CASE NO. 83442

IN THE SUPREME COURT FOR THE STATE OF NEVADA

PHILLIP J. FAGAN, JR., AN INDIVIDUAL AND AS TRUSTEE OF