IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA DEPARTMENT OF TRANSPORTATION, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE GLORIA STRUMAN, DISTRICT JUDGE, Respondents. and FRED NASSIRI, INDIVIDUALLYAND AS TRUSTEE OF THE NASSIRI LIVING TRUST, A TRUST FORMED UNDER NEVADA LAW, Real Party in Interest.	District Court Case No.: A672841 No.: 70098

ANSWER TO PETITION FOR WRIT OF MANDAMOUS

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NRAP 26.1 DISCLOSURE

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

Real Party in Interest, by and through counsel, Eric R. Olsen, Esq. and Dylan T. Ciciliano, Esq., of the law firm of Garman Turner Gordon LLP, hereby state that Fred Nassiri, individually and as trustee of the Nassiri Living Trust, a trust formed under the laws of the State of Nevada, is an individual, and therefore there are no parent corporation(s) and/or publicly-held corporation(s) owning 10% or more of the party's stock.

Dated this 20th day of June, 2016.

GARMAN TURNER GORDON LLP

By /s/ Dylan T. Ciciliano
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. SUMMARY OF ARGUMENT

On the eve of a second trial, after waiting a year since the conclusion of the first trial it had requested be held on a preferential setting basis, and more than a year after its serial motions for summary judgment were denied, NDOT seeks extraordinary relief Petition for Writ of Mandamus (the "Petition") claiming that it has no adequate remedy at law. While NDOT goes to great lengths to suggest that an apocalypse is looming if this Court does not grant relief, the reality is that this is a unique case without widespread impact or consequences. Accordingly, it should proceed to trial.

The fact, as shown by the pre-trial and trial evidence, is that beginning in 1999 NDOT decided to redesign and realign the Blue Diamond Interchange with Interstate 15 ("I-15"). In doing so, NDOT shifted the interchange from the northern border of Nassiri's property to the southern border. (Compare PA01058, with PA01056; PA00509). This required that NDOT condemn more than four acres of Nassiri's property. After the construction of the new interchange, under this plan, NDOT would be left with surplus land that was contiguous with Nassiri's existing property (the "Exchange Property"). NDOT and Nassiri engaged in lengthy and detailed settlement negotiations and in the process NDOT provided Nassiri with maps and plans for the new Blue Diamond Interchange. In settling the condemnation action in Spring 2005, Nassiri agreed to purchase the Exchange

Property after NDOT reconstructed the Blue Diamond Interchange. NDOT specifically valued the Exchange Property for its visibility from I-15 and value to Nassiri as an adjacent land owner, and charged Nassiri based on that visibility. NDOT and Nassiri incorporated a diagram of NDOT's proposed reconstruction of the interchange into its settlement agreement. Those exchanged plans and diagrams, the "after-condition" omitted any flyover.

What Nassiri did not know is that by 2003 NDOT had committed to constructing a flyover ramp that would extend 60 feet above the Blue Diamond Interchange and merge east bound traffic on Blue Diamond with I-15 Northbound traffic. (PA01004) The effect would be to create a large retaining wall and bridge on the surplus property's border with I-15, destroying its visibility from I-15. NDOT never disclosed its plan, which NDOT itself has testified was a certainty. In fact, when NDOT was negotiating with Nassiri, it was simultaneously planning the flyover and securing the necessary property through condemnation. Nonetheless, in all the maps and plans provided to Nassiri that represented the "after-condition," NDOT omitted the flyover altogether.

By 2003 traffic studies warranted the construction of the flyover and in the legislative session immediately following its 2005 settlement with Nassiri, NDOT secured the funding needed to build the flyover. It then, without notice to Nassiri, hired a firm to build the flyover. Beginning in 2010, NDOT started construction on

the visibility destroying flyover and Nassiri brought the current action. Based on the above facts, Nassiri has asserted claims for breach of contract, breached of the covenant of good faith and fair dealing and has requested to rescind his purchase of the surplus property.

In bringing its Petition, NDOT has been careful to omit any discussion of the numerous and detailed meetings NDOT had with Nassiri. It further omits the Court's specific factual findings regarding those meetings and the fact that NDOT and Nassiri incorporated NDOT's construction plans for the Blue Diamond Interchange (excluding any flyover) into the Settlement Agreement. To the contrary, NDOT actually disavows that when it sold Nassiri property in the "after-condition" the parties had any conversation about what the "after-condition" might entail. It also avoids the fact that NDOT's own appraisers valued the surplus property purchased by Nassiri based on an "after-condition" that did not include a flyover. When considering the evidence in a light most favorable to Nassiri, as this Court must, there are clear facts and questions of fact that preclude entry of summary judgment.

II. NDOT HAS AN ADEQUATE REMEDY AT LAW WITH AN APPEAL FROM FINAL JUDGMENT.

A petitioner bears the burden of demonstrating that the extraordinary remedy of mandamus or prohibition is warranted. Manuela H. v. Eighth Jud. Dist. Ct., 132

Nev. Adv. Op. 1, 365 P.3d 497, 501 (2016). A writ will not issue if a petitioner has a plain, speedy, and adequate remedy in the ordinary course of the law. Nevada Revised Statute ("NRS") 34.170; Cote H. v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008). "A remedy does not fail to be speedy and adequate, because, by pursuing it through the ordinary course of law, more time probably would be consumed than in a mandamus proceeding." County of Washoe v. City of Reno, 77 Nev. 152, 156, 360 P.2d 602, 603 (1961). "The issue of whether an appeal is an adequate and speedy remedy "necessarily turns on the underlying proceedings' status, the types of issues raised in the writ petition, and whether a future appeal will permit this court to meaningfully review the issues presented." Rolf Jensen & Associates v. Dist. Ct., 128 Nev. Adv. Op. 42, 282 P.3d 743, 745-46 (2012).

NDOT brought its Petition on the literal eve of trial, challenging events that occurred more than a year prior to its filing of the Petition and a year after the bifurcated trial in this matter. NDOT's claim that a plain and speedy remedy is unavailable is ironic considering that NDOT requested and received a preferential trail setting (an adequate, speedy remedy) when NDOT found it expedient (PA01306-1339), and then delayed phase two of the trial (an adequate, speedy remedy) when it feared the outcome. NDOT's current action delays its adequate, speedy remedy, but it has one.

NDOT's motions for summary judgment were denied in part on or about April 1, 2015. Hoping it would prevail at trial, or at least get two bites at the apple, NDOT requested that trial be bifurcated and expedited with the first portion of the trial pertaining solely to the statute of limitation on Nassiri's claim for rescission. (PA01306-1339). The first part of the bifurcated trial concluded on May 19, 2015. The Court entered its findings of facts and conclusion of law ("FFCL"), on August 29, 2015, which were unfavorable to NDOT.[1] Perplexingly, NDOT then argued that the second phase of trial should be continued until mid-to-late 2016 to provide NDOT the opportunity to file additional dispositive motions. NDOT again moved for summary judgment on Nassiri's claim for rescission, which was denied on November 17, 2015.

With trial scheduled for May 31, 2016, NDOT, desperate to avoid it, filed the Petition for a writ on May 18, 2016. The Petition makes the dramatic claim that extraordinary relief is needed to avoid the cost of a six-week trial and to allow NDOT to continue to condemn and sell property for other projects. Both positions are incorrect – the latter is utter nonsense. The second phase of trial will be considerably shorter, as the evidence will mimic the week-long phase one trial. Second, NDOT's claim that going to trial will cause NDOT to cease condemning

[1] While NDOT states that the Court erred in its findings, it does not present those issues in its Petition.

or selling property is unsubstantiated and ridiculous—as is the necessary implication that any adverse ruling to NDOT or the State should be directly appealable because it might impact the State's behavior. As the imminent trial is an adequate and speedy remedy, the Court should decline considering the Petition.

