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.

Case No. 70098

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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INTRODUCTION

The State's petition established that Nassiri's remaining claims fail as a matter of law. His breach of contract claims rely on contractual rights and obligations that Nassiri never bargained for, that the State never undertook, and that simply do not exist in the integrated Settlement Agreement or quitclaim deed. Under basic principles of Nevada contract law, the district court was obligated to construe and enforce these contracts as they are written. Instead of following this well-settled legal mandate, however, the district court rewrote the terms of the parties' fully negotiated agreements—a clear error of law.

The petition also established that Nassiri's mistake-based rescission claim cannot be substantiated. His alleged mistake relates to a mistaken belief about the future, which is not a viable basis to rescind a contract in Nevada. Even assuming otherwise, based on the State's multiple lawful public disclosures, Nassiri knew about the facts constituting his alleged mistake long before he filed his now time-barred claim.

Finally, the petition established that the district court's multiple erroneous legal rulings have the potential to cause widespread damage to the State of Nevada. If upheld, the rulings will render the State's federally-approved public disclosure process functionally meaningless; they will resurrect the long-repudiated doctrine of implied negative easements for view and visibility; they will undermine the

benefits, certainty, and finality of the State's settlement agreements (even those memorialized in final judgments of condemnation); and they will severely hamper the State's ability to efficiently plan and acquire right-of-way needed for public transportation projects, including the ongoing Project Neon.

In his answer, Nassiri fails to provide a meaningful and accurate—or even coherent—legal analysis in response to any of these issues. To avoid addressing the widespread legal errors that have occurred in this case, Nassiri resorts to *ad hominem* attacks and categorical assertions designed to vilify the State and confuse the issues.

Rather than providing any legal authority or analysis in support of his sweeping positions, Nassiri premises his entire answer on a single factual contention: that he had no notice or knowledge of the State's proposed plans for a future flyover at the time that he entered into the Settlement Agreement. This linchpin assertion, which Nassiri threads throughout every single argument that he makes, is untenable.

First, it is uncontroverted that between 1999 and 2004, the State disclosed its proposed plans for a future flyover in full compliance with the National Environmental Policy Act (NEPA), the federal law governing the disclosure process related to the federally-funded Blue Diamond Project. 42 U.S.C. § 4321, *et seq.* In order to accept any of Nassiri's arguments, this Court would essentially

have to find that these federally-mandated and approved public disclosure procedures do not effectively provide notice to individual members of the public.

Second, Nassiri's linchpin assertion is demonstrably inaccurate. It is a continuation of the position taken by Nassiri for the first time ever in response to the State's motions for summary judgment. Prior to the close of discovery, Nassiri never denied knowledge of the State's publicly-disclosed plans for a future flyover. On the contrary, he contended that he reviewed those early plans—in 2005 as part of the State's NEPA disclosures, and again in 2010 as part of his Ground Lease with Las Vegas Paving—and "saw no problem with [the flyover]." 1PA00210; *see generally,* 1PA00196-210. "He saw [that] the [flyover] design wasn't going to affect the property." 1PA00210. Nassiri filed suit because the as-built flyover is different than what he expected based on the State's preliminary concepts. 1PA00030 ("had NDOT, through its agent Las Vegas Paving, not misrepresented the ***nature and configuration*** of the 'flyover' in April ***2010***, Plaintiffs would have taken action to object… or to obtain relief from the courts to change or halt these ***altered plans***.") (Emphasis added).

In January 2016, Nassiri flip-flopped and began asserting that the State never disclosed its proposed plan to build ***any*** flyover, which is his stance in the answer. Ans., 2. Despite previously conceding notice and knowledge of the State's proposed plans for a future flyover, in his answer Nassiri repeatedly

accuses the State of not only failing to inform him about the flyover, but ***misrepresenting*** its plans in some scheme to charge him "an increased price for visibility that it intended to obliterate with the flyover." Ans., 6.

Ultimately, Nassiri's ever-changing claims about his notice and knowledge of the State's early flyover plans are irrelevant. It is uncontroverted that the State provided multiple public notices of the flyover to Nassiri in compliance with state and federal law. Whether he admits receiving these notices (as he did at the outset) or denies receiving them (as he does now), it does not change the legal significance of the State's lawful public disclosures.

In sum, Nassiri's answering brief is baseless as a matter of fact and wrong as a matter of law. Nassiri continually fails to identify any contractual obligation that the State breached. He continually fails to identify any arbitrary or unfair acts that contravene the spirit of the quitclaim land sale. And he continually fails to identify any lawful basis to rescind the more than 10-year-old, fully negotiated Settlement Agreement.

Nassiri relies solely on alleged pre-contract "representations" that the State never made, that are found nowhere in the unambiguous Settlement Agreement, and that have nothing to do with the legal infirmities in his remaining claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and rescission. In reading the answer, it appears that Nassiri has confused these

remaining claims with his misrepresentation claims, which were dismissed at the outset under Rule 12(b)(5). 1PA00225.

Given the insufficiency of Nassiri's arguments and legal support, his incorporation of false liability theories, and his failure to respond to several of the State's points and authorities, this Court should grant the State's petition and issue a writ of mandamus compelling the district court to enter summary judgment in the State's favor on all of Nassiri's remaining claims.

ARGUMENT

I. This case is appropriate for writ review.

Before addressing any of the State's substantive arguments, Nassiri asks the Court to summarily reject the State's petition without even considering the pervasive legal errors that have occurred in this case. He asserts that the State "has an adequate remedy at law with an appeal from final judgment." Ans., 3. He is wrong.

The law is not in dispute. "The issue of whether an appeal is an adequate 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.*, 282 P.3d 743, 745-46 (Nev. 2012) (citation omitted). Under these factors, an

appeal from a final jury verdict and judgment is neither an adequate nor speedy remedy for the State in this case.

