR. COULTHARD: They did serve that Amended Complaint.

3 THE COURT: And so -- and so -- right, so --

4 MR. OLSEN: And Your Honor, if I may ask that for one  
5 other -- the reason that the Complaint was not served  
6 initially -- in fact, the reason I filed earlier was that for  
7 an extended period of time, we were in negotiations with the  
8 State and --

9 THE COURT: Right. So here's my point, Mr. Olsen.

10 MR. OLSEN: Yes.

11 THE COURT: Is that, there's a new Complaint on file and  
12 so, the new Complaint gets filed and then there's an affidavit  
13 of service as to, I guess two parties, and compare -- and  
14 along with that a motion to extend service. So I guess my  
15 question, Mr. Coulthard, is they filed an Amended Complaint.  
16 Does that start the time over? I mean as I, you know, argued  
17 with the other gentleman there, the pro se gentleman that, you  
18 know, you filed an Amended Complaint, you got to serve that.  
19 So --

20 MR. COULTHARD: It does not, under my reading of NRCP 4.  
21 And I think that Plaintiff's Counsel has acknowledged that  
22 they did not effectuate service within the requisite 120 days.

23 THE COURT: Okay.

24 MR. COULTHARD: That 120 days begins upon the initial  
25 filing of the original Complaint --

1 THE COURT: Initial filing of the Complaint.

2 MR. COULTHARD: -- and filing an Amended Complaint does  
3 not give you --

4 THE COURT: Give you an additional 20 days.

5 MR. COULTHARD: -- an additional 120 days.

6 THE COURT: But you got to serve the Amended Complaint  
7 and they did serve the Amended Complaint on a couple of  
8 parties, just not everybody that's required by statute.

9 MR. COULTHARD: Correct.

10 THE COURT: Okay.

11 MR. COULTHARD: And I think they did that on the final  
12 day, 120 days, maybe 119 days.

13 THE COURT: Yeah, the 29th.

14 MR. COULTHARD: But they served a -- they partially  
15 served the Amended Complaint on -- in a timely manner.

16 THE COURT: Right. And then -- then they --

17 MR. COULTHARD: But our position is, that's not effective  
18 service under the requisite two statutes we cited.

19 THE COURT: Statutory. That it says -- exactly to serve.  
20 So, then they filed their motion to extend on the 17th.

21 MR. COULTHARD: Admittedly 12 days late.

22 THE COURT: Correct, 12 days late. So -- and --

23 MR. COULTHARD: 16, excuse me.

24 THE COURT: And what the Complaint says is, basically, in  
25 the motion it says, basically, that they filed on November

1 12th in order to preserve the cause of action in the midst of  
2 settlement negotiations and considerations with the State  
3 Board of Examiners so, they partially served it. And after  
4 they extended 120 days, the Attorney General gave Plaintiffs  
5 notion they were required to serve certain individuals who  
6 were to receive service under the Nevada Revised Statutes. So  
7 then, immediately, the Plaintiff files this motion to extend.

8           Now, I would agree with you that the order doesn't  
9 set forth grounds which the Saavedra Sandoval case says you're  
10 supposed to do, and I don't know what happened in this whole  
11 thing about the order not getting signed in Judge Allf's  
12 department before it came to me; I don't know. But -- and the  
13 -- order they submitted arguably doesn't set forth the grounds  
14 and the minute order just says, basically, it's unopposed,  
15 we're granting it.

16           But some more language might have been appropriate  
17 under Saavedra Sandoval because it was filed after the 120  
18 days and you're required to show good cause. They don't give  
19 you quite as much information as Scrimmer does as to what good  
20 cause is, but I always refer back to that for the laundry list  
21 of factors that they give us there as to what establishes good  
22 cause.

23           And, as I look at the pleading that was filed by Mr.  
24 Olsen's office, you know, they filed it timely. They were  
25 engaged in negotiations, it didn't come to fruition, they were

1 running out of time, they amended their Complaint, attempted  
2 to serve it and did it wrong. I will concede to you, Mr.  
3 Coulthard, it's correct, and I don't think they argue that  
4 they didn't do it wrong. They're very clear that Ms. Kern is  
5 the one who put them on notice of what they had to do to  
6 perfect service.

7 At that point, then, they request an extension of  
8 time, immediately request an extension of time to serve. I  
9 grant you the order doesn't lay all that out but I think that  
10 under Scrimmer, those are factors that the Court can consider  
11 and say: Yes, there's good cause to file this and to extend  
12 time -- there's -- and the Court understands the cause for why  
13 it was -- why time was not requested earlier because they  
14 appeared to have believed they served it properly.

15 The service defect was pointed out to them by Ms.  
16 Kerns. They immediately requested additional time in which to  
17 perfect their service.

18 I agree, it could all have been laid out more  
19 clearly and probably should have been. But I think that  
20 between what Saavedra Sandoval tells us you need to do -- I  
21 think they met the Saavedra Sandoval standard in their motion.  
22 I would concede to you that the minute order and the new order  
23 that this Court ultimately signed, arguably, doesn't lay it  
24 all out but, I think that there is enough there in the record  
25 to find that there was good cause for filing the motion to

1 extend time for service, late.

2           They attempted to serve it prior to the expiration  
3 of the time for service, 120 days, they attempted -- they  
4 didn't complete it. And it is -- I agree it's a defect in  
5 service, however, they immediately, upon learning of it,  
6 requested the additional time and the Court granted it.

7           The facts could have been a little bit more clear,  
8 the order should have been a little bit more clear, but with  
9 this confusion about transferring between departments and  
10 somehow having lost that order, the original order, the record  
11 has not been made clear.

12           So, I'm going to deny the motion to dismiss for  
13 failure to serve on the grounds that I find that adequate  
14 grounds were laid out in the motion to extend service for a  
15 late request under Saavedra Sandoval versus Wal-Mart.

16           And unfortunately, the order wasn't clear. And  
17 since this is a transferred case, when I signed the order, I  
18 signed an order that didn't lay it all out. I would like to  
19 think that maybe I would have put a little bit more detail in  
20 the order had it been my original order. So, apologize for  
21 that. I don't think that it has anything to do with the  
22 preempt because it wasn't opposed. So --

23           MR. COULTHARD: Understood so --

24           THE COURT: -- the preempt transferred it to this Court.  
25 So now we're going forward on the next issue.

1 MR. COULTHARD: Understood, Your Honor. Thank you and I  
2 guess I would just want to go forward with the understanding  
3 on the record that I'm not waiving my rights to challenge  
4 jurisdictional --

5 THE COURT: I understand.

6 MR. COULTHARD: -- issues despite moving forward --

7 THE COURT: I understand.

8 MR. COULTHARD: -- to continue to --

9 THE COURT: Absolutely.

10 MR. COULTHARD: -- pursue this issue with the State so  
11 desires.

12 THE COURT: And as Mr. Olsen indicated, I mean, you may  
13 even have the right to request reconsideration of it; I don't  
14 know. There's all sorts of weird procedural issues given the  
15 procedural history of this thing and the transfer and the  
16 order getting signed late. Sorry it messed up the record.

17 MR. COULTHARD: No, we understand. These things happen.  
18 There is one bit of language in the order granting the motion  
19 to enlarge time that suggests that there be no opposition  
20 thereto.

21 THE COURT: Right.

22 MR. COULTHARD: And I think it's important for the  
23 record, there's no opposition. It was not contested --

24 THE COURT: Correct.

25 MR. COULTHARD: -- because we were never served nor aware

1 of it until they filed their opposition and had the June 26th  
2 order --

3 THE COURT: Yeah.

4 MR. COULTHARD: -- entered by your Court so.

5 THE COURT: Would not have even been appropriate at that  
6 point for Ms. Kern to have entered an appearance. She was not  
7 going to volunteer an appearance --

8 MR. COULTHARD: Thank you, Your Honor, I --

9 THE COURT: -- simply by opposing it so, that's  
10 understood.

11 MR. COULTHARD: We understand the Court's ruling. I  
12 think maybe a real quick one is, probably, and straightforward  
13 is, the third prong of our motion was motion to strike  
14 punitive damages asserted by the Plaintiff as against the  
15 State. NDOT's a State agency, NRS 41.0351 limits awards  
16 against a State agency. It specifically provides an -- or it  
17 may not include any amount as exemplary --

18 THE COURT: Yeah.

19 MR. COULTHARD: -- or punitive damages. Plaintiff  
20 Nassiri's Complaint on page 16, in the prayer, seeks punitive  
21 damages to the extent --

22 MR. OLSEN: Your Honor, we'll concede that.

23 MR. COULTHARD: Thank you.

24 THE COURT: Okay. Thank you, granted.

25 MR. COULTHARD: They seem to do that --



1 MR. OLSEN: I'm looking for a gap.

2 MR. COULTHARD: I thought that was -- I was rushing --

3 THE COURT: That's granted.

4 MR. COULTHARD: -- through that one.

5 THE COURT: Okay, that's an easy one, granted.

6 MR. COULTHARD: Okay. So Your Honor, the other one is --

7 THE COURT: Mean the substantive one.

8 MR. COULTHARD: -- pretty lengthy and I know you've been  
9 on the bench for some time. If you need a break or you want  
10 me to just roll right into this.

11 THE COURT: Ladies? Maybe we'll take a break after you  
12 guys are done because we still have one more thing then we  
13 have our 10:30, then we have our 1:30.

14 MR. COULTHARD: Okay.

15 THE COURT: It's that kind of day.

16 MR. COULTHARD: I think just to -- if I can just go --  
17 and I do apologize to everyone in the courtroom and Your  
18 Honor, and thank you for your patience but, obviously there's  
19 a lot in this, a lot of Complaint --

20 THE COURT: Right.

21 MR. COULTHARD: -- and some weighty issues that we need  
22 to deal with. But first, if I could go to the ELMO and just  
23 --

24 THE COURT: Yeah.

25 MR. COULTHARD: -- familiarize the Court a little bit

1 with the subject property. I'm not sure if it's coming on.

2 THE COURT: There it goes.

3 MR. COULTHARD: So what I'm depicting and showing you  
4 just to familiarize you a little bit with the area that we're  
5 talking about.

6 THE COURT: Why is it black?

7 MR. COULTHARD: I have a set of these for you. And  
8 actually --

9 THE CLERK: I think it's still searching.

10 THE COURT: Huh? Doesn't seem to be connected to the tv.

11 MR. COULTHARD: Your Honor, I did bring some extra copies  
12 if it's appropriate.

13 THE COURT: Okay, sure.

14 MR. COULTHARD: And I can walk you through --

15 THE COURT: Yeah, we're having some technical  
16 difficulties.

17 MR. COULTHARD: If I may approach, Your Honor?

18 THE COURT: Thank you.

19 MR. COULTHARD: Just to -- maybe this isn't even on --  
20 I'm --

21 THE BAILIFF: It's on.

22 MR. COULTHARD: It is on.

23 THE BAILIFF: Yes.

24 THE COURT: I think it must be a connection between the  
25 television and the ELMO, somehow they're not connecting.

1 MR. COULTHARD: So -- well maybe I just walk you through  
2 these --

3 THE COURT: Okay.

4 MR. COULTHARD: -- real quick --

5 THE COURT: Thanks.

6 MR. COULTHARD: -- then, Judge.

7 THE COURT: Uh-huh.

8 MR. COULTHARD: The first photo which has, in highlighted  
9 -- the -- in red that -- that is -- well you see on I-15 and  
10 then you have Blue Diamond, just to put this property in  
11 reference to the area it's located within.

12 And what's highlighted in the red is the exchange  
13 property that was -- that really is the subject underlying 23  
14 acres that's the subject of this lawsuit.

15 The next page, which is the page that has the green  
16 property.

17 THE COURT: Uh-huh.

18 MR. COULTHARD: This shows both the -- Nassiri acquired  
19 the property from NDOT, the 24 acres -- I'm still hoping it'll  
20 come up but -- and the adjacent property that he owned  
21 previously, and it really shows the assembled size of the  
22 acreage.

23 Again, you've got the Blue Diamond access and I-15.  
24 This property, this picture actually depicts the roadway  
25 configuration with the Blue Diamond flyover as presently

1 constructed, as does the prior photo shows that the flyover,  
2 that there's much complaining about in the Complaint.

3 And then, finally, we have a page of the  
4 environmental assessment from October of 2008. And as we go  
5 through these, I guess the reason I'm showing you the second  
6 one with the green that shows the assembled property, as you  
7 know, through the pleadings and the Complaint, there's a lot  
8 of noise by the Plaintiff about this overcharging by a 46  
9 percent assemblage value.

10 Well, that's true, and when we look at the Kent  
11 appraisal that's attached to the Complaint, he actually values  
12 it two ways: He values this pork chop piece of property that  
13 NDOT owned that Nassiri acquired as a standalone parcel, but  
14 he then also values it as an assemblage value, which clearly,  
15 assembling the property has a greater value.

16 And this 46 percent assemblage value is a bit of a  
17 red herring and noise, and I don't want to get ahead of myself  
18 --

19 THE COURT: Uh-huh.

20 MR. COULTHARD: -- but that's clearly one of their big  
21 allegations. And I think that map actually shows he did  
22 assemble it consistent with the appraisal.

23 And so, finally, this October 2008 exhibit, this is  
24 actually a page and they complain a lot about the  
25 misrepresentations and intentional misrepresentations by NDOT

1 by and through Las Vegas Paving. Well, this is a color copy  
2 of the map that was actually attached to the Las Vegas  
3 Paving/Nassiri ground lease. And you know --

4 THE COURT: That's the one --

5 MR. COULTHARD: -- they make a lot of noise about, that  
6 no flyover was disclosed, and this Las Vegas Paving  
7 representation and attachment to their ground lease, was fraud  
8 by NDOT, by my client. When, in fact, you look at the color  
9 exhibit, this build alternative number -- this is actually  
10 from Figure 10-F from the October 28th environmental  
11 assessment study for this project.

12 It actually shows the flyover for eastbound traffic  
13 on Blue Diamond. Yet, I would acknowledge it's in a different  
14 location. But again, much noise about a failure to disclose  
15 this flyover when, in fact, their own documents which is,  
16 again -- this is attached, I believe, as Exhibit 5 to the  
17 Complaint. This is one of their own exhibits, shows there is  
18 a flyover so, I wanted to point that out.

19 With that backdrop, Your Honor, again, I think it's  
20 important that the Court understand that this entire I-15 and  
21 Blue Diamond interchange was a design build project, i.e., as  
22 the contractors moved forward through this project, there  
23 could be engineering modifications to save costs.

24 And so, the fact that this was noticed as a design  
25 build and was, in fact, a design build, clearly should come as

1 no surprise and certainly doesn't submit -- doesn't support  
2 the fraud and intentional misrepresentation claims.

3 With that backdrop, we'll get into the meat of the  
4 motion to dismiss.

5 THE COURT: Okay.

6 MR. COULTHARD: There's actually six claims for relief,  
7 inverse condemnation, breach of contract, contractual breach  
8 of implied covenant of good faith, tortious breach of implied  
9 covenant in good faith, negligent misrepresentation and  
10 intentional misrepresentation.

11 We outline, on our moving papers, the bases for our  
12 12(b) (5) motion and the standards. But clearly, this Court  
13 can consider documents attached to the Complaint, documents  
14 incorporated by reference in the Complaint and also other  
15 matters of judicial notice without converting the present  
16 motion today into a summary judgment. So, I think the  
17 standard we're operating under is a motion to dismiss.

18 And we recognize that that is a weighty burden on  
19 the State to come in and show that they can't plead any set of  
20 operative facts to substantiate these -- the basis of these  
21 claims, and we think we've done it.

22 And we've done it on multiple grounds for each of  
23 the claims and multiple independent grounds, Your Honor. And  
24 I will -- I will say that it is a little bit difficult to work  
25 through these claims and they were challenging. It was a

1 challenging opposition to work through because of, I think,  
2 some very crafty pleadings by a very good law firm by very  
3 good attorneys that recognized, I believe, that they had real  
4 problems with these -- this Plaintiff's allegations.

5 And so, I think when we try and clear it up and look  
6 at the law on this, and through their Complaint and then  
7 through their opposition, they muddied up and make it  
8 difficult for this Court. And which, again, I apologize to  
9 everyone who's here but, as a result, we've got to work  
10 through some of these issues.

11 I think the first basis of -- and actually in an  
12 effort to assist the Court we have prepared --

13 THE COURT: Exhibit 3?

14 MR. COULTHARD: -- and I'll provide a copy to counsel, a  
15 summary, which really addresses each of the claims. If I may  
16 approach.

17 THE COURT: Sure.

18 MR. COULTHARD: I brought one for Your Honor, and I'll  
19 provide one to your law clerk which I think will help simplify  
20 and streamline the positions we're asserting. And really what  
21 we've got here on this chart, and I don't know if we're up and  
22 rolling on the ELMO but --

23 THE COURT: He's working on it.

24 MR. COULTHARD: -- I'll just explain, really, we've got  
25 our -- each of the claims broken out, and then, under each of

1 the categories, each of the columns, we outline the basis for  
2 the motions to dismiss, and when you work through all of these  
3 I think what is left and should survive this -- in fact, we  
4 don't even try and challenge this portion of the inverse  
5 condemnation claim, is their allegation that this Blue Diamond  
6 interchange somehow impacted the access to the Nassiri site  
7 and therefore they're entitled to inverse condemnation  
8 damages. That is, I think, requires factual determinations  
9 that that is not part of our claim.

10 So, I guess there is a portion of the inverse  
11 condemnation claim we're not seeking to dismiss in its  
12 entirety dealing with the access. But really, and I think the  
13 general categories, excuse me, of our failure -- of our motion  
14 of failure to state a claim: Number one, deal with the  
15 contractual waivers under the settlement agreement.

16 Number two, the fact that Nassiri's tort claims are  
17 barred under NRS 41.032, because we have clear case law we've  
18 cited in our briefs that the decision by NDOT to build and  
19 expand and the decisions related to the configuration of the  
20 roadways is a discretionary function --

21 THE COURT: Uh-huh.

22 MR. COULTHARD: -- and NRS 41.032 shields the State for  
23 discretionary functions versus operation functions --

24 THE COURT: Tort liability.

25 MR. COULTHARD: -- and I don't believe that's been



1     disputed.

2             THE COURT:   For tort liability.

3             MR. COULTHARD:  For tort liability, yes.

4                     We've also addressed the statute of limitations in  
5 here and then, finally, really drilled down into the  
6 insufficiency of the pleadings.

7                     So, I think probably the best starting place is the  
8 breach of contract claim, the second claim.  These claims  
9 really center around NDOT's sale of the exchange property and  
10 NDOT's construction of the I-15 Blue Diamond overpass, and  
11 this is really, I think, the primary defense to those claims  
12 to both the breach of contract, contractual breach of implied  
13 covenant and likewise, the tortious breach of implied  
14 covenant.  We turn to the settlement agreement and release of  
15 all claims.  And this is one where -- oh, I guess -- am I up  
16 and running with the ELMO?

17             THE CLERK:  It still is not working.

18             MR. COULTHARD:  Okay.  And it is attached and I'm not  
19 sure I did bring Your Honor -- oh, I guess I did bring an  
20 actual separate copy of that just for convenience of the  
21 Court.

22             THE COURT:  Thank you for being prepared, Mr. Coulthard.

23             MR. COULTHARD:  And I think it's been attached to -- it's  
24 both attached to the Complaint and attached to the opposition.  
25 But, I mean I think the title, settlement agreement, release

1 of all claims.

2 THE COURT: Yeah, I got it.

3 MR. COULTHARD: Now this arose out of the separate piece  
4 of property on the other side of I-15 where there was a  
5 condemnation action by NDOT.

6 THE COURT: Uh-huh.

7 MR. COULTHARD: And through that process they then did a  
8 settlement agreement that -- whereby Nassiri indicated his  
9 desire to acquire this pork chop exchange property and that's  
10 defined in the settlement agreement.

11 But I think probably one of the best starting places  
12 to evaluate the settlement is, the settlement agreement and  
13 releases is, through the acknowledgments under paragraph 2.19  
14 when, you know, they acknowledge, under subsection 2, that the  
15 releases contained herein extend and apply to any -- and also  
16 cover and include all unknown, unforeseen, unsuspected,  
17 unanticipated injuries, promises, claims, losses, damages, et  
18 cetera.

19 That no promises or inducements have been offered  
20 except as herein set forth. That this settlement is good  
21 faith and is equitable. The agreements executed without  
22 reliance upon any statement or representation of any party and  
23 on and on and on.

24 And actually, even specifically address some of the  
25 third party claims that Plaintiff Nassiri is suing the State

1 for, both the Chambers litigation and related third party  
2 claims surrounding title, he acknowledges those.

3           So there, you know, I would encourage the Court to  
4 -- and I won't read them all. The acknowledgments acknowledge  
5 they had independent counsel, they acknowledge this was an  
6 arm's length negotiated settlement agreement. There are  
7 mutual releases under -- and importantly I emphasize mutual.  
8 It's not just Plaintiff Nassiri releasing it, it's NDOT was --  
9 had negotiated and provided releases that ran in favor of the  
10 Plaintiff.

11           But the release under 2.09 is very broad. Nassiri  
12 hereby releases and forever discharges the lawsuit and any  
13 matters asserted therein or which could have been asserted  
14 therein or its subject matter.

15           And then it goes on, and I won't read it all, but  
16 subsection 2 talks about the physical condition of the  
17 exchange property as of the execution date or matters  
18 affecting title or claims thereto.

19           Again, the Chambers Third Party Claim specifically  
20 referenced in other places, but that clearly was actually in  
21 the title policy as an accepted -- exception, an acknowledged  
22 exception. So they had notice of that despite what they tell  
23 you now in their opposition.

24           And the other claims or the Krolecki claims for  
25 about seven million dollars. Well those group of claimants

1 were Plaintiff Nassiri's partners that he had a handshake deal  
2 with to share in ownership of this property they were  
3 acquiring. He acquired it himself and did the end run on his  
4 partners and they sued him. And they sued him and he settled  
5 for seven million dollars, and now he wants the State to come  
6 back and indemnify him or pay those funds as part of his  
7 damage claim despite the fact he's released claims for Third  
8 Party Claims related to title.

9 I think importantly, the quitclaim deed is also  
10 mentioned in the settlement agreement. That quitclaim deed  
11 that, whereby, Nassiri agreed with his Counsel, knowingly, in  
12 an arm's length negotiation and settlement agreement that he  
13 was accepted -- would accept the property without warranty as  
14 is, where is, and with all faults. Now that references the  
15 quit claim deed.

16 And he acknowledges, it goes on, Nassiri  
17 acknowledges that he is aware of claims by Carolyn Ann  
18 Chambers, part of the Third Party Claim he's suing us for now,  
19 for breach of contract, or her representatives relating to an  
20 alleged reversionary interest or other rights relating to the  
21 exchange property. It's defined as the Chamber claims.

22 And he has performed his own investigation of the  
23 Chamber claims, and based upon said investigation accepts the  
24 exchange property subject to any claims of Chambers, her  
25 assigns or successors. That's referenced several places

1 throughout.

2           Importantly -- so we've got these releases which I  
3 believe, and under this chart, deal with the second claim with  
4 all the breach of contract claims; he's released those claims.  
5 And -- but importantly, not only do you have this release,  
6 Your Honor, we've got the language in the quitclaim deed which  
7 is, I guess, typical of a quitclaim and that's Exhibit B to  
8 their -- to our opposition. I think it was also attached to  
9 their motion.

10           But that language -- grantee accepts the property as  
11 is, where is and with all faults including, but not limited  
12 to, et cetera, et cetera. But he then goes on specifically  
13 referencing the Chamber claims including, but not limited to,  
14 claims for attorneys' fees and costs relating in any way to  
15 claims made with respect to the property by Carolyn Ann  
16 Chambers. Again, he's released that claim as he has with all  
17 other Third Party Claims.

18           But there's some important language in this  
19 quitclaim deed that I think bear on other claims, particularly  
20 this whole claim about the -- now what is this implied  
21 easement or easement of visibility that he's suing under the  
22 indemnification claim. He says that we've given him that.

23           But the very last sentence in the acceptance of  
24 property as is/where is states: Grantors make no warranty,  
25 express or implied, of any kind, with respect to any matter

1 affecting the property. I think that ends the visibility  
2 inquiry, that combined with the Provasco Supreme Court case  
3 that we've cited addressed that.

4 And I did put together, again, and I will provide  
5 counsel with a copy of it which I -- and if I may provide one  
6 to Your Honor and the Court.

7 THE COURT: Certainly.

8 MR. COULTHARD: And this is really just crypt notes of  
9 the --

10 THE COURT: Thank you.

11 MR. COULTHARD: -- settlement agreement and releases of  
12 all claims I've worked through. I haven't gone through all of  
13 them. We highlighted most of them but for the ease of the  
14 Court, we think these are all applicable to their first  
15 through fourth claims for relief. So, he's expressly waived  
16 those claims.

17 And it's pretty clear to me, when you take a look at  
18 those, that those breach of contract claims have to go away;  
19 he's released them. And that through -- and through the  
20 quitclaim deed's released them.

21 Now there's a lot of complaints about the flyover  
22 and the change related to the flyover and this easement, this  
23 visual easement. In fact, that's the basis of their inverse  
24 condemnation claim. Importantly, in the settlement agreement  
25 there's an integration clause. We state there are no

1 warranties and there's no duty, whatsoever, in the settlement  
2 agreement and release which is the contract they're suing  
3 under that they have pointed to that support, their breach of  
4 contract claim.

5           We have said: Tell us, you know, tell us where  
6 there's a duty. In our motion, there's no duty and absent a  
7 duty to give you visibility, absent a duty to not build this  
8 flyover, there can't be a breach of contract, and it's very  
9 clearly given those up and they can't provide Your Honor with  
10 any duties, which likewise, I think signals the end of their  
11 breach of contract claims. They have not given us a duty.  
12 There can be no breach of contract without a duty.

13           Under their basis of the breach of contract is that  
14 they paid too much. That we -- that NDOT failed to disclose  
15 the Gary Kent appraisal which is attached to their Complaint  
16 at the time they negotiated the sale of the exchange property.  
17 But they're pretty crafty with this, Judge, because they say,  
18 in a couple of places in their motion -- I had to go back and  
19 take a good hard look at it.

20           They say: Well, we breached Federal and State law  
21 by not providing an appraisal when we did this deal. Well,  
22 you know, when you take a good hard look at that there is no  
23 duty of a seller, be it NDOT or any other seller, to provide  
24 an appraisal they have when they're selling property. There  
25 just flat out isn't.

1 But what they're trying to do is, I think, confuse  
2 the Court. There is a duty when you're a condemning agency on  
3 the other side of I-15, there is a duty to provide an  
4 appraisal to support their motion for immediate occupancy  
5 which NDOT did, in fact, file with the Court in the prior  
6 litigation. So they're muddying the waters there, Judge.

7 There is absolutely no duty by -- on any seller who  
8 has an appraisal to provide that appraisal to a buyer. It's  
9 not in the settlement agreement and they can't point to  
10 anything and they haven't. They again try to confuse the  
11 Court, confuse the issues about the condemnation property,  
12 but that is not what we're talking about here.

13 So, when they -- when they tell you that we had a  
14 duty on this to not charge this -- what they refer to as the  
15 46 percent overage --

16 THE COURT: Uh-huh.

17 MR. COULTHARD: -- or assemblage piece, take a look at  
18 Exhibit 1 to the Gary Kent appraisal. It is clear that this  
19 assemblage valuation, they paid just a little over that, not  
20 46 percent. So they're being disingenuous with that, Judge.  
21 But again, at the end of the day there is no duty in an arm's  
22 length transaction. We didn't have an obligation to provide  
23 that and they can't sue you after the fact, a number of years  
24 after the fact, seven years after the fact because they're  
25 unhappy with the purchase price they paid.



1           It's absurd, Your Honor, and I would suggest that --  
2 and Your Honor's very familiar with it, the reality of the  
3 economic situation and the related property values in this  
4 valley which we've spent a lot of time in other cases arguing  
5 about, I think is what we're dealing with here, and an unhappy  
6 buyer faced with a major devaluation in property who looks to  
7 strap the State with his bad decisions.

8           Your Honor, the breach of contract claims all are  
9 time barred. We cite NRS 11.190(1)(b), six year statute of  
10 limitations; it's applicable. We entered into the contract in  
11 April of 2005. I believe there was one amendment in June of  
12 2005; six years to sue us for that under breach of contract,  
13 no duty, time barred, end of story. And -- oh, and the  
14 release.

15           So if you look through -- those are the basis for  
16 each of those breach of contract claims -- waived his right  
17 under the express language of the settlement agreement and  
18 quitclaim deeds. There are no duties alleged or that support  
19 their claims. And finally, they're time barred under NRS  
20 11.190(1)(b).

21           The tortious breach of contract, I think, again, I  
22 think is pretty clear. He waived his right to bring these  
23 under the settlement agreement under -- let me just get to my  
24 notes, Judge, so I can see where I am. Okay, so tortious  
25 breach of implied covenant of good faith, I think that they

1 have a heightened pleading standard. The Court well knows  
2 there's a special element of reliance where fiduciary duty  
3 exists between the parties.

4 I think we've cited some case law that, you know,  
5 it's limited to rare and exceptional cases under K-Mart v.  
6 Ponzak. I think special relationships include  
7 insurers/insureds, partners and partnerships,  
8 franchisees/franchisors, maybe lenders and mortgagors, but in  
9 situations where a vastly superior bargaining power won over  
10 the other, and they simply cited no case law that support, in  
11 this arm's length transaction, where both parties are  
12 sophisticated.

13 Mr. Nassiri is a sophisticated landowner/real estate  
14 developer who had Counsel, Mr. Chapman, who approved this  
15 whole deal, I just don't think that, in fact, when you look at  
16 the acknowledgments, that this was an arm's length  
17 transaction, specifically the acknowledgments in the  
18 settlement agreement I went through earlier that say, you  
19 know, it's mutually negotiated. No one's acting under duress.

20 They understood it and it's signed by their lawyers.  
21 Clearly, no special relationship and superior bargaining  
22 required to show the special relationship. So, again, that --  
23 I think that claim clearly has been -- should be dismissed by  
24 Your Honor.

25 And we also cited a couple of cases, both General

1 Builders, Inc. and Long v. Town which Nevada Supreme Court  
2 cases that say, generally, there is no fiduciary obligations  
3 that exist between a buyer and a seller of property. It  
4 denied, under General Builders, denied tort liability where,  
5 as here, agreements have been heavily negotiated and where the  
6 aggrieved party is a sophisticated businessman. So that tort  
7 should go away.

8 Fifth claim for relief: Negligent  
9 Misrepresentation. You know, I think when you look at it, I  
10 guess I'll start with the easier one, it's time barred, Your  
11 Honor. Their allegation is that NDOT was required to provide  
12 this appraisal they had of the pork chop exchange property  
13 and that it was required to disclose any and all plans to  
14 construct Blue Diamond, this Blue Diamond flyover. That's the  
15 basis of their -- both their negligent misrepresentation and  
16 their intentional misrepresentation.

17 Well, you entered into the contract in April of  
18 2005, it's a three year statute of limitations, NRS 11.190.  
19 That three year statute runs well before the filing of this  
20 Complaint in November of 2012. But even if you give them the  
21 benefit of the doubt of the discovery rule, which essentially  
22 says that the statute begins to run when the date of discovery  
23 of facts, which is in the exercise of proper diligence, would  
24 have enabled the Plaintiff to learn of the fraud, which is  
25 Howard v. Howard, Nassiri admits, in his Complaint, on

1 paragraph 16 that he obtained the appraisal in late 2008.

2 That's paragraph 16. He admits he got that appraisal.

3 And that's the basis of his fraud claim is, you  
4 didn't tell me how much it was that this property was worth.  
5 So, giving him the benefit of a doubt then, that Complaint --  
6 that three years would have tolled in late 2011. He alleges  
7 late 2008, three years, late 2011. Complaint was not filed  
8 until November of 2012, four years later, a year late.

9 It's not properly plead. We've argued this in our  
10 pleadings, but they need to show the false information -- that  
11 false information was provided at the time that we entered  
12 into the contract and that any resulting loss was caused by  
13 justifiable reliance on that information. They don't plead  
14 that, and they haven't given any explanation that's legitimate  
15 in their opposition.

16 So, clearly, absent an allegation that we provided  
17 false information when we entered into the settlement  
18 agreement there can be no negligent misrepresentation. Again,  
19 we -- it kind of comes back to duty too. We didn't have a  
20 duty to disclose this appraisal. Nassiri could have gone out  
21 and gotten his own appraisal. In fact, I think that's what  
22 the -- what he did.

23 Intentional misrepresentation. I think the same  
24 argument although, I think it's a much -- it's a heightened  
25 pleading requirement under NRCP 9(b), they've got to plead

1 specific circumstances of the alleged fraud and they must be  
2 detailed. Our case law is clear, they've got to tell you the  
3 identity of the speaker, the substance of the statement, when  
4 the statement was made and the recipient of the statement,  
5 and that's Brown v. Keller, Nevada Supreme Court case.

6 And they failed to properly plead those allegations  
7 because I would submit they don't exist. But because, again,  
8 a motion to dismiss -- they have failed to plead, and likewise  
9 it's a three year statute of limitation. They acknowledged  
10 receipt of this appraisal which forms the basis of their  
11 intentional misrepresentation clause. Paragraph 16 was in  
12 October 2008. They're four years past that discovery when  
13 they filed their action so it has to be dismissed.

14 Your Honor, finally, this gets us to the inverse  
15 condemnation. I think it's very clear, and I would ask the  
16 Court to take a close reading at Provasco v. City of Reno.  
17 But the Court, the Nevada Supreme Court reconfirms that it has  
18 repudiated any private right of action for negative implied  
19 easement of light, air or view or visibility, and they go on  
20 to state the Nevada law does not recognize a claim for an  
21 implied negative easement or view or visibility in eminent  
22 domain proceedings. It can't get much clearer than that.

23 And I think you then need to -- and so, they -- we  
24 argued that in our motion saying: The law doesn't support it.  
25 So they get real crafty in their opposition and say: Well,

1 it's not really a negative easement it's really an implied  
2 easement on I-15 and NDOT's property to ensure that visibility  
3 from people on that property, on the freeway, can see our  
4 sign.

5 So it's not really what Provasco is talking about.  
6 Well, I think that's completely disingenuous but -- and so  
7 they argue that we've somehow given them an implied easement  
8 or express easement and they relate back to the appraisal that  
9 they didn't have and they pull a couple sentences out of that.

10 Well, Judge, go back to the settlement agreement,  
11 it has an integration clause in it. It says the entire  
12 settlement agreement is in that release and settlement  
13 agreement. They can't go outside the four corners of that  
14 clear unambiguous settlement agreement and rely upon a couple  
15 of sentences in the appraisal, which they didn't have, to  
16 support their position that we've given them an implied or  
17 express easement for visibility. It's circular. It's  
18 nonsensical and it should not withstand the Court's scrutiny.

19 Case law is clear. They're not -- this is not a  
20 recognized claim in Nevada. There's no recorded easement, no  
21 express right to visibility in the settlement agreement, and  
22 the quitclaim release specifically says: No warranty, express  
23 or implied. So they don't get there.

24 Judge, I think, finally, the tort claims I touched  
25 on, those are all barred by the discretionary immunity. We

1 didn't see any case law that came back in the opposition that  
2 suggests this roadway decisions and construction decisions on  
3 a design built project are anything but discretionary.

4           Finally, just check my notes, Your Honor. I thank  
5 you and everyone for your patience. Your Honor, think those  
6 are the issues. If the Court has any questions I would just  
7 reserve a brief rebuttal and thank you for your patience.

8           THE COURT: Thank you, Mr. Coulthard. Mr. Olsen.

9           MR. OLSEN: Yes, Your Honor. There's a lot to cover.

10          THE COURT: There's a lot to cover, yeah.

11          MR. OLSEN: But let me start -- let me start with the  
12 exhibits that Mr. Coulthard gave to the Court and to me  
13 because I think some of the things he said in conjunction with  
14 those are inaccurate or confusing, at least.

15               Exhibit 1 was the -- is the blue tinted aerial --

16          THE COURT: Correct.

17          MR. OLSEN: -- as I call the pork chop which is the  
18 exchange property outlined there. Just so we're clear, this  
19 was said a couple of times. The property that the -- that  
20 NDOT condemned that started this process rolling was not on  
21 the other side of the freeway. It's on this side of the  
22 freeway and it's actually where the now existing Blue Diamond,  
23 in this diagram goes, which is two-thirds the way down.

24               He owned the property at the corner and the State  
25 wanted to change that configuration, or you may recall

1 originally, it was way over on the side.

2 THE COURT: The Blue Diamond and Las Vegas Boulevard?

3 MR. OLSEN: Right. So it isn't across the freeway. That  
4 whole process -- what you have here is really, the State  
5 starts by condemning Mr. Nassiri's property. As a part of the  
6 resolution of that, they sold Mr. Nassiri this landlocked  
7 piece of property and that -- which is the issue. By the way,  
8 they didn't get any premium for their assemblage of this  
9 property but that's how this started.

10 And really, this is all a settlement of the  
11 condemnation case and that's where some of the duties, such as  
12 the duty to disclose, which they acknowledge exists to  
13 disclose the value being given in the condemnation case, it  
14 wasn't really disclosed because this sale is not an arm's  
15 length transaction in that sense.

16 Well, first of all, it's with the State and it's  
17 also part of an overall settlement of the condemnation claim.  
18 So just to be clear, that's really -- the property is on this  
19 side of the freeway, on the east side.

20 In the next Exhibit 2, I think this depicts pretty  
21 well the situation. Exhibit 3 though, this is the  
22 environmental assessment from October 2008, which is a copy.  
23 And I'll accept the representation, this is a copy of what was  
24 attached to the lease presented to Mr. Nassiri in April of  
25 2010 by the State's agent, Las Vegas Paving, showing the



1 configuration of the -- the planning configuration of the  
2 interchange.

3 Now, had Mr. Nassiri known, at this point, what it  
4 was really going to look like or any point prior to its going  
5 under construction, he could have taken some action to try to  
6 stop this. Compare, though, what's in Exhibit 3 and Exhibit 1  
7 because that gives you an idea of the distinction.

8 What you have in Exhibit 3, what Mr. Nassiri saw --  
9 what Mr. Nassiri saw, both at the time at the beginning and in  
10 2010, was something that was not going to block the  
11 visibility, primarily from the northbound I-15 lanes, people  
12 coming in from California or other places from the south, the  
13 main route into the city.

14 He has -- this property's at Blue Diamond so it's --  
15 it's far south. The idea is to make this property visible.  
16 The idea is to potentially sell it for a hotel/casino  
17 development or other -- there was talk about a stadium -- I  
18 mean, those kinds of developments. Visibility is crucial.

