

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Aug 31 2021 08:14 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

<p>PHILLIP J. FAGAN, JR., an individual, and as Trustee of the PHILIP J. FAGAN, JR. 2001 TRUST,</p> <p>Petitioners,</p> <p>v.</p> <p>EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, THE HONORABLE ERIKA BALLOU, DISTRICT COURT JUDGE,</p> <p>Respondents.</p> <p>and</p> <p>AAL-JAY, INC., a Nevada corporation; CHRISTIANO DE CARLO, an individual; and LAIL LEONARD, an individual</p> <p>Real Party in Interest.</p>	<p>Supreme Court No.:</p> <p>Case No. A-21-832379-C</p>
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**APPENDIX TO EMERGENCY PETITION UNDER NRAP 27(e)
PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF
PROHIBITION UNDER 21(a)(6)**

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**APPEAL
FROM THE EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE ERIKA BALLOU/CASE NO. A-21-832379-C**

**APPENDIX ON APPEAL
VOLUME III OF III
INDEX TO PETITIONERS' APPENDIX OF RECORD**

VOLUMES

No.	Date of Item	Description	Vol.	Bates Nos.
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VOLUME I

1.	04/06/2021	Complaint	I	PET000001 PET000019
2.	04/06/2021	Initial Appearance Fee Disclosure	I	PET000020
3.	05/03/2021	First Amended Complaint	I	PET000021 PET000082
4.	05/04/2021	Affidavit of Service – Philip Fagan, Jr.	I	PET000083
5.	05/04/2021	Affidavit of Service – Philip Fagan Trust	I	PET000084
6.	05/18/2021	Answer to Plaintiff's Amended Complaint and Counterclaim	I	PET000085 PET000122
7.	05/18/2021	Exhibits 1 – 13 to Answer to Plaintiff's Amended Complaint and Counterclaim	I	PET000123 PET000193
8.	05/18/2021	Initial Appearance Fee Disclosures	I	PET000194 PET000195
9.	05/18/2021	Emergency Motion for Specific Performance of Purchase Agreement, on An Order Shortening Time	I	PET000196 PET000223
10.	05/28/2021	Stipulation and Order to Continue Hearing	I	PET000224 PET000228
11.	06/01/2021	Notice of Entry of Stipulation and Order to Continue Hearing	I	PET000229 PET000236

VOLUME II

12.	06/08/2021	Opposition to Motion for Specific Performance	II	PET000237 PET000251
13.	06/09/2021	Exhibits 1 through 5 of Defendant's Opposition to Plaintiff's Motion for Specific Performance of Purchase Agreement	II	PET000252 PET000279

14.	06/15/2021	Reply In Support of Emergency Motion for Specific Performance of Purchase Agreement, on Order Shortening Time	II	PET000280 PET000289
15.	06/15/2021	Demand for Jury Trial	II	PET000290 PET000292

VOLUME III

16.	06/30/2021	Recorder's Transcript of Hearing: Emergency Motion for Specific Performance of Purchase Agreement, on an Order Shortening Time	III	PET000293 PET000299
17.	07/12/2021	Objection to Draft Order for Emergency Motion for Specific Performance of Purchase Agreement, on an Order Shortening Time	III	PET000300 PET000316
18.	07/22/2021	Defendants/Counterclaimants' Motion for Stay Pending Adjudication of Defendants/Counterclaimants' Writ of Mandamus and/or In the Alternative, Writ of Prohibition	III	PET000317 PET000325
19.	07/29/2021	Stipulation and Order to Continue Hearing on Defendants/Counterclaimants' Motion for Stay Pending Adjudication of Defendants/Counterclaimants' Writ of Mandamus and/or In the Alternative, Writ of Prohibition	III	PET000326 PET000330
20.	07/30/2021	Notice of Entry of Stipulation and Order to Continue Hearing on Defendants/Counterclaimants' Motion for Stay Pending Adjudication of Defendants/Counterclaimants' Writ of Mandamus and/or In the Alternative, Writ of Prohibition	III	PET000331 PET000337
21.	08/05/2021	Plaintiff AAL-Jay, Inc.'s Opposition to Defendants/Counterclaimants' Motion for Stay Pending Adjudication of Defendants/Counterclaimants' Writ of Mandamus and/or In the Alternative, Writ of Prohibition	III	PET000338 PET000350
21.	08/11/2021	(Recorded) Notice of Pendency of Action (Lis Pendens)	III	PET000351 PET000354
22.	08/26/2021	Notice of Entry of Order Granting Emergency Motion for Specific Performance of Purchase Agreement, on an Order Shortening Time	III	PET000355 PET000379
23.	08/26/2021	Order Granting Emergency Motion for Specific Performance of Purchase Agreement, on an Order Shortening Time	III	PET000380 PET000402

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on this 30th day of August 2021.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system, and to the following.

Ogonna Brown, Esq.
Lewis Roca
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169
(702) 474-2622
obrown@lewisroca.com

DATED this 30th day of August 2021.

BLACK & WADHAMS

/s/ Christopher V. Yergensen
Christopher V. Yergensen, Esq.
Nevada Bar No. 6183
10777 W. Twain Avenue, Suite 300
Las Vegas, NV 89135
Attorneys for Petitions



1 RTRAN

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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7
8 AAL-JAY, INC.,

9 Plaintiff,

10 vs.

11 PHILIP FAGAN, JR.,

12 Defendants.

CASE#: A-21-832379-C

DEPT. XXIV

13
14 BEFORE THE HONORABLE ERIKA BALLOU, DISTRICT COURT JUDGE
15 TUESDAY, JUNE 22, 2021

16 **RECORDER'S TRANSCRIPT OF HEARING:**
17 **EMERGENCY MOTION FOR SPECIFIC PERFORMANCE OF**
18 **PURCHASE AGREEMENT, ON AN ORDER SHORTENING TIME**

19
20 APPEARANCES:

21 For the Plaintiff:

OGONNA M. BROWN, ESQ.

22
23 For the Defendants:

CHRISTOPHER YERGENSEN, ESQ

24
25 RECORDED BY: SUSAN SCHOFIELD, COURT RECORDER

1 Las Vegas, Nevada, Tuesday, June 22, 2021

2 *****

3 [Hearing began at 8:58 a.m.]

4 THE COURT: Page Number 3, AAL-JAY, Inc. versus Philip
5 Fagan, Jr., Case Number A-21-832379-C. And, ma'am, would you state
6 your appearance.

7 MS. BROWN: Good morning, Your Honor. Ogonna Brown
8 from the law firm of Lewis Roca, Bar Number 7589, on behalf of the
9 plaintiff and movant today, AAL-JAY, LLC.

10 THE COURT: Okay. And who do I have on behalf of the
11 Fagan – who else do I have?

12 MR. FLANNIGAN: This is Sean Flannigan for Leo Flangas.

13 THE COURT: Okay. That's not this case. We're looking for
14 someone representing Philip Fagan, Jr.

15 THE CLERK: It should be Mr. Yergensen.

16 THE COURT: Okay. We seem like we're going to have to
17 recall this case. So Ms. Brown, sorry about that.

18 MS. BROWN: May I sit here, Your Honor?

19 THE COURT: Sure. Yeah.

20 [Proceeding trailed and resumed at 9:03 a.m.]

21 THE COURT: Page Number 3, AAL-JAY, Inc. versus Philip
22 Fagan, Jr., Case Number A-21-832379-C. Ms. Brown is present, and
23 who else do I have? Mr. Yergensen, can you –

24 MR. YERGENSEN: Your Honor, I'm sorry. This is Chris
25 Yergensen for defendant, Philip Fagan.

1 THE COURT: Thank you.

2 So here's where I am. I'm inclined to grant the motion for
3 specific performance. I believe that the initial contract for the sale was
4 valid. I believe that the terms of the initial contract were definite and
5 certain. I believe that everything has been met. They were the original
6 total price and the requirement of the 35 months in payments.

7 I think that the remedy at law is inadequate because property
8 is considered unique and, therefore, any monetary compensation would
9 not be an adequate remedy for the plaintiff. And the plaintiff, I believe,
10 tendered performance on their end by taking possession of the property
11 as well as making payments towards purchasing the property, and I
12 think that specific performance is actually the solution in this case.

13 Mr. Yergensen, go ahead and make your record.

14 MR. YERGENSEN: Your Honor, that caught me a little bit off
15 guard in that the motion for specific performance was not on the original
16 contract, Your Honor.

17 The motion for specific performance is pursuant to a
18 residential purchase agreement that was drafted the 14th day of
19 December, 2020.

20 Your Honor, the motion – I apologize. That got me. That's not
21 even what the motion for specific performance was filed for. The original
22 contract, Your Honor, I believe – I don't even think that plaintiff
23 themselves are arguing that that contract is valid.

24 There were so many breaches throughout the five years, Your
25 Honor. And plaintiff has not even made a payment pursuant to that

1 contract for almost a year now, Your Honor.

2 The motion in front of this Court is not a motion for specific
3 performance under the original contract that was signed in 2016. The
4 motion for specific performance is for specific performance for a draft
5 purchase agreement that was drafted in December of 2020. I don't
6 know what more to say, Your Honor.

7 THE COURT: Okay. Ms. Brown.

8 MS. BROWN: Thank you, Your Honor.

9 We are here before this Court today arising from the original
10 contract in 2016, and as a result of that contract, we have the right to a
11 purchase agreement.

12 You will note for the record correctly that counsel for the
13 defendant, the seller, drafted an agreement for the purchase with a
14 specific term of \$800,000, and \$50,000 in escrow.

15 You'll note as Exhibit 12 that on January 6, 2021, an escrow
16 officer at First American Title sent a residential purchase agreement to
17 Ms. Leonard who is the representative of the plaintiff here, she is an
18 agent of the buyer, for a purchase price, again, very specific, \$800,000,
19 and a \$50,000 earnest money deposit. That's in Exhibit 12 to the
20 DeCarlo Declaration.

21 The purchase price reflected, just as this Court noted, that
22 there were 35 prior payments that the buyer made under the terms of
23 the original contract and addendum. That's Exhibit 13 to the DeCarlo
24 Declaration.

25 On January 11th, 2021, Ms. Leonard executed the purchase

1 agreement and transmitted it via e-mail to First American Title. And that
2 is, again, Exhibit 13 to the DeCarlo Declaration, Your Honor.

3 Turning next to what happened with the escrow. That's the
4 \$50,000 escrow deposit. On January 12th, 2021, the evidence brought
5 before this Court is that the buyer wired \$50,000 into escrow. That's
6 Exhibit 14. That is uncontested. Those are the facts before this Court.

7 Everything was on track with successful closing, and then to
8 the buyer's surprise on January 12, 2021, Dr. Fagan contacted Ms.
9 Leonard to dispute the purchase price. Notwithstanding the fact that his
10 lawyer drafted the document, it was submitted to escrow, my client, the
11 buyer, accepted the offer, signed it, and performed.

12 We are ready, willing, and able to proceed, Your Honor.
13 There is absolutely no evidence to the contrary. The issue with the
14 lease payments that were made after the fact are all current. We were
15 taken aback that they tried to renege on the deal, and so, of course, my
16 client wasn't going to pay for lease payments when there should have
17 been a closing that should have occurred months ago.

18 In the interim because of eviction efforts that the seller has
19 effectuated, we were able to avoid eviction because we told the Court
20 that we filed a complaint for specific performance before this Court, and
21 we tried to get this heard on shortened time. Counsel said he didn't
22 receive the motion with a file stamp even though I sent the motion to
23 him, so we agreed, of course, to continue the hearing to give him the
24 opportunity to brief it.

25 But we're before you today, Your Honor, with the exact

1 agreement that you cited to. It is for the purchase of property for
2 \$800,000, with the escrow of \$50,000.

3 I will note for the record in furtherance of our good faith efforts
4 to close, we've added more money to the escrow account, and we have
5 proof of that, Your Honor. We have now \$170,000 that's sitting in
6 escrow. We are ready, willing, and able to proceed with the closing.

7 We also have, and that's Exhibit 21 for this Court's reference,
8 and we also have lender confirmation for a loan that's approved, that's
9 Exhibit 22, up to \$680,000. So the delta between the \$170,000 and the
10 \$680,000, Your Honor, there's more than enough to cover the \$800,000
11 purchase price.

12 My client specifically seeks specific performance to require the
13 seller to proceed. This is a case of seller's remorse. It's absolutely
14 inappropriate. I know that there's been an uptick in the market. I've
15 seen more and more cases where the sellers are reneging on the deal.
16 This is inappropriate, and this is, Your Honor, the poster child for specific
17 performance, and we request that you grant our motion.

18 THE COURT: And I'm still inclined to grant the motion. Mr.
19 Yergensen, you're welcome to take that up, but I'm going to sign
20 whatever Ms. Brown puts in front of – not whatever Ms. Brown puts in
21 front, but a motion basically stating what I had said – I mean, an Order
22 stating what I had said. I'm going to ask you to run it by Mr. Yergensen
23 but I still think that she's correct. This is just seller's remorse.

24 MS. BROWN: I will submit the Order to opposing counsel
25 before I submit it to the Court.

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THE COURT: Thank you.


MS. BROWN: Thank you very much. Have a good day
everyone.

MR. YERGENSEN: Yep.

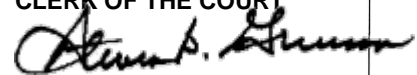
[Hearing concluded at 9:10 a.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the
audio/video proceedings in the above-entitled case to the best of my
ability.



SUSAN SCHOFIELD
Court Recorder/Transcriber



OBJ
BLACK & WADHAMS
Chris V. Yergensen, Esq.
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DISTRICT COURT
CLARK COUNTY, NEVADA

<p>AAL-JAY, INC., a Nevada corporation,</p> <p>Plaintiff,</p> <p>v.</p> <p>PHILLIP J. FAGAN, JR., an individual, and as Trustee of the PHILIP J. FAGAN, JR. 2001 TRUST,</p> <p>Defendants.</p>	<p>Case No. A-21-832379-C Dept. No.: 24</p> <p>OBJECTION TO DRAFT ORDER FOR EMERGENCY MOTION FOR SPECIFIC PERFORMANCE OF PURCHASE AGREEMENT, ON AN ORDER SHORTENING TIME</p>
<p>PHILLIP J. FAGAN, JR., as Trustee of the PHILIP J. FAGAN, JR. 2001 TRUST,</p> <p>Counterclaimant,</p> <p>v.</p> <p>AAL-JAY, INC., a Nevada corporation; CHRISTIANO DE CARLO, an individual; and LAIL LEONARD, an individual,</p> <p>Counter-Defendants.</p>	

COMES NOW, Defendants/Counterclaimants, PHILIP J. FAGAN, JR., an individual,
(hereinafter, "**Dr. Fagan**"), PHILIP J. FAGAN, JR., AS TRUSTEE OF THE PHILIP J. FAGAN,

1 JR. 2001 TRUST (hereinafter, the "**Fagan Trust**"), (Dr. Fagan and the Fagan Trust may
2 hereinafter be collectively referred to as "**Defendants**") by and through its attorney, Chris V.
3 Yergensen, Esq. of the law firm of Black & Wadhams, files this Objection to the Draft Order for
4 Emergency Motion for Specific Performance of Purchase Agreement, On an Order Shortening
5 Time. The objection to the Draft Order is hereby attached as Exhibit 1.
6

7 Dated: July 12th, 2021

8 **BLACK & WADHAMS**

9
10 By /s/ Chris V. Yergensen
11 Christopher V. Yergensen, Esq.
12 10777 West Twain Avenue, Ste 300
13 Las Vegas, NV 89135
14 cyergensen@blackwadhamslaw
15 *Attorneys for Defendants*
16
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am employee of Black & Wadhams, and that on the 12th day of July 2021, I served the above and foregoing OBJECTION TO DRAFT ORDER FOR EMERGENCY MOTION FOR SPECIFIC PERFORMANCE OF PURCHASE AGREEMENT, ON AN ORDER SHORTENING TIME on the following parties in compliance with the Nevada Electronic Filing and Conversion Rules:

Oganna Brown, Esq.
LEWIS ROCA ROTHERGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Ste. 600
Las Vegas, NV 89169
OBrown@lewisroca.com

/s/ Diane Meeter
An Employee of Black & Wadhams

EXHIBIT 1

Ogonna M. Brown, Esq. (NBN 7589)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
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Tel: 702.949.8200
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Attorneys for Plaintiff AAL-JAY, Inc.

IN THE EIGHTH JUDICIAL DISTRICT COURT
FOR THE COUNTY OF CLARK, STATE OF NEVADA

AAL-JAY, INC., a Nevada Corporation.

Plaintiff,

v.

PHILIP J. FAGAN, JR., an individual, and as
Trustee of the PHILIP J. FAGAN, JR. 2001
TRUST; DOES I through X, inclusive, and
ROE CORPORATIONS I through X,
inclusive,

Defendants.

Case No. A-21-832379-B

Dept. No. 24

**ORDER GRANTING EMERGENCY
MOTION FOR SPECIFIC
PERFORMANCE OF PURCHASE
AGREEMENT, ON AN ORDER
SHORTENING TIME**

An Application for Emergency Motion for Specific Performance of Purchase Agreement, on an Order Shortening Time ("Application") having been duly made by Plaintiff AAL-JAY, INC. ("Plaintiff", or alternatively, "Buyer") by and through its counsel, Ogonna M. Brown, Esq. of the law firm of Lewis Roca Rothgerber Christie LLP against Phillip J. Fagan, Jr. and Trustee of the PHILIP J. FAGAN, JR. 2001 TRUST ("Defendants", or alternatively "Seller"), by and through its counsel, Christopher Yergensen, Esq. of the law firm of Black & Wadhams, which Application was set for hearing on June 22, 2021, at 9:00 a.m. before Department 24 of the Eighth Judicial District Court, in and for Clark County, Nevada, with Judge Erika Ballou presiding, and good cause appearing therefor, and the Court, having reviewed the papers and pleadings on file herein and hearing the oral argument of the parties, finds the following:

FINDINGS OF FACT

1. ~~Sometime in the latter part of 2020, Mr. DeCarlo, on behalf of the Buyer, engaged in discussions with Dr. Fagan's attorney, Richard Scott, Esq. ("Attorney Scott") regarding the existing terms of the Property purchase.~~

Commented [CY1]: This is not fact, but is hearsay. There was never an evidentiary hearing to establish this alleged fact, nor opportunity for objection, nor opportunity to overcome objection.

2.1 ~~As a result of these conversations, on January 6, 2021, an Escrow Officer at First American Title Insurance Company ("First American") sent a Residential Purchase Agreement ("Purchase Agreement") to Ms. Leonard.~~

Commented [CY2R1]: Dr. Fagan's affidavit, as well as an affidavit submitted by Mr. Scott's daughter, dispute this allegation, and the Court has not conducted any evidentiary hearing to determine this fact.

Commented [CY3]: same comment as above

3.2 ~~According to the terms of the Purchase Agreement that was drafted and prepared by the Seller's attorneys and remitted-emailed by the escrow company First American, to the Buyer, the Purchase Price for the Property was \$800,000.00 ("Purchase Price"), which Purchase Agreement was conditioned upon the amount of \$50,000-\$5,000 to be placed in escrow with First American as an Earnest Money Deposit ("EMD").~~

4.3 ~~The Purchase Price under the Purchase Agreement reflected the (35) prior payments made under the terms of the original Contract and Addendum.~~

Commented [CY4]: This is not true, and is intentionally vague because the math does not equate to what is being expressed here.

5.4 ~~Buyer accepted the offer of \$800,000 as evidenced by the Purchase Agreement executed on January 11, 2021, by Lail Leonard as President of the Buyer, AAL Jay, Inc. ("Ms. Leonard").~~

Commented [CY5]: This is not true. How is there an acceptance of an unsigned real estate sales contract?

6.5 ~~On January 11, 2021, after Ms. Leonard executed the Purchase Agreement on behalf of the Buyer, Ms. Leonard transmitted via electronic correspondence the executed Purchase Agreement to the First American Escrow Officer.~~

7.6 ~~On January 12, 2021, the Buyer wired \$50,000 into an escrow account, as evidenced by the January 12, 2021 U.S. Bank General Wire Transfer Request.~~

8.7 ~~After Buyer executed the Purchase Agreement, Buyer timely funded the \$50,000.000 earnest money deposit ("EMD") with First American, the Buyer demonstrated that it was ready, willing, and able to purchase the Property under the Purchase Agreement.~~

Commented [CY6]: Timely? The express term of the draft purchase contract required the EMD to be deposited December 14, 2020.

9.8 ~~The Court hereby finds that there was a meeting of the minds and a binding agreement between the Seller and the Buyer for the Seller to sell the Property to the Buyer for \$800,000 as evidenced by the Purchase Agreement.~~

Commented [CY7]: This is not true. The purchase agreement is void, not binding, until the landowner signs the purchase agreement as required by NRS 111.210.

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1 ~~10.9. The Court hereby finds that there was a valid, binding and enforceable contract~~
2 ~~evidenced by the Purchase Agreement for the sale of the property from the Seller to the Buyer in~~
3 ~~the amount of \$800,000.~~

4 ~~11. The Court hereby finds that there was a meeting of the minds and a binding~~
5 ~~agreement between the Seller and the Buyer for the Seller to sell the Property to the Buyer for~~
6 ~~\$800,000 as evidenced by the Purchase Agreement.~~

7 ~~12.10. The Court hereby finds that after the Buyer executed the Purchase Agreement and~~
8 ~~timely funded the EMD, the Buyer refused to close on the sale of the Property.~~

9 ~~13. The Court hereby finds that on January 12, 2021, Dr. Fagan contacted Ms. Leonard~~
10 ~~to withdraw the offer to sell the Property at the Purchase Price of \$800,000, notwithstanding that~~
11 ~~the Buyer already accepted the offer as evidenced in the executed Purchase Agreement.~~

12 ~~14.11. The Court hereby finds that on January 15, 2021, the First American Escrow Officer~~
13 ~~verbally advised Ms. Leonard via telephone and text message of a revised Residential Purchase~~
14 ~~Agreement ("Revised Purchase Agreement") with a new Purchase Price of \$895,000 instead of the~~
15 ~~previously agreed upon Purchase Price of \$800,000.~~

16 ~~15.12. The Court hereby finds that the First American Escrow Officer then presented the~~
17 ~~Revised Purchase Agreement, as evidenced by the January 13, 2021 email and attachments.~~

18 ~~16.13. The Court hereby finds that on January 15 2021, Ms. Leonard rejected the~~
19 ~~Landlord's Revised Purchase Agreement on behalf of the Buyer on the basis that the parties already~~
20 ~~had a deal to purchase the Property for \$800,000 as evidenced by the Purchase Agreement executed~~
21 ~~by Ms. Leonard.~~

22 ~~17. The Court hereby finds that the Buyer agreed to sign documentation believed to~~
23 ~~represent an extension of time to negotiate the purchase of the Property to the Buyer for the~~
24 ~~month of February 2021, to reconcile the prior payments, and that the Buyer relied in good faith~~
25 ~~on the nearly ten-year relationship with Dr. Fagan and trusted in his story that the Second Revised~~
26 ~~Purchase Agreement was signed was for the purpose Dr. Fagan proposed was needed to finalize~~
27 ~~the terms of the sale.~~

Commented [CY8]: This is not true. The draft purchase agreement called for a closing date of December 17, 2020. Seller did not refuse to the sale of the Property prior to December 17, 2020. It was Buyer that failed to perform all terms and conditions prior to December 17, 2020.