A. The status of the underlying proceedings supports writ review.

In the underlying action, discovery is complete and has confirmed (i) that there are no material questions of fact, and (ii) that the State is entitled to judgment in its favor on Nassiri's remaining claims as a matter of clear law. Based on the district court's erroneous legal rulings, however, the State is facing a lengthy and costly jury trial on groundless claims that should have been dismissed on summary judgment.

This Court will exercise its discretion to consider writ petitions challenging orders denying motions for summary judgment "where considerations of sound judicial economy and administration militate[] in favor of granting such petitions." *Smith v. Eighth Jud. Dist. Ct.*, 950 P.2d 280, 281 (Nev. 1997). Although an appeal from final judgment may often be an adequate remedy, the interest of judicial economy is "the primary standard by which this court exercises its discretion." *Id.* Resolving the dispositive issues in this case now is far more economical than forcing the State to incur the substantial costs of a jury trial on claims that have absolutely no legal or contractual basis.

In his answering brief, Nassiri attempts to minimize the significance of forcing the State through a 3-4 week jury trial on his groundless claims. He

reasons that the jury trial on his remaining contractual causes of action will somehow be "considerably shorter" than the six-day, limited bench trial on a narrow statute of limitations question. Ans., 5. His lone reason for this conclusion is that "the [jury trial] evidence will mimic the week-long [bench trial]." Ans., 5.

Nassiri offers absolutely no explanation or rationale in support of his illogical assertion that a jury trial on his remaining contractual claims will not be incredibly costly to Nevada taxpayers. He seeks more than ***$10 million*** in claimed contract damages. He alternatively seeks rescission to the tune of more than ***$40 million***. It's unclear whether or not the district court intends to include Nassiri's equitable rescission claim as part of the jury trial (Nassiri previously requested an "advisory jury"). 7PA01340. But either way, no trial—or trials—involving these significant stakes will be simple or short, let alone ***this*** trial, in which the district court's erroneous legal and evidentiary rulings have confused the issues beyond comprehension.

Moreover, the State will present a case that spans a historical time frame running from 1999 to 2010. Along with the circumstances surrounding the entry and terms of the underlying 2005 Settlement Agreement, the presentation of evidence will involve project planning, design, development, and construction. At a minimum, a trial will last 3-4 weeks. For Nassiri to suggest otherwise is inaccurate.

Justice delayed is justice denied. And the State should not have to spend one more minute or one more nickel defending against Nassiri's frivolous claims.

B. The types of issues raised in the State's petition support writ review.

1. The petition presents clear questions of law, dispositive of the suit.

This Court will exercise its discretion to review interlocutory summary judgment orders "in cases in which there [is] no question of fact, and in which a **clear** question of law, dispositive of the suit, [is] presented for [its] review." *Poulos v. Eighth Jud. Dist. Ct.*, 652 P.2d 1177, 1178 (Nev. 1982) (emphasis in original). It will also "exercise its discretion with respect to certain petitions where no disputed factual issues exist and, pursuant to clear authority under a statute or rule, the district court is obligated to dismiss an action." *Smith*, 950 P.2d at 281.

In denying summary judgment on Nassiri's remaining claims, the district court failed to construe and enforce the unambiguous Settlement Agreement as written; it granted Nassiri an implied negative easement of light, air, and view; it determined that a mistaken belief about the future is a valid ground for rescission; and it concluded that the applicable statutes of limitations were tolled until Nassiri ***individually*** realized facts that were lawfully disclosed to the public years earlier.

The State's petition established that there are no questions of fact related to these issues, which all present questions of law subject to de novo review. Nassiri

does not argue otherwise. He does not contend that the Settlement Agreement is ambiguous. Nor does he identify any other questions of fact that would preclude this Court from determining whether the district court misconstrued the unambiguous Settlement Agreement, created an implied negative easement, or wrongly determined that a mistaken belief about the future may justify rescission.

Nassiri also concedes that the State lawfully disclosed its future flyover plans in accordance with NEPA. Although he falsely denies receiving ***individual*** notice of the State's plans, he cannot contest that the State provided ***public*** notice of the flyover in compliance with both state and federal law. Unless this Court determines that the State's federally-mandated public disclosure process is ineffective to establish individual notice, the State's lawful NEPA disclosures triggered the applicable statutes of limitations. Thus, pursuant to clear statutory authority, the district court was obligated to dismiss Nassiri's remaining claims as time-barred.

2. The petition involves important issues of law and public policy.

This Court will also exercise its discretion to review interlocutory summary judgment orders in cases that present "serious issues of substantial public policy, or which involve [] important precedential questions of statewide interest." *Poulos*, 652 P.2d at 1178 (citations omitted). Recently, the Court exercised its discretion where, as here, the writ petition raised "important policy questions about the

State's ability to engage in efficient, long-term highway improvement projects." *See State v. Eighth Jud. Dist. Ct. (Ad America)*, 351 P.2d 736, 740 (Nev. 2015).

The State's petition established that the district court's erroneous legal rulings have left the State on precarious ground. Under the district court's inaccurate application of law, the State's settlement agreements are subject to court revision; the State's contractual integration clauses mean nothing; the State's quitclaim deeds include implied warranties; the State's land exchanges give rise to implied negative easements; and the State's federally-mandated public disclosure process doesn't conclusively establish notice against individual members of the public.

If upheld, the district court's legal rulings will likely require the State to significantly re-evaluate and change the way that it carries out its transportation responsibilities. Depending on the outcome of its petition, the State may have to overhaul its federally-approved public disclosure process, reconsider its practice of selling or exchanging surplus property as part of condemnation settlements, and/or scramble to determine what—if anything—it can possibly do going forward to prevent the courts from rewriting its fully negotiated, arm's length settlement agreements.

These issues, which touch on many of the State's ongoing, day-to-day activities, including those related to the massive Project Neon, should be settled

now, not several years down the road after a trial and appeal. Whether the Court agrees with the State's legal positions or not, the petition raises "important policy questions about the State's ability to engage in efficient, long-term highway improvement projects." *Ad America*, 351 P.2d at 740.