19 And if you look what happened -- in fact, what they  
20 built was Exhibit 1 which completely -- and you may have been  
21 down there -- completely obstructs the view and you don't get  
22 the visibility I should say.

23 And you don't get a perspective from the air of how  
24 high this thing is. It is 60 feet above grade and it includes  
25 embankments which completely obscure this property from the

1 south -- completely obscure this property as you're crossing  
2 Blue Diamond from -- along Blue Diamond west -- eastbound from  
3 the west. So just so we're clear this is -- it's a completely  
4 different scenario.

5 And as late as 2010, at the time when Mr. Nassiri  
6 still had an opportunity to try to do something then to block  
7 this, the State was telling him nothing about what it was  
8 going to look like -- nothing about the view that he had paid  
9 for being obscured.

10 THE COURT: But in Nevada you can't pay for a view.

11 MR. OLSEN: I'm sorry, Your Honor.

12 THE COURT: In Nevada, there's -- you can't pay for a  
13 view.

14 MR. OLSEN: Well, I'm going to use the word "visibility"  
15 because we can skip to the Provasco issue then if you'd like.  
16 First of all, I'll say that we believe that this contract  
17 breach here, regardless of Provasco, Provasco talked  
18 specifically about condemnation actions.

19 We believe this is an affirmative easement across  
20 the State's property for view, for visibility. It's an  
21 affirmative easement. It's as though you had a path across  
22 this property.

23 Here's the difference between Provasco too. In 99.9  
24 percent of the condemnation cases you're not buying the  
25 property from the State, you contracted with the State, you

1 have, whether it's express, and there isn't an express  
2 easement, but express or implied easement, you can have them  
3 in an agreement with the State.

4           You don't have to have that typical situation where  
5 they just want a chunk of property which is how this started.  
6 You know, they're going to -- they're going to, you know,  
7 propose a value for you -- you can fight about it and resolve  
8 it.

9           This is our contract with the State. They knew  
10 because it's in their appraisal and even though they didn't  
11 give it to us, they knew they were charging for the view.  
12 There's something said in the papers of the State about, you  
13 know, confusing this with a premium for assemblage and that --  
14 if you take the lower value, the 15.5 million dollar value,  
15 the value that, had they told Mr. Nassiri about, he would have  
16 negotiated with the State because -- why would he want to pay  
17 eight million dollars -- 46 percent premium for this property?

18           Had they -- if you look at appraisal it talked  
19 specifically about the view and you know, yes, out of a 50-  
20 page document -- Counsel, it's fair to say I picked out some  
21 language, yes. But the language is part of the valuation.  
22 It's part of the assessment. It is critical to this.

23           And if you go to the property or you look at the  
24 pictures you know it is. What is the value of a landlocked  
25 piece of land abutting the freeway? It has certain value.

1 But the State acknowledged through its appraiser that the  
2 value, substantial in that value was the visibility.

3 What they did though, they turned around and  
4 destroyed that value. Now they've acknowledged, State's  
5 acknowledged we still have -- even under their argument we  
6 have an inverse condemnation case with respect to access.

7 There are access issues and that's not before you  
8 today. But this issue, this easement across the State's  
9 property, that needs to be brought, that needs to be heard.

10 I think it's said somewhere in their papers that  
11 really it's a negative easement against building something;  
12 it's really not. It's as if you had an access road --

13 THE COURT: The road that we have here, if you -- this is  
14 filed originally, I think, as a motion to dismiss. The  
15 information outside the pleadings isn't in so it really  
16 becomes a motion for summary judgment. So the question is, as  
17 -- are there questions of fact here or is there a dispute as  
18 to the law as to what it is Mr. Nassiri's claim is.

19 So that's really the argument here is that as Mr.  
20 Coulthard has very eloquently laid out the entire history and  
21 -- there's still questions here about whether Mr. Nassiri  
22 would have engaged or entered into this contract had he been  
23 given certain information.

24 MR. OLSEN: Yes, Your Honor.

25 THE COURT: So it's a breach of contract claim. It gets

1 us down to his main argument with those. Then, how do we get  
2 around summary judgment? Summary judgment --

3 MR. OLSEN: The waiver?

4 THE COURT: -- the statute of limitations even if there  
5 are questions of fact as to whether Mr. Nassiri is entitled to  
6 raise these causes of action, which I still have statute of  
7 limitations problems with alot of this because it does go back  
8 so far.

9 MR. OLSEN: Your Honor, let me address that. Inverse  
10 condemnation, that's not an issue.

11 THE COURT: I would agree.

12 MR. OLSEN: With respect to the breach of contract and  
13 the bad faith claims, you understand what I'm saying, the  
14 breach of the --

15 THE COURT: Correct.

16 MR. OLSEN: -- covenant of good faith and fair dealing.

17 MR. OLSEN: With respect to those, those are six year  
18 statutes of limitation.

19 THE COURT: Right.

20 MR. OLSEN: The earliest point at which Mr. Nassiri could  
21 have known of any breach -- now we're talking about breaches  
22 that are at the beginning, and really the breaches -- there's  
23 some question about what the breaches are. There's a breach  
24 of -- by violating this what we say is an easement, that's a  
25 contract claim as well. There's also -- well, destruction.

1 The biggest one is really destruction of the consideration.  
2 The consideration for this contract in large part was the  
3 visibility and they destroyed the visibility.

4           They say: I won't skip to the waiver. They say:  
5 The waivers which really generally talk about either past  
6 actions or the as is condition of the property is a waiver of  
7 everything. It certainly can't be waiver of their future  
8 contract breaches but that breach -- those breaches of  
9 contract, we couldn't have known about any breaches of  
10 contract until at least 2008.

11           You're talking about the failure to disclose. The  
12 breach by interfering with our easement and destroying the  
13 consideration, destroying the thing you were buying, that  
14 didn't happen until 2010. So on the contract claims and the  
15 bad faith claims, I don't think there's any issue about  
16 statute of limitations.

17           THE COURT: Okay.

18           MR. OLSEN: I think those statutes are safe.

19           THE COURT: Yeah, they --

20           MR. OLSEN: I will acknowledge there's an issue with  
21 respect to the tort claims.

22           THE COURT: Okay. Well then, let's talk first about the  
23 tortious interference with or tortious breach of implied  
24 covenant. I don't really view that as a pure tort that the  
25 immunity statutes apply to; it arises out of a contract.

1 MR. OLSEN: Your Honor, that's -- I think if you look at  
2 case law -- we didn't cite this case law because their real  
3 argument was about special relationship.

4 THE COURT: Right.

5 MR. OLSEN: It isn't akin to some sort of, you know,  
6 negligence claim or another kind of a tort.

7 THE COURT: Where the statute of immunity applies and you  
8 know --

9 MR. OLSEN: Intentional torts, of course, are excluded.

10 THE COURT: -- it's -- yeah. But it's a contract claim  
11 that --

12 MR. OLSEN: It arises from contract.

13 THE COURT: Arises from a contract but it's tort damages.  
14 I don't know, to me, that's not the kind of thing that the  
15 governmental immunity statute was meant to bar.

16 MR. OLSEN: Well we would agree, Your Honor, and that --  
17 all that -- the difference there is you get, potentially, your  
18 damages can be different under the --

19 THE COURT: Okay.

20 MR. OLSEN: We're going to concede punitive damages.

21 THE COURT: Correct.

22 MR. OLSEN: But even the standard for what damages you  
23 collect is slightly different for, obviously, a contract  
24 claim.

25 THE COURT: Right. And ultimately it may be that the

1 ultimate case, as we get further down the road here, it may  
2 not be an appropriate case for inverse condemnation. Maybe it  
3 really is a breach of contract action. Because it seems to me  
4 it's kind of -- I don't know if it can be both or if it's one  
5 or the other. I'm not really clear on how you could get all  
6 of this, but anyway, I don't think that's a question for  
7 today. So --

8 MR. OLSEN: And Your Honor, unless you have questions on  
9 the special relationship argument.

10 THE COURT: So moving -- no, it's the State. Moving on  
11 to 5 and 6, the negligent misrepresentation and intentional  
12 misrepresentation, I kind of think we have two issues there  
13 which are the statute of limitations and the -- I mean to me I  
14 appreciate your arguments that it's not discretionary  
15 function. That this is -- I don't see how it could be  
16 anything but discretionary. It's not ministerial.

17 It's not -- I mean the easiest was always the  
18 decision to place a stop sign is discretionary, cutting down  
19 the tree that blocks it is ministerial. So to me this isn't  
20 cutting down a tree blocking a stop sign. This is -- we're  
21 going to put an exchange here. We're going to put flyover  
22 here. This is for the public good.

23 We need to have this interstate exchange, which I  
24 have to tell you, I get lost every time and I always miss that  
25 thing to get off the -- at the airport. It's a mess.



1 But you know how they design it and where they put  
2 it, that's -- isn't that just the definition of discretionary?

3 MR. OLSEN: Well, Your Honor, let me say a couple things.  
4 First of all, there's a couple of non-disclosures. One was  
5 back at the beginning when they failed to disclose the  
6 appraisal, which we think they had a duty to -- it's part of  
7 the settlement of a condemnation case.

8 THE COURT: Right. But it doesn't mean they can be sued  
9 for that. It --

10 MR. OLSEN: Well, they -- they didn't give us that;  
11 that's the first one --

12 THE COURT: On a tort theory.

13 MR. OLSEN: -- then they hid --

14 THE COURT: On a tort theory.

15 MR. OLSEN: --then they hid -- and we'll address this  
16 either intentionally or negligently in 2010, the fact that  
17 this new design was going to go up and we were prevented from,  
18 at that point, from taking any action. I can't tell you what  
19 the result of that action would have been but I can tell you  
20 that there would have been. So there are these two events in  
21 time.

22 We said this, I think, in the papers but taking --  
23 at the beginning, the decision to condemn our property in the  
24 first place, I mean that's a policy decision. They can't get  
25 sued for that.

1 THE COURT: Correct.

2 MR. OLSEN: It's the things they do once -- and probably  
3 even deciding they're going to sell us a piece of property.  
4 But it's the things they do in that process. It's failure to  
5 disclose to us the appraisal. It's failure to give us an  
6 indication about Mr. Kerogli's case. By the way, Counsel  
7 doesn't know the assertion that the Kerogli, Mr. Kerogli was  
8 Nassiri's partner, is certainly outside the pleadings. It's  
9 also not correct. That whole issue shouldn't even be part of  
10 this discussion today. That's a seven million dollar dig.

11 We're not making a claim, by the way, for the  
12 Chambers and maybe the Court's discounted that. We put in the  
13 \$200,000 he spent on that just to show how much Mr. Nassiri  
14 has into this now. We acknowledge Chambers was expressly  
15 waived; no doubt about that. But that is in there just to  
16 kind of show you everything that he had at stake.

17 That's our position on -- as far as discretionary  
18 function, I think that is what they did within -- once you get  
19 past a policy decision, at the beginning or once you get past  
20 the policy decision in 2010 to build this thing, don't tell us  
21 something different through your agent.

22 THE COURT: Okay. But then that's -- I guess where I  
23 just get --

24 MR. OLSEN: Then back to the statute of limitations.

25 THE COURT: Statute of limitations. So that it's 2000 --

1 your position is these misrepresentations were made in 2010?  
2 Not back when the whole thing was originally negotiated with  
3 them?

4 MR. OLSEN: Well, we discovered -- I will admit this. To  
5 the extent that the allegations include the allegation that  
6 they committed a tort by not disclosing or by not disclosing  
7 the premium, in 2005 we discovered that. 2008, I think  
8 sometime in 2008 we discovered it. It's not clear when that  
9 is but --

10 THE COURT: Okay.

11 MR. OLSEN: -- I think we have to acknowledge that the  
12 statute of limitations on the intentional misrepresentation on  
13 that portion ran -- could have begun to run -- began to run in  
14 2008. Now I think that they -- this notion of building the  
15 flyover and that misrepresentation -- we don't know, there's  
16 no evidence when they actually learned or decided. Counsel  
17 said it's a design build but we don't know when that design  
18 change occurred. We don't know what they knew.

19 We're entitled to discovery to find out on that  
20 issue when they decided to build the flyover. Was it a  
21 misrepresentation back in the beginning which we discovered in  
22 2010 or was it a misrepresentation in 2010 which prevented us  
23 from taking any action?

24 I have to concede on the premium issue. It's a bad  
25 faith issue. I think the misrepresentation claim has arguably

1 run. On the 2010 timeframe, I think we're still entitled to  
2 explore when they decided to build the flyover.

3 THE COURT: Okay. But to prove --

4 MR. OLSEN: What other questions you have, Your Honor?

5 THE COURT: -- but to prove because that's what my  
6 problem is. I still -- I'm still not seeing this as anything  
7 other than discretionary actions. Deciding to build a  
8 flyover; they've got immunity for that.

9 MR. OLSEN: Deciding --

10 THE COURT: It's discretionary.

11 MR. OLSEN: Deciding not to tell us, deciding to provide  
12 us through their agent with a map --

13 THE COURT: Uh-huh.

14 MR. OLSEN: -- which you've seen which tells us they're  
15 not going to build a flyover. It tells us the plans --  
16 they're different. It's a flyover, it's not the flyover that  
17 destroyed our view. They're telling us something different.  
18 Mr. Nassiri didn't know until he saw this edifice built the  
19 end of 2010.

20 THE COURT: But I just -- I'm not -- first of all I'm not  
21 seeing how it's negligence and if it's -- if it is negligence  
22 then they're immune. That's my problem with this whole thing.  
23 It seems to me like this is a contract action.

24 MR. OLSEN: I guess -- well, and it certainly is a  
25 contract action we would say with respect to this issue that

1 it is not part of their -- it's not a part of policy --

2 THE COURT: Uh-huh.

3 MR. OLSEN: -- to -- through their agent present our  
4 client with a document which he relied on because it's for  
5 purposes of leasing --

6 THE COURT: Right.

7 MR. OLSEN: -- part of this property as a staging area in  
8 2010. He saw no problem with it. He saw -- the design wasn't  
9 going to affect the property. So at least as to that piece,  
10 yes, it's a policy decision to build the thing. It is a day  
11 to day act of discretion to present it to us as something  
12 different; that's our position.

13 THE COURT: Okay. All right.

14 MR. OLSEN: That's our position on that issue.

15 THE COURT: Okay. Thank you.

16 MR. OLSEN: What else can -- what do you have specific  
17 questions about? There are a lot of things.

18 THE COURT: I -- yeah, I will tell --

19 MR. OLSEN: I was going to go through more but --

20 THE COURT: I will tell you and just so Mr. Coulthard  
21 knows what to address when he stands back up. I agree, I  
22 think you're entitled to continue with your inverse  
23 condemnation action. I appreciate Mr. Coulthard's argument  
24 that to the extent that there is -- it's about view or  
25 visibility, you know, that's something I think we have to

1 litigate at a later date.

2           The second, third and fourth causes of action which  
3 have to do with breach of contract and breach of the covenant  
4 of good faith, I'm not really sure what the benefit of  
5 contractual breach of implied covenant and tortious breach of  
6 implied covenant -- what the difference is or why there's any  
7 benefit there.

8           Because I guess I'm -- there's no opinion of damages  
9 so, what's the real benefit of distinguishing between them  
10 that way? But I can appreciate that there might have been a  
11 tortious breach but then I think I'm getting into my whole  
12 problems with the negligent misrepresentation and intentional  
13 misrepresentation. I just think there's immunity. And you  
14 know, I did a lot of immunity work and I just, you know --

15           MR. OLSEN: Your Honor, if I can pull out the --

16           THE COURT: -- my background, I just view it as immune --  
17 I think they're immune from this.

18           MR. OLSEN: Understood. But I understand not with  
19 respect to the tortious --

20           THE COURT: And that's why, like I said I'm --

21           MR. OLSEN: -- for each claim.

22           THE COURT: -- inclined to let it stand but I just -- I'm  
23 telling you I'm not sure I really see a lot of distinction and  
24 so it's without any prejudice to renew these issues at a later  
25 date because I'm not sure I'm understanding the distinction

1 there. But I think that that's really up to me where it is.  
2 It's all about this contract and about the breach of the  
3 contract. I really don't see independent causes of action for  
4 negligent misrepresentation and intentional misrepresentation.  
5 I just think there's immunity and statute of limitation  
6 problems both.

7 MR. OLSEN: Your Honor.

8 THE COURT: I just -- I don't see how I can get around  
9 those issues to allow those two causes of actions to go  
10 forward. To me it seems like it's all about this contract.

11 MR. OLSEN: And Your Honor, I have nothing to add to  
12 that.

13 THE COURT: And I got to tell you, I am not foreclosing  
14 them from bringing up, later, any other statute of limitations  
15 defenses if it turns out that, you know, there was notice at  
16 any earlier date, because I -- there's real problems with the  
17 timing in this thing, Mr. Olsen.

18 MR. OLSEN: Your Honor, and we appreciate that and I  
19 think that no matter what happens going forward, I mean there  
20 may -- some -- there'll be some discovery about what they --

21 THE COURT: Right.

22 MR. OLSEN: -- decided when or knew when; I understand  
23 that.

24 THE COURT: Right.

25 MR. OLSEN: It could affect things. I think some -- a

1 couple of these dates are pretty hard and fast dates. If, you  
2 know, just as an aside, the distinction between tortious and  
3 contractual breach of covenant --

4 THE COURT: Well you can't get punitives, I mean, because  
5 --

6 MR. OLSEN: Without punitives, there's still --

7 THE COURT: Right.

8 MR. OLSEN: -- and you know this will probably be for  
9 jury instructions, there is a different flow of damages --

10 THE COURT: Right. Uh-huh.

11 MR. OLSEN: -- from a tort claim than contract claim.

12 THE COURT: Right.

13 MR. OLSEN: You get into the damages on the contract and  
14 consequential and those issues --

15 THE COURT: Right.

16 MR. OLSEN: -- under the tort claim. Whatever you can  
17 show flows from that breach.

18 THE COURT: And then we get into --

19 MR. OLSEN: You're entitled to argue including potential  
20 attorneys fees.

21 THE COURT: -- that whole issue of, was it an act that  
22 was discretionary versus negligence? I think that -- I think  
23 that's where you're entitled to do your discovery. Was it  
24 negligent --

25 MR. OLSEN: Yes, Your Honor.



1           THE COURT: -- or discretionary? I just -- my big  
2 problem with those fourth and fifth causes of -- beg your  
3 pardon, my fifth and sixth causes of action: Negligent  
4 misrepresentation and intentional misrepresentation. I don't  
5 understand how anything could happen that either didn't fall  
6 well outside the statute of limitations or there wouldn't be  
7 immunity for.

8           I'm just really -- I don't see how those -- you can  
9 survive the immunity statute on those two causes of action.

10          MR. OLSEN: All I would ask with respect to that issue is  
11 to look closely at the actions that were taken. It is not the  
12 case that once the State decides to build an intersection or  
13 to do something that everything else they do after that with  
14 -- that concerns, in any way and touches upon that  
15 intersection, is something they're immune from; we know that.  
16 We know it's the, you know --

17          THE COURT: Well, you said that they may have used your  
18 client's property as a staging area if they, I don't know, ran  
19 over somebody with a truck coming out of the staging area,  
20 yeah; I mean there's not immunity from that but --

21          MR. OLSEN: But even with aspect to the zoning, Your  
22 Honor, I know there's a case called Armisano (phonetic  
23 throughout) which is an example that came to my mind. Moving  
24 the freeway overpass, I think, at Flamingo was a policy  
25 decision.

1 THE COURT: Right, uh-huh.

2 MR. OLSEN: Putting the guardrails not far enough out to  
3 keep Mr. Armisano alive was a day to day decision for which  
4 the State was liable.

5 THE COURT: Uh-huh.

6 MR. OLSEN: That's the kind of thing --

7 THE COURT: Right.

8 MR. OLSEN: It is everything, even to do with the  
9 execution of the design.

10 THE COURT: And that's why I said -- that's why I said,  
11 putting up a stop sign, absolutely immune, maintaining the  
12 tree limbs around it so that somebody can see it, ministerial.  
13 I don't understand how --

14 MR. OLSEN: We pulled the tree limbs down in the  
15 negotiation process, Your Honor.

16 THE COURT: I don't understand how anything, with respect  
17 to negotiating this deal with Mr. Nassiri, could have been  
18 ministerial. It's -- I mean that's not what it's about.

19 MR. OLSEN: Oh, but don't you think -- don't you think a  
20 decision --

21 THE COURT: I'm just really struggling with this, Mr.  
22 Olsen.

23 MR. OLSEN: Don't you think a decision not to, assuming a  
24 decision was made -- but let's assume a decision was made,  
25 we're not going to give them the appraisal.

1 THE COURT: Right.

2 MR. OLSEN: They can't be protected from that. I mean,  
3 let's say there's no statute of limitations issue and, you  
4 know, two days after we've done this deal, we learn that or  
5 some other fact that's a misrepresentation. We've got to be  
6 -- we've got to have a fraud. They can't -- because they --  
7 in the process of negotiation hit something or affirmatively  
8 lied about something or took some other action within that  
9 process, that they're immune?

10 It can't go on just because, if the origin is a  
11 policy decision to condemn Mr. Nassiri's strip of land, that  
12 everything else they do is golden or it's protected; that  
13 can't be. I'd ask you to think about that.

14 THE COURT: Okay.

15 MR. COULTHARD: Very briefly, rebuttal, Your Honor. I  
16 think Mr. Olsen's a fine attorney and he did a fine tap dance  
17 around a lot of difficult issues he was presented with but it  
18 reminds me of the -- if you have the facts on your side and  
19 argue the facts, you got the law on your side and argue law,  
20 if you don't, drag a dead skunk around the courtroom. That's  
21 what he's doing here today, Judge.

22 He's touching on some issues here and there but he's  
23 not addressing the facts or the law as plead in his first  
24 Amended Complaint.

25 Your Honor, I think you're right on with your

1 analysis and I would as to the -- whether this is a  
2 discretionary function, and I would refer you to the case law  
3 cited on page 14 of our reply brief, State of Nevada v.  
4 Webster, states Nevada Supreme Court:

5 "That the decision to construct a highway is a  
6 policy determination and a discretionary act  
7 immune from tort liability."

8 And Delino:

9 "We have held that the initial decision to  
10 construct a highway is a policy determination."

11 And Brisko v. County of Clark holding that:

12 "The preparation of plans and specifications  
13 for future construction, all approved by the  
14 County, were the product and the exercise of  
15 the County's discretionary function and are  
16 exempt and not actionable."

17 The third, the fourth, fifth and sixth claims which  
18 were tortious breach of the implied covenant, negligent  
19 misrepresentation and intentional misrepresentation are all --  
20 the State and NDOT, it's division is immune from liability for  
21 those claims. I think that ends that inquiry and it didn't  
22 address the three year statute on fraud. I think maybe he  
23 admitted it.

24 But Your Honor, the -- I am concerned with when the  
25 Court states that you consider this a contract action.

1 THE COURT: Well, that's the claim. I mean, I think, and  
2 under our very low pleading standard, we don't have Iqbal and  
3 Twombly, he's allowed to do some discovery. And I think  
4 that's really --

5 MR. COULTHARD: What --

6 THE COURT: -- where it is. It's really -- was there a  
7 conflict?

8 MR. COULTHARD: I would generally agree, Judge if -- if,  
9 importantly, they could point to a contractual duty within the  
10 contract that they're suing on. The settlement agreement and  
11 release is the contract they're suing on, a contractual duty  
12 that obligates NDOT to number one -- and they're complaining  
13 about two things: Breach of contract -- the failure to  
14 provide the 2000 -- well the exchange property appraisal. I  
15 think it was dated 2004 or 2005. That's their one complaint  
16 and then the building of the flyover.

17 Neither of those claims -- there is no duty in the  
18 settlement agreement or the quitclaim deed that creates a duty  
19 to turn over this appraisal. There is nothing in the  
20 statutes, nothing in the law that says we've got to turn that  
21 over, no contractual provision in this arm's length negotiated  
22 contract by sophisticated parties, with their lawyers, that  
23 creates that duty. And the quitclaim deed expressly states  
24 there is no warranty --

25 THE COURT: Uh-huh.

1 MR. COULTHARD: -- express or implied, created. We've  
2 got an integration clause. There is no duty, Judge, and we  
3 said it in our moving papers, in our motion to dismiss and  
4 they could not point to a duty in either of the four corners  
5 of the quitclaim deed or the settlement agreement.

6 And they tried to go outside of the four corners of  
7 the agreement despite the integration clause and argue from a  
8 sentence in the appraisal, and I would suggest they can't  
9 create a duty that way because there are -- there is specific  
10 language in the quitclaim deed that says:

11 "Grantor makes no warranty, express or implied,  
12 of any kind, with respect to any matter  
13 affecting the property."

14 End of story. No duty. No breach of contract. That  
15 leaves them -- what we should be talking about, Judge, is the  
16 inverse condemnation action. That claim we're prepared to  
17 defend, and if Your Honor is not prepared to dismiss the --

18 THE COURT: Uh-huh.

19 MR. COULTHARD: -- visibility then, okay, that issue,  
20 which I think the Nevada Supreme Court has been given as clear  
21 and concise direction that it is not a viable cause of action  
22 in this State, then that moves forward with their allegations  
23 --

24 THE COURT: Right.

25 MR. COULTHARD: -- that we impact it --

1 THE COURT: Yeah. That alone --

2 MR. COULTHARD: -- and we'll do some discovery.

3 THE COURT: -- that alone, it's not the basis for an  
4 inverse condemnation claim, but if there's something else,  
5 they can do their discovery on it and try to prove it.

6 I'm not going to dismiss the breach of contract  
7 action, I think they're entitled to do some discovery. I  
8 still am really not -- I -- I think they're going to -- the  
9 real problem's going to be statute of limitations and that's  
10 never waived.

11 And you can certainly -- so it's without prejudice,  
12 to renew this at a later date because I don't see how they're  
13 -- I think there's really problems with the statute of  
14 limitations here, at a minimum. And whether we can get into  
15 all these other issues, duty and all those other things at a  
16 later date, I -- I think that's the one that should be raised.

17 The tortious breach of implied covenant is -- it's  
18 kind of an interesting cause of action and I have real  
19 questions about -- I'm just not sure it's what the immunity  
20 statutes intended to bar but, you know, I think we need to  
21 like take another look at that at a later date, because to me  
22 that's kind of an interesting question: Whether the  
23 governmental immunity statute bars tortious breach of implied  
24 covenant? It's just an interesting legal concept.

25 I just -- I'm, Mr. Olsen, I just -- I don't see how

1 you -- how negligent misrepresentation and intentional  
2 misrepresentation can survive the immunity statute. It's  
3 about building a freeway overpass, which I believe is  
4 discretionary. This allegation that they didn't tell us  
5 something about it, you know, in the context of settling the  
6 previous case, that's where the breach of contract cause of  
7 action, I think, arises.

8 I just don't see how those torts can survive,  
9 particularly since they've got a three year statute of  
10 limitations, and I'm not sure that what the 2010 allegation  
11 is, but basically, it seems to be 2008 -- and that it was  
12 discovered.

13 So, I just don't see how you can survive on the  
14 statute of limitations either. So, for those two reasons I'm  
15 going to -- I'm dismissing the fifth and sixth causes of  
16 action and the rest of it without prejudice, at this point in  
17 time, for Mr. Coulthard to renew at a later date.

18 But I think you're entitled, under our very low  
19 pleading standard in Nevada, to do some discovery on your  
20 contract causes of action. Inverse condemnation, you're all  
21 agreed that's going forward. But -- so it's certainly without  
22 prejudice, to renew his objections to your contract claims at  
23 a later date, particularly since I have real questions about  
24 the fourth one on tortious breach.

25 I'm not sure that's really something you can sue the



1 State for, but anyway, we'll let it go and then we'll see --

2 MR. OLSEN: Understood, Your Honor.

3 THE COURT: -- where we can go, but -- so I will grant it  
4 in part and deny it in part. And I'm only granting it as to  
5 fifth and sixth. It's entirely without prejudice to be  
6 renewed at a later date, Mr. Coulthard, on these other --  
7 these other legal issues, particularly since we got real  
8 statute of limitations problems.

9 MR. COULTHARD: Thank, Your Honor --

10 MR. OLSEN: Thank you so much.

11 MR. COULTHARD: I'll prepare the order and run it by Mr.  
12 Olsen.

13 THE COURT: Okay.

14 MR. COULTHARD: Thank you for your patience.

15 THE COURT: Okay, would you like your notebook back?

16 MR. OLSEN: You want your notebook?

17 THE COURT: You want your notebook? I'm going to keep  
18 these.

19 MR. COULTHARD: We can -- I can leave those for Your  
20 Honor.

21 THE COURT: Okay, I'm keeping these nice pictures so I  
22 can remember how this place looks. And if we can take a break  
23 we'll come back and do our 10:30.

24 COURT CLERK: No.

25 THE COURT: No, we still have one thing at 9.

1 MR. COULTHARD: Thank you very much, Your Honor. Thank  
2 you, everybody.

3

4

[Proceeding Concluded at 12:00 p.m.]

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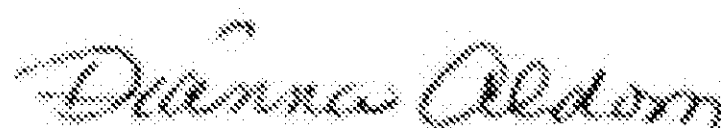
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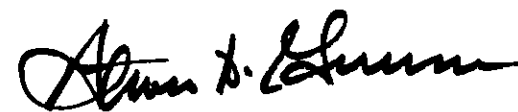
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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video recording in the above entitled case to the best of my ability.

A handwritten signature in cursive script, reading "Dianna Aldom". The signature is dark and appears to be ink on a light background.

---

Dianna Aldom, CET\*\*236, Transcriber



CLERK OF THE COURT

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15 DISTRICT COURT

16 CLARK COUNTY, NEVADA

17 FRED NASSIRI, individually and as trustee  
18 of the NASSIRI LIVING TRUST, a trust  
formed under Nevada law,

19 Plaintiffs,

20 vs.

21 STATE OF NEVADA, on relation of its  
22 Department of Transportation; DOE  
GOVERNMENT AGENCIES I-X,  
23 inclusive; DOE INDIVIDUALS I-X; and  
DOE ENTITIES 1-10, inclusive,

24 Defendants.  
25

Case No.: A672841  
Dept. No.: XXVI

**Order Granting in Part Defendant NDOT's  
Motion to Dismiss Amended Complaint for  
Failure to State a Claim**

Date of Hearing: July 31, 2013  
Time of Hearing: 9:00 a.m.

26 This matter having come on for hearing on July 31, 2013, as to Defendant State of  
27 Nevada, on relation of its Department of Transportation's ("NDOT") Motion to Dismiss  
28 Amended Complaint for Failure to State a Claim, with Plaintiff Fred Nassiri ("Nassiri") being

AUG 30 2013

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1 represented by Eric R. Olsen, Esq. of the law firm Gordon Silver, and NDOT being represented  
2 by William L. Coulthard, Esq. and Mona Kaveh, Esq. of the law firm Kemp, Jones &  
3 Coulthard, LLP, and Amanda B. Kern, Esq. of the Office of the Attorney General. The Court  
4 having reviewed the papers and pleadings on file herein and having heard argument of counsel;  
5 and with good cause appearing and there being no just reason for delay, the Court hereby makes  
6 the following findings of fact, conclusions of law, and order:

7 **I.**

8 **Findings of Fact**

9 1. NDOT and Nassiri entered into a Settlement Agreement and Release of All  
10 Claims dated April 28, 2005, and partially amended on June 14, 2005 (the "Settlement  
11 Agreement"). The Settlement Agreement provides in part that Nassiri would purchase from  
12 NDOT an approximately 24-acre parcel east of another piece of property owned by Nassiri (the  
13 "Exchange Property") for \$23,239,004.50.

14 2. On November 30, 2012, Nassiri filed a Complaint against NDOT in the Eighth  
15 Judicial District Court of the State of Nevada, followed by an Amended Complaint on March  
16 27, 2013. Nassiri asserts six claims for relief: (i) inverse condemnation, (ii) breach of contract,  
17 (iii) contractual breach of the implied covenant of good faith and fair dealing, (iv) tortious  
18 breach of the implied covenant of good faith and fair dealing, (v) negligent misrepresentation,  
19 and (vi) intentional misrepresentation.

20 3. On June 24, 2013, NDOT filed its Motion to Dismiss Amended Complaint for  
21 Failure to State a Claim (the "Motion"). Nassiri opposed NDOT's Motion on July 12, 2013.

22 **II.**

23 **Conclusions of Law**

24 **Motion to Dismiss Standard**

25 4. A defendant is entitled to dismissal of a complaint when the plaintiff fails "to  
26 state a claim upon which relief can be granted." NRCP 12(b)(5). The plaintiff fails to state a  
27 claim if it appears beyond a doubt that the claimant can prove no set of facts that would entitle  
28

1 him to relief. *See Buzz Stew, LLC v. City of North Las Vegas*, 181 P.3d 670, 672 (Nev. 2008);  
2 *Morris v. Bank of America*, 886 P.2d 454, 456 (Nev. 1994).

3 5. Although Nevada is a notice-pleading jurisdiction, a complaint nevertheless  
4 “must set forth sufficient facts to establish all necessary elements of a claim for relief . . . so that  
5 the adverse party has adequate notice of the nature of the claim and relief sought.” *See Hay v.*  
6 *Hay*, 678 P.2d 672, 674 (Nev. 1984); *Ravera v. City of Reno*, 675 P.2d 407, 408 (Nev. 1984).  
7 Although the court must accept all of the non-moving party’s factual allegations as true and  
8 construe them in its favor, *see Buzz Stew*, 181 P.3d at 672; *Morris*, 886 P.2d at 456, it is not  
9 bound to accept as true a legal conclusion or contractual interpretation couched as a factual  
10 allegation. *Bailey v. Gates*, 290 P.411, 412 (Nev. 1930) (“Good pleading requires that . . . the  
11 facts relating to the matter be averred, leaving the court to draw the legal conclusion”).

12 6. When ruling on a motion to dismiss, the Court may consider “documents  
13 attached to the complaint, documents incorporated by reference in the complaint, or matters of  
14 judicial notice [] without converting the motion to dismiss into a motion for summary  
15 judgment.” *U.S. v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). “Even if a document is not  
16 attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff  
17 refers extensively to the document or the document forms the basis of the plaintiff’s claim.” *Id.*;  
18 *see also Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994), overruled on other grounds,  
19 *Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002) (holding that in ruling on a  
20 motion to dismiss, the Court may consider “documents whose contents are alleged in a  
21 complaint and whose authenticity no party questions, but which are not physically attached to  
22 the pleading”).

### 23 **Discretionary Immunity**

24 7. The State of Nevada has waived its immunity from liability and consented to  
25 have its liability determined in accordance with the same rules of law as are applied to civil  
26 actions against natural persons and corporations. Nev. Rev. Stat. § 41.031. One of the noted  
27 exceptions to this express waiver is set forth in NRS 41.032, which provides that the State, its  
28 agencies, political subdivisions and employees (i.e. NDOT) are immune from liability for

1 claims stemming from the exercise of discretionary functions or the performance of  
2 discretionary duties. Nev. Rev. Stat. § 41.032(2).

3 8. Government actions fall within the scope of the immunity doctrine when they  
4 “(1) involve an element of individual judgment or choice and (2)[are] based on considerations  
5 of social, economic, or political policy.” *Martinez v. Maruszczak*, 168 P.3d 720, 729 (Nev.  
6 2007). “[D]ecisions at all levels of government, including frequent or routine decisions, may be  
7 protected by discretionary-act immunity, if the decisions require analysis of government policy  
8 concerns.” *Id.* “While policy decisions involving the consideration of competing economic,  
9 social, and political factors are subject to discretionary-act immunity, operational level  
10 decisions are not.” *Warner v. City of Reno*, 2010 WL 3791493 at \*2 (D. Nev. 2010) (citing  
11 *Martinez*, 168 P.3d at 728; *Nguyen v. State*, 788 P.2d 962, 964-65 (Okla. 1990)). “Operational  
12 level decisions are those involved in the day-to-day operations of government and those  
13 required to implement the discretionary policy decisions.” *Id.* (citing *Martinez*, 168 P.3d at 728,  
14 n. 32).

15 9. NDOT’s decision to construct a freeway overpass (the “fly over”) is  
16 discretionary. Therefore, NDOT is immune from tort liability under NRS 41.032 as to its  
17 decision to construct the “fly over.”

#### 18 **Inverse Condemnation**

19 10. Citing *Probasco v. City of Reno*, 459 P.2d 772 (Nev. 1969), NDOT asserted in  
20 its Motion that Nevada does not recognize an implied negative easement of view or visibility in  
21 the context of eminent domain. Nassiri, however, argued in his Opposition that he had acquired  
22 an affirmative easement for visibility across NDOT’s property.

23 11. The parties are permitted to conduct discovery on this claim and NDOT is  
24 permitted to renew its Motion and its arguments therein at a later date.

#### 25 **Breach of Contract**

26 12. The elements to prove a breach of contract claim include: (i) the contract, (ii)  
27 plaintiff’s performance or excuse for nonperformance, (iii) defendant’s breach, and (iv)  
28

1 resulting damages. *Reichert v. General Insurance Company of America*, 68 Cal.2d 822, 830  
2 (1968).

3 13. NRS 11.190(1)(b) provides a six-year limitation period for contract actions in  
4 Nevada. The statute of limitations begins to run as soon as the plaintiff knows or should know  
5 of the facts constituting the breach. *Soper By & Through Soper v. Means*, 903 P.2d 222, 225  
6 (Nev. 1995).

7 14. The parties are permitted to conduct discovery on this claim and NDOT is  
8 permitted to renew its Motion and its arguments therein at a later date.

9 **Contractual Breach of the Implied Covenant of Good Faith and Fair Dealing**

10 15. An implied covenant of good faith and fair dealing exists in every Nevada  
11 contract and essentially *forbids arbitrary, unfair acts* by one party that disadvantage the other.  
12 *Frantz v. Johnson*, 116 Nev. 455, 465, 999 P.2d 351, 358 (2000) (emphasis added). A  
13 contractual breach of covenant arises “[w]here the terms of a contract are literally complied  
14 with but one party to the contract deliberately countervenes [sic] the intention and spirit of the  
15 contract.” *Hilton Hotels v. Butch Lewis Prods.*, 808 P.2d 919, 923 (Nev. 1991) (emphasis  
16 added).

17 16. The parties are permitted to conduct discovery on this claim and NDOT is  
18 permitted to renew its Motion and its arguments therein at a later date.