III. COMPETING STATEMENT OF FACTS

When reviewing a "writ of mandamus to compel entry of a summary judgment," all evidence is "viewed in a light most favorable to the nonmoving party." State v. Eighth Jud. Dist. Ct., 131 Nev. Adv. Op. 41, 351 P.3d 736, 740 (2015); Cnty. of Clark v. Bonanza No. 1, 96 Nev. 643, 650, 615 P.2d 939, 943 (1980); In re Irrevocable Tr. Agreement of 1979, ––– Nev. ––––, ––––, 331 P.3d 881, 889 n. 8 (2014).

The facts in a light most favorable to Nassiri demonstrate that this is a case where NDOT knew that it would construct a flyover, was actively planning to construct the flyover at the time of the settlement agreement, and simply chose not to inform the landowner of the flyover. Worse yet, NDOT repeatedly met with the landowner and provided it with incomplete plans and then charged the landowner an increased price for visibility that it intended to obliterate with the flyover.

After conducting phase one of NDOT's requested bifurcated trial, the Court made detailed findings of facts. Factual findings will not set aside a district court' factual findings unless they are clearly erroneous or not supported by substantial

evidence. Sowers v. Forest Hills Subdivision, 129 Nev., Adv. Op. 9, 294 P.3d 427, 432 (2013). "Substantial evidence has been defined as that which 'a reasonable mind might accept as adequate to support a conclusion.'" Mason-McDuffie Real Estate, Inc. v. Villa Fiore Dev., LLC, 130 Nev., Adv. Op. 83, 335 P.3d 211, 214 (2014).

A. NDOT always intended on constructing the Flyover as part of the Blue Diamond Project.

As early as 1999, NDOT proposed a flyover—a roadway which directs traffic above and over an existing roadway—at the Blue Diamond and I-15 Interchange (the "Blue Diamond Interchange"). (PA00818; PA00830; PA01580). The flyover was designed to be 60 feet above the roadway. (PA01130). NDOT has unequivocally testified that "there was a flyover in the Blue Diamond Project" and that the Blue Diamond Project was not completed until the flyover was built. (PA00818-PA00820; PA00826-PA00827; PA00701).

On July 27, 1999, NDOT held its first public meeting regarding the Blue Diamond Project. (PA00867). Although Mr. Nassiri attended, he testified that NDOT did not discuss the flyover and that he could not independently decipher any map presented. (PA00871; PA00876).

NDOT admitted that it did not explain the proposed project to meeting attendees. NDOT testified "that all of NDOT's public meetings during that time

period were 'open forum,' meaning that NDOT did not make a presentation to the public but made employees available to answer the questions of individuals, if asked." (PA01579-PA01580) (emphasis added).[2]

On or about September 29, 2000, the State recognized that the flyover would need to be considered when planning and designing the Blue Diamond Project. (PA00884-889; see also PA00823-PA00824). Through 2002, NDOT's engineers discussed accommodations to the Blue Diamond Project to allow for a flyover. (PA00891-PA00894).

On February 3, 2003, NDOT and its then-Assistant Director of Engineering agreed that the fly-over "will definitely be needed much earlier than the design year" and stated that NDOT should "acquire the necessary right-of-way now, especially if it means we don't have to go back and hit a property owner twice." (PA00896; PA001581; see also PA00898-PA00903).

On March 3, 2003, NDOT's Chief Hydraulics Engineer noted that the flyover could be constructed within a few years and that the proposed right-of-way acquisitions would be adequate for the flyover and related flood concerns. (PA00905-PA00908).

On May 1, 2003, "the ultimate configuration was received for SR 160," and

[2] After 2005, as a result of litigation against NDOT, NDOT ceased holding "open forum" meetings and instead made presentations to the public. (PA01580).

NDOT's Roadway Design was directed to provide all roadway information for the flyover. (PA00910-PA00911).

By June 2003, NDOT confirmed that traffic volumes necessitated the building of a flyover. (PA00913-PA00918).

On July 24, 2003, NDOT's Surplus Property Committee stated that NDOT's right-of-way maps are based on the assumption that NDOT has adequate right of way for the flyover. (PA00920-PA00921; PA00929-PA00932).

On April 6, 2004, NDOT made Respondent an informal offer to acquire approximately 4.22 acres of its property (the "Condemned Property"). (PA00734).

On May 7, 2004, NDOT's Chief Road Design Engineer explained to the Federal Highway Administration that the Blue Diamond Project would include a design for a future flyover ramp. (PA01004). There is, however, no evidence that NDOT's 2004 Environmental Assessment (the "2004EA") was provided to Nassiri or that he ever saw it. (PA001582)

On May 30, 2004, NDOT and the Attorney General met with Nassiri and presented maps that purported to lay out the Blue Diamond Project. Those maps, however, omitted any reference to a flyover. (PA00981; PA01582- PA01583)

Thereafter, NDOT personnel continued designing and planning a flyover at the Blue Diamond Interchange. (PA01016-PA01032).

On or about April 28, 2005, NDOT and Plaintiffs executed the Settlement Agreement. (PA01585).

By May 2005, NDOT had published notice of potential transportation improvements to the I-15 Corridor (the "I-15 South Corridor Improvement Project"). 4PA00639). As the Blue Diamond Project was broken into multiple phases, NDOT's NRCP 30(b)(6) designee testified that the "last phase of [the Blue Diamond Realignment] project--one of the last phases of that project, which was the flyover, was actually incorporated into the I-15 South [Corridor Improvement Project]". (PA00819-PA00820; see also PA00818, PA00826-PA00827). It is undisputed that Nassiri did not receive notice of any meetings concerning the I-15 South Corridor Improvement Project. (PA01585).

By Fall 2006, NDOT had realigned Blue Diamond Road to the south side of the Respondent's property, as represented in the maps and plans provided to Nassiri by the State before the settlement was completed. (Compare PA01058, with PA01056).

During the 2007 legislative session, the session immediately following the signing of the Settlement Agreement, Assembly Bill 544 was introduced to make appropriations to NDOT to carry out improvements to the Blue Diamond Interchange. On June 13, 2007, the Governor approved the appropriations. (Act of June 13, 2007, Ch. 372, NV 74th Sess.). Funding for the flyover came from those appropriations. (PA00824-PA00825).

On July 1, 2009, NDOT selected Nevada Paving to build the flyover.

(PA01060-PA010).

Between 2010 and 2011, NDOT constructed a 60-foot-tall flyover. (PA1130). Abutting Nassiri's property are retaining walls that are substantially above grade. (PA01130; PA01132- PA01134).

B. In negotiating the condemnation of the Condemned Property, NDOT failed to disclose that the flyover would be built.

1. Nassiri was purchasing the "after-condition."

One the most important facts here, one that must be clearly understood, is that the exchange property Nassiri would eventually purchase as part of the condemnation settlement was not the property as it existed at the time of the Settlement Agreement.

In 2004, NDOT initiated a condemnation action to redesign and realign Blue Diamond Road. NDOT planned on shifting the Blue Diamond interchange from the Northern border of Nassiri's property to its Southern border; aligned with what was Windmill Lane. In order to realign the interchange, NDOT needed to acquire approximately 4.22 acres of Nassiri's Property. (PA01105). At that time, the 24.42 acres of property to the North of Nassiri's property—the Exchange Property—was an interchange with I-15 and Blue Diamond Road. (PA01109). Indisputably, Nassiri was not buying the interchange as part of the settlement, he was buying the land in the "after-condition"—the condition after the interchange was realigned

and reconstructed. At the time of the Settlement Agreement and First Amendment, NDOT had not reconstructed the interchange and, therefore, Nassiri was entirely dependent upon NDOT for its understanding of the "after condition" of the Blue Diamond Interchange.

2. During negotiations NDOT provided Nassiri with representations of the "after condition" but failed to provide Plaintiffs with plans depicting the flyover.