In his answer, Nassiri fails to meaningfully address these points and authorities (he never even mentions *Ad America*). While his argument is hard to follow, Nassiri seems to suggest that there's no real urgency in resolving these issues now because the State's petition challenges "events that occurred more than a year [earlier]." Ans., 4. This suggestion is misleading.

Although it's true that the State's petition ***includes*** challenges to orders that were entered in July of 2015, it's misleading to imply that the State was dilatory in filing its petition—or that including these issues undermines the importance of settling the issues raised by the State's petition sooner rather than later. During the interim months between these orders and filing its petition, the State diligently pursued its legal arguments in the district court. It proceeded through a week-long bench trial on the statute of limitations issue, only to have the district court conclude that its federally-mandated public disclosure process didn't actually provide effective public notice to Nassiri and his team of professional consultants. 8PA01570. It also filed two more dispositive motions, which were each inexplicably denied. 8PA01598, 9PA01649. These last two motions weren't

denied until January 19, 2016 (and written orders weren't entered until March 14, 2016). 12PA02451, 12PA02458. A short time later, on April 7, 2016, the State filed its all-inclusive petition. The State was diligent in bringing its petition.

The State had every reason to believe that the district court would dismiss Nassiri's claims under each one of its meritorious legal challenges. In truth, the State is stunned that the district court allowed Nassiri's claims to get to the point that this petition is even necessary. The State was not dilatory or unconcerned about the district court's erroneous legal rulings; short of capitulating to a lengthy and costly jury trial on legally baseless claims, the State was simply exhausting ***all*** of its avenues of relief in the district court before filing its petition. The State understands and respects that the Court expends an enormous amount of time and effort processing these petitions. It should not be punished for attempting to resolve or narrow the issues at the district court level before turning to this Court.

Nor should the State be maligned for taking the needed time to cogently brief and present its arguments to this Court. There is an urgency and strong need to vacate the district court's erroneous legal rulings. Until this Court reviews those rulings, the State won't know what actions—if any—it needs to take in the future to prevent courts from unwinding or rewriting its fully negotiated settlement agreements. And until the orders are vacated, they retain at least a colorable validity that poses a threat of copycat lawsuits and other continuing issues

(especially related to design-build projects such as Project Neon). But it would make little sense to sacrifice the substance of the petition to save a few weeks or months, when these troubling orders could linger for years if the State's petition is denied.

II. In denying summary judgment on Nassiri's breach of contract claim, the district court erred as a matter of law.

In the district court, Nassiri's approach was to avoid the State's legal arguments, confuse the issues, change his theories, and frivolously accuse the State of misrepresenting its public plans to divert attention away from the fatal flaws in his ever-changing claims. These same tactics are on display in the answer. He fails to address the State's legal arguments. His analysis is almost entirely unintelligible, bouncing from unsupported assertions to illogical conclusions. He retreats from his arguments about the flyover and the loss of visibility and concocts a brand new take on these prior liability theories involving the so-called "after-condition." And he continues to frivolously accuse the State of misrepresenting its public plans for a future flyover.

This Court must not be distracted by these rhetorical gimmicks. The relevant facts are uncontested. This was an arm's length transaction between two unrelated and sophisticated parties, who were each separately represented by counsel, real estate appraisers, and civil engineers. Nassiri approached the State about purchasing the Exchange Property, and he freely and voluntarily accepted

the State's offered sales price. 4PA00561, 595. Any existing plans to further develop the Blue Diamond Interchange were publicly disclosed and available to all citizens of the State, including Nassiri, his experienced counsel Chapman, his civil engineer Oxoby, his appraisers, and his real estate broker.

The State did not make any side promises to Nassiri that contradicted these public plans. It sold the Property to Nassiri "as-is, where-is, and with all faults," specifically making "no warranty, express or implied, of any kind with respect to any matter affecting the Property." 4PA00625. Nassiri cannot identify a contractual duty that the State breached, and his baseless arguments about pre-contract "representations" are all belied by the Settlement Agreement's integration clause.

A. Nassiri continually fails to identify any contractual obligation that the State did not fulfill.

According to Nassiri, his claim is no longer based on the flyover, the "'right to visibility,' or any other buzzword that [the State] employs." Ans. 20. Now, he contends that the State "breached the Settlement Agreement when it built something other than the "after-condition." Ans., 23. He defines the "after-condition" as the eternal configuration of the Blue Diamond Interchange after Blue Diamond was realigned over and to the east of I-15 as part of Phase 1 of the Blue Diamond Project. Ans., 11-12. In a convoluted analysis, Nassiri essentially claims that, during negotiations of the Settlement Agreement, the State promised

him that it would never develop the Blue Diamond Interchange beyond Phase 1 of the Blue Diamond Project, and that the State broke that promise by building something other than the "after-condition," which somehow amounts to a breach of the Settlement Agreement. Ans., 21-26.

Nassiri's argument is undermined by the plain and unambiguous terms of the Settlement Agreement. The phrase "after condition" is not a term found anywhere within the four corners of the Settlement Agreement. This term, which Nassiri contrived for the first time in his answer, was never negotiated or even discussed among the parties. Nor was it ever mentioned during the district court proceedings. Nassiri simply made it up in response to the State's petition, and he now asserts it as the cornerstone of claims that have been pending for nearly four years. But no matter how he characterizes the alleged breach—either as "the building of the flyover," as the interference with his visibility, or as the building of "something other than the 'after-condition'"—Nassiri's claim still fails under the unambiguous Settlement Agreement, which imposes ***no obligations*** with respect to any of these matters.

Further confounding the issue, Nassiri does ***not*** suggest that the State had any contractual obligations specifically relating to the "after-condition." Rather, he asserts that the State's contractual duty was "to accurately disclose [its] construction plans for the Blue Diamond Interchange" prior to him entering into

the Agreement. Ans., 20. But, again, no matter how he describes the duty, Nassiri's claim has no foundation in the Settlement Agreement.