19 **Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing**

20 17. A tortious breach of covenant occurs when a “special element of reliance or  
21 fiduciary duty” exists between the parties. *Great Am. Ins. Co. v. General Builders, Inc.*, 934  
22 P.2d 257, 263 (Nev. 1997). When such a relationship exists, tort recovery is appropriate if “the  
23 party in the superior or entrusted position” has engaged in “grievous and perfidious conduct.”  
24 *Id.* at 355, 934 P.2d at 263 (quoting *K Mart Corp. v. Ponsock*, 732 P.2d 1364, 1371 (Nev.  
25 1987)).

26 18. The parties are permitted to conduct discovery on this claim and NDOT is  
27 permitted to renew its Motion and its arguments therein at a later date.  
28



**Negligent Misrepresentation**

19. NRS 11.190(3)(d) provides a three-year limitation period for fraud actions. Fraud actions are “deemed to accrue upon the discovery by the aggrieved party of the facts constituting the fraud . . .” *Id.* “[T]he statute of limitation commence[s] to run from the date of the discovery of facts which in the exercise of proper diligence would have enabled the plaintiff to learn of the fraud.” *Howard v. Howard*, 239 P.2d 584, 589 (Nev. 1952); *accord Sierra Pacific Power Co. v. Nye*, 389 P.2d 387, 390 (Nev. 1964) (“mere ignorance of the existence of . . . the facts which constitute the cause will not postpone the operation of the statute of limitations . . . if the facts may be ascertained by inquiry or diligence”).

20. Nassiri’s negligent misrepresentation claim with respect to the assemblage value of the Exchange Property is barred by the applicable three-year limitation period for fraud actions under NRS 11.190(3)(d). Nassiri became aware of the assemblage premium in “late 2008” when he received NDOT’s Appraisal. *See* Amended Complaint at ¶ 16. Nassiri’s original Complaint was filed on November 30, 2012, after the applicable statute of limitations under NRS 11.190(3)(d) had expired. Nassiri’s claim for negligent misrepresentation based on the assemblage premium is time barred.

21. Furthermore, given that NDOT’s decision to construct the “fly over” is a discretionary duty, NDOT is immune from tort liability on this claim under NRS 41.032.

**Intentional Misrepresentation**

22. The elements to prove an intentional misrepresentation claim include: (i) defendant made a false representation, (ii) defendant knew or believed that his or her representation was false, or defendant had an insufficient basis of information for making the representation; (iii) defendant intended to induce plaintiff to act or refrain from acting upon misrepresentation; (iv) plaintiff justifiably relied upon defendant’s representation; and (v) plaintiff sustained damages as a result. *Barmettler v. Reno Air, Inc.*, 956 P.2d 1382, 1386 (Nev. 1998).

23. Like the negligent misrepresentation claim, Nassiri’s intentional misrepresentation claim with respect to the assemblage value of the Exchange Property is also

1 barred by the applicable three-year limitation period for fraud actions under NRS 11.190(3)(d).  
2 Nassiri became aware of the assemblage premium in “late 2008” when he received the NDOT  
3 Appraisal. *See* Amended Complaint at ¶ 16. Nassiri’s original Complaint was filed on  
4 November 30, 2012, after the applicable statute of limitations under NRS 11.190(3)(d) had  
5 expired. Nassiri’s claim for intentional misrepresentation based on the assemblage premium is  
6 time barred.

7 24. Furthermore, given that NDOT’s decision to construct the “fly over” is a  
8 discretionary duty, NDOT is immune from tort liability on this claim under NRS 41.032.

9 **III.**

10 **Order**

11 25. ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED  
12 that Defendant NDOT’s Motion to Dismiss Amended Complaint for Failure to State a Claim is  
13 DENIED without prejudice as to Nassiri’s claims for inverse condemnation, breach of contract,  
14 contractual breach of the implied covenant of good faith and fair dealing, and tortious breach of  
15 the implied covenant of good faith and fair dealing.

16 26. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant  
17 NDOT’s Motion to Dismiss Amended Complaint for Failure to State a Claim is GRANTED  
18 with prejudice as to Nassiri’s claims for negligent misrepresentation and intentional  
19 misrepresentation.

20 27. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each of the  
21 Court’s findings of fact is to be considered as a conclusion of law, and each of the Court’s  
22 conclusions of law are to be construed as a finding of fact, as may be necessary or appropriate to  
23 carry out this Order.

24 ///

25 ///

26 ///

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28. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that NDOT's Answer to the Amended Complaint is due within ten (10) days from the notice of entry of this Order.

DATED this 3rd day of September, 2013.

DISTRICT COURT JUDGE

Respectfully submitted by:

Approved as to form and content:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, on relation of its  
Department of Transportation,

Petitioner,

vs.

Case No. 70098

THE EIGHTH JUDICIAL DISTRICT  
COURT, COUNTY OF CLARK, STATE OF  
NEVADA, AND THE HONORABLE  
GLORIA STURMAN, DISTRICT JUDGE,

Respondents,

and

FRED NASSIRI, individually and as trustee of  
the NASSIRI LIVING TRUST, a trust formed  
under Nevada law,

Real Party in Interest.

**APPENDIX VOLUME 1, part 2**

**TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION**

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ATTORNEYS FOR PETITIONER

<b>Document Description</b>	<b>Volume Number</b>	<b>Bates Number</b>
Amended Complaint	1	PA00015-054
Answer to Amended Complaint and Counterclaim	2	PA00233-282
Answer to the State's Counterclaim	2	PA00283-292
Appendix to Nassiri's Opposition to Motion to Exclude Nassiri's Damages Evidence or Strike His Expert, Keith Harper, MAI	10	PA01841-2091
Appendix to Nassiri's Opposition to Motion to Exclude Nassiri's Damages Evidence or Strike His Expert, Keith Harper, MAI...	11	PA02092-2281
Appendix to Nassiri's Opposition to the State's MPSJs Re Inverse Claim and Contract Claims	5	PA00808-977
Appendix to Nassiri's Opposition to the State's MPSJs Re Nassiri's Inverse Claim and Contract Claims...	6	PA00978-1150
Appendix to the State's Motion for Partial Summary Judgment on Nassiri's Contract Claims	4	PA00504-695
Complaint	1	PA00001-014
Hearing Transcript (4-1-15 Hearing on the State's MPSJ on Nassiri's Inverse Claim and Contract Claims)	13	PA02460-2540
Hearing Transcript (5-19-15 Transcript of Closing Arguments at Bench Trial)	13	PA02541-2634
Hearing Transcript (Motion to Dismiss)	1	PA00156-224
Hearing Transcript (MPSJ on Prayer for Rescission)	7	PA01391-1451
Hearing Transcript (MPSJ Re Rescission Based on Bench Trial Ruling)	9	PA01763-1812
Hearing Transcript.1 (Motion to Exclude Damages Evidence or Strike Harper-Oral Arguments)	12	PA02389-2455
Hearing Transcript.2 (Motion to Exclude Damages Evidence or Strike Harper-Announcement of Ruling)	12	PA02349-2388
Motion for Partial Summary Judgment on Nassiri's Contract Claims	4	PA00596-726
Motion for Partial Summary Judgment on Nassiri's	5	PA00727-754

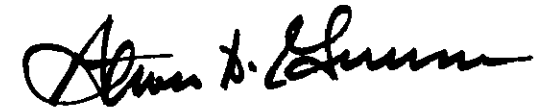
Prayer for Rescission		
Motion for Partial Summary Judgment on Nassiri's Rescission Claim Based on the Court's Trial Ruling	8	PA01598-1614
Motion for Summary Judgment on Nassiri's Claim for Inverse Condemnation (with Appendix)	3	PA00293-503
Motion to Bifurcate/Confirm the May 4, 2015, Trial as a Bench Trial	7	PA01306-1339
Motion to Dismiss Filed by the State	1	PA00055-108
Motion to Exclude Nassiri's Damages Evidence or Strike His Expert, Keith Harper, MAI	9	PA01649-1746
Notice of Supplemental Authority Re MPSJs Filed by the State	7	PA01239-1249
Opposition to the State's Motion to Bifurcate/Confirm the May 4, 2015, Trial as a Bench Trial	7	PA01340-1390
Opposition to the State's Motion to Dismiss	1	PA00108-136
Opposition to the State's Motion to Exclude Nassiri's Damages Evidence or Strike His Expert, Keith Harper, MAI	9	PA01813-1840
Opposition to the State's MPSJ on Nassiri's Claim for Inverse Condemnation	5	PA00775-807
Opposition to the State's MPSJ on Nassiri's Contract Claims	5	PA00755-774
Opposition to the State's MPSJ on Nassiri's Prayer for Rescission	6	PA01151-1170
Opposition to the State's MPSJ on Nassiri's Rescission Claim Based on Trial Ruling	8	PA01615-1648
Order Re Motion to Bifurcate/Confirm May 4, 2015, Trial as Bench Trial	8	PA01552-1555
Order Re Motion to Exclude Nassiri's Damages Evidence or Strike His Expert, Keith Harper, MAI	12	PA02456-2457
Order Re MPSJ on Nassiri's Claim for Inverse Condemnation	8	PA01536-1543
Order Re MPSJ on Nassiri's Contract Claims	8	PA01526-1535
Order Re MPSJ on Nassiri's Prayer for Rescission	8	PA01544-1551
Order Re MPSJ on Nassiri's Rescission Claim Based on Trial Ruling	12	PA02458-2459
Order Re the State's Motion to Dismiss	1	PA00225-232
Reply in Support of the State's Motion to Dismiss	1	PA00137-155

Reply in Support of the State's Motion to Exclude Nassiri's Damages Evidence or Strike His Expert, Keith Harper, MAI	12	PA02282-2348
Reply in Support of the State's MPSJ on Contract Claims	6	PA01171-1201
Reply in Support of the State's MPSJ on Nassiri's Claim for Inverse Condemnation	7	PA01202-1238
Reply in Support of the State's MPSJ on Nassiri's Prayer for Rescission	7	PA01250-1305
Reply in Support of the State's MPSJ on Nassiri's Rescission Claim Based on Trial Ruling	9	PA01747-1762
Supplemental Trial Brief Filed by Nassiri	8	PA01505-1525
Supplemental Trial Brief Filed by the State	8	PA01494-1504
Trial Brief Filed by Nassiri	8	PA01479-1493
Trial Brief Filed by the State	8	PA01452-1478
Trial Ruling	8	PA01577-1597
Trial Ruling (with Handwritten Changes)	8	PA01556-1576

“EXHIBIT 3”

“EXHIBIT 3”





CLERK OF THE COURT

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14  
15 DISTRICT COURT

16 CLARK COUNTY, NEVADA

17 FRED NASSIRI, individually and as trustee  
18 of the NASSIRI LIVING TRUST, a trust  
formed under Nevada law,

19 Plaintiffs,

20 vs.

21 STATE OF NEVADA, on relation of its  
22 Department of Transportation; DOE  
GOVERNMENT AGENCIES I-X, inclusive;  
23 DOE INDIVIDUALS I-X; and DOE  
ENTITIES 1-10, inclusive,

24 Defendants.

Case No.: A672841

Dept. No.: XXVI

**Defendant NDOT's: (1) Motion to Dismiss  
Amended Complaint and/or Quash Service  
of the Summons and Amended Complaint  
for Insufficiency of Service of Process, or  
Alternatively, (2) Motion to Dismiss  
Amended Complaint for Failure to State a  
Claim, and (3) Motion to Strike the Prayer  
for Punitive Damages**

Date of Hearing:

Time of Hearing:

26 Defendant State of Nevada, on relation of its Department of Transportation ("NDOT"),  
27 by and through its counsel of record, Kemp, Jones & Coulthard, LLP, and the Office of the  
28 Attorney General, hereby moves this Court for an Order (1) dismissing Plaintiff Fred Nassiri's

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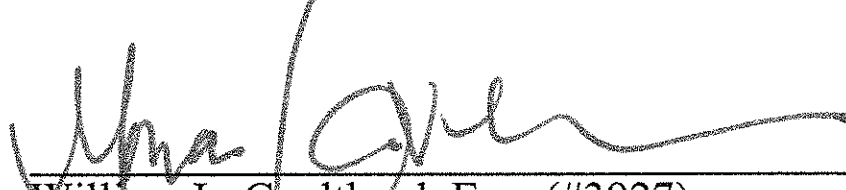
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1 Amended Complaint and/or quashing service of the summons and Amended Complaint for  
2 insufficiency of service of process, or alternatively, (2) dismissing Nassiri's Amended Complaint  
3 for failure to state a claim upon which relief can be granted, and (3) striking the prayer for  
4 punitive damages.

5 This Motion is made and based upon NRCP 4, NRCP 12(b)(4), NRS 408.116, NRS  
6 41.031, NRCP 12(b)(5), NRS 41.035, the following memorandum of points and authorities, the  
7 pleadings and papers on file herein, any exhibits attached hereto, and any oral argument this  
8 Court may entertain at a hearing on this Motion.

9 DATED this 24th day of June, 2013.

10 Respectfully submitted by:

11 

12 William L. Coulthard, Esq. (#3927)  
13 Eric M. Pepperman, Esq. (#11679)  
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## Notice of Motion

TO: Plaintiff, Fred Nassiri, individually and as trustee of the Nassiri Living Trust; and  
TO: Eric R. Olsen, Esq., and Dylan T. Ciciliano, Esq., his attorneys.

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that Defendant NDOT will bring the above-entitled Motion on for hearing on the 31 day of JULY, 2013, <sup>9:00 A</sup> Department XXVI of the Eighth Judicial District Court, 200 South Third Street, Las Vegas, Nevada or soon thereafter as counsel may be heard.

DATED this 24th day of June, 2013.

Respectfully submitted by:

  
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## MEMORANDUM OF POINTS & AUTHORITIES

### I.

#### Introduction

Sophisticated landowner Fred Nassiri claims that NDOT overcharged him for 24 acres of property in a fully negotiated, arms-length land deal in 2005 and that NDOT's later-developed plans to construct a "fly over" negatively impacted that property. He asserts six claims for relief: (i) inverse condemnation, (ii) breach of contract, (iii) contractual breach of the implied covenant of good faith and fair dealing, (iv) tortious breach of the implied covenant of good faith and fair dealing, (v) negligent misrepresentation, and (vi) intentional misrepresentation.

Nassiri's pleading suffers from several fatal deficiencies, each of which independently requires dismissal for the following reasons:

- **Failure to serve the Complaint within the statutory period:** Nassiri failed to properly serve NDOT within the requisite 120-day time period;
- **Express waiver of claims:** Nassiri expressly waived his right to assert his claims against NDOT under the clear and unambiguous terms of a quitclaim deed and settlement agreement;
- **Governmental immunity:** NDOT is immune from tort liability under NRS 41.032 because it is a state agency and all of Nassiri's allegations challenge discretionary functions and/or duties;
- **Failure to state a claim for relief under NRCP 12(b)(5):**
  - The inverse condemnation claim must be partially dismissed because the deprivation of a property owner's view is not a compensable "taking" that can substantiate an inverse condemnation claim;
  - The breach of contract claim fails because Nassiri has failed to identify any contractual obligation that NDOT breached;
  - Nassiri's breach of the implied covenant claim fails because the acts alleged do not contravene the spirit of the parties' agreement;
  - The tortious bad faith claim must be dismissed because the parties lack a fiduciary or special relationship as a matter of law; and
  - The misrepresentation claims must be dismissed because Nassiri has failed to sufficiently plead that NDOT provided him with any false information, that Nassiri relied upon any false information when entering into the agreement, or that NDOT fraudulently concealed any information from him;
- **Statutes of limitation have run:** All but the inverse condemnation claim are time-barred by their applicable statutes of limitations because they arise from events that occurred seven and a half years before this action was filed; and
- **Punitive damages are statutorily prohibited:** Nassiri's prayer for punitive damages must be stricken because exemplary damages against a state agency are statutorily prohibited.

NDOT respectfully requests that the Court quash the service of the summons and complaint as untimely, dismiss Nassiri's Amended Complaint in its entirety, or at a minimum, dismiss individual claims and strike Nassiri's punitive damages prayer.

## II.

### Statement of Facts

#### A. The 2004-2005 Events that Underlie Nassiri's Claims in this Action.

The relationship between Nassiri and NDOT dates back to 2004, when NDOT filed a condemnation action against Nassiri in connection with the construction of the I-15/Blue Diamond interchange.<sup>1</sup> After extensive negotiations, the parties agreed to two deals: (1) to resolve the eminent domain action, NDOT would acquire 4.21 acres of Nassiri's property for \$4.81 million; and (2) sophisticated landowner Nassiri would also purchase from NDOT an approximately 24-acre parcel east of Nassiri's property ("the Exchange Property") for \$23,239,004.50. *Id.* at ¶¶ 1.01-1.04; Amended Complaint at ¶ 8. The two deals were memorialized in a single Settlement Agreement and Release of All Claims dated April 28, 2005,<sup>2</sup> in which the parties expressly acknowledged that the terms of their deal had "been negotiated and discussed between NDOT and Nassiri," that the parties "have had the benefit and advice of counsel of their choosing," and that the "Agreement constitute[d] the entire Agreement by and between" them. *Id.* at ¶¶ 2.19, 2.20, and (second) 2.28.

The Exchange Property had a history well known to its neighbor Nassiri at the time he was negotiating its purchase from NDOT, and as part of the deal, he agreed to take the property "with all faults" and without warranties via quitclaim deed. *Id.* at ¶2.04. For example, and as memorialized in the Settlement Agreement, Nassiri "acknowledge[d] he is aware of claims by Carolyn Ann Chambers . . . related to an alleged reversionary interest or other right relating to the Exchange Property (the "Chambers Claims"), that he has performed his own investigation of the Chambers Claims, and, based upon such investigation, accepts the Exchange Property subject to any claims of Chambers, her assigns or successors." *Id.* at ¶2.04(a). And he promised to "hold

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<sup>1</sup> See Settlement Agreement and Release of All Claims ("Settlement Agreement") at ¶ 1.01, attached to Nassiri's Amended Complaint as Exhibit 2; Amended Complaint at ¶ 7.

<sup>2</sup> The Settlement Agreement was amended in part on June 14, 2005; the First Amendment is also contained within Nassiri's Exhibit 2. Both are attached hereto as Exhibit A for the Court's ease of reference.

1 harmless the State of Nevada and NDOT . . . of and from all claims, known or unknown, asserted  
2 or unasserted of whatever nature, now existing or hereafter arising, including but not limited to  
3 claims for attorney's fees and costs, relating in any way to the Chambers Claims." *Id.* at ¶  
4 2.04(c). Nassiri also expressly released NDOT not just for the Chambers Claims but for any and  
5 all "matters affecting" the Exchange Property's "title or claims thereto," and he acknowledged  
6 that this release applies, covers, and includes "all unknown, unforeseen, unsuspected, and  
7 unanticipated injuries, claims, damages, losses, and liabilities, if any." *Id.* at ¶ 2.19(ii).

8 As a property owner in the I-15/Blue Diamond corridor, Nassiri also knew that the  
9 interchange was being constructed and plans for construction would continue into the future.  
10 Indeed, as part of the Settlement Agreement, Nassiri acknowledged that the deal was necessitated  
11 due to "the construction and reconstruction of the interchange at I-15 and Blue Diamond Road,  
12 and the attendant widening and realignment of Blue Diamond Road," and he agreed to "execute  
13 and deliver to Escrow a temporary construction easement" allowing "NDOT to use certain  
14 portions of the Exchange Property in connection with Project planning, staging, and  
15 construction." *Id.* at ¶¶ 1.01 and 2.06. The quitclaim deed transferring the Exchange Property  
16 was executed on June 14, 2005, and the transfer was recorded in the real property records on  
17 June 17, 2005.<sup>3</sup>

18 **B. Nassiri's 2012 Lawsuit Challenges those 2004-2005 Events.**

19 On November 30, 2012, **seven and a half years after the Settlement Agreement was**  
20 **executed and the land deals were completed**, Nassiri filed this action, followed with an  
21 amended complaint on March 27, 2013. Nassiri alleges that in 2008 he obtained a copy of a  
22 2004 appraisal that NDOT had for the Exchange Property, which reflected that the property had  
23 an appraised value of \$15.55 million with a premium assemblage value of \$22.65. Amended  
24 Complaint at ¶ 16. He essentially contends that he did not realize that the price he negotiated  
25 with the advice of counsel contained a "hidden premium" and that NDOT misled him into  
26 believing that the property was worth the purchase price, and he was overcharged by \$8 million.

---

27  
28 <sup>3</sup> A true and correct copy of the Quitclaim Deed is attached hereto as Exhibit B.

1 *Id.* at ¶¶ 16-17. Curiously, Nassiri fails to allege why this sophisticated land purchaser never  
2 obtained his own appraisal of the property he was investing more than \$22 million into and  
3 taking title to under a no-warranty quitclaim deed.

4       Apparently forgetting the plain and express releases in his Settlement Agreement, Nassiri  
5 also alleges that NDOT should be required to reimburse him for expenses he incurred in  
6 resolving title claims against the Exchange Property by Chambers and other third parties.  
7 Amended Complaint at ¶¶ 12-15. Nassiri also claims that the construction of the “fly over” at  
8 Blue Diamond Road effected a taking of the Exchange Property because it has blocked both the  
9 visibility of, and northbound-traffic access to, the Exchange Property. *Id.* at ¶¶ 27-28.

10 **C. Nassiri Failed to Properly Serve His Complaint Before the 120 Days Expired.**

11       Nassiri filed his Complaint on November 30, 2012, followed by an Amended Complaint  
12 on March 27, 2013. Nassiri served the Director of NDOT with the Amended Complaint on  
13 March 28, 2013,<sup>4</sup> but failed to serve it upon the other required recipients set forth in NRS  
14 408.116 and NRS 41.031 by the time the requisite 120-day time period for serving a complaint  
15 under the Nevada rules expired on March 29, 2013. These other mandatory recipients include  
16 the Attorney General or a person designated by the Attorney General, and the Chair of the Board  
17 of Directors of the Department of Transportation. *See* NRS 408.116 and NRS 41.031. On April  
18 12, 2013, Deputy Attorney General Amanda B. Kern notified Nassiri about his insufficient  
19 service of process. *See* Exhibit 3 to Nassiri’s April 17, 2013, Ex Parte Motion to Extend Time  
20 for Service on Order Shortened Time on file herein.

21       Although Nassiri was aware that Ms. Kern represented NDOT with respect to his matter,  
22 he filed an *Ex Parte* Motion to Extend Time for Service on Shortened Time on April 17,  
23 2013—weeks after the 120 days ran. *See* April 17, 2013, Ex Parte Motion on file herein. NDOT  
24 never received notice of this motion or had an opportunity to be heard on it. On the same day  
25 Nassiri filed this Ex Parte Motion and without awaiting the Court’s decision on his Ex Parte  
26 Motion, he served both a representative of the Attorney General and the Governor’s Office. *See*

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27  
28 <sup>4</sup> *See* March 28, 2013, Affidavit of Service, on file herein.



1 April 17, 2013, Affidavits of Service on file herein. Although the Court Minutes show the Ex  
2 Parte Motion was granted on April 22, 2013, no order has been entered granting Nassiri's Ex  
3 Parte Motion.

4 **III.**

5 **Argument**

6 **A. Nassiri's Action Must Be Dismissed under NRCP 12(b)(4) and/or Service of the**  
7 **Summons and Amended Complaint Must be Quashed Due to Nassiri's Insufficient**  
8 **Service of Process.**

9 NRCP 4 and 12(b)(4) permit a party to move for dismissal of a complaint for insufficient  
10 service of process. "If a service of the summons and complaint is not made upon a defendant  
11 within 120 days after the filing of the complaint, the action shall be dismissed as to that  
12 defendant without prejudice." Nev. R. Civ. Proc. 4(i). Although the rule permits a party to file a  
13 motion to enlarge the time for service and show good cause why service was not made within  
14 that period, when the party fails to file that motion before the 120-day service period expires, the  
15 court must take that failure into consideration in determining good cause for an extension of  
16 time. *Id.* Without a showing of good cause, the court must deny the extension. *Id.* In *Saavedra-*  
17 *Sandoval v. Wal-Mart Stores, Inc.*, 245 P.3d 1198, 1201 (Nev. 2010), the Nevada Supreme Court  
18 recently clarified that the rule "creates a threshold question for the district court, requiring it to  
19 first evaluate whether good cause exists for a party's failure to file a timely motion seeking  
20 enlargement of time. Failure to demonstrate such good cause ends the district court's inquiry."

21 Nassiri did not properly serve NDOT within the requisite 120-day time period under  
22 NRCP 4. Nassiri filed his Complaint with this Court on November 30, 2012, and filed his  
23 Amended Complaint on March 27, 2013, thereby requiring Nassiri to serve NDOT and all related  
24 parties by April 1, 2013. *See* NRCP 4(i). Nassiri served the Director of NDOT with the  
25 Amended Complaint on March 28, 2013, but failed to serve it upon the other recipients required  
26 by NRS 408.116 and NRS 41.031 before the April 1st deadline. These other recipients include  
27 the Attorney General, or a person designated by the Attorney General, and the Chair of the Board  
28 of Directors of the Department of Transportation. *See* NRS 408.116 and NRS 41.031. On April  
12, 2013, Deputy Attorney General Amanda B. Kern notified Nassiri about his insufficient



1 service of process. *See* Exhibit 3 to Nassiri's April 17, 2013, Ex Parte Motion to Extend Time  
2 for Service on Order Shortened Time on file herein.

3 Although Nassiri was aware that Ms. Kern represented NDOT, he filed an Ex Parte  
4 Motion to Extend Time for Service on Shortened Time, therefore precluding NDOT's  
5 opportunity to oppose the Ex Parte Motion and to be heard on it. Furthermore, the grounds  
6 asserted in the Ex Parte Motion fall short of the "good cause" required for an extension of the  
7 120-day period. Nassiri essentially based his entire Ex Parte Motion on the holding in *Scrimmer v.*  
8 *Eighth Judicial Dist. Court*, 116 Nev. 507, 998 P.2d 1190 (2000), and completely ignored the  
9 more recent case of *Saavedra-Sandoval, supra*. The motion was filed on April 17, 2013 - 16  
10 days after the requisite 120-day time period had already elapsed. That same day, Nassiri  
11 served both a representative of the Attorney General and the Governor's Office. *See* April 17,  
12 2013, Affidavits of Service on file herein.

13 The Court Minutes from April 22, 2013, reflect that this Court granted the Ex Parte  
14 Motion, but no Order has yet been entered. Since no Order has been entered, NDOT never  
15 received notice of Nassiri's Ex Parte Motion or had an opportunity to be heard on it, and the  
16 showing of good cause for failure to timely serve and failure to timely file a motion as required  
17 by *Saavedra-Sandoval* was not made by Nassiri in his Ex Parte Motion, NDOT respectfully  
18 requests this Court dismiss Nassiri's Amended Complaint and/or quash service of the summons  
19 and Amended Complaint for insufficient service of process.<sup>5</sup>

20 **B. Nassiri's Amended Complaint Fails to State Any Claim Upon Which Relief Can Be**  
21 **Granted, and 12(b)(5) Dismissal is Required.**

22 A defendant is entitled to dismissal of a complaint when the plaintiff fails "to state a  
23 claim upon which relief can be granted." NRCP 12(b)(5). The plaintiff fails to state a claim if it  
24 appears beyond a doubt that the claimant can prove no set of facts that would entitle him to relief.  
25 *See Buzz Stew, LLC v. City of North Las Vegas*, 181 P.3d 670, 672 (Nev. 2008); *Morris v. Bank*

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26  
27 <sup>5</sup> Although no order has been entered granting the request for extension, to the extent the more  
28 more proper relief is reconsideration of the prior decision on the Ex Parte Motion, NDOT asks  
that the Court convert this into a request for reconsideration.

1 of America, 886 P.2d 454, 456 (Nev. 1994). Although Nevada is a notice-pleading jurisdiction, a  
2 complaint nevertheless “must set forth sufficient facts to establish all necessary elements of a  
3 claim for relief . . . so that the adverse party has adequate notice of the nature of the claim and  
4 relief sought.” See *Hay v. Hay*, 678 P.2d 672, 674 (Nev. 1984); *Ravera v. City of Reno*, 675 P.2d  
5 407, 408 (Nev. 1984). Although the court must accept all of the non-moving party’s factual  
6 allegations as true and construe them in its favor, see *Buzz Stew*, 181 P.3d at 672; *Morris*, 886  
7 P.2d at 456, it is not bound to accept as true a legal conclusion or contractual interpretation  
8 couched as a factual allegation. *Bailey v. Gates*, 290 P.411, 412 (Nev. 1930) (“Good pleading  
9 requires that . . . the facts relating to the matter be averred, leaving the court to draw the legal  
10 conclusion”).

11 When ruling on a motion to dismiss, the Court may consider “documents attached to the  
12 complaint, documents incorporated by reference in the complaint, or matters of judicial notice []  
13 without converting the motion to dismiss into a motion for summary judgment.” *U.S. v. Ritchie*,  
14 342 F.3d 903, 908 (9th Cir. 2003). “Even if a document is not attached to a complaint, it may be  
15 incorporated by reference into a complaint if the plaintiff refers extensively to the document or  
16 the document forms the basis of the plaintiff’s claim.” *Id.*; see also *Branch v. Tunnell*, 14 F.3d  
17 449, 453-54 (9th Cir. 1994), overruled on other grounds, *Galbraith v. County of Santa Clara*,  
18 307 F.3d 1119 (9th Cir. 2002) (holding that in ruling on a motion to dismiss, the Court may  
19 consider “documents whose contents are alleged in a complaint and whose authenticity no party  
20 questions, but which are not physically attached to the pleading”).

21 NDOT seeks an Order dismissing Nassiri’s claims pursuant to NRCP 12(b)(5) based on  
22 several independent and alternative grounds: (1) Nassiri has contractually waived his right to  
23 assert the majority of his claims in an express, written Quitclaim Deed and Settlement  
24 Agreement, (2) Nassiri’s tort claims are barred by NRS 41.032, which immunizes NDOT from  
25 any liability for these claims as a matter of statute, and (3) Nassiri’s claims are insufficiently pled  
26 or barred by applicable statutes of limitations.

1           ***1. Nassiri Has Expressly Waived His Right to Bring his First Four Claims for***  
2           ***Relief.***

3           Nassiri asserts six claims for relief against NDOT. The first four of these claims (inverse  
4 condemnation, breach of contract, contractual breach of the implied covenant of good faith and  
5 fair dealing, and tortious breach of the implied covenant of good faith and fair dealing) must be  
6 dismissed because Nassiri expressly waived them in his Quitclaim Deed and Settlement  
7 Agreement.<sup>6</sup>

8           All of Nassiri's claims generally center around the sale price of the Exchange Property  
9 and NDOT's alleged change of the Blue Diamond Road Interchange development plan and its  
10 effect on the Exchange Property. In the Quitclaim Deed and Settlement Agreement, Nassiri  
11 expressly agreed:

- 12           •       "Grantee accepts the Property as is, where is, and with all faults, including, but  
13               not limited to, any and all easements, encroachments, utilities, or other  
14               encumbrances, whether or not of record." Quitclaim Deed at p. 2.
- 15           •       "Grantor makes no warranty, express or implied of any kind with respect to any  
16               matter affecting the Property." *Id.*
- 17           •       "NDOT shall convey the Exchange Property to Nassiri by quitclaim deed . . .  
             without warranty, 'as-is,' 'where-is', and 'with all faults.'" Settlement Agreement  
             at ¶ 2.04(a).

18       The language of these documents is clear and unambiguous. The Quitclaim Deed provides that  
19 any future claims by Nassiri regarding the Exchange Property and/or "other encumbrances,  
20 whether or not of record" that may affect the Exchange Property are deemed waived. *See*  
21 *Southern Trust Mort. Co. v. K & B Door Co., Inc.*, 763 P.2d 353, 355 (Nev. 1988) (holding  
22 "where a document is clear and unambiguous on its face, the court must construe it from the  
23 language therein"). Nassiri's first four claims each relate to the effects of the "fly over" on the  
24 Exchange Property or the price that he paid for the Exchange Property. *See e.g.* Amended  
25 Complaint at ¶¶ 39-40 (claiming the "fly over" has eliminated access and visibility); ¶¶ 49-50; ¶¶

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26  
27       <sup>6</sup> Nevada law prohibits contractual waiver of misrepresentation claims. *Blanchard v.*  
28       *Blanchard*, 839 P.2d 1320, 1322-23 (Nev. 1992). Accordingly, although Nassiri waived all  
      claims by his contractual releases, NDOT recognizes this legal limitation.

1 57-59; ¶¶ 68-70 (referencing third-party claims, the purchase price of the Exchange Property and  
2 the “fly over’s” effect on the Exchange Property). Nassiri expressly waived his right to assert  
3 these claims and they must be dismissed.

4  
5 **2. Nassiri also waived his right to bring an action against NDOT to recover  
expenses related to third party actions involving the Exchange Property.**

6 Nassiri’s contractual waivers in the Settlement Agreement and Quitclaim Deed also  
7 require the dismissal of any claim seeking to recover expenditures on other litigation. Nassiri  
8 alleges that NDOT’s actions exposed him to, and forced him to bear, millions of dollars in  
9 expenses to resolve “third party litigation” by Carolyn Ann Chambers (involving “an alleged  
10 reversionary interest in a portion of the Exchange Property”) and a handful of parties in the  
11 Koroghli Litigation (“alleging claims . . . relating directly to the acquisition of the Exchange  
12 Property”), and his breach of contract claim is, in part, based on these allegations. *See* Amended  
13 Complaint at ¶¶ 12-15; 48. This theory is expressly barred by the release provisions in the  
14 Settlement Agreement.

15 Nassiri expressly “acknowledges” in the Settlement Agreement “that **he is aware of**  
16 **claims by Carolyn Ann Chambers** or her representatives relating to an alleged reversionary  
17 interest or other right relating to the Exchange Property, that he has performed his own  
18 investigation” of those claims and **he “accepts the Exchange Property subject to any claims of**  
19 **Chambers, her assigns or successors.”** Settlement Agreement at ¶ 2.04(a) (emphasis added).  
20 Two paragraphs later, he “represents and warrants” that he has “secured an assignment . . . of all  
21 right, title, and interest of Carolyn Ann Chambers, her successors or assigns, in or to the  
22 Chambers Claims,” and agrees that “Nassiri shall indemnify and hold harmless the State of  
23 Nevada and NDOT . . . of and from all claims, known or unknown, asserted or unasserted of  
24 whatever nature, now existing or hereafter arising, including but not limited to claims for  
25 attorney’s fees and costs, relating in any way to the Chambers Claims.” *Id.* at ¶ 2.04(c). The  
26 Quitclaim Deed reiterates this promise verbatim. *See* Quitclaim Deed at p.2. Section 2.04(b)  
27 deems any interest purportedly claimed by Chambers an “Approved Exception” to title. *Id.* at ¶  
28 2.04(b). Thus, to the extent that Nassiri’s breach of contract claim is based on his allegation that

1 he was required “to pay an additional \$200,000 . . . to address the ‘Chambers Claim,’” this claim  
2 is expressly barred by the Settlement Agreement and the Quitclaim Deed.

3 The same is true for the Koroghli claims. In paragraph 2.09(ii), Nassiri “release[d] and  
4 forever discharge[d]” all claims relating to “the physical condition of the Exchange Property as  
5 of the Execution Date or **matters affecting title or claims thereto.**” Settlement Agreement at ¶  
6 2.09(ii) (emphasis added). And Nassiri acknowledged in that agreement that he intended this  
7 release to “apply to and also cover and include all unknown, unforeseen, unsuspected, and  
8 unanticipated injuries, claims, damages, losses, and liabilities . . . .” *Id.* at ¶ 2.19(ii). Not only  
9 would this release further cover the Chambers claim, it also prevents Nassiri from obtaining any  
10 recovery from NDOT with respect to the Koroghli claims because, as alleged by Nassiri, these  
11 claims relate to “the physical condition of the Exchange Property” or “matters affecting title or  
12 claims thereto.” *Id.* The Quitclaim Deed similarly releases these claims when it states that  
13 Nassiri “releases” NDOT “for any matter affecting the physical condition of the Property as of  
14 the date Grantee executes this Quitclaim Deed, and for any matter relating to title or third-party  
15 claims to any interest in the Property.” Quitclaim Deed at p.2. Clearly, this release covers both  
16 the Chambers and Koroghli claims and bars any recovery based on these theories.

17 **3. Nassiri’s tort claims are barred by the discretionary-act immunity doctrine.**

18 The State of Nevada has waived its immunity from liability and consented to have its  
19 liability determined in accordance with the same rules of law as are applied to civil actions  
20 against natural persons and corporations. Nev. Rev. Stat. § 41.031. One of the noted exceptions  
21 to this express waiver is set forth in NRS 41.032, which provides that the state, its agencies,  
22 political subdivisions and employees (i.e. NDOT) are immune from liability for claims stemming  
23 from the exercise of discretionary functions or the performance of discretionary duties. Nev.  
24 Rev. Stat. § 41.032(2). This exception applies here.

25 **a. State agencies are immune from tort liability for discretionary policy**  
26 **decisions like planning and the execution of land sale contracts.**

27 Government actions fall within the scope of the immunity doctrine when they “(1)  
28 involve an element of individual judgment or choice and (2)[are] based on considerations of

1 social, economic, or political policy.” *Martinez v. Maruszczak*, 168 P.3d 720, 729 (Nev. 2007).  
2 “[D]ecisions at all levels of government, including frequent or routine decisions, may be  
3 protected by discretionary-act immunity, if the decisions require analysis of government policy  
4 concerns.” *Id.* “While policy decisions involving the consideration of competing economic,  
5 social, and political factors are subject to discretionary-act immunity, operational level decisions  
6 are not.” *Warner v. City of Reno*, 2010 WL 3791493 at \*2 (D. Nev. 2010) (citing *Martinez*, 168  
7 P.3d at 728; *Nguyen v. State*, 788 P.2d 962, 964-65 (Okla. 1990)). “Operational level decisions  
8 are those involved in the day-to-day operations of government and those required to implement  
9 the discretionary policy decisions.” *Id.* (citing *Martinez*, 168 P.3d at 728, n. 32).