Beginning in 2002, Nassiri met with NDOT and its engineers regarding the Blue Diamond Interchange realignment. (PA01580-PA01581). Nassiri and NDOT discussed the Condemned Property[3] and Nassiri informed NDOT that he would be interested in acquiring the abandoned surplus, the Exchange Property, after the Blue Diamond Interchange was built. (Id.).

NDOT obtained an appraisal for the Condemned Property on October 1, 2003, in which it valued the condemned property and severance damages at $23 per square foot. (PA01581). Because the "after-condition" is central to the valuation of the impact of the condemnation on the whole of the property, the appraisal considered the realignment of the Blue Diamond Interchange. (Id.). The appraisal, however, did not mention the flyover. (Id.). NDOT, knowing a flyover

[3] NDOT did not give formal notice that it was condemning the approximately 4.22 acres of its property (the "Condemned Property"), until late 2003.

was planned, formally reviewed and approved the appraisal. (PA01581). NDOT's formal review expressly stated that Nassiri's property (the "Condemned Property") was visible from I-15 and that after the reconstruction and realignment of the Blue Diamond Interchange Respondent's property "will sustain its exposure from I-15 . . . thereby retaining its visibility." (PA01581-PA01582). The review did not mention any flyover. (PA01582).

On April 6, 2004, NDOT made Nassiri an informal offer to acquire approximately 4.22 acres of its property, the Condemned Property. (PA00787).

A meeting was held between NDOT's Chief Right-of-Way officer Heidi Mireles, the Nevada Attorney General, Mr. Nassiri, Mr. Chapman, and Mr. Oxoby, on May 28, 2004. (PA00961). At that meeting, NDOT's "obligation[was] to lay out the plan so that the landowner can understand what the impacts may or may not be to the remaining property." (PA00984-PA00985). "One of the main purposes of the meeting [was] the scope of the project. Because in order to evaluate the settlement--or the severance damages of the project, [Nassiri] needed to know what the entire project is . . . that the Department intends to build. (PA00988- PA00989; see also PA00985).

During the May 28, 2004, meeting, NDOT made representations as to what the "after-condition" would be. (PA00983; PA00989). NDOT specifically provided Nassiri with a map of the final project. (PA00981-PA00982; PA00984-

PA00985; PA01092; see also PA00855). NDOT specifically represented that the Alleged Blue Diamond Project Map was "the plan that the Department was going to be proceeding on in its eminent domain case." (PA00984). The Alleged Blue Diamond Project Map did not contain a flyover. After hearing the evidence, the Court reached the same conclusion. (PA01582- PA01583).

Mr. Nassiri's attorney, Chapman, testified that there were specific "discussions as to what the ultimate configuration would look like at the intersection of Blue Diamond and Interstate 15" but there was no discussion of a flyover that "would connect eastbound ST-160 traffic with northbound I-15 traffic. (PA00985-PA00986). During that meeting, Mr. Nassiri also recalls Ms. Miereles talking about how the "after-condition" would provide Plaintiffs' property with increased visibility and how it Plaintiffs' property would be better off with the new alignment. (PA00879). NDOT does not dispute that it failed to inform Nassiri of the flyover during their settlement meetings. (PA00828; PA00829; PA00856-PA00857; PA00836).

On August 30, 2004, NDOT's appraiser Gary Kent appraised the Exchange Property in the "after condition, presuming reconstruction and realignment of the State Route 160/Interstate 15 interchange." (PA01034, PA01043-PA01045; PA01047; PA01049; PA01050; PA01583). The appraisal contains two maps titled "Subject Property Site Plan in the After Condition," which shows the realignment

of SR160 and I-15 interchange but no "fly-over." (PA01043-PA01045; PA01583). Furthermore, Kent specifically noted that the Exchange Property would benefit from its visibility to Interstate 15 in the after condition:

- "does and will include direct visibility and presumed frontage on the easterly most portion of the Interstate 15 right-of-way." (PA01047).
- "The subject property, in the after condition, will have good visibility from . . . Interstate 15." (PA01049).
- "[T]he subject property, in the after condition,. . . would include and/or benefit from direct visibility along the Interstate 15 right-of-way." (PA01050).

(PA00791, PA01583). Kent determined that as of August 16, 2004, the Exchange Property would have a value to Nassiri in the after condition of $22,650,000.00, which included a 46% increase in the price for an assemblage premium because it was contiguous to other land owned by Nassiri. (PA01040).

NDOT specifically knew that the properties' visibility was valuable and accordingly sold the visibility to Nassiri. (PA00864-PA00865).

3. The Settlement Agreements incorporate maps depicting NDOT's plans for the Blue Diamond Interchange, all of which exclude the flyover.

On or about August 31, 2004, NDOT filed the Condemnation Action.

NDOT made a written offer to Mr. Nassiri to "conclude" the Condemnation Action (the "Settlement Offer"), on December 6, 2004. (PA01105- PA01107; PA00999). NDOT included a map of the "after-condition" titled "EXCHANGE

PROPERTY," that showed a realigned Blue Diamond but did not include a flyover. (PA01107).

Nassiri and NDOT prepared a joint case conference report pursuant to NRCP 16.1, which was filed with the Court on or about December 22, 2004. (PA01584). NDOT then made the "construction plans" for the reconstruction and realignment of the Blue Diamond Interchange available to Nassiri and his counsel for their review. (Id.). Mr. Chapman, Nassiri's counsel, reviewed the construction plans. (Id.). It is undisputed that the construction plans shown to Mr. Chapman did not include any flyover. (Id.).

During the negotiations of the Settlement Agreement, NDOT prepared a "Sketch Map" as a representation of the Blue Diamond Interchange in the after-completed condition. (PA00996-PA00997; PA01124; PA01584). The Sketch Map did not depict any flyover. (See PA01124; PA00997). Chapman testified that the Sketch Map was to be included in the Settlement Agreement and Quit Claim deed. (PA01584).

He further testified that:

> The Department never mentioned a flyover during any of the process, and the maps that we used in ·the settlement agreement and the first amendment to settlement agreement are very similar to this one, not showing a flyover. And the word flyover was never mentioned in the settlement agreement or the first amendment to settlement agreement.

(PA00986) (emphasis added).

On January 27, 2005, Plaintiff accepted NDOT's Settlement Offer. The

Settlement Agreement was "entered into in contemplation of the scope of the project as is depicted" in the maps provided during settlement negotiations. (PA01000).

Ultimately, on or about April 28, 2005, NDOT and Nassiri executed the Settlement Agreement. (PA01109-PA01120). The Settlement Agreement makes plain reference to the fact that it was being settled against the backdrop of the realignment and reconstruction of the Blue Diamond Interchange. (See generally id.). NDOT specifically understood, agreed and warranted that the settlement was reached in "good faith" and was equitable. (PA01115).

Nassiri eventually recognized that the boundaries of the Exchange Property were incorrect and that is should be 24.42 acres, not the 24.41 acres reflected in the Settlement Agreement. Accordingly, the Settlement Agreement was amended. (PA01585). On June 1, 2005, NDOT prepared a revised Sketch Map that identifies the Exchange Property to be 24.42 acres. (PA01150; PA01585). The next day, NDOT provided a revised legal description of the Exchange Property and a revised sketch map to Nassiri. (PA01585). The Sketch Map did not include a flyover.

On June 14, 2005, the parties executed the "First Amendment to Settlement Agreement and Release of All Claims" (the "First Amendment"). (PA00617-PA00618). The First Amendment makes clear "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." (PA00617-PA00618 at §§ 1.03, 2.04). Likewise, the First Amendment expressly incorporated a "diagram" of the property. (PA00618 at § 2.02). Mr. Chapman provided the unrefuted testimony that the revised June 1, 2005 revised Sketch Map, which did not include a flyover, was the diagram that the parties agreed to include with the First Amendment. (PA01585).

