

CASE No. 20-_____

IN THE SUPREME COURT FOR THE STATE OF NEVADA, IN THE UNITED STATES OF AMERICA

**PHILLIP J. FAGAN, JR. an individual and as Trustee of the PHILLIP J.
FAGAN, FR. 2001 TRUST**

Petitioner,

vs.

**THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR, THE COUNTY OF CLARK, AND THE
HONORABLE ERIKA BALLOU, DISTRICT JUDGE**

Respondent,

and

AAL-JAY, INC., a Nevada corporation

Real Party in Interest.

Petition from the Eighth Judicial District Court, Clark County, Nevada
District Court Case No. A-21-832379-C
The Honorable Erika Ballou

EMERGENCY PETITION UNDER NRAP 27(e)

**PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE,
WRIT OF PROHIBITION UNDER 21(a)(6)**

**ACTION IS NEEDED IMMEDIATE BEFORE CLERK OF COURT
TRANSFERS PETITIONER'S REAL PROPERTY**

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NRAP 26.1 DISCLOSURE

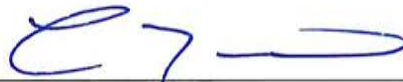
The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

- Phillip J. Fagan, Jr., is an individual residing in Clark County, Nevada.
- The Phillip J. Fagan, Jr., 2001 Trust, is a Nevada revocable trust.

Phillip J. Fagan, Jr., as an individual and as trustee of the Phillip J. Fagan, Jr., 2001 Trust, is represented in the District Court and in this Court by Christopher V. Yergensen, Esq., of the law firm of Black & Wadhams.

DATED: August 30, 2021

BLACK & WADHAMS



Christopher V. Yergensen (6183)

10777 West Twain Avenue, Suite 300

Las Vegas, Nevada 89135

Attorneys for Petitioner

ROUTING STATEMENT

This matter is presumptively retained by the Nevada Supreme Court pursuant to NRAP 17(a)(12). The Petition for Writ of Mandamus and for Prohibition (“Petition”) raises as a principal issue a question of statewide public importance, and/or this matter is not one of the enumerated case categories presumptively assigned to the Court of Appeals under NRAP 17(b). This matter seeks specific performance of an unexecuted and alleged land sale contract.

The Petition raises the issues of whether a District Court has the authority to (1) disregard the requirement of NRS 111.210(1) that a contract for the sale of lands be subscribed by the party upon which the sale is to be made; and (2) disregard precedent from this Court expressing that NRS 111.210(1) requires contracts for the sale of lands to be subscribed by the party upon which the sale is to be made. These issues have been raised throughout this Petition.

NRAP 27(e) CERTIFICATE

and

**AFFIDAVIT OF CHRISTOPHER V. YERGENSEN, ESQ. IN SUPPORT OF
PETITIONER'S EMERGENCY PETITION FOR WRIT OF MANDAMUS
AND/OR PROHIBITION**

STATE OF NEVADA, COUNTY OF CLARK:

1. I, Christopher V. Yergensen, am an attorney licensed to practice in the State of Nevada and I am an attorney with the law firm of Black & Wadhams, Attorneys for Petitioners Phillip J. Fagan, Jr., an individual and as trustee of the Phillip J. Fagan, Jr., 2001 Trust, in support of this Petition for Writ of Mandamus, or in the alternative, Writ of Prohibition under NRAP 21(a)(6), filed as an Emergency Motion under NRAP 27(e).

2. The telephone numbers and office address of the attorneys for the Real Party in Interest is listed as follows:

- Ogonna Brown, Esq., the law firm of Lewis Roca, 3993 Howard Hughes Parkway, Suite 600, Las Vegas, Nevada 89169, (702) 474-2622, obrown@lewisroca.com.

3. Counsel for Real Party in Interest was served with this Petition via electronic service as identified on the proof of service in this document. Prior to filing this Petition and Motion, my office contacted, by telephone, the clerk of the Supreme Court, the Clerk of the Eighth Judicial District Court of the State of Nevada,

and Real Party in Interest's attorney to notify them that Petitioners were filing the instant Petition for Writ of Mandamus, or in the alternative, Writ of Prohibition under NRAP 21(a)(6), filed as an Emergency Motion under NRAP 27(e).

4. Petitioner will lose its ownership interest in real property by actions of the Clerk of the Court of the Eighth Judicial District of the State of Nevada if this Court does not take immediate action.

5. Petitioner has owned the real property since May 9, 2006. This case began in response to Petitioner attempting to evict Real Party in Interest from the real property. On April 6, 2021, Real Party in Interest filed its complaint, and on May 18, 2021, Petitioner filed its Answer and Counterclaim.