10  
11 ***b. Nassiri’s fourth, fifth and sixth claims for relief challenge discretionary  
functions and are barred by the immunity doctrine.***

12 NDOT’s decisions regarding the sale of the Exchange Property to Nassiri, in settlement of  
13 a condemnation action, and the ultimate construction of the flyover are immune from tort liability  
14 under NRS 41.032. Both involve an element of individual judgment or choice and are based on  
15 considerations of social, economic, or political policy. The Nevada Supreme Court expressly  
16 recognized in *State of Nevada v. Webster*, 504 P.2d 1316, 1319 (Nev. 1972), that the decision to  
17 construct a highway is a policy determination and a discretionary act immune from tort liability.  
18 “Whether or not, for the convenience of the traveling public, the State would construct a  
19 controlled-access freeway between the two cities or construct a portion of the route was an  
20 exercise of discretion based upon policy. Its decision to do so was a discretionary act.” *See also*  
21 *Andolino v. State of Nevada*, 624 P.2d 7, 9 (Nev. 1981) (“We have held that the initial decision to  
22 construct a highway is a policy determination.”); *Frank Briscoe Company, Inc. v. County of*  
23 *Clark*, 643 F.Supp. 93 (D.Nev. 1986) (holding that the preparation of plans and specifications for  
24 future construction, all approved by the County, were the product of the exercise of the County’s  
25 discretionary function and are exempt and not actionable).

26 Nassiri’s fourth through sixth claims for relief (tortious breach of the implied covenant of  
27 good faith and fair dealing, negligent misrepresentation, and intentional misrepresentation) are all  
28 tort claims based on NDOT’s discretionary functions. *See e.g.* Amended Complaint at ¶ 66

(citing to NDOT's "knowledge and control over highway projects"); ¶ 70 (NDOT's planning and construction of the "fly over"); ¶ 78 (citing to NDOT's alleged decision to charge an assemblage premium); ¶ 79 (complaining of NDOT's alleged changes to the Blue Diamond Road Interchange). They are all statutorily barred by NRS 41.032 and must be dismissed.

**4. Nassiri Has Failed to Sufficiently Plead His Claim for Inverse Condemnation.**

Nassiri's inverse condemnation claim fails as a matter of law to the extent it is based on the allegation that the "fly over" eliminates the visibility of the Subject Property from I-15. Amended Complaint at ¶ 42. It is well-settled in Nevada that the deprivation of a property owner's view is not a compensable "taking" that would substantiate an inverse condemnation claim. Therefore, Nassiri's inverse condemnation claim must be partially dismissed for failure to state a claim upon which relief can be granted. In *Probasco v. City of Reno*, 459 P.2d 771, 774 (Nev. 1969), the Nevada Supreme Court "expressly repudiate[d] the doctrine of implied negative easements [of light, air, and view] in the context of eminent domain." *Id.* at 774. The *Probasco* Court also emphasized that "[t]here is no right to compensation for damages resulting from reasonable zoning regulations, or by reason of the diversion of traffic away from one's property," and that "[t]he infringement upon an abutting landowner's light, air and view over a public highway should be similarly regarded unless such owner has acquired a right to light, air and view by express covenant." *Id.*

*Probasco* is fatal to Nassiri's theory that NDOT effectuated a taking of his property by its construction of a flyover that "eliminates the visibility of the Subject Property from I-15" and that Nassiri "relied on the visibility of the Exchange Property when" purchasing it. Amended Complaint at ¶¶ 42-43. Nassiri fails to allege any facts demonstrating that he acquired a right to view by express covenant. Indeed, a review of the Settlement Agreement and Quitclaim Deed reveals that neither of those documents contains any language regarding NDOT's duty to preserve visibility for this property. To the extent that it relies on the visibility theory, Nassiri's inverse condemnation claim must be dismissed as a matter of Nevada law.

**5. Nassiri Has Failed to Sufficiently Plead His Claim for Breach of Contract.**

In order for Nassiri's breach of contract claim to survive a motion to dismiss, he must



1 properly plead and demonstrate all of the essential elements for a breach of contract claim, which  
2 include: (i) the contract, (ii) his performance or excuse for nonperformance, (iii) NDOT's breach,  
3 and (iv) resulting damages. *Reichert v. General Insurance Company of America*, 68 Cal.2d 822,  
4 830 (1968). Nassiri fails to sufficiently plead any facts to establish the breach element of this  
5 cause of action. Although he alleges that NDOT breached the Settlement Agreement by (i)  
6 failing to provide equivalent value, and (ii) changing the Blue Diamond Road Interchange plans,  
7 Amended Complaint at ¶¶ 49-50, Nassiri has not and cannot identify any contractual obligation  
8 that NDOT did not fulfill, requiring the dismissal of this claim.

9  
10 *a. NDOT's alleged failure to provide equivalent value is not a breach of the Settlement Agreement.*

11 Nassiri alleges that NDOT was to convey the Exchange Property for a just and reasonable  
12 price and it failed to do so by withholding the 2004 Appraisal of the Exchange Property and  
13 failing to disclose that it had charged Nassiri a 45.65% assemblage premium. Amended  
14 Complaint at ¶¶ 48-49. What Nassiri fails to allege, however, is how the withholding of an  
15 appraisal or the charging of an assemblage premium amounts to a breach of the Settlement  
16 Agreement in which Nassiri expressly agreed to pay \$23,239,004.50 for the Exchange Property  
17 and acknowledges that that term and all others in the agreement "have been negotiated . . . and  
18 reflect [ ] their mutual agreement. See Settlement Agreement at ¶ 2.28; First Amended  
19 Settlement Agreement at ¶ 2.03. It is axiomatic that breach liability requires that the breaching  
20 party failed to perform an express contractual obligation. As Nassiri has identified no such  
21 obligation in his Amended Complaint, dismissal is required.

22 Furthermore, nowhere in the Settlement Agreement does it state that NDOT had a duty to  
23 provide Nassiri with a copy of the 2004 Appraisal. Indeed, Nassiri does not and cannot even  
24 allege this in his Amended Complaint. Nassiri fails to identify any provision in the Settlement  
25 Agreement requiring NDOT to provide him with this document. This was simply an arm's  
26 length transaction between two unrelated and sophisticated parties. As a sophisticated party  
27 likely involved in many real estate transactions, Nassiri had the opportunity to get his own  
28 appraisal and he cannot now fault NDOT for his failure to obtain some commercial validation of



1 the purchase price he negotiated and agreed to.

2 Lastly, Nassiri fails to explain how, when negotiating the sales price for the Exchange  
3 Property, NDOT's reliance on its own appraisal amounts to any actionable breach of the  
4 Settlement Agreement. The Appraisal attached to Nassiri's Amended Complaint shows two  
5 scenarios and two valuations. See pgs.2-3 of Appraisal attached to Amended Complaint at  
6 Exhibit 3. The first scenario is the valuation of the parcel as a "standalone" property and the  
7 second is the valuation of the parcel taking Nassiri's adjoining parcel into consideration. *Id.*  
8 Under scenario two, the appraised valuation was \$22,650,000.00, which is nearly the same price  
9 that Nassiri paid for the Exchange Property. *Id.* Therefore, NDOT lawfully relied on this  
10 valuation when selling the Exchange Property to Nassiri - at a just and reasonable price. Most  
11 importantly, Nassiri, as a sophisticated party involved in many real estate transactions,  
12 voluntarily and contractually accepted this price. There was no breach.

13 ***b. The claim is time-barred.***

14 If Nassiri is alleging that the withholding of the Appraisal or written summary of the basis  
15 for amount established as just compensation somehow amounts to a breach of the Settlement  
16 Agreement, then this cause of action must also be dismissed for the additional reason that it is  
17 barred by the applicable statute of limitations. NRS 11.190(1)(b) provides a six-year limitation  
18 period for contract actions in Nevada. The statute of limitations begins to run as soon as the  
19 plaintiff knows or should know of the facts constituting the breach. *Soper By & Through Soper*  
20 *v. Means*, 903 P.2d 222, 225 (Nev. 1995). At the latest, Nassiri knew that NDOT "refused" to  
21 provide the Appraisal by April 28, 2005 - the date of the Settlement Agreement. The six-year  
22 statute of limitations on this claim thus ran on April 29, 2011, 1 ½ years before Nassiri  
23 commenced this action on November 30, 2012. This claim is, therefore, time barred and must be  
24 dismissed.

25 ***c. NDOT's alleged change in the Blue Diamond Road Interchange plans***  
26 ***breached no term of the Settlement Agreement.***

27 Nassiri's allegations regarding NDOT's alleged change in the Blue Diamond Road  
28 Interchange plans also do not state a claim for breach of the Settlement Agreement. The

1 Settlement Agreement contains no language regarding the Blue Diamond Road Interchange  
2 development plan, the fly over, or preservation of any view or visibility. Therefore, Nassiri's  
3 claim that NDOT's future revisions to the development plan somehow amounts to a breach of the  
4 Settlement Agreement is unsupportable by the contract itself. Should Nassiri allege that he relied  
5 upon some extrinsic representation prior to entering the Settlement Agreement, such allegation  
6 cannot be considered because the Settlement Agreement contains an integration clause that  
7 clearly states that it "constitutes the entire Agreement by and between the Parties and supersedes  
8 and replaces any and all previous agreements entered into or negotiated between the parties."  
9 Settlement Agreement at ¶ 2.20. *See e.g. Galardi v. Naples Polaris, LLC*, 301 P.3d 364 (Nev.  
10 2013) (citing *Campanelli v. Conservas Altamira, S.A.*, 477 P.2d 870, 872 (Nev. 1970) (parties to  
11 a written contract are bound by its terms regardless of their subjective beliefs at the time the  
12 agreement was signed)).

13  
14 **6. Nassiri has failed to sufficiently plead his claim for breach of implied covenant  
of good faith and fair dealing.**

15 Nassiri's claim for contractual breach of the implied covenant of good faith and fair  
16 dealing must be dismissed for many of the same reasons as the contract claim itself, including the  
17 fact that it is time-barred. An implied covenant of good faith and fair dealing exists in every  
18 Nevada contract and essentially *forbids arbitrary, unfair acts* by one party that disadvantage the  
19 other. *Frantz v. Johnson*, 116 Nev. 455, 465, 999 P.2d 351, 358 (2000) (emphasis added). A  
20 contractual breach of covenant arises "[w]here the terms of a contract are literally complied with  
21 but one party to the contract deliberately countervenes [sic] the intention and spirit of the  
22 contract." *Hilton Hotels v. Butch Lewis Prods.*, 808 P.2d 919, 923 (Nev. 1991) (emphasis added).  
23 A plaintiff must, therefore, prove that the defendant literally complied with the contract's express  
24 terms, but violated its "intention and spirit." *Id.*

25 Nassiri alleges that NDOT breached its duty of good faith and fair dealing: (i) by failing  
26 to disclose that it charged Nassiri a 45.65% premium prior to its sale of the Exchange Property,  
27 (ii) failing to disclose that it "intended, contemplated, or that it was otherwise possible that  
28 NDOT would construct a 'fly over,'" and (iii) when it planned and began construction on the "fly

1 over,” despite express representations that the Blue Diamond Road Interchange would not  
2 include a “fly over.” Amended Complaint at ¶¶ 57-59. None of these alleged actions constitutes  
3 a breach of the implied covenant under the law.

4 NDOT had no duty or obligation to provide Nassiri with a copy of the 2004 Appraisal or  
5 to reveal the justification for its asking price. Indeed, in the typical land sale deal, the parties  
6 have their own justification for arriving at a negotiated purchase price, and as Nassiri expressly  
7 acknowledged in the Settlement Agreement, these terms, particularly the sales price, were  
8 “negotiated” and “reflect[ ]” the parties’ “mutual agreement.” Settlement Agreement at ¶ 2.28;  
9 First Amended Settlement Agreement at ¶ 2.03 (amending the purchase price). Moreover, there  
10 is no evidence indicating that NDOT contemplated the final construction of the “fly over” at the  
11 time the parties entered into the Settlement Agreement (there is no mention in the Settlement  
12 Agreement regarding the Blue Diamond Road Interchange development plan, the fly over, or  
13 preservation of any view), thus no subsequent decision by NDOT with respect to those features  
14 could contravene anything in the parties’ contract. In short, the purpose of a contractual breach  
15 of covenant claim is to provide the means to seek damages where a party has honored express  
16 terms of a contract while still acting unfaithfully and deliberately contravening the intent and  
17 spirit of the contract. Since none of the allegations in the Amended Complaint support such a  
18 claim for relief, Nassiri’s claim for contractual breach of covenant must be dismissed.

19  
20 **7. *Nassiri has failed to sufficiently plead his claim for tortious breach of implied  
covenant of good faith and fair dealing.***

21 As the allegations in Nassiri’s Amended Complaint fail to state a claim for contractual  
22 breach of the implied covenant, it is no surprise that they fall woefully short of pleading a  
23 tortious breach claim. A tortious breach of covenant occurs when a “special element of reliance  
24 or fiduciary duty” exists between the parties. *Great Am. Ins. Co. v. General Builders, Inc.*, 934  
25 P.2d 257, 263 (Nev. 1997). When such a relationship exists, tort recovery is appropriate if “the  
26 party in the superior or entrusted position” has engaged in “grievous and perfidious conduct.”  
27 *Id.* at 355, 934 P.2d at 263 (quoting *K Mart Corp. v. Ponsock*, 732 P.2d 1364, 1371 (Nev. 1987)).  
28 Tort liability for breach of the covenant of good faith and fair dealing is limited to “rare and

1 exceptional cases.” *Id.* at 263 (quoting *K Mart*, 732 P.2d at 1370). Examples of special  
2 relationships include relationships between insurers and insureds, partners of partnerships, and  
3 franchisees and franchisers. *Insurance Co. of the West v. Gibson Tile Co., Inc.*, 122 Nev. 455,  
4 461-62, 134 P.3d 698, 702 (2006). Each of these relationships shares a common “special  
5 element of reliance” where “there is a need to ‘protect the weak from the insults of the stronger’  
6 that is not adequately met by ordinary contract damages,” *id.* (quoting *K Mart*, 103 Nev. at 49,  
7 732 P.2d at 1371), or exhibits a situation in which one party holds “‘vastly superior bargaining  
8 power.’” *Id.* (quoting *Aluevich v. Harrah’s*, 660 P.2d 986, 987 (Nev. 1983)).

9 This claim fails for all the same reasons that the contractual breach one does, including  
10 the fact that it is time-barred. It must be dismissed for the additional and fundamental reason that  
11 the special element of reliance or fiduciary duty simply does not exist between NDOT and  
12 Nassiri. This was an arm’s length transaction between two unrelated and sophisticated parties.  
13 One party was not weaker than the other and there was no unequal bargaining power between the  
14 two. *See e.g.* Settlement Agreement at ¶ 2.28 (noting that the negotiation and drafting process  
15 was a mutual one); *see also* ¶ 2.19 (acknowledging, *inter alia*, that the parties “had the benefit  
16 and advice of counsel of their choosing” and that the parties were “acting freely and voluntarily  
17 and without influence, compulsion, or duress of any kind from any source, including, but not  
18 limited to, any other party”). The Nevada Supreme Court has specifically “denied tort liability in  
19 certain relationships where agreements have been heavily negotiated and the aggrieved party was  
20 a sophisticated businessman,” such as here. *General Builders, Inc.*, 934 P.2d at 263.

21 This claim is also primarily based on allegations related to NDOT’s sale to Nassiri of the  
22 Exchange Property and the parties’ relationship as buyers and sellers of that real property. *See*  
23 Amended Complaint at ¶¶ 67-71. But, as the Nevada Supreme Court has expressly recognized,  
24 “generally, no fiduciary obligations exist between a buyer and seller of property.” *Long v.*  
25 *Towne*, 639 P.2d 528, 530 (Nev. 1982). Therefore, this claim, too, must be dismissed for failure  
26 to state a claim upon which relief can be granted under NRCP 12(b)(5).

1                   8.       *Nassiri has failed to sufficiently plead his claim for negligent*  
2                   *misrepresentation.*

3           The elements to prove a negligent misrepresentation claim include: (i) defendant, in the  
4 course of an action in which he had a pecuniary interest, supplied false information for the  
5 guidance of others in their business transactions, (ii) defendant failed to exercise reasonable care  
6 or competence in obtaining or communicating the information to plaintiff; (iii) plaintiff  
7 justifiably relied on this information; and (iv) plaintiff suffered damages as a result. In order to  
8 establish justifiable reliance, the plaintiff is required to show that the false representation played  
9 a material and substantial part in leading plaintiff to adopt his particular course. *Blanchard v.*  
10 *Blanchard*, 839 P.2d 1320, 1322 (Nev. 1992). Plaintiff's loss is not attributed to defendant if he  
11 was unaware of the false representation at the time that he acted, or it is clear that he was not in  
12 any way influenced and would have done the same thing without it for other reasons. *Id.*

13           Nassiri alleges that: (i) NDOT was required to accurately disclose the fair market value of  
14 the property, refused to produce the Appraisal of the Exchange Property and, unbeknownst to  
15 Nassiri, charged Nassiri an assemblage premium of 46%, and (ii) NDOT was required to disclose  
16 any and all intent or plans to impact the visibility or access to his property. Amended Complaint  
17 at ¶¶ 77-79. Neither of these allegations supports a negligent misrepresentation claim for relief.  
18 Regardless, this claim is time barred by the statute of limitations.

19                   a.       *Nassiri failed to file this claim within the mandatory statutory period.*

20           NRS 11.190(3)(d) provides a three-year limitation period for fraud actions. Fraud actions  
21 are "deemed to accrue upon the discovery by the aggrieved party of the facts constituting the  
22 fraud . . ." *Id.* "[T]he statute of limitation commence[s] to run from the date of the discovery of  
23 facts which in the exercise of proper diligence would have enabled the plaintiff to learn of the  
24 fraud." *Howard v. Howard*, 239 P.2d 584, 589 (Nev. 1952); accord *Sierra Pacific Power Co. v.*  
25 *Nye*, 389 P.2d 387, 390 (Nev. 1964) ("mere ignorance of the existence of . . . the facts which  
26 constitute the cause will not postpone the operation of the statute of limitations . . . if the facts  
27 may be ascertained by inquiry or diligence").

28           Nassiri's claim is based on the theory that NDOT was required to accurately disclose the

1 fair market value of the property, but failed to do so by refusing to produce the Appraisal. At the  
2 latest, Nassiri learned of the alleged misrepresentation when he received the Appraisal in late  
3 2008. *See* Amended Complaint at ¶ 16. The Complaint was filed four years later on November  
4 30, 2012, and approximately a year after the three-year limitation period for this claim for relief  
5 ran out. Dismissal is now required.

6  
7 ***b. Nassiri has failed to plead sufficient facts to state a negligent misrepresentation claim.***

8 In addition to being time barred, Nassiri's negligent misrepresentation claim still fails to  
9 sufficiently plead all of the requisite elements to survive Rule 12(b)(5). Nevada law requires a  
10 plaintiff alleging negligent misrepresentation to show that false information was provided and  
11 that any resulting loss was caused by justifiable reliance on that information. *Barmletter*, 956  
12 P.2d at 1387. Nassiri does not plead any facts showing that he relied upon any such  
13 misrepresentation by NDOT, let alone, that NDOT provided him with any false information or  
14 fraudulently concealed any information about the Appraisal from him. NDOT lawfully and  
15 reasonably relied upon its own Appraisal while negotiating the sales price of the Exchange  
16 Property and Nassiri could have just as easily obtained an appraisal himself. Nothing in the  
17 Amended Complaint alleges that NDOT misrepresented any information to Nassiri or had a duty  
18 to reveal the justification for its asking price - just two sophisticated parties negotiating the sales  
19 price for a piece of property and both agreeing upon the final price. Buyer's remorse may not be  
20 the basis for a misrepresentation claim.

21 Nor can this claim be founded on the allegation that NDOT was required to disclose any  
22 and all intent or plans to impact the visibility or access to the Subject Property. Nassiri has not  
23 offered a single allegation that NDOT supplied false information regarding the Subject Property  
24 at the time the parties were negotiating the Settlement Agreement. Nassiri never alleges that  
25 anyone or any document stated he would enjoy a full and unobstructed view, and the Settlement  
26 Agreement contains no language regarding the "fly over," its location, or the preservation of any  
27 view. Indeed, Nassiri does not even allege that anyone represented to him that the original  
28 design of the "fly over" would provide for a completely unobstructed view and that he relied



1 upon those misrepresentations without ever investigating the design himself. Nassiri simply fails  
2 to sufficiently plead all of the requisite elements for this cause of action and it must be dismissed.

3       **9. Nassiri's sixth claim for intentional misrepresentation must be dismissed.**

4       The elements to prove an intentional misrepresentation claim include: (i) defendant made  
5 a false representation, (ii) defendant knew or believed that his or her representation was false, or  
6 defendant had an insufficient basis of information for making the representation; (iii) defendant  
7 intended to induce plaintiff to act or refrain from acting upon misrepresentation; (iv) plaintiff  
8 justifiably relied upon defendant's representation; and (v) plaintiff sustained damages as a result.  
9 *Barmettler v. Reno Air, Inc.*, 956 P.2d 1382, 1386 (Nev. 1998). NRCP 9(b) sets forth a  
10 heightened standard for pleading fraud: "[i]n all averments of fraud or mistake, the circumstances  
11 constituting fraud or mistake shall be stated with particularity." This has been interpreted by the  
12 Nevada Supreme Court to mean that in order to comply with NRCP 9(b), the specific  
13 circumstances of the alleged fraud must be detailed, which includes not only the representation  
14 made, but also the time, place, identity of the parties involved, and the nature of the fraud. *See*  
15 *Rocker v. KPMG LLP*, 148 P.3d 703, 708 (Nev. 2006); *Brown v. Kellar*, 636 P.2d 874 (1981). In  
16 other words, at a minimum, the plaintiff must allege the identity of the speaker of the alleged  
17 fraudulent statement, the substance of the statement, when the statement was made, and the  
18 recipient. *See, e.g., Brown*, 636 P.2d at 874.

19       Nassiri bases his intentional misrepresentation claim on the allegations that (i) NDOT  
20 made false representations regarding the value of the property in order to obtain a higher price for  
21 the Exchange Property, and (ii) to further entice Nassiri into purchasing the property, NDOT  
22 failed to disclose that it intended and/or contemplated the building of a "fly over" that would  
23 significantly impact the visibility of the property from I-15. Amended Complaint at ¶¶ 83, 85.  
24 Neither of these allegations supports an intentional misrepresentation claim for relief.

25                   **a. Nassiri has failed to plead facts to establish all of the requisite elements**  
26                   **of an intentional misrepresentation claim.**

27       Nassiri has not specifically pled that NDOT provided him false information regarding the  
28 value of the Exchange Property, that NDOT knew or believed the information it provided him

1 was false, that it intended to induce him to enter into the Settlement Agreement or that he  
2 justifiably relied upon NDOT's alleged misrepresentation. The same is true for his "fly over"  
3 allegations. Like his negligent misrepresentation claims, Nassiri's intentional misrepresentation  
4 claim offers no facts demonstrating that NDOT had any intent to defraud Nassiri, let alone facts  
5 sufficiently detailed to satisfy NRC 9(b).

6 ***b. This claim is also time-barred.***

7 Like the negligent misrepresentation claim, any alleged intentional misrepresentation  
8 made by NDOT regarding the value of the Exchange Property is barred by the three-year  
9 limitation period for bringing a fraud claim. *See* 11.190(3)(d). Nassiri claims NDOT never  
10 disclosed that it charged him an assemblage premium and that he discovered this information  
11 when he received the Appraisal in late 2008. *See* Amended Complaint at ¶¶ 16, 83, and 87.  
12 Given that the Complaint was filed on November 30, 2012, nearly four years after receipt of the  
13 Appraisal, the three-year limitation period for this claim for relief has elapsed and must be  
14 dismissed.

15 **C. Nevada Law Bars Nassiri's Punitive Damages Prayer and it Must Be Stricken.**

16 NDOT is a state agency and is entitled to the protections of Chapter 41 of the Nevada  
17 Revised Statutes. NRS 41.035(1) limits the award of damages that may be recovered against a  
18 state agency and states that "[a]n award may not include any amount as exemplary or punitive  
19 damages." Nassiri's Amended Complaint includes a prayer "[f]or punitive damages, to the  
20 extent any are allowed by law." Amended Complaint at p.16:25. Nevada law allows no punitive  
21 damages against NDOT. Accordingly, Nassiri's prayer for punitive damages must be stricken.

22 **IV.**

23 **Conclusion**

24 Nassiri's claims must be dismissed. He failed to serve NDOT within the requisite 120-  
25 day time period. The inverse condemnation claim must be dismissed because it asserts no legally  
26 cognizable taking claim. The pleading identifies no failed contractual provision on which a  
27 breach of contract claim may stand. No action by NDOT contravenes the spirit of the Settlement  
28 Agreement so as to state a claim for breach of the implied covenant of good faith and fair

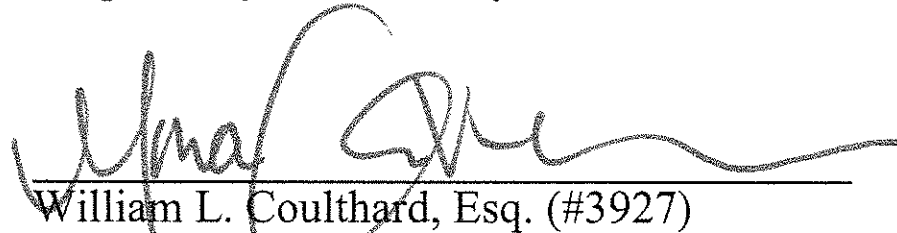


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1 dealing. The parties share no special or fiduciary relationship that would support a tortious  
2 breach claim. No facts support a negligent or intentional misrepresentation claim, and both  
3 misrepresentation claims are time-barred under the statute of limitations. Regardless, Nassiri  
4 waived his first four claims by the express terms of the Settlement Agreement and Quitclaim  
5 Deed, and the remaining two claims (plus the tortious breach claim) are barred by the doctrine of  
6 governmental immunity. Lastly, Nassiri's prayer for punitive damages must be stricken because  
7 Nevada law precludes the recovery of punitive damages against NDOT. Accordingly, and for all  
8 the foregoing reasons, NDOT respectfully requests that the Court quash the service of the  
9 summons and complaint as untimely, dismiss Nassiri's Amended Complaint in its entirety, or at  
10 a minimum, dismiss individual claims and strike Nassiri's punitive damages prayer.

11 DATED this 24th day of June, 2013.

12 Respectfully submitted by:

13   
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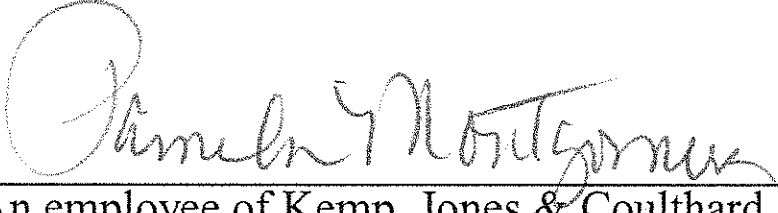
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Certificate of Service

I hereby certify that on the 24th day of June, 2013, I served a true and correct copy of the above and foregoing Defendant NDOT's (1) Motion to Dismiss Amended Complaint and/or Quash Service of the Summons and Amended Complaint for Insufficiency of Service of Process, or Alternatively, (2) Motion to Dismiss Amended Complaint for Failure to State a Claim, and (3) Motion to Strike the Prayer for Punitive Damages via U.S. Mail, properly addressed to the following:

Eric R. Olsen, Esq.  
Dylan T. Ciciliano, Esq.  
Gordon Silver  
3960 Howard Hughes Parkway, 9<sup>th</sup> Floor  
Las Vegas, Nevada 89169  
*Attorneys for Plaintiffs*

  
An employee of Kemp, Jones & Coulthard, LLP

# EXHIBIT A

## SETTLEMENT AGREEMENT AND RELEASE OF ALL CLAIMS

This Settlement Agreement and Release of All Claims (this "Agreement") is entered into this 28 day of April, 2005 (the "Execution Date") by and among The State of Nevada, on relation of its Department of Transportation ("NDOT" or "Plaintiff") and Fred Nassiri, a resident of Clark County, Nevada ("NASSIRI" or "Defendant", and together with NDOT, "the Parties").

### I.

#### Recitals

1.01 The Lawsuit. On or about August 31, 2004, NDOT filed its Complaint in condemnation ("Complaint") against, among others, NASSIRI, in the Eighth Judicial District Court, Clark County, Nevada, Case Number A491334 (the "Lawsuit") to acquire certain property owned by NASSIRI in fee simple and other property owned by NASSIRI for a two-year construction easement in connection with the construction and reconstruction of the interchange at I-15 and Blue Diamond Road, and the attendant widening and realignment of Blue Diamond Road (the "Project"). NDOT also named Clark County as a defendant in the Lawsuit. Clark County filed a disclaimer of any interest in the proceedings on October 13, 2004.

1.02 Funds on Deposit With Court Clerk. On September 27, 2004, NDOT deposited with the Clerk of the Court ("Clerk") the sum of FOUR MILLION EIGHT HUNDRED TEN THOUSAND and NO/100 DOLLARS (\$4,810,000.00) in connection with NDOT's motion for immediate occupancy (the "Deposit").

1.03 The Exchange Property. NDOT owns 24.41 acres (1,063,132 square feet) of land located generally southeast of the intersection of existing Blue Diamond Road and I-15 and east of NASSIRI's property, which land is more particularly described in the legal description attached hereto at Exhibit "1" and incorporated herein by this reference (the "Exchange Property"). NASSIRI desires to purchase the Exchange Property from NDOT.

1.04 Settlement. The parties hereto desire to enter into this Agreement, which among other things provides for full and final resolution of the Lawsuit, the release of the Deposit to NASSIRI, the conveyance in fee simple of certain property owned by Nassiri to NDOT by judgment, the conveyance of temporary construction easements over the Exchange Property to NDOT, and the conveyance of the Exchange Property to NASSIRI on the terms and conditions set forth herein.

## II.

### Agreement

NOW, THEREFORE, in consideration of the mutual promises and agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which the Parties acknowledge, the Parties agree as follows.

2.01 Escrow. The Parties shall establish an escrow in Las Vegas, Nevada with Nevada Title Company ("Escrow"), establishing a certified escrow officer to act as the Escrow Agent, and this Agreement shall serve as the instructions to the Escrow Agent for handling the transaction. The Escrow Agent shall not take any action contrary to this Agreement absent the express direction of both Parties in writing. Closing shall occur on the Closing Date as defined in Section 2.07, below.

2.02 Stipulated Judgment and Condemnation Proceeds. On or before the Closing Date, the Parties shall execute and deliver to Escrow a stipulation ("Stipulated Judgment") in the form attached hereto as Exhibit "2" together with an executed Final Judgment and Final Order of Condemnation attached thereto ("Final Judgment"), which Stipulated Judgment shall provide, among other matters, that the Clerk shall release the Deposit to NASSIRI, and release the balance of any funds held by the Clerk in connection with the Lawsuit to NDOT.

2.03 Vesting of Title in NDOT. The property to be conveyed to NDOT by recordation of the Final Judgment is located in unincorporated Clark County, Nevada, and consists of portions of the property generally located at the southwest corner of the intersection of Las Vegas Boulevard South and existing Blue Diamond Road, having Clark County Assessor's Parcel Number 177-08-803-002 and an address of 8011 Las Vegas Boulevard South, Las Vegas, Nevada 89123, and more specifically described in the Complaint as a 183,823 square-foot portion of NDOT Parcel No. S-160-CL-000.016 in fee simple absolute, as further described and identified in Exhibit "2" attached hereto and incorporated herein by this reference (the "Fee Acquisition"), a temporary easement on a 705 square-foot portion of NDOT Parcel No. S-160-CL-000.016 TE, also as described in Exhibit "2" (the "TE"), and a 25,419 square-foot portion of NDOT Parcel No. S-160-CL-000.015, which the Complaint requested in fee simple but the Parties have agreed will serve instead as a temporary easement (the "Teardrop TE", and together with the TE and the Fee Acquisition, the "Subject Property"). The Subject Property shall be condemned and given over to NDOT through entry with the Clerk of the Stipulated Judgment attached hereto as Exhibit "1" and the recording with the Clark County Recorder of the Final Judgment attached thereto, or such other documentation as NDOT may require to vest fee simple title to the Fee Acquisition in NDOT and secure NDOT's TE and Teardrop TE.

2.04 Conveyance of Exchange Property to NASSIRI.

(a) Quitclaim Deed. NDOT shall convey the Exchange Property to NASSIRI by quitclaim deed in the form attached hereto as Exhibit "3", without warranty, "as-is", "where-is", and

"with all faults" (the "Quitclaim Deed"). NASSIRI acknowledges that he is aware of claims by Carolyn Ann Chambers or her representatives relating to an alleged reversionary interest or other right relating to the Exchange Property (the "Chambers Claims"), that he has performed his own investigation of the Chambers Claims, and, based upon such investigation, accepts the Exchange Property subject to any claims of Chambers, her assigns or successors.

(b) Title. NASSIRI may cause Escrow Agent to issue to NASSIRI (with a copy to NDOT) a preliminary title report with respect to the Exchange Property (the "Preliminary Report") on or before the close of business on the tenth business day following the Execution Date, together with copies of all documents relating to title exceptions referred to in the Preliminary Report. NASSIRI shall give NDOT notice if the Preliminary Report contains any exceptions that are not reasonably acceptable to NASSIRI on or before the close of business on the tenth (10<sup>th</sup>) business day prior to Closing ("NASSIRI's Title Notice"). NDOT shall notify NASSIRI on or before the close of business on the fifth (5<sup>th</sup>) business day following the date of NASSIRI's Title Notice if NDOT will satisfy any requirement or remove any exception before the Closing Date ("NDOT's Title Notice"). NDOT's failure to provide NDOT's Title Notice with respect to any requirement or exception shall constitute NDOT's refusal to satisfy or remove the requirement or exception. NASSIRI shall thereafter, but not less than two (2) business days prior to the Closing Date, approve the title contingency set forth herein, or terminate this Agreement. NASSIRI's failure to give such notice of termination shall constitute NASSIRI's agreement to all title exceptions or requirements and NASSIRI's agreement to consummate the transactions contemplated by this Agreement. If notice of termination is given, this Agreement shall terminate and the parties shall be released from any and all further obligations under this Agreement, except for any such obligation which survives termination. Those exceptions to title set forth in the Preliminary Report to which NASSIRI has not objected in writing to NDOT or that NDOT has not agreed to remove pursuant to this Section 9 shall, together with any interest of Carolyn Ann Chambers, her assigns or successors, constitute the "Approved Exceptions".

(c) Chambers Representation and Indemnity. Nassiri represents and warrants as of the Closing Date that Nassiri shall have secured an assignment to Nassiri of all right, title, and interest of Carolyn Ann Chambers, her successors or assigns, in or to the Chambers Claims. Nassiri shall indemnify and hold harmless the State of Nevada and NDOT, their managers, agents, employers, employees, attorneys, insurers, successors, and assigns, and their political subdivisions and sister agencies, of and from all claims, known or unknown, asserted or unasserted of whatever nature, now existing or hereafter arising, including but not limited to claims for attorney's fees and costs, relating in any way to the Chambers Claims.

2.05 Exchange Compensation. On or before the Closing Date, NASSIRI shall deposit in Escrow the sum of TWENTY-THREE MILLION TWO HUNDRED TWENTY NINE THOUSAND FIVE HUNDRED and NO/100 DOLLARS (\$23,229,500.00) (the "Exchange Compensation") in "Cash." For purposes of this Agreement, "Cash" means immediately available United States funds transferred by certified check or wire transfer.

2.06 Exchange Property Construction Easement. On or before the Closing Date, NASSIRI shall execute and deliver to Escrow a temporary construction easement in the form attached hereto as Exhibit "4" allowing NDOT to use certain portions of the Exchange Property in connection with Project planning, staging, and construction (the "Exchange Property Easement").

2.07 Closing.

(a) Date and Location. Closing shall occur at the offices of Escrow Agent at 10:00 a.m. on the thirtieth (30th) day after the Execution Date, or at such other time or place as the Parties may agree in writing (the "Closing Date").

(b) NASSIRI Deliveries on Closing Date. Unless previously provided, NASSIRI shall deliver the following to Escrow on the Closing Date:

- (i) Executed Stipulated Judgment together with executed Final Judgment and such other documentation as NDOT may require to vest fee simple title to the Fee Acquisition in NDOT and secure NDOT's TE and Teardrop TE;
- (ii) Executed Exchange Property Easement;
- (iii) Exchange Compensation;
- (iv) Any fees for issuance by Nevada Title Company of a policy of title insurance for the Exchange Property;
- (v) ½ of any fees of Escrow or Escrow Agent for handling this transaction; and
- (vi) Real property transferor other taxes, if any, that apply to the recording of the Quitclaim Deed.

(c) NDOT Deliveries on Closing Date. Unless previously provided, NDOT shall deliver the following to Escrow on the Closing Date:

- (i) Executed Stipulated Judgment together with executed Final Judgment and Final Order of Condemnation; and
- (ii) The Quitclaim Deed;

(d) Actions by Escrow Agent on Closing Date. On the Closing Date, Escrow Agent shall:

- (i) Collect the deliveries required by NASSIRI and NDOT as set forth in Sections 2.07(b) and (c), above;
- (ii) If desired and paid for by NASSIRI, issue an Owner's Policy of Title Insurance for the Exchange Property subject only to the Approved Exceptions;
- (iii) Record the Quitclaim Deed and the Exchange Property Easement;
- (iv) Deliver to NDOT, less ½ any applicable Escrow or Escrow Agent fees for handling this transaction, the Exchange Compensation; and
- (v) Prepare and deliver to the Parties a closing statement.

2.08 NDOT Release. NDOT hereby fully releases and forever discharges NASSIRI and his agents, employers, employees, attorneys, insurers, successors, and assigns, of and from all claims, known or unknown, asserted or unasserted, of whatever nature, now existing or hereafter arising, including but not limited to claims for attorney's fees and costs, relating in any way to the Lawsuit, or any matters asserted therein, or which could have been asserted therein, or its subject matter.

2.09 NASSIRI Release. NASSIRI hereby releases and forever discharges: (i) the Lawsuit, or any matters asserted therein, or which could have been asserted therein, or its subject matter, including but not limited to any claims related to the location on the Property of a public highway and necessary incidents thereto, and any claims for any severance damages to the remainder of NASSIRI's property; and (ii) the physical condition of the Exchange Property as of the Execution Date or matters affecting title or claims thereto.

2.10 NDOT Ownership. NASSIRI represents and warrants that, to the best of his knowledge, no third party has any right, title, or interest in the Fee Acquisition or TE or Teardrop TE land, and Nassiri covenants that he shall take no action between the Execution Date and Closing Date that will result in any third party having any right, title, or interest in or to the Fee Acquisition, TE, or Teardrop TE.

2.11 Property Damage. NASSIRI shall be responsible for any and all risk and liability for any injury or damage to persons or personal property or for any injury or damage to the Subject Property, including but not limited to any and all repairs and/or maintenance to the Property, until the Final Judgment and Final Order of Condemnation is recorded with the Clark County, Nevada Recorder. NDOT shall be responsible for any and all risk and liability for any injury or damage to persons or personal property or for any injury or damage to the Exchange Property, including but not limited to any and all repairs and/or maintenance to the Exchange Property, until the Closing Date.