The parties included the Settlement Agreement Map with the Settlement Agreement to demonstrate the "after-condition" of the Blue Diamond Interchange:

> Q. And was the purpose of this diagram to show the proposed realignment of Blue Diamond east of I-15?
>
> A. The purpose of it was to show the thought process of the parties in putting the deal together, which, as I said, was a package deal, not two separate ones. Mr. Nassiri would not have done the deal if it was--if he was not able to get this property in trade.
> . . .
> Q. . . . So the purpose --one of the purposes was to show the realignment of the SR-160 east of I-15. Correct?
>
> A. And the scope of the rest of the project as if (sic) would affect the settlement that the parties are putting together.
>
> Q. And to show the surplus property of the--or the diagram of the surplus property. Correct?
>
> A. And the construction of the project in the manner proposed by the Department [NDOT].

(PA00996-PA00997).

Likewise, Nassiri would not have acquired the Exchange Property if he knew about the flyover. (PA00866, PA00880- PA00881).

IV. THE COURT PROPERLY DENIED SUMMARY JUDGMENT

The Court "will generally not exercise its discretion to consider petitions for extraordinary relief challenging the denial of a summary judgment motion." Yellow Cab of Reno, Inc. v. Second Judicial Dist. Court of State ex rel. Cty. of Washoe, 127 Nev. Adv. Op. 52, 262 P.3d 699, 702-03 (2011). "Writ petitions challenging a district court denial of a motion for summary judgment" should only be considered "when no factual dispute exists." Walters v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark, 263 P.3d 231, 233-34 (Nev. 2011).

A. The Court properly allowed Nassiri's claim for breach of contract to proceed to trial.

For Nassiri's claim for breach of contract to survive summary judgment, there must be evidence of contract between Nassiri and NDOT, Nassiri's performance thereunder, NDOT's failure to perform, and damages suffered by Nassiri as a result of the breach. Calloway v. City of Reno, 116 Nev. 250, 993 P.2d 1259 (2000). There is no dispute that the Settlement Agreement and First Amendment Agreement are contracts between Plaintiffs and NDOT and that Nassiri performed. The only question on summary judgment is whether there is evidence that NDOT breached the Settlement Agreement. There is.

/ / /

1. The Settlement Agreement and First Amendment imposed a duty on NDOT to accurately disclose their construction plans for the Blue Diamond Interchange.

The Petition makes several forays in its attempt to convince this Court that Nassiri and the District Court have imposed a duty upon NDOT that is inconsistent with the Settlement Agreement and the First Amendment. Each attempt mischaracterizes the claims. Nassiri's claim is not based on an "implied right to visibility" or any other buzzword that NDOT employs. Instead, Nassiri's claim is based in the fundamental fact that at the time NDOT negotiated the Settlement Agreement and First Amendment, NDOT represented to Nassiri the "after-condition." This was essential because Nassiri would only obtain property in the "after-condition" and not in the condition that existed at the time of the agreements. Accordingly, the "after-condition" was a (perhaps the) material term to the Settlement Agreement and First Amendment; it was incorporated into the Settlement Agreement and First Amendment; it determined the compensation paid; and it was the basis for extended negotiations.

In understanding the terms of the Settlement Agreement and First Amendment, it is crucial to understand their context. The settlement agreements resolved the Condemnation Action and provided for the sale of 24.42 acres of NDOT property that would become available in the "after-condition." As a result,

at the time of the Settlement Agreement and First Amendment, Nassiri was entirely dependent upon NDOT for its understanding of the "after-condition."

Prior to reaching the Settlement Agreement, the unrefuted testimony is that NDOT explained to Nassiri "after-condition" so that Nassiri could understand the impacts of the new interchange to his property and exchange property. (PA00984-PA00985). The scope of the project was an essential point in the negotiations. (PA00985; PA00988-PA00989). NDOT specifically laid out what the "after-condition" would entail and provided Nassiri with a map to illustrate that condition. (PA00981-PA00982; PA01092). This is absolutely consistent with NDOT's duties in a condemnation action under NRS 37.110 to disclose the "proposed improvement" to a landowner when condemning a portion of the landowners' property. NRS 37.110(2).

NDOT never mentioned the flyover and specifically told Nassiri that the "after-condition" would increase the visibility to Nassiri's property. (PA00828-PA00829; PA00836; PA00856-PA00857; PA00879; PA00986). NDOT also obtained several appraisals which established the value of the condemned property and exchange property in the "after-condition." (See PA01034, PA01043-PA01045; PA01047; PA01049; PA01050; PA01583). The appraisals contained maps of the "after-condition," those maps did not contain a flyover, and based the value of the property in part on its visibility. (Id.). As part of the settlement, NDOT

also marketed the property to Nassiri based on its visibility. (PA00864-PA00865; PA01583).

In April 2005, Nassiri and NDOT entered into the Settlement Agreement, which was specifically related to the "construction and reconstruction of the interchange at I-15 and Blue Diamond Road, and the attendant widening and realignment of Blue Diamond Road," defined as the project. (PA01109, at § 1.01).[4] The Settlement Agreement was for the transfer of the Exchange Property in the "after-condition." NDOT warrantied that the "settlement is in good faith and is equitable." (PA01115).

On June 19, 2005, NDOT and Nassiri executed the First Amendment. (PA00617). The First Amendment expressly incorporates a "diagram" of the "after-condition" of the property. (PA00618).[5] Mr. Chapman provided the unrefuted testimony that the diagram, which did not include a flyover, was the "after condition" diagram that the parties agreed to include with the First Amendment. (PA01585). The purpose of including the diagram was to show "the construction of the project in the manner proposed by [NDOT]." (PA00996-PA00997).

[4] NDOT claims that Mr. Chapman drafted the settlement agreement,

[5] Mr. Chapman testified that the Settlement Agreement was supposed to include a diagram of the "after-condition" of the property. (PA01584).

Nassiri has consistently maintained that NDOT breached the Settlement agreement when it built something other than the "after-condition." Nassiri did not receive the property bargained for in the Settlement Agreement. NDOT also breached the express good faith and equitable warranty by presenting an inaccurate depiction of the "after-condition." The Court similarly summarized that the alleged duties that were breached were the Settlement Agreement's express good faith clause and the failure to deliver the property in the "after-condition." (PA02538-PA02539).

2. There are questions of fact as to whether a breach occurred.

In denying summary judgment, the Court found that there are questions of facts surrounding what NDOT knew at the time of the Settlement Agreement and First Amendment and whether NDOT charged Nassiri a higher price based on the purported "after-condition." (PA02535).

NDOT's argument to the contrary is premised on discredited assumptions, including that the flyover was an afterthought and that NDOT never discussed the "after-condition" with Nassiri. To make these assumptions, NDOT ignores its own testimony that the flyover was always part of the Blue Diamond Project and that by 2003 NDOT had committed to building the flyover, and completely omits from the Petition that Nassiri repeatedly met with NDOT and that NDOT provided Nassiri with numerous diagrams and information regarding the "after-condition," which

were incorporated into the Settlement Agreement. Based on a full assessment of the facts, it is undeniable that questions of fact preclude summary judgment. Indeed, a summary judgment in Nassiri's favor would be more appropriate.