6. On May 18, 2021, minutes after Petitioner filed its Answer and Counterclaim, Real Party in Interest filed an Emergency Motion for Specific Performance of Purchase Agreement, on Order Shortening Time, requesting that the District Court order specific performance of a draft "purchase agreement" that was not agreed to, nor executed, nor subscribed to, by Petitioner, the owner of the real property.

6. No discovery has been conducted by the parties, nor has there been any evidentiary hearings conducted by the District Court with regard to any allegations in the Complaint, Answer, or Counterclaim, nor has the District Court conducted any

evidentiary hearings with respect to the Motion for Specific Performance and the Opposition thereto.

7. On June 8, 2021, Petitioner filed an Opposition to the Motion for Specific Performance, asserting, among other things, that NRS 111.210(1) requires contracts for the sale of lands to be subscribed by the party by whom the sale is to be made, and that this Court in *Kern v. Kern*, 107 Nev. 988, 823 P.2d 275 (1991), expressed that specific performance under a contractual obligation to convey real property was not appropriate because the “agreement was not signed by the party to be bound” as required by NRS 111.210(1). *Id.* at 991. Specifically, this Court held that the signature of the owner and alleged seller of the land in question is required. *Id.* at 992.

8. On June 22, 2021, the District Court summarily granted the Motion for Specific Performance without placing any comments on the record, and summarily instructed legal counsel for Real Party in Interest to prepare the order for the District Court to consider.

9. On July 6, 2021, counsel for Real Party in Interest sent to me a draft of the proposed order for the District Court to consider. The draft order contained numerous factual conclusions based upon hearsay and lack of supporting evidence. On July 6, 2021, I sent an email to counsel for Real Party in Interest objecting to the

draft order. On July 12, 2021, I filed an Objection to the Draft Order with the District Court containing my objections.

10. On August 26, 2021, the District Court filed the Order Granting Emergency Motion for Specific Performance of Purchase Agreement, on an Order Shortening Time (the “Order”). On August 26, 2021, counsel for Real Party in Interest filed a Notice of Entry of Order.

11. The Order of the District Court provides findings of fact without ever conducting any evidentiary hearings on the matter.

12. For example, paragraph 1 of the Order of the District Court finds that discussions occurred between Real Party in Interest and Petitioner’s attorney, Mr. Richard Scott, Esq., despite the fact that an affidavit of Richard Scott’s daughter was submitted to the court that declares no such discussions could have occurred because Mr. Richard Scott was in a full-time nursing care facility for individuals suffering from dementia since 2019. And, paragraph 24 of the Order of the District Court refers to me, Chris Yergensen, as having made some sort of representations to Buyer, in which I declare, by this declaration, that I have never had any communication with the Buyer or any representative of the Buyer. I am not aware how or where the District Court could have made such finding of fact.

13. There are countless other findings of fact by the Court that are just not true, based upon my personal knowledge of representing Petitioner in this matter

since November, 2020. The Court arbitrarily and capriciously made conclusions of fact without any basis of evidence that normally would be gathered by discovery, an evidentiary hearing or a trial, which none has occurred in this case.

14. The Order of the District Court provides that the Clerk of the Court shall sign the “purchase agreement” attached to the Order as Exhibit “A” in the place of and instead of Petitioner, as well as the Clerk of the Court shall sign the transfer deed and other documents in the place of and instead of Petitioner to effectuate the sale of Petitioner’s real property to Real Party in Interest.

12. In doing so, Petitioner will suffer irreparable harm by losing its ownership interest in the real property.

13. The relief sought in this Writ Petition is not available by the District Court.

14. I certify that I have read this Petition and, to the best of my knowledge, information and belief, this Petition complies with the form requirements of Rule 21(d) and is not frivolous or interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the costs of litigation.

15. I further certify that this brief complies with all Nevada Rules of Appellate Procedure, including the requirements of Rule 28(e) that every assertion in the brief regarding matters in the record be supported by a reference to the appendix where the matter relied upon is to be found. I understand that I may be subject to

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

16. I have discussed this PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION UNDER 21(a)(6), filed as an EMERGENCY MOTION UNDER NRAP 27(e) with Petitioner, my client, and have obtained authorization to file this Writ Petition.

Further affiant sayeth naught.

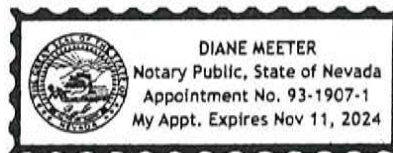


Christopher V. Yergensen, Esq.