The State discloses its transportation plans in compliance with applicable state and/or federal law. Because the State received federal funds to improve the Blue Diamond Interchange, it disclosed all of its plans in accordance with NEPA. The FHWA, the federal agency overseeing the Blue Diamond Project, reviewed these disclosures and confirmed that they were all *accurate* and compliant with NEPA. 4PA00512.

These lawfully disclosed plans were also available for public examination. *See* 23 CFR § 771.111, *et seq.* Anyone who was interested was free to review the State's existing present and future plans for the Blue Diamond Interchange. Nassiri has not and cannot point to any ***contractual*** language requiring the State to disclose its plans in any different, or more "accurate," manner than through its federally-approved public disclosure process.

The evidence is uncontroverted that the "Sketch Maps" that Nassiri relies upon to bolster his new "after-condition" theory were prepared by the State's Department of Transportation Right-of-Way Division for the sole purpose of showing land areas and boundaries. 5PA00854. These right-of-way land maps were not prepared to depict planned roadway improvements. They simply showed the Exchange Property that would be available after the State realigned Blue

Diamond as part of ***Phase 1*** of the Blue Diamond Project. *Compare* the "Sketch Map" (6PA01124) *with* the Figure 2 of the EA showing one possible configuration of the proposed Blue Diamond/I-15 Interchange, including a conceptual flyover (4PA00514).

Nassiri's logic is seriously flawed. He contends that these land maps were supposed to represent the ***eternal*** configuration of the Blue Diamond Interchange and that the State could never build anything other than what was depicted in these maps. If Nassiri is correct, then the State was obligated to include future improvements that were not only preliminary and subject to change, like the flyover, but also disclose future plans that did not yet exist. Thus, assuming that Nassiri (a sophisticated real estate investor), his attorney Chapman (a former Nevada deputy attorney general who represented NDOT in eminent domain matters for nearly ten years), and his civil engineer Oxoby (who worked for NDOT for 30 years and ended his tenure as NDOT's Chief Roadway Design Engineer) all misinterpreted these land maps as roadway design and engineering plans, Nassiri's "after-condition" theory would still be irrational.

Finally, even if this Court were to accept Nassiri's unsupported assertions about the contractual duty in this case, his breach of contract claim would nevertheless fail pursuant to clear authority under a statute or rule. *See Smith*, 950 P.2d at 281. Under NRS 11.190(1)(b), if the State had a contractual obligation to

accurately disclose its plans during negotiations of the 2005 Settlement Agreement, and it failed to perform that obligation, then Nassiri was required to file his breach of contract claim within six years. Because he waited more than 7 years to file this action, his breach of contract claim is time-barred.

B. Nassiri's reliance on alleged pre-contract "representations" is belied by the Settlement Agreement's integration clause.

In a tacit admission that his claim lacks any contractual support, Nassiri premises his entire argument on alleged representations that the State supposedly made while negotiating the Settlement Agreement. Ans., 20. Significantly, Nassiri doesn't argue that the State made any affirmative representations about its future development plans at the Interchange. Nor does he suggest that he even asked about the State's existing plans, which were always publicly available. Instead, he contends that the State undertook these significant contractual obligations by showing him Phase 1right-of-way maps that he somehow interpreted as the eternal roadway design configuration of the Blue Diamond Interchange, i.e., the "after-condition." Piling one flawed assertion on another, Nassiri argues that the "after-condition" was impliedly incorporated into the Settlement Agreement as "perhaps ***the***" most material term in the Agreement. Ans., 20 (emphasis in original).

Once again, Nassiri's argument is thwarted by the Agreement's actual language. The State did not make any "representations" or promises about the so-

called "after-condition while negotiating the Settlement Agreement. But even if it had, those "representations" or promises would have been mooted by the final language of the Settlement Agreement, which (at 4PA00595) contains an integration clause in which the parties each acknowledged that the "Agreement constitutes the entire agreement by and between [them] and supersedes and replaces and all previous agreements entered into ***or negotiated*** between the Parties." *See Kaldi v. Farmers Ins. Exchange*, 21 P.3d 16, 21 (Nev. 2001) ("The parol evidence rule forbids the reception of evidence which would vary or contradict the contract, since all prior negotiations and agreements are deemed to have merged therein.").

In the Settlement Agreement, Nassiri further expressly acknowledged that "no promise or inducement ha[d] been offered except as [set forth in the Agreement];" that he executed the Agreement "without reliance upon any statement or ***representation*** by any party ***or its representatives***;" that he "carefully read" the Agreement and "had the benefit and advice of counsel of [his] choosing;" that he understood that the Agreement was the "full and final" deal between the parties; and that he was entering into the Agreement "freely and voluntarily." 4PA00595. The district court erred as a matter of law by implying terms into the parties' fully integrated, unambiguous Settlement Agreement. *See Reno Club v.*

Young Inv. Co., 182 P.2d 1011, 1017 (Nev. 1947) ("Neither a court of law nor a court of equity can interpolate in a contract what the contract does not contain.").

C. Nassiri received the Exchange Property in the manner provided in the Settlement Agreement and quitclaim deed.

Nassiri also contends that he "did not receive the property bargained for in the Settlement Agreement." Ans., 23. Predictably, Nassiri offers no explanation for this contention, which has no basis in reality. In the Settlement Agreement, Nassiri bargained to acquire 24.42 acres of land from the State. 4PA00617. As mandated by NRS 408.533(3), which requires all property conveyances by the State to "be quitclaim in nature," and under the terms and conditions of the unambiguous Settlement Agreement, the State conveyed these 24.42 acres to Nassiri via quitclaim deed, as-is, where-is, and with all faults. 4PA00624. The quitclaim deed further specified that the State was making "no warranty, express or implied, of any kind with respect to any matter affecting the Property." 4PA00625. Nassiri received everything that he bargained for; he merely wants more. His "buyer's remorse" motivation in bringing this suit is not a legitimate claim for relief.