The facts show that in 2003 NDOT was actively planning and acquiring property to construct the flyover. (PA00896-PA00932). NDOT's testimony is that there was always a flyover planned for the Blue Diamond project. (PA00818-PA00820; PA00826-PA00827). By 2003 NDOT had decided to construct a flyover and began actively accommodating and planning the flyover. (PA01581). When deciding to institute condemnation proceedings, NDOT even instructed its Chief Right-of-Way officer Heidi Mireles—who subsequently met with Nassiri regarding condemnation—to acquire sufficient right-of-way to build the flyover. (PA00896-PA00903). Even during closing arguments at the first trial, NDOT argued that by 1999 it was a foregone conclusion that the Blue Diamond Interchange would include a flyover:

> This Blue Diamond Project prompted the 2004 eminent domain action against plaintiff, Mr. Nassiri, and importantly, the Blue Diamond Project always included, and you'll see it throughout -- as early as 1999 throughout 2008 through all the public notices that you heard about during trial, it included a proposed design for a future eastbound Blue Diamond to northbound 1-15 flyover ramp to be constructed when traffic demand warrants have been met and funding is available

(PA01619).

Because it suits its position for the Petition, NDOT now suggests that the

flyover was a distant thought in 2005. This plainly contradicts the testimony of NDOT's NRCP 30(b)(6) witness, and NDOT also omits the fact that by 2003 NDOT had confirmed traffic volumes necessitated the building of a flyover and NDOT knew that the flyover would be constructed within a few years. (PA00905-PA00918). Not coincidently, NDOT actually sought and obtained funding for the flyover during the very next legislative session following the signing of the Settlement Agreement. (PA00824-PA00825). Accordingly, NDOT's argument that it did not know whether it would build a flyover in 2005 is contrary to evidence.

Likewise, it is misleading to argue that NDOT actually constructed the flyover as part of the I-15 South Corridor Improvement Project, rather than as the Blue Diamond project, because NDOT actually incorporated the "last phase of [the Blue Diamond Realignment] project--one of the last phases of that project, which was the flyover, . . . into the I-15 South [Corridor Improvement Project]". ((PA00819-PA00820; see also PA00818, PA00826-PA00827).

During the time of settlement discussions and Settlement Agreement, NDOT does not dispute that it had diagrams and plans for the flyover. It included a diagram of the flyover in the 2004 Environmental Assessment. (PA00514). Though plenty of inferences may be drawn, it is unknown why NDOT failed to provide the map with a flyover to Nassiri during settlement discussions.

NDOT's representation to Nassiri of the "after-condition" was absolutely

material and necessary to settlement since NDOT was selling Nassiri the "exchange property" specifically in the "after-condition." As a result, NDOT and Nassiri not surprisingly incorporated the diagram of the "after condition," which was prepared by NDOT, into the Settlement Agreement. The "after-condition" shows a realigned Blue Diamond Interchange but omits the flyover.

Furthermore, NDOT and its appraisers valued the exchange property in an "after-condition" that did not include the flyover. (PA01043-PA01050; PA01581). NDOT's appraisers unequivocally assigned importance and value to the visibility of the property. It is expressly noted that the exchange property has 1,500 feet of direct, valuable visibility to Interstate 15. (Id.). Accordingly, NDOT charged Nassiri based on an "after-condition" that did not include a flyover.

It is also undeniable that the actual after-condition was different then what NDOT represented to Nassiri and his counsel during settlement negotiations. In constructing the flyover, NDOT constructed a large wall to accommodate the ramp and the flyover itself, which extended over 60 feet above the road deck of Interstate 15. Accordingly, the flyover obliterated the properties visibility from Interstate 15, a factor on which the Settlement Agreement was premised.

The above facts create questions of fact that precluded summary judgment in NDOT's favor as to whether it breached a material term of the Settlement Agreement and First Amendment, including the express good faith provision of the

Settlement Agreement and whether NDOT delivered the exchange property to Nassiri in the "after-condition" referenced in the Settlement Agreement and First Amendment. These facts alone preclude a granting of summary judgment.

3. The quitclaim deed did not merge and extinguish the Settlement Agreement and First Amendment.

NDOT's contention that the quitclaim deed for the Exchange Property extinguishes the Settlement Agreement is simply wrong. Merger does not apply here. Hanneman v. Downer, 110 Nev. 167, 177, 871 P.2d 279, 285 (1994), provides that "when the terms of the deed cover the same subject matter as the earlier contract and the two are at variance, the deed controls." (emphasis added). The Hanneman decision goes on to make clear that whether the deed merges with the subject matter of another contract "depends upon the intention of the parties" and that the intention of the parties "is a question of fact to be determined by an examination of the instruments and from the facts and circumstances surrounding their execution." Id. Notably, the First Amendment makes clear "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." (PA00617-PA00618 at §§ 1.03, 2.04).

The Settlement Agreement is also not at variance with deed. The Settlement

Agreement and the attendant duties under NRS 37.110 do not concern the use of the exchanged property, and the breach of contract concerns the building of the flyover, something separate and apart from the Quitclaim Deed but clearly part of the Settlement Agreement. Thus, the merger argument fails.

4. The Court did not create an implied easement for visibility.

NDOT conflates the Court's denial of summary judgment with the finding that an implied easement for visibility exists. That is simply misdirection. Probasco v. City of Reno, 85 Nev. 563, 565, 459 P.2d 772, 774 (1969) stands for the proposition that there is no "implied negative easement of light, air and view for the purpose of a private suit by one landowner against a neighbor" or in the context of eminent domain. However, Nassiri's claim is not based on a negative easement. Instead, the claim is based on his acquisition of the exchange property from NDOT pursuant to the Settlement Agreement and First Amendment, and on the implied covenants associated therewith. As the evidence bears out, NDOT represented to Nassiri what its plans were for the intersection and those plans were incorporated into the Settlement Agreement. Accordingly, its claims are related to the agreements and not any implied easement

In support of its argument, NDOT cites to closing arguments (PA02608-09 and PA02536), not the Court's pronouncement of its order denying summary judgment. Thus, it is outside the record on appeal for the motion for summary

judgment. Moreover, the omitted portion of the dialogue between NDOT's counsel and the Court is instructive. The Court states that the difference between this case and a case where the State builds a freeway next to an adjoining property is the fact that Nassiri purchased the property from the State in the context of the condemnation action. (PA02609; see also PA02608). The case simply did not apply to the facts.

Accordingly, the Court did not repudiate Probasco or any relevant case law.

B. The Court properly allowed Nassiri's claim for breach of the covenant of good faith and fair dealing.

In Nevada, every contract imposes upon the contracting parties a duty of good faith and fair dealing. Frantz v. Johnson, 116 Nev. 455, 999 P.2d 351 (2000). A party can incur liability where "the terms of a contract are literally complied with but one party to the contract deliberately countervenes [sic] the intention and spirit of the contract." Hilton Hotels v. Butch Lewis Prods., 107 Nev. 226, 808 P.2d 919 (1991).

NDOT relies solely on Nelson v. Heer, 123 Nev. 217, 163 P.3d 420 (2007) for its argument that NDOT had no duty to disclose its future plans for the intersection to Nassiri. In Heer, the contract notably limited disclosures to those under NRS 113.130. Id. at 227, 163 P.3d at 427. Here in the present case, the

"after-condition" of the property was a material term that NDOT controlled and was responsible for disclosing to Nassiri.

In the event that the trier of fact determines NDOT did not breach express terms of the Settlement Agreement and First Amendment, questions of fact exist as to whether NDOT breached the implied covenant of good faith and fair dealing. By not constructing the interchange as expressly represented to Nassiri, and incorporated in the First Amendment, NDOT countervened the spirit and intent of the agreements. Likewise, by destroying the visibility that formed the basis of its appraisals and the sales value, NDOT violated the spirit and intent of the agreements. The court, therefore, appropriately denied summary judgment.