Subscribed and sworn to before me by
Christopher V. Yergensen,
on this 30th day of August 2021.



Notary



Notary Seal:

I. PETITION

COMES NOW, Phillip J. Fagan, Jr., as an individual and Trustee of the Phillip J. Fagan, Jr., 2001 Trust (hereinafter, "Petitioner") by and through his counsel of record, Black & Wadhams, and petitions this Court for a Writ of Mandamus or, in the alternative, Writ of Prohibition under NRAP 21(a) ordering the Eighth Judicial District Court to vacate its order of August 26, 2021 and to enter an order denying the Motion for Specific Performance because an unexecuted contract by the owner of real property is void pursuant to NRS 111.210(1) and therefore, unenforceable as a matter of law, and by the very express terms of the alleged contract, the alleged contract was not valid until the both parties affixed their signatures thereon. Petitioner requests that this relief be granted on an emergency basis pursuant to NRAP 27(e) and NRAP 21(a)(6). This matter involves the ownership of real property and if the emergency relief is not granted irreparable harm will result.

This Petition and Motion are based on the following Memorandum of Points and Authorities, the Appendix of Record, and such oral arguments as presented to this Honorable Court.

DATED: August 30, 2021

BLACK & WADHAMS



Christopher V. Yergensen (6183)
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IV. MEMORANDUM OF POINTS AND AUTHORITIES

A. INTRODUCTION

Petitioners are entitled to a writ relating to the District Court's erroneous decision granting Real Party in Interest's Motion for Specific Performance (the "Motion for Specific Performance").¹ The District Court granted the Motion for Specific Performance and entered its Order August 26, 2021 (hereinafter, the "District Court's Order").²

The District Court's decision was in error because NRS 111.210(1) requires that a contract for the sale of land is void unless the contract is in writing and signed by the party by whom the sale is to be made. This Court in *Kern v. Kern*, 107 Nev. 988, 823 P.2d 275 (1991), expressed that specific performance under a contractual obligation to convey real property is not appropriate if the agreement is not signed by the party to be bound, as required by NRS 111.210(1). This Court expressed in *Kern*: "that because Dorsey was the owner and alleged seller of the land in question, his signature as an individual was required." *Id.* at 992 (Emphasis added).

Here, the District Court ignored Nevada law and this Court's express binding precedent in *Kern*. There is no dispute that the draft "purchase agreement" in which

¹ Appendix, Vol. I, Tab 9, PET 000196-000223, Emergency Motion for Specific Performance of Purchase Agreement, on An Order Shortening Time.

² Appendix, Vol. III, Tab 23 PET 000380-000402, Order Granting Motion for Specific Performance of Purchase Agreement, on An Order Shortening Time.

Real Party in Interest seeks to enforce in its Motion for Specific Performance was not agreed to, nor subscribed to, nor executed by Petitioner.³ In fact, the District Court actually ordered the Clerk of the Court to execute the “purchase agreement” in the place of and instead of Petitioner, an order by the District Court that has no grounds in law. Rather, Petitioner, as owner of the real property, is the party by whom the sale is to be made, and Nevada law requires Petitioner’s signature, not the Clerk of the Court’s.

Furthermore, the express terms of the alleged “purchase agreement” provide that the acceptance of the alleged “purchase agreement” is the “date that both parties have consented to a final, binding contract by affixing their signatures to this Agreement.” (Emphasis added).⁴ The alleged “purchase agreement” itself makes clear that there has been no acceptance of the obligations contained therein because Petitioner had not affixed his signature to the “purchase agreement”. Furthermore, the “purchase agreement” in which the District Court ordered to be enforced had expired by its own express terms prior to Buyer’s acknowledgement and its own

³ See *id.*; see also Appendix, Vol. II, Tab 13, at PET 000257-000260, Declaration of Phillip J. Fagan, Jr.

⁴ See Appendix, Vol. III, Tab 23, at PET 000399, Exhibit A, “The Residential Purchase Agreement for \$800,000” to Order Granting Motion for Specific Performance of Purchase Agreement, on An Order Shortening Time.

signature of the document, and as a matter of law, was not enforceable.⁵ Hence, there is not a valid contract to form a remedy of specific performance.

Therefore, Petitioner seeks a writ of mandamus from this Court requiring the District Court to vacate its order and enter an order denying the Motion for Specific Performance. Further, Petitioner alternatively seeks a writ of prohibition effectuating the same result.