D. Nassiri's breach of contract claim relies on the repudiated doctrine of implied negative easements.

Nassiri seeks more than $10 million as alleged "compensation for the diminution of value to [his entire 66-acre parcel] due to the loss of ***visibility*** from

the new 'flyover.'" 9PA01817 (emphasis added). He originally pursued this claimed compensation as severance damage under his inverse condemnation claim. 9PA01671. But the district court dismissed his inverse claim on summary judgment because the State constructed the flyover entirely within its existing right-of-way. 8PA01536.

To circumvent the district court's order, Nassiri continued to pursue his dismissed severance damages as claimed contract damages. 9PA01705. The State moved the district court to strike these claimed contract damages because Nassiri never acquired a right to visibility or an easement for visibility in the Settlement Agreement. 9PA01649. The district court inexplicably denied the State's motion. 12PA02456. As a result, if there is a trial in this matter, Nassiri will be allowed to ask the jury to award him more than $10 million in compensation for the State's alleged infringement with a claimed ***implied*** right to visibility.

Nassiri overlooks this point. Without offering a scintilla of legal support, he simply concludes that his "claim is not based on a negative easement." Ans., 28. But Nassiri's self-serving assertions are no substitute for a cogent legal analysis.

Nassiri likely avoids the law because it squarely refutes his sweeping assertions. Even though he seeks damages related to his entire ***66-acre*** parcel, Nassiri argues that his claim for lost visibility "is based on his acquisition of the [***24-acre***] Exchange Property from NDOT pursuant to the Settlement Agreement."

Ans., 28. But no matter how Nassiri describes his claims or exorbitant damages demand, he has not and cannot show that he acquired a right to visibility by express covenant. He relies on a claimed implied negative easement of visibility—a doctrine that was repudiated more than 50 years ago. *See Boyd v. McDonald*, 408 P.2d 717, 722 (Nev. 1965) and *Probasco v. City of Reno*, 459 P.2d 772, 774 (Nev. 1969).

Finally, Nassiri ignores the rationale behind *Boyd* and *Probasco*. If the Court accepts Nassiri's unsupported declaration that his "claims are related to the agreements and not any implied easement," then the same problems that spurred the Court's decisions in *Boyd* and *Probasco* will arise here. Ans., 28. The parties will be litigating undefined rights, and because the Settlement Agreement inures to the benefit of Nassiri's successors in interest, the State will never know whether or why it can be sued for further improving the Blue Diamond Interchange in the future. As cautioned in *Boyd*, this result "would greatly embarrass the improvement of estates, and, by reason of the very indefinite character of the right asserted, promote litigation." 408 P.2d at 722. Rather than addressing these significant concerns, which form the foundation for the State's arguments on this issue, Nassiri rests on conclusory assertions that are not supported by any identifiable law.

III. In denying the State's motion for summary judgment on Nassiri's breach of the implied covenant of good faith and fair dealing claim, the district court erred as a matter of law.

Nassiri's analysis on this issue is, again, virtually incomprehensible. Rather than providing any hint of a cognizable legal analysis against the State's arguments, Nassiri simply concludes that the State contravened the spirit and intention of the Settlement Agreement in two ways: (1) "[b]y not constructing the interchange as expressly represented to [him]" during settlement negotiations, and (2) "by destroying the visibility that formed the basis of [the Exchange Property's] appraisals and sales value." Ans., 30. Neither of these unsupported assertions provides a legal basis for the district court's inexplicable refusal to dismiss Nassiri's breach of the implied covenant of good faith and fair dealing claim on summary judgment.

The State did not contravene the spirit of the 2005 Settlement Agreement by further improving the Blue Diamond Interchange in 2010. The State's future development at the Interchange was not a part of the parties' agreement. The Settlement Agreement contains no mention of the flyover, the preservation of view or visibility, or any other express term that would suggest that the spirit of this fully negotiated, arm's length land deal involved anything more than a quitclaim conveyance of property.

Nassiri's visibility argument fares no better. His constant assertion that the Exchange Property's visibility "formed the basis of its appraisals and sales value" is a gross distortion of the truth. Ans., 30. Nassiri admits that he never saw the State's ***independent*** appraisal of the Property until 2008, long after he entered into the 2005 Settlement Agreement. Even still, whether he misinterprets the terms of the appraisal, or is attempting to mislead this Court, nowhere in the appraisal does it state that visibility is a component of the Property's value. The appraisal's only mention of visibility is in a few passing references, buried deep within the appraisal, in relation to the appraiser's conclusion regarding the Property's highest and best use as a hotel/casino. The flyover obviously does not change this highest and best use, as Nassiri is still marketing the Property for development as a hotel/casino.[1]

In any event, Nassiri's reliance on the State's ***independent*** appraisal is totally irrelevant and does not support his theories. While the appraisal may have formed the basis for the State's ***independent*** opinion regarding the Exchange Property's fair market value, it did not dictate the agreed upon ***sales price***. Nassiri was free to disagree with the State's independent opinion of value. Nassiri had months to conduct his due diligence on the State's offer. 4PA00572, 582. No one

[1] While Nassiri argues in his answering brief that the flyover destroyed the visibility to his Property, both during his deposition and in his promotional materials used to market the Property for sale, he represented that the Property has "excellent visibility."

forced him to buy the Exchange Property. The lump sales price wasn't based on the Property's visibility or any other attribute or analysis that Nassiri can conjure up. The sole basis of the sales amount was Nassiri's voluntary acceptance of the State's initial asking price.

Moreover, assuming *arguendo* that the State contravened the spirit and intention of the Settlement Agreement as Nassiri contends, his argument is still legally deficient in two ways. First, the implied covenant of good faith and fair dealing only "prohibits arbitrary or unfair acts by one party that work to the disadvantage of the other." *Nelson v. Heer*, 163 P.3d 420, 427 (Nev. 2007). Nassiri makes no effort to show that the State's construction of the flyover was an arbitrary or unfair act that worked to his disadvantage. Nor could he make that showing.