2.12 Condition of TE and Teardrop TE. NDOT shall leave the TE and Teardrop TE in as neat and presentable condition as it existed prior to NDOT's use of the TE and Teardrop TE, with



all fences, structures and other property belonging to NASSIRI that NDOT may remove or relocate in order to complete the Project to be replaced as nearly in their original condition as is reasonably possible.

2.13 Civil Rights Act. The regulations pertaining to nondiscrimination and Title VI of the Civil Rights Act of 1964, as contained in Title 23, Code of Federal Regulations Part 200, and Title 49, Code of Federal Regulations Part 21, are hereby incorporated by reference and made a part of this Agreement.

2.14 NRS Chapter 408. NDOT shall have the right to adapt and improve the whole or any part of the Property in accordance with the provisions of NRS Chapter 408, including but not limited to NRS 408.487.

2.15 Highway Engineer's Stationing. All Highway Engineer's Stationing is approximate and subject to slight adjustment as necessary to meet construction requirements. To the extent adjustments due to Highway Engineer's Stationing result in a net Fee Acquisition more than one hundred (100) square feet greater or less than 183,823 square feet, the rate of Twenty-Three dollars (\$23.00) per square foot shall be applied to such net change and a credit or invoice generated by NDOT at the conclusion of the Project or at such earlier time as the net area can be finally calculated. NDOT shall pay any credit owing Nassiri hereunder within sixty (60) days of calculating the final net Fee Acquisition, or, alternatively, Nassiri shall pay any invoice generated by NDOT hereunder within sixty (60) days of receipt.

2.16 Extension of TE and Teardrop TE Term. The termination date of the TE and Teardrop TE has been established in compliance with the best available information on the time frame needed for the Project. If NDOT determines that circumstances warrant an extension of the term of the TE and Teardrop TE to complete the Project, NASSIRI shall grant such an extension to NDOT at a rate of \$500.00 per month.

2.17 No Liability. By entering into this Agreement, no party shall be deemed to admit: (i) any liability for any claims, causes of action, or demands; (ii) any wrong doing or fault; nor (iii) violation of any law, precedent, rule, regulation, or statute. Further, nothing contained in this Agreement may be construed as an admission against the interest of any party.

2.18 Attorney's Fees. If any action is commenced to enforce the terms of this Agreement, the prevailing party shall be entitled to recover all of its expenses related to such action, including but not limited to, its reasonable attorney's fees and costs.

2.19 Acknowledgments. The parties mutually understand, agree, and warrant: (i) that NDOT and NASSIRI deny the legal liability and damages alleged in the Lawsuit, that the payment and distribution of the Condemnation Proceeds, and execution of the Judgment, as provided herein is not to be construed as admissions of liability on the part of NDOT or NASSIRI, but such payment and distribution is solely in compromise and settlement of disputed claims, and the amount of the

Condemnation Proceeds is not an admission by any party as to the fair market value of the Subject Property, or any claims for damages; (ii) that the releases contained herein extend and apply to and also cover and include all unknown, unforeseen, unsuspected, and unanticipated injuries, claims, damages, losses, and liabilities, if any, arising from the matters addressed herein; (iii) that no promise or inducement has been offered except as herein set forth; (iv) that this settlement is in good faith and is equitable; (v) that this Agreement is executed without reliance upon any statement or representation by any party or its representatives concerning the nature and extent of the claimed damages or legal liability therefor; (vi) the parties are legally competent to execute this Agreement and to accept full responsibility therefore; (vii) that this Agreement and the releases set forth herein have been carefully read in their entirety by the Parties, who have had the benefit and advice of counsel of their choosing, and this Agreement and the releases set forth herein are known by the Parties to be in full and final and complete compromise, settlement, release, accord and satisfaction, and discharge of all claims and actions as above stated; and (viii) that in entering into this Agreement and the settlement and releases that are encompassed herein, the Parties are acting freely and voluntarily and without influence, compulsion, or duress of any kind from any source, including, but not limited to, any other party or parties, their attorneys, representatives, or anyone acting or purporting to act on behalf of any party.

2.20 Integration. This Agreement constitutes the entire Agreement by and between the Parties and supersedes and replaces any and all previous agreements entered into or negotiated between the Parties.

2.21 Assignment. This Agreement shall not be assigned by NASSIRI, in whole or in part, to any third party, except to a buyer of all of the property NASSIRI owns within Parcel Number 177-08-803-002 as of the Execution Date, without the approval of NDOT in writing, and only then in the event such third party agrees to be bound by the terms herein. Any such assignment will not relieve NASSIRI of any obligations to NDOT hereunder.

2.22 Amendments. This Agreement may not be amended or modified except in writing and signed by each of the Parties.

2.23 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Nevada.

2.24 Counterparts. This Agreement may be executed in any number of counterparts confirmed by facsimile signatures transmitted by telephone, each of which shall be deemed a duplicate original.

2.25 Successors and Assigns. This Agreement shall be binding upon and shall inure to the benefit of the Parties hereto and their respective heirs, executors, administrators, personal representatives, successors, or assigns, as the case may be.

2.26 Notices. Any Notice required or desired to be given under this Agreement shall be

in writing and personally hand delivered, given by overnight express delivery with receipt, or given by United States registered or certified mail, postage prepaid, return receipt requested. All Notices shall be sent to the receiving party at the following address or at such other address as the party may from time to time direct in writing:

If to NASSIRI:  
6590 Bermuda Road  
Las Vegas, Nevada 89119

With a copy to:  
Michael Chapman, Esq.  
9585 Prototype Court, #C  
Reno, Nevada 89521  
Fax: (775)827-1872

If to NDOT:  
Nevada Department of Transportation  
Attn: Jeffrey Fontaine, P.E., Director  
1263 S. Stewart St.  
Carson City, Nevada 89712

With a copy to:  
Gregory J. Walch, Esq.  
Santoro, Driggs, Walch et al.  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101  
Fax: (702)791-0308

For purposes of this Agreement, Notices shall be deemed to have been given, delivered, or received upon personal delivery thereof or seventy-two (72) hours after having been deposited in the United States mail as provided herein.

2.27 Headings. All headings and subheadings employed within this Agreement are inserted only for convenience and ease of reference and shall not be considered in the construction or interpretation of any provision of this Agreement.

2.28 No Third Party Beneficiaries. This Agreement is for the benefit of the State of Nevada on relation of its Department of Transportation and NASSIRI only, and is not for the benefit of any other person or entity. Without limiting the generality of the preceding sentence, the Parties hereto agree that there are no third-party beneficiaries of this Agreement.

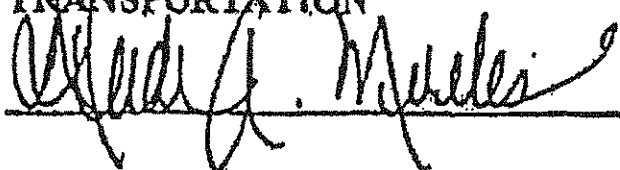
2.28 No Presumption Regarding Drafter. The Parties acknowledge and agree that the terms and provisions of this Agreement have been negotiated and discussed between NDOT and NASSIRI, and that this Agreement reflects their mutual agreement regarding the subject matter of this Agreement. Because of the nature of such negotiations and discussions, it would not be appropriate to deem either Party to be the drafter of this Agreement, and therefore no presumption for or against the drafter shall be applicable in interpreting or enforcing this Agreement.

...

...

2.29 Time is of the Essence. The Parties acknowledge that time is of the essence in every aspect of this Agreement.

THE STATE OF NEVADA, ON  
RELATION OF ITS DEPARTMENT OF  
TRANSPORTATION



By: Heidi A. Mireles

Its: Chief Right-of-Way Agent

Date: April 29, 2005

FRED NASSIRI

Date: \_\_\_\_\_

Approved as to Legality and Form:

SANTORO, DRIGGS, WALCH,  
KEARNEY, JOHNSON & THOMPSON

CHAPMAN LAW OFFICE

By: \_\_\_\_\_

GREGORY J. WALCH, ESQ.  
Nevada Bar No. 4780  
KIRBY C. GRUCHOW, JR., ESQ.  
Nevada Bar No. 6663  
400 South Fourth Street, Third Floor  
Las Vegas, NV 89101  
Phone: (702) 791-0308  
Attorneys for Plaintiff The State of  
Nevada, on relation of its Department  
of Transportation

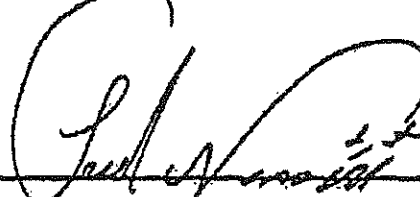
By: \_\_\_\_\_

MICHAEL G. CHAPMAN, ESQ.  
Nevada Bar No. 1630  
9585 Prototype Court, #C  
Reno, Nevada 89521  
Phone: (775) 827-1866  
Attorney for Defendant Fred Nassiri

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THE STATE OF NEVADA, ON  
RELATION OF ITS DEPARTMENT OF  
TRANSPORTATION

FRED NASSIRI



Date: 4-28-05

By: \_\_\_\_\_  
Its: \_\_\_\_\_  
Date: \_\_\_\_\_

Approved as to Legality and Form:

SANTORO, DRIGGS, WALCH,  
KEARNEY, JOHNSON & THOMPSON

CHAPMAN LAW OFFICE

By: \_\_\_\_\_  
GREGORY J. WALCH, ESQ.  
Nevada Bar No. 4780  
KIRBY C. GRUCHOW, JR., ESQ.  
Nevada Bar No. 6663  
400 South Fourth Street, Third Floor  
Las Vegas, NV 89101  
Phone: (702) 791-0308  
Attorneys for Plaintiff The State of  
Nevada, on relation of its Department  
of Transportation

By: \_\_\_\_\_  
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Nevada Bar No. 1630  
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Phone: (775) 827-1866  
Attorney for Defendant Fred Nassiri

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THE STATE OF NEVADA, ON  
RELATION OF ITS DEPARTMENT OF  
TRANSPORTATION

FRED NASSIRI


\_\_\_\_\_  
By: \_\_\_\_\_  
Its: \_\_\_\_\_  
Date: \_\_\_\_\_

\_\_\_\_\_  
Date: \_\_\_\_\_

Approved as to Legality and Form:

SANTORO, DRIGGS, WALCH,  
KEARNEY, JOHNSON & THOMPSON

CHAPMAN LAW OFFICE

By:   
GREGORY J. WALCH, ESQ.  
Nevada Bar No. 4780  
KIRBY C. GRUCHOW, JR., ESQ.  
Nevada Bar No. 6663  
400 South Fourth Street, Third Floor  
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Attorneys for Plaintiff The State of  
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Phone: (775) 827-1866  
Attorney for Defendant Fred Nassiri

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THE STATE OF NEVADA, ON  
RELATION OF ITS DEPARTMENT OF  
TRANSPORTATION

FRED NASSIRI

\_\_\_\_\_  
By: \_\_\_\_\_  
Its: \_\_\_\_\_  
Date: \_\_\_\_\_

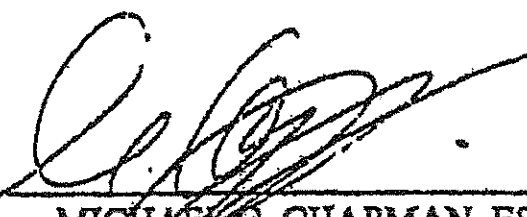
\_\_\_\_\_  
Date: \_\_\_\_\_

Approved as to Legality and Form:

SANTORO, DRIGGS, WALCH,  
KEARNEY, JOHNSON & THOMPSON

CHAPMAN LAW OFFICE

By: \_\_\_\_\_  
GREGORY J. WALCH, ESQ.  
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Nevada Bar No. 6663  
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By:   
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Nevada Bar No. 1630  
9585 Prototype Court, #C  
Reno, Nevada 89521  
Phone: (775) 827-1866  
Attorney for Defendant Fred Nassiri



# Nevada Title Company

## ESCROW DISCLAIMER

TO: Nevada Title Company  
ESCROW NO.: 05-05-0001-CLB  
DATE: May 8, 2005

The undersigned parties acknowledge that the Escrow Agent's function is to be a disinterested third party, taking mutual instructions from the parties to a transaction for preparation of documentation to complete the principal's prior agreements.

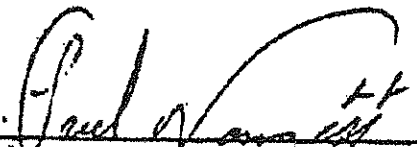
The Escrow Agent is NOT AN ATTORNEY and CANNOT ADVISE the parties as to any legal business, or tax consequences of any provisions or instrument set forth or prepared in connection with this transaction. The undersigned have read and understand each document to which we have affixed our signature and have authorized and instructed Escrow Agent in the manner in which any blanks remaining in said forms are to be completed.

With regard to any questions we may have had pertaining to the Escrow Instructions, the Escrow Agent's role or participation in the escrow, or to the roles of the Real Estate Broker, if any, we have received sufficient explanation. We understand that the subject escrow shall close in accordance with the matters set forth on the documents we have executed.

With regard to any questions we may have had pertaining to the new loan being obtained, if any, we have been made aware that the loan documents were not generated by Nevada Title Company, and that we have received sufficient explanation from the lender providing said loan.

DO NOT AFFIX YOUR SIGNATURES BELOW UNTIL YOU HAVE READ AND AGREED WITH THE MATTERS SET FORTH ABOVE. SHOULD YOU STILL HAVE QUESTIONS WITH REGARD TO THE ABOVE, YOU ARE ADVISED TO SEEK THE ADVICE OF AN INDEPENDENT LEGAL COUNSEL.

BUYERS:

  
\_\_\_\_\_  
Fred Nassiri

SELLERS:

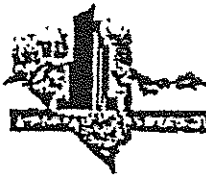
State of Nevada Department of Transportation

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_





# Nevada Title Company

## ESCROW DISCLAIMER

TO: Nevada Title Company  
ESCROW NO.: 05-05-0001-CLB  
DATE: May 8, 2005

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The Escrow Agent is NOT AN ATTORNEY and CANNOT ADVISE the parties as to any legal business, or tax consequences of any provisions or instrument set forth or prepared in connection with this transaction. The undersigned have read and understand each document to which we have affixed our signature and have authorized and instructed Escrow Agent in the manner in which any blanks remaining in said forms are to be completed.

With regard to any questions we may have had pertaining to the Escrow Instructions, the Escrow Agent's role or participation in the escrow, or to the roles of the Real Estate Broker, if any, we have received sufficient explanation. We understand that the subject escrow shall close in accordance with the matters set forth on the documents we have executed.

With regard to any questions we may have had pertaining to the new loan being obtained, if any, we have been made aware that the loan documents were not generated by Nevada Title Company, and that we have received sufficient explanation from the lender providing said loan.

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BUYERS:

\_\_\_\_\_  
Fred Nassiri

SELLERS:

State of Nevada Department of Transportation

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

*Heldi A. Mireles*  
Heldi A. Mireles  
Chief R/W Agent

**FIRST AMENDMENT TO SETTLEMENT AGREEMENT  
AND RELEASE OF ALL CLAIMS**

This First Amendment to Settlement Agreement and Release of All Claims (the "First Amendment") is made and entered into this 7<sup>th</sup> day of June, 2005, by and among The State of Nevada, on relation of its Department of Transportation ("NDOT" or "Plaintiff") and Fred Nassiri, a resident of Clark County, Nevada ("NASSIRI" or "Defendant", and together with NDOT, "the Parties") to amend that certain Settlement Agreement and Release of All Claims (the "Settlement Agreement") entered into by the Parties on or about April 28, 2005.

**I.**

**Recitals**

1.01 The Lawsuit. On or about August 31, 2004, NDOT filed its Complaint in condemnation ("Complaint") against, among others, NASSIRI, in the Eighth Judicial District Court, Clark County, Nevada, Case Number A491334 (the "Lawsuit") to acquire certain property owned by NASSIRI in fee simple and other property owned by NASSIRI for a two-year construction easement in connection with the construction and reconstruction of the interchange at I-15 and Blue Diamond Road, and the attendant widening and realignment of Blue Diamond Road (the "Project"). NDOT also named Clark County as a defendant in the Lawsuit. Clark County filed a disclaimer of any interest in the proceedings on October 13, 2004.

1.02 Settlement Agreement. The Parties resolved the Lawsuit through the Settlement Agreement, which, among other things, provided that NDOT would convey to NASSIRI a 1,063,132 parcel of land defined therein as the "Exchange Property" and NASSIRI would pay NDOT TWENTY-THREE MILLION TWO HUNDRED TWENTY NINE THOUSAND FIVE HUNDRED and NO/100 DOLLARS (\$23,229,500.00) (the "Exchange Compensation") in exchange. The Parties have discovered that the Exchange Property legal description should be changed as set forth in this First Amendment, and that such revised legal description will be used in both the Quitclaim Deed and Exchange Property Easement.

1.03 Settlement Agreement Survival. The Parties also desire that the Settlement Agreement be modified to set forth more clearly the Parties' intention that the representations, warranties, indemnities, and all other rights and obligations of the Settlement Agreement shall not merge with the conveyance or recording of the Quitclaim Deed or Exchange Property Easement.

II.

Agreement

NOW, THEREFORE, in consideration of the mutual promises and agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which the Parties acknowledge, the Parties agree as follows.

2.01 Defined Terms. All capitalized terms used but not otherwise defined herein shall have the meaning ascribed to such terms in the Settlement Agreement.

2.02 Exchange Property Legal Description. The Exchange Property shall be the 1,063,570 square foot property set forth in the legal description and diagram attached hereto as Exhibit A-1 and incorporated herein by this reference. The legal description set forth in Exhibit A-1 shall be attached to and incorporated into the Quitclaim Deed and the Exchange Property Easement.

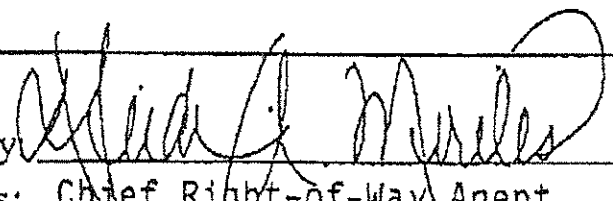
2.03 Exchange Compensation. The Exchange Compensation shall be TWENTY-THREE MILLION TWO HUNDRED THIRTY-NINE THOUSAND FOUR AND 05/100 DOLLARS (\$23,239,004.50) rather than TWENTY-THREE MILLION TWO HUNDRED TWENTY NINE THOUSAND FIVE HUNDRED and NO/100 DOLLARS (\$23,229,500.00) to reflect the additional square footage included in the Exchange Property legal description attached hereto as Exhibit A-1 at TWENTY-ONE AND 85/100 DOLLARS (\$21.85) per square foot.

2.04 Survival. The representations, warranties, indemnities, and all other rights and obligations provided in the Settlement Agreement shall not merge with the conveyance or recording of the Quitclaim Deed or Exchange Property Easement, or with the entry or recording of the Final Judgment.

This First Amendment shall be effective as of the date first written above.

THE STATE OF NEVADA, ON  
RELATION OF ITS DEPARTMENT OF  
TRANSPORTATION

FRED NASSIRI

By   
Its: Chief Right-of-Way Agent  
Date: June 14, 2005

Date: \_\_\_\_\_

II.

Agreement

NOW, THEREFORE, in consideration of the mutual promises and agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which the Parties acknowledge, the Parties agree as follows.

2.01 Defined Terms. All capitalized terms used but not otherwise defined herein shall have the meaning ascribed to such terms in the Settlement Agreement.

2.02 Exchange Property Legal Description. The Exchange Property shall be the 1,063,570 square foot property set forth in the legal description and diagram attached hereto as Exhibit A-1 and incorporated herein by this reference. The legal description set forth in Exhibit A-1 shall be attached to and incorporated into the Quitclaim Deed and the Exchange Property Easement.

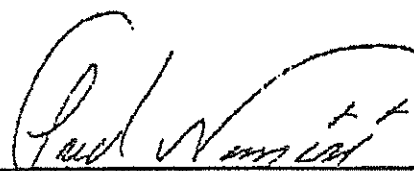
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2.04 Survival. The representations, warranties, indemnities, and all other rights and obligations provided in the Settlement Agreement shall not merge with the conveyance or recording of the Quitclaim Deed or Exchange Property Easement, or with the entry or recording of the Final Judgment.

This First Amendment shall be effective as of the date first written above.

THE STATE OF NEVADA, ON  
RELATION OF ITS DEPARTMENT OF  
TRANSPORTATION

FRED NASSIRI



Date: 7-7-05

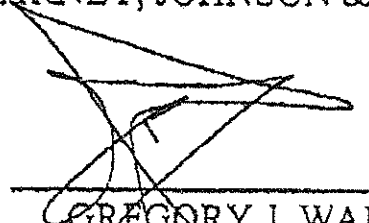
By: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

Approved as to Legality and Form:

SANTORO, DRIGGS, WALCH,  
KEARNEY, JOHNSON & THOMPSON

By:   
GREGORY J. WALCH, ESQ.  
Nevada Bar No. 4780  
KIRBY C. GRUCHOW, JR., ESQ.  
Nevada Bar No. 6663  
400 South Fourth Street, Third Floor  
Las Vegas, NV 89101  
Phone: (702) 791-0308  
Attorneys for Plaintiff The State of  
Nevada, on relation of its Department  
of Transportation

CHAPMAN LAW OFFICE


By: \_\_\_\_\_  
MICHAEL G. CHAPMAN, ESQ.  
Nevada Bar No. 1630  
9585 Prototype Court, #C  
Reno, Nevada 89521  
Phone: (775) 827-1866  
Attorney for Defendant Fred Nassiri

Approved as to Legality and Form:

SANTORO, DRIGGS, WALCH,  
KEARNEY, JOHNSON & THOMPSON

CHAPMAN LAW OFFICE

By: \_\_\_\_\_  
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Nevada Bar No. 4780  
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Nevada Bar No. 6663  
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Attorneys for Plaintiff The State of  
Nevada, on relation of its Department  
of Transportation

By:  \_\_\_\_\_  
MICHAEL G. CHAPMAN, ESQ.  
Nevada Bar No. 1630  
9585 Prototype Court, #C  
Reno, Nevada 89521  
Phone: (775) 827-1866  
Attorney for Defendant Fred Nassiri

# EXHIBIT B

20050617-0003561

Fee: \$20.00 RPTT: \$118,521.45  
N/C Fee: \$25.00

06/17/2005 14:19:00  
T20050111257

Requestor:  
NEVADA TITLE COMPANY

Frances Deane PUN  
Clark County Recorder Pgs: 7

AFTER RECORDING RETURN TO:  
MICHAEL CHAPMAN, ESQ.  
9585 Prototype Court, #C  
Reno, Nevada 89521

26

AND SEND TAX NOTICES TO:  
FRED NASSIRI  
6590 Bermuda Road  
Las Vegas, Nevada 89119

LEGAL DESCRIPTION PREPARED BY:  
HEIDI A. MIRELES  
NEVADA DEPT. OF TRANSPORTATION  
RIGHT-OF-WAY DIVISION  
1263 S. STEWART ST.  
CARSON CITY, NV 89712

en

Ptn. of APNs: 177-08-799-011 177-08-899-002, -003, -005, -009, -010 & -011	Project: I-015-1(6)28 E.A. 70090 All of Parcels: I-15-CL-000170 (Old Parcel No. 140) I-15-CL-000171 (Old Parcel No. 141) I-15-CL-000172 (Old Parcel No. 142) I-15-CL-000179 (Old Parcel No. 149) I-15-CL-000180 (Old Parcel No. 150) I-15-CL-000181 (Old Parcel No. 151)
All of APNs 177-08-799-012, -013, -014, -015, -016, & -017 177-08-899-004, -006, -014, & -015	Ptn. of Parcels: I-15-CL-000159 (Old Parcel No. 133) I-15-CL-000160 (Old Parcel No. 41-N) I-15-CL-000161 (Old Parcel No. 134) I-15-CL-000169 (Old Parcel No. 139) I-15-CL-000178 (Old Parcel No. 147)

### QUITCLAIM DEED

The STATE OF NEVADA, acting by and through its Department of Transportation ("Grantor"), hereby conveys all of Grantor's right, title, and interest in and to the following described real property to FRED NASSIRI ("Grantee"), a resident of Clark County, Nevada:

See Exhibit "A-1", Legal Description, attached hereto and incorporated herein by this reference (the "Property").



The Property shall have no access in and to Interstate Route 15.

GRANTOR,  
THE STATE OF NEVADA  
ON RELATION OF ITS DEPARTMENT  
OF TRANSPORTATION

By: [Signature]  
Printed Name: Heidi A. Mireles  
Its: Chief Right-of-Way Agent  
Date: June 14, 2005

STATE OF Nevada }  
County of Carson } SS

On this 4<sup>th</sup> day of June, 2005, before me a Notary Public personally appeared Heidi A. Mireles personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to this instrument and acknowledged that he (she or they) executed it.

Margaret E. Orsi  
Notary Public

GRANTEE,  
FRED NASSIRI

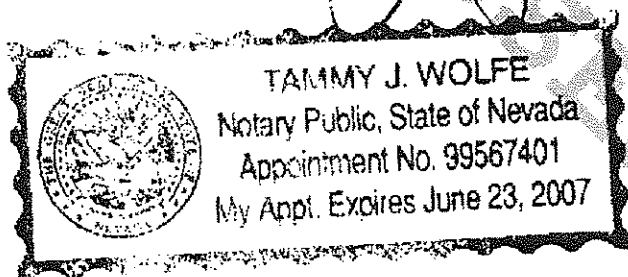
*Fred Nassiri* <sup>21</sup>

Date: 6/15/05

STATE OF                    }  
                                      }  
County of                   }

On this 15 day of June, 2005, before me a Notary Public personally appeared Fred Nassiri personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to this instrument and acknowledged that he (she or they) executed it.

*Tammy J. Wolfe*  
Notary Public



PREPARED BY  
FRED NASSIRI'S  
COPY

## EXHIBIT A – 1: LEGAL DESCRIPTION

Said real property situate, lying and being in the County of Clark, State of Nevada, and more particularly described as being a portion of GOVERNMENT LOTS 30, 31, 32, 33, 35, 38, 39, 40, all of GOVERNMENT LOT 34 and a portion of the E 1/2 of the SE 1/4, all in Section 8, T. 22 S., R. 61 E., M.D.M., and more fully described by metes and bounds as follows, to wit:

COMMENCING at a found R/R Spike with punch mark, located at the intersection of Las Vegas Boulevard and Mesa Verde Lane, accepted as being the south one-sixteenth corner common to said Section 8 and Section 9, T. 22 S., R. 61 E., M.D.M., shown and delineated as a "R/R SPIKE" on that certain RECORD OF SURVEY for CLARK COUNTY, No. 00414, filed for record on June 27, 1997, File 089, Page 0086 of SURVEYS, Official Records Book No. 970627, Clark County, Nevada Records; thence S. 0°13'50" E., along the east line of said Section 8, a distance of 1,322.43 feet, (record N. 0°00'27" E. - 1,322.49 feet per said RECORD OF SURVEY), to a found R/R Spike with punch mark, located at the intersection of Las Vegas Boulevard and Windmill Lane, accepted as being the corner common to Sections 8, 9, 17, and 16, T. 22 S., R. 61 E., M.D.M., shown and delineated as a "R/R SPIKE" on said RECORD OF SURVEY; thence N. 69°42'39" W. a distance of 1,702.09 feet to the POINT OF BEGINNING; said point of beginning described as being on the right or easterly right-of-way line of IR-15, 845.66 feet right of and at right angles to Highway Engineer's Station "LNe" 364+79.89 P.O.T.; thence along said right or easterly right-of-way line the following three (3) courses and distances:

- 1) N. 85°40'00" W. - 300.00 feet;
- 2) from a tangent which bears the last described course, curving to the right with a radius of 260.00 feet, through an angle of 80°26'12", an arc distance of 365.01 feet;
- 3) N. 5°13'48" W. - 984.40 feet to the former right or easterly right-of-way line of said IR-15;

thence along said former right or easterly right-of-way line the following three (3) courses and distances:

- 1) from a tangent which bears S. 30°05'59" E., curving to the left with a radius of 600.00 feet, through an angle of 86°41'24", an arc distance of 907.82 feet;
- 2) N. 63°12'37" E. - 500.00 feet;
- 3) N. 63°05'14" E. - 441.62 feet;

thence S. 29°09'04" E. a distance of 215.92 feet to the former right or easterly right-of-way line of said IR-15; thence along said former right or easterly right-of-way line the following five (5) courses and distances:

- 1) S. 58°42'57" W. - 499.31 feet;
- 2) from a tangent which bears the last described course, curving to the left with a radius of 600.00 feet, through an angle of 36°52'12", an arc distance of 386.10 feet;
- 3) S. 21°50'45" W. - 336.79 feet;
- 4) from a tangent which bears the last described course, curving to the right with a radius of 800.00 feet, through an angle of 30°06'10", an arc distance of 420.31 feet;
- 5) S. 51°56'55" W. - 76.01 feet to the point of beginning;

said parcel contains an area of 24.42 acres (1,063,570 square feet).

The Basis of Bearing for this description is the NEVADA STATE PLANE COORDINATE SYSTEM, NAD 83/94 DATUM, East Zone as determined by the State of Nevada, Department of Transportation.

The above described parcel shall have no access in and to IR-15.

SUBJECT TO any and all existing utilities, whether of record or not.

State of Nevada

Declaration of Value

1. Assessor Parcel Number(s)

a) 177-08-799-011, 177-08-799-012, 177-08-799-013, 177-08-799-014, 177-08-799-015, 177-08-799-016, 177-08-799-017, 177-08-899-002, 177-08-899-003, 177-08-899-004, 177-08-899-005, 177-08-899-006, 177-08-899-009, 177-08-899-010, 177-08-899-011, 177-08-899-014, 177-08-899-015

b) \_\_\_\_\_  
c) \_\_\_\_\_  
d) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

2. Type of Property:

- ☒ a) Vacant Land ☐ b) Sgl. Fam. Residence  
☐ c) Condo/Twnhse ☐ d) 2-4 Plex  
☐ e) Apt. Bldg. ☐ f) Comm'l/Ind'l  
☐ g) Agricultural ☐ h) Mobile Home  
☐ i) Other \_\_\_\_\_

<b>FOR RECORDER'S OPTIONAL USE ONLY</b>	
Document/Instrument #:	_____
Book:	_____ Page: _____
Date of Recording:	_____
Notes:	_____

3. Total Value/Sales Price of Property

\$23,239,004.50

Deed in Lieu of Foreclosure Only (value of property)

Transfer Tax Value:

\$23,239,004.50

Real Property Transfer Tax Due

\$118,521.45

4. If Exemption Claimed:

a. Transfer Tax Exemption, per NRS 375.090, Section: \_\_\_\_\_

b. Explain Reason for Exemption: \_\_\_\_\_  
\_\_\_\_\_

5. Partial Interest: Percentage being transferred: 100 %

The undersigned declare(s) and acknowledges, under penalty of perjury, pursuant to NRS 375.060 and NRS 375.110, that the information provided is correct to the best of their information and belief, and can be supported by documentation if called upon to substantiate the information provided herein. Furthermore, parties agree that disallowance of any claimed exemption, or other determination of additional tax due, may result in a penalty of 10% of the tax due plus interest at 1% per month. Pursuant to NRS 375.030, the Buyer and Seller shall be jointly and severally liable for any additional amount owed.

Signature: Carla D. Burchard, Escrow Agent Capacity: GRANTOR/SELLER

Signature: Carla D. Burchard, Escrow Agent Capacity: GRANTEE/BUYER

SELLER (GRANTOR) INFORMATION  
(REQUIRED)

BUYER (GRANTEE) INFORMATION  
(REQUIRED)

Print Name: State of Nevada Department of Transportation

Print Name: Fred Nassiri

Address: 1263 South Stewart Street

Address: 6590 Bermuda Road

City/State/Zip: Carson City, NV 89712

City/State/Zip: Las Vegas, NV 89119

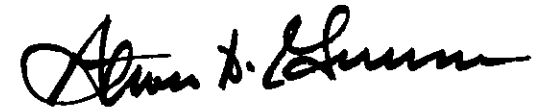
COMPANY/PERSON REQUESTING RECORDING (required if not seller or buyer)

Cont  
3561

Print Name: Nevada Title Company Esc. #: 05-05-0001-CLB  
Address: 2500 N Buffalo, Suite 150  
City: Las Vegas State: NV Zip: 89128  
(AS A PUBLIC RECORD THIS FORM MAY BE RECORDED/MICROFILMED)

ASSESSOR'S COPY

3561



CLERK OF THE COURT

1 **OMD**  
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Nevada Bar No. 3127  
3 Email: eolsen@gordonsilver.com  
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5 3960 Howard Hughes Pkwy., 9th Floor  
Las Vegas, Nevada 89169  
6 Tel: (702) 796-5555  
Fax: (702) 369-2666  
7 Attorneys for Plaintiffs

8  
9 DISTRICT COURT

10 CLARK COUNTY, NEVADA

11 FRED NASSIRI, an individual; NASSIRI  
12 LIVING TRUST, a trust formed under Nevada  
law,

13 Plaintiffs,

14 vs.

15 STATE OF NEVADA, on relation of its  
Department of Transportation; DOE  
16 GOVERNMENT AGENCIES I-X, inclusive;  
DOE INDIVIDUALS I-X; and DOE ENTITIES  
17 1-10, inclusive,,

18 Defendants.

CASE NO. A672841  
DEPT. XXVI

**PLAINTIFFS' OPPOSITION TO  
DEFENDANT NDOT'S (1) MOTION TO  
DISMISS AMENDED COMPLAINT  
AND/OR QUASH SERVICE OF THE  
SUMMONS AND AMENDED  
COMPLAINT FOR INSUFFICIENCY OF  
SERVICE OF PROCESS, OR  
ALTERNATIVELY, (2) MOTION TO  
DISMISS AMENDED COMPLAINT FOR  
FAILURE TO STATE A CLAIM, AND (3)  
MOTION TO STRIKE THE PRAYER  
FOR PUNITIVE DAMAGES**

19  
20 COMES NOW Plaintiffs, Fred Nassiri and Nassiri Living Trust ("Plaintiffs"), by and  
21 through their counsel, the law firm of Gordon Silver, and hereby files this Opposition to  
22 Defendants' Motion to Dismiss filed by Defendants on June 24, 2013.

23 ...

24 ...

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26 ...

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28 ...

1 This Opposition is made and based upon the following Memorandum of Points and  
2 Authorities and any attachments thereto; the papers and pleadings already on file herein; and any  
3 oral argument the Court may permit at the hearing of this matter.

4 Dated this 12th day of July, 2013.

5 GORDON SILVER

6 

7 ERIC R. OLSEN  
8 Nevada Bar No. 3127  
9 DYLAN T. CICILIANO  
10 Nevada Bar No. 12348  
11 3960 Howard Hughes Pkwy., 9th Floor  
12 Las Vegas, Nevada 89169  
13 (702) 796-5555  
14 Attorneys for Plaintiffs

11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 **I.**

13 **STATEMENT OF FACTS**

14 **A. THE COURT MUST CONSIDER WHETHER ANY SET OF FACTS COULD**  
15 **MAINTAIN NASSIR'S CLAIMS.**

16 Nevada Rule of Civil Procedure 12(b)(5) permits the filing of a motion to dismiss for  
17 "failure to state a claim upon which relief can be granted." The "no set of facts" standard that the  
18 Nevada Supreme Court applied to review a NRCP 12(b)(5) motion emanated from the United  
19 States Supreme Court's decision in *Conley v. Gibson*, 355 U.S. 41 (1978). The Nevada Supreme  
20 Court holds that a motion to dismiss should not be granted unless "it appears beyond a doubt that  
21 [the plaintiff] could prove no set of facts, which, if true, would entitle it to relief." *Buzz Stew,*  
22 *LLC v. City of North Las Vegas*, 124 Nev. 224, 227, 181 P.2d 670, 672 (2008).

23 Therefore, under NRCP 12(b)(5), Plaintiff is not required to prove its case to overcome  
24 Plaintiffs' motion to dismiss.

25 **B. SUMMARIZED STATEMENT OF FACTS AS ADDUCED IN THE COMPLAINT**

26 **1. Plaintiffs Purchase of Property from NDOT.**

27 Through a transaction with the State, Plaintiffs became and remain the fee simple owner  
28 of property location in Clark County, Nevada, known as APN# 177-08-803-013 (the "Exchange



1 Property”), a land-locked piece of ground approximately 24.41 acres in size. The Exchange  
2 Property, together with an approximate 43 acre adjacent property that Plaintiffs at all times  
3 relevant owned (collectively with the Exchange Property, the “Subject Property”), is located on  
4 the North East side of the intersection of I-15 and Blue Diamond Road, abutting the I-15 on the  
5 West border, Blue Diamond Road on the South Border and South Las Vegas Boulevard on the  
6 Eastern border. (Amended Complaint, at ¶ 6).

7 On or about August 31, 2004, the Nevada Department of Transportation filed a  
8 condemnation action against Plaintiffs in the Eighth Judicial District Court, Clark County,  
9 Nevada, Case No. A491334 (the “Condemnation Action”), to acquire certain property Plaintiffs  
10 owned in fee simple, in connection with the construction and reconstruction of the I-15/Blue  
11 Diamond interchange and the attendant widening and realignment of Blue Diamond Road. (*Id.* at  
12 ¶ 7).

13 The parties resolved the Condemnation Action by entering into a Settlement Agreement  
14 and Release of All Claims dated April 28, 2005 (the “Settlement Agreement”). Pursuant to the  
15 terms of the Settlement Agreement, NDOT acquired 4.21 acres from Plaintiffs for \$4,810,000.00  
16 and, as an “exchange,” Plaintiffs acquired the Exchange Property from NDOT for  
17 \$23,239,004.50. (*Id.* at ¶ 8). Plaintiffs paid \$23,396,223.00 to Nevada Title Co. to close escrow.  
18 (*Id.* at ¶ 11).

19 During Plaintiffs discussions with NDOT for the purchase of the Exchange Property,  
20 NDOT refused to provide Plaintiffs with a copy of its appraisal of the Exchange Property, or  
21 even a written statement of, and summary of the basis for the amount established as just  
22 compensation, as required by Federal and State law; and failed to provide a true and accurate  
23 statement of the same. (*Id.* at ¶ 10).