This Petition has been filed as an Emergency Motion under NRAP 27(e) because the District Court's Order allows for the immediate transfer of Petitioner's real property to Real Party in Interest, without any further actions on the part of Petitioner. The District Court's order makes clear that the District Court and the Clerk of the Court will act in the place of and instead of Petitioner to transfer the real property to Real Party in Interest. Therefore, immediate action by this Court is necessary to protect the wrongful transfer of the Petitioner's real property, which will result in irreparable harm to Petitioner.

⁵ See *id.* at PET 000394-000396 (The document was not signed by Respondent until January 11, 2021, and the "Close of Escrow" was expressed to occur 25 days prior on December 17, 2020).

B. RELIEF SOUGHT

Pursuant to the Nev. Const. Art. 6 § 4, NRS 34.320 or NRS 34.160 and NRAP 21, Petitioners request that this Court issue a Writ of Mandamus and/or Writ of Prohibition instructing Respondent, the Eighth Judicial Court of the State of Nevada and the Honorable Judge Erika Ballou to:

1. Vacate the District Court's Order of August 26, 2021, granting Real Party in Interest's Motion for Specific Performance; and
2. Enter an order denying Real Party in Interest's Motion for Specific Performance in its entirety.

C. ISSUES PRESENTED

Issue One: Whether the District Court erred, as a matter of law, in granting Real Party in Interest's Motion for Specific Performance when the alleged contract did not comply with NRS 111.210(1), which provides that a land sale contract is void if not signed by the party by whom the sale is to be made.

Issue Two: Whether the District Court erred, as a matter of law, in granting Real Party in Interest's Motion for Specific Performance when the express terms of the alleged contract provide that the alleged contract is not valid until both parties affix their signatures upon the alleged contract.

Issue Three: Whether the District Court erred, as a matter of law, in granting Real Party in Interest's Motion for Specific Performance when the express terms of

the alleged contract had expired prior to any acknowledgement, acceptance or signature by either Party.

D. STATEMENT OF THE CASE

This case arises from a dispute over a residential home located in the Lake Las Vegas community at 1 Grand Anacapri, Henderson, Nevada (the “Property”). Petitioner has owned the Property since 2006.⁶

In 2014, Petitioner leased the Property to Real Party in Interest. Real Party in Interest took possession of the Property and remains in possession of the Property as of today.

In 2016, Petitioner entered into a purchase and sale agreement with Real Party in Interest wherein Real Party in Interest would purchase the Property by October 31, 2019 (the “Original Land Sale Contract”).⁷ Furthermore, Real Party in Interest would make monthly payments to Petitioner until such time as the purchase and sale transaction closed, with a portion of the monthly payment to be applied against the purchase price and the remaining portion to be applied against an accrual of interest.⁸

⁶ Appendix, Vol. 1, Tab 3, PET000021-000082, First Amended Complaint, and Appendix, Vol. I, Tab 6, PET000085-000122, Answer to Plaintiff’s Amended Complaint and Counterclaim.

⁷ See Exhibit 1 to the Complaint, Appendix, Vol. I, Tab 3, at PET000047-000056.

⁸ See *id.* at PET000049.

Over the course of the years, Real Party in Interest continually breached the terms of the Original Land Sale Contract by failing to make the monthly payments. Moreover, Real Party in Interest failed to purchase the Property prior to October 31, 2019.

Following Real Party in Interest's breach of the Original Land Sale Contract, the parties attempted to negotiate the ultimate purchase and sale of the Property. Various terms and conditions were negotiated, and ultimately never agreed to by either Petitioner or Real Party in Interest, such as an appropriate closing date and an appropriate purchase price. When terms and conditions of a purchase and sale of the Property could not be reached, Petitioner and Real Party in Interest executed two short term lease agreements for the months of February, March and April, 2021.⁹ Each lease agreement provided that the lease superceded all previous agreements between the parties, and that at the end of the Lease Term (as defined in each lease agreement), Real Party in Interest would vacate the premises.¹⁰ As of today, Real Party in Interest is wrongfully in possession of the Property without the consent of Petitioner and is a hold over tenant.

⁹ See Exhibits 11 and 12 to the Answer, Appendix, Vol. I, Tab 4, at PET000172-000184.

¹⁰ See *id.* at PET000179 and PET000180.

On April 6, 2021, Real Party in Interest filed its Complaint. On May 3, 2021, Real Party in Interest filed its First Amended Complaint.¹¹ On May 18, 2021, Petitioner filed its Answer to Plaintiff's Amended Complaint and Counterclaim.¹²

On May 18, 2021, Real Party in Interest filed its Emergency Motion for Specific Performance of Purchase Agreement, on an Order Shortening Time.¹³ Real Party in Interest's Motion for Specific Performance seeks to specifically enforce one of three unsigned draft "purchase agreements" that were drafted from December, 2020 to February, 2021. The Motion for Specific Performance is not based upon the Original Land Sale Contract of 2016,¹⁴ but seeks to enforce a draft "purchase agreement" which is attached to the District Court's Order.¹⁵ On June 8, 2021, Petitioner filed its Opposition for Specific Performance.¹⁶ On June 15, 2021, Real Party in Interest filed its Reply.¹⁷

¹¹ Appendix, Vol. 1, Tab 3, PET000021-000082, First Amended Complaint.