The State's construction of the flyover was not an arbitrary or unfair act because the Settlement Agreement contains no mention of the flyover or the preservation of visibility. *See Nelson*, 163 P.3d at 427. Nor did it work to Nassiri's disadvantage, as Nassiri never raised the State's future construction at the interchange, or his Property's visibility, as a concern during negotiations of the Settlement Agreement. If Nassiri was worried about the State's future construction or the visibility of his Property going forward, then he could have and should have attempted to address his concerns in the Settlement Agreement. He not only said

nothing, but he voluntarily agreed to take the Exchange Property as-is, with "no warranties, express or implied, of any kind with respect to any matter affecting the Property." 4PA00625. Based on his own conduct, Nassiri cannot now claim that the State's future construction was an arbitrary or unfair act that worked to his disadvantage.

Second, in refusing to dismiss this claim, the district court used the implied covenant of good faith and fair dealing to expand the State's contractual duties beyond those contained in the express Settlement Agreement. As established in the State's petition, this was a clear error of law. *See Metcalf Const. Co., Inc. v. U.S.*, 742 F.3d 984, 991 (Fed. Cir. 2014), *accord, Nelson*, 163 at 427. Nassiri simply ignores this issue, which, in and of itself, justifies a writ of mandamus compelling the district court to dismiss Nassiri's breach of the implied covenant claim on summary judgment.

IV. In denying summary judgment on Nassiri's mistake-based rescission claim, the district court erred as a matter of law.

A. Nassiri's alleged mistaken belief about the future cannot, as a matter of law, substantiate his rescission claim.

Nassiri admittedly seeks to rescind the more than 10-year-old Settlement Agreement because, in 2005, he mistakenly believed that the State would not build an allegedly "visibility destroying flyover" in 2010. Ans., 31. He contends that his "claim for rescission is not based on a [future] contingency but on NDOT's

unambiguous ***plan*** at the time of the Settlement Agreement to construct the flyover...." Ans., 33 (emphasis added).

Nassiri cites no case, from any state or federal jurisdiction in the country, in which a court has awarded contractual rescission due to a mistake over future ***plans***. Nor has he cited any case, from any jurisdiction, where a court held that future ***plans*** were somehow not contingent because they were "unambiguous." He cannot cite these cases because they do not exist. It is well-settled that uncertainty about the future is not the same thing as a mistake of fact. *Tarrant v. Monson*, 619 P.2d 1210, 1211 (Nev. 1980).

In 2005, the future flyover was a contingency—an "event that may or may not occur; ***a possibility***." *Black's Law Dictionary*, 362 (9th ed. 2009) (emphasis added). It was to be built "when traffic demand warrants had been met and funding was available"—both contingencies. 4PA00512. Indeed, the only reason that the flyover was built in 2010 was because Las Vegas Paving included a flyover in its winning design-build bid proposal. 4PA00647. None of the other competing bids included the flyover, so the flyover ultimately could have been designed differently, built much later than 2010, or never at all.

Nassiri's argument that the State's ***plans*** to build a flyover in the future meant that "the flyover was an inevitability" instead of a contingency is without merit. Ans., 33. Even the best laid plans can change or fall through. The State's

conceptual plans in 2005 to later build a flyover could have been mooted or changed by an infinite number of possibilities—and, in fact, they did change as a result of Las Vegas Paving's 2009 design modifications. 4PA00647. This is why the State's 2005 flyover plans were, by definition, a future contingency.

Nassiri's false accusations that the State misrepresented its future plans do not save his claim. Ans., 32. Nassiri asserts that by showing him right-of-way plans that did not include a flyover, the State somehow promised him that it would never build a flyover. But right-of-way plans are designed to depict property boundaries and land areas, not project designs or engineering specifications.

Moreover, the right-of-way plans that Nassiri identifies relate to Phase 1 of the Four-Phase Blue Diamond Project. 4PA00512. The State never planned to build the flyover as part of Phase 1 of the Project. 4PA00512. The flyover wasn't to be fully designed or constructed until some unknown point in the future "when additional traffic demand warrants had been met and funding was available." 4PA00512. The flyover could have been constructed as part of a later phase of the Blue Diamond Project, or at some point after the Blue Diamond Project was completed. It ended up being the latter, as the flyover was fully designed and built as part of the separate and distinct 2010 Design-Build Project. It defies reason to suggest that these Phase 1 right-of-way maps should have included flyover construction plans that did not yet exist.

Still, even if his theory was correct, which it isn't, Nassiri would still be conceding that his mistake relates to a promise of future conduct (i.e., a promise to not build a flyover). But, under the Restatement, which this Court has adopted as Nevada law, "the mistake doctrine does not apply to predictions or promises of future conduct." *Shear v. National Rifle Ass'n of America*, 606 F.2d 1251, 1260 (D.C. Cir. 1979) (applying the Restatement (Second) of Contracts).

B. The district court's rationale is significantly flawed.

Despite acknowledging that "[p]rior to 2010, NDOT ***might*** have ***chosen*** to not build the flyover at all," the district court inexplicably concluded that the State's flyover plans were not a future contingency. 8PA01588 (emphasis added). In a confounding circular argument, Nassiri attempts to defend the district court's ruling by citing to the district court's faulty reasoning:

> Isn't that what the State said? Well, we were going to build it, we just needed 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. Ans., 34, citing 01787 (emphasis added).

Nassiri unwittingly makes the State's point. Under the district court's unsupported application of the law, which Nassiri asks this Court to accept without offering a shred of legal support or analysis, Nassiri's alleged mistake was not a valid basis for rescission until Nassiri decided so. His alleged mistake was "***dependent*** on who [the State] hired to design [the flyover] and how they designed

it." In other words, Nassiri's alleged mistake was ***contingent*** on future events and did not arise until the State actually built the flyover in 2010.

Moreover, Nassiri's alleged mistake only arose because the State constructed what Nassiri believes is a "visibility destroying flyover." If Nassiri had decided that the 2010 flyover did not obstruct his visibility, then he might have decided that he was never mistaken in the first place. Under Nevada law, however, "a mistake is a state of mind not in accord with the facts... [a]t the time the contract is formed." *Tarrant*, 619 P.2d at 1211.