24 Plaintiffs also inquired of NDOT as to NDOT’s plans for the Blue Diamond Interchange  
25 construction. (*Id.* at ¶ 19). NDOT provided plans for the Blue Diamond Road Interchange. The  
26 Blue Diamond Road Interchange Plans explained the construction to be performed at the Blue  
27 Diamond Road Interchange, but did not include the “fly-over” at the Blue Diamond Road  
28 Interchange, as ultimately constructed. (*Id.* at ¶ 23). Rather, the plans depicted that the 22.4 acre

1 Exchange Property would benefit from enhanced 1-15 traffic flow and approximately 1,500 feet  
2 of visual I-15 exposure. (*Id.* at ¶ 20).

3 NDOT conveyed the Exchange Property by Quit Claim to Plaintiffs, despite specific  
4 knowledge of a potential or threatened litigation by a neighboring landowner. Over the next  
5 couple years, Plaintiffs incurred expenses of \$200,000 to resolve a claim by Carolyn Ann  
6 Chamber<sup>1</sup>, and \$7 million to resolve claims by Alexandra Properties, LLC, Oasis Las Vegas,  
7 LLC, and New Horizon 2001, LLC (*Id.* at ¶ ¶ 12-15). In effect, the Exchange Property cost  
8 Plaintiffs over \$30 million.

## 9 **2. NDOT's 2004 Appraisal**

10 In late 2008, in the course of fighting the claims brought against him as a result of the  
11 purchase, Plaintiffs obtained a copy of NDOT's 2004 appraisal of the Exchange Property. The  
12 appraisal showed the Exchange Property had a value only \$15,550,000.00. It concluded that  
13 value of the Exchange Property would be as high as \$22,650,000.00 if a premium for  
14 "assemblage value" was considered. (*Id.* at ¶ 16).

15 The State did not tell Plaintiffs this, but asked for and received a sale price of  
16 \$23,239,005.50. On the purchase price alone, Plaintiffs paid a hidden premium of approximately  
17 45.65%,. Such premium was two and one-half to four times higher than any reasonable premium.  
18 (*Id.* at ¶ 17).

19 In valuing the land, NDOT's own appraisal of the Exchange Property expressly took into  
20 account the visual benefit the owner of the Exchange Property would receive from I-15 and  
21 noted traffic flows, as well. Specifically, the 2004 appraisal stated: "The subject property, in the  
22 after condition, will have good visibility from Las Vegas Boulevard, Interstate 15 and the  
23 realigned Blue Diamond Road. . . ." In addition, NDOT's appraisal went on to state that "with  
24 the assemblage or plottage of the subject site, would include and/or benefit from direct visibility  
25 along the Interstate 15 right-of-way." NDOT specifically appreciated the value of the projects

26  
27 <sup>1</sup> To be clear, Plaintiffs acknowledges that they were made aware of the existence of the Chamber's claim prior to  
28 closing of the settlement. The point is, however, that they had to spend \$200,000 to resolve this claim against the State.

1 (and related signage) visibility, particularly at one of the southernmost interchanges in Las  
2 Vegas. (*Id.* at ¶ 21).

### 3 **3. Changes in the Blue Diamond Interchange**

4 On October 24, 2008, NDOT prepared an Environmental Assessment report of the I-15  
5 South improvements. Therein, the report mentions that “[a] flyover ramp would be added to  
6 accommodate eastbound (EB) Blue Diamond Report traffic destined for NB I-15.” (*Id.* at ¶ 24).  
7 This was not disclosed to Plaintiffs.

8 In March 2010, NDOT held a public meeting on the I-15 South improvements. There the  
9 State discussed and presented a new “fly-over” at the Blue Diamond Road Interchange. NDOT  
10 did not provide notice of that meeting to Plaintiffs, even though Plaintiffs were adjoining  
11 landowners, and even though NDOT had sold them the land, NDOT knew specifically that the  
12 Exchange Property’s visibility had value for which the State had charged Plaintiffs. NDOT never  
13 provided the materials describing the new “flyover” to Plaintiffs. (*Id.* at ¶ 25).

14 In fact, the State effectively lead Plaintiffs to believe the planned construction of the  
15 interchange would not include a “fly-over”. Three weeks later, on April 15, 2010 NDOT’s agent  
16 and partner, Las Vegas Paving Corporation (“LV Paving”), entered into a Ground Lease  
17 Agreement with Plaintiffs to use a portion of the Subject Property as a storage and staging area  
18 for I-15 construction. The agreement included a diagram of the Blue Diamond Road Interchange  
19 improvements. That diagram, however, did not depict the “fly-over” that was actually planned  
20 by that time. (*Id.* at ¶ 26).

21 At some point in 2010, without providing Plaintiffs with any notice whatsoever, NDOT  
22 began construction of the new “fly-over” at Blue Diamond Road. The “fly-over” was constructed  
23 to a height of approximately 60 feet. As built, the “fly-over” towers over Plaintiffs’ land, and it  
24 completely blocks the view of the Subject Property and any possible signage from I-15. As such,  
25 the new “fly-over” dramatically and negatively impacts the entire Subject Property, with  
26 significant impact to the Exchange Property sold by the State to Plaintiffs, at a price based, in  
27 part, on the visibility of the property to I-15. (*Id.* at ¶ 27).

28 . . .

1 The “fly-over,” as constructed, also blocks access to the Subject Property from Blue  
2 Diamond Road. The “fly-over” also prevents access from northbound traffic on South Las Vegas  
3 Boulevard and from I-215. (*Id.* at ¶¶ 28-29).

4 **C. SERVICE OF THE AMENDED COMPLAINT**

5 On November 30, 2012, Plaintiffs filed their Complaint, naming only the State of Nevada  
6 on relation of its Department of Transportation as Defendant (hereinafter, “Defendant”). (*See Ex*  
7 *Parte* Motion to Extend Time for Service on Shortened Time (“Motion to Extend”), on file  
8 herein, at p. 4). Prior to service of their Complaint, Plaintiffs filed an Amended Complaint on  
9 March, 27, 2013. (*Id.* at p. 5).

10 The next day, on March 28, 2013, Plaintiffs effectuated service of the Amended  
11 Complaint upon the Nevada Department of Transportation. (*Id.* at p. 6).

12 Plaintiffs’ counsel received a letter from Deputy Attorney General Amanda B. Kern on  
13 April 15, 2013, indicating she had received a copy of the Summons and Complaint and  
14 informing them that service had not been effectuated as to all individuals with the State who are  
15 required to be served under NRS 408.116 and NRS 41.031. (*Id.* at p. 6). The next day, Plaintiffs  
16 served all the additional individuals required by NRS 408.116 and NRS 41.031 to be served. (*Id.*  
17 at p. 6). Nonetheless, Plaintiffs filed a Motion to Extend the Time for Service. (*See id.*). On  
18 April 22, 2013, the Court granted Plaintiffs Motion to Extend. On June 3, 2013, NDOT’s counsel  
19 requested an extension to answer the amended complaint, which was granted. After receiving the  
20 extension, on June 10, 2013, NDOT filed a Peremptory Challenge of Judge Alf, pursuant to  
21 Nevada Supreme Court Rule (“SCR”) 48.1(5) certifying that the previous court had not ruled on  
22 any contested matter. (*See* Peremptory Challenge, on file herein).

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II.

LEGAL ARGUMENT

A. PLAINTIFFS SERVICE OF PROCESS WAS TIMELY AND IN THE ALTERNATIVE NDOT WAIVED ITS RIGHT TO CHALLENGE THE HOLDING WHEN IT FILED ITS PEREMPTORY CHALLENGE.

A plaintiff may obtain an extension of the service period under NRCP 6(b) upon a showing of good cause. *Scrimmer v. Eighth Judicial Dist. Court ex rel. County of Clark*, 116 Nev. 507, 517, fn. 6, 998 P.2d 1190, 1196, fn. 6 (2000); NRCP 6(b)(2). If a district court finds good cause it should explicitly extend the time for service. *Id.* The determination of good cause is within the district court's discretion. *Id.* at 513, 998 P.2d at 1193-94.

Despite this, NDOT challenges the Court's exercise of discretion. This challenge is without merit. NDOT makes reference to the holding in *Saavedra-Sandoval v. Wal-Mart Stores*, 245 P.3d 1198, 1201 (Nev. 2010). There the Supreme Court states that the district court should consider certain factors set forth in *Scrimmer*, as well as any other factor demonstrating good cause for filing a tardy motion. *Id.* Among the factors to consider are defendants' knowledge of the existence of the lawsuit and plaintiff's diligence in attempting service. *Id.*

Plaintiff filed its Motion to Extend on April 17, 2013. The Motion to Extend was filed in an abundance of caution, because of the State's letter pointing out that not all of the State actors required to be served had been served; an honest oversight. Plaintiffs' Motion to Extend set forth and argued the very factors that *Saavedra-Sandoval* contemplates. (Motion to Extend, at p. 6). Furthermore, it specifically outlined that not only had NDOT itself been served prior to the expiration of the 120-days, but that at least one other department of the State—who by inadvertence was formally not served—acknowledged its receipt of the Amended Complaint, such that the NDOT was not prejudiced by the technical failure to serve all State entities. On April 22, 2013, the presiding Judge, Nancy Alf, heard and granted Plaintiff's Motion to Extend. At the time, if not on April 17<sup>th</sup>, the service of the Amended Complaint became effectuated as to all State actors.<sup>2</sup>

---

<sup>2</sup> For reasons unknown, an Order prepared by Plaintiffs was never signed by the Court. (Ex. 1, at ¶4).

1 Despite having record notice that the Court ruled on the Motion to Extend, NDOT did not  
2 move the Court for reconsideration. Rather it waited nearly 45 days—the statutory period for it  
3 to file an answer—and then requested additional time to file its answer. Shortly thereafter, on  
4 June 10, 2013, NDOT filed its Peremptory Challenge certifying that the Court had not “made  
5 any ruling on a contested matter or commenced hearing any contested matter in the action.” SCR  
6 48.1(5). The rule clearly denotes that a peremptory challenge may not be filed after the  
7 commencement of a hearing on a contested matter. The rule makes no requirement that the Court  
8 must issue a written order, rather it prohibits a challenge if a ruling is made or a hearing on a  
9 contested matter commences.

10 NDOT now argues that the hearing commenced on April 22, 2013, and the ruling  
11 thereafter, made was in fact contested. NDOT then requests that this Court to go back and  
12 reconsider Judge Alf’s ruling on the Motion to Extend filed by Plaintiffs. (Motion to Dismiss, at  
13 p.9, fn .5). NDOT’s request does one of two things: either it voids the peremptory challenge and  
14 this matter must be remanded to Judge Alf’s court, or it serves as a waiver of any challenge to  
15 the Court’s ruling. Simply put, NDOT cannot have it both ways. It cannot both contest Plaintiffs  
16 Motion to Extend, on which the prior Court issued a ruling, while simultaneously asserting that  
17 the prior Court did not hear or rule on a contested issue. Therefore, NDOT’s Motion to Dismiss  
18 based on service fails.

19 **B. PLAINTIFFS DID NOT WAIVE THEIR RIGHTS AS TO THE ACTIONS OF**  
20 **THE NDOT.**

21 NDOT alleges that Plaintiffs waived their rights to assert claims against NDOT for  
22 Inverse Condemnation, Breach of Contract, Breach of Implied Covenant of Good Faith and Fair  
23 Dealing, Tortious Breach of Implied Covenant of Good Faith and Fair Dealing, and to recover  
24 expenses from third-party actions based on waivers contained in the Quitclaim Deed and  
25 Settlement Agreement (collectively, the “waivers”). (See Motion to Dismiss, at p. 11).

26 The State, however, bears the factual burden of proving that those “waivers” are  
27 relevant to this action and binding on Plaintiffs. As Plaintiffs extensively allege in their  
28 Amended Complaint, the State, using uneven bargaining power, its position of trust, and fraud,

1 induced Plaintiffs into executing these waivers. As such, the waivers are unenforceable, and the  
2 provisions must be reformed or rescinded to eliminate the clauses.

3 **1. Terms founded on unilateral mistake, either through fraud, accident or mistake,**  
4 **must be rescinded or reformed, and are therefore unenforceable.**

5 “Courts of equity have the power to order the reformation of deeds, contracts, and other  
6 instruments, when, through mistake of the parties thereto, or through the fraud of one of the  
7 parties, or unconscionable conduct amounting to fraud, such instrument does not contain the real  
8 terms of the contract between them.” *Roberts v. Hummel*, 69 Nev. 154, 158-59, 243 P.2d 248,  
9 249-50 (1952). Nevada Courts allow for the reformation of an instrument “where one party  
10 makes a unilateral mistake and the other party knew about it but failed to bring it to the mistaken  
11 party's attention.” *NOLM, LLC*, 120 Nev. at 740, 100 P.3d at 661; *Graber v. Comstock Bank*, 111  
12 Nev. 1421, 1428-29, 905 P.2d 1112, 1116 (1995); *Home Savers, Inc. v. United Security Co.*, 103  
13 Nev. 357, 358-59, 741 P.2d 1355, 1356-57 (1987).

14 In evaluating whether a unilateral mistake may be the basis for rescission, the Nevada  
15 Supreme Court has adopted the rules found in the Second Restatement of Contracts. *Home*  
16 *Savers, Inc.*, 103 Nev. at 358-59, 741 P.2d at 1356-57. A unilateral mistake may be the basis for  
17 a rescission when:

18 a mistake of one party at the time a contract was made as to a basic assumption on  
19 which he made the contract has a material effect on the agreed exchange of  
performances that is adverse to him, the contract is voidable by him if he does not  
bear the risk of the mistake under the rule stated in § 154, and

20 (b) the other party had reason to know of the mistake or his fault caused the  
mistake.

21 Restatement (Second) of Contracts § 153 (1981).

22 *Id.*

23 The Nevada Supreme Court specifically relied on Section 166 of the Restatement of  
24 Contracts when evaluating the effect of a writing when one party alleges fraud or unilateral  
25 mistake. *Tropicana Pizza, Inc. v. Advo, Inc.*, 124 Nev. 1514, 238 P.3d 861 (2008); *NOLM, LLC*  
26 *v. Cnty. of Clark*, 120 Nev. 736, 740, 100 P.3d 658, 661 (2004). In relevant part, Section 166 of  
the Second Restatement of Contracts states that:

27 If a party's manifestation of assent is induced by the other party's fraudulent  
28 misrepresentation as to the contents or *effect of a writing evidencing or*

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, on relation of its  
Department of Transportation,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT, COUNTY OF CLARK, STATE OF  
NEVADA, AND THE HONORABLE  
GLORIA STURMAN, DISTRICT JUDGE,

Respondents,

and

FRED NASSIRI, individually and as trustee of  
the NASSIRI LIVING TRUST, a trust formed  
under Nevada law,

Real Party in Interest.

Electronically Filed  
May 19 2016 08:42 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

Case No. 70098

**APPENDIX VOLUME 1, part 1**

**TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION**

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ATTORNEYS FOR PETITIONER



<b>Document Description</b>	<b>Volume Number</b>	<b>Bates Number</b>
Amended Complaint	1	PA00015-054
Answer to Amended Complaint and Counterclaim	2	PA00233-282
Answer to the State's Counterclaim	2	PA00283-292
Appendix to Nassiri's Opposition to Motion to Exclude Nassiri's Damages Evidence or Strike His Expert, Keith Harper, MAI	10	PA01841-2091
Appendix to Nassiri's Opposition to Motion to Exclude Nassiri's Damages Evidence or Strike His Expert, Keith Harper, MAI...	11	PA02092-2281
Appendix to Nassiri's Opposition to the State's MPSJs Re Inverse Claim and Contract Claims	5	PA00808-977
Appendix to Nassiri's Opposition to the State's MPSJs Re Nassiri's Inverse Claim and Contract Claims...	6	PA00978-1150
Appendix to the State's Motion for Partial Summary Judgment on Nassiri's Contract Claims	4	PA00504-695
Complaint	1	PA00001-014
Hearing Transcript (4-1-15 Hearing on the State's MPSJ on Nassiri's Inverse Claim and Contract Claims)	13	PA02460-2540
Hearing Transcript (5-19-15 Transcript of Closing Arguments at Bench Trial)	13	PA02541-2634
Hearing Transcript (Motion to Dismiss)	1	PA00156-224
Hearing Transcript (MPSJ on Prayer for Rescission)	7	PA01391-1451
Hearing Transcript (MPSJ Re Rescission Based on Bench Trial Ruling)	9	PA01763-1812
Hearing Transcript.1 (Motion to Exclude Damages Evidence or Strike Harper-Oral Arguments)	12	PA02389-2455
Hearing Transcript.2 (Motion to Exclude Damages Evidence or Strike Harper-Announcement of Ruling)	12	PA02349-2388
Motion for Partial Summary Judgment on Nassiri's Contract Claims	4	PA00596-726
Motion for Partial Summary Judgment on Nassiri's	5	PA00727-754

Prayer for Rescission		
Motion for Partial Summary Judgment on Nassiri's Rescission Claim Based on the Court's Trial Ruling	8	PA01598-1614
Motion for Summary Judgment on Nassiri's Claim for Inverse Condemnation (with Appendix)	3	PA00293-503
Motion to Bifurcate/Confirm the May 4, 2015, Trial as a Bench Trial	7	PA01306-1339
Motion to Dismiss Filed by the State	1	PA00055-108
Motion to Exclude Nassiri's Damages Evidence or Strike His Expert, Keith Harper, MAI	9	PA01649-1746
Notice of Supplemental Authority Re MPSJs Filed by the State	7	PA01239-1249
Opposition to the State's Motion to Bifurcate/Confirm the May 4, 2015, Trial as a Bench Trial	7	PA01340-1390
Opposition to the State's Motion to Dismiss	1	PA00108-136
Opposition to the State's Motion to Exclude Nassiri's Damages Evidence or Strike His Expert, Keith Harper, MAI	9	PA01813-1840
Opposition to the State's MPSJ on Nassiri's Claim for Inverse Condemnation	5	PA00775-807
Opposition to the State's MPSJ on Nassiri's Contract Claims	5	PA00755-774
Opposition to the State's MPSJ on Nassiri's Prayer for Rescission	6	PA01151-1170
Opposition to the State's MPSJ on Nassiri's Rescission Claim Based on Trial Ruling	8	PA01615-1648
Order Re Motion to Bifurcate/Confirm May 4, 2015, Trial as Bench Trial	8	PA01552-1555
Order Re Motion to Exclude Nassiri's Damages Evidence or Strike His Expert, Keith Harper, MAI	12	PA02456-2457
Order Re MPSJ on Nassiri's Claim for Inverse Condemnation	8	PA01536-1543
Order Re MPSJ on Nassiri's Contract Claims	8	PA01526-1535
Order Re MPSJ on Nassiri's Prayer for Rescission	8	PA01544-1551
Order Re MPSJ on Nassiri's Rescission Claim Based on Trial Ruling	12	PA02458-2459
Order Re the State's Motion to Dismiss	1	PA00225-232
Reply in Support of the State's Motion to Dismiss	1	PA00137-155

Reply in Support of the State's Motion to Exclude Nassiri's Damages Evidence or Strike His Expert, Keith Harper, MAI	12	PA02282-2348
Reply in Support of the State's MPSJ on Contract Claims	6	PA01171-1201
Reply in Support of the State's MPSJ on Nassiri's Claim for Inverse Condemnation	7	PA01202-1238
Reply in Support of the State's MPSJ on Nassiri's Prayer for Rescission	7	PA01250-1305
Reply in Support of the State's MPSJ on Nassiri's Rescission Claim Based on Trial Ruling	9	PA01747-1762
Supplemental Trial Brief Filed by Nassiri	8	PA01505-1525
Supplemental Trial Brief Filed by the State	8	PA01494-1504
Trial Brief Filed by Nassiri	8	PA01479-1493
Trial Brief Filed by the State	8	PA01452-1478
Trial Ruling	8	PA01577-1597
Trial Ruling (with Handwritten Changes)	8	PA01556-1576

## CIVIL COVER SHEET

XXVI I

Clark County, Nevada  
Case No. \_\_\_\_\_  
(Assigned by Clerk's Office)

**I. Party Information**

Plaintiff(s) (name/address/phone):  
**Fred Nassir and the Nassiri Living Trust**

Defendant(s) (name/address/phone):  
**State of Nevada**

Attorney (name/address/phone):  
**Dylan T. Ciciliano**  
Gordon Silver  
3960 Howard Hughes Pkwy., 9<sup>th</sup> Floor  
Las Vegas, NV 89169  
(702) 796-5555

Attorney (name/address/phone):

**II Nature of Controversy** (Please check applicable bold category and applicable subcategory, if appropriate)

☐ **Arbitration Requested**

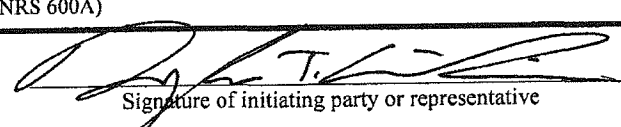
**Civil Cases**

Real Property	Negligence	Torts
<input type="checkbox"/> <b>Landlord/Tenant</b> <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> <b>Title to Property</b> <input type="checkbox"/> Foreclosure <input type="checkbox"/> Liens <input type="checkbox"/> Quiet Title <input type="checkbox"/> Specific Performance <input checked="" type="checkbox"/> <b>Condemnation/Eminent Domain</b> <input type="checkbox"/> <b>Other Real Property</b> <input type="checkbox"/> Partition <input type="checkbox"/> Planning/Zoning	<input type="checkbox"/> <b>Negligence – Auto</b> <input type="checkbox"/> <b>Negligence – Medical/Dental</b> <input type="checkbox"/> <b>Negligence – Premises Liability</b> (Slip/Fall) <input type="checkbox"/> <b>Negligence – Other</b>	<input type="checkbox"/> <b>Product Liability</b> <input type="checkbox"/> Product Liability/Motor Vehicle <input type="checkbox"/> Other Torts/Product Liability <input type="checkbox"/> <b>Intentional Misconduct</b> <input type="checkbox"/> Torts/Defamation (Libel/Slander) <input type="checkbox"/> Interfere with Contract Rights <input type="checkbox"/> <b>Employment Torts</b> (Wrongful termination) <input type="checkbox"/> <b>Other Torts</b> <input type="checkbox"/> Anti Trust <input checked="" type="checkbox"/> <b>Fraud/Misrepresentation</b> <input type="checkbox"/> Insurance <input type="checkbox"/> Legal Tort <input type="checkbox"/> Unfair Competition
Probate	Other Civil Filing Types	
<input type="checkbox"/> <b>Summary Administration</b> <input type="checkbox"/> <b>General Administration</b> <input type="checkbox"/> <b>Special Administration</b> <input type="checkbox"/> <b>Set Aside Estates</b> <input type="checkbox"/> <b>Trust/Conservatorships</b> <input type="checkbox"/> Individual Trustee <input type="checkbox"/> Corporate Trustee <input type="checkbox"/> <b>Other Probate</b>	<input type="checkbox"/> <b>Construction Defect</b> <input type="checkbox"/> Chapter 40 <input type="checkbox"/> General <input checked="" type="checkbox"/> <b>Breach of Contract</b> <input type="checkbox"/> Building & Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input checked="" type="checkbox"/> <b>Other Contracts/Acct/Judgment</b> <input type="checkbox"/> Collection of Actions <input type="checkbox"/> Employment Contract <input type="checkbox"/> Guarantee <input type="checkbox"/> Sale Contract <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> <b>Civil Petition for Judicial Review</b> <input type="checkbox"/> Foreclosure Mediation <input type="checkbox"/> Other Administrative Law <input type="checkbox"/> Department of Motor Vehicles <input type="checkbox"/> Worker's Compensation Appeal	
	<input type="checkbox"/> <b>Appeal from Lower Court</b> (also check applicable civil case box) <input type="checkbox"/> Transfer from Justice Court <input type="checkbox"/> Justice Court Civil Appeal <input type="checkbox"/> <b>Civil Writ</b> <input type="checkbox"/> Other Special Proceeding <input type="checkbox"/> <b>Other Civil Filing</b> <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Conversion of Property <input type="checkbox"/> Damage to Property <input type="checkbox"/> Employment Security <input type="checkbox"/> Enforcement of Judgment <input type="checkbox"/> Foreign Judgment – Civil <input type="checkbox"/> Other Personal Property <input type="checkbox"/> Recovery of Property <input type="checkbox"/> Stockholder Suit <input type="checkbox"/> Other Civil Matters	

**III. Business Court Requested** (Please check applicable category; for Clark or Washoe Counties only.)

<input type="checkbox"/> NRS Chapters 78-88	<input type="checkbox"/> Investments (NRS 104 Art. 8)	<input type="checkbox"/> Enhanced Case Mgmt/Business
<input type="checkbox"/> Commodities (NRS 90)	<input type="checkbox"/> Deceptive Trade Practices (NRS 598)	<input type="checkbox"/> Other Business Court Matters
<input type="checkbox"/> Securities (NRS 90)	<input type="checkbox"/> Trademarks (NRS 600A)	

11/30/12  
Date

  
Signature of initiating party or representative



CLERK OF THE COURT

**COMP**  
GORDON SILVER  
ERIC R. OLSEN  
Nevada Bar No. 3127  
DYLAN T. CICILIANO  
Nevada Bar No. 12348  
3960 Howard Hughes Pkwy., 9th Floor  
Las Vegas, Nevada 89169  
(702) 796-5555  
Attorneys for Plaintiffs

DISTRICT COURT

COUNTY, NEVADA

FRED NASSIRI, an individual; the NASSIRI  
LIVING TRUST, an trust formed under Nevada  
law,

Plaintiffs,

vs.

STATE OF NEVADA, on relation of its  
Department of Transportation; DOE  
GOVERNMENT AGENCIES I-X inclusive;  
DOE INDIVIDUALS I-X; and DOE ENTITIES  
1-10, inclusive;

Defendants.

A- 12- 672841- C

CASE NO.  
DEPT.

COMPLAINT

XXVI I

Arbitration Exempt:  
Action Concerning Title to Real Property

COMES NOW Plaintiffs, Fred Nassiri and the Nassiri Living Trust, by and through their  
counsel, the law firm of Gordon Silver, and hereby complains and allege against Defendants,  
State of Nevada, as follows:

1.

**THE PARTIES, JURSDICTION AND VENUE**

1. Plaintiff the Nassiri Living Trust is a trust who, on information and belief, is  
formed pursuant to the laws of the State of Nevada. Plaintiff's Trustee, Fred Nassiri, has at all  
times relevant been a resident of Clark County, Nevada.

2. Plaintiff Fred Nassiri (collectively with "Plaintiffs") is an individual who, on  
information and belief, has at all times relevant herein been a resident of Clark County, Nevada.

3. Defendant State of Nevada ("Defendant") on relation of its Department of  
Transportation ("NDOT", duly created, organized, existing and acting under and by virtue of

1 Nevada Revised Statutes Chapter 408 is subject to the provisions of the Nevada Revised  
2 Statutes, including NRS 342.105.

3 4. Defendants designated herein as Does Government Agencies, Individuals or  
4 Entities are individuals and legal entities that are liable to Plaintiffs for the claims set forth  
5 herein. In addition to possible alter egos of the above-named Defendants, if discovery should  
6 reveal the individual Defendants, or any of their trusts, affiliated entities, family members or ex-  
7 spouses are participating in fraudulent transfers for the purpose of avoiding creditors such as  
8 Plaintiffs, then members of these entities, trusts and/or third-party transferees, including but not  
9 limited to ex-spouse transferees and/or new entities formed for the purpose of holding property  
10 and assets, shall be added as Defendants herein. Any transactions and the true capacities of Does  
11 and Roe Entities are presently unknown to Plaintiffs and, therefore, Plaintiffs sue said  
12 Defendants by such fictitious names. Plaintiffs will amend this Complaint to assert the true  
13 names and capacities of such Doe and Roe Entities when more information has been ascertained.

14 5. Jurisdiction and venue are proper with this Court because Plaintiff is a Clark  
15 County, Nevada resident, the events in dispute took place in Clark County, Nevada, and the  
16 amount in dispute exceeds this Court's jurisdictional threshold.

17 2.

18 **GENERAL ALLEGATIONS**

19 1. At all times relevant herein, Plaintiff was the fee simple owners of property  
20 location in Clark County, Nevada, known as APN# 177-08-803-01 (the "Exchange Property"),  
21 approximately 24.41 acres. The Exchange Property, together with an approximate 43 acre  
22 adjacent property that Plaintiff at all times relevant owned (collectively with the Exchange  
23 Property, the "Subject Property"), is located on the North East side of the intersection of I-15 and  
24 Blue Diamond Road, abutting the I-15 on the West border, Blue Diamond Road on the South  
25 Border and South Las Vegas Boulevard on the Eastern border.<sup>1</sup>

26 ///

27  
28 <sup>1</sup> See Diagram of the land attached hereto as Exhibit 1.

1 **Acquisition of the Exchange Property**

2 2. On or about August 31, 2004, the Nevada Department of Transportation filed a  
3 condemnation action against Plaintiffs in the Eighth Judicial District Court, Clark County,  
4 Nevada, Case No. A491334 (the "Condemnation Action"), to acquire certain property Plaintiffs  
5 owned in fee simple, in connection with the construction and reconstruction of the I-15/Blue  
6 Diamond interchange and the attendant widening and realignment of Blue Diamond Road.

7 3. The parties resolved the Condemnation Action by entering into a Settlement  
8 Agreement and Release of All Claims dated April 28, 2005 (the "Settlement Agreement").<sup>2</sup>  
9 Pursuant to the terms of the Settlement Agreement, NDOT acquired 4.21 acres from Plaintiffs  
10 for \$4,810,000 and, as an "exchange," Plaintiffs acquired the Exchange Property from NDOT for  
11 \$23,239,004.50

12 4. As for the 4.21 acres, Plaintiffs did not question NDOT, and simply accepted  
13 NDOT's asking price of \$4,810,000.

14 5. During his discussions with NDOT concerning the purchase of the Exchange  
15 Property, Plaintiffs repeatedly requested that NDOT provide him with a copy of the appraisal  
16 relating to the Exchange Property. NDOT refused to disclose its appraisal.

17 6. Plaintiffs ultimately purchased the Exchange Property from NDOT for  
18 \$23,239,004.50. Together with all applicable title fees, Plaintiffs paid \$23,396,223 to Nevada  
19 Title Co. to close escrow.

20 7. NDOT did not convey the Exchange Property to Plaintiffs by Warranty Deed.  
21 Instead, NDOT only conveyed the Exchange Property by Quit Claim, possibly with specific  
22 knowledge of a pending or threatened lawsuit, thus exposing Plaintiffs to litigation.

23 8. On or about March 6, 2007, Alexandra Properties, LLC, Oasis Las Vegas, LLC,  
24 and New Horizon 2001, LLC filed an action against Fred Nassiri and the Plaintiffs in the Eighth  
25 Judicial District Court, Clark County Nevada, Case No. A537215 (the "Koroghli Litigation"),  
26 alleging claims against Plaintiffs relating to his acquisition of the Exchange Property.

27 <sup>2</sup> See Settlement Agreement and Release of Claims and First Amendment thereto attached collectively hereto as  
28 Exhibit 2.

1           9.       On or about November 17, 2008, the parties entered into a Settlement Agreement  
2 to resolve the Koroghli Litigation. Pursuant to the terms of the Settlement Agreement, the parties  
3 each agreed to a mutual exchange of parcels that were contiguous to other's large parcels of land.  
4 Plaintiffs were required to pay the settlement sum of \$5,500,000 to Plaintiffs.

5           10.      Together with legal expenses, Plaintiffs incurred over \$7 Million in connection  
6 with the Koroghli Litigation. NDOT exposed Plaintiffs to this claim by conveying the Exchange  
7 Property to him by Quit Claim, instead of by Warranty Deed.

8           11.      Plaintiffs also incurred expenses in the amount of \$200,000 to resolve a claim by  
9 Carolyn Ann Chambers relating to an alleged reversionary interest in a portion of the Exchanged  
10 Property.

11           12.      It was not until late 2008 that Plaintiffs obtained a copy of NDOT's 2004  
12 appraisal of the Exchange Property.<sup>3</sup> The standalone value of the Exchange Property was  
13 \$15,550,000.00. The assemblage value of the Exchange Property was \$22,650,000.00. NDOT  
14 charged Plaintiffs approximately \$8,000,000.00 over and above the appraised value of the  
15 Exchanged Property.

16           13.      Plaintiffs were denied knowledge that he was being charged an assemblage  
17 premium. NDOT essentially penalized Plaintiffs, with a hidden premium of approximately  
18 45.65%, for buying an adjoining parcel of land. Plaintiffs did not charge NDOT a premium,  
19 though it needed to assemble land for its right-of-way.

20           14.      This overpayment has also resulted in Plaintiffs being required to pay additional  
21 interest on money borrowed to make this overpayment and additional property taxes based on the  
22 inflated value.

23       **Changes in the Blue Diamond Interchange**

24           15.      In 2004, Plaintiffs, in connection with his purchase of the Exchange Property,  
25 inquired with NDOT as to NDOT's plans for the Blue Diamond Interchange construction.

26           16.      NDOT provided plans for the Blue Diamond Road Interchange. The plans  
27

28       <sup>3</sup> See 2004 NDOT Appraisal, a true and correct copy is attached hereto as Exhibit 3.



1 depicted that the 22.4 acre Exchange Property would benefit from enhanced I-15 traffic flow and  
2 approximately 1,500 feet of visual I-15 exposure.

3 17. NDOT's own appraisal of the Exchange Property took into account the visual  
4 benefit the owner of the Exchange Property would receive. Specifically, the 2004 appraisal  
5 stated: "The subject property, in the after condition, will have good visibility from Las Vegas  
6 Boulevard, Interstate 15 and the realigned Blue Diamond Road...."<sup>4</sup> In addition, NDOT's  
7 appraisal went on to state that "with the assemblage or plottage of the subject site, would include  
8 and/or benefit from direct visibility along the Interstate 15 right-of-way."<sup>5</sup> NDOT specifically  
9 appreciated the value of the projects (and related signage) visibility, particularly at one of the  
10 southernmost interchanges in Las Vegas.

11 18. Plaintiffs purchased the Exchange Property in reliance on the Blue Diamond Road  
12 Interchange plans NDOT provided Plaintiffs, and specifically the 1,500 feet of visibility the  
13 Exchange Property would have once NDOT completed the Blue Diamond Road Interchange.  
14 NDOT was aware that Plaintiffs relied upon NDOT's representation of the Blue Diamond Road  
15 Interchange when Plaintiffs purchased the Exchange Property.

16 19. The Blue Diamond Road Interchange Plans that NDOT provided Plaintiffs  
17 disclosed and explained the construction to be performed at the Blue Diamond Road Interchange,  
18 but did not include the "fly over" at the Blue Diamond Road Interchange, as now constructed.

19 20. On October 24, 2008, NDOT prepared an Environmental Assessment report of  
20 the I-15 South improvements. Therein, the report mentions that "[a] flyover ramp would be  
21 added to accommodate eastbound (EB) Blue Diamond Road traffic destined for NB I-15."

22 21. On March 24, 2010, NDOT held a public meeting on the I-15 South  
23 improvements. The meeting materials discuss the "fly over" at the Blue Diamond Road  
24 Interchange.

25 22. In 2010, without providing Plaintiffs with any notice whatsoever, NDOT began  
26 construction of the new "fly over" at Blue Diamond Road. The "fly over" was constructed at a

27 <sup>4</sup> See Exhibit 3 at p. 64.)

28 <sup>5</sup> (Id. at p. 68.)

1 height of approximately 60 feet. The "fly over" completely blocks the view of the Subject  
2 Property and any possible signage from I-15. The new "fly over" negatively impacts the entire  
3 Subject Property, with significant impact to the Exchange Property.

4 23. As a further result of the "fly over," access to the Subject Property from Blue  
5 Diamond Road has been eliminated. Prior to the "fly over's" construction, a means of ingress  
6 and egress to the Subject Property existed along Blue Diamond Road. The new "fly over" called  
7 for the construction of retaining walls along the North end of Blue Diamond Road, from Las  
8 Vegas Boulevard west until I-15. The only remaining access to the Subject Property is from  
9 southbound traffic on South Las Vegas Boulevard, as medians prevent access from northbound  
10 traffic on South Las Vegas Boulevard.

11 24. Further, the new "fly over" prevented vehicle traffic from I-215 from reaching the  
12 Subject Property, as traffic from I-215 can access either I-15 South or westbound Blue Diamond  
13 Road. It is no longer possible to go eastbound on Blue Diamond Road from I-215, as it had  
14 previously been at the time Plaintiffs purchased the Exchange Property.

15 25. The Blue Diamond Road Interchange "fly over" is contrary to plans shown to  
16 Plaintiffs at the time of the transaction.

17 26. The "fly over" has had an enormous and disastrous impact on the Subject  
18 Property, resulting in a significant decline in the value and the possible development uses of both  
19 the Exchange Property and Plaintiffs' existing contiguous parcel. The loss in value is due to both  
20 the loss of visibility from I-15 and loss of access to the Subject Property.

21 27. As the I-15 visual exposure was a central consideration to this transaction,  
22 Plaintiffs never would have purchased the Exchange Property from NDOT, let alone for nearly  
23 \$24 Million if Plaintiffs had known that NDOT intended to ever construct a "fly over" at Blue  
24 Diamond Road and destroy the property's visibility from I-15.

25 28. Moreover, despite having sold the Exchange Property to Plaintiffs with the  
26 knowledge that visibility had material value that led to a 46% premium, NDOT failed to provide  
27 Plaintiffs with notice of the "fly over."

28 29. NRS 37.110(3) provides that if "property, though no part thereof is taken, will be

1 damaged by the construction of the proposed improvement, the amount of such damage” is to be  
2 determined by the jury, Court, commissioners, or master.

3 30. NDOT has deprived Plaintiffs of visibility and access rights to the Subject  
4 Property, of which Plaintiffs’ purchased the Exchange Property from NDOT under the  
5 representation that the Blue Diamond Road Interchange development did not include any  
6 improvements that impaired access or visibility of the Exchange Property.

7 31. As a result of the “fly over” constructed at the Blue Diamond Road Interchange,  
8 Plaintiffs has suffered significant damages.

9 3.

### 10 CLAIMS FOR RELIEF

#### 11 **FIRST CLAIM FOR RELIEF** 12 **(Inverse Condemnation)**

13 1. Plaintiffs repeat and reallege the allegations set forth in each of the preceding  
14 paragraphs, as though set forth fully herein.

15 2. In 2010, NDOT did redevelop the Blue Diamond Road Interchange. NDOT  
16 constructed a “fly over” with an approximate height of 60 feet and removed all access to the  
17 parcels abutting the North side of Blue Diamond Road between I-15 and South Las Vegas  
18 Boulevard.