C. The Court properly denied summary judgment on the claim for rescission.

"A unilateral mistake occurs when one party makes a mistake as to a basic assumption of the contract, that party does not bear the risk of mistake, and the other party has reason to know of the mistake or caused it." In re Irrevocable Trust, 130 Nev. Adv. Op. 63, 331 P.3d at 885. Generally, a unilateral mistake is grounds for the rescission of a contract or release if the "other party had reason to know of the mistake or his fault caused the mistake." Id. at 885; Oh v. Wilson, 112 Nev. 38, 39-40, 910 P.2d 276, 277-78 (1996); Graber v. Comstock Bank, 111 Nev. 1421, 1428, 905 P.2d 1112, 1116 (1995); Chwialkowski v. Sachs, 108 Nev. 404, 406,

834 P.2d 405, 406 (1992); Home Savers, Inc. v. United Security Co., 103 Nev. 357, 358–59, 741 P.2d 1355, 1356-57 (1987).

Nassiri's claim for rescission is based on his unilateral mistake that the "after-condition" of the Blue Diamond Interchange would not contain a visibility destroying flyover. NDOT recognizes that the "Settlement Agreement contains no whisper of the flyover." (Petition at p. 39). That is because NDOT specifically omitted the flyover from the maps and its discussions with Nassiri. As NDOT is the party who possessed the true plans for the Blue Diamond Interchange, it knew of Nassiri's mistake and, in fact, actually caused it.

To avoid the reality that NDOT neglected to disclose the flyover, NDOT misstates that the Settlement Agreement does not even mention "the future Blue Diamond interchange development plan." As set forth in detail above, however, the Settlement Agreement and First Amendment are specifically premised upon the "after-condition," i.e. NDOT's development of the Blue Diamond interchange, as Nassiri was purchasing property in the after-condition. (PA01000). Keeping mind this was all part of the settlement of a condemnation. The First Amendment also incorporates a diagram of what NDOT represented was the "after-condition." (PA01150). The evidence is also clear that NDOT knew at the time of the Settlement Agreement that it would construct the flyover, and it ensured that it condemned sufficient property to actually construct the flyover. In no uncertain

terms, at the time the Settlement Agreement was signed, the Blue Diamond Interchange would include a flyover, NDOT just did not disclose it. (PA00818-PA00820; PA00826-PA00827). Moreover, NDOT instructed its appraisers to value the property in an "after-condition" that omitted a flyover, and that value formed the basis for the compensation paid by Nassiri. (PA01034-PA01050). Likewise, the Court found that the "after-condition" was central to valuation. (PA01581). Nassiri bought the after-condition. Thus, Nassiri has set forth a claim for rescission.

1. Nassiri did not bargain with uncertainty.

NDOT argues that Rescission is not available to Nassiri because "at the time of the Settlement Agreement was formed there was uncertainty about the future configuration of the Blue Diamond Interchange." Petition at p. 40.

As a result of NDOT's overzealous attempts to obtain summary judgment and prove Nassiri had knowledge of the flyover, however, NDOT proved the opposite, and the Court found that "NDOT has established that it always intended on building the flyover." (PA01588-PA01589). Likewise, the evidence demonstrates that Nassiri and his counsel, Mr. Chapman, made deliberate efforts to learn NDOT's ultimate configuration of the interchange, including by meeting with NDOT and reviewing plans. Moreover, the parties specifically included a diagram of what NDOT represented was the "after-condition" in the First Amendment, which shows a realignment but omits the flyover. The Settlement Agreement and

First Amendment do not reflect uncertainty as to NDOT's development of the Blue Diamond interchange but instead reflect NDOT's clear and concise plan—as explained to Nassiri.[6] The undisputed issue is that the plan represented to Nassiri by NDOT did not reflect or contain what NDOT knew to be the ultimate design. Thus, Nassiri did not negotiate with uncertainty. He negotiated with the certainty of what NDOT represented as the after-condition.

2. The evidence demonstrates that the Flyover was an inevitability.

NDOT contends that Nassiri's "mistaken belief in 2005 that the Blue Diamond Interchange would never include a flyover" relates to a future contingency. (Petition at p. 40). As found by the Court, the construction of the flyover was never a contingency to NDOT. By no later than 2003, two years prior to the Settlement Agreement, NDOT had decided to construct a flyover. (PA01581). Mr. Terry "confirmed that there was always a flyover planned for the Blue Diamond project." (PA01580). Consequently, NDOT included the flyover in the 2004 Environmental Assessment. (PA01582). NDOT has been clear that the

[6] NDOT misrepresents that Nassiri's position would prohibit NDOT from changing its design in any manner. In reality, Nassiri's claim is based on NDOT substantially altering the interchange to include a flyover that extended more than 60 feet above what NDOT proposed and one that completely altered the western boundary of the exchange property, a boundary and condition for which Nassiri expressly provided compensation.

flyover was always just a question of timing.[7]

In fact, NDOT has actually argued that as of 2004 it would be a violation of federal law if it did not build the flyover:

> Mr. Terry testified that to not build the flyover would violate the 2004 EA and require an amended EA. NDOT always intended to build a future eastbound and northbound 1-15 flyover when traffic demands warrant and funding was available. That was clear from going back to 1999.

(PA01620). Therefore, at the time of the Settlement Agreement, it was a foregone conclusion that the flyover would be constructed.

The Court recognized the fundamental flaw in NDOT's position. Prior to the Settlement Agreement NDOT had already decided to construct the flyover and Nassiri's mistake was not that he was unaware of when the flyover would be constructed, but that NDOT would build a flyover:

> Isn't that what the State said? Well, we were going to build it, we just needed to get the funding and so it was—we didn't know if we were going to build it because we had to get the funding. When we got the funding, then it was dependent on who we hired to design it and how they designed it, but we were going to build it.

(PA01787);

> A jury has to hear all a that and, to me, it just seems like it's this—always an issue within the State's control as to when—they intended

[7] NDOT also advances the notion that the flyover was dependent on traffic volumes and funding, such that it was a contingency. In doing so, NDOT omits that in 2003 traffic volumes had been met and that in the next legislative session after the Settlement Agreement NDOT obtained funding. (PA00913-PA00918).

> to do it as soon as they could get the approval, as soon as they could get the funding, as soon as they could get the design, as soon as they could approve a design that would pass all the muster. I mean, they always knew it was going to be there, so I don't see it's a contingency at all.

(PA01808).

Thus, Nassiri's claim for rescission is not based on a contingency but on NDOT's unambiguous plan at the time of the Settlement Agreement to construct the flyover, which it failed to disclose to Nassiri.

3. Nassiri did not bear the risk of mistake regarding the flyover.

NDOT's representations as to the property, and the parties' inclusion of those designs into the First Amendment are sufficient grounds to assign any risk of mistake to NDOT. Coleman Holdings Ltd. P'ship v. Eklund, No. 59323, 2015 WL 428567, at *2 (Nev. Jan. 29, 2015) (citing Restatement § 154 (indicating that courts may assign the risk of mistake when it is reasonable to do so); see also Mitchell v. Boyer, 237 Mont. 434, 774 P.2d 384, 386 (Mont.1989) (holding that a seller's innocent misrepresentations of property restrictions justified mutual mistake and rescission)). Its assertions that the decision in Land Baron Inv. v. Bonnie Springs Family LP, 131 Nev. Adv. Op. 69, 356 P.3d 511, 514 (2015) supports a dismissal of Plaintiffs' claim for rescission is without merit. So too is NDOT's contention that "the facts in this case are extremely similar to those in Land Baron Inv. (Petition at 42). These statements are simply not true.

Land Baron Inv. concerned a land developer's contemplated purchase of land from a third party. While the sale was pending, Land Baron discovered that access to the land was limited and water was scarce. Id. at 514-15. Over a period of three years, while the parties extended escrow, Land Baron struggled to secure access or water. Id at 515. Eventually, Land Baron failed to make a payment to extend escrow, and Bonnie Springs terminated escrow and kept prior payments as liquidated damages. Id. This Court concurred that Land Baron bore the risk of mistake because, by entering into the contract, it would know that water and access was difficult given the properties location in an undeveloped desert. Id. at 517. The purchase agreement did not address water or access. Id. In addition, the court found that there was no evidence Bonnie Springs made any representations that water or access existed, and that Land Baron did not conduct any due diligence. Id. at 518. Therefore, Land Baron did not have a "reasonable belief in a set of facts, and Land Baron assumed the risk by proceeding with the contract despite having limited knowledge of the actual conditions as to water and access." Id.