Nassiri's rationale, which the district court adopted, violates virtually every basic rule regarding when an alleged mistake is a viable reason to rescind a contract. Nassiri did not make a mistake at the time he entered into the 2005 Settlement Agreement. He was not mistaken until something happened in the future, and then he suddenly decided that he made a mistake all those years earlier when he freely and voluntarily entered into the Settlement Agreement. If this is the law, then the courts will be flooded with "mistaken" litigants looking to unwind contracts that failed to meet their every expectation about the future.

C. If the Court somehow determines that Nassiri's alleged mistaken belief about the future is a viable basis to seek rescission, his claim still fails because he bore the risk of his alleged mistake.

Nassiri blames the State for anything and everything, even his own ***unilateral*** mistake. He suggests that the State was somehow responsible for

making sure that the Settlement Agreement addressed all of his individual concerns about the future, even though the State had no idea what those concerns even were. While, in his answer (at 37), Nassiri disclaims any responsibility for his alleged mistake, in the Settlement Agreement, he accepted "full responsibility" for it. 4PA00595.

Nassiri's see-saw arguments do not add up. The Settlement Agreement was an arm's length transaction. Nassiri was separately represented by his own team of attorneys, engineers, and real estate appraisers and consultants. If Nassiri believed that the State would never develop the Interchange beyond Phase 1 of the Blue Diamond Project, then it was incumbent on him to include language in the Settlement Agreement to that effect. But he never mentioned it. And the State had no reason to know that he never inquired into the State's public plans for a future flyover, or that he believed something so illogical. Again, the Settlement Agreement does ***not*** restrict or in any way preclude the State from designing and constructing roadway improvements, entirely within its own right-of-way, that the State deems warranted and necessary. Nassiri bore the risk of his mistake because he failed to include language in the contract to address the reasonable possibility that the State might further improve the Interchange—a possibility that was laid out in the State's publicly disclosed plans.

This same rationale was one of the main reasons for the Court's holding in *Land Baron Inv. v. Bonnie Springs Family LP*, 356 P.3d 511, 517 (Nev. 2015), which involved circumstances that are substantially similar to those present here. Nassiri contends that the State "draws a false correlation" between this case and *Land Baron*. Ans., 36. He spends nearly three pages attempting to distinguish the two cases. Ans., 35-38. The State will not go point-counter point with Nassiri on whether *Land Baron* applies here. This Court is more than capable of making that determination itself.

D. Based on the State's lawful NEPA disclosures, Nassiri's claim is time-barred.

Between 1999 and 2004, in full compliance with NEPA, the State held four public meetings on its proposed plans for the Blue Diamond Project, which included a proposed design for a future flyover. It gave lawful public notice of these meetings, either by publishing notice in multiple newspapers or by mailing notice directly to nearby landowners. It provided meeting handouts describing the project, including the proposed future flyover. It staffed the meetings with knowledgeable representatives to answer questions about the proposed plans, including those related to the flyover. It took public statements on the proposed improvements, including the flyover. It provided written responses to these statements, which included questions about the proposed flyover. And it published all of the notices, handouts, written statements, and responses in a comprehensive,

federally-mandated public EA document, which was approved by both the FHWA and the public (at a fifth and final, lawfully-noticed public meeting). 4PA00511-541. This lengthy and comprehensive EA process is how the State provides and memorializes notice of proposed transportation projects to all citizens of Nevada, including Nassiri.

Nassiri contends that that the district court correctly determined that these federally-required public disclosure procedures did not effectively establish notice of the State's proposed flyover plans. Ans., 38. Under the district court's misapplication of law, which Nassiri baldly asks this Court to accept, the State's federally-mandated public disclosure process is essentially meaningless. The district court's ruling, however, contradicts both federal law under NEPA and state law as provided in this Court's recent *Ad America* opinion. 351 P.3d at 744 (holding that "the reason there was public knowledge of Project Neon's anticipated need for Ad America's property was because NEPA required disclosure of the plans and an opportunity for public comment.").

Moreover, Nassiri admits that he attended several of the public meetings on the Project, received the direct-mail meeting notices and handouts describing a future flyover, and submitted multiple written statements expressing his support for the proposed improvements, which included a future flyover. He does not deny receiving notice of the State's flyover plans. Ans., 7-8; 4PA00517-20, 523-24,

526-31. He merely and self-servingly now says that "he could not independently decipher" the flyover from the notice that he was provided. Ans., 7. But, to the extent that this is true, which it isn't, the State is not to blame.

If anyone is to blame, it's Nassiri. At the public hearings that he attended, Nassiri acknowledges that the State' "made employees available to answer the questions of individuals, ***if asked***." Ans., 8 (emphasis in original). If Nassiri couldn't decipher the notice that he received, he could have and should have asked a knowledgeable State representative to explain the notice. That is why they were there. But Nassiri asserts that he didn't ask. He also apparently failed to ask for help from his own expert engineering consultant, Oxoby, who testified that he was fully aware of the State's plans for a future flyover but didn't think that those plans mattered to Nassiri because they didn't affect his property. 4PA00552, 5PA00936.

Regardless of what he understood, Nassiri was on inquiry notice solely by possessing the plans. *See Winn v. Sunrise Hosp. & Medical Center*, 277 P.3d 458, 463 (Nev. 2012). In *Wynn*, this Court affirmed summary judgment under the discovery rule because the plaintiff "was put on inquiry notice of his potential cause of action" simply by receiving medical records. *Id.* The Court reasoned that Plaintiff and his attorney could have combed through the voluminous medical records to determine "facts that would have led an ordinarily prudent person to investigate further." *Id.* The Court concluded that this evidence "***irrefutably***

demonstrate[d] that [Plaintiff] was put on inquiry notice of his potential cause of action." *Id.* (emphasis added). The same is true here.