¹² Appendix, Vol. I, Tab 6, PET000085-000122, Answer to Plaintiff's Amended Complaint and Counterclaim.

¹³ Appendix, Vol. I, Tab 9, PET 000196-000223, Emergency Motion for Specific Performance of Purchase Agreement, on An Order Shortening Time.

¹⁴ *See id.*

¹⁵ *See* Appendix, Vol III, Tab. 23, Exhibit A, PET 000393-000401, Notice of Entry of Order Granting Emergency Motion for Specific Performance of Purchase Agreement, on An Order Shortening Time

¹⁶ Appendix, Vol. I, Tab 12, PET000237-000251, Opposition to Motion for Specific Performance.

¹⁷ Appendix, Vol. I, Tab 14, PET 000280-000289, Reply in Support of Emergency Motion for Specific Performance of Purchase Agreement, on An Order Shortening Time.

On June 22, 2021, the district court summarily granted the Motion for Specific Performance in its entirety.¹⁸ On August 26, 2021, the district court entered the Order, and on August 26, 2021, a Notice of Entry of Order was filed by Real Party in Interest.¹⁹

E. STANDARD OF REVIEW

The Nevada Supreme Court has original jurisdiction to issue writs of prohibition and mandamus. Nev. Const. Art. 6 § 4. Mandamus is available to compel performance of an act which the law especially enjoins as a duty resulting from an office, trust or station, or to control an arbitrary or capricious exercise of discretion. *Ivey v. Dist. Ct.*, 299 P.3d 354 (2013). *See also* NRS 34.160. “[W]here an important issue of law needs clarification and public policy is served by this court’s invocation of its original jurisdiction, our consideration of a petition for extraordinary relief may be justified.” *Mineral County v. State, Dep’t of Conserv.*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2010) (internal citations omitted).

Writ relief is warranted where the Petitioners do not have a plain, speedy, and adequate remedy at law. *Millen v. District Court*, 122 Nev. 1245, 1250-1251 (2006).

¹⁸ See Appendix, Vol. III, Tab 16, PET000293-000299, Recorder’s Transcript of Hearing: Emergency Motion for Specific Performance of Purchase Agreement, on An Order Shortening Time (Court making clear that the Court was going “to sign whatever Ms. Brown puts in front of” the Court. PET000298).

¹⁹ Appendix, Vol III, Tab. 22, PET 000355-000379, Notice of Entry of Order Granting Emergency Motion for Specific Performance of Purchase Agreement, on An Order Shortening Time.

Special factors favoring writ relief include status of underlying pleadings, types of issues raised by the writ petition, and whether a future appeal will permit this court to meaningfully review the issues presented. *D.R. Horton v. District Court*, 123 Nev. 468, 474-75 (2007). An appellate court generally will address only legal issues presented in a writ petition. *See Poulos v. Eighth Jud. Dist. Ct.*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982). “[T]he standard” in the determination of whether to entertain a writ petition is “[t]he interests of judicial economy.” *Smith v. Eighth Jud. Dist. Ct.*, 113 Nev. 1343, 1355, 950 P.2d 280, 281 (1997). When the parties raise only legal issues on appeal from a district court order, the Court reviews the matter de novo. *St. James Village, Inc. v. Cunningham*, 125 Nev. 211, 216 (2009).

F. ARGUMENT

Specific performance is an order from the court requiring a valid contract be fully performed according to its terms. *See* Restatement (Second) of Contracts §357, cmt. A (1981); *see also* 71 Am. Jur. 2d Specific Performance §134 (2014) (“To succeed in an action for specific performance of a contract for the purchase of real property, a petitioner must show by clear and convincing evidence that there is a valid contract to purchase real property”). And, following the determination of a valid contract, this Court expressed that specific performance is available only when: (1) the terms of the contract are definite and certain, (2) the remedy at law is

inadequate, (3) the party seeking specific performance has tendered performance, and (4) the court is willing to order it. *Serpa v. Darling*, 107 Nev. 299, 304 (1991).

Here, the District Court has arbitrarily and capriciously ruled the existence of a valid contract, when Nevada law, judicial precedent, and the express terms of the draft “purchase agreement” say otherwise.