NDOT draws a false correlation between Land Barron Inv. and the present case. While Land Baron Inv. involves purchase of real property, that is where the similarity ends.[8] NDOT falsely contends that Nassiri is a sophisticated and

[8] NDOT sought summary judgment based on Land Baron Inv. after the first trial and after the Court made its findings of facts and conclusions of law.

experienced land buyer. There is no evidence of Nassiri's sophistication, let alone sufficient evidence to resolve any question of fact. Moreover, in Land Baron Inv. Bonnie Springs made no representations regarding the mistake and Land Baron performed no due diligence into the issue of access or water. While NDOT argues that Nassiri never inquired into NDOT's plan and failed to perform any due diligence, after a week of trial the Court specifically rejected that argument and found that Nassiri "actively engaged with NDOT in negotiations regarding the after-condition of Blue Diamond Interchange" and NDOT made representations. (PA01592-PA01593). The Court also expressly found that Plaintiffs satisfied any duty of reasonable diligence prior to entering into the Settlement Agreement. (PA01590-PA01595). NDOT's representations regarding the "after-condition" were also false and misleading, as opposed to Land Baron where there was no evidence in the record of any representations. In such a scenario, there is no basis for the conclusion that Plaintiffs somehow assumed the risk that NDOT would, contrary to its constitutional duties to provide just compensation, not disclose its plans or that NDOT would misrepresent its plans.

Conveniently, NDOT also ignores another clear differences between this case and Land Baron Inv. In Land Baron Inv., the seller was not responsible for dolling out water or providing access—the alleged subject of the mistake. Here, NDOT was in complete control of the facts and circumstances surrounding the

mistake—the building of the Flyover. Moreover, the entire Condemnation Action and the Settlement Agreement at issue here is the result of NDOT's redevelopment of the Blue Diamond Interchange. While water and physical access in Land Baron Inv. was not relevant to the purchase agreement, NDOT's future plans and intent not only begat the Settlement Agreement but dictated the terms of the Settlement Agreement itself, including the value of the properties.

Given the facts and circumstances of this case, Nassiri did not bear the risk of mistake. Likewise, the matter is clearly distinguishable from Land Baron Inv.

D. The Court appropriately concluded that the Statute of Limitations had not run.

During a one-week trial, the District Court concluded that Nassiri had exercised reasonable diligence and did not discover NDOT's plans to construct the flyover until 2010. The Petition claims that Nassiri "slept" on his rights and failed to exercise any diligence. Such an argument is unfaithful to the fact that Nassiri repeatedly met with NDOT to discuss the "after-condition." As the Petition admits, at the time of the Settlement Agreement NDOT was in possession of plans and maps showing the flyover, it just did not disclose those maps. While NDOT now claims that the 2004 Environmental Assessment, which contained the flyover, were

the actual plans for the "after-condition,"[9] NDOT did not exchange those plans in the condemnation action or in meetings with Nassiri. NDOT's position that Nassiri was required to disbelieve NDOT's direct representations and ignore the maps and plans it provided, in favor of scouring the public library, is absurd.

A statute of limitations does not begin to run under the discovery rule until "the claimant discovers, or reasonably should have discovered, the material facts for the action, including the damages." Brady Vorwerck v. New Albertson's, 130 Nev. Adv. Op. 68, 333 P.3d 229, 232 (2014). "Inquiry notice" refers to the point where the facts would lead a reasonably diligent person to investigate further, but that is not necessarily the point at which he would have discovered facts constituting a claim. Merck & Co. v. Reynolds, 559 U.S. 633, 651 (2010). Whether a party exercised proper diligence is a question of fact. Siragusa v. Brown, 114 Nev. 1384, 1391, 971 P.2d 801, 806 (1998); Day v. Zubel, 112 Nev. 972, 977, 922 P.2d 536, 539 (1996). If a party exercises diligence, it may excuse ignorance to reasonably accessible information. Wagner v. Chevron U.S.A., Inc., 281 P.3d 1228 (Nev. 2009); Siragusa, 114 Nev. at 1394, 971 P.2d at 807. The statute of limitations is also tolled when a party relies upon another party's false representations. El Pollo Loco, Inc. v. Hashim, 316 F.3d 1032, 1040 (9th Cir.

[9] A stark contrast to NDOT's earlier argument that the flyover was an ethereal idea.

2003); see also Van Meter v. Bent Constr. Co., 46 Cal.2d 588, 595, 297 P.2d 644 (Cal.1956) (negligent reliance should not bar equitable relief where plaintiff relied in good faith upon defendant's false representations); see also TRW Inc. v. Andrews, 534 U.S. 19, 29 (2001) (recognizing that if an agency conceals an offending action that the "generally applicable discovery rule and the misrepresentation exception would operate to toll the statute of limitations until the concealment is revealed").

The Court specifically found that Nassiri exercised reasonable diligence when he contacted NDOT, had repeated meeting with NDOT's engineering department and NDOT's right-of-way director Ms. Mireles to discuss NDOT's planned development of the Blue Diamond Interchange, hired counsel, reviewed NDOT's appraisals, and analyzed and reviewed maps and plans made available by NDOT. Furthermore, in its disclosures in the condemnation case, NDOT disclosed no communications, plans, or maps that depicted any type of flyover, and did not produce the 2004 Environmental Assessment. In light of Nassiri's actions, the Court found that Nassiri exercised reasonable diligence.

The District Court also considered NDOT's argument that because the 2004 Environmental Assessment was a public document, available at public libraries and NDOT's office, he was on notice of the plan. The District Court concluded that reasonable diligence "did not require Mr. Nassiri to seek out and review every

available document in the public sphere to determine whether they contradicted the documents provide by NDOT in negotiation and discovery." (PA01593). Additionally, the Court found that if the 2004 Environmental Assessment was material and dispositive of NDOT's plans, it is unclear why NDOT failed to produce them pursuant to NRCP 16.1, or even reference them in maps and diagrams given to Nassiri during litigation and the settlement negotiations. In light of the facts and circumstances, the evidence supports a finding that Nassiri exercised reasonable diligence, which tolled the statute of limitations.

V. NDOT'S MOTION IN LIMINE TO EXCLUDE DAMAGES WAS APPROPRIATELY DENIED

A. The Court correctly refused to strike Nassiri's damages.

On November 3, 2014, Plaintiffs disclosed the expert report of Keith Harper. (PA01818). Harper opined that Nassiri's property lost 10% of its value as a result of the building of the flyover. (PA01958).

On December 18, 2014, NDOT's counsel stated in an email that "as it currently stands, the only breach of contract damages alleged by Mr. Nassiri relate to rescission. . . . If you will not dismiss the breach of contract claims in the absence of rescission, then we need to know your damages computation immediately, as that information will also affect the scope of the depositions." (PA02034-PA02035). Nassiri's counsel responded immediately and

unambiguously stated: "While rescission has been sought in the alternative, the value determined by the severance, even if not compensable under inverse condemnation, would also be a contract damage." (Id.) (emphasis added). Thus, by no later than December 18, 2014, NDOT was aware of Nassiri's damage theory and amount.

NDOT then took Harper's deposition on January 15, 2015. (PA01819).