Commented [CY9R8]: You cannot conclude "timely" in accordance to the specific terms of the draft Purchase Agreement.

Commented [CY10]: This is not fact, but is hearsay. There was never an evidentiary hearing to establish this alleged fact, nor opportunity for objection, nor opportunity to overcome objection.

Commented [CY11]: This is not true. The purchase agreement is void, not binding, until the landowner signs the purchase agreement as required by NRS 111.210.

Commented [CY12]: This is not fact, but is hearsay. There was never an evidentiary hearing to establish this alleged fact, nor opportunity for objection, nor opportunity to overcome objection.

1 ~~18.14.~~ The Court hereby finds that on February 23, 2021, at Buyer's request, Ms. Hardin,
2 the Seller's agent, sent to Buyer the amortization schedule for the Property payments
3 ("Amortization Schedule") which included the increased interest rate.

4 ~~19.15.~~ The Court hereby finds that the Buyer was current on the payments due and owing
5 under the Amortization Schedule through March 2021, based upon the credit of the \$30,000
6 payment made under the Promissory Note.

Commented [CY13]: This is not fact, but is hearsay. There was never an evidentiary hearing to establish this alleged fact, nor opportunity for objection, nor opportunity to overcome objection.

7 ~~20.16.~~ The Court hereby finds that on March 12, 2021, the Seller filed a Five-Day Notice
8 to Quit for Tenancy At Will ("Five-Day Notice") to evict the Buyer.

9 ~~21.17.~~ The Court hereby finds that on March 15, 2021, the Parties conferred regarding the
10 updated Amortization Schedule.

11 ~~22.18.~~ The Court hereby finds that during this discussion, Dr. Fagan, on behalf of the
12 Seller, agreed to have his staff itemize all payments.

13 ~~23.~~ The Court hereby finds that while the parties were verifying the itemization and
14 reconciliation, Dr. Fagan, on behalf of the Seller, represented to Buyer that in furtherance of
15 discussions regarding the purchase of the Property, that the Seller and Buyer would enter into
16 another lease agreement for the months of March 2021 and April 2021.

Commented [CY14]: This is not fact, but is hearsay. There was never an evidentiary hearing to establish this alleged fact, nor opportunity for objection, nor opportunity to overcome objection.

17 ~~24.19.~~ The Court hereby finds that Ms. Leonard, acting on Buyer's behalf and relying
18 upon Attorney Vergensen's representations, agreed to enter into another lease agreement for the
19 months of March and April under the false understanding that discussions regarding the purchase
20 of the Property would continue.

21 ~~25.20.~~ The Court hereby finds that on March 9, 2021, the Seller presented a second lease
22 agreement which was dated March 2, 2021 ("Second Lease Agreement").

23 ~~26.21.~~ The Court hereby finds that the Seller also sent an unsigned Letter of Agreement
24 attached to the March 9, 2021 email. The Letter of Agreement stated that, upon execution of the
25 March Lease Agreement that "all other agreements are terminated and of no further force or effect",
26 and there were also additional provisions based on proposed closing dates.

27 ~~27.22.~~ The Court hereby finds that under the terms of the Second Lease Agreement, Tenant
28 would make (2) monthly payments in the amount of \$6,800 for the months of March and April

114895205.1

1 2021, of which \$3,000 of the payment amount would be applied ~~to the Modified Purchase~~
2 ~~Price (defined?)~~.

3 28-23. The Court hereby finds that the Buyer submitted two checks dated March 15, 2021
4 to Seller, each in the amount of \$6,800, consisting of check numbers 3276 and 3277 representing
5 payment for the March and April 2021 Property rent.

6 29-24. The Court hereby finds that on the same day and after submission of the March
7 and April rent payments, Ms. Leonard executed the Second Lease Agreement on behalf of the
8 Buyer.

9 30-25. The Court hereby finds that once the Second Lease Agreement was executed by
10 the Buyer, the Seller agreed to not pursue the March 12, 2021 Five-Day Notice and the Buyer
11 further agreed that a ~~new p~~Purchase ~~a~~Agreement which would correctly reflect and apply all prior
12 Property payments would be completed and submitted expeditiously ("Third Revised Purchase
13 Agreement").

14 31-26. The Court hereby finds that shortly thereafter, the Buyer was informed by the Seller
15 that the Third Revised Purchase Agreement would not be executed until the end of the lease term.

16 ~~32-27. The Court hereby finds that instead, Dr. Fagan, on behalf of the Seller, ceased~~
17 ~~communicating in good faith regarding the fair and accurate itemization and reconciliation of the~~
18 ~~previous payments made by the Buyer, refused to negotiate in good faith and refused to sign any~~
19 ~~purchase agreement for Buyer's purchase of the Property.~~

20 33-28. The Court hereby finds that on March 17, 2021, ~~as a result of Dr. Fagan's refusal to~~
21 ~~proceed in good faith and proceed with the Purchase Agreement~~, the Buyer placed a stop payment
22 order on check numbers 3276 and 3277.

23 34-29. The Court hereby finds that on April 23, 2021, the Buyer delivered a cashier's check
24 in the amount of \$17, 575.00 to the Seller ("Cashier's Check"), representing payment of rent for
25 March and April 2021, inclusive of late fees in accordance with the Second Lease Agreement, ~~made~~
26 ~~under reservation of rights to avoid further eviction proceedings while Buyer pursues its rights~~
27 ~~under the Purchase Agreement for \$800,000.~~

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Commented [CY15]: There was no evidentiary hearing to establish this fact.

1 ~~35.30. The Court hereby finds that the Seller has refused to negotiate with the Buyer in~~
2 ~~good faith and has refused to allow the Buyer to close on the sale of the \$800,000 Purchase Price.~~

Commented [CY16]: Matter for jury to decide.

3 ~~36.31. The Court hereby finds that the Seller is proceeding in bad faith and induced the~~
4 ~~Buyer to waive its rights under the original \$800,000 Purchase Agreement to trick the Buyer, and~~
5 ~~all the while the Seller continues to charge rent instead of allowing the Buyer to purchase the~~
6 ~~Property at the previously negotiated \$800,000 purchase price, which was prepared and submitted~~
7 ~~by the Seller's attorney.~~

Commented [CY17]: matter for jury to decide.

Commented [CY18R17]: reneged?

8 ~~37.32. The Court hereby finds that the Seller reneged on the Purchase Agreement and is~~
9 ~~proceeding in bad faith, and should be compelled to proceed with the \$800,000 Purchase~~
10 ~~Agreement.~~

11 ~~38.33. The Court hereby finds that Buyer is ready, willing and able to close on the purchase~~
12 ~~of the Property for \$800,000, as evidenced by the proof of funds in escrow in the amount of~~
13 ~~\$170,000, and the pre-approved lending in the amount of up to \$680,000 from Zions~~
14 ~~Bancorporation, N.A. dba Nevada State Bank ("Lender"), which is more than enough for the Buyer~~
15 ~~to close on the Purchase of the Property.~~

16 ~~39.34. The Court hereby finds that on April 24, 2021, Heather Weger, from First American~~
17 ~~Title, confirmed the total receipt of \$170,000 deposited by Buyer in its escrow account for the real~~
18 ~~property located at 1 Grand Anacapri Drive,~~

19 ~~40.35. The Court hereby finds that the Lender has remitted the Conditional Approval and~~
20 ~~Pre-Qualification Letter dated April 14, 2021, to fund the Buyer's the purchase of the Property.~~

21 ~~41.36. The Court hereby finds that the Lender will not fund the loan for the Buyer's~~
22 ~~purchase of the Property until the Lender receives a fully executed Purchase Agreement.~~

23 ~~42.37. The Court hereby finds that it is necessary for this Court to intervene to order~~
24 ~~specific performance to order the Seller to perform under the Purchase Agreement to sell the~~
25 ~~Property to the Buyer for \$800,000.~~

26 ~~43.38. The Court hereby finds that the Seller suffered from a case of "seller's remorse" in~~
27 ~~refusing to close the sale of the Property after Seller's attorney prepared the Purchase Agreement~~
28

1 and transmitted the same to First American, who in turn transmitted to the Purchase Agreement to
2 the Buyer for signature and to fund the EMD.

Commented [CY19]: what is "seller's remorse"?

3 ~~44-39.~~ To the extent any of the foregoing Findings of Fact are more properly deemed a
4 Conclusion of Law, they may be so construed.

5 CONCLUSIONS OF LAW

6 1. This Court concludes that "specific performance is available only when: (1) the
7 terms of the contract are definite and certain; (2) the remedy at law is inadequate; (3) the appellant
8 has tendered performance; and (4) the court is willing to order it." *Serpa v. Darling*, 107 Nev. 299,
9 304, 810 P.2d 778, 782 (1991); *see also Carcione v. Clark*, 96 Nev. 808, 811, 618 P.2d 346, 348
10 (1980).

11 2. This Court concludes that under the first element of specific performance, the terms
12 of the Purchase Agreement are definite and certain, and that pursuant to the Purchase Agreement
13 that was prepared by the Seller's attorneys and ~~emailed~~remitted to Seller's escrow company, First
14 American by the Seller's attorney, Seller agreed to sell the Property to the Buyer for the Purchase
15 Price of \$800,000.00, conditioned upon ~~\$50,000~~\$5,000 to be placed in escrow as EMD.

16 ~~3. This Court concludes that the Purchase Price reflected the (35) prior payments made~~
17 ~~by Buyer under the terms of the original Contract and Addendum~~

18 ~~4.3~~ This Court concludes that the Purchase Agreement was forwarded by the First
19 American Escrow Officer, ~~who was acting as a representative of the Seller,~~ to Ms. Leonard on
20 January 6, 2021, which Purchase Agreement Ms. Leonard executed on January 21, 2021 and
21 subsequently transmitted via electronic correspondence to the First American Escrow Officer.

Commented [CY20]: This is not true. There was no evidentiary hearing to establish this allegation. Fagan did not open escrow, and escrow's explicit instructions clarify that escrow agent does not represent either party. This is a conclusion contrary to law and standard customary procedures.

22 ~~5.4.~~ This Court concludes that any remedy at law is inadequate because the Property is
23 a singular parcel of real property having unique characteristics ~~and because under the Parties'~~
24 ~~contractual agreements, including the Contract, Addendum, and the Purchase Agreement, Seller~~
25 ~~agreed to sell the Property to the Buyer.~~

26 ~~6. This Court concludes that based on these contractual agreements, Buyer has funded~~
27 ~~money, including the (35) prior payments made under the terms of the original Contract and~~
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1 Addendum, as well as the \$50,000 EMD, to the Seller for the specific purpose of purchasing the
2 Property, and that any monetary remedy would therefore be inadequate.

3 7.5. This Court concludes that if the Buyer is not able to complete the purchase of the
4 Property at the agreed-upon price of \$800,000 as contemplated by the Purchase Agreement, the
5 Seller will be unjustly enriched by the funds that Buyer has previously paid to the Seller, and which
6 funds were paid for the express purpose of the purchase of the Property.

7 8.6. This Court concludes that Buyer is ready, willing and able to close on the purchase
8 of the Property for \$800,000, as evidenced by the proof of funds in escrow in the amount of
9 \$170,000, and the pre-approved lending in the amount of up to \$680,000 from Lender, Nevada
10 State Bank, which is more than enough for the Buyer to close on the Purchase of the Property.

11 9.7. This Court concludes that if the Seller is permitted to renege on the agreement to
12 sell the Property to the Buyer at the \$800,000 Purchase Price, Buyer will never be able to recoup
13 the benefit for which it expressly bargained with Seller years ago: owning and living in the Property,
14 maintaining the Property and purchasing the Property.

15 10.8. This Court concludes that because the Property possesses specific and unique
16 characteristics, a monetary compensation by way of returned funds to the Buyer would not be an
17 adequate remedy in this circumstance.

18 11.9. This Court concludes that the record unequivocally established that Buyer tendered
19 performance under the Purchase Agreement by funding the \$50,000 EMD on January 12, 2021,
20 immediately after Buyer executed the Purchase Agreement.

21 12. This Court concludes that Buyer is ready, willing and able to close on the purchase
22 of the Property for \$800,000, as evidenced by the proof of funds in escrow in the amount of
23 \$170,000, and the pre-approved lending in the amount of up to \$680,000 from Lender, Nevada
24 State Bank, which is more than enough for the Buyer to close on the Purchase of the Property.

25 13.10. This Court concludes that specific performance appropriate when the record
26 demonstrates there is "no dispute" that the purchaser of real property offered to tender the purchase
27 price. See *Mayfield v. Koroghli*, 124 Nev. 343, 351-52, 184 P.3d 362, 367-68 (2008).

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Commented [CY21]: This is far outside the scope of the motion, and there was no evidentiary hearing to establish the existence of any "contractual agreements". Further, if the original Contract is valid, then why is there not specific performance of the original Contract, but specific performance of a draft contract in December, 2020. This makes no legal sense.

1 14.11. This Court concludes that it is Seller's – not Buyer's – actions that are preventing
2 the close of the Buyer's purchase of the Property.

3 ~~15.12. This Court concludes that the Buyer is entitled to specific performance of its~~
4 ~~purchase contract because it signed all necessary closing documents, it deposited all signed closing~~
5 ~~documents and the entire amount due under the purchase agreement with the escrow agent in the~~
6 ~~form of the \$50,000 earnest money deposit was payment was timely made, and the Buyer has~~
7 ~~sought to close escrow to purchase the Property.~~

Commented [CY22]: None of the actions of Buyer were timely in accordance to the draft Purchase Agreement.

Commented [CY23R22]: The EMD, the signing of the Purchase Agreement by the Buyer, and all actions of the Buyer were not "timely".

8 ~~16.13. This Court concludes that absent specific performance, Buyer risks losing the~~
9 ~~Property, and that in the event specific performance is not ordered by this Court, the prior payments~~
10 ~~Buyer has made over the years toward the goal of purchasing the Property will be completely lost.~~

11 17.14. This Court concludes that absent relief from this Court, Buyer will be forced to
12 acknowledge that forfeit the funds paid to Seller will be reduced to rent, for Buyer had possession
13 of the Property, and that such funds will not be used that have already been invested over the years
14 to the Seller towards the purchase of the Property.

15 18.15. This Court concludes that under *Mayfield v. Koroghli*, 124 Nev. 343, 351, 184 P.3d
16 362, 367-68 (2008), "If a purchaser of real property has not yet tendered the purchase price, the
17 district court may still grant specific performance if the purchase can 'demonstrate that she is ready,
18 willing, and able to perform.'" *Citing Serpa v. Darling*, 107 Nev. 299,304,810 P.2d 778, 782
19 (1991).

20 ~~19.16. This Court concludes that the record shows the Buyer was ready, willing, and able~~
21 ~~to tender the purchase price of \$800,000 and further demonstrates that Buyer's Lender, Nevada~~
22 ~~State Bank, has confirmed proof of funds in escrow and by way of pre-approved lending totaling~~
23 ~~in excess of the \$800,000 Purchase Price.~~

24 ~~20.17. This Court concludes that although the Buyer stands ready to complete the purchase~~
25 ~~transaction, Seller has failed to perform under the terms of the Parties' contractual agreement by~~
26 ~~way of the Purchase Agreement.~~

Commented [CY24]: This is not true. What terms has Seller failed to perform? The closing date was December 17, 2020. In fact, the Buyer has defaulted on all terms and conditions of the draft Purchase Agreement, not seller.

27 21.18. This Court concludes that if Seller is ordered to proceed with the sale of the Property
28 to the Buyer for \$800,000, that Buyer's Lender will proceed with funding the loan upon receipt of

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1 a fully-executed Purchase Agreement from the Sellers????.

2 22-19 This Court concludes that based upon the record before this Court, equity may only
3 be served if this Court orders specific performance.

4 23-20 This Court concludes that the Nevada Supreme Court's ruling in *Carcione v. Clark*,
5 96 Nev. 808, 811, 618 P.2d 346, 348 (1980) is instructive???:

Commented [CY25]: instructive?

6 Equity regards as done what in good conscience ought to be done.
7 *Woods v. Bromley*, 69 Nev. 96 at 107, 241 P.2d 1103. Specific
8 performance is available when the terms of the contract are definite
9 and certain, *Dodge Bros., Inc. v. Williams Estate Co.*, 52 Nev. 364,
10 287 P.2d 282 (1930), the remedy at law is inadequate, *Harmon v.*
11 *Tanner Motor Tours*, 79 Nev. 4, 377 P.2d 622 (1963), the plaintiff
12 has tendered performance, *Southern Pacific Co. v. Miller*, 39 Nev.
13 169, 154 P. 929 (1916), and the court is willing to order it.

14 24-21 This Court concludes that under *Gullo*, 2015 WL 233493 at *1 (internal quotation
15 marks omitted), quoting *Mosso v. Lee*, 53 Nev. 176, 182, 295 P. 776, 777-78 (1931) (quoting *Cheney*
16 *v. Libby*, 134 U.S. 68, 78 (1890) (internal citations omitted):

17 Even where time is made material, by express stipulation, the failure
18 of one of the parties to perform a condition within the particular time
19 limited will not in every case defeat his right to specific
20 performance, if the condition be subsequently performed, without
21 unreasonable delay, and no circumstances have intervened that
22 would render it unjust or inequitable to give such relief. The
23 discretion which a court of equity has to grant or refuse specific
24 performance, and which is always exercised with reference to the
25 circumstances of the particular case before it, may and of necessity
26 must often be controlled by the conduct of the party who bases his
27 refusal to perform the contract upon the failure of the other party to
28 strictly comply with its conditions.

21 25-22 This Court concludes that in the present case, specific performance is warranted and
22 appropriate because Buyer performed its responsibilities—'under the Parties' contractual
23 agreements???' by making (35) payments towards the purchase of the Property over the course of
24 several years, by funding an EMD in the amount of \$50,000, increasing the EMD to \$170,000, and
25 by securing pre-approved funds in the amount of \$680,000 from its Lender, Nevada State Bank,
26 which in the aggregate, is more than sufficient to fund the purchase of the Property at the previously
27 agreed upon purchase price of \$800,000.

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1 ...

2 ~~26. This Court concludes that Lender is only waiting for the completely executed~~
3 ~~Purchase Agreement to proceed with funding the balance of the loan to the Buyer for purchase of~~
4 ~~the Property.~~

Commented [CY26]: There was no evidentiary hearing to determine this allegation??? It is hearsay.

5 ~~27.23. This Court concludes that because the Seller reneged on the \$800,000 Purchase~~
6 ~~Agreement in bad faith, and fraudulently coerced Buyer to attempt to void the Purchase Agreement~~
7 ~~based upon misrepresentations to Buyer that a reconciliation of past payments would be~~
8 ~~forthcoming and adjusted accordingly in connection with the purchase of the Property.~~

9 ~~28.24. This Court concludes that after the lease extensions were executed, Seller did not~~
10 ~~negotiate with Buyer in good faith and cut off all communications with Buyer regarding the~~
11 ~~purchase of the Property, in direct contravention of the representations Seller made to induce Buyer~~
12 ~~to "negotiate" the final purchase of the Property.~~

Commented [CY27]: Matter for jury to decide.

13 ~~29.25. This Court concludes that Seller's deceptive actions and unfair dealings have~~
14 ~~prevented Buyer from purchasing the Property, which is unjust, wholly inequitable and will hereby~~
15 ~~be remedied by this Court by ordering specific performance.~~

Commented [CY28]: Matter for jury to decide.

16 ~~30.26. To the extent any of the foregoing Conclusions of Law are more properly deemed~~
17 ~~a Finding of Fact, they may be so construed.~~

18 **ORDER**

19 Therefore, based on the foregoing Findings of Fact and Conclusions of Law,

20 **IT IS HEREBY ORDERED** that Buyer's Application for Emergency Motion for Specific
21 Performance of Purchase Agreement, on an Order Shortening Time is **GRANTED** in its entirety.

22 **IT IS FURTHER ORDERED** that cause exists to order specific performance of Buyer's
23 ~~purchase of the real property parcel located at the address 1 Grand Anacapi, Henderson, Nevada,~~
24 ~~89011, Clark County Assessor Parcel Number 162-22-810-011, which real property is described as~~
25 ~~follows: PARCEL ONE (1): LOT SIXTEEN (16) OF AMENDED CAPRI (ALSO KNOWN AS~~
26 ~~"LAKE LAS VEGAS PARCEL 30"), AS SHOWN BY MAP THEREOF ON FILE IN BOOK 57~~
27 ~~OF PLATS, PAGE 88 IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY,~~
28 ~~NEVADA. PARCEL TWO (2): AN EASEMENT FOR INGRESS AND EGRESS OVER AND~~

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1 ~~ACROSS THOSE AREAS SHOWN AS "PRIVATE DRIVES" AND "COMMON AREA" ON~~
2 ~~THE MAP OF SAID LAND ("Property"), and that Seller is hereby ordered to sell the Property to~~
3 ~~Buyer or its assignee for \$800,000 pursuant to the Residential Purchase Agreement, dated~~
4 ~~December 14, 2020 and executed by Buyer on January 11, 2011, - a true and correct copy is attached~~
5 ~~hereto as Exhibit "A" for the Purchase Price of \$800,000.00, for which Buyer timely deposited~~
6 ~~\$50,000 as the Earnest Money Deposit ("EMD"), which Purchase Price reflected the (35) prior~~
7 ~~payments made under the terms of the original Contract and Addendum.~~

8 **IT IS FURTHER ORDERED** that the \$50,000 Buyer wired into the escrow account held
9 with First American Title Insurance Company on January 12, 2021, in addition to the \$120,000
10 Buyer subsequently deposited with First American Title for a total of \$170,000 in EMD shall be
11 used toward the close of escrow for the purchase of the Property.

12 **IT IS FURTHER ORDERED** that the Clerk of the Court shall execute the Residential
13 Purchase Agreement ~~dated December 14, 2020, and executed by Buyer on January 11, 2021, in the~~
14 ~~purchase price amount of \$800,000 for the sale of the Property, a true and correct copy of which is~~
15 ~~attached hereto as Exhibit "1",~~ and that the Clerk of the Court shall execute any necessary
16 documents, such as the Deed, to effectuate the transfer of title of the Property to Buyer in
17 compliance with this Order for specific performance in the event the Seller fails and/or refuses to
18 comply with this Court's Order for specific performance.

19 **IT IS SO ORDERED.**

20
21
22
23 Submitted by:

24 LEWIS ROCA ROTHGERBER CHRISTIE LLP

25 /s/ Ogonna Brown
26 OGONNA M. BROWN
27 Nevada Bar No. 7589
28 3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

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Attorneys for Plaintiff AAL-JAY, Inc.

Approves/Disapproves as to form and content;

BLACK & WADHAMS

/s/

CHRISTOPHER YERGENSEN (SBN 6183)

10777 West Twain Avenue, 3rd Floor

Las Vegas, NV 89135

Attorneys for Defendants/Counterclaimants

Heather S. Hume

CLERK OF THE COURT

MSTY

Christopher V. Yergensen, Esq.