1. Pursuant to NRS 111.210(1), the draft “purchase agreement” is void as a matter of law.

One of the most fundamental and long-standing concept of the law of contracts is the legal doctrine of the statute of frauds, which requires certain contracts to be in writing. The statute of frauds comes from an Act of the Parliament of England in 1677, it is a Contracts-101 subject in law school, and is essentially a doctrine, with its accompanying title, designed to prevent frauds and perjuries, such as this case. Contracts for the transfer of an interest in land has long been designated as a contract that must be in writing pursuant to the statute of frauds.²⁰

Nevada, some 150 years ago, codified the statute of frauds with respect to a contract for the sale of lands. NRS 111.210(1) states:

“Every contract . . . for the sale of any lands, or any interest in lands, shall be void unless the contract . . . be in writing, and be subscribed by the party by whom the . . . sale is to be made.” (Emphasis added).

²⁰ See Legal Information Institute, (6 August 2007) “Statute of Frauds”.

Here, there is no dispute that the draft “purchase agreement” attached to the District Court’s Order is not subscribed to by Plaintiff. Plaintiff did not execute the draft “purchase agreement” and made such a fact clear to Defendant. In fact, the District Court’s Order does not even mention NRS 111.210(1), despite the fact that Plaintiff’s Opposition to the Motion for Specific Performance raises it as the first and foremost legal issue. Further, Real Party in Interest did not even raise NRS 111.210(1) in its Motion, nor in its Reply. The District Court, along with the Real Party in Interest, essentially ignored NRS 111.210(1) entirely, which is completely arbitrary and capricious.

Furthermore, to make matters even more bizarre, the District Court’s Order actually mandates the Clerk of the Court to sign the draft “purchase agreement” in the place of and instead of Petitioner. Such an order is beyond the bounds of any authority or power granted to the District Court, is a form of involuntary servitude against Petitioner, and is completely contrary to NRS 111.210(1) which provides that the signature must be subscribed by the party by whom the sale is to be made. The signature must be Petitioner’s, not the Clerk of the Court.

Here, there is no valid contract in which this court can even determine a remedy of specific performance. The draft “purchase agreement” was not executed by Petitioner, as the seller of the real property. NRS 111.210(1) makes clear that under these circumstances, the draft “purchase agreement” is void as a matter of law.

This Court has made clear that the specific “enforcement of a nonenforceable contract [is] impossible.” *Serpa*, 107 Nev. at 304.

The motion for specific performance should be denied in its entirety.

2. This Court has made clear that NRS 111.210(1) requires the signature of the owner/seller of the land in question.

In *Kern v. Kern*, 107 Nev. 988, 823 P.2d 275 (1991), this Court expressed that specific performance under a contractual obligation to convey real property was not appropriate because the “agreement was not signed by the party to be bound.” *Id.* at 991. The *Kern* decision made clear that NRS 111.210 (1) requires that a contract for the sale of land to be in writing, “and be subscribed by the party by whom the lease or sale is to be made.” *Id.* at 992. This Court concluded “that because Dorsey was the owner and alleged seller of the land in question, his signature as an individual was required.” *Id.* (Emphasis added).

As stated earlier, there is no dispute that the “purchase agreement” in the Motion for Specific Performance was not executed by Petitioner. The “purchase agreement” is incomplete and is missing the most important element, the signature of the seller, among other things. See *Dodge Bros. v. Williams Estate Co.*, 52 Nev. 364, 287 P. 282 (1930) (stating that “[t]here is no better established principle of equity jurisprudence than that specific performance will not be decreed when the contract is incomplete, uncertain, or indefinite.”) Furthermore, given that there is no written contract executed by Petitioner for the sale of his real property, NRS

111.210 makes clear that purported contract is void, as a matter of law. Therefore, in accordance to this Court's case precedence, there is no valid contract in which to provide a remedy of specific performance.

Furthermore, most troubling with the District Court's Order is that it completely ignores any discussion of this Court's decision in *Kern* and NRS 111.210(1). The district court does not even seek to distinguish this case from the facts of *Kern*, which is squarely on point, and fails to even address Nevada's long-standing requirement codified in NRS 111.210 that real estate sales contracts be in writing and signed by the person by whom the sale is to be made (the owner/seller). Rather, the District Court cites to a few Nevada cases as "instructive", and willfully fails to recognize that each Nevada case cited by the District Court is notably distinctive to this case.²¹ In each case cited by the District Court, the facts supported compliance with NRS 111.210(1) in that a valid land sale contract existed. The issue in each case was simply whether the remedy of specific performance was appropriate based upon the valid land sale contract in the first place.²² Each case cited by the

²¹ See Appendix, Vol III, Tab 23, the District Court's Order, PET000389.