On January 30, 2015, NDOT also took Mr. Nassiri's deposition. (PA01819). During Mr. Nassiri's deposition, NDOT recognized that Plaintiffs' contractual damages were equal to the damages expressed by Mr. Harper:

> MR. COULTHARD:· Okay.· And then for the damages for inverse condemnation and breach of contract and breach of the implied, the -- the contractual claims, is -- are your damages related to the damages as opined by Keith Harper?
> MR. OLSEN: Yes.
> MR. COULTHARD:·And that is the total damages for those claims?
> MR. OLSEN:·Yeah, other than punitive damages and those sort of extra contractual damages that are claimed in the complaint.

(PA02041). At the conclusion of Mr. Nassiri's deposition, the parties agreed that if NDOT wanted to further explore Nassiri's damages that they would re-depose Mr. Nassiri on the issue. (PA02040).[10]

[10] MR. COULTHARD:·Perfect.· So, okay, that's acceptable to me, then.· I need to get -- I need to understand exactly the damage and the damage model and -- and -- and, if need be, if it's not clear and I feel I need to depose him on that narrow issue, then we'll drag you back in on that.. (PA02040).

In order to impose NRCP 37 sanctions, Nassiri's disclosures must have caused harm. NRCP 37. Here, there was absolutely no harm from the disclosure. The basis for the damages were timely disclosed by the expert deadline. NDOT took Nassiri and Harper's deposition after Nassiri clarified that his severance and contractual damages were the same. Thus, NDOT actually conduct discovery into Nassiri's damages. Even more, the parties agreed that if NDOT had further questions than it would redepose Nassiri.

NDOT requests sanctions not because of any prejudice, but in order to secure a victory. In interpreting appropriate sanctions under NRCP 37's federal counterpart, courts consider, *inter alia*, "the risk of prejudice to the party seeking sanctions and the availability of less drastic sanctions." Boliba v. Camping World, Inc., No. 2:14-CV-01840-JAD, 2015 WL 3916775, at *1 (D. Nev. June 25, 2015)(citing Wendt v. Hostlnt'l, Inc., 125 F.3d 806, 814 (9th Cir.1997)). NDOT fails to set forth any prejudice. It could not because it deposed Nassiri's witnesses on the very damages at issue, and rather than seek additional discovery, as NDOT agreed to if necessary, NDOT decided to try for dispositive sanctions. Under prevailing standards, however, no such sanctions are available.

B. Harper's opinion will assist the Jury and is therefore admissible.

NDOT contends that Harper's opinion can only be applied to Plaintiffs now dismissed inverse condemnation claims. This wishful argument has no actual

merit. While "constitutional just compensation" and "breach of contract damages" are different legal concepts, both are intended to do the same thing: place the injured in the same position they would have been but for a specific injury.

"It is well established that in contracts cases, compensatory damages are awarded to make the aggrieved party whole and ... should place the plaintiff in the position he would have been in had the contract not been breached." Rd. & Highway Builders v. N. Nev. Rebar, 128 Nev. Adv. Op. 36, 284 P.3d 377, 382 (2012); Hornwood v. Smith's Food King No. 1, 107 Nev. 80, 84, 807 P.2d 208, 211 (1991); Cheyenne Const., Inc. v. Hozz, 102 Nev. 308, 312, 720 P.2d 1224, 1227 (1986). Likewise, in eminent domain actions, "severance damages are damages awarded to compensate for the difference between the value of the remainder property before and after the taking." Nevada Power Co. v. 3 Kids, LLC, 129 Nev. Adv. Op. 47, 302 P.3d 1155, 1157 (2013), as modified (July 24, 2013). Accordingly, both severance and contract damages seek to place the aggrieved party in the position they would have been had there been no injury. When the injury is the same, as it is here, these different concepts converge in the same measure of damages.

As testified to by Harper, his report determines the amount of money necessary to place Plaintiffs in the same position as if the flyover had never been built. (PA01837; PA01892; PA02084). In an eminent domain context, the taking

was the property's view and visibility. (PA2064). Thus, his opinion is the value of the property that has "been affected by the flyover and the construction that has taken place." (PA2063; see also PA2059-PA2060). In calculating damages resulting from a breach of contract, on the other hand, one must determine the decrease in the value of the property due to a loss of visibility resulting from the construction of the flyover. (PA02281). Necessarily, in this situation contract damages are equal to "just compensation," and both seek to place Plaintiffs in the position they would be had the flyover not been constructed. (Id.). Therefore, regardless of whether Harper was calculating "just compensation" or "contractual damages," both yield the same result, a 10% decrease in the value of the property.

Furthermore, NDOT argues that Harper's damage calculation should be excluded because it considers damages to property Nassiri did not acquire from NDOT. Contractual damages, however, include damages that are the probable result of the breach. Hornwood, 105 Nev. 188, 772 P.2d at 1286 (quotation omitted); Andrew v. Century Sur. Co., --- F.Supp.3d ----, 2015 WL 5691254, at *3 (D. Nev. Sept. 28, 2015); see also Restatement (Second) of Contracts § 351(1) (1981). Whether injury to Plaintiffs remaining property was foreseeable is a question of fact. In truth, NDOT well understood that the Exchange Property added value to Nassiri's entire property and actually charged Nassiri an assemblage premium.

NDOT also tries to limit Nassiri's damages to the decrease in value of the Exchange Property in 2005. The argument is *non sequitur*. Contract damages equal the amount of money needed to place Nassiri in the same place they would had been had the flyover not been constructed. In determining contract damages, the value of the view and visibility in 2005 is unimportant. Likewise, it is irrelevant what Nassiri paid for the Exchange Property in 2005 or what they would have paid for the Exchange Property in 2005 had they known of the flyover. It is also irrelevant that the Property has appreciated. Nassiri's position is that absent the flyover his property would had been worth even more, and it is that difference in value Nassiri are entitled to recover as contract damages.

Harper's damage calculation is relevant even though his quantification of damages is based on the value of the property in 2013. The date on which damages are determined does relate to the date of breach. J.J. Indus., LLC v. Bennett, 119 Nev. 269, 276, 71 P.3d 1264, 1269 (2003). However, "where special circumstances show proximate damages of an amount greater than existed on the date of the breach, a date different than the time of breach may be fixed for establishing damages." Cheyenne Const., Inc., 102 Nev. at 312, 720 P.2d at 1227; Fairway Builders, Inc. v. Malouf, Etc., 124 Ariz. 242, 603 P.2d 513, 526 (Ct.App.1979) (measure of the damages for breach of a construction contract as of the time of trial). In the present case, special circumstances exist such that the date of damages

should be the date of the summons. Nassiri began negotiations with NDOT upon discovering NDOT's breach. At that time, NDOT insisted that Nassiri submit a claim to the Board of Examiners, as a prerequisite. After more than a year of negotiations and administrative procedure, NDOT summarily refused Plaintiffs claim. Accordingly, the delay in bringing litigation was the result of NDOT's own actions.

Moreover, even if the Court were to determine that the date of damages is the date of NDOT's breach in 2010, Harper's testimony is still relevant to the issue of damages. He opined that the flyover decreased the value of Plaintiffs' property by 10%. (PA02281). That decrease in value would hold true in 2010. (Id.). Likewise, because Harper considered and relied upon Tim Morse's 2010 appraisal, Harper can opine as to the value of that 10% in 2010. (PA01839; PA02086-PA02087). Accordingly, even if the date of damages is 2010, Harper's testimony is relevant to the determination of damages.

NDOT's disagreement that the entire property was damaged or that the amount of damage would differ between 2010 and 2013 goes to weight and not admissibility. Therefore, the District Court did not err when it refused to strike Harper's report.

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VI. CONCLUSION

Based on the foregoing, the Court should deny the Petition and refer the case back to the District Court for a plain, speedy, and adequate remedy in the ordinary course of the law

Dated this 20th day of June, 2016.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this answer complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

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Dated this 20th day of June, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **ANSWER TO PETITION FOR WRIT OF MANDAMUS** was filed electronically with the Nevada Supreme Court on the 20th day of June, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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