BLACK & WADHAMS

Nevada Bar No. 6183

10777 West Twain Avenue, 3rd Floor

Las Vegas, Nevada 89135

Telephone: (702) 869-8801

Facsimile: (702) 869-2669

E-mail: cyergensen@blackwadhams.law

Attorney for Defendants/Counterclaimants

DISTRICT COURT

CLARK COUNTY, NEVADA

AAL-JAY, INC., a Nevada corporation,

Plaintiff,

v.

PHILIP J. FAGAN, JR., an individual, and as
Trustee of the PHILIP J. FAGAN, JR. 2001
TRUST,

Defendants.

Case No. A-21-832379-C

Dept. No.: 24

**DEFENDANTS/COUNTERCLAIMANTS'
MOTION FOR STAY PENDING
ADJUDICATION OF
DEFENDANTS/COUNTERCLAIMANTS'
WRIT OF MANDAMUS AND/OR IN THE
ALTERNATIVE, WRIT OF
PROHIBITION**

PHILIP J. FAGAN, JR., as Trustee of the
PHILIP J. FAGAN, JR. 2001 TRUST,

Counterclaimant,

v.

AAL-JAY, INC., a Nevada corporation;
CHRISTIANO DE CARLO, an individual;
and LAIL LEONARD, an individual,

Counter-Defendants.

COMES NOW, Defendants/Counterclaimants PHILIP J. FAGAN, JR., as Trustee of the
PHILIP J. FAGAN, JR., 2001 TRUST (hereinafter "Fagans" or "Defendants") by and through
their attorney of record, Christopher V. Yergensen, Esq., of the law firm Black & Wadhams, and

1 hereby submit their MOTION FOR STAY PENDING ADJUDICATION OF DEFENDANTS'
2 WRIT OF MANDAMUS AND/OR IN THE ALTERNATIVE, WRIT OF PROHIBITION. This
3 Motion is based upon the following memorandum of points and authorities, the pleadings and
4 papers on file herein and any other evidence or oral argument the Court may entertain at the
5 hearing of this Motion.
6

7 Dated this 15th day of July 2021.

8 **BLACK & WADHAMS**

9 

10 Christopher V. Yergensen, Esq.
11 Nevada Bar No. 6183
12 10777 West Twain Avenue, Suite 300
13 Las Vegas, Nevada 89135
14 Telephone: (702) 869-8801
15 Facsimile: (702) 869-2669
16 E-mail: cyergensen@blackwadhamslaw
17 Attorney for Defendants/Counterclaimants

18 **ORDER SHORTENING TIME**

19 The Court having reviewed the attached Affidavit in Support of Order Shortening Time,
20 and good cause appearing therefore:

21 IT IS HEREBY ORDERED that the hearing on the foregoing
22 **DEFENDANTS/COUNTERCLAIMANTS MOTION FOR STAY PENDING**
23 **ADJUDICATION OF DEFENDANTS/COUNTERCLAIMANTS WRIT OF MANDAMUS**
24 **AND/OR IN THE ALTERNATIVE, WRIT OF PROHIBITION ON ORDER**
25 **SHORTENING TIME** in the above-entitled action is set for the 3rd day of
26 August, 2021, at the hour of 9:00 a.m./p.m. in Department XXIV of the above-
27 entitled Court located at 200 Lewis Avenue, Las Vegas, Nevada.

28 Dated this ____ day of July 2021.

Dated this 22nd day of July, 2021



DISTRICT COURT JUDGE
55A DD1 F38C 8C3A
Erika Ballou
Page 2 of 9 District Court Judge

1
2 **AFFIDAVIT OF CHRISTOPHER V. YERGENSEN**

3 STATE OF NEVADA)
) ss:
4 COUNTY OF CLARK)

5 Christopher V. Yergensen, Esq., being first duly sworn, deposes and states:

6 1. That I am the attorney for Defendants/Counterclaimants, Philip J. Fagan, an
7 individual and as Trustee of the Philip J. Fagan 2001 Trust, in the above-referenced matter and
8 make this Affidavit in Support of Defendant/Counterclaimants Motion to Stay Pending
9 Adjudication of Defendants/Counterclaimants Writ of Mandamus and/or in the alternative, Writ
10 of Prohibition on an Order Shorting Time.
11

12 2. I have personal knowledge of the matters stated herein and am competent to
13 testify thereto. I have read this affidavit and contents herein are true of my own knowledge,
14 except for those matters herein contained stated upon information and belief, and as to those
15 matters, I believe them to be true.

16 3. If called to testify, I will state what is expressed in this affidavit.
17

18 4. I make the attached statements of fact in support of this Motion for Stay Pending
19 Adjudication of Defendants/Counterclaimants Writ of Mandamus and/or in the alternative, Writ
20 of Prohibition, pursuant to NRCP 70.

21 5. The Defendants are planning to file a Petition for Writ of Mandamus/Prohibition
22 ("Writ") on the Court's order granting Plaintiff's Motion for Specific Performance as soon as the
23 Order is entered by this Court.

24 6. The basis of the Writ is that the court erred when it ruled that there was a valid
25 land sale contract in which to base a remedy of specific performance because NRS 111.210(1)
26 clearly and unequivocally provides that a land sale contract is void, as a matter of law, if it is not
27 signed by the party in which the sale is to be made. The Court has not rendered its ruling on this
28

1 issue into a written order, and as such this motion is further necessitated.

2 7. The need for this motion on an ordering shortening time is that the court may
3 provide that the Clerk of Court take actions on behalf of and instead of Defendants in the transfer
4 of Defendants' real property, which will cause irreparable harm to Defendants.

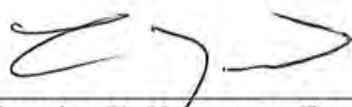
5 8. Further, good cause exists to grant this motion for stay as this court's order would
6 be unprecedented in the context of real estate law, it is in direct contravention to the long
7 standing legal theory of the statute of frauds codified by NRS 111, and is in direct conflict with
8 existing Nevada Supreme Court precedent.

9 9. I sent opposing counsel, Ogonna Brown, Esq, an email on July 15, 2021, about
10 the order and this motion for stay, and inquired if she would stipulate to the stay. Ms. Brown
11 indicated that she would not stipulate to a stay.

12 10. This motion requests this District Court to stay these proceedings and take no
13 further actions while the Nevada Supreme Court reviews the Order Granting the Motion for
14 Specific Performance.

15 11. This request is made in good faith and without dilatory motive or intent.
16 Further, I (Affiant) sayeth naught.

17 Dated this 15th day of July 2021.

18 
19 Christopher V. Yergensen, Esq.

20 Sworn to and subscribed before me this
21 15th day of July 2021.

22 
23 Notary Public



MEMORANDUM OF POINTS AND AUTHORITIES**I.****INTRODUCTION**

As the Court is already aware, Plaintiff filed a Motion for Specific Performance on May 18, 2021, seeking to enforce a “purchase agreement” dated December 14, 2020, with a closing date of December 17, 2020, executed by Plaintiff on January 11, 2021, and not executed by Defendant, the owner of the real property. On June 8, 2021, Defendants filed its Opposition to Motion for Specific Performance asserting that the “purchase agreement” is void as a matter of law pursuant to NRS 111.210(1). The matter came before the Court in a hearing held June 22, 2021, wherein the Court granted the Motion. A written order has not been signed by the Court and entered by the same. Defendants now bring the instant Motion requesting a stay of these proceedings pending the adjudication of their Petition for a Writ of Mandamus/Prohibition directing that the Motion for Specific Performance be denied.

II.**LEGAL ARGUMENT****A. LEGAL STANDARD FOR STAY OF PROCEEDINGS**

Per NRCP 62, a party may “obtain a stay by supersedeas bond, except in an action described in Rule 62(a)(2)” for a matter being appealed. *See NRCP 62(d)(1)*. NRCP 62(a)(2) describes actions for (1) Rule 50 judgments as a matter of law; (2) Rule 52(b) motions to amend the findings or for additional findings; (3) Rule 59 motions for a new trial or to alter or amend a judgment; and (4) Rule 60 motions for relief from a judgment or order. *See NRCP 62(a)(2)*. Here, the motion for stay pending the adjudication of Defendants Writ of Mandamus/Prohibition is based on an order directing specific performance of a “purchase agreement” for the sale of real property. NRCP 62(a)(2) does not apply and Defendants may obtain a stay in this matter with a

1 supersedeas bond pursuant to NRCP 62(d)(1). *See NRCP 62(d)(1)*.

2 In assessing a motion for stay pending appeal, Nevada courts assess the four factors:

3 (1) whether the object of the appeal will be defeated if the stay is denied, (2) whether [the
4 moving party] will suffer irreparable or serious injury if the stay is denied, (3) whether
5 [the responding party] will suffer irreparable or serious injury if the stay is granted, and
6 (4) whether [the moving party] is likely to prevail on the merits in the appeal.

7 *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P. 3d 36, 38 (2004). No one factor
8 carries more weight than another. *Id.* The Defendants need not prove all four factors in their
9 favor to prevail, here, the factors weigh more heavily in favor granting the stay in favor of the
10 Defendants than the Plaintiff.

11 **B. ARGUMENT**

12 The object of the Writ will be defeated if the stay is denied. By seeking the Writ on this
13 order, the Defendants are asking the Nevada Supreme Court to deny the motion for specific
14 performance for the sale of real property of Defendants. Once the real estate sale takes place, the
15 damage is done. Defendants will lose its ownership in the real property in which Defendants
16 have owned for over 15 years. Thus, the object of the appeal will be defeated if the stay is not
17 granted.
18

19 The Defendants will suffer irreparable harm and injury if the stay is not granted. The
20 ownership rights of real property have been commonly found to be unique, and the loss of such
21 rights are not easily compensated with money damages.
22

23 Furthermore, the Plaintiff would not be harmed if this stay were issued. Currently,
24 Plaintiff has possession of the real property. The Nevada Supreme Court has recognized that “a
25 mere delay in pursuing discovery and litigation normally does not constitute irreparable harm.”
26 *Mikohn* at 253. A delay in acting on the order and a delay in discovery will be nominal at best.
27 More importantly, when this court weighs the potential for harm to the Plaintiff against that
28

1 asserted here as to the Defendants, it is obvious that maintaining the status quo is less intrusive
2 than usurping Defendants from its ownership interests in the real property.

3 Finally, Defendants believe and assert here that they will succeed on the merits in front of
4 the Nevada Supreme Court. The district court granted the Motion for Specific Performance
5 without any discussion of NRS 111.210(1), which requires that contracts for the sale of lands are
6 void unless the contract is in writing and signed by the party by whom the sale is to be made.
7 Such a disregard to a long-standing legal principal like the statute of frauds, as codified a century
8 ago in Nevada law, is clearly erroneous. There is no dispute that the "purchase agreement" in
9 which the district court granted specific performance is not, and was not, signed by Defendants.
10 Defendants submitted to the district court an opposition that cited to and discussed NRS
11 111.210(1), as well as clear legal precedent directly on point from the Nevada Supreme Court.
12 In *Kern v. Kern*, 107 Nev. 988, 823 P.2d 275 (1991), the Nevada Supreme Court expressed that
13 specific performance under a contractual obligation to convey real property was not appropriate
14 because the "agreement was not signed by the party to be bound." *Id.* at 991. The *Kern Court*
15 made clear that NRS 111.210 (1) requires that a contract for the sale of land to be in writing,
16 "and be subscribed by the party by whom the lease or sale is to be made." *Id.* at 992. The *Kern*
17 *Court* concluded "that because Dorsey was the owner and alleged seller of the land in question,
18 his signature as an individual was required." *Id.* (Emphasis added).
19
20
21

22 The district court, as well as opposing counsel, did not even address NRS 111.210(1) and
23 the Nevada Supreme Court precedent in *Kern*. Rather, the district court simply concluded
24 specific performance was appropriate based upon a host of random, alleged and unproven facts
25 asserted by Plaintiff, without any evidentiary basis. This was clear judicial error.

26 ///

27 ///

III.

CONCLUSION

Based on the above discussion, Defendants respectfully request the Court grant the instant Motion and stay proceedings of this matter pending the adjudication of the Defendants Writ of Mandamus/Prohibition seeking a denial of Plaintiff's Motion for Specific Performance.

Dated this 15th day of July 2021.

BLACK & WADHAMS



Christopher V. Yergensen, Esq.
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10777 West Twain Avenue, Suite 300
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Facsimile: (702) 869-2669
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Attorney for Defendants/Counterclaimants

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 AAL-JAY, INC., Plaintiff(s) CASE NO: A-21-832379-C
7 vs. DEPT. NO. Department 24
8 Philip Fagan, Jr., Defendant(s)
9

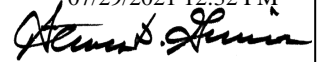
10 **AUTOMATED CERTIFICATE OF SERVICE**

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12 Court. The foregoing Motion to Stay was served via the court's electronic eFile system to all
13 recipients registered for e-Service on the above entitled case as listed below:

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17 Peggy Dale	Mdale@lewisroca.com
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19 Chris Yergensen	cyergensen@blackwadhams.law
20 Jerri Hunsaker	jhunsaker@blackwadhams.law
21 Nicole Lord	nlord@lewisroca.com

22
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CLERK OF THE COURT

SAO
OGONNA BROWN, ESQ.
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Telephone (702) 949-8200
Facsimile: (702) 949-8398

Attorneys for Plaintiff AAL-JAY, INC.

DISTRICT COURT

COUNTY OF CLARK, NEVADA

AAL-JAY, INC., a Nevada Corporation.

Plaintiff,

v.

PHILIP J. FAGAN, JR., an individual, and as
Trustee of the PHILIP J. FAGAN, JR. 2001
TRUST; DOES I through X, inclusive, and
ROE CORPORATIONS I through X,
inclusive,

Defendants.

Case No. A-21-832379-C

Dept. No. 24

**STIPULATION AND ORDER TO
CONTINUE HEARING ON
DEFENDANTS/ COUNTERCLAIMANTS'
MOTION FOR STAY PENDING
ADJUDICATION OF DEFENDANTS/
COUNTERCLAIMANTS' WRIT OF
MANDAMUS AND/OR IN THE
ALTERNATIVE, WRIT OF
PROHIBITION**

Hearing Date: August 3, 2021

Hearing Time: 9:00 a.m.

PHILIP J. FAGAN, JR., an individual, and as
Trustee of the PHILIP J. FAGAN, JR. 2001
TRUST,

Counterclaimant,

v.

AAL-JAY, INC., a Nevada Corporation;
CHRISTIANO DE CARLO, an individual; and
LAIL LEONARD, an individual,

Counter-Defendants.

Plaintiff/Counter-Defendant AAL-JAY, INC, by and through its undersigned counsel of
record, Ogonna M. Brown, Esq. of Lewis Roca Rothgerber Christie LLP, and
Defendant/Counterclaimant PHILIP J. FAGAN, JR., an individual, and as Trustee of the PHILIP
115101300.2

PET000326

J. FAGAN, JR. 2001 TRUST, by and through his undersigned counsel of record, Christopher V. Yergensen, Esq. of Black & Wadhams, hereby **STIPULATE** to continue the hearing on the Motion for Stay Pending Adjudication of Defendants/Counterclaimants' Writ of Mandamus and/or in the Alternative, Writ of Prohibition from August 3, 2020, at 9:00 a.m. to **August 24, 2021, at 9:00 a.m.**

IT IS SO STIPULATED.

DATED this 27th day of July, 2021.

DATED this 27th day of July, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

BLACK & WADHAMS

By: /s/ Ogonna Brown

By: /s/ Christopher V. Yergensen

OGONNA BROWN, ESQ.
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CHRISTOPHER V. YERGENSEN, ESQ.
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10777 West Twain Avenue, 3rd Floor
Las Vegas, Nevada 89135

*Attorneys for Plaintiff/Counter-Defendant
AAL-JAY, Inc.*

*Attorneys for Defendants/
Counterclaimants*

ORDER

Based upon stipulation of the parties, it is hereby **ORDERED** that the hearing on the Motion for Stay Pending Adjudication of Defendants/Counterclaimants' Writ of Mandamus and/or in the Alternative, Writ of Prohibition, presently set for August 3, 2021, is continued to **August 24, 2021 at 9:00 a.m.**

Dated this 29th day of July, 2021



Respectfully submitted by:
LEWIS ROCA ROTHGERBER CHRISTIE LLP

**548 D7E 6431 1DD5
Erika Ballou
District Court Judge**

By: /s/ Ogonna Brown

OGONNA BROWN, ESQ.
Nevada Bar No. 7589
OBrown@lewisroca.com
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169

*Attorneys for Plaintiff/Counter-Defendant
AAL-JAY, Inc.*

Lord, Nicole

From: Christopher Yergensen <cyergensen@blackwadhams.law>
Sent: Wednesday, July 28, 2021 5:10 PM
To: Lord, Nicole
Subject: RE: AAL-JAY, INC. v. PHILIP J. FAGAN, JR.

[EXTERNAL]

Yes

Chris Yergensen, Esq.
Attorney



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f: (702)869-2669
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From: Lord, Nicole <NLord@lewisroca.com>
Sent: Wednesday, July 28, 2021 5:09 PM
To: Christopher Yergensen <cyergensen@blackwadhams.law>
Cc: Brown, Ogonna <OBrown@lewisroca.com>; Lopez, Kim <KLopez@lewisroca.com>
Subject: AAL-JAY, INC. v. PHILIP J. FAGAN, JR.

Mr. Yergensen -

The court rejected the stipulation submitted yesterday because August 10th is no longer available. The clerk confirmed that August 3rd has already been vacated and that August 24th is available. Accordingly, please review the attached stipulation, which changes the continuance date to August 24, 2021.

Do we have authority to affix your signature on this version? Thank you for your professional courtesy in this matter.

Best,
Nicole

Nicole Lord
Legal Administrative Assistant

NLord@lewisroca.com
D. 702.474.2657



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Las Vegas, Nevada 89169-5996
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LEWIS ROCA ROTHGERBER CHRISTIE LLP

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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 AAL-JAY, INC., Plaintiff(s)

CASE NO: A-21-832379-C

7 vs.

DEPT. NO. Department 24

8 Philip Fagan, Jr., Defendant(s)

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

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cyergensen@blackwadhams.law

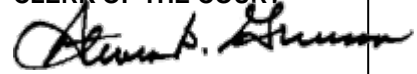
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PET000330



1 **NEOJ**
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6 3993 Howard Hughes Parkway, Suite 600
7 Las Vegas, Nevada 89169
8 Telephone (702) 949-8200
9 Facsimile: (702) 949-8398
10 *Attorneys for Plaintiff AAL-JAY, INC.*

11 **DISTRICT COURT**
12 **COUNTY OF CLARK, NEVADA**

13 AAL-JAY, INC., a Nevada Corporation.

Case No. A-21-832379-C

14 Plaintiff,

Dept. No. 24

15 v.

16 **NOTICE OF ENTRY OF STIPULATION**
17 **AND ORDER TO CONTINUE HEARING ON**
18 **DEFENDANTS/COUNTERCLAIMANTS'**
19 **MOTION FOR STAY PENDING**
20 **ADJUDICATION OF DEFENDANTS' WRIT**
21 **OF MANDAMUS AND/OR IN THE**
22 **ALTERNATIVE, WRIT OF PROHIBITION**

23 PHILIP J. FAGAN, JR., an individual, and
24 as Trustee of the PHILIP J. FAGAN, JR.
25 2001 TRUST; DOES I through X, inclusive,
26 and ROE CORPORATIONS I through X,
27 inclusive,

28 Defendants.

NOTICE IS HEREBY GIVEN that a Stipulation and Order to Continue Hearing on Defendants/Counterclaimants' Motion for Stay Pending Adjudication of Defendants' Writ of Mandamus and/or in the Alternative, Writ of Prohibition ("Stipulation and Order") was entered on July 29, 2021. A copy of the Stipulation and Order is attached.

DATED this 30th day of July, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: /s/ Ogonna Brown

OGONNA BROWN, ESQ.

Nevada Bar No. 7589

OBrown@lewisroca.com

3993 Howard Hughes Parkway, Suite 600

Las Vegas, Nevada 89169

Attorneys for Plaintiff AAL-JAY, Inc.

CERTIFICATE OF SERVICE

Pursuant to NEFCR 9, NRCP 5(b), and EDCR 7.26, I certify that on July 30, 2021, I served a copy of **NOTICE OF ENTRY OF STIPULATION AND ORDER TO CONTINUE HEARING ON DEFENDANTS/COUNTERCLAIMANTS' MOTION FOR STAY PENDING ADJUDICATION OF DEFENDANTS' WRIT OF MANDAMUS AND/OR IN THE ALTERNATIVE, WRIT OF PROHIBITION** on all parties as follows:

☒ Electronic Service – By serving a copy thereof through the Court's electronic service system via the Odyssey Court e-file system

Attorneys for Defendant Philip Fagan JR, Philip J. Fagan Jr. 2001 Trust and The Trustee for Philip J. Fagan Jr. 2001 Trust

Jerri Hunsaker jhunsaker@blackwadhamns.law
Diane Meeter dmeeter@blackwadhamns.law
Chris V. Yergensen cyergensen@blackwadhamns.law

☐ E-mail – By serving a copy thereof at the email addresses listed below; and

☐ U.S. Mail—By depositing a true copy thereof in the U.S. mail, first class postage prepaid and addressed as listed below.

/s/ Nicole N. Lord

An employee of Lewis Roca Rothgerber
Christie LLP

Heather S. Smith
CLERK OF THE COURT

SAO
OGONNA BROWN, ESQ.
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OBrown@lewisroca.com
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3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
Telephone (702) 949-8200
Facsimile: (702) 949-8398

Attorneys for Plaintiff AAL-JAY, INC.

DISTRICT COURT
COUNTY OF CLARK, NEVADA

AAL-JAY, INC., a Nevada Corporation.

Plaintiff,

v.

PHILIP J. FAGAN, JR., an individual, and as
Trustee of the PHILIP J. FAGAN, JR. 2001
TRUST; DOES I through X, inclusive, and
ROE CORPORATIONS I through X,
inclusive,

Defendants.

Case No. A-21-832379-C

Dept. No. 24

**STIPULATION AND ORDER TO
CONTINUE HEARING ON
DEFENDANTS/ COUNTERCLAIMANTS'
MOTION FOR STAY PENDING
ADJUDICATION OF DEFENDANTS/
COUNTERCLAIMANTS' WRIT OF
MANDAMUS AND/OR IN THE
ALTERNATIVE, WRIT OF
PROHIBITION**

Hearing Date: August 3, 2021
Hearing Time: 9:00 a.m.

PHILIP J. FAGAN, JR., an individual, and as
Trustee of the PHILIP J. FAGAN, JR. 2001
TRUST,

Counterclaimant,

v.

AAL-JAY, INC., a Nevada Corporation;
CHRISTIANO DE CARLO, an individual; and
LAIL LEONARD, an individual,

Counter-Defendants.