²² The cases cited by the District Court are: *Carcione v. Clark*, 96 Nev. 808 (1980) (action based upon land sale contract subscribed to by owner); *Woods v. Bromley*, 69 Nev. 96 (action based upon executed property settlement agreement between husband and wife); *Dodge Bros., Inc. v. Williams Estate Co.*, 52 Nev. 364 (1930) (action on executed contract for sale of land that contained an option to purchase); *Harmon v. Tanner Motor Tours*, 79 Nev. 4 (1963) (action on contract for exclusive licensing rights); *Southern Pacific v. Miller*, 39 Nev. 169 (1916)(action based upon an agreement signed by both parties); *Gullo v. City of*

District Court had a land sale contract that was in writing and executed by the seller in conformance to NRS 111.210(1), and the issue was the remedy, not the validity of the contract.²³

Here, the facts are completely different because there is no contract that conforms to NRS 111.210(1), and therefore is void as a matter of law. The cases cited by the District Court are not “instructive”, they are not persuasive, and serve no precedential purpose whatsoever. Rather, the *Kern* case is directly on point, which is completely ignored by the District Court.

Here, the District Court’s Order simply alludes to a “meeting of the minds” to conclude there was a “valid, binding and enforceable contract evidenced by the Purchase Agreement for the sale of the property from Seller to the Buyer in the amount of \$800,000.”²⁴ The District Court makes such a conclusion without any substantiated evidentiary basis. No discovery in this case has been conducted, nor has there been a trial on the merits, nor has the District Court held any evidentiary hearing to have the opportunity to judge the witnessess’ credibility to determine any

Las Vegas, 131 Nev. 1287 (2015)(action based upon executed purchase and sale agreement to sell real property); *Mosso v. Lee*, 53 Nev. 179 (1931)(action based upon executed agreement to sell land); *Cheney v. Libby*, 134 U.S. 68 (1890)(action based upon written agreement executed by both parties).

²³ See *Lear v. Bishop*, 86 Nev. 709 (1970)(holding that escrow instructions was valid contract because the purchase and sale terms were memorialized in the escrow instructions and signed by the land owner).

²⁴ See Findings of Fact, paragraphs 9, 10, and 11 of the District Court’s Order, Appendix, Vol. III, Tab 23, PET 000381-000382.

such facts. *See* NRCP Rule 52 (Expressing that “[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”).

Furthermore, the District Court blindly disregarded any declarations within Petitioner’s Opposition to the Motion for Summary Judgment that presented contrary evidence. Most egregious is the Court’s very first Findings of Fact that concludes that in the “latter part of 2020, Mr. DeCarlo, on behalf of Buyer, engaged in discussion with Dr. Fagan’s attorney, Richard Scott, Esq., regarding the existing terms of the Property purchase.” It is this foundational fact that Real Party in Interest based the opening of escrow, and the drafting of the “purchase agreement”. But, according to Mr. Richard Scott’s daughter, Mr. Scott has been in a full-time nursing care facility for dementia since 2019, and therefore, no such conversations could have even occurred.²⁵ Petitioner also confirmed that Mr. Scott had not been acting as his attorney since 2009 due to Mr. Scott’s failing mental health.²⁶ Furthermore, other findings of fact by the Court are scattered, inconsistent, and make assumptions without any evidentiary support.

²⁵ *See* the Declaration of Cassandra Marino (Richard Scott’s daughter), Appendix, Vol. II, at PET000254-000256.

²⁶ *See* the Declaration of Philip R. Fagan, Jr., Appendix, Vol. II, at PET000257-000260.

And while the District Court did its best to find facts, albeit unsupported by substantiated evidence, in an attempt to find the existence of valid contractual principals, such an exercise is futile when dealing with a land sale contract if such a contract violates NRS 111.210(1). As a matter of law, the “meeting of the minds” or the “acceptance” of a land sale contract is when the contract is reduced to writing and signed by the land’s owner. NRS 111.210(1) makes this clear, and noncompliance makes the contract void as a matter of law. The District Court ignored this issue completely, and even actually ordered the Clerk of the Court to sign the “purchase agreement” in the place of and instead of Petitioner. Such actions by the District Court ignored legal precedent from this Court, ignored the express provisions of NRS 111.210(1), and overstepped its legal authority by ordering the Clerk of the Court to sign a private-party land sale contract to which the Clerk of the Court does not own, nor have any interest in such real property. Such actions by the Court are legally out-of-bounds, clearly in error, and are easily classified as an arbitrary and capricious exercise of discretion. This is an important issue of law that justifies extraordinary relief from this Court and Petitioner requests the appropriate remedy through this writ of mandamus/writ of prohibition. This Court should order the District Court to vacate the District Court’s Order in its entirety, and order the District Court to deny the Motion for Specific Performance in its entirety.