19 3. The Subject Property abuts the North side of Blue Diamond Road between I-15  
20 and South Las Vegas Boulevard. As a result of the “fly over” access to the Subject Property from  
21 Blue Diamond road has been eliminated. Further, the Subject Property is no longer visible from  
22 I-15.

23 4. Nevada law entitles a property owner access to a public way that is adjacent to the  
24 property, and that access is a property right. Blue Diamond Road is adjacent to the Subject  
25 Property. As a result of the building of the “fly over,” the Subject Property cannot be accessed  
26 from Blue Diamond Road.

27 5. Nevada law recognizes that visibility is a property right that when infringed upon  
28 entitles the injured party to just compensation. The “fly over” eliminates the visibility of the

1 Subject Property from I-15, a significant thoroughfare. NDOT used the visibility of the  
2 Exchange Property to demand a higher asking price from Plaintiffs, and Plaintiffs relied on the  
3 visibility of the Exchange Property when it purchased the Exchange Property.

4 6. Defendant has not offered Plaintiffs any compensation for the deprivation of  
5 Plaintiffs' access to the Subject Property nor for Defendant's Blue Diamond Road Interchange  
6 improvements significantly affecting the visibility of the Subject Property.

7 7. The Nevada constitution requires the payment of just compensation whenever a  
8 government defendant takes property even though no eminent domain proceedings were  
9 undertaken.

10 8. As a direct and proximate cause of Defendant's Inverse Condemnation, Plaintiffs  
11 has been damaged in an amount exceeding \$10,000.00.

12 **SECOND CLAIM FOR RELIEF**  
13 **(Breach of Contract)**

14 9. Plaintiffs repeat and reallege the allegations set forth in each of the preceding  
15 paragraphs, as though set forth fully herein.

16 10. Plaintiffs and Defendant entered into the Settlement Agreement on or about April  
17 28, 2005. The Settlement Agreement was a valid and enforceable contract. Pursuant to that  
18 agreement, Defendant was to convey the Exchange Property, in exchange for a just and  
19 reasonable price.

20 11. Defendant withheld the 2004 appraisal of the property. Therein, it is reflected that  
21 Defendant knowingly charged Plaintiffs in excess of the value of the Exchange Property.  
22 Plaintiffs' failure to provide equivalent value is a breach of the Settlement Agreement.

23 12. Further, as a condition subsequent to Plaintiffs' purchase of the Exchange  
24 Property, Defendant's presented Plaintiffs with the Blue Diamond Interchange development  
25 plan. That plan reflected that the Exchange Property had in excess of 1,500 feet of visibility from  
26 I-15. After Plaintiffs' purchase of the Exchange Property, Defendant, by and through NDOT,  
27 changed the Blue Diamond Road Interchange development plan, such that a "fly over"  
28 eliminated the Exchange Property's 1,500 feet of visibility from I-15, which amounts to a breach

1 of the Settlement Agreement.

2 13. As a direct and proximate cause of Defendant's breach of the Settlement  
3 Agreement, Plaintiffs has been damaged in an amount exceeding \$10,000.00.

4  
5 **THIRD CLAIM FOR RELIEF**  
6 **(Negligent Misrepresentation)**

7 14. Plaintiffs repeat and reallege the allegations set forth in each of the preceding  
8 paragraphs, as though set forth fully herein.

9 15. Defendant, as the seller of the Exchange Property, possessed a pecuniary interest  
10 in any sale of the Exchange Property.

11 16. Defendant, as the seller and as a state entity, owes Plaintiffs the duty of candor  
12 and full disclosure. The duty of full disclosure extends to any fact that is pertinent to Plaintiffs'  
13 decision to purchase the property.

14 17. Defendant was required to accurately disclose the fair market value of the  
15 property it offered Plaintiffs. Defendant refused to produce the appraisal for the property.

16 18. Defendant was required to disclose that it charged Plaintiffs a premium based on  
17 assemblage or any other factor. Defendant, unbeknownst to Plaintiffs, changed Plaintiffs a  
18 premium of 46% based on assemblage.

19 19. Defendant was required to disclose any and all intent or plans to impact the  
20 visibility or access to the Subject Property. Defendant was aware that the visibility of the  
21 Exchange Property was a key selling factor that increased the value of the property. Defendant  
22 was also aware that access to the property from Blue Diamond Road was essential. Defendant's  
23 failed to disclose to Plaintiffs the Blue Diamond Road Interchange plan that included the "fly  
24 over." Defendant's never provided Plaintiffs notice of the change to the Blue Diamond Road  
25 Interchange, such that Plaintiffs could seek administrative remedies.

26 20. Plaintiffs were justified in relying on Defendant's representation. Defendant, as  
27 the State, has a duty to faithfully serve the people of the State of Nevada.

28 21. As a direct and proximate cause of Defendant's Negligent Misrepresentation,

1 Plaintiffs has been damaged in an amount exceeding \$10,000.00.

2 **FOURTH CLAIM FOR RELIEF**  
3 **(Breach of Implied Covenant of Good Faith and Fair Dealing)**

4 22. Plaintiffs repeat and reallege the allegations set forth in each of the preceding  
5 paragraphs, as though set forth fully herein.

6 23. The Settlement Agreement constituted a valid and existing contract between  
7 Plaintiffs and Defendant.

8 24. Every contract in Nevada imposes upon the contracting parties a duty of good  
9 faith and fair dealing.

10 25. Defendant owed an implied duty of good faith and fair dealing to Plaintiffs under  
11 the Contract.

12 26. Defendant was aware that Plaintiffs' purchased the Exchange Property based on  
13 the express representations of NDOT by and through the Blue Diamond Road Interchange  
14 development plan.

15 27. Defendant breached its duty of good faith and fair dealing by failing to disclose  
16 the value of the Exchange Property or that it charged Plaintiffs a premium prior to its sale of the  
17 Exchange Proper to Plaintiffs, which is unfaithful to the purpose of the Settlement Agreement.

18 28. Defendant breached its duty of good faith and fair dealing by failing to disclose  
19 that it intended, contemplated, or that it was otherwise possible that NDOT would construct a  
20 "fly over" at the Blue Diamond Road Interchange that would obstruct Plaintiffs' ingress and  
21 egress to the Exchange Property and/or visibility of the property from I-15. Defendant was aware  
22 that Plaintiffs paid valuable consideration for both rights of access and visibility. Defendant's  
23 impairment of those rights is unfaithful to the purpose of the Settlement Agreement.

24 29. Defendant further breached its duty of good faith and fair dealing when it planned  
25 and began construction on the "fly over," despite express representations to Plaintiffs that the  
26 Blue Diamond Road Interchange would not include a "fly over." Defendant's failure to maintain  
27 its representation to Plaintiffs regarding the Blue Diamond Road Interchange is unfaithful to the  
28 purpose of the Settlement Agreement.

1           30. Defendant owes a duty to the citizens and landowners of the State, such that  
2 Plaintiffs is justified in relying on Defendant's representation, including the value of the  
3 Exchange Property and NDOT's plan to develop the adjacent Blue Diamond Road Interchange.

4           31. As a direct and proximate cause of Defendant's breach of the covenant of good  
5 faith and fair dealing, Plaintiffs has been damaged in an amount exceeding \$10,000.00.

6                                   **FIFTH CLAIM FOR RELIEF**  
7                                   **(Breach of Implied Covenant of Good Faith and Fair Dealing-Tortious Breach**

8           32. Plaintiffs repeat and reallege the allegations set forth in each of the preceding  
9 paragraphs, as though set forth fully herein.

10           33. The Settlement Agreement constituted a valid and existing contract between  
11 Plaintiffs and Defendant.

12           34. Every contract in Nevada imposes upon the contracting parties a duty of good  
13 faith and fair dealing.

14           35. Defendant owed an implied duty of good faith and fair dealing to Plaintiffs under  
15 the Contract.

16           36. Defendant, as the State of Nevada, owes the people of the State of Nevada a  
17 fiduciary duty, such that Defendant is in a trusted position, wherein it is reasonable for Plaintiffs'  
18 to rely on the representations of Defendant.

19           37. Defendant was aware that Plaintiffs' purchased the Exchange Property based on  
20 the express representations of NDOT by and through the Blue Diamond Road Interchange  
21 development plan and Defendant's representation of the value of the property.

22           38. Defendant breached its duty of good faith and fair dealing by failing to disclose  
23 the value of the Exchange Property or that it charged Plaintiffs a premium prior to its sale of the  
24 Exchange Proper to Plaintiffs, which is unfaithful to the purpose of the Settlement Agreement.

25           39. Defendant breached its duty of good faith and fair dealing by failing to disclose  
26 that it intended, contemplated, or that it was otherwise possible that NDOT would construct a  
27 "fly over" at the Blue Diamond Road Interchange that would obstruct Plaintiffs' ingress and  
28

1 egress to the Exchange Property and/or visibility of the property from I-15. Defendant was aware  
2 that Plaintiffs paid valuable consideration for both rights of access and visibility. Defendant's  
3 impairment of those rights is unfaithful to the purpose of the Settlement Agreement.

4 40. Defendant further breached its duty of good faith and fair dealing when it planned  
5 and began construction on the "fly over," despite express representations to Plaintiffs that the  
6 Blue Diamond Road Interchange would not include a "fly over." Defendant's failure to maintain  
7 its representation to Plaintiffs regarding the Blue Diamond Road Interchange is unfaithful to the  
8 purpose of the Settlement Agreement.

9 41. Defendant owes a duty to the citizens and landowners of the State, such that  
10 Plaintiffs is justified in relying on Defendant's representation, including the value of the  
11 Exchange Property and NDOT's plan to develop the adjacent Blue Diamond Road Interchange.

12 As a direct and proximate cause of Defendant's breach of the covenant of good faith and  
13 fair dealing, Plaintiffs has been damaged in an amount exceeding \$10,000.00.

14  
15 **FIFTH CLAIM FOR RELIEF**  
16 **(Intentional Misrepresentation)**

17 42. Plaintiffs repeat and reallege the allegations set forth in each of the preceding  
18 paragraphs, as though set forth fully herein.

19 43. Defendant's made false representations regarding the value of the property, in  
20 order to obtain greater value for the Exchange Property. Despite the existence of a valid  
21 appraisal, Defendant failed to disclose the substance of the appraisal or that fact that Defendant  
22 charged Plaintiffs a 46% premium.

23 44. Defendant intended to induce Plaintiffs' purchase of the property at its maximum  
24 value.

25 45. To further entice Plaintiffs into purchasing the property, Defendant failed to  
26 disclose that Defendant intended and/or contemplated the building of a "fly over" that would  
27 significantly impact the visibility of the property from I-15, which Defendant's appraisal  
28 identified as a significant feature of value.



46. Plaintiffs were justified in relying of Defendant's representation of value and future plans based on the fact that Defendant is the State and is slated to serve the public.

47. Defendant never disclosed that it overcharged Plaintiffs for the property or that its eventual plans would eliminate one path of entry to the Subject Property and obscures the Subject Properties visibility from I-15, a major factor leading to Plaintiffs' purchase of the property.

48. As a direct and proximate cause of Defendant's breach of contract, Plaintiffs has been damaged in an amount exceeding \$10,000.00.

Wherefore, Plaintiffs prays for judgment against Defendant as follows:

1. For an award against Defendant in favor of Plaintiffs in an amount in excess of \$10,000.00;

2. For pre-judgment and post-judgment interest at the appropriate rate of interest;

3. For an award to Plaintiffs of its costs;

4. For an award to Plaintiffs of its reasonable attorneys' fees; and

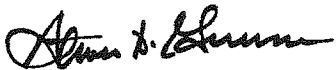
5. For the rescission of the Purchase Agreement;

6. For such other and further relief that the Court deems just and proper.

Dated this 30<sup>th</sup> day of November, 2012.

~~GORDON SILVER~~

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CLERK OF THE COURT

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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

FRED NASSIRI, an individually and as trustee  
of the NASSIRI LIVING TRUST, n trust  
formed under Nevada law,

Plaintiffs,

vs.

STATE OF NEVADA, on relation of its  
Department of Transportation; DOE  
GOVERNMENT AGENCIES I-X inclusive;  
DOE INDIVIDUALS I-X; and DOE ENTITIES  
1-10, inclusive;  
Defendants.

CASE NO. A672841  
DEPT. NO. XXVII

**AMENDED COMPLAINT**

**Arbitration Exempt:  
Action Concerning Title to Real Property**

COMES NOW Plaintiffs, Fred Nassiri and the Nassiri Living Trust, by and through their  
counsel, the law firm of Gordon Silver, and hereby complains and allege against Defendants,  
State of Nevada, as follows:

**I.**  
**THE PARTIES, JURISDICTION AND VENUE**

1. Plaintiff the Nassiri Living Trust is a trust which, on information and belief, is  
formed pursuant to the laws of the State of Nevada. Plaintiff's Trustee, Fred Nassiri, has at all  
times relevant been a resident of Clark County, Nevada.

2. Plaintiff Fred Nassiri (collectively with the Nassiri Living Trust, "Plaintiffs") is  
an individual who, on information and belief, has at all times relevant herein been a resident of  
Clark County, Nevada.

...

3. Defendant State of Nevada (“Defendant”) on relation of its Department of Transportation (“NDOT”, duly created, organized, existing and acting under and by virtue of Nevada Revised Statutes Chapter 408 is subject to the provisions of the Nevada Revised Statutes, including NRS 342.105.

4. Defendants designated herein as Does Government Agencies, Individuals or Entities are individuals and legal entities that are liable to Plaintiffs for the claims set forth herein. In addition to possible alter egos of the above-named Defendants, if discovery should reveal the individual Defendants, or any of their trusts, affiliated entities, family members or ex-spouses are participating in fraudulent transfers for the purpose of avoiding creditors such as Plaintiffs, then members of these entities, trusts and/or third-party transferees, including but not limited to ex-spouse transferees and/or new entities formed for the purpose of holding property and assets, shall be added as Defendants herein. Any transactions and the true capacities of Does and Roe Entities are presently unknown to Plaintiffs and, therefore, Plaintiffs sue said Defendants by such fictitious names. Plaintiffs will amend this Complaint to assert the true names and capacities of such Doe and Roe Entities when more information has been ascertained.

5. Jurisdiction and venue are proper with this Court because Plaintiff is a Clark County, Nevada resident, the events in dispute took place in Clark County, Nevada, and the amount in dispute exceeds this Court's jurisdictional threshold.

## II.

## GENERAL ALLEGATIONS

6. Through the course of events described herein, Plaintiff became and remains the fee simple owner of property location in Clark County, Nevada, known as APN# 177-08-803-013 (the "Exchange Property"), approximately 24.41 acres. The Exchange Property, together with an approximate 43 acre adjacent property that Plaintiff at all times relevant owned (collectively with the Exchange Property, the "Subject Property"), is located on the North East side of the intersection of I-15 and Blue Diamond Road, abutting the I-15 on the West border, Blue Diamond Road on the South Border and South Las Vegas Boulevard on the Eastern

border.<sup>1</sup>

**Acquisition of the Exchange Property**

7. On or about August 31, 2004, the Nevada Department of Transportation filed a condemnation action against Plaintiffs in the Eighth Judicial District Court, Clark County, Nevada, Case No. A491334 (the "Condemnation Action"), to acquire certain property Plaintiffs owned in fee simple, in connection with the construction and reconstruction of the I-15/Blue Diamond interchange and the attendant widening and realignment of Blue Diamond Road.

8. The parties resolved the Condemnation Action by entering into a Settlement Agreement and Release of All Claims dated April 28, 2005 (the "Settlement Agreement"). (A First Amendment to Settlement Agreement and Release of All Claims, was entered into on or about June 14, 2005.)<sup>2</sup> Pursuant to the terms of the Settlement Agreement, NDOT acquired 4.21 acres from Plaintiffs for \$4,810,000.00 and, as an "exchange," Plaintiffs acquired the Exchange Property from NDOT for \$23,239,004.50

9. As for the 4.21 acres, Plaintiffs did not question NDOT, and simply accepted NDOT's asking price of \$4,810,000.00.

10. During his discussions with NDOT concerning the Plaintiffs' acquisition of the Exchange Property, Plaintiffs repeatedly requested that NDOT provide him with a copy of the appraisal relating to the Exchange Property. NDOT refused to disclose its appraisal. In addition, NDOT failed to provide Plaintiffs with a written statement of, and summary of the basis for, the amount established as just compensation, as required by Federal and State law; or failed to provide a true and accurate statement of the same.

11. Plaintiffs ultimately completed acquisition of the Exchange Property from NDOT for \$23,239,004.50, as part of the settlement. Together with all applicable title fees, Plaintiffs paid \$23,396,223.00 to Nevada Title Co. to close escrow.

...

<sup>1</sup> See Diagram of the land attached hereto as Exhibit 1.

<sup>2</sup> See Settlement Agreement and Release of Claims and First Amendment thereto attached collectively hereto as Exhibit 2.

1           12.     NDOT did not convey the Exchange Property to Plaintiffs by Warranty Deed.  
2     Instead, NDOT only conveyed the Exchange Property by Quit Claim, with specific knowledge of  
3     a potential or threatened litigation by a neighboring landowner, thus exposing Plaintiffs to  
4     litigation. Plaintiffs not only paid NDOT a very large sum of money and become exposed to  
5     third party litigation, but they also incurred expenses in the amount of \$200,000 to resolve a  
6     claim by Carolyn Ann Chambers relating to an alleged reversionary interest in a portion of the  
7     Exchange Property. Plaintiffs are also informed and believe that the Exchange Property may be  
8     subject to other reversionary and/or residual rights of third parties that may expose them to  
9     further costs of litigation and potential liability.

10           13.     On or about March 6, 2007, Alexandra Properties, LLC, Oasis Las Vegas, LLC,  
11     and New Horizon 2001, LLC filed an action against the Plaintiffs in the Eighth Judicial District  
12     Court, Clark County Nevada, Case No. A537215 (the "Koroghli Litigation"), alleging claims  
13     against Plaintiffs relating directly to the acquisition of the Exchange Property.

14           14.     On or about November 17, 2008, the parties entered into a Settlement Agreement  
15     to resolve the Koroghli Litigation. Pursuant to the terms of the Settlement Agreement, the parties  
16     each agreed to a mutual exchange of parcels that were contiguous to other large parcels of land.  
17     In addition to fees and costs expended to defend that litigation, Plaintiffs were required to pay a  
18     settlement to the Koroghli Litigation plaintiffs.

19           15.     Together with legal expenses, Plaintiffs incurred over \$7 Million in expenses in  
20     connection with the Koroghli Litigation. NDOT exposed Plaintiffs to this claim by conveying  
21     the Exchange Property to them by Quit Claim, instead of by Warranty Deed, and with  
22     knowledge of potential litigation by the Koroghli Litigation plaintiffs resulting from NDOT's  
23     condemnation of neighboring property owed by those parties.

24           16.     It was not until late 2008 that Plaintiffs obtained a copy of NDOT's 2004  
25     appraisal of the Exchange Property.<sup>3</sup> A review of that appraisal showed the value of the  
26     Exchange Property was only \$15,550,000.00. The appraisal also concluded that the Exchange  
27

28     

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<sup>3</sup> See 2004 NDOT Appraisal, a true and correct copy is attached hereto as Exhibit 3.

1 Property had a premium "assemblage value" of \$22,650,000.00. As it turned out, NDOT had  
2 charged Plaintiffs approximately \$8,000,000.00 over and above the appraised value of the  
3 Exchanged Property, without ever telling Nassiri.

4 17. Plaintiffs were denied knowledge of the extent to which they were being charged  
5 an "assemblage" premium. NDOT essentially penalized Plaintiffs, with a hidden premium of  
6 approximately 45.65%, for buying an adjoining parcel of land. Such premium was two and one-  
7 half to four times higher than any reasonable premium. (Plaintiffs did not charge NDOT a  
8 premium on its end of the Exchange, though NDOT needed to assemble land for its right-of-  
9 way.) The effect was to mislead Plaintiffs into believing the comparative fair market value  
10 (without an assemblage premium) was substantially higher than it actually was determined to be.  
11 Plaintiffs would not have paid the price demanded for the Exchange Property had they know of  
12 the secret premium of nearly 50%.

13 18. This secret premium resulted not only in Plaintiffs overpaying for the Exchange  
14 Property, but in being required to pay additional interest on money borrowed to make this  
15 overpayment and required to pay additional property taxes based on the inflated value.

16 **Changes in the Blue Diamond Interchange**

17 19. In 2004, Plaintiffs, in connection with his purchase of the Exchange Property,  
18 inquired of NDOT as to NDOT's plans for the Blue Diamond Interchange construction.

19 20. NDOT provided plans for the Blue Diamond Road Interchange. The plans  
20 depicted that the 22.4 acre Exchange Property would benefit from enhanced I-15 traffic flow and  
21 approximately 1,500 feet of visual I-15 exposure. Visual exposure of the Subject Property along  
22 I-15 and Blue Diamond Road was of tremendous value to the Plaintiffs. In fact, because it was  
23 landlocked, most of the Exchange Property's value to Plaintiffs was in its visibility to traffic, in  
24 particular freeway traffic coming from Southern California.

25 21. Plaintiffs later learned that NDOT's own appraisal of the Exchange Property  
26 expressly took into account the visual benefit the owner of the Exchange Property would receive.  
27 Specifically, the 2004 appraisal stated: "The subject property, in the after condition, will have  
28 good visibility from Las Vegas Boulevard, Interstate 15 and the realigned Blue Diamond

1 Road...".<sup>4</sup> In addition, NDOT's appraisal went on to state that "with the assemblage or plottage  
2 of the subject site, would include and/or benefit from direct visibility along the Interstate 15  
3 right-of-way."<sup>5</sup> NDOT specifically appreciated the value of the projects (and related signage)  
4 visibility, particularly at one of the southernmost interchanges in Las Vegas.

5 22. Plaintiffs acquired the Exchange Property in reliance on the Blue Diamond Road  
6 Interchange plans NDOT provided Plaintiffs, and specifically the 1,500 feet of visibility the  
7 Exchange Property would have once NDOT completed the Blue Diamond Road Interchange.  
8 NDOT was aware that Plaintiffs relied upon NDOT's representation of the Blue Diamond Road  
9 Interchange when Plaintiffs purchased the Exchange Property.

10 23. The Blue Diamond Road Interchange Plans that NDOT provided Plaintiffs  
11 disclosed and explained the construction to be performed at the Blue Diamond Road Interchange,  
12 but did not include the "fly over" at the Blue Diamond Road Interchange, as now constructed.

13 24. On October 24, 2008, NDOT prepared an Environmental Assessment report of  
14 the I-15 South improvements. Therein, the report mentions that "[a] flyover ramp would be  
15 added to accommodate eastbound (EB) Blue Diamond Report traffic destined for NB I-15."

16 25. On March 24, 2010, NDOT held a public meeting on the I-15 South  
17 improvements. A review of meeting materials reveals that NDOT, and its agent Las Vegas  
18 Paving, discussed and presented a new "fly over" at the Blue Diamond Road Interchange.  
19 NDOT did not provide notice of that meeting to Plaintiffs, even though Plaintiffs were adjoining  
20 landowners, NDOT had sold them the land, and NDOT knew the Exchange Property's visibility  
21 had value. NDOT did not provide the materials describing the new "flyover" to Plaintiffs.

22 26. Three weeks later, on April 15, 2010 NDOT's agent and partner, Las Vegas  
23 Paving Corporation ("LV Paving"), entered into a Ground Lease Agreement with Plaintiffs to  
24 use a portion of the Subject Property as a storage and staging area for I-15 construction. (See  
25 Exhibit 4 attached hereto.) At that time LV Paving provided, and incorporated into the  
26 Agreement, a diagram of the Blue Diamond Road Interchange improvements. That diagram,

27 <sup>4</sup> See Exhibit 3 at p. 64.)

28 <sup>5</sup> (Id. at p. 68.)

1 however, did not depict the “fly over” that actually planned at that time; the “fly over” would  
2 obstruct the Subject Property’s visibility, limit its access, and devastate its value. Las Vegas  
3 Paving, NDOT’s agent, clearly knew of the plans for an obstructing “fly over,” because Las  
4 Vegas Paving was the “design and build” contractor for the entire I-15 corridor improvement  
5 project, which included the Blue Diamond Interchange.

6 27. At some point in 2010, without providing Plaintiffs with any notice whatsoever,  
7 NDOT began construction of the new “fly over” at Blue Diamond Road. The “fly over” was  
8 constructed to a height of approximately 60 feet. The “fly over” completely blocks the view of  
9 the Subject Property and any possible signage from I-15, and that the new “fly over”  
10 dramatically and negatively impacts the entire Subject Property, with significant impact to the  
11 Exchange Property.

12 28. As a further result of the “fly over,” access to the Subject Property from Blue  
13 Diamond Road has been eliminated. Prior to the “fly over’s” construction, a means of ingress  
14 and egress to the Subject Property existed along Blue Diamond Road. The new “fly over” also  
15 included the construction of massive retaining walls along the North end of Blue Diamond Road,  
16 from Las Vegas Boulevard west until I-15 – the Subject Property’s southern border. The only  
17 remaining access to the Subject Property is from southbound traffic on South Las Vegas  
18 Boulevard, as medians prevent access from northbound traffic on South Las Vegas Boulevard.

19 29. Further, the new “fly over” has prevented vehicle traffic from I-215 from reaching  
20 the Subject Property, as traffic from I-215 can access either I-15 South or westbound Blue  
21 Diamond Road. It is no longer possible to go eastbound on Blue Diamond Road from I-215, as it  
22 had previously been at the time Plaintiffs purchased the Exchange Property.

23 30. The Blue Diamond Road Interchange “fly over” is contrary to plans shown to  
24 Plaintiffs at the time of the exchange transaction. The Blue Diamond Road Interchange “fly  
25 over” is contrary to plans shown to Plaintiffs in April 2010, at a time after the plans had already  
26 been changed. Each time the plans were shown to Plaintiffs, they reasonably relied on the plans  
27 in taking or refraining from taking action, including action to object to the changed and  
28 damaging construction, or to seek judicial relief to alter or halt the planned construction.



1           31.     Once constructed, the "fly over" has had an enormous and disastrous impact on  
2 the Subject Property, resulting in a significant decline in the value and the possible development  
3 uses of both the Exchange Property and Plaintiffs' existing contiguous parcel. The loss in value  
4 is due to both the loss of visibility from I-15 and loss of access to the Subject Property.

5           32.     As the I-15 visual exposure was a central consideration to this transaction,  
6 Plaintiffs never would have purchased the landlocked Exchange Property from NDOT, let alone  
7 for nearly \$24 Million if Plaintiffs had known that NDOT intended to ever construct a "fly over"  
8 at Blue Diamond Road and utterly destroy the property's visibility from I-15.

9           33.     Despite having sold the Exchange Property to Plaintiffs at 46.65% premium, with  
10 the specific knowledge that visibility had material value, NDOT failed to provide Plaintiffs with  
11 notice of the "fly over." NDOT, through its agent, also made misrepresentations to Plaintiffs, that  
12 the interchange improvements would not block the Subject Property's visibility and access, after  
13 NDOT was aware of the plan for the for the "fly over".

14           34.     NRS 37.110(3) provides that if "property, though no part thereof is taken, will be  
15 damaged by the construction of the proposed improvement, the amount of such damage" is to be  
16 determined by the jury, Court, commissioners, or master.

17           35.     NDOT has deprived Plaintiffs of visibility and access rights to the Subject  
18 Property, of which Plaintiffs' purchased the Exchange Property from NDOT under the  
19 representation that the Blue Diamond Road Interchange development did not include any  
20 improvements that impaired access or visibility of the Exchange Property.

21           36.     As a result of NDOT's breaches, bad faith, misrepresentation, and concealment  
22 concerning the property value and the "fly over" constructed at the Blue Diamond Road  
23 Interchange, Plaintiffs has suffered significant damages, in the millions of dollars.

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III.

**CLAIMS FOR RELIEF**

**FIRST CLAIM FOR RELIEF  
(Inverse Condemnation)**

37. Plaintiffs repeat and reallege the allegations set forth in each of the preceding paragraphs, as though set forth fully herein.

38. In 2010, NDOT reconfigured the Blue Diamond Road Interchange. NDOT constructed a "fly over" with an approximate height of 60 feet and removed all access to the parcels abutting the North side of Blue Diamond Road between I-15 and South Las Vegas Boulevard.

39. The Subject Property abuts the North side of Blue Diamond Road between I-15 and South Las Vegas Boulevard. As a result of the "fly over" access to the Subject Property from Blue Diamond road has been eliminated. Further, the Subject Property is no longer visible from I-15 or from Blue Diamond west of the I-15.

40. Nevada law entitles a property owner access to a public way that is adjacent to the property, and that access is a property right. Blue Diamond Road is adjacent to the Subject Property. As a result of the building of the "fly over," the Subject Property cannot be accessed from Blue Diamond Road.

41. Nevada law, under NRS 37.110(3), provides that if "property, though no part thereof is taken, will be damaged by the construction of the proposed improvement, the amount of such damage" is to be determined by the jury, Court, commissioners, or master.

42. Nevada law, including the Nevada Revised Statutes and the Nevada Constitution, consistent with the U.S. Constitution, assure that citizens whose property is taken by the government are entitled to just compensation. Nevada law also recognizes inverse condemnation may result from a taking or impairment of a citizen's property without a physical taking of land. The "fly over" eliminates the visibility of the Subject Property from I-15, the primary route into Las Vegas and a significant local thoroughfare. NDOT specifically used the visibility of the Exchange Property to demand a higher asking price from Plaintiffs, and Plaintiffs relied on the

1 visibility of the Exchange Property when it purchased the Exchange Property.

2 43. Despite repeated requests, Defendant has not offered Plaintiffs any compensation  
3 for the deprivation of Plaintiffs' access to the Subject Property nor for Defendant's Blue  
4 Diamond Road Interchange improvements significantly affecting the visibility of the Subject  
5 Property, even though NDOT itself profited from the value of that same visibility in completing  
6 the Exchange with Plaintiffs.

7 44. The Nevada Constitution, and the U.S. Constitution, require the payment of just  
8 compensation whenever a government entity takes property even though no eminent domain  
9 proceedings were undertaken. NDOT has failed to pay any such compensation for this taking.

10 45. As a direct and proximate cause of Defendant's Inverse Condemnation, Plaintiffs  
11 has been damaged in an amount exceeding \$10,000.00.

12 **SECOND CLAIM FOR RELIEF**  
13 **(Breach of Contract)**

14 46. Plaintiffs repeat and reallege the allegations set forth in each of the preceding  
15 paragraphs, as though set forth fully herein.

16 47. Plaintiffs and Defendant entered into the Settlement Agreement on or about April  
17 28, 2005. The Settlement Agreement was a valid and enforceable contract. Pursuant to that  
18 agreement, Defendant was to convey the Exchange Property for a just and reasonable price.

19 48. Defendant withheld the 2004 appraisal of the property. It also failed to provide  
20 Plaintiffs with a written of and summary of the basis for the amount established as just  
21 compensation for the Settlement and Exchange. By doing so, the Defendant hid from a Nevada  
22 citizen, whom it serves, the fact a 45.65% premium to the market price was being charged to him  
23 by virtue of his simply owning the adjoining parcel. The appraisal reflects that Defendant  
24 knowingly charged Plaintiffs in excess of the value of the Exchange Property, without disclosing  
25 this to Plaintiffs. To complete acquisition of the Exchange Property, Plaintiffs were also required  
26 to pay an additional \$200,000 not included in the contract to address the "Chambers Claim."  
27 NDOT exposed the Plaintiffs to the Koroghli Litigation, which cost Plaintiffs millions of dollars.  
28 NDOT exposed the Plaintiffs to potential residual or reversionary interests of third parties.

1           49.    The contract was premised upon settlement of litigation, exchange of property and  
2 payment of cash by Plaintiffs, for equivalent value. Defendant's failure to provide equivalent  
3 value is a breach of the Settlement Agreement.

4           50.    Moreover, the contract between the parties included continuing duties owed by  
5 the Defendant coextensive with the project that included the reconstruction of the interchange at  
6 I-15 and Blue Diamond Road. Prior to and, again, subsequent to Plaintiffs' purchase of the  
7 Exchange Property, Defendant's presented Plaintiffs with the Blue Diamond Interchange  
8 development plan. That plan reflected that the Exchange Property had in excess of 1,500 feet of  
9 visibility from I-15. After Plaintiffs' purchase of the Exchange Property, Defendant, by and  
10 through NDOT, changed the Blue Diamond Road Interchange development plan, such that a "fly  
11 over" entirely eliminated the Exchange Property's 1,500 feet of visibility from I-15, which  
12 amounts to a breach of the Settlement Agreement.

13           51.    As a direct and proximate cause of Defendant's breach of the Settlement  
14 Agreement, Plaintiffs has been damaged in an amount exceeding \$10,000.00.

15                                   **THIRD CLAIM FOR RELIEF**  
16                                   **(Breach of Implied Covenant of Good Faith and Fair Dealing)**

17           52.    Plaintiffs repeat and reallege the allegations set forth in each of the preceding  
18 paragraphs, as though set forth fully herein.

19           53.    The Settlement Agreement constituted a valid and existing contract between  
20 Plaintiffs and Defendant.

21           54.    Every contract in Nevada imposes upon the contracting parties a duty of good  
22 faith and fair dealing.

23           55.    Defendant owed an implied duty of good faith and fair dealing to Plaintiffs under  
24 the Contract.

25           56.    Defendant was aware that Plaintiffs' purchased the Exchange Property based on  
26 the express representations of NDOT by and through the Blue Diamond Road Interchange  
27 development plan.

28    ...

1           57. Defendant breached its duty of good faith and fair dealing by failing to disclose  
2 that it charged Plaintiffs a 45.65% premium prior to its sale of the Exchange Proper to Plaintiffs,  
3 which is unfaithful to the basis for and purpose of the Settlement Agreement.

4           58. Defendant breached its duty of good faith and fair dealing by failing to disclose  
5 that it intended, contemplated, or that it was otherwise possible that NDOT would construct a  
6 "fly over" at the Blue Diamond Road Interchange that would obstruct Plaintiffs' ingress and  
7 egress to the Exchange Property and/or visibility of the property from I-15. Defendant was aware  
8 that Plaintiffs paid valuable consideration for both rights of access and visibility. Defendant's  
9 impairment of those rights is unfaithful to the purpose of the Settlement Agreement.

10          59. Defendant further breached its duty of good faith and fair dealing when it planned  
11 and began construction on the "fly over," despite express representations to Plaintiffs that the  
12 Blue Diamond Road Interchange would not include a "fly over." Defendant's failure to maintain  
13 its representation to Plaintiffs regarding the Blue Diamond Road Interchange is unfaithful to the  
14 purpose of the Settlement Agreement. Indeed, NDOT specifically and intentionally failed to  
15 provide notice of the "fly over," notwithstanding the duty of good faith and special relationship  
16 that arose out of the Settlement Agreement. Furthermore, NDOT, through its agent, Las Vegas  
17 Paving, affirmatively represented to Plaintiffs, even after it had finalized plans for the obstructive  
18 "fly over," that the reconstruction of the Blue Diamond Road Interchange would not obstruct the  
19 visibility of the Subject Property, including northbound I-15 visibility and eastbound Blue  
20 Diamond Road visibility.

21          60. Defendant owes a duty to the citizens and landowners of the State, and  
22 particularly the Plaintiffs who entered into a contract with NDOT, such that Plaintiffs are  
23 justified in relying on Defendant's representation, including the value of the Exchange Property  
24 and NDOT's plan to develop the adjacent Blue Diamond Road Interchange. NDOT breached all  
25 of its duties of good faith to Plaintiffs.

26          61. As a direct and proximate cause of Defendant's breach of the covenant of good  
27 faith and fair dealing, Plaintiffs has been damaged in an amount exceeding \$10,000.00.

28 . . .

**FOURTH CLAIM FOR RELIEF**  
**(Breach of Implied Covenant of Good Faith and Fair Dealing-Tortious Breach)**

62. Plaintiffs repeat and reallege the allegations set forth in each of the preceding paragraphs, as though set forth fully herein.

63. The Settlement Agreement constituted a valid and existing contract between Plaintiffs and Defendant.

64. Every contract in Nevada imposes upon the contracting parties a duty of good faith and fair dealing.

65. Defendant owed an implied duty of good faith and fair dealing to Plaintiffs under the Contract.

66. Defendant, as the State of Nevada, owes the people of the State of Nevada a fiduciary duty, such that Defendant is in a trusted position, wherein it is reasonable for Plaintiffs' to rely on the representations of Defendant. Furthermore, Defendant, as a trusted agency and servant to the people of the State of Nevada, and having superior knowledge and control over highway projects, including those on land adjoining the Exchange Property, had a special relationship to the Plaintiffs.

67. Defendant was aware that Plaintiffs' acquired the Exchange Property based on the express representations of NDOT by and through the Blue Diamond Road Interchange development plan and Defendant's representation of the value of the property. It also knew specifically from its own appraisal that a substantial part of the value of the landlocked Exchange Property was its visibility along both I-15 and Blue Diamond Road.

68. Defendant breached its duty of good faith and fair dealing by failing to disclose the value of the Exchange Property or that it charged Plaintiffs a 45.65% premium prior to its sale of the Exchange Property to Plaintiffs, which is unfaithful to the purpose of the Settlement Agreement.

69. Defendant breached its duty of good faith and fair dealing by failing to disclose that it intended, contemplated, or that it was otherwise possible that NDOT would construct a "fly over" at the Blue Diamond Road Interchange that would obstruct Plaintiffs' ingress and

1 egress to the Exchange Property and/or visibility of the property from I-15. Defendant was aware  
2 that Plaintiffs paid valuable consideration for both rights of access and visibility. Defendant's  
3 impairment of those rights is unfaithful to the purpose of the Settlement Agreement.

4 70. Defendant further breached its duty of good faith and fair dealing when it planned  
5 and began construction on the "fly over," intentionally failing to provide notice to the Plaintiffs,  
6 notwithstanding the fact the Exchange Property was acquired in full or in part for its visibility,  
7 and that the NDOT's valuation was in part based on the value of its visibility, and despite  
8 express representations to Plaintiffs that the Blue Diamond Road Interchange would not include  
9 a "fly over." Defendant further breached the duty when it represented, through its agent Las  
10 Vegas Paving, even after specific plans for the "fly over" were determined, that the construction  
11 of the Interchange would not obstruct visibility, and was unfaithful to the purpose of the  
12 Settlement Agreement.

13 71. Defendant owes a duty to the citizens and landowners of the State, such that  
14 Plaintiffs is justified in relying on Defendant's representation, including the value of the  
15 Exchange Property and NDOT's plan to develop the adjacent Blue Diamond Road Interchange.