Plaintiff/Counter-Defendant AAL-JAY, INC, by and through its undersigned counsel of
record, Ogonna M. Brown, Esq. of Lewis Roca Rothgerber Christie LLP, and
Defendant/Counterclaimant PHILIP J. FAGAN, JR., an individual, and as Trustee of the PHILIP
115101300.2

PET000333

J. FAGAN, JR. 2001 TRUST, by and through his undersigned counsel of record, Christopher V. Yergensen, Esq. of Black & Wadhams, hereby **STIPULATE** to continue the hearing on the Motion for Stay Pending Adjudication of Defendants/Counterclaimants' Writ of Mandamus and/or in the Alternative, Writ of Prohibition from August 3, 2020, at 9:00 a.m. to **August 24, 2021, at 9:00 a.m.**

IT IS SO STIPULATED.

DATED this 27th day of July, 2021.

DATED this 27th day of July, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

BLACK & WADHAMS

By: /s/ Ogonna Brown

By: /s/ Christopher V. Yergensen

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Las Vegas, Nevada 89169

CHRISTOPHER V. YERGENSEN, ESQ.
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CYergensen@blackwadhamslaw.com
10777 West Twain Avenue, 3rd Floor
Las Vegas, Nevada 89135

*Attorneys for Plaintiff/Counter-Defendant
AAL-JAY, Inc.*

*Attorneys for Defendants/
Counterclaimants*

ORDER

Based upon stipulation of the parties, it is hereby **ORDERED** that the hearing on the Motion for Stay Pending Adjudication of Defendants/Counterclaimants' Writ of Mandamus and/or in the Alternative, Writ of Prohibition, presently set for August 3, 2021, is continued to **August 24, 2021 at 9:00 a.m.**

Dated this 29th day of July, 2021



Respectfully submitted by:
LEWIS ROCA ROTHGERBER CHRISTIE LLP

**548 D7E 6431 1DD5
Erika Ballou
District Court Judge**

By: /s/ Ogonna Brown

OGONNA BROWN, ESQ.
Nevada Bar No. 7589
OBrown@lewisroca.com
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169

*Attorneys for Plaintiff/Counter-Defendant
AAL-JAY, Inc.*

Lord, Nicole

From: Christopher Yergensen <cyergensen@blackwadhams.law>
Sent: Wednesday, July 28, 2021 5:10 PM
To: Lord, Nicole
Subject: RE: AAL-JAY, INC. v. PHILIP J. FAGAN, JR.

[EXTERNAL]

Yes

Chris Yergensen, Esq.
Attorney



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w: www.blackwadhams.law e: cyergensen@blackwadhams.law

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Cc: Brown, Ogonna <OBrown@lewisroca.com>; Lopez, Kim <KLopez@lewisroca.com>
Subject: AAL-JAY, INC. v. PHILIP J. FAGAN, JR.

Mr. Yergensen -

The court rejected the stipulation submitted yesterday because August 10th is no longer available. The clerk confirmed that August 3rd has already been vacated and that August 24th is available. Accordingly, please review the attached stipulation, which changes the continuance date to August 24, 2021.

Do we have authority to affix your signature on this version? Thank you for your professional courtesy in this matter.

Best,
Nicole

Nicole Lord
Legal Administrative Assistant

NLord@lewisroca.com
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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

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6 AAL-JAY, INC., Plaintiff(s) CASE NO: A-21-832379-C
7 vs. DEPT. NO. Department 24
8 Philip Fagan, Jr., Defendant(s)
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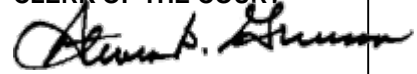
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18 Diane Meeter	dmeeter@blackwadhams.law
19 Chris Yergensen	cyergensen@blackwadhams.law
20 Jerri Hunsaker	jhunsaker@blackwadhams.law
21 Nicole Lord	nlord@lewisroca.com

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OPPM
Ogonna M. Brown, Esq.
Nevada Bar No. 7589
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Tel: 702.949.8200
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Email: obrown@lewisroca.com

Counsel for Plaintiff AAL-JAY, Inc.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

AAL-JAY, INC., a Nevada corporation,

Plaintiff,

v.

PHILIP J. FAGAN, JR., an individual, and as
Trustee of the PHILIP J. FAGAN, JR. 2001
TRUST; DOES I through X, inclusive, and
ROE CORPORATIONS I through X,
inclusive,

Defendants.

PHILIP J. FAGAN, JR., as Trustee of the
PHILIP J. FAGAN, JR. 2001,

Counterclaimant,

v.

AAL-JAY, INC., a Nevada corporation;
CHRISTIANO DE CARLO, an individual;
and LAIL LEONARD, an individual,

Counter-Defendants.

CASE NO.: A-21-832379-C

DEPT. NO.: 24

**PLAINTIFF AAL-JAY, INC.'S
OPPOSITION TO DEFENDANTS/
COUNTERCLAIMANTS' MOTION FOR
STAY PENDING ADJUDICATION OF
DEFENDANTS/COUNTERCLAIMANTS'
WRIT OF MANDAMUS AND/OR IN
THE ALTERNATIVE, WRIT OF
PROHIBITION**

**Date of Hearing: August 24, 2021
Time of Hearing: 9:00 a.m.**

Plaintiff AAL-JAY, INC. ("Plaintiff" or "AAL-JAY"), by and through its attorneys,
Ogonna M. Brown, Esq. of the law firm Lewis Roca Rothgerber Christie LLP ("Lewis Roca"),
hereby files submits this *Opposition to Defendants/Counterclaimants' Motion for Stay Pending
Adjudication of Defendants/Counterclaimants' Writ of Mandamus and/or in the Alternative, Writ
of Prohibition* ("Opposition").

115170190.1

PET000338

1 This Opposition is based upon the following grounds and reasons: (1) Defendants Philip J.
2 Fagan, Jr. (“Fagan”) and Philip J. Fagan, Jr. 2011 Trust (“Trust”) (collectively, “Defendants”) filed
3 a premature motion to stay these proceedings. This Opposition is based upon the following grounds
4 and the following reasons: (1) the Motion to Stay is premature for two reasons. (i)First, no
5 appealable order has been filed and Defendants have not requested for the written order to be filed,
6 rather Defendants have only objected to the form of the written order; (ii)Second, Defendants have
7 not yet filed a writ upon which the stay would be based; (2) The applicable rules of procedure,
8 Nevada Rule of Civil Procedure¹ 62 and perhaps Nevada Rule of Appellate Procedure² 8, militate
9 against Defendants’ request to stay this matter; (3) Defendants request a stay that is overbroad in
10 scope; and, (4) To the extent a stay is issued, Defendants should be ordered to post a bond in the
11 amount of \$800,000, the contract price for the purchase of the Property, plus two years of post-
12 judgment interest.

13 This Opposition is further based upon the Memorandum of Points and Authorities, the
14 papers and pleadings on file in this matter, and any further oral argument which may be considered
15 by this Court during the hearing on *Defendants/Counterclaimants’ Motion for Stay Pending*
16 *Adjudication of Defendants/Counterclaimants’ Writ of Mandamus and/or in the Alternative, Writ*
17 *of Prohibition* (“Motion to Stay”).

18 DATED: August 5, 2021.

19 **LEWIS ROCA ROTHGERBER CHRISTIE LLP**

20 By: /s/ Ogonna M. Brown

21 Ogonna M. Brown, SBN 7589
22 3993 Howard Hughes Pkwy, Suite 600
23 Las Vegas, NV 89169
24 Tel.: 702.949.8200
25 Fax: 702.949.8398
26 Email: obrown@lewisroca.com
27 *Counsel for Plaintiff AAL-JAY, Inc.*

28 ¹ Nevada Rule of Civil Procedure shall hereafter be referred to as “NRCP”.

² Nevada Rule of Appellate Procedure shall hereafter be referred to as “NRAP”.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. FACTUAL AND PROCEDURAL BACKGROUND**

3 **A. The Parties Engage in Ten Years of Business Relations and Contractual**
4 **Dealings, Resulting in the Final Purchase Agreement³**

5 Plaintiff first leased the at-issue property ("Property") from Defendants in November 2011.
6 Then, on December 8, 2016, the parties entered into a Contract for Deed ("Contract"), under which
7 Defendants agreed to sell the Property to Plaintiff for \$1,050,000. The terms of the Contract were
8 later amended by Addendum No. 1 ("Addendum"). Since the Addendum was entered into by the
9 parties, Defendants unilaterally decided to increase the interest rate on the purchase price despite
10 no terms in the contractual documents allowing for such a change. Further, Plaintiff has made
11 dozens of payments towards the principal of the underlying Promissory Note, including a \$30,000
12 payment on or about January 22, 20219.

13 Then, in the latter part of 2020, the parties engaged in additional negotiations regarding the
14 existing terms of the purchase of the Property. As a result of the conversations—which occurred
15 between Plaintiff's Corporate Director and Defendants' attorney, Richard Scott—First American
16 Title Insurance Company ("First American") sent a Residential Purchase Agreement ("Purchase
17 Agreement") to Plaintiff on January 6, 2021. The Purchase Agreement was prepared by Defendants'
18 attorneys. Under the Purchase Agreement, the new purchase price for the Property was \$800,000
19 ("Purchase Price"), with a stipulation for \$5,000 to be placed in escrow as an earnest money deposit
20 ("EMD"). The Purchase Price reflected the thirty-five (35) prior payments made under the terms of
21 the original Contract and Addendum. Plaintiff executed the Purchase Agreement on January 11,
22 2021, and returned it to First American.

23 The very next day, Defendants thereafter attempted to renege on the new Purchase Price,
24 seeking to increase it to \$895,000—nearly a hundred thousand dollars more. Indeed, Defendants
25 caused a revised agreement to be presented to Plaintiff on January 13, 2021. Plaintiff rejected the
26 revisions.

27 _____
28 ³ The following facts are more fully set forth in Plaintiff's Motion for Specific Performance (defined *infra*)
and supported by the exhibits attached thereto. Plaintiff includes an abridged version of the facts contained
therein for the Court's convenience.

1 To allow for time for a potential revision to the Purchase Agreement be negotiated, Plaintiff
2 agreed to sign a Residential Lease Agreement dated January 22, 2021 (“Lease Agreement”) for the
3 term of February 2021. Given their nearly ten-year relationship, Plaintiff trusted Defendants’
4 representations that the Lease Agreement served only to allow for additional time for the
5 negotiations regarding the potential revision to occur. Plaintiff was deceived.

6 Despite Plaintiff being compliant with the governing terms and Defendants’ Amortization
7 Schedule dated February 23, 2021, Defendants filed a 5-Day Notice to Quit for Tenancy At Will
8 (“Five-Day Notice”) in an attempt to evict Plaintiff from the Property on March 12, 2021. But the
9 parties engaged in further discussions, resulting in Defendants agreeing to provide an itemization
10 of all payments previously made. Defendants then represented that a second lease agreement should
11 be made to allow for the parties to verify the itemization and reconciliation. Based on Defendants’
12 representations and the ten-year relationship between the parties, Plaintiff agreed to execute the
13 second lease agreement dated March 2, 2021 (“Second Lease Agreement”) as drafted and presented
14 by Defendants. Defendants included the language that “all other agreements are terminated and of
15 no further force or effect” in an accompanying, unexecuted Letter of Agreement.

16 Pursuant to the agreed-upon terms of the Second Lease Agreement, Plaintiff made two
17 additional \$6,800 monthly payments for March and April 2021, of which \$3,000 of the payment
18 amount would be applied to a modified purchase price. Defendants did not pursue eviction efforts
19 under the Five-Day Notice only after Plaintiff made the two additional payments and executed the
20 Second Lease Agreement.

21 Further, only after Plaintiff executed the Second Lease Agreement and remitted the
22 additional payments, Defendants informed Plaintiff that a revised purchase agreement would not
23 be executed until the end of the lease term and then ceased all negotiations regarding the parties’
24 outstanding disputes as to the itemization and reconciliation for the purchase of the Property.
25 Plaintiff stopped payment on the two additional payments as a result of Defendants’ untimely and
26 bad faith actions. Defendants then served a Seven Day Notice to Pay or Quit Pursuant to NRS §
27 40.253 (“Seven-Day Notice”) on March 26, 2021. A hearing was held on April 14, 2021, at which
28 Defendants requested summary eviction.

B. Plaintiff Sues to Protect the Thousands of Dollars in Payments Already Remitted and Move to Enforce the Purchase Agreement

In response to Defendants’ bad faith efforts and to protect Plaintiff’s numerous payments remitted for the purchase of the Property, Plaintiff initiated the instant lawsuit on April 6, 2021. *See Verified Compl.*, filed Apr. 6, 2021. In the Amended Complaint, Plaintiff asserts eight claims for relief: (1) Injunctive Relief; (2) Conversion; (3) Breach of Contract; (4) Breach of Covenant of Good Faith and Fair Dealing; (5) Unjust Enrichment; (6) Negligent Misrepresentation; (7) Declaratory Relief; (8) Specific Performance; (9) Fraud; (10) Fraudulent Misrepresentation; and, (11) Rescission. *Am. Compl.*, filed May 3, 2021. *Id.* Defendants filed an Answer and Counterclaim, asserting five counterclaims: (1) Breach of Contract; (2) Breach of Implied Covenant of Good Faith and Fair Dealing; (3) Slander of Title; (4) Fraud in the Inducement; and, (5) Fraud – Promise without intent to Perform. *Answer and Countercl.*, filed May 18, 2021.

Plaintiff subsequently filed its Emergency Motion for Specific Performance of Purchase Agreement, on an Order Shortening Time (“Motion for Specific Performance”) on May 18, 2021, in an effort to obtain an adjudication for specific performance of the Purchase Agreement from this Court before Defendants pursued further eviction efforts after Defendants’ first request for summary eviction was denied. *See Mot. for Specific Performance*, filed May 18, 2021. A hearing was set for 9:00 am on June 1, 2021. *See id.* However, the hearing was continued at Defendants’ request by stipulation to June 22, 2021. *See Stipulation and Order to Continue Hearing*, filed May 28, 2021 (acknowledging Defendants’ agreement to not conduct eviction proceedings prior to the hearing on the Motion for Specific Performance). Defendants opposed the Motion for Specific Performance, and Plaintiff replied. *See Opp’n to Mot. for Specific Performance*, filed June 8, 2021; *see also Reply in support of Mot. for Specific Performance*, filed June 15, 2021.

C. This Court Grants Plaintiff’s Motion for Specific Performance but a Written Order Has Yet to Issue

The Motion for Specific Performance was fully briefed, and the Court held oral arguments on June 22, 2021, and concluded that the Defendants suffered from “seller’s remorse” and ordered specific performance of the Purchase Agreement for \$800,000. The Court did not accept Defendants’ arguments against Plaintiff’s request for specific performance as to the Purchase

1 Agreement, including Defendants’ argument regarding the application of the statute of frauds as
2 codified in NRS § 111.210(1), as evidenced by the Court’s verbal ruling that granted the Motion
3 for Specific Performance.

4 After efforts for Plaintiff and Defendants to agree on the form order failed, Plaintiff
5 submitted a proposed order to the Court. Defendants’ objected to the proposed order. The Court
6 has not yet entered its formal order to grant the Motion for Specific Performance. However,
7 Defendants filed their Motion for Stay Pending Adjudication of Defendants/Counterclaimants’
8 Writ of Mandamus and/or in the Alternative, Writ of Prohibition (“Motion to Stay”) to challenge
9 the forthcoming written order.

10 II. LEGAL ARGUMENT

11 Defendants are not entitled to a stay of the entire district-court litigation for three reasons:
12 (1) the Motion is premature because this Court has not yet entered a written order, and in turn,
13 Defendants have not yet filed a writ petition; (2) the applicable procedural rules militate against a
14 stay of the matter; and (3) the scope of the stay is overbroad. Further, to the extent a stay is
15 considered by the Court, Defendants should be ordered to post a bond in the amount of \$800,000,
16 the purchase price for the Property, plus two years of post-judgment interest.

17 A. Defendants Filed a Premature Motion to Stay

18 As a preliminary matter, Defendants’ Motion to Stay must be denied as a premature filing
19 given that no written order has been entered by this Court and no writ petition has been filed. The
20 Nevada Supreme Court has previously held that a party acts prematurely when it pursues an appeal
21 prior to the issuance of a written judgment or order from the district court. *Rust v. Clark Cty. Sch.*
22 *Dist.*, 103 Nev. 686, 747 P.2d 1380 (1987). In *Rust*, the Nevada Supreme Court found an appeal to
23 be premature because the appeal was filed to the entry of written order. *Id.* at 689, 747 P.2d at 1382.
24 The Court so found even though the district court had previously “announc[ed] that it did not intend
25 to enter a written judgment.” *Id.* After explaining that an oral pronouncement of judgment was not
26 valid, the Nevada Supreme Court averred that the “[a]pellant, rather than filing a premature notice
27 of appeal, should have requested a written judgment from the district court.” *Id.*

28 . . .

Defendants’ Motion to Stay this entire matter is premature. A written order granting the Motion for Specific Performance has not issued. More glaringly, Defendants have not even filed a writ petition upon which their stay would potentially be based. Defendants instead ask this Court to stay the proceeding *until* the written order issues, *until* Defendants draft and file a writ petition, *and until* the hypothetical writ petition is adjudicated. Defendants must instead wait for an order to be filed and then file their potential writ *prior* to seeking a stay of this entire litigation. Indeed, Defendants do not yet having standing to even file their allegedly forthcoming writ. *See* NRAP 3A(a) (appellate standing requires a “party who is aggrieved by an ***appealable*** judgment or order”) (emphasis added). The stay should be denied as premature accordingly.

B. Defendants Conflate NRCP 62 and NRAP 8(c), But Defendants Are Not Entitled to a Stay Under Either Rule

In addition to being premature, Defendants misapprehend the interplay between NRCP 62 and NRAP 8(c) when arguing for the stay. *See* Mot. at 6–7. NRCP 62(a) typically allows for an automatic stay as a matter of right in the district court proceeding where the moving party posts a supersedeas bond unless the appeal concerns “[a]n interlocutory or final judgment in an action for an injunction or a receivership[.]” NEV. R. CIV. P. 62(a)(1)-(2), (d)(1)-(2); *see also* Kress v. Corey, 65 Nev. 1, 16–17, 189 P.2d 352, 360 (1948) (“Except where the court is bound to allow a supersedeas or stay as a matter of right (as where supersedeas or stay is the subject of express statutory provisions), an order for a supersedeas or stay will only be granted on good cause shown and where a proper case for exercise of the court’s discretion is made out.”) (internal quotations omitted). Where the appeal concerns an interlocutory judgment for an injunction, the moving party lacks the automatic right to a stay even if a supersedeas bond is posted; instead, a district court may order the matter stayed. NEV. R. CIV. P. 62(a)(2), (d)(1)-(2).

Indeed, a court may “stay, suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party’s rights.” NEV. R. CIV. P. 62(c). Lastly, NRCP 62(b) provides circumstances under which a court ***may*** stay a matter pending the resolution of certain motions; it does not list circumstances under which a court ***cannot*** stay a matter, contrary to . . .

1 Defendants' contentions. NEV. R. CIV. P. 62(b) (listing motions brought under NRCP 50, 52(b), 59,
2 and 60); *see also* Mot. at 5 (confusing NRCP 62(a)(2) with NRCP 62(b)(1)-(4)).

3 Alternatively, NRAP 8 allows for an appellate court to stay pending an appeal or writ.
4 N.R.A.P. 8(c). NRAP 8(a)(1) requires that a party move for the requested stay in the district court
5 where the motion seeks the following relief:

- 6 (A) a stay of the judgment or order of, or proceedings in, a district court pending
7 appeal or resolution of a petition to the Supreme Court or Court of Appeals for an
8 extraordinary writ;
9 (B) approval of a supersedeas bond; or
10 (C) an order suspending, modifying, restoring or granting an injunction while an
11 appeal or original writ petition is pending.

12 N.R.A.P. 8(a)(1)(A)-(C). But where seeking the stay from the district court is "impracticable" or
13 has been "denied," the moving party may seek a stay from the appellate courts. N.R.A.P. 8(a)(2).
14 Only then would the appellate court consider the factors of NRAP 8(c):

- 15 (1) whether the object of the appeal or writ petition will be defeated if the stay or
16 injunction is denied;
17 (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay
18 or injunction is denied;
19 (3) whether respondent/real party in interest will suffer irreparable or serious injury
20 if the stay or injunction is granted; and
21 (4) whether appellant/petitioner is likely to prevail on the merits in the appeal or writ
22 petition.

23 N.R.A.P. 8(c); *see also* *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004).

24 Here, Defendants do not, and could not, contend that a motion to stay before this District
25 Court is "impracticable" as such a motion has not been entertained by this Court yet, and to the
26 extent applicable, such a motion has not been denied. Instead, the Motion remains pending. Thus, the
27 factors of NRAP 8(c) do not apply.

28 But even if the factors considered under NRCP 8(c) were applicable or are to be considered
by this Court to determine if the stay should be permitted, the factors militate against staying this
litigation. As for the first and second factors, a less severe action than staying this entire proceeding
would both preserve the alleged object of Defendants' writ and preclude the possibility of
irreparable injury to Defendants. Specifically, the district court may preclude Plaintiff from
disposing of or encumbering the Property pending the adjudication of the potentially forthcoming

1 writ by Defendants. Indeed, in July 2021, Plaintiff has voluntarily agreed not to dispose of or
2 encumber the Property until the hearing on the Motion to Stay is ruled upon by this Court.

3 Defendants attempt to avoid the reality that this narrower course of action moots factors one
4 and two of NRAP 8(c) by claiming their injury is the loss of “a real property in which Defendants
5 have owned for over 15 years.” *See* Mot. at 6:16-17. This claim is disingenuous. Defendants were
6 attempting to rid themselves of their interest in the Property by selling it to Plaintiff as demonstrated
7 by the Purchase Agreement. Defendants only attempted to increase the price of the sale after
8 Plaintiff accepted their offer and after Plaintiff funded the earnest money deposit—not to undo or
9 terminate the sale or potential further negotiations thereof. Thus, Defendants’ claims of injury are
10 not irreparable in nature—they are monetary. *Excellence Cmty. Mgmt. v. Gilmore*, 131 Nev. 347,
11 353, 351 P.3d 720, 723 (2015) (“Irreparable harm is an injury for which compensatory damage is
12 an inadequate remedy.”) (internal quotations omitted). The question is how much money
13 Defendants are entitled to for the Property: the \$800,000 under the Purchase Agreement or the
14 \$895,000 requested after Plaintiff accepted the offer in the Purchase Agreement? Thus, factors one
15 and two do not favor a stay.

16 Likewise, factor three under NRAP 8(c) does not favor the imposition of a stay. Plaintiff
17 will suffer irreparable injury by being denied the rights to the Property as contracted for under the
18 terms of the Purchase Agreement and the parties’ dealings over the course of nearly ten years. *See*
19 *Dixon v. Thatcher*, 103 Nev. 414, 416, 742 P.2d 1029, 1030 (1987) (holding that the loss of real
20 property rights generally result in irreparable harm because of the unique attributes of real
21 property). Defendants, in fact, have already threatened Plaintiff with eviction twice. And unlike
22 Defendants, Plaintiff did not attempt to rid itself of the rights to the Property—including Plaintiff’s
23 leasehold rights or the rights it acquired under the Purchase Agreement. Factor three of NRAP 8(c)
24 therefore counsels against the stay.