This Court should not hold that the State's federally-mandated public disclosure process fails to effectively provide notice to individual members of the public. Nor should it hold that the statute of limitations on Nassiri's rescission claim was tolled for nearly five years because Nassiri failed to read documents that he admittedly possessed.

V. The district court erred by refusing to strike Nassiri's alleged evidence of contract damages.

A. Nassiri's dismissed inverse condemnation damages computation cannot be substituted in for his claimed contract damages.

Nassiri failed to ever disclose any computation of damages for his breach of contract claim during discovery. And when he did finally disclose it well ***after*** the close of discovery, he simply used his dismissed inverse condemnation damages computation as his claimed contract damages computation. Although Nassiri alleges in his Answer that "contract damages are equal to 'just compensation'" and that "both yield the same result," (Ans., 45), he fails to cite to any case, statute, treatise, or other legal authority in support of this assertion. That is because these two types of damages computations are not interchangeable and the district court erred by not striking Nassiri's alleged evidence of contract damages.

Under Nevada law, contract damages "are intended to place the non-breaching party in as good a position as if the contract had been performed." *Colorado Environments, Inc. v. Valley Grading Corp.*, 779 P.2d 80, 84 (Nev. 1989). Constitutional just compensation, however, includes the value of the property actually taken, and the damages, if any, to the remaining property. NRS 37.110.

As determined by the district court, the State did not take any portion of Nassiri's property. 8PA01536. Nassiri is not entitled to just compensation, either for a taking that didn't occur, or for severance damages to his entire 66-acre parcel of land related to a taking that didn't occur. Yet, that is exactly what Nassiri is seeking under his breach of contract claims. 9PA01705. And the district court intends to allow it. Nassiri's groundless claims should be dismissed. If the Court somehow disagrees, however, it should not allow Nassiri to recover more than $10 million in just compensation as a breach of contract damage.

B. Nassiri's damages evidence is highly prejudicial.

Nassiri's only damages evidence—the appraisal testimony of Keith Harper, MAI—is inadmissible. Harper's valuation opinion relates to a very specific date of value (04/17/13) that, by Harper's own admission, simply cannot be applied to any other dates. A valuation opinion as to any other date would—under USPAP—require him to conduct a whole new appraisal. 9PA01734 ("If the date of value

changes, I would have to do a new analysis as of whatever that date of value is."). Unless Nassiri's claimed contract damages were to somehow accrue on that specific date of valuation, which is legally impossible, Harper's testimony is irrelevant.

Although Nassiri has never identified the precise date on which the State allegedly breached the 2005 Settlement Agreement, he has definitely never claimed that it was April 17, 2013. Nassiri offers no basis in logic or law for allowing him to unilaterally pick the date on which his alleged damages are measured. He contends that "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." Ans., 46, *quoting Cheyenne Const., Inc. v. Hozz*, 720 P.2d 1224, 1227 (Nev. 1986). But *Cheyenne Const.* doesn't apply here.

Cheyenne Const. merely held that the cost to cure a certain constructional defect could be measured at the time of trial. 720 P.2d at 1227. Its holding is expressly limited to the "measure of damages for breach of a construction contract." *Id., citing Fairway Builders, Inc. v. Malouf, Etc.*, 603 P.2d 513, 526 (Ariz. Ct. App. 1979) (emphasis added). Even if it weren't, damages in *Cheyenne Const.* were measured as of the time of trial, not the date that the summons was served. If that case justified measuring damages on a different date of value

here—which it does not—it offers no support for selecting the date on which Nassiri was finally able to comply with Nevada's rules regarding service of process on the State.

Moreover, the reason that *Cheyenne Constr.* measured breach of contract damages as of the date of trial was because the damages were proximately caused by the need to cure a constructional defect. And the cost to cure that defect was higher at the time that the plaintiff proved his claim (i.e., the time of trial). It was not a random date that just happened to fit in with the plaintiff's ever-changing claims and disclosures.

Unlike *Cheyenne Constr.*, Nassiri's claimed contract damages are not proximately greater as of April 17, 2013. Other than the possibility that his property's value was higher on April 17, 2013, than on the alleged date of breach, there is nothing about this particular date that actually caused Nassiri's claimed contract damages to increase. Its relevance is limited to Nassiri's inverse condemnation claim, which has since been dismissed. 8PA01536-1543. Nassiri's failure to disclose his contract damages—or produce any relevant evidence of those damages—is not a "special circumstance" allowing him to cherry pick the date used to measure his claimed contract damages.

CONCLUSION

This is a case that should have been dismissed at the outset. The district court's series of erroneous legal rulings through multiple dispositive motions and a week-long bench trial have forced the State and Nevada taxpayers to incur hundreds of thousands of dollars in litigation expenses defending claims that have no legal or contractual basis.

Nassiri's claims are squarely contradicted by the unambiguous, integrated Settlement Agreement. There exists no contractual language precluding the State from improving the Blue Diamond Interchange. Nor is there contractual language requiring the State to forever preserve Nassiri's subjective expectations regarding the visibility of his Property. The district court's legal rulings wrongfully create an implied negative easement for view and visibility, which has long been repudiated in Nevada.

Nassiri's rescission claim is legally flawed and time-barred. The State lawfully disclosed its plans to Nassiri and he should not be allowed to avoid the legal significance of the State's federally-mandated disclosure process. Neither the State nor Nevada taxpayers should be burdened with the continued defense of this fatally flawed litigation. Extraordinary relief from this Court is warranted and desperately needed. Accordingly, and for all of the forgoing reasons, the State respectfully asks this Honorable Court to grant its petition and issue a writ of

mandamus compelling the district court to enter summary judgment in the State's favor on all of Nassiri's remaining claims.

DATED: August 10, 2016:

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CERTIFICATE OF SERVICE

Under NRAP 25(c)(1)(A), I certify that I am an employee of Kemp, Jones & Coulthard, LLP and that on this date I caused to be served, via the Nevada Supreme Court's electronic filing system, a true copy of the Reply in Support of Petition for Writ of Mandamus on the following people:

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