16 72. As a direct and proximate cause of Defendant's breach of the covenant of good  
17 faith and fair dealing, Plaintiffs have been damaged in an amount exceeding \$10,000.00.

18 73. To the extent allowed by law, Plaintiffs are entitled to an award of punitive  
19 damages in excess of \$10,000.

20 **FIFTH CLAIM FOR RELIEF**  
21 **(Negligent Misrepresentation)**

22 74. Plaintiffs repeat and reallege the allegations set forth in each of the preceding  
23 paragraphs, as though set forth fully herein.

24 75. Defendant, as the seller of the Exchange Property, possessed a pecuniary interest  
25 in any sale of the Exchange Property.

26 76. Defendant, as the seller and as a state entity, owes Plaintiffs the duty of candor  
27 and full disclosure. The duty of full disclosure extends to any fact that is pertinent to Plaintiffs'  
28 decision to purchase the property.

77. Defendant was required to accurately disclose the fair market value of the property it offered Plaintiffs. Defendant refused to produce the appraisal for the property.

78. Defendant was required to disclose that it charged Plaintiffs a premium based on assemblage or any other factor. Defendant, unbeknownst to Plaintiffs, charged Plaintiffs a premium of 46% based on assemblage.

79. Defendant was required to disclose any and all intent or plans to impact the visibility or access to the Subject Property. Defendant was aware that the visibility of the Exchange Property was a key selling factor that increased the value of the property. Defendant was also aware that access to the property from Blue Diamond Road was essential. Defendant's failed to disclose to Plaintiffs the Blue Diamond Road Interchange plan that included the "fly over." Defendant's never provided Plaintiffs notice of any change to the Blue Diamond Road Interchange, such that Plaintiffs could seek administrative remedies. Indeed, NDOT's agent represented to Plaintiffs by way of a diagram, after plans for the "fly over" were finalized, that the reconstruction would not include any obstructive feature.

80. Plaintiffs were justified in relying on Defendant's representation. Defendant, as the State, has a duty to faithfully serve the people of the State of Nevada.

81. As a direct and proximate cause of Defendant's Negligent Misrepresentation, Plaintiffs has been damaged in an amount exceeding \$10,000.00.

### **SIXTH CLAIM FOR RELIEF (Intentional Misrepresentation)**

82. Plaintiffs repeat and reallege the allegations set forth in each of the preceding paragraphs, as though set forth fully herein.

83. Defendant's made false representations regarding the value of the property, in order to obtain greater value for the Exchange Property. Despite the existence of a valid appraisal, Defendant failed and refused to disclose the substance of the appraisal or that fact that Defendant charged Plaintiffs a 46% premium for assemblage.

84. Defendant intended to induce Plaintiffs' purchase of the property for an amount in excess of its maximum value; profiteering at the expense of its citizen.



1           85. To further entice Plaintiffs into purchasing the property, Defendant failed to  
2 disclose that Defendant intended and/or contemplated the building of a "fly over" that would  
3 significantly impact the visibility of the property from I-15, which Defendant's appraisal  
4 identified as a significant feature of value.

5           86. Plaintiffs were justified in relying of Defendant's representation of value and  
6 future plans based on the fact that Defendant is the State and bound to serve its citizens,  
7 including Mr. Nassiri.

8           87. Defendant never disclosed that it charged Plaintiffs for the property not based on  
9 comparable market values and some reasonable assemblage value, but upon a secret premium of  
10 45.65%, or that it could at any time plan to eliminate one path of entry to the Subject Property  
11 and obscure the Subject Properties visibility from I-15, a major factor leading to Plaintiffs'  
12 purchase of the property. Had Plaintiffs known the appraised values obtained by NDOT, they  
13 would not have entered into the Settlement Agreement and acquired the Exchange Property. Had  
14 they known any of these things, Plaintiffs would not have entered into the Settlement Agreement.  
15 Furthermore, had NDOT, through its agent Las Vegas Paving, not misrepresented the nature and  
16 configuration of the "fly over" in April 2010, Plaintiffs would have taken action to object, as a  
17 citizen and purchaser from the State, or to obtain relief from the courts to change or halt these  
18 altered plans.

19           88. As a direct and proximate result of Defendant's breach of contract, Plaintiffs has  
20 been damaged in an amount exceeding \$10,000.00.

21           WHEREFORE, Plaintiffs prays for judgment against Defendant as follows:

- 22           1. For an award against Defendant in favor of Plaintiffs in an amount in excess of  
23 \$10,000.00;
- 24           2. For the rescission of the Exchange Property transaction;
- 25           3. For punitive damages, to the extent any are allowed by law;
- 26           4. For pre-judgment and post-judgment interest at the statutory rate of interest;
- 27           5. For an award to Plaintiffs of its costs;
- 28           6. For an award to Plaintiffs of its reasonable attorneys' fees; and

1           7.       For such other and further relief that the Court deems just and proper.

2       Dated this 27<sup>th</sup> day of March, 2013.

3                               GORDON SILVER

4                               

5                               \_\_\_\_\_  
ERIC R. OLSEN

6                               Nevada Bar No. 3127

7                               DYLAN T. CICILIANO

8                               Nevada Bar No. 12348

9                               3960 Howard Hughes Pkwy., 9th Floor

10                              Las Vegas, Nevada 89169

11                              (702) 796-5555

12                              Attorneys for Plaintiffs

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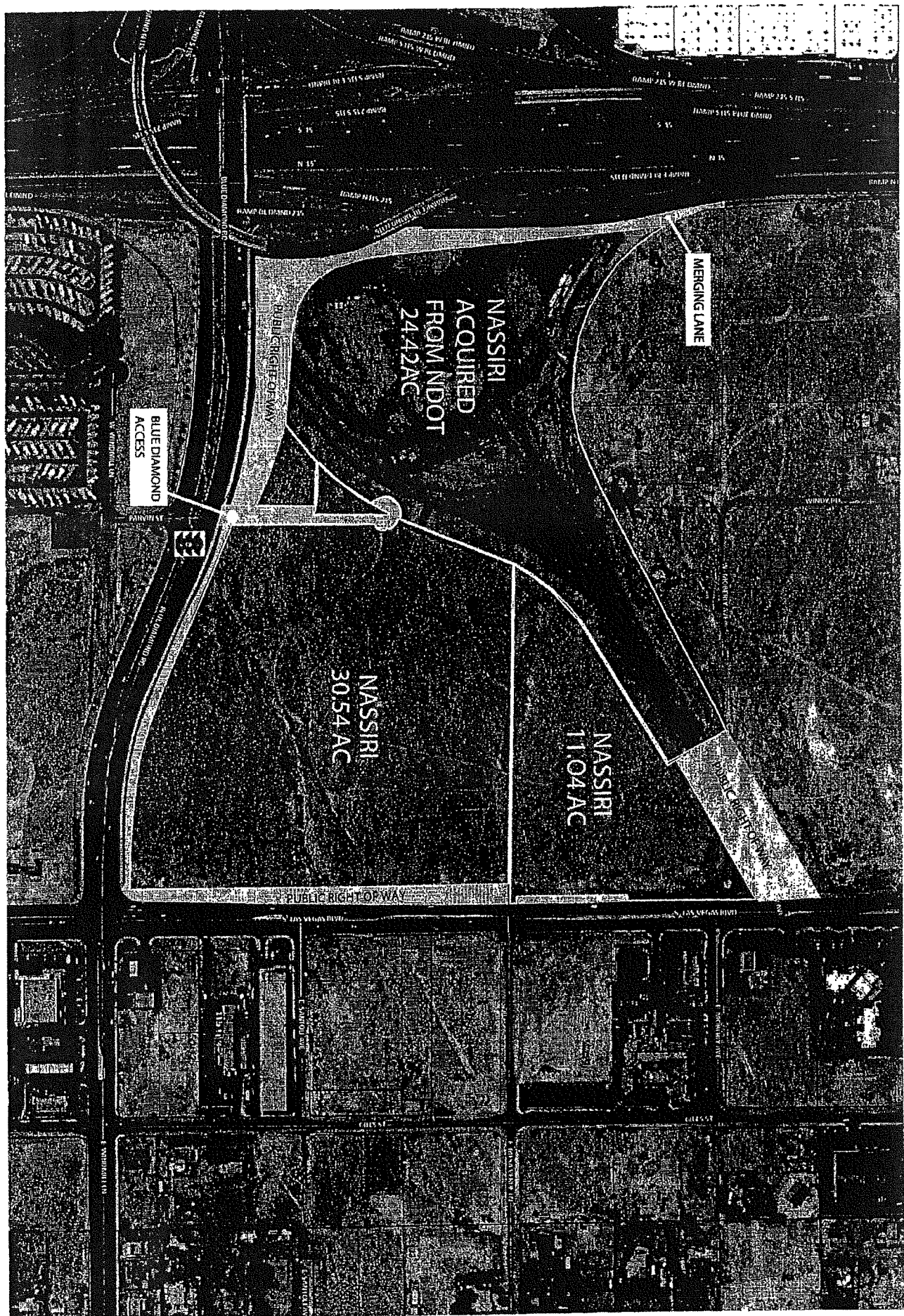
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**“EXHIBIT 1”**

**“EXHIBIT 1”**



“EXHIBIT 2”

“EXHIBIT 2”

## SETTLEMENT AGREEMENT AND RELEASE OF ALL CLAIMS

This Settlement Agreement and Release of All Claims (this "Agreement") is entered into this 28 day of April, 2005 (the "Execution Date") by and among The State of Nevada, on relation of its Department of Transportation ("NDOT" or "Plaintiff") and Fred Nassiri, a resident of Clark County, Nevada ("NASSIRI" or "Defendant", and together with NDOT, "the Parties").

### I.

#### Recitals

1.01 The Lawsuit. On or about August 31, 2004, NDOT filed its Complaint in condemnation ("Complaint") against, among others, NASSIRI, in the Eighth Judicial District Court, Clark County, Nevada, Case Number A491334 (the "Lawsuit") to acquire certain property owned by NASSIRI in fee simple and other property owned by NASSIRI for a two-year construction easement in connection with the construction and reconstruction of the interchange at I-15 and Blue Diamond Road, and the attendant widening and realignment of Blue Diamond Road (the "Project"). NDOT also named Clark County as a defendant in the Lawsuit. Clark County filed a disclaimer of any interest in the proceedings on October 13, 2004.

1.02 Funds on Deposit With Court Clerk. On September 27, 2004, NDOT deposited with the Clerk of the Court ("Clerk") the sum of FOUR MILLION EIGHT HUNDRED TEN THOUSAND and NO/100 DOLLARS (\$4,810,000.00) in connection with NDOT's motion for immediate occupancy (the "Deposit").

1.03 The Exchange Property. NDOT owns 24.41 acres (1,063,132 square feet) of land located generally southeast of the intersection of existing Blue Diamond Road and I-15 and east of NASSIRI's property, which land is more particularly described in the legal description attached hereto at Exhibit "1" and incorporated herein by this reference (the "Exchange Property"). NASSIRI desires to purchase the Exchange Property from NDOT.

1.04 Settlement. The parties hereto desire to enter into this Agreement, which among other things provides for full and final resolution of the Lawsuit, the release of the Deposit to NASSIRI, the conveyance in fee simple of certain property owned by Nassiri to NDOT by judgment, the conveyance of temporary construction easements over the Exchange Property to NDOT, and the conveyance of the Exchange Property to NASSIRI on the terms and conditions set forth herein.

...

## II.

### Agreement

NOW, THEREFORE, in consideration of the mutual promises and agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which the Parties acknowledge, the Parties agree as follows.

2.01 Escrow. The Parties shall establish an escrow in Las Vegas, Nevada with Nevada Title Company ("Escrow"), establishing a certified escrow officer to act as the Escrow Agent, and this Agreement shall serve as the instructions to the Escrow Agent for handling the transaction. The Escrow Agent shall not take any action contrary to this Agreement absent the express direction of both Parties in writing. Closing shall occur on the Closing Date as defined in Section 2.07, below.

2.02 Stipulated Judgment and Condemnation Proceeds. On or before the Closing Date, the Parties shall execute and deliver to Escrow a stipulation ("Stipulated Judgment") in the form attached hereto as Exhibit "2" together with an executed Final Judgment and Final Order of Condemnation attached thereto ("Final Judgment"), which Stipulated Judgment shall provide, among other matters, that the Clerk shall release the Deposit to NASSIRI, and release the balance of any funds held by the Clerk in connection with the Lawsuit to NDOT.

2.03 Vesting of Title in NDOT. The property to be conveyed to NDOT by recordation of the Final Judgment is located in unincorporated Clark County, Nevada, and consists of portions of the property generally located at the southwest corner of the intersection of Las Vegas Boulevard South and existing Blue Diamond Road, having Clark County Assessor's Parcel Number 177-08-803-002 and an address of 8011 Las Vegas Boulevard South, Las Vegas, Nevada 89123, and more specifically described in the Complaint as a 183,823 square-foot portion of NDOT Parcel No. S-160-CL-000.016 in fee simple absolute, as further described and identified in Exhibit "2" attached hereto and incorporated herein by this reference (the "Fee Acquisition"), a temporary easement on a 705 square-foot portion of NDOT Parcel No. S-160-CL-000.016 TE, also as described in Exhibit "2" (the "TE"), and a 25,419 square-foot portion of NDOT Parcel No. S-160-CL-000.015, which the Complaint requested in fee simple but the Parties have agreed will serve instead as a temporary easement (the "Teardrop TE", and together with the TE and the Fee Acquisition, the "Subject Property"). The Subject Property shall be condemned and given over to NDOT through entry with the Clerk of the Stipulated Judgment attached hereto as Exhibit "1" and the recording with the Clark County Recorder of the Final Judgment attached thereto, or such other documentation as NDOT may require to vest fee simple title to the Fee Acquisition in NDOT and secure NDOT's TE and Teardrop TE.

2.04 Conveyance of Exchange Property to NASSIRI.

(a) Quitclaim Deed. NDOT shall convey the Exchange Property to NASSIRI by quitclaim deed in the form attached hereto as Exhibit "3", without warranty, "as-is", "where-is", and

"with all faults" (the "Quitclaim Deed"). NASSIRI acknowledges that he is aware of claims by Carolyn Ann Chambers or her representatives relating to an alleged reversionary interest or other right relating to the Exchange Property (the "Chambers Claims"), that he has performed his own investigation of the Chambers Claims, and, based upon such investigation, accepts the Exchange Property subject to any claims of Chambers, her assigns or successors.

(b) Title. NASSIRI may cause Escrow Agent to issue to NASSIRI (with a copy to NDOT) a preliminary title report with respect to the Exchange Property (the "Preliminary Report") on or before the close of business on the tenth business day following the Execution Date, together with copies of all documents relating to title exceptions referred to in the Preliminary Report. NASSIRI shall give NDOT notice if the Preliminary Report contains any exceptions that are not reasonably acceptable to NASSIRI on or before the close of business on the tenth (10<sup>th</sup>) business day prior to Closing ("NASSIRI's Title Notice"). NDOT shall notify NASSIRI on or before the close of business on the fifth (5<sup>th</sup>) business day following the date of NASSIRI's Title Notice if NDOT will satisfy any requirement or remove any exception before the Closing Date ("NDOT's Title Notice"). NDOT's failure to provide NDOT's Title Notice with respect to any requirement or exception shall constitute NDOT's refusal to satisfy or remove the requirement or exception. NASSIRI shall thereafter, but not less than two (2) business days prior to the Closing Date, approve the title contingency set forth herein, or terminate this Agreement. NASSIRI's failure to give such notice of termination shall constitute NASSIRI's agreement to all title exceptions or requirements and NASSIRI's agreement to consummate the transactions contemplated by this Agreement. If notice of termination is given, this Agreement shall terminate and the parties shall be released from any and all further obligations under this Agreement, except for any such obligation which survives termination. Those exceptions to title set forth in the Preliminary Report to which NASSIRI has not objected in writing to NDOT or that NDOT has not agreed to remove pursuant to this Section 9 shall, together with any interest of Carolyn Ann Chambers, her assigns or successors, constitute the "Approved Exceptions".

(c) Chambers Representation and Indemnity. Nassiri represents and warrants as of the Closing Date that Nassiri shall have secured an assignment to Nassiri of all right, title, and interest of Carolyn Ann Chambers, her successors or assigns, in or to the Chambers Claims. Nassiri shall indemnify and hold harmless the State of Nevada and NDOT, their managers, agents, employers, employees, attorneys, insurers, successors, and assigns, and their political subdivisions and sister agencies, of and from all claims, known or unknown, asserted or unasserted of whatever nature, now existing or hereafter arising, including but not limited to claims for attorney's fees and costs, relating in any way to the Chambers Claims.

2.05 Exchange Compensation. On or before the Closing Date, NASSIRI shall deposit in Escrow the sum of TWENTY-THREE MILLION TWO HUNDRED TWENTY NINETHOUSAND FIVE HUNDRED and NO/100 DOLLARS (\$23,229,500.00) (the "Exchange Compensation") in "Cash." For purposes of this Agreement, "Cash" means immediately available United States funds transferred by certified check or wire transfer.



2.06 Exchange Property Construction Easement. On or before the Closing Date, NASSIRI shall execute and deliver to Escrow a temporary construction easement in the form attached hereto as Exhibit "4" allowing NDOT to use certain portions of the Exchange Property in connection with Project planning, staging, and construction (the "Exchange Property Easement").

2.07 Closing.

(a) Date and Location. Closing shall occur at the offices of Escrow Agent at 10:00 a.m. on the thirtieth (30th) day after the Execution Date, or at such other time or place as the Parties may agree in writing (the "Closing Date").

(b) NASSIRI Deliveries on Closing Date. Unless previously provided, NASSIRI shall deliver the following to Escrow on the Closing Date:

- (i) Executed Stipulated Judgment together with executed Final Judgment and such other documentation as NDOT may require to vest fee simple title to the Fee Acquisition in NDOT and secure NDOT's TE and Teardrop TE;
- (ii) Executed Exchange Property Easement;
- (iii) Exchange Compensation;
- (iv) Any fees for issuance by Nevada Title Company of a policy of title insurance for the Exchange Property;
- (v)  $\frac{1}{2}$  of any fees of Escrow or Escrow Agent for handling this transaction; and
- (vi) Real property transferor other taxes, if any, that apply to the recording of the Quitclaim Deed.

(c) NDOT Deliveries on Closing Date. Unless previously provided, NDOT shall deliver the following to Escrow on the Closing Date:

- (i) Executed Stipulated Judgment together with executed Final Judgment and Final Order of Condemnation; and
- (ii) The Quitclaim Deed;

(d) Actions by Escrow Agent on Closing Date. On the Closing Date, Escrow Agent shall:

- (i) Collect the deliveries required by NASSIRI and NDOT as set forth in Sections 2.07(b) and (c), above;
- (ii) If desired and paid for by NASSIRI, issue an Owner's Policy of Title Insurance for the Exchange Property subject only to the Approved Exceptions;
- (iii) Record the Quitclaim Deed and the Exchange Property Easement;
- (iv) Deliver to NDOT, less 1/2 any applicable Escrow or Escrow Agent fees for handling this transaction, the Exchange Compensation; and
- (v) Prepare and deliver to the Parties a closing statement.

**2.08 NDOT Release.** NDOT hereby fully releases and forever discharges NASSIRI and his agents, employers, employees, attorneys, insurers, successors, and assigns, of and from all claims, known or unknown, asserted or unasserted, of whatever nature, now existing or hereafter arising, including but not limited to claims for attorney's fees and costs, relating in any way to the Lawsuit, or any matters asserted therein, or which could have been asserted therein, or its subject matter.

**2.09 NASSIRI Release.** NASSIRI hereby releases and forever discharges: (i) the Lawsuit, or any matters asserted therein, or which could have been asserted therein, or its subject matter, including but not limited to any claims related to the location on the Property of a public highway and necessary incidents thereto, and any claims for any severance damages to the remainder of NASSIRI's property; and (ii) the physical condition of the Exchange Property as of the Execution Date or matters affecting title or claims thereto.

**2.10 NDOT Ownership.** NASSIRI represents and warrants that, to the best of his knowledge, no third party has any right, title, or interest in the Fee Acquisition or TE or Teardrop TE land, and Nassiri covenants that he shall take no action between the Execution Date and Closing Date that will result in any third party having any right, title, or interest in or to the Fee Acquisition, TE, or Teardrop TE.

**2.11 Property Damage.** NASSIRI shall be responsible for any and all risk and liability for any injury or damage to persons or personal property or for any injury or damage to the Subject Property, including but not limited to any and all repairs and/or maintenance to the Property, until the Final Judgment and Final Order of Condemnation is recorded with the Clark County, Nevada Recorder. NDOT shall be responsible for any and all risk and liability for any injury or damage to persons or personal property or for any injury or damage to the Exchange Property, including but not limited to any and all repairs and/or maintenance to the Exchange Property, until the Closing Date

**2.12 Condition of TE and Teardrop TE.** NDOT shall leave the TE and Teardrop TE in as neat and presentable condition as it existed prior to NDOT's use of the TE and Teardrop TE, with

all fences, structures and other property belonging to NASSIRI that NDOT may remove or relocate in order to complete the Project to be replaced as nearly in their original condition as is reasonably possible.

2.13 Civil Rights Act. The regulations pertaining to nondiscrimination and Title VI of the Civil Rights Act of 1964, as contained in Title 23, Code of Federal Regulations Part 200, and Title 49, Code of Federal Regulations Part 21, are hereby incorporated by reference and made a part of this Agreement.

2.14 NRS Chapter 408. NDOT shall have the right to adapt and improve the whole or any part of the Property in accordance with the provisions of NRS Chapter 408, including but not limited to NRS 408.487.

2.15 Highway Engineer's Stationing. All Highway Engineer's Stationing is approximate and subject to slight adjustment as necessary to meet construction requirements. To the extent adjustments due to Highway Engineer's Stationing result in a net Fee Acquisition more than one hundred (100) square feet greater or less than 183,823 square feet, the rate of Twenty-Three dollars (\$23.00) per square foot shall be applied to such net change and a credit or invoice generated by NDOT at the conclusion of the Project or at such earlier time as the net area can be finally calculated. NDOT shall pay any credit owing Nassiri hereunder within sixty (60) days of calculating the final net Fee Acquisition, or, alternatively, Nassiri shall pay any invoice generated by NDOT hereunder within sixty (60) days of receipt.

2.16 Extension of TE and Teardrop TE Term. The termination date of the TE and Teardrop TE has been established in compliance with the best available information on the time frame needed for the Project. If NDOT determines that circumstances warrant an extension of the term of the TE and Teardrop TE to complete the Project, NASSIRI shall grant such an extension to NDOT at a rate of \$500.00 per month.

2.17 No Liability. By entering into this Agreement, no party shall be deemed to admit: (i) any liability for any claims, causes of action, or demands; (ii) any wrong doing or fault; nor (iii) violation of any law, precedent, rule, regulation, or statute. Further, nothing contained in this Agreement may be construed as an admission against the interest of any party.

2.18 Attorney's Fees. If any action is commenced to enforce the terms of this Agreement, the prevailing party shall be entitled to recover all of its expenses related to such action, including but not limited to, its reasonable attorney's fees and costs.

2.19 Acknowledgments. The parties mutually understand, agree, and warrant: (1) that NDOT and NASSIRI deny the legal liability and damages alleged in the Lawsuit, that the payment and distribution of the Condemnation Proceeds, and execution of the Judgment, as provided herein is not to be construed as admissions of liability on the part of NDOT or NASSIRI, but such payment and distribution is solely in compromise and settlement of disputed claims, and the amount of the

Condemnation Proceeds is not an admission by any party as to the fair market value of the Subject Property, or any claims for damages; (ii) that the releases contained herein extend and apply to and also cover and include all unknown, unforeseen, unsuspected, and unanticipated injuries, claims, damages, losses, and liabilities, if any, arising from the matters addressed herein; (iii) that no promise or inducement has been offered except as herein set forth; (iv) that this settlement is in good faith and is equitable; (v) that this Agreement is executed without reliance upon any statement or representation by any party or its representatives concerning the nature and extent of the claimed damages or legal liability therefor; (vi) the parties are legally competent to execute this Agreement and to accept full responsibility therefore; (vii) that this Agreement and the releases set forth herein have been carefully read in their entirety by the Parties, who have had the benefit and advice of counsel of their choosing, and this Agreement and the releases set forth herein are known by the Parties to be in full and final and complete compromise, settlement, release, accord and satisfaction, and discharge of all claims and actions as above stated; and (viii) that in entering into this Agreement and the settlement and releases that are encompassed herein, the Parties are acting freely and voluntarily and without influence, compulsion, or duress of any kind from any source, including, but not limited to, any other party or parties, their attorneys, representatives, or anyone acting or purporting to act on behalf of any party.

2.20 Integration. This Agreement constitutes the entire Agreement by and between the Parties and supersedes and replaces any and all previous agreements entered into or negotiated between the Parties.

2.21 Assignment. This Agreement shall not be assigned by NASSIRI, in whole or in part, to any third party, except to a buyer of all of the property NASSIRI owns within Parcel Number 177-08-803-002 as of the Execution Date, without the approval of NDOT in writing, and only then in the event such third party agrees to be bound by the terms herein. Any such assignment will not relieve NASSIRI of any obligations to NDOT hereunder.

2.22 Amendments. This Agreement may not be amended or modified except in writing and signed by each of the Parties.

2.23 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Nevada.

2.24 Counterparts. This Agreement may be executed in any number of counterparts confirmed by facsimile signatures transmitted by telephone, each of which shall be deemed a duplicate original.

2.25 Successors and Assigns. This Agreement shall be binding upon and shall inure to the benefit of the Parties hereto and their respective heirs, executors, administrators, personal representatives, successors, or assigns, as the case may be.

2.26 Notices. Any Notice required or desired to be given under this Agreement shall be

in writing and personally hand delivered, given by overnight express delivery with receipt, or given by United States registered or certified mail, postage prepaid, return receipt requested. All Notices shall be sent to the receiving party at the following address or at such other address as the party may from time to time direct in writing:

If to NASSIRI:  
6590 Bermuda Road  
Las Vegas, Nevada 89119

If to NDOT:  
Nevada Department of Transportation  
Attn: Jeffrey Fontaine, P.E., Director  
1263 S. Stewart St.  
Carson City, Nevada 89712

With a copy to:  
Michael Chapman, Esq.  
9585 Prototype Court, #C  
Reno, Nevada 89521  
Fax: (775)827-1872

With a copy to:  
Gregory J. Walch, Esq.  
Santoro, Driggs, Walch et al.  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101  
Fax: (702)791-0308

For purposes of this Agreement, Notices shall be deemed to have been given, delivered, or received upon personal delivery thereof or seventy-two (72) hours after having been deposited in the United States mail as provided herein.

**2.27 Headings.** All headings and subheadings employed within this Agreement are inserted only for convenience and ease of reference and shall not be considered in the construction or interpretation of any provision of this Agreement.

**2.28 No Third Party Beneficiaries.** This Agreement is for the benefit of the State of Nevada on relation of its Department of Transportation and NASSIRI only, and is not for the benefit of any other person or entity. Without limiting the generality of the preceding sentence, the Parties hereto agree that there are no third-party beneficiaries of this Agreement.

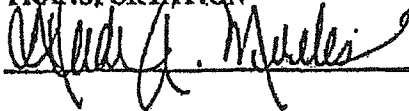
**2.28 No Presumption Regarding Drafter.** The Parties acknowledge and agree that the terms and provisions of this Agreement have been negotiated and discussed between NDOT and NASSIRI, and that this Agreement reflects their mutual agreement regarding the subject matter of this Agreement. Because of the nature of such negotiations and discussions, it would not be appropriate to deem either Party to be the drafter of this Agreement, and therefore no presumption for or against the drafter shall be applicable in interpreting or enforcing this Agreement.

...

...

2.29 Time is of the Essence. The Parties acknowledge that time is of the essence in every aspect of this Agreement.

THE STATE OF NEVADA, ON  
RELATION OF ITS DEPARTMENT OF  
TRANSPORTATION



By: Heidi A. Mireles

Its: Chief Right-of-Way Agent

Date: April 29, 2005

FRED NASSIRI

Date: \_\_\_\_\_

Approved as to Legality and Form:

SANTORO, DRIGGS, WALCH,  
KEARNEY, JOHNSON & THOMPSON

CHAPMAN LAW OFFICE

By: \_\_\_\_\_

GREGORY J. WALCH, ESQ.  
Nevada Bar No. 4780  
KIRBY C. GRUCHOW, JR., ESQ.  
Nevada Bar No. 6663  
400 South Fourth Street, Third Floor  
Las Vegas, NV 89101  
Phone: (702) 791-0308  
Attorneys for Plaintiff The State of  
Nevada, on relation of its Department  
of Transportation

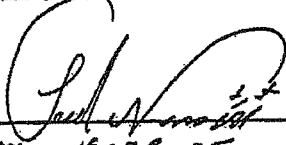
By: \_\_\_\_\_

MICHAEL G. CHAPMAN, ESQ.  
Nevada Bar No. 1630  
9585 Prototype Court, #C  
Reno, Nevada 89521  
Phone: (775) 827-1866  
Attorney for Defendant Fred Nassiri

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THE STATE OF NEVADA, ON  
RELATION OF ITS DEPARTMENT OF  
TRANSPORTATION

FRED NASSIRI

  
Date: 4-28-05

By: \_\_\_\_\_  
Its: \_\_\_\_\_  
Date: \_\_\_\_\_

Approved as to Legality and Form:

SANTORO, DRIGGS, WALCH,  
KEARNEY, JOHNSON & THOMPSON

CHAPMAN LAW OFFICE

By: \_\_\_\_\_  
GREGORY J. WALCH, ESQ.  
Nevada Bar No. 4780  
KIRBY C. GRUCHOW, JR., ESQ.  
Nevada Bar No. 6663  
400 South Fourth Street, Third Floor  
Las Vegas, NV 89101  
Phone: (702) 791-0308  
Attorneys for Plaintiff The State of  
Nevada, on relation of its Department  
of Transportation

By: \_\_\_\_\_  
MICHAEL G. CHAPMAN, ESQ.  
Nevada Bar No. 1630  
9585 Prototype Court, #C  
Reno, Nevada 89521  
Phone: (775) 827-1866  
Attorney for Defendant Fred Nassiri

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THE STATE OF NEVADA, ON  
RELATION OF ITS DEPARTMENT OF  
TRANSPORTATION

FRED NASSIRI

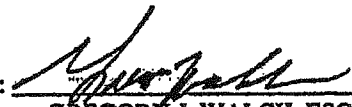
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Its: \_\_\_\_\_  
Date: \_\_\_\_\_

\_\_\_\_\_  
Date: \_\_\_\_\_

Approved as to Legality and Form:

SANTORO, DRIGGS, WALCH,  
KEARNEY, JOHNSON & THOMPSON

CHAPMAN LAW OFFICE

By:   
GREGORY J. WALCH, ESQ.  
Nevada Bar No. 4780  
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Nevada Bar No. 6663  
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Phone: (702) 791-0308  
Attorneys for Plaintiff The State of  
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By: \_\_\_\_\_  
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Nevada Bar No. 1630  
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Reno, Nevada 89521  
Phone: (775) 827-1866  
Attorney for Defendant Fred Nassiri



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THE STATE OF NEVADA, ON  
RELATION OF ITS DEPARTMENT OF  
TRANSPORTATION

FRED NASSIRI

\_\_\_\_\_  
By: \_\_\_\_\_  
Its: \_\_\_\_\_  
Date: \_\_\_\_\_


\_\_\_\_\_  
Date: \_\_\_\_\_

Approved as to Legality and Form:

SANTORO, DRIGGS, WALCH,  
KEARNEY, JOHNSON & THOMPSON

CHAPMAN LAW OFFICE

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Attorneys for Plaintiff The State of  
Nevada, on relation of its Department  
of Transportation

By:   
MICHAEL G. CHAPMAN, ESQ.  
Nevada Bar No. 1630  
9585 Prototype Court, #C  
Reno, Nevada 89521  
Phone: (775) 827-1866  
Attorney for Defendant Fred Nassiri



## Nevada Title Company

### ESCROW DISCLAIMER

TO: Nevada Title Company  
ESCROW NO.: 05-05-0001-CLB  
DATE: May 8, 2005

The undersigned parties acknowledge that the Escrow Agent's function is to be a disinterested third party, taking mutual instructions from the parties to a transaction for preparation of documentation to complete the principal's prior agreements.

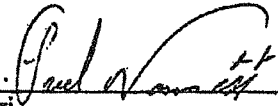
The Escrow Agent is NOT AN ATTORNEY and CANNOT ADVISE the parties as to any legal business, or tax consequences of any provisions or instrument set forth or prepared in connection with this transaction. The undersigned have read and understand each document to which we have affixed our signature and have authorized and instructed Escrow Agent in the manner in which any blanks remaining in said forms are to be completed.

With regard to any questions we may have had pertaining to the Escrow Instructions, the Escrow Agent's role or participation in the escrow, or to the roles of the Real Estate Broker, if any, we have received sufficient explanation. We understand that the subject escrow shall close in accordance with the matters set forth on the documents we have executed.

With regard to any questions we may have had pertaining to the new loan being obtained, if any, we have been made aware that the loan documents were not generated by Nevada Title Company, and that we have received sufficient explanation from the lender providing said loan.

**DO NOT AFFIX YOUR SIGNATURES BELOW UNTIL YOU HAVE READ AND AGREED WITH THE MATTERS SET FORTH ABOVE. SHOULD YOU STILL HAVE QUESTIONS WITH REGARD TO THE ABOVE, YOU ARE ADVISED TO SEEK THE ADVICE OF AN INDEPENDENT LEGAL COUNSEL.**

BUYERS:

  
\_\_\_\_\_  
Fred Nassiri

SELLERS:

State of Nevada Department of Transportation

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_



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**BUYERS:**

\_\_\_\_\_  
Fred Nassiri

**SELLERS:**

State of Nevada Department of Transportation

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

*Heldi A. Mireles*  
*Heldi A. Mireles*  
*Chief R/W Agent*

**FIRST AMENDMENT TO SETTLEMENT AGREEMENT  
AND RELEASE OF ALL CLAIMS**

This First Amendment to Settlement Agreement and Release of All Claims (the "First Amendment") is made and entered into this ~~17th~~ day of June, 2005, by and among The State of Nevada, on relation of its Department of Transportation ("NDOT" or "Plaintiff") and Fred Nassiri, a resident of Clark County, Nevada ("NASSIRI" or "Defendant", and together with NDOT, "the Parties") to amend that certain Settlement Agreement and Release of All Claims (the "Settlement Agreement") entered into by the Parties on or about April 28, 2005.

**I.**

**Recitals**

1.01 The Lawsuit. On or about August 31, 2004, NDOT filed its Complaint in condemnation ("Complaint") against, among others, NASSIRI, in the Eighth Judicial District Court, Clark County, Nevada, Case Number A491334 (the "Lawsuit") to acquire certain property owned by NASSIRI in fee simple and other property owned by NASSIRI for a two-year construction easement in connection with the construction and reconstruction of the interchange at I-15 and Blue Diamond Road, and the attendant widening and realignment of Blue Diamond Road (the "Project"). NDOT also named Clark County as a defendant in the Lawsuit. Clark County filed a disclaimer of any interest in the proceedings on October 13, 2004.

1.02 Settlement Agreement. The Parties resolved the Lawsuit through the Settlement Agreement, which, among other things, provided that NDOT would convey to NASSIRI a 1,063,132 parcel of land defined therein as the "Exchange Property" and NASSIRI would pay NDOT TWENTY-THREE MILLION TWO HUNDRED TWENTY NINE THOUSAND FIVE HUNDRED and NO/100 DOLLARS (\$23,229,500.00) (the "Exchange Compensation") in exchange. The Parties have discovered that the Exchange Property legal description should be changed as set forth in this First Amendment, and that such revised legal description will be used in both the Quitclaim Deed and Exchange Property Easement.

1.03 Settlement Agreement Survival. The Parties also desire that the Settlement Agreement be modified to set forth more clearly the Parties' intention that the representations, warranties, indemnities, and all other rights and obligations of the Settlement Agreement shall not merge with the conveyance or recording of the Quitclaim Deed or Exchange Property Easement.

II.

Agreement

NOW, THEREFORE, in consideration of the mutual promises and agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which the Parties acknowledge, the Parties agree as follows.

2.01 Defined Terms. All capitalized terms used but not otherwise defined herein shall have the meaning ascribed to such terms in the Settlement Agreement.

2.02 Exchange Property Legal Description. The Exchange Property shall be the 1,063,570 square foot property set forth in the legal description and diagram attached hereto as Exhibit A-1 and incorporated herein by this reference. The legal description set forth in Exhibit A-1 shall be attached to and incorporated into the Quitclaim Deed and the Exchange Property Easement.

2.03 Exchange Compensation. The Exchange Compensation shall be TWENTY-THREE MILLION TWO HUNDRED THIRTY-NINE THOUSAND FOUR AND 05/100 DOLLARS (\$23,239,004.50) rather than TWENTY-THREE MILLION TWO HUNDRED TWENTY NINE THOUSAND FIVE HUNDRED and NO/100 DOLLARS (\$23,229,500.00) to reflect the additional square footage included in the Exchange Property legal description attached hereto as Exhibit A-1 at TWENTY-ONE AND 85/100 DOLLARS (\$21.85) per square foot.

2.04 Survival. The representations, warranties, indemnities, and all other rights and obligations provided in the Settlement Agreement shall not merge with the conveyance or recording of the Quitclaim Deed or Exchange Property Easement, or with the entry or recording of the Final Judgment.

This First Amendment shall be effective as of the date first written above.

THE STATE OF NEVADA, ON  
RELATION OF ITS DEPARTMENT OF  
TRANSPORTATION

FRED NASSIRI

By

Its: Chief Right-of-Way Agent

Date: June 14, 2005

Date: \_\_\_\_\_

II.

Agreement

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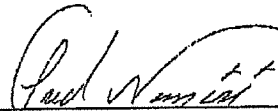
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THE STATE OF NEVADA, ON  
RELATION OF ITS DEPARTMENT OF  
TRANSPORTATION

FRED NASSIRI



Date: 8-7-05

By: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

Approved as to Legality and Form:

SANTORO, DRIGGS, WALCH,  
KEARNEY, JOHNSON & THOMPSON

By: 

GREGORY J. WALCH, ESQ.  
Nevada Bar No. 4780  
KIRBY C. GRUCHOW, JR., ESQ.  
Nevada Bar No. 6663  
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Las Vegas, NV 89101  
Phone: (702) 791-0308  
Attorneys for Plaintiff The State of  
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CHAPMAN LAW OFFICE

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