25 The fourth factor under NRAP 8(c) also does not favor the stay, because Defendants have
26 not demonstrated that they are likely to succeed on the merits as suggested by this Court’s oral
27 ruling granting the Motion for Specific Performance, during which time this Court made the express
28 finding that the Defendants suffered from “seller’s remorse”. Defendants rely on the codified statute

1 of fraud to argue otherwise. *See* Mot. at 7. It is true that the Statute of Frauds, as codified and
2 applied in Nevada, requires that a sale for land must generally include a writing executed by the
3 party by whom the sale it being made. NRS 111.210(1); *see also Matter of Est. of Kern*, 107 Nev.
4 988, 991–92, 823 P.2d 275, 277 (1991). Defendants fault this Court for ignoring the Statute of
5 Frauds in granting the Motion for Specific Performance.

6 However, as this Court was aware at the time of the ruling on this fully briefed issue,
7 Defendants’ argument ignored, and continues to ignore, the particularities and the exceptions to the
8 Statute of Frauds in at least two notable ways. First, the Nevada Supreme Court has found that the
9 Statute of Frauds does not void an informal contract for a land sale where “[a]ll essential terms
10 were expressed with certainty” through escrow instructions prepared by the defendant’s lawyers
11 and agents. *Lear v. Bishop*, 86 Nev. 709, 713, 476 P.2d 18, 21 (1970) (affirming the grant of a
12 motion for specific performance, compelling the buyer to purchase land as contemplated by the
13 parties negotiations). Moreover, it has long been established that a buyer’s part performance
14 removes a land-sale contract from the purview of the Statute of Frauds. *Waters v. Weyerhaeuser*
15 *Mortg. Co.*, 582 F.2d 503, 506 (9th Cir. 1978).⁴

16 Here, the Purchase Agreement was prepared by Defendants’ attorneys and agents and
17 remitted to Plaintiff by the title company per Defendants’ instructions. The Purchase Agreement
18 provides for the material terms of the parties’ contracts as previously recognized by this Court in
19 granting the Motion for Specific Performance. Moreover, Plaintiff partly performed under the
20 Purchase Agreement by placing \$50,000 in escrow to satisfy the EMD term and making additional
21 payments for the Property. Plaintiff’s part performance of the Purchase Agreement therefore
22 removes the contract from the Statute of Frauds under long-standing precedent. The Motion to Stay
23 must be denied accordingly.

24 **C. Defendants Seek a Stay that Is Overbroad in Scope**

25 Defendants also err in seeking a stay that is overbroad. Specifically, Defendants request a
26 stay of this *entire* matter pending the adjudication of their allegedly forthcoming writ. *See* Mot. at

27 _____
28 ⁴ Multiple writings can also be construed together to meet the requirements of the Statute of Frauds.
Butler v. Lovoll, 96 Nev. 931, 935, 620 P.2d 1251, 1253 (1980).

1 8. But the writ, if filed, need not be resolved before the eleven claims and five counterclaims can
2 continue to be adjudicated. Thus, to the extent this Court determines a stay is warranted (which it
3 is not), the stay should be limited in scope, applying only to the appealed order: the enforcement
4 of the Motion for Specific Performance.

5 **D. If the Court Is Inclined to Grant the Motion, Defendants Should Be Ordered**
6 **to Post a \$800,000 Bond and Two-Years' Post-Judgment Interest**

7 NRCP 62 provides that if an appeal is taken, the appellant may obtain a stay by supersedeas
8 bond. NEV. R. CIV. P. 62(d). The purpose of security for a stay pending appeal is to protect the
9 judgment creditor's ability to collect the judgment if it is affirmed by preserving the status quo and
10 preventing prejudice to the creditor arising from the stay. *Nelson v. Heer*, 121 Nev. 832, 835, 122
11 P.3d 1252, 1254 (2005), as modified (Jan. 25, 2006). Generally, “a supersedeas bond posted under
12 NRCP 62 should usually be set in an amount that will permit full satisfaction of the judgment”
13 unless “unusual circumstances exist and ... warrant [a lesser amount].” *Id.* at 834–35, 122 P.3d at
14 1253.

15 Defendants seek to enforce the status quo prior to the Court’s verbal order, *i.e.* Defendants
16 seek to continue to hold title to the Property against the terms of the Purchase Agreement as drafted
17 by Defendants’ agents and attorneys, offered by Defendants to Plaintiff on January 6, 2021, and
18 accepted by Plaintiff on January 11, 2021. To the extent the Court allows for a stay in relation to
19 this status quo, Defendants must post a supersedeas bond that would otherwise satisfy the
20 judgement to be issued by the court: conveying the Property to Plaintiff for the Purchase Price.
21 Thus, Defendants should be required to post a bond totaling the sum of \$800,000 plus two years of
22 the post-judgment total. *See Nelson*, 121 Nev. at 836, 122 P.3d at 1254 (identifying the “amount of
23 time required to obtain a judgment after it is affirmed on appeal” as a relevant factor in determining
24 the amount of a supersedeas bond).

25 ...

26 ...

27 ...

1 **III. CONCLUSION**

2 Based upon the foregoing, Plaintiff respectfully requests that this Court deny Defendants'
3 Motion for Stay. Alternatively, in the event a stay is imposed notwithstanding Defendants' Motion
4 for Stay being premature and based upon a currently hypothetical writ, the scope of the stay should
5 be appropriately limited and Defendants should be required to post a supersedeas bond totaling
6 \$800,000, the purchase price of the Property, plus two-years of post-judgment interest.

7
8 DATED: August 5, 2021.

9 **LEWIS ROCA ROTHGERBER CHRISTIE LLP**

10 By: /s/ Ogonna M. Brown

11 Ogonna M. Brown, SBN 7589
12 3993 Howard Hughes Pkwy, Suite 600
13 Las Vegas, NV 89169
14 Tel.: 702.949.8200
15 Fax: 702.949.8398
16 Email: obrown@lewisroca.com
17 *Counsel for Plaintiff AAL-JAY, Inc.*

CERTIFICATE OF SERVICE

Pursuant to NEFCR 9, NRCF 5(b), and EDCR 7.26, I certify that on August 5, 2021, I served a copy of **PLAINTIFF AAL-JAY, INC.'S OPPOSITION TO DEFENDANTS/ COUNTERCLAIMANTS' MOTION FOR STAY PENDING ADJUDICATION OF DEFENDANTS/COUNTERCLAIMANTS' WRIT OF MANDAMUS AND/OR IN THE ALTERNATIVE, WRIT OF PROHIBITION** on all parties via the Odyssey Court e-file system:

☒ Electronic Service – By serving a copy thereof through the Court's electronic service system:

Attorneys for Defendant Philip Fagan JR, Philip J. Fagan Jr. 2001 Trust and The Trustee for Philip J. Fagan Jr. 2001 Trust

Jerri Hunsaker jhunsaker@blackwadhams.law
Diane Meeter dmeeter@blackwadhams.law
Chris V. Yergensen cyergensen@blackwadhams.law

/s/ Nicole Lord
An Employee of Lewis Roca Rothgerber
Christie LLP

Inst #: 20210811-0001378
Fees: \$42.00
08/11/2021 11:15:33 AM
Receipt #: 4649968
Requestor:
BLACK & WADHAMS PLLC
Recorded By: RYUD Pgs: 4
Debbie Conway
CLARK COUNTY RECORDER
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Ofc: MAIN OFFICE

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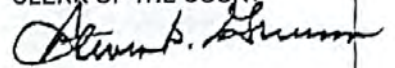
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DISTRICT COURT
CLARK COUNTY, NEVADA

BLACK & WADHAMS
10777 W. Twain Avenue, 3rd Floor
Las Vegas, Nevada 89135
(702) 869-8801 FAX: (702) 869-2669

<p>AAL-JAY, INC., a Nevada corporation, Plaintiff, v. PHILLIP J. FAGAN, JR., an individual, and as Trustee of the PHILIP J. FAGAN, JR. 2001 TRUST, Defendants.</p>	<p>Case No. A-21-832379-C Dept. No.: 24 NOTICE OF PENDENCY OF ACTION (LIS PENDENS)</p>
<p>PHILLIP J. FAGAN, JR., as Trustee of the PHILIP J. FAGAN, JR. 2001 TRUST, Counterclaimant, v. AAL-JAY, INC., a Nevada corporation; CHRISTIANO DE CARLO, an individual; and LAIL LEONARD, an individual, Counter-Defendants.</p>	

PLEASE TAKE NOTICE that an action was commenced and is pending in the above-
entitled Court, by and between the parties named in the above caption, affecting certain real

property or a portion thereof, owned by Defendants in this action, as well as appeals to the Nevada Supreme Court, if any. The real property at issue is located at, commonly known as, and identified as:

Address: 1 Grand Anacapi
Henderson, Nevada 89011

A.P.N.: 162-22-810-011

Legal Description: PARCEL ONE (1): LOT SIXTEEN (16) OF AMENDED CAPRI (ALSO KNOWN AS "LAKE LAS VEGAS PARCEL 30"), AS SHOWN BY MAP THEREOF ON FILE IN BOOK 57 OF PLATS, PAGE 88 IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA.

Dated: July 27, 2021

BLACK & WADHAMS

By /s/ Chris V. Yergensen
Christopher V. Yergensen, Esq.
10777 West Twain Avenue, Ste 300
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cyergensen@blackwadhamslaw
Attorneys for Defendants



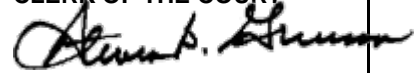
CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am employee of Black & Wadhams, and that on the 28th day of July 2021, I served the above and foregoing NOTICE OF PENDENCY OF ACTION (LIS PENDENS) on the following parties in compliance with the Nevada Electronic Filing and Conversion Rules:

Oganna Brown, Esq.
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3993 Howard Hughes Parkway, Ste. 600
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/s/ Diane Meeter
An Employee of Black & Wadhams

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1 **NEOJ**
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8 Email: OBrown@lewisroca.com

9 *Attorneys for Plaintiff AAL-JAY, Inc.*

10 **DISTRICT COURT**

11 **CLARK COUNTY, NEVADA**

12 AAL-JAY, INC., a Nevada Corporation.

Case No. A-21-832379-C

13 Plaintiff,

Dept. No. 24

14 v.

**NOTICE OF ENTRY OF ORDER
GRANTING EMERGENCY MOTION
FOR SPECIFIC PERFORMANCE OF
PURCHASE AGREEMENT, ON AN
ORDER SHORTENING TIME**

15 PHILIP J. FAGAN, JR., an individual, and as
16 Trustee of the PHILIP J. FAGAN, JR. 2001
17 TRUST; DOES I through X, inclusive, and
18 ROE CORPORATIONS I through X,
19 inclusive,

20 Defendants.

21 **NOTICE IS HEREBY GIVEN** that an Order Granting Emergency Motion for Specific
22 Performance of Purchase Agreement on an Order Shortening Time (“Order”) was entered by the
23 Court on August 26, 2021. A copy of the Order is attached.

24 DATED: August 26, 2021

25 LEWIS ROCA ROTHGERBER CHRISTIE LLP



26 By:

27 OGONNA M. BROWN, ESQ. (NBN 7589)
28 OBrown@lewisroca.com
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Attorneys for Plaintiff AAL-JAY, Inc.

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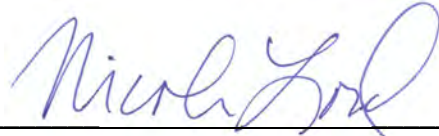
PET000355

CERTIFICATE OF SERVICE

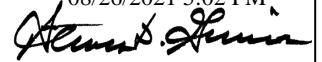
Pursuant to NEFCR 9, NRCP 5(b), and EDCR 7.26, I certify that on August 26, 2021, I served a copy of **NOTICE OF ENTRY OF ORDER GRANTING EMERGENCY MOTION FOR SPECIFIC PERFORMANCE OF PURCHASE AGREEMENT, ON AN ORDER SHORTENING TIME** on all parties as follows:

☒ Electronic Service – By serving a copy thereof through the Court’s electronic service system via the Odyssey Court e-file system, which includes all relevant parties in the above entitled matter.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct. Executed on August 26, 2021.



An employee of Lewis Roca Rothgerber Christie LLP


CLERK OF THE COURT

Ogonna M. Brown, Esq. (NBN 7589)
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Email: obrown@lewisroca.com

Attorneys for Plaintiff AAL-JAY, Inc.

**IN THE EIGHTH JUDICIAL DISTRICT COURT
FOR THE COUNTY OF CLARK, STATE OF NEVADA**

AAL-JAY, INC., a Nevada Corporation.

Plaintiff,

v.

PHILIP J. FAGAN, JR., an individual, and as
Trustee of the PHILIP J. FAGAN, JR. 2001
TRUST; DOES I through X, inclusive, and
ROE CORPORATIONS I through X,
inclusive,

Defendants.

Case No. A-21-832379-C

Dept. No. 24

**ORDER GRANTING EMERGENCY
MOTION FOR SPECIFIC
PERFORMANCE OF PURCHASE
AGREEMENT, ON AN ORDER
SHORTENING TIME**

An Application for Emergency Motion for Specific Performance of Purchase Agreement, on an Order Shortening Time (“Application”) having been duly made by Plaintiff AAL-JAY, INC. (“Plaintiff”, or alternatively, “Buyer”) by and through its counsel, Ogonna M. Brown, Esq. of the law firm of Lewis Roca Rothgerber Christie LLP against Phillip J. Fagan, Jr. and Trustee of the PHILIP J. FAGAN, JR. 2001 TRUST (“Defendants”, or alternatively “Seller”), by and through its counsel, Christopher Yergensen, Esq. of the law firm of Black & Wadhams, which Application was set for hearing on June 22, 2021, at 9:00 a.m. before Department 24 of the Eighth Judicial District Court, in and for Clark County, Nevada, with Judge Erika Ballou presiding, and good cause appearing therefor, and the Court, having reviewed the papers and pleadings on file herein and hearing the oral argument of the parties, finds the following:

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FINDINGS OF FACT

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2 1. Sometime in the latter part of 2020, Mr. DeCarlo, on behalf of the Buyer, engaged
3 in discussions with Dr. Fagan's attorney, Richard Scott, Esq. ("Attorney Scott") regarding the
4 existing terms of the Property purchase.

5 2. As a result of these conversations, on January 6, 2021, an Escrow Officer at First
6 American Title Insurance Company ("First American") sent a Residential Purchase Agreement
7 ("Purchase Agreement") to Ms. Leonard.

8 3. According to the terms of the Purchase Agreement that was drafted and prepared by
9 the Seller's attorneys and emailed by the escrow company First American, to the Buyer, the
10 Purchase Price for the Property was \$800,000.00 ("Purchase Price"), which Purchase Agreement
11 was conditioned upon the amount of \$5,000 to be placed in escrow with First American as an
12 Earnest Money Deposit ("EMD").

13 4. The Purchase Price under the Purchase Agreement reflected the (35) prior payments
14 made under the terms of the original Contract and Addendum.

15 5. Buyer accepted the offer of \$800,000 as evidenced by the Purchase Agreement
16 executed on January 11, 2021, by Lail Leonard as President of the Buyer, AAL-Jay, Inc. ("Ms.
17 Leonard").

18 6. On January 11, 2021, after Ms. Leonard executed the Purchase Agreement on behalf
19 of the Buyer, Ms. Leonard transmitted via electronic correspondence the executed Purchase
20 Agreement to the First American Escrow Officer.

21 7. On January 12, 2021, the Buyer wired \$50,000 into an escrow account, as evidenced
22 by the January 12, 2021 U.S. Bank General Wire Transfer Request.

23 8. After Buyer executed the Purchase Agreement, Buyer funded the \$50,000.000
24 earnest money deposit ("EMD") with First American.

25 9. The Court hereby finds that there was a meeting of the minds and a binding
26 agreement between the Seller and the Buyer for the Seller to sell the Property to the Buyer for
27 \$800,000 as evidenced by the Purchase Agreement.

1 10. The Court hereby finds that there was a valid, binding and enforceable contract
2 evidenced by the Purchase Agreement for the sale of the property from the Seller to the Buyer in
3 the amount of \$800,000.

4 11. The Court hereby finds that there was a meeting of the minds and a binding
5 agreement between the Seller and the Buyer for the Seller to sell the Property to the Buyer for
6 \$800,000 as evidenced by the Purchase Agreement.

7 12. The Court hereby finds that after the Buyer executed the Purchase Agreement and
8 funded the EMD, the Buyer refused to close on the sale of the Property.

9 13. The Court hereby finds that on January 12, 2021, Dr. Fagan contacted Ms. Leonard
10 to withdraw the offer to sell the Property at the Purchase Price of \$800,000, notwithstanding that
11 the Buyer already accepted the offer as evidenced in the executed Purchase Agreement.

12 14. The Court hereby finds that on January 15, 2021, the First American Escrow Officer
13 verbally advised Ms. Leonard via telephone and text message of a revised Residential Purchase
14 Agreement (“Revised Purchase Agreement”) with a new Purchase Price of \$895,000 instead of the
15 previously agreed-upon Purchase Price of \$800,000.

16 15. The Court hereby finds that the First American Escrow Officer then presented the
17 Revised Purchase Agreement, as evidenced by the January 13, 2021 email and attachments.

18 16. The Court hereby finds that on January 15 2021, Ms. Leonard rejected the
19 Landlord’s Revised Purchase Agreement on behalf of the Buyer on the basis that the parties already
20 had a deal to purchase the Property for \$800,000 as evidenced by the Purchase Agreement executed
21 by Ms. Leonard.

22 17. The Court hereby finds that the Buyer agreed to sign documentation believed to
23 represent an extension of time to negotiate the purchase of the Property to the Buyer for the
24 month of February 2021, to reconcile the prior payments, and that the Buyer relied in good faith
25 on the nearly ten-year relationship with Dr. Fagan and trusted in his story that the Second Revised
26 Purchase Agreement was signed was for the purpose Dr. Fagan proposed was needed to finalize
27 the terms of the sale.

1 18. The Court hereby finds that on February 23, 2021, at Buyer’s request, Ms. Hardin,
2 the Seller’s agent, sent to Buyer the amortization schedule for the Property payments
3 (“Amortization Schedule”) which included the increased interest rate.

4 19. The Court hereby finds that the Buyer was current on the payments due and owing
5 under the Amortization Schedule through March 2021, based upon the credit of the \$30,000
6 payment made under the Promissory Note.

7 20. The Court hereby finds that on March 12, 2021, the Seller filed a Five-Day Notice
8 to Quit for Tenancy At Will (“Five-Day Notice”) to evict the Buyer.

9 21. The Court hereby finds that on March 15, 2021, the Parties conferred regarding the
10 updated Amortization Schedule.

11 22. The Court hereby finds that during this discussion, Dr. Fagan, on behalf of the
12 Seller, agreed to have his staff itemize all payments.

13 23. The Court hereby finds that while the parties were verifying the itemization and
14 reconciliation, Dr. Fagan, on behalf of the Seller, represented to Buyer that in furtherance of
15 discussions regarding the purchase of the Property, that the Seller and Buyer would enter into
16 another lease agreement for the months of March 2021 and April 2021.

17 24. The Court hereby finds that Ms. Leonard, acting on Buyer’s behalf and relying
18 upon Attorney Yergensen’s representations, agreed to enter into another lease agreement for the
19 months of March and April under the false understanding that discussions regarding the purchase
20 of the Property would continue.

21 25. The Court hereby finds that on March 9, 2021, the Seller presented a second lease
22 agreement which was dated March 2, 2021 (“Second Lease Agreement”).

23 26. The Court hereby finds that the Seller also sent an unsigned Letter of Agreement
24 attached to the March 9, 2021 email. The Letter of Agreement stated that, upon execution of the
25 March Lease Agreement that “all other agreements are terminated and of no further force or effect”,
26 and there were also additional provisions based on proposed closing dates.

1 27. The Court hereby finds that under the terms of the Second Lease Agreement, Tenant
2 would make (2) monthly payments in the amount of \$6,800 for the months of March and April
3 2021, of which \$3,000 of the payment amount would be applied to the purchase price.

4 28. The Court hereby finds that the Buyer submitted two checks dated March 15, 2021
5 to Seller, each in the amount of \$6,800, consisting of check numbers 3276 and 3277 representing
6 payment for the March and April 2021 Property rent.

7 29. The Court hereby finds that on the same day and after submission of the March
8 and April rent payments, Ms. Leonard executed the Second Lease Agreement on behalf of the
9 Buyer.

10 30. The Court hereby finds that once the Second Lease Agreement was executed by
11 the Buyer, the Seller agreed to not pursue the March 12, 2021 Five-Day Notice and the Buyer
12 further agreed that a purchase agreement which would correctly reflect and apply all prior
13 Property payments would be completed and submitted expeditiously (“Third Revised Purchase
14 Agreement”).

15 31. The Court hereby finds that shortly thereafter, the Buyer was informed by the Seller
16 that the Third Revised Purchase Agreement would not be executed until the end of the lease term.

17 32. The Court hereby finds that instead, Dr. Fagan, on behalf of the Seller, ceased
18 communicating in good faith regarding the fair and accurate itemization and reconciliation of the
19 previous payments made by the Buyer, refused to negotiate in good faith and refused to sign any
20 purchase agreement for Buyer’s purchase of the Property.

21 33. The Court hereby finds that on March 17, 2021, as a result of Dr. Fagan’s refusal to
22 proceed in good faith and proceed with the Purchase Agreement, the Buyer placed a stop payment
23 order on check numbers 3276 and 3277.

24 34. The Court hereby finds that on April 23, 2021, the Buyer delivered a cashier’s check
25 in the amount of \$17, 575.00 to the Seller (“Cashier’s Check”), representing payment of rent for
26 March and April 2021, inclusive of late fees in accordance with the Second Lease Agreement, made
27 under reservation of rights to avoid further eviction proceedings while Buyer pursues its rights
28 under the Purchase Agreement for \$800,000.

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1 35. The Court hereby finds that the Seller has refused to negotiate with the Buyer in
2 good faith and has refused to allow the Buyer to close on the sale of the \$800,000 Purchase Price.

3 36. The Court hereby finds that the Seller is proceeding in bad faith and induced the
4 Buyer to waive its rights under the original \$800,000 Purchase Agreement to trick the Buyer, and
5 all the while the Seller continues to charge rent instead of allowing the Buyer to purchase the
6 Property at the previously negotiated \$800,000 purchase price, which was prepared and submitted
7 by the Seller's attorney.

8 37. The Court hereby finds that the Seller reneged on the Purchase Agreement and is
9 not proceeding in good faith, and should be compelled to proceed with the \$800,000 Purchase
10 Agreement.

11 38. The Court hereby finds that Buyer is ready, willing and able to close on the purchase
12 of the Property for \$800,000, as evidenced by the proof of funds in escrow in the amount of
13 \$170,000, and the pre-approved lending in the amount of up to \$680,000 from Zions
14 Bancorporation, N.A. dba Nevada State Bank ("Lender"), which is more than enough for the Buyer
15 to close on the Purchase of the Property.

16 39. The Court hereby finds that on April 24, 2021, Heather Weger, from First American
17 Title, confirmed the total receipt of \$170,000 deposited by Buyer in its escrow account for the real
18 property located at 1 Grand Anacapri Drive,

19 40. The Court hereby finds that the Lender has remitted the Conditional Approval and
20 Pre-Qualification Letter dated April 14, 2021, to fund the Buyer's the purchase of the Property.