3. The express terms of the draft “purchase agreement” provide that the contract is not valid, and therefore, unenforceable as a matter of law.

The express terms of the draft “purchase agreement” provide that it is not a valid contract, and therefore not enforceable as a matter of law.

First, Section 4.b of the draft “purchase agreement” provides that the Close of Escrow shall be on or before 5:00 pm on Thursday, December 17, 2020.²⁷ The district court concludes that the draft “purchase agreement” was executed by the Real Party in Interest on January 21, 2021,²⁸ some 36 days after the date in which the Real Party in Interest was required to purchase the Property. The draft “purchase agreement” had expired by its own express terms before any “acceptance” was made by either party. Therefore, the draft “purchase agreement” was not a valid contract and cannot be enforced as a matter of law.

Furthermore, given that the essential term of the closing date had expired, an essential term of the “purchase agreement” was missing, and therefore was incomplete and indefinite. The draft “purchase agreement” required the parties to further negotiate the essential term and condition of a closing date. *See Lahaina-*

²⁷ See Appendix, Vol. III, at PET000396.

²⁸ The District Court is in error with this conclusion. The draft “purchase agreement” was executed by Real Party in Interest on January 11, 2021, not January 21, 2021, but still 25 days after the closing date of December 17, 2020. *See* PET000394.

Maui Corp. v. Tau Tet Hew, 362 F.2d 419, 422 (9th Cir. 1966) (stating that “if . . . negotiations of the parties affirmatively disclose or indicate *further* negotiations, terms and conditions are contemplated, the proposed [contract] . . . is considered incomplete and incapable of being specifically enforced.”). This Court has held that if the “purchase agreement” is incomplete and is missing an important element, such as the closing date, such a contract is not appropriate for specific performance. *See Dodge Bros.*, 52 Nev. at 364 (1930) (stating that “[t]here is *no better established principle of equity jurisprudence* than that specific performance will not be decreed when the contract is incomplete, uncertain, or indefinite.”). Specific performance is not warranted under these specific facts.

Second, Section 18 of the draft “purchase agreement” provides that the term “Acceptance” means “the date that both parties have consented to a final, binding contract by affixing their signatures to this Agreement.” (Emphasis added).²⁹ Section 4.a of the draft “purchase agreement” provides that the “Opening of Escrow” take place “by the end of one (1) business day after Acceptance of this Agreement” and only after the title company’s “receipt of this fully accepted Agreement.”

Here, the Petitioner did not “affix” his signature to the draft “purchase agreement.” By the very express terms of the draft “purchase agreement”, “Acceptance” has not even occurred, and the title company has never received a fully

²⁹ See Appendix, Vol. III, at PET000396-000400.

“accepted” agreement to even open escrow. Escrow should have never been opened in the first place, which would not even allow for a “close of escrow.” Again, the draft “purchase agreement” was not a valid contract by its own express terms and cannot be enforced as a matter of law.

V. CONCLUSION

This petition seeks relief from this Court of an important issue of law – whether a court may order specific performance based upon an alleged land-sale contract that violates NRS 111.210(1), and may a court order specific performance where the express terms of the land-sale contract provide that the contract is not valid until the signature of both parties are affixed thereon, or the very terms of the contract have expired prior to acceptance by either party. This matter requires resolution on an emergency basis because the District Court’s order provides for the immediate transfer of Petitioner’s Property. If the requested relief is not granted on an emergency basis, Petitioner’s rights in the Property will be irreparably damaged. Petitioner respectfully requests:

1. That this Court issue an immediate order vacating the District Court’s Order granting the Motion for Specific Performance.

2. That this Court issue an immediate order denying the Motion for Specific Performance in its entirety.

DATED: August 30, 2021

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VI. CERTIFICATE OF COMPLIANCE

I hereby certify that this petition 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 petition has been prepared in a proportionally spaced typeface using Microsoft Word Processor for Windows 10 in 14 point Times New Roman font. I further certify that this petition complies with the page or type-volume limitations of NRAP 21(d), because, excluding the parts of the petition exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and contains 6,580 words.

V. CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of August 2021, that I served a copy of the foregoing document upon counsel of record for Real Party in Interest and the District Court, Department 24, by electronic mail to the following:

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