21 41. The Court hereby finds that the Lender will not fund the loan for the Buyer's
22 purchase of the Property until the Lender receives a fully executed Purchase Agreement.

23 42. The Court hereby finds that it is necessary for this Court to intervene to order
24 specific performance to order the Seller to perform under the Purchase Agreement to sell the
25 Property to the Buyer for \$800,000.

26 43. The Court hereby finds that the Seller suffered from a case of "seller's remorse" in
27 refusing to close the sale of the Property after Seller's attorney prepared the Purchase Agreement
28

1 and transmitted the same to First American, who in turn transmitted to the Purchase Agreement to
2 the Buyer for signature and to fund the EMD.

3 44. To the extent any of the foregoing Findings of Fact are more properly deemed a
4 Conclusion of Law, they may be so construed.

5 **CONCLUSIONS OF LAW**

6 1. This Court concludes that “specific performance is available only when: (1) the
7 terms of the contract are definite and certain; (2) the remedy at law is inadequate; (3) the appellant
8 has tendered performance; and (4) the court is willing to order it.” *Serpa v. Darling*, 107 Nev. 299,
9 304, 810 P.2d 778, 782 (1991); *see also Carcione v. Clark*, 96 Nev. 808, 811, 618 P.2d 346, 348
10 (1980).

11 2. This Court concludes that under the first element of specific performance, the terms
12 of the Purchase Agreement are definite and certain, and that pursuant to the Purchase Agreement
13 that was prepared by the Seller’s attorneys and emailed to escrow company, First American by the
14 Seller’s attorney, Seller agreed to sell the Property to the Buyer for the Purchase Price of
15 \$800,000.00, conditioned upon \$5,000 to be placed in escrow as EMD.

16 3. This Court concludes that the Purchase Agreement was forwarded by the First
17 American Escrow Officer, , to Ms. Leonard on January 6, 2021, which Purchase Agreement Ms.
18 Leonard executed on January 21, 2021 and subsequently transmitted via electronic correspondence
19 to the First American Escrow Officer.

20 4. This Court concludes that any remedy at law is inadequate because the Property is
21 a singular parcel of real property having unique characteristics and because under the Parties’
22 contractual agreements, including the Contract, Addendum, and the Purchase Agreement, Seller
23 agreed to sell the Property to the Buyer.

24 5. This Court concludes that based on these contractual agreements, Buyer has funded
25 money, including the (35) prior payments made under the terms of the original Contract and
26 . . .
27 Addendum, as well as the \$50,000 EMD, to the Seller for the specific purpose of purchasing the
28 Property, and that any monetary remedy would therefore be inadequate.

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1 6. This Court concludes that if the Buyer is not able to complete the purchase of the
2 Property at the agreed-upon price of \$800,000 as contemplated by the Purchase Agreement, the
3 Seller will be unjustly enriched by the funds that Buyer has previously paid to the Seller, and which
4 funds were paid for the express purpose of the purchase of the Property.

5 7. This Court concludes that Buyer is ready, willing and able to close on the purchase
6 of the Property for \$800,000, as evidenced by the proof of funds in escrow in the amount of
7 \$170,000, and the pre-approved lending in the amount of up to \$680,000 from Lender, Nevada
8 State Bank, which is more than enough for the Buyer to close on the Purchase of the Property.

9 8. This Court concludes that if the Seller is permitted to ??on the agreement to sell the
10 Property to the Buyer at the \$800,000 Purchase Price, Buyer will never be able to recoup the benefit
11 for which it expressly bargained with Seller years ago: owning and living in the Property,
12 maintaining the Property and purchasing the Property.

13 9. This Court concludes that because the Property possesses specific and unique
14 characteristics, a monetary compensation by way of returned funds to the Buyer would not be an
15 adequate remedy in this circumstance.

16 10. This Court concludes that Buyer tendered performance under the Purchase
17 Agreement by funding the \$50,000 EMD on January 12, 2021, immediately after Buyer executed
18 the Purchase Agreement.

19 11. This Court concludes that Buyer is ready, willing and able to close on the purchase
20 of the Property for \$800,000, as evidenced by the proof of funds in escrow in the amount of
21 \$170,000, and the pre-approved lending in the amount of up to \$680,000 from Lender, Nevada
22 State Bank, which is more than enough for the Buyer to close on the Purchase of the Property.

23 12. This Court concludes that specific performance appropriate when the record
24 demonstrates there is “no dispute” that the purchaser of real property offered to tender the purchase
25 price. *See Mayfield v. Koroghli*, 124 Nev. 343, 351-52, 184 P.3d 362, 367-68 (2008).

26 ...

27 13. This Court concludes that it is Seller’s – not Buyer’s – actions that are preventing
28 the close of the Buyer’s purchase of the Property.

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1 14. This Court concludes that the Buyer is entitled to specific performance of its
2 purchase contract because it signed all necessary closing documents, it deposited all signed closing
3 documents and the entire amount due under the purchase agreement with the escrow agent in the
4 form of the \$50,000 earnest money deposit was payment was timely made, and the Buyer has
5 sought to close escrow to purchase the Property.

6 15. This Court concludes that absent specific performance, Buyer risks losing the
7 Property, and that in the event specific performance is not ordered by this Court, the prior payments
8 Buyer has made over the years toward the goal of purchasing the Property will be completely lost.

9 16. This Court concludes that absent relief from this Court, Buyer will be forced to
10 forfeit the funds that have already been invested over the years to the Seller towards the purchase
11 of the Property.

12 17. This Court concludes that the funds the Buyer paid to Seller after the Buyer accepted
13 the Purchase Agreement and executed the same evidencing rent payments will not be applied to
14 reduce the \$800,000 purchase price under the Purchase Agreement.

15 18. This Court concludes that under *Mayfield v. Koroghli*, 124 Nev. 343, 351, 184 P.3d
16 362, 367-68 (2008), “If a purchaser of real property has not yet tendered the purchase price, the
17 district court may still grant specific performance if the purchase can ‘demonstrate that she is ready,
18 willing, and able to perform.’” *Citing Serpa v. Darling*, 107 Nev. 299,304,810 P.2d 778, 782
19 (1991).

20 19. This Court concludes that the record shows the Buyer was ready, willing, and able
21 to tender the purchase price of \$800,000 and further demonstrates that Buyer’s Lender, Nevada
22 State Bank, has confirmed proof of funds in escrow and by way of pre-approved lending totaling
23 in excess of the \$800,000 Purchase Price.

24 20. This Court concludes that although the Buyer stands ready to complete the purchase
25 transaction, Seller has failed to perform under the terms of the Parties’ contractual agreement by
26 way of the Purchase Agreement.

27 21. This Court concludes that if Seller is ordered to proceed with the sale of the Property
28 to the Buyer for \$800,000, that Buyer’s Lender will proceed with funding the loan upon receipt of

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1 a fully-executed Purchase Agreement from the Sellers.

2 22. This Court concludes that based upon the record before this Court, equity may only
3 be served if this Court orders specific performance.

4 23. This Court concludes that the Nevada Supreme Court's ruling in *Carcione v. Clark*,
5 96 Nev. 808,811,618 P.2d 346,348 (1980) is instructive:

6 Equity regards as done what in good conscience ought to be done.
7 *Woods v. Bromley*, 69 Nev. 96 at 107, 241 P.2d 1103. Specific
8 performance is available when the terms of the contract are definite
9 and certain, *Dodge Bros., Inc. v. Williams Estate Co.*, 52 Nev. 364,
10 287 P.2d 282 (1930), the remedy at law is inadequate, *Harmon v.*
11 *Tanner Motor Tours*, 79 Nev. 4, 377 P.2d 622 (1963), the plaintiff
12 has tendered performance, *Southern Pacific Co. v. Miller*, 39 Nev.
13 169, 154 P. 929 (1916), and the court is willing to order it.

14 24. This Court concludes that under *Gullo*, 2015 WL 233493 at *1 (internal quotation
15 marks omitted), *quoting Mosso v. Lee*, 53 Nev. 176,182,295 P. 776, 777-78 (1931) (*quoting Cheney*
16 *v. Libby*, 134 U.S. 68, 78 (1890) (internal citations omitted):

17 Even where time is made material, by express stipulation, the failure
18 of one of the parties to perform a condition within the particular time
19 limited will not in every case defeat his right to specific
20 performance, if the condition be subsequently performed, without
21 unreasonable delay, and no circumstances have intervened that
22 would render it unjust or inequitable to give such relief. The
23 discretion which a court of equity has to grant or refuse specific
24 performance, and which is always exercised with reference to the
25 circumstances of the particular case before it, may and of necessity
26 must often be controlled by the conduct of the party who bases his
27 refusal to perform the contract upon the failure of the other party to
28 strictly comply with its conditions.

29 25. This Court concludes that in the present case, specific performance is warranted and
30 appropriate because Buyer performed its "under the Parties' " by making (35) payments towards
31 the purchase of the Property over the course of several years, by funding an EMD in the amount of
32 \$50,000, increasing the EMD to \$170,000, and by securing pre-approved funds in the amount of
33 \$680,000 from its Lender, Nevada State Bank, which in the aggregate, is more than sufficient to
34 fund the purchase of the Property at the previously agreed upon purchase price of \$800,000.

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30. To the extent any of the foregoing Conclusions of Law are more properly deemed a Finding of Fact, they may be so construed.

Therefore, based on the foregoing Findings of Fact and Conclusions of Law,

IT IS FURTHER ORDERED that cause exists to order specific performance of Buyer's purchase of the real property parcel located at the address 1 Grand Anacapri, Henderson, Nevada, 89011, Clark County Assessor Parcel Number 162-22-810-011, which real property is described as follows: PARCEL ONE (1): LOT SIXTEEN (16) OF AMENDED CAPRI (ALSO KNOWN AS "LAKE LAS VEGAS· PARCEL 30"), AS SHOWN BY MAP THEREOF ON FILE IN BOOK 57 OF PLATS, PAGE 88 IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA. PARCEL TWO (2): AN EASEMENT FOR INGRESS AND EGRESS OVER AND ACROSS THOSE AREAS SHOWN AS "PRIVATE DRIVES" AND "COMMON AREA" ON

1 THE MAP OF SAID LAND (“Property”), and that Seller is hereby ordered to sell the Property to
2 Buyer or its assignee for \$800,000 pursuant to the Residential Purchase Agreement for the Purchase
3 Price of \$800,000.00, for which Buyer timely deposited \$50,000 as the Earnest Money Deposit
4 (“EMD”), which Purchase Price reflected the (35) prior payments made under the terms of the
5 original Contract and Addendum.

6 **IT IS FURTHER ORDERED** that the \$50,000 Buyer wired into the escrow account held
7 with First American Title Insurance Company on January 12, 2021, in addition to the \$120,000
8 Buyer subsequently deposited with First American Title for a total of \$170,000 in EMD shall be
9 used toward the close of escrow for the purchase of the Property.

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IT IS FURTHER ORDERED that the Clerk of the Court shall execute the Residential Purchase Agreement dated December 14, 2020, and executed by Buyer on January 11, 2021, in the purchase price amount of \$800,000 for the sale of the Property, a true and correct copy of which is attached hereto as **Exhibit “1”**, and that the Clerk of the Court shall execute any necessary documents, such as the Deed, to effectuate the transfer of title of the Property to Buyer in compliance with this Order for specific performance in the event the Seller fails and/or refuses to comply with this Court’s Order for specific performance.

IT IS SO ORDERED.

Dated this 26th day of August, 2021



5CA 32B 2855 F27C
Erika Ballou
District Court Judge

Submitted by:
LEWIS ROCA ROTHGERBER CHRISTIE LLP

/s/ Ogonna Brown
OGONNA M. BROWN
Nevada Bar No. 7589
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Attorneys for Plaintiff AAL-JAY, Inc.

Approves/Disapproves as to form and content:

BLACK & WADHAMS

/s/
CHRISTOPHER YERGENSEN (SBN 6183)
10777 West Twain Avenue, 3rd Floor
Las Vegas, NV 89135
Attorneys for Defendants/Counterclaimants

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EXHIBIT “A”

RESIDENTIAL PURCHASE AGREEMENT FOR \$800,000

LAIL LEONARD

**1873 Golden Horizon drive
Las Vegas, Nevada 89123**

**TELEPHONE: (702) 384-8650
E-MAIL: auntlail@cox.net**

**CELL: (702) 332-8651
FAX: (702) 384-8653**

DATE: January 11, 2021

TO: MICHELLE
FIRST AMERICAN TITLE INSURANCE COMPANY,

E-MAIL: mmlc@firstam.com

Attached please find Residential Purchase agreement signed,

Thank you for your assistance

Lail Leonard

RESIDENTIAL PURCHASE AGREEMENT

This Residential Purchase Agreement ("Agreement") is entered into on this 14th day of December, 2020, ("Effective Date") by and between the Philip J. Fagan, Jr., as Trustee for the Philip J. Fagan, JR. 2001 Trust ("Buyer") and AAL-JAY, Inc., a Nevada corporation ("Seller"). Buyer and Seller may collectively be referred to herein as Parties.

RECITALS

WHEREAS, Seller owns the residential real property located 1 Grand Anacapi, Henderson, Nevada 89011, assessor parcel number 162-22-810-011, (the "Property");

WHEREAS, on or around November 2016, Seller and Buyer entered into that certain Contract for Deed (the "Previous Contract"), wherein Seller agreed to sell, and Buyer agreed to Buy, the Property;

WHEREAS, the Previous Contract provided that the purchase price was to be \$1,050,000, in which Buyer was to pay to Seller approximately thirty five (35) monthly payments of principal and interest, with the remaining balance of principal and interest of the purchase price to be paid on or before October 31, 2019;

WHEREAS, Buyer has made monthly payments, but has failed to pay the remaining principal balance, with accrued interest thereon, on or before October 31, 2019;

WHEREAS, Seller is willing to give to Buyer credit for the principal portion of the monthly payments made to Seller in establishing the Purchase Price (as defined below) of this Agreement;

WHEREAS, based upon the terms and conditions set forth below, Buyer wishes to purchase all of Seller's right, title, and interest in and to the Property, and Seller wishes to sell all of Seller's right, title, and interest in and to the Property.

AGREEMENT

NOW THEREFORE, for good cause and valuable consideration, the receipt and sufficiency of which is hereby agreed upon, the Parties agree as follows:

1. The Previous Contract is hereby terminated, and all terms and conditions expressed therein are of no longer force or effect on either Party.
2. Purchase Price:
 - a. The Purchase Price for the Property shall be Eight Hundred Thousand and NO/100ths Dollars (\$800,000.00) ("Purchase Price").

Each party acknowledges that he/she has read, understood, and agrees to each and every provision of this page unless a particular paragraph is otherwise modified by addendum of counteroffer.

Buyer's Initials: _____

Seller's Initials: _____

- b. The Purchase Price shall be paid by Buyer in Good Funds on or before the Close of Escrow. The Purchase Price does not include closing costs, prorations, or other fees and costs associated with the purchase of the Seller's Property Interest. Closing costs, prorations and all fees and costs associated with the purchase of Seller's Property Interest shall be paid for as set forth in Section 7 of this Agreement.
- c. Upon the opening of escrow, Buyer shall deposit the sum of Five Thousand and No/100ths Dollars (\$5,000.00) as and for its Earnest Money Deposit ("EMD"). The EMD shall be credited toward the Purchase Price at Close of Escrow, as defined below, or delivered to Seller in the event of Buyer's default as set forth herein.

3. **FIXTURES AND PERSONAL PROPERTY:** The following items will be transferred to Buyer, free of liens, with the sale of the Property with no real value unless stated otherwise herein. Unless an item is covered under Section 7(F) of this Agreement, all items are transferred in an "AS IS" condition. All fixtures, fittings and furniture including, but not limited to: electrical, mechanical, lighting, plumbing and heating fixtures, ceiling fan(s), fireplace insert(s), gas logs and grates, solar power system(s), built-in appliance(s) including ranges/ovens, window and door screens, awnings, shutters, window coverings, attached floor covering(s), television antenna(s), satellite dish(es), private integrated telephone systems, air coolers/conditioner(s), pool/spa equipment, garage door opener(s)/remote control(s), mailbox, in-ground landscaping, trees/shrub(s), water softener(s), water purifiers, security systems/alarm(s) and furniture remaining at the Property upon COE.

4. **ESCROW:**

- a. **OPENING OF ESCROW:** The purchase of the Property shall be consummated through Escrow ("Escrow"). Opening of Escrow shall take place by the end of one (1) business day after Acceptance of this Agreement ("Opening of Escrow"), at First American Title Company ("Escrow Company" or "Escrow Holder") with Michele Eaton ("Escrow Officer") (or such other escrow officer as Escrow Company may assign). Opening of Escrow shall occur upon Escrow Company's receipt of this fully accepted Agreement. Escrow Holder is instructed to notify the Parties (through their respective Agents) of the opening date and the Escrow Number.
- b. **CLOSE OF ESCROW:** Close of Escrow shall be on or before 5:00 pm PST on Thursday, December 17, 2020 ("COE").
- c. **IRS DISCLOSURE:** Seller is hereby made aware that there is a regulation that requires all Escrow Holders to complete a modified 1099 form, based upon specific information known only between parties in this transaction and the Escrow Holder. Seller is also made aware that Escrow Holder is required by federal law to provide

Each party acknowledges that he/she has read, understood, and agrees to each and every provision of this page unless a particular paragraph is otherwise modified by addendum of counteroffer.

Buyer's Initials: _____

Seller's Initials: _____

this information to the Internal Revenue Service after COE in the manner prescribed by federal law.

5. **PRELIMINARY TITLE REPORT:** The Title Company shall provide Buyer with a Preliminary Title Report ("PTR") to review, which must be approved or rejected prior to Close of Escrow (the "Title Review Period"). If Buyer does not object to the PTR prior to Close of Escrow, the PTR shall be deemed accepted. If Buyer makes an objection to any item(s) contained within the PTR, Seller shall have five (5) business days after receipt of objections to correct or address the objections. If, within the time specified, Seller fails to have each such exception removed or to correct each such objection, Buyer shall have the option to: (a) terminate this Agreement by providing notice to Seller and Escrow Officer, or (b) elect to accept title to the Property as is. All title exceptions approved or deemed accepted are hereafter collectively referred to as the "Permitted Exceptions." Buyer and Seller agree that the Deed of Trust recorded on May 09, 2006, in Book 20060509, as Instrument No. 04291, to secure an original indebtedness of \$1,400,000, is NOT a Permitted Exception, and Seller agrees to remove such exception to title of the Property at Close of Escrow.

6. Intentionally deleted.

7. **TITLE INSURANCE:** This Purchase Agreement is contingent upon the Buyer's ability to receive, good and marketable title to Seller's Property Interest on COE as evidenced by a policy of title insurance, naming Buyer as the insured in an amount equal to the purchase price, furnished by the title company identified in Section 3. Said policy shall be in the form necessary to effectuate marketable title or its equivalent and shall be paid for as set forth in Section 7.

8. **FEES, AND PRORATIONS:** The fees and costs associated with the closing shall be paid by the Parties as follows:

Loan Costs	Paid by Buyer
Escrow Company Fees:	Paid by Buyer
Title Policy:	Paid by Buyer
Real Property Transfer Tax:	Paid by Seller

PRORATIONS: Any and all rents, taxes, interest, homeowner association fees, trash service fees, payments on bonds, SIDs, LIDs, and assessments assumed by the Buyer, and other expenses of the property shall be prorated as of the date of the recordation of the deed.

ATTORNEYS FEES: Each Party shall pay its own attorneys' fees associated with and respect to this transaction.

Each party acknowledges that he/she has read, understood, and agrees to each and every provision of this page unless a particular paragraph is otherwise modified by addendum of counteroffer.

Buyer's Initials: _____

Seller's Initials: _____

9. TRANSFER OF TITLE: Upon COE, Buyer shall tender to Seller the agreed upon Purchase Price, and Seller shall tender to Buyer marketable title to the Property free of all encumbrances other than (1) current real property taxes, (2) covenants, conditions and restrictions (CC&R's) and related restrictions, (3) zoning or master plan restrictions and public utility easements; and (4) any obligations assumed and encumbrances accepted by Buyer prior to COE. Buyer is advised the Property may be reassessed after COE which may result in a real property tax increase or decrease.

10. COMMON-INTEREST COMMUNITIES: If the Property is subject to a Common Interest Community ("CIC"), Seller is required to provide at Buyer's expense the CIC documents as required by NRS 116.4109 (collectively, the "Resale Package"). Buyer waives any rights to CIC documents, to the extent such apply, as Buyer has been in possession of the Property and should be aware of the status of the CIC. To the extent there are CIC Capital Contributions or CIC Transfer Fees related to the Property in connection with the transaction contemplated by this Agreement, those contributions and transfer fees shall be paid by Seller.

11. DELIVERY OF POSSESSION: Seller shall deliver the Property along with any keys, alarm codes, garage door opener/controls and title or bill of sale related to any other item listed under Section 2 above, upon COE, if requested by Buyer.

12. RISK OF LOSS: Risk of loss shall be governed by NRS 113.040. This law provides generally that if all or any material part of the Property is destroyed before transfer of legal title or possession, Seller cannot enforce the Agreement and Buyer is entitled to recover any portion of the sale price paid. If legal title or possession has transferred, risk of loss shall shift to Buyer.

13. ASSIGNMENT OF THIS AGREEMENT: This Agreement is non-assignable unless agreed upon in writing by the Parties.

14. DEFAULT:

a. MEDIATION: Before any legal action is taken to enforce any term or condition under this Agreement, the parties agree to engage in mediation, a dispute resolution process, through a mediator mutually agreed upon by the parties, except in the case of a claim of specific performance. Mediation fees, if any, shall be divided equally among the Parties. Each party has consulted with an independent lawyer of their choice to review this mediation provision and this Agreement before agreeing thereto. By initialing below, the parties confirm that they have read and understand this section and voluntarily agree to the provisions thereof.

BUYER(S) INITIALS: / SELLER(S) INITIALS: /

b. IF SELLER DEFAULTS: If Seller defaults in performance under this Agreement, Buyer may, at Buyer's option, (i) terminate this Agreement and receive the

Each party acknowledges that he/she has read, understood, and agrees to each and every provision of this page unless a particular paragraph is otherwise modified by addendum of counteroffer.

Buyer's Initials:

Seller's Initials:

EMD, or (ii) take legal action for specific performance, including the claim for attorneys' fees and costs in taking such action of specific performance.

c. IF BUYER DEFAULTS: If Buyer defaults in performance under this Agreement, Seller may retain, as liquidated damages, the EMD and shall keep title to the Property. In this respect, the Parties agree that Seller's actual damages would be difficult to measure and that the EMD is in fact a reasonable estimate of the damages that Seller would suffer as a result of Buyer's default.

15. CANCELLATION OF AGREEMENT: In the event this Agreement is properly cancelled in accordance with Section 5, neither Buyer nor Seller will be reimbursed for any expenses incurred in conjunction with due diligence, inspections, appraisals or any other matters pertaining to this transaction (unless otherwise provided herein or except as otherwise provided by law) and both Parties shall be obligated to pay, equally, any costs set forth herein associated with this transaction and such cancellation.

16. ESCROW INSTRUCTIONS: If this Agreement or any matter relating hereto shall become the subject of any litigation or controversy, Buyer and Seller agree, jointly and severally, to hold Escrow Holder free and harmless from any loss or expense, except losses or expenses as may arise from Escrow Holder's negligence or willful misconduct.

17. BROKER'S COMPENSATION/FEES: Buyer and Seller agree that the sale of the Property is not subject to any Broker's fees.

18. DEFINITIONS: "Acceptance" means the date that both parties have consented to a final, binding contract by affixing their signatures to this Agreement and all counteroffers and said Agreement and all counteroffers have been delivered to both parties pursuant to Section 24 herein. "Agreement" includes this document as well as all accepted counteroffers and addenda. "Appraisal" means a written appraisal or Notice of Value as required by any lending institution prepared by a licensed or certified professional. "Bona Fide" means genuine. "Broker" means the Nevada licensed real estate broker listed herein representing Seller and/or Buyer (and all real estate agents associated therewith). "Business Day" excludes Saturdays, Sundays, and legal holidays. "Calendar Day" means a calendar day from/to midnight unless otherwise specified. "CIC" means Common Interest Community (formerly known as "HOA" or homeowners' associations). "CIC Capital Contribution" means a one-time non-administrative fee, cost or assessment charged by the CIC upon change of ownership. "CIC Transfer Fees" means the administrative service fee charged by a CIC to transfer ownership records. "Close of Escrow (COE)" means the time of recordation of the deed in Buyer's name. "Default" means the failure of a Party to observe or perform any of its material obligations under this Agreement. "Delivered" means personally delivered to Parties or respective Agents, transmitted by facsimile machine, electronic means, overnight delivery, or mailed by regular mail. "Escrow Holder" means the neutral party that will handle the closing. "Good Funds" means an acceptable form of payment determined by Escrow Holder in accordance with NRS 645A.171. "IRC" means the Internal Revenue Code (tax code). "N/A" means not

Each party acknowledges that he/she has read, understood, and agrees to each and every provision of this page unless a particular paragraph is otherwise modified by addendum of counteroffer.

Buyer's Initials:

Seller's Initials:

applicable. "NAC" means Nevada Administrative Code. "NRS" means Nevada Revised Statutes as Amended. "Party" or "Parties" means Buyer and Seller. "PITI" means principal, interest, taxes, and hazard insurance. "PST" means Pacific Standard Time, and includes daylight savings time if in effect on the date specified. "PTR" means Preliminary Title Report. "Property" means the real property and any personal property included in the sale as provided herein. "Receipt" means delivery to the party or the party's agent. "RPA" means Residential Purchase Agreement.

19. SIGNATURES, DELIVERY, AND NOTICES:

- a. This Agreement may be signed by the parties on more than one copy, which, when taken together, each signed copy shall be read as one complete form. This Agreement (and documents related to any resulting transaction) may be signed by the parties manually or digitally. Facsimile signatures may be accepted as original.
- b. When a Party wishes to provide notice as required in this Agreement, such notice shall be sent regular mail, personal delivery, overnight delivery, by facsimile, and/or by electronic transmission to the Agent for that Party. The notification shall be effective when postmarked, received, faxed, delivery confirmed, and/or read receipt confirmed in the case of email. Delivery of all instruments or documents associated with this Agreement shall be delivered to the Agent for Seller or Buyer if represented. Any cancellation notice shall be contemporaneously delivered to Escrow in the same manner.

20. MISCELLANEOUS: Time is of the essence. No change, modification or amendment of this Agreement shall be valid or binding unless such change, modification or amendment shall be in writing and signed by each party. This Agreement will be binding upon the heirs, beneficiaries and devisees of the parties hereto. This Agreement is executed and intended to be performed in the State of Nevada, and the laws of that state shall govern its interpretation and effect. The parties agree that the county and state in which the Property is located is the appropriate forum for any action relating to this Agreement. Should any party hereto retain counsel for the purpose of initiating litigation to enforce or prevent the breach of any provision hereof, or for any other judicial remedy, then the prevailing party shall be entitled to be reimbursed by the losing party for all costs and expenses incurred thereby, including, but not limited to, reasonable attorney's fees and costs incurred by such prevailing party.

(signatures follow on next page)

Each party acknowledges that he/she has read, understood, and agrees to each and every provision of this page unless a particular paragraph is otherwise modified by addendum of counteroffer.

Buyer's Initials: _____

Seller's Initials: _____

IN WITNESS WHEREOF, each of the persons executing this Agreement has authority on behalf of the respective party to do so and has had the opportunity to review this Agreement with counsel of their choosing and based upon their review and understanding of this Agreement, agrees to the terms and conditions set forth herein as of the Effective Date set forth above.

Dated this 14th day of December, 2020.

SELLER

Philip J. Fagan, JR. 2011 Trust

By: _____
Philip J. Fagan, Jr., its Trustee

BUYER

AAL-JAY, Inc.
a Nevada corporation

By : _____
Lail Leonard, its President

Each party acknowledges that he/she has read, understood, and agrees to each and every provision of this page unless a particular paragraph is otherwise modified by addendum or counteroffer.

Buyer's Initials: _____

Seller's Initials: _____

1 **CSERV**

2
3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**

5
6 **AAL-JAY, INC., Plaintiff(s)**

CASE NO: A-21-832379-C

7 **vs.**

DEPT. NO. Department 24

8 **Philip Fagan, Jr., Defendant(s)**

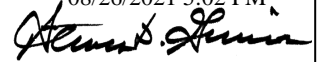
9
10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order Granting Motion was served via the court's electronic eFile
13 system to all recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 8/26/2021

15 Ogonna Brown	obrown@lewisroca.com
16 Kennya Jackson	kjackson@lewisroca.com
17 Peggy Dale	Mdale@lewisroca.com
18 Diane Meeter	dmeeter@blackwadhams.law
19 Chris Yergensen	cyergensen@blackwadhams.law
20 Jerri Hunsaker	jhunsaker@blackwadhams.law
21 Patricia Grijalva	PGrijalva@lewisroca.com
22 Nicole Lord	nlord@lewisroca.com

23
24
25
26
27
28


CLERK OF THE COURT

Ogonna M. Brown, Esq. (NBN 7589)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, NV 89169
Tel: 702.949.8200
Fax: 702.949.8398
Email: obrown@lewisroca.com

Attorneys for Plaintiff AAL-JAY, Inc.

**IN THE EIGHTH JUDICIAL DISTRICT COURT
FOR THE COUNTY OF CLARK, STATE OF NEVADA**

AAL-JAY, INC., a Nevada Corporation.

Plaintiff,

v.

PHILIP J. FAGAN, JR., an individual, and as
Trustee of the PHILIP J. FAGAN, JR. 2001
TRUST; DOES I through X, inclusive, and
ROE CORPORATIONS I through X,
inclusive,

Defendants.

Case No. A-21-832379-C

Dept. No. 24

**ORDER GRANTING EMERGENCY
MOTION FOR SPECIFIC
PERFORMANCE OF PURCHASE
AGREEMENT, ON AN ORDER
SHORTENING TIME**

An Application for Emergency Motion for Specific Performance of Purchase Agreement, on an Order Shortening Time (“Application”) having been duly made by Plaintiff AAL-JAY, INC. (“Plaintiff”, or alternatively, “Buyer”) by and through its counsel, Ogonna M. Brown, Esq. of the law firm of Lewis Roca Rothgerber Christie LLP against Phillip J. Fagan, Jr. and Trustee of the PHILIP J. FAGAN, JR. 2001 TRUST (“Defendants”, or alternatively “Seller”), by and through its counsel, Christopher Yergensen, Esq. of the law firm of Black & Wadhams, which Application was set for hearing on June 22, 2021, at 9:00 a.m. before Department 24 of the Eighth Judicial District Court, in and for Clark County, Nevada, with Judge Erika Ballou presiding, and good cause appearing therefor, and the Court, having reviewed the papers and pleadings on file herein and hearing the oral argument of the parties, finds the following:

...

...

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FINDINGS OF FACT

1
2 1. Sometime in the latter part of 2020, Mr. DeCarlo, on behalf of the Buyer, engaged
3 in discussions with Dr. Fagan's attorney, Richard Scott, Esq. ("Attorney Scott") regarding the
4 existing terms of the Property purchase.

5 2. As a result of these conversations, on January 6, 2021, an Escrow Officer at First
6 American Title Insurance Company ("First American") sent a Residential Purchase Agreement
7 ("Purchase Agreement") to Ms. Leonard.

8 3. According to the terms of the Purchase Agreement that was drafted and prepared by
9 the Seller's attorneys and emailed by the escrow company First American, to the Buyer, the
10 Purchase Price for the Property was \$800,000.00 ("Purchase Price"), which Purchase Agreement
11 was conditioned upon the amount of \$5,000 to be placed in escrow with First American as an
12 Earnest Money Deposit ("EMD").

13 4. The Purchase Price under the Purchase Agreement reflected the (35) prior payments
14 made under the terms of the original Contract and Addendum.

15 5. Buyer accepted the offer of \$800,000 as evidenced by the Purchase Agreement
16 executed on January 11, 2021, by Lail Leonard as President of the Buyer, AAL-Jay, Inc. ("Ms.
17 Leonard").

18 6. On January 11, 2021, after Ms. Leonard executed the Purchase Agreement on behalf
19 of the Buyer, Ms. Leonard transmitted via electronic correspondence the executed Purchase
20 Agreement to the First American Escrow Officer.

21 7. On January 12, 2021, the Buyer wired \$50,000 into an escrow account, as evidenced
22 by the January 12, 2021 U.S. Bank General Wire Transfer Request.

23 8. After Buyer executed the Purchase Agreement, Buyer funded the \$50,000.000
24 earnest money deposit ("EMD") with First American.

25 9. The Court hereby finds that there was a meeting of the minds and a binding
26 agreement between the Seller and the Buyer for the Seller to sell the Property to the Buyer for
27 \$800,000 as evidenced by the Purchase Agreement.

1 10. The Court hereby finds that there was a valid, binding and enforceable contract
2 evidenced by the Purchase Agreement for the sale of the property from the Seller to the Buyer in
3 the amount of \$800,000.

4 11. The Court hereby finds that there was a meeting of the minds and a binding
5 agreement between the Seller and the Buyer for the Seller to sell the Property to the Buyer for
6 \$800,000 as evidenced by the Purchase Agreement.

7 12. The Court hereby finds that after the Buyer executed the Purchase Agreement and
8 funded the EMD, the Buyer refused to close on the sale of the Property.

9 13. The Court hereby finds that on January 12, 2021, Dr. Fagan contacted Ms. Leonard
10 to withdraw the offer to sell the Property at the Purchase Price of \$800,000, notwithstanding that
11 the Buyer already accepted the offer as evidenced in the executed Purchase Agreement.

12 14. The Court hereby finds that on January 15, 2021, the First American Escrow Officer
13 verbally advised Ms. Leonard via telephone and text message of a revised Residential Purchase
14 Agreement (“Revised Purchase Agreement”) with a new Purchase Price of \$895,000 instead of the
15 previously agreed-upon Purchase Price of \$800,000.

16 15. The Court hereby finds that the First American Escrow Officer then presented the
17 Revised Purchase Agreement, as evidenced by the January 13, 2021 email and attachments.

18 16. The Court hereby finds that on January 15 2021, Ms. Leonard rejected the
19 Landlord’s Revised Purchase Agreement on behalf of the Buyer on the basis that the parties already
20 had a deal to purchase the Property for \$800,000 as evidenced by the Purchase Agreement executed
21 by Ms. Leonard.

22 17. The Court hereby finds that the Buyer agreed to sign documentation believed to
23 represent an extension of time to negotiate the purchase of the Property to the Buyer for the
24 month of February 2021, to reconcile the prior payments, and that the Buyer relied in good faith
25 on the nearly ten-year relationship with Dr. Fagan and trusted in his story that the Second Revised
26 Purchase Agreement was signed was for the purpose Dr. Fagan proposed was needed to finalize
27 the terms of the sale.

1 18. The Court hereby finds that on February 23, 2021, at Buyer’s request, Ms. Hardin,
2 the Seller’s agent, sent to Buyer the amortization schedule for the Property payments
3 (“Amortization Schedule”) which included the increased interest rate.

4 19. The Court hereby finds that the Buyer was current on the payments due and owing
5 under the Amortization Schedule through March 2021, based upon the credit of the \$30,000
6 payment made under the Promissory Note.

7 20. The Court hereby finds that on March 12, 2021, the Seller filed a Five-Day Notice
8 to Quit for Tenancy At Will (“Five-Day Notice”) to evict the Buyer.

9 21. The Court hereby finds that on March 15, 2021, the Parties conferred regarding the
10 updated Amortization Schedule.

11 22. The Court hereby finds that during this discussion, Dr. Fagan, on behalf of the
12 Seller, agreed to have his staff itemize all payments.

13 23. The Court hereby finds that while the parties were verifying the itemization and
14 reconciliation, Dr. Fagan, on behalf of the Seller, represented to Buyer that in furtherance of
15 discussions regarding the purchase of the Property, that the Seller and Buyer would enter into
16 another lease agreement for the months of March 2021 and April 2021.

17 24. The Court hereby finds that Ms. Leonard, acting on Buyer’s behalf and relying
18 upon Attorney Yergensen’s representations, agreed to enter into another lease agreement for the
19 months of March and April under the false understanding that discussions regarding the purchase
20 of the Property would continue.

21 25. The Court hereby finds that on March 9, 2021, the Seller presented a second lease
22 agreement which was dated March 2, 2021 (“Second Lease Agreement”).

23 26. The Court hereby finds that the Seller also sent an unsigned Letter of Agreement
24 attached to the March 9, 2021 email. The Letter of Agreement stated that, upon execution of the
25 March Lease Agreement that “all other agreements are terminated and of no further force or effect”,
26 and there were also additional provisions based on proposed closing dates.

1 27. The Court hereby finds that under the terms of the Second Lease Agreement, Tenant
2 would make (2) monthly payments in the amount of \$6,800 for the months of March and April
3 2021, of which \$3,000 of the payment amount would be applied to the purchase price.

4 28. The Court hereby finds that the Buyer submitted two checks dated March 15, 2021
5 to Seller, each in the amount of \$6,800, consisting of check numbers 3276 and 3277 representing
6 payment for the March and April 2021 Property rent.

7 29. The Court hereby finds that on the same day and after submission of the March
8 and April rent payments, Ms. Leonard executed the Second Lease Agreement on behalf of the
9 Buyer.

10 30. The Court hereby finds that once the Second Lease Agreement was executed by
11 the Buyer, the Seller agreed to not pursue the March 12, 2021 Five-Day Notice and the Buyer
12 further agreed that a purchase agreement which would correctly reflect and apply all prior
13 Property payments would be completed and submitted expeditiously (“Third Revised Purchase
14 Agreement”).

15 31. The Court hereby finds that shortly thereafter, the Buyer was informed by the Seller
16 that the Third Revised Purchase Agreement would not be executed until the end of the lease term.

17 32. The Court hereby finds that instead, Dr. Fagan, on behalf of the Seller, ceased
18 communicating in good faith regarding the fair and accurate itemization and reconciliation of the
19 previous payments made by the Buyer, refused to negotiate in good faith and refused to sign any
20 purchase agreement for Buyer’s purchase of the Property.

21 33. The Court hereby finds that on March 17, 2021, as a result of Dr. Fagan’s refusal to
22 proceed in good faith and proceed with the Purchase Agreement, the Buyer placed a stop payment
23 order on check numbers 3276 and 3277.

24 34. The Court hereby finds that on April 23, 2021, the Buyer delivered a cashier’s check
25 in the amount of \$17, 575.00 to the Seller (“Cashier’s Check”), representing payment of rent for
26 March and April 2021, inclusive of late fees in accordance with the Second Lease Agreement, made
27 under reservation of rights to avoid further eviction proceedings while Buyer pursues its rights
28 under the Purchase Agreement for \$800,000.

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1 35. The Court hereby finds that the Seller has refused to negotiate with the Buyer in
2 good faith and has refused to allow the Buyer to close on the sale of the \$800,000 Purchase Price.

3 36. The Court hereby finds that the Seller is proceeding in bad faith and induced the
4 Buyer to waive its rights under the original \$800,000 Purchase Agreement to trick the Buyer, and
5 all the while the Seller continues to charge rent instead of allowing the Buyer to purchase the
6 Property at the previously negotiated \$800,000 purchase price, which was prepared and submitted
7 by the Seller's attorney.

8 37. The Court hereby finds that the Seller reneged on the Purchase Agreement and is
9 not proceeding in good faith, and should be compelled to proceed with the \$800,000 Purchase
10 Agreement.

11 38. The Court hereby finds that Buyer is ready, willing and able to close on the purchase
12 of the Property for \$800,000, as evidenced by the proof of funds in escrow in the amount of
13 \$170,000, and the pre-approved lending in the amount of up to \$680,000 from Zions
14 Bancorporation, N.A. dba Nevada State Bank ("Lender"), which is more than enough for the Buyer
15 to close on the Purchase of the Property.

16 39. The Court hereby finds that on April 24, 2021, Heather Weger, from First American
17 Title, confirmed the total receipt of \$170,000 deposited by Buyer in its escrow account for the real
18 property located at 1 Grand Anacapri Drive,

19 40. The Court hereby finds that the Lender has remitted the Conditional Approval and
20 Pre-Qualification Letter dated April 14, 2021, to fund the Buyer's the purchase of the Property.

21 41. The Court hereby finds that the Lender will not fund the loan for the Buyer's
22 purchase of the Property until the Lender receives a fully executed Purchase Agreement.

23 42. The Court hereby finds that it is necessary for this Court to intervene to order
24 specific performance to order the Seller to perform under the Purchase Agreement to sell the
25 Property to the Buyer for \$800,000.

26 43. The Court hereby finds that the Seller suffered from a case of "seller's remorse" in
27 refusing to close the sale of the Property after Seller's attorney prepared the Purchase Agreement
28

1 and transmitted the same to First American, who in turn transmitted to the Purchase Agreement to
2 the Buyer for signature and to fund the EMD.

3 44. To the extent any of the foregoing Findings of Fact are more properly deemed a
4 Conclusion of Law, they may be so construed.

5 **CONCLUSIONS OF LAW**

6 1. This Court concludes that “specific performance is available only when: (1) the
7 terms of the contract are definite and certain; (2) the remedy at law is inadequate; (3) the appellant
8 has tendered performance; and (4) the court is willing to order it.” *Serpa v. Darling*, 107 Nev. 299,
9 304, 810 P.2d 778, 782 (1991); *see also Carcione v. Clark*, 96 Nev. 808, 811, 618 P.2d 346, 348
10 (1980).

11 2. This Court concludes that under the first element of specific performance, the terms
12 of the Purchase Agreement are definite and certain, and that pursuant to the Purchase Agreement
13 that was prepared by the Seller’s attorneys and emailed to escrow company, First American by the
14 Seller’s attorney, Seller agreed to sell the Property to the Buyer for the Purchase Price of
15 \$800,000.00, conditioned upon \$5,000 to be placed in escrow as EMD.

16 3. This Court concludes that the Purchase Agreement was forwarded by the First
17 American Escrow Officer, , to Ms. Leonard on January 6, 2021, which Purchase Agreement Ms.
18 Leonard executed on January 21, 2021 and subsequently transmitted via electronic correspondence
19 to the First American Escrow Officer.

20 4. This Court concludes that any remedy at law is inadequate because the Property is
21 a singular parcel of real property having unique characteristics and because under the Parties’
22 contractual agreements, including the Contract, Addendum, and the Purchase Agreement, Seller
23 agreed to sell the Property to the Buyer.

24 5. This Court concludes that based on these contractual agreements, Buyer has funded
25 money, including the (35) prior payments made under the terms of the original Contract and
26 . . .
27 Addendum, as well as the \$50,000 EMD, to the Seller for the specific purpose of purchasing the
28 Property, and that any monetary remedy would therefore be inadequate.

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1 6. This Court concludes that if the Buyer is not able to complete the purchase of the
2 Property at the agreed-upon price of \$800,000 as contemplated by the Purchase Agreement, the
3 Seller will be unjustly enriched by the funds that Buyer has previously paid to the Seller, and which
4 funds were paid for the express purpose of the purchase of the Property.

5 7. This Court concludes that Buyer is ready, willing and able to close on the purchase
6 of the Property for \$800,000, as evidenced by the proof of funds in escrow in the amount of
7 \$170,000, and the pre-approved lending in the amount of up to \$680,000 from Lender, Nevada
8 State Bank, which is more than enough for the Buyer to close on the Purchase of the Property.

9 8. This Court concludes that if the Seller is permitted to ??on the agreement to sell the
10 Property to the Buyer at the \$800,000 Purchase Price, Buyer will never be able to recoup the benefit
11 for which it expressly bargained with Seller years ago: owning and living in the Property,
12 maintaining the Property and purchasing the Property.

13 9. This Court concludes that because the Property possesses specific and unique
14 characteristics, a monetary compensation by way of returned funds to the Buyer would not be an
15 adequate remedy in this circumstance.

16 10. This Court concludes that Buyer tendered performance under the Purchase
17 Agreement by funding the \$50,000 EMD on January 12, 2021, immediately after Buyer executed
18 the Purchase Agreement.

19 11. This Court concludes that Buyer is ready, willing and able to close on the purchase
20 of the Property for \$800,000, as evidenced by the proof of funds in escrow in the amount of
21 \$170,000, and the pre-approved lending in the amount of up to \$680,000 from Lender, Nevada
22 State Bank, which is more than enough for the Buyer to close on the Purchase of the Property.

23 12. This Court concludes that specific performance appropriate when the record
24 demonstrates there is “no dispute” that the purchaser of real property offered to tender the purchase
25 price. *See Mayfield v. Koroghli*, 124 Nev. 343, 351-52, 184 P.3d 362, 367-68 (2008).

26 ...

27 13. This Court concludes that it is Seller’s – not Buyer’s – actions that are preventing
28 the close of the Buyer’s purchase of the Property.

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1 14. This Court concludes that the Buyer is entitled to specific performance of its
2 purchase contract because it signed all necessary closing documents, it deposited all signed closing
3 documents and the entire amount due under the purchase agreement with the escrow agent in the
4 form of the \$50,000 earnest money deposit was payment was timely made, and the Buyer has
5 sought to close escrow to purchase the Property.

6 15. This Court concludes that absent specific performance, Buyer risks losing the
7 Property, and that in the event specific performance is not ordered by this Court, the prior payments
8 Buyer has made over the years toward the goal of purchasing the Property will be completely lost.

9 16. This Court concludes that absent relief from this Court, Buyer will be forced to
10 forfeit the funds that have already been invested over the years to the Seller towards the purchase
11 of the Property.

12 17. This Court concludes that the funds the Buyer paid to Seller after the Buyer accepted
13 the Purchase Agreement and executed the same evidencing rent payments will not be applied to
14 reduce the \$800,000 purchase price under the Purchase Agreement.

15 18. This Court concludes that under *Mayfield v. Koroghli*, 124 Nev. 343, 351, 184 P.3d
16 362, 367-68 (2008), “If a purchaser of real property has not yet tendered the purchase price, the
17 district court may still grant specific performance if the purchase can ‘demonstrate that she is ready,
18 willing, and able to perform.’” *Citing Serpa v. Darling*, 107 Nev. 299,304,810 P.2d 778, 782
19 (1991).

20 19. This Court concludes that the record shows the Buyer was ready, willing, and able
21 to tender the purchase price of \$800,000 and further demonstrates that Buyer’s Lender, Nevada
22 State Bank, has confirmed proof of funds in escrow and by way of pre-approved lending totaling
23 in excess of the \$800,000 Purchase Price.

24 20. This Court concludes that although the Buyer stands ready to complete the purchase
25 transaction, Seller has failed to perform under the terms of the Parties’ contractual agreement by
26 way of the Purchase Agreement.

27 21. This Court concludes that if Seller is ordered to proceed with the sale of the Property
28 to the Buyer for \$800,000, that Buyer’s Lender will proceed with funding the loan upon receipt of

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1 a fully-executed Purchase Agreement from the Sellers.

2 22. This Court concludes that based upon the record before this Court, equity may only
3 be served if this Court orders specific performance.

4 23. This Court concludes that the Nevada Supreme Court's ruling in *Carcione v. Clark*,
5 96 Nev. 808, 811, 618 P.2d 346, 348 (1980) is instructive:

6 Equity regards as done what in good conscience ought to be done.
7 *Woods v. Bromley*, 69 Nev. 96 at 107, 241 P.2d 1103. Specific
8 performance is available when the terms of the contract are definite
9 and certain, *Dodge Bros., Inc. v. Williams Estate Co.*, 52 Nev. 364,
10 287 P.2d 282 (1930), the remedy at law is inadequate, *Harmon v.*
11 *Tanner Motor Tours*, 79 Nev. 4, 377 P.2d 622 (1963), the plaintiff
12 has tendered performance, *Southern Pacific Co. v. Miller*, 39 Nev.
13 169, 154 P. 929 (1916), and the court is willing to order it.

14 24. This Court concludes that under *Gullo*, 2015 WL 233493 at *1 (internal quotation
15 marks omitted), *quoting Mosso v. Lee*, 53 Nev. 176, 182, 295 P. 776, 777-78 (1931) (*quoting Cheney*
16 *v. Libby*, 134 U.S. 68, 78 (1890) (internal citations omitted):

17 Even where time is made material, by express stipulation, the failure
18 of one of the parties to perform a condition within the particular time
19 limited will not in every case defeat his right to specific
20 performance, if the condition be subsequently performed, without
21 unreasonable delay, and no circumstances have intervened that
22 would render it unjust or inequitable to give such relief. The
23 discretion which a court of equity has to grant or refuse specific
24 performance, and which is always exercised with reference to the
25 circumstances of the particular case before it, may and of necessity
26 must often be controlled by the conduct of the party who bases his
27 refusal to perform the contract upon the failure of the other party to
28 strictly comply with its conditions.

29 25. This Court concludes that in the present case, specific performance is warranted and
30 appropriate because Buyer performed its "under the Parties' " by making (35) payments towards
31 the purchase of the Property over the course of several years, by funding an EMD in the amount of
32 \$50,000, increasing the EMD to \$170,000, and by securing pre-approved funds in the amount of
33 \$680,000 from its Lender, Nevada State Bank, which in the aggregate, is more than sufficient to
34 fund the purchase of the Property at the previously agreed upon purchase price of \$800,000.

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30. To the extent any of the foregoing Conclusions of Law are more properly deemed a Finding of Fact, they may be so construed.

Therefore, based on the foregoing Findings of Fact and Conclusions of Law,

IT IS FURTHER ORDERED that cause exists to order specific performance of Buyer's purchase of the real property parcel located at the address 1 Grand Anacapri, Henderson, Nevada, 89011, Clark County Assessor Parcel Number 162-22-810-011, which real property is described as follows: PARCEL ONE (1): LOT SIXTEEN (16) OF AMENDED CAPRI (ALSO KNOWN AS "LAKE LAS VEGAS· PARCEL 30"), AS SHOWN BY MAP THEREOF ON FILE IN BOOK 57 OF PLATS, PAGE 88 IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA. PARCEL TWO (2): AN EASEMENT FOR INGRESS AND EGRESS OVER AND ACROSS THOSE AREAS SHOWN AS "PRIVATE DRIVES" AND "COMMON AREA" ON

1 THE MAP OF SAID LAND (“Property”), and that Seller is hereby ordered to sell the Property to
2 Buyer or its assignee for \$800,000 pursuant to the Residential Purchase Agreement for the Purchase
3 Price of \$800,000.00, for which Buyer timely deposited \$50,000 as the Earnest Money Deposit
4 (“EMD”), which Purchase Price reflected the (35) prior payments made under the terms of the
5 original Contract and Addendum.

6 **IT IS FURTHER ORDERED** that the \$50,000 Buyer wired into the escrow account held
7 with First American Title Insurance Company on January 12, 2021, in addition to the \$120,000
8 Buyer subsequently deposited with First American Title for a total of \$170,000 in EMD shall be
9 used toward the close of escrow for the purchase of the Property.

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IT IS FURTHER ORDERED that the Clerk of the Court shall execute the Residential Purchase Agreement dated December 14, 2020, and executed by Buyer on January 11, 2021, in the purchase price amount of \$800,000 for the sale of the Property, a true and correct copy of which is attached hereto as **Exhibit “1”**, and that the Clerk of the Court shall execute any necessary documents, such as the Deed, to effectuate the transfer of title of the Property to Buyer in compliance with this Order for specific performance in the event the Seller fails and/or refuses to comply with this Court’s Order for specific performance.

IT IS SO ORDERED.

Dated this 26th day of August, 2021



5CA 32B 2855 F27C
Erika Ballou
District Court Judge

Submitted by:
LEWIS ROCA ROTHGERBER CHRISTIE LLP

/s/ Ogonna Brown
OGONNA M. BROWN
Nevada Bar No. 7589
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Attorneys for Plaintiff AAL-JAY, Inc.

Approves/Disapproves as to form and content:

BLACK & WADHAMS

/s/
CHRISTOPHER YERGENSEN (SBN 6183)
10777 West Twain Avenue, 3rd Floor
Las Vegas, NV 89135
Attorneys for Defendants/Counterclaimants

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EXHIBIT “A”

RESIDENTIAL PURCHASE AGREEMENT FOR \$800,000

LAIL LEONARD

**1873 Golden Horizon drive
Las Vegas, Nevada 89123**

**TELEPHONE: (702) 384-8650
E-MAIL: auntlail@cox.net**

**CELL: (702) 332-8651
FAX: (702) 384-8653**

DATE: January 11, 2021

TO: MICHELLE
FIRST AMERICAN TITLE INSURANCE COMPANY,

E-MAIL: michele@firstam.com

Attached please find Residential Purchase agreement signed,

Thank you for your assistance

Lail Leonard

RESIDENTIAL PURCHASE AGREEMENT

This Residential Purchase Agreement ("Agreement") is entered into on this 14th day of December, 2020, ("Effective Date") by and between the Philip J. Fagan, Jr., as Trustee for the Philip J. Fagan, JR. 2001 Trust ("Buyer") and AAL-JAY, Inc., a Nevada corporation ("Seller"). Buyer and Seller may collectively be referred to herein as Parties.

RECITALS

WHEREAS, Seller owns the residential real property located 1 Grand Anacapi, Henderson, Nevada 89011, assessor parcel number 162-22-810-011, (the "Property");

WHEREAS, on or around November 2016, Seller and Buyer entered into that certain Contract for Deed (the "Previous Contract"), wherein Seller agreed to sell, and Buyer agreed to Buy, the Property;

WHEREAS, the Previous Contract provided that the purchase price was to be \$1,050,000, in which Buyer was to pay to Seller approximately thirty five (35) monthly payments of principal and interest, with the remaining balance of principal and interest of the purchase price to be paid on or before October 31, 2019;

WHEREAS, Buyer has made monthly payments, but has failed to pay the remaining principal balance, with accrued interest thereon, on or before October 31, 2019;

WHEREAS, Seller is willing to give to Buyer credit for the principal portion of the monthly payments made to Seller in establishing the Purchase Price (as defined below) of this Agreement;

WHEREAS, based upon the terms and conditions set forth below, Buyer wishes to purchase all of Seller's right, title, and interest in and to the Property, and Seller wishes to sell all of Seller's right, title, and interest in and to the Property.

AGREEMENT

NOW THEREFORE, for good cause and valuable consideration, the receipt and sufficiency of which is hereby agreed upon, the Parties agree as follows:

1. The Previous Contract is hereby terminated, and all terms and conditions expressed therein are of no longer force or effect on either Party.
2. Purchase Price:
 - a. The Purchase Price for the Property shall be Eight Hundred Thousand and NO/100ths Dollars (\$800,000.00) ("Purchase Price").

Each party acknowledges that he/she has read, understood, and agrees to each and every provision of this page unless a particular paragraph is otherwise modified by addendum of counteroffer.

Buyer's Initials: _____

Seller's Initials: _____

- b. The Purchase Price shall be paid by Buyer in Good Funds on or before the Close of Escrow. The Purchase Price does not include closing costs, prorations, or other fees and costs associated with the purchase of the Seller's Property Interest. Closing costs, prorations and all fees and costs associated with the purchase of Seller's Property Interest shall be paid for as set forth in Section 7 of this Agreement.
- c. Upon the opening of escrow, Buyer shall deposit the sum of Five Thousand and No/100ths Dollars (\$5,000.00) as and for its Earnest Money Deposit ("EMD"). The EMD shall be credited toward the Purchase Price at Close of Escrow, as defined below, or delivered to Seller in the event of Buyer's default as set forth herein.

3. **FIXTURES AND PERSONAL PROPERTY:** The following items will be transferred to Buyer, free of liens, with the sale of the Property with no real value unless stated otherwise herein. Unless an item is covered under Section 7(F) of this Agreement, all items are transferred in an "AS IS" condition. All fixtures, fittings and furniture including, but not limited to: electrical, mechanical, lighting, plumbing and heating fixtures, ceiling fan(s), fireplace insert(s), gas logs and grates, solar power system(s), built-in appliance(s) including ranges/ovens, window and door screens, awnings, shutters, window coverings, attached floor covering(s), television antenna(s), satellite dish(es), private integrated telephone systems, air coolers/conditioner(s), pool/spa equipment, garage door opener(s)/remote control(s), mailbox, in-ground landscaping, trees/shrub(s), water softener(s), water purifiers, security systems/alarm(s) and furniture remaining at the Property upon COE.

4. **ESCROW:**

- a. **OPENING OF ESCROW:** The purchase of the Property shall be consummated through Escrow ("Escrow"). Opening of Escrow shall take place by the end of one (1) business day after Acceptance of this Agreement ("Opening of Escrow"), at First American Title Company ("Escrow Company" or "Escrow Holder") with Michele Eaton ("Escrow Officer") (or such other escrow officer as Escrow Company may assign). Opening of Escrow shall occur upon Escrow Company's receipt of this fully accepted Agreement. Escrow Holder is instructed to notify the Parties (through their respective Agents) of the opening date and the Escrow Number.
- b. **CLOSE OF ESCROW:** Close of Escrow shall be on or before 5:00 pm PST on Thursday, December 17, 2020 ("COE").
- c. **IRS DISCLOSURE:** Seller is hereby made aware that there is a regulation that requires all Escrow Holders to complete a modified 1099 form, based upon specific information known only between parties in this transaction and the Escrow Holder. Seller is also made aware that Escrow Holder is required by federal law to provide

Each party acknowledges that he/she has read, understood, and agrees to each and every provision of this page unless a particular paragraph is otherwise modified by addendum of counteroffer.

Buyer's Initials: _____

Seller's Initials: _____

this information to the Internal Revenue Service after COE in the manner prescribed by federal law.

5. **PRELIMINARY TITLE REPORT:** The Title Company shall provide Buyer with a Preliminary Title Report ("PTR") to review, which must be approved or rejected prior to Close of Escrow (the "Title Review Period"). If Buyer does not object to the PTR prior to Close of Escrow, the PTR shall be deemed accepted. If Buyer makes an objection to any item(s) contained within the PTR, Seller shall have five (5) business days after receipt of objections to correct or address the objections. If, within the time specified, Seller fails to have each such exception removed or to correct each such objection, Buyer shall have the option to: (a) terminate this Agreement by providing notice to Seller and Escrow Officer, or (b) elect to accept title to the Property as is. All title exceptions approved or deemed accepted are hereafter collectively referred to as the "Permitted Exceptions." Buyer and Seller agree that the Deed of Trust recorded on May 09, 2006, in Book 20060509, as Instrument No. 04291, to secure an original indebtedness of \$1,400,000, is NOT a Permitted Exception, and Seller agrees to remove such exception to title of the Property at Close of Escrow.

6. Intentionally deleted.

7. **TITLE INSURANCE:** This Purchase Agreement is contingent upon the Buyer's ability to receive, good and marketable title to Seller's Property Interest on COE as evidenced by a policy of title insurance, naming Buyer as the insured in an amount equal to the purchase price, furnished by the title company identified in Section 3. Said policy shall be in the form necessary to effectuate marketable title or its equivalent and shall be paid for as set forth in Section 7.

8. **FEES, AND PRORATIONS:** The fees and costs associated with the closing shall be paid by the Parties as follows:

Loan Costs	Paid by Buyer
Escrow Company Fees:	Paid by Buyer
Title Policy:	Paid by Buyer
Real Property Transfer Tax:	Paid by Seller

PRORATIONS: Any and all rents, taxes, interest, homeowner association fees, trash service fees, payments on bonds, SIDs, LIDs, and assessments assumed by the Buyer, and other expenses of the property shall be prorated as of the date of the recordation of the deed.

ATTORNEYS FEES: Each Party shall pay its own attorneys' fees associated with and respect to this transaction.

Each party acknowledges that he/she has read, understood, and agrees to each and every provision of this page unless a particular paragraph is otherwise modified by addendum of counteroffer.

Buyer's Initials: _____

Seller's Initials: _____

9. TRANSFER OF TITLE: Upon COE, Buyer shall tender to Seller the agreed upon Purchase Price, and Seller shall tender to Buyer marketable title to the Property free of all encumbrances other than (1) current real property taxes, (2) covenants, conditions and restrictions (CC&R's) and related restrictions, (3) zoning or master plan restrictions and public utility easements; and (4) any obligations assumed and encumbrances accepted by Buyer prior to COE. Buyer is advised the Property may be reassessed after COE which may result in a real property tax increase or decrease.

10. COMMON-INTEREST COMMUNITIES: If the Property is subject to a Common Interest Community ("CIC"), Seller is required to provide at Buyer's expense the CIC documents as required by NRS 116.4109 (collectively, the "Resale Package"). Buyer waives any rights to CIC documents, to the extent such apply, as Buyer has been in possession of the Property and should be aware of the status of the CIC. To the extent there are CIC Capital Contributions or CIC Transfer Fees related to the Property in connection with the transaction contemplated by this Agreement, those contributions and transfer fees shall be paid by Seller.

11. DELIVERY OF POSSESSION: Seller shall deliver the Property along with any keys, alarm codes, garage door opener/controls and title or bill of sale related to any other item listed under Section 2 above, upon COE, if requested by Buyer.

12. RISK OF LOSS: Risk of loss shall be governed by NRS 113.040. This law provides generally that if all or any material part of the Property is destroyed before transfer of legal title or possession, Seller cannot enforce the Agreement and Buyer is entitled to recover any portion of the sale price paid. If legal title or possession has transferred, risk of loss shall shift to Buyer.

13. ASSIGNMENT OF THIS AGREEMENT: This Agreement is non-assignable unless agreed upon in writing by the Parties.

14. DEFAULT:

a. MEDIATION: Before any legal action is taken to enforce any term or condition under this Agreement, the parties agree to engage in mediation, a dispute resolution process, through a mediator mutually agreed upon by the parties, except in the case of a claim of specific performance. Mediation fees, if any, shall be divided equally among the Parties. Each party has consulted with an independent lawyer of their choice to review this mediation provision and this Agreement before agreeing thereto. By initialing below, the parties confirm that they have read and understand this section and voluntarily agree to the provisions thereof.

BUYER(S) INITIALS: / SELLER(S) INITIALS: /

b. IF SELLER DEFAULTS: If Seller defaults in performance under this Agreement, Buyer may, at Buyer's option, (i) terminate this Agreement and receive the

Each party acknowledges that he/she has read, understood, and agrees to each and every provision of this page unless a particular paragraph is otherwise modified by addendum of counteroffer.

Buyer's Initials:

Seller's Initials:

EMD, or (ii) take legal action for specific performance, including the claim for attorneys' fees and costs in taking such action of specific performance.

c. IF BUYER DEFAULTS: If Buyer defaults in performance under this Agreement, Seller may retain, as liquidated damages, the EMD and shall keep title to the Property. In this respect, the Parties agree that Seller's actual damages would be difficult to measure and that the EMD is in fact a reasonable estimate of the damages that Seller would suffer as a result of Buyer's default.

15. CANCELLATION OF AGREEMENT: In the event this Agreement is properly cancelled in accordance with Section 5, neither Buyer nor Seller will be reimbursed for any expenses incurred in conjunction with due diligence, inspections, appraisals or any other matters pertaining to this transaction (unless otherwise provided herein or except as otherwise provided by law) and both Parties shall be obligated to pay, equally, any costs set forth herein associated with this transaction and such cancellation.

16. ESCROW INSTRUCTIONS: If this Agreement or any matter relating hereto shall become the subject of any litigation or controversy, Buyer and Seller agree, jointly and severally, to hold Escrow Holder free and harmless from any loss or expense, except losses or expenses as may arise from Escrow Holder's negligence or willful misconduct.

17. BROKER'S COMPENSATION/FEEs: Buyer and Seller agree that the sale of the Property is not subject to any Broker's fees.

18. DEFINITIONS: "Acceptance" means the date that both parties have consented to a final, binding contract by affixing their signatures to this Agreement and all counteroffers and said Agreement and all counteroffers have been delivered to both parties pursuant to Section 24 herein. "Agreement" includes this document as well as all accepted counteroffers and addenda. "Appraisal" means a written appraisal or Notice of Value as required by any lending institution prepared by a licensed or certified professional. "Bona Fide" means genuine. "Broker" means the Nevada licensed real estate broker listed herein representing Seller and/or Buyer (and all real estate agents associated therewith). "Business Day" excludes Saturdays, Sundays, and legal holidays. "Calendar Day" means a calendar day from/to midnight unless otherwise specified. "CIC" means Common Interest Community (formerly known as "HOA" or homeowners' associations). "CIC Capital Contribution" means a one-time non-administrative fee, cost or assessment charged by the CIC upon change of ownership. "CIC Transfer Fees" means the administrative service fee charged by a CIC to transfer ownership records. "Close of Escrow (COE)" means the time of recordation of the deed in Buyer's name. "Default" means the failure of a Party to observe or perform any of its material obligations under this Agreement. "Delivered" means personally delivered to Parties or respective Agents, transmitted by facsimile machine, electronic means, overnight delivery, or mailed by regular mail. "Escrow Holder" means the neutral party that will handle the closing. "Good Funds" means an acceptable form of payment determined by Escrow Holder in accordance with NRS 645A.171. "IRC" means the Internal Revenue Code (tax code). "N/A" means not

Each party acknowledges that he/she has read, understood, and agrees to each and every provision of this page unless a particular paragraph is otherwise modified by addendum of counteroffer.

Buyer's Initials:

Seller's Initials:

applicable. "NAC" means Nevada Administrative Code. "NRS" means Nevada Revised Statutes as Amended. "Party" or "Parties" means Buyer and Seller. "PITI" means principal, interest, taxes, and hazard insurance. "PST" means Pacific Standard Time, and includes daylight savings time if in effect on the date specified. "PTR" means Preliminary Title Report. "Property" means the real property and any personal property included in the sale as provided herein. "Receipt" means delivery to the party or the party's agent. "RPA" means Residential Purchase Agreement.

19. SIGNATURES, DELIVERY, AND NOTICES:

- a. This Agreement may be signed by the parties on more than one copy, which, when taken together, each signed copy shall be read as one complete form. This Agreement (and documents related to any resulting transaction) may be signed by the parties manually or digitally. Facsimile signatures may be accepted as original.
- b. When a Party wishes to provide notice as required in this Agreement, such notice shall be sent regular mail, personal delivery, overnight delivery, by facsimile, and/or by electronic transmission to the Agent for that Party. The notification shall be effective when postmarked, received, faxed, delivery confirmed, and/or read receipt confirmed in the case of email. Delivery of all instruments or documents associated with this Agreement shall be delivered to the Agent for Seller or Buyer if represented. Any cancellation notice shall be contemporaneously delivered to Escrow in the same manner.

20. MISCELLANEOUS: Time is of the essence. No change, modification or amendment of this Agreement shall be valid or binding unless such change, modification or amendment shall be in writing and signed by each party. This Agreement will be binding upon the heirs, beneficiaries and devisees of the parties hereto. This Agreement is executed and intended to be performed in the State of Nevada, and the laws of that state shall govern its interpretation and effect. The parties agree that the county and state in which the Property is located is the appropriate forum for any action relating to this Agreement. Should any party hereto retain counsel for the purpose of initiating litigation to enforce or prevent the breach of any provision hereof, or for any other judicial remedy, then the prevailing party shall be entitled to be reimbursed by the losing party for all costs and expenses incurred thereby, including, but not limited to, reasonable attorney's fees and costs incurred by such prevailing party.

(signatures follow on next page)

Each party acknowledges that he/she has read, understood, and agrees to each and every provision of this page unless a particular paragraph is otherwise modified by addendum of counteroffer.

Buyer's Initials: _____

Seller's Initials: _____

IN WITNESS WHEREOF, each of the persons executing this Agreement has authority on behalf of the respective party to do so and has had the opportunity to review this Agreement with counsel of their choosing and based upon their review and understanding of this Agreement, agrees to the terms and conditions set forth herein as of the Effective Date set forth above.

Dated this 14th day of December, 2020.

SELLER

Philip J. Fagan, JR. 2011 Trust

By: _____
Philip J. Fagan, Jr., its Trustee

BUYER

AAL-JAY, Inc.
a Nevada corporation

By : _____
Lail Leonard, its President

Each party acknowledges that he/she has read, understood, and agrees to each and every provision of this page unless a particular paragraph is otherwise modified by addendum or counteroffer.

Buyer's Initials: _____

Seller's Initials: _____

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

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5
6 AAL-JAY, INC., Plaintiff(s)

CASE NO: A-21-832379-C

7 vs.

DEPT. NO. Department 24

8 Philip Fagan, Jr., Defendant(s)

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order Granting Motion was served via the court's electronic eFile
13 system to all recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 8/26/2021

15 Ogonna Brown	obrown@lewisroca.com
16 Kennya Jackson	kjackson@lewisroca.com
17 Peggy Dale	Mdale@lewisroca.com
18 Diane Meeter	dmeeter@blackwadhams.law
19 Chris Yergensen	cyergensen@blackwadhams.law
20 Jerri Hunsaker	jhunsaker@blackwadhams.law
21 Patricia Grijalva	PGrijalva@lewisroca.com
22 Nicole Lord	nlord@lewisroca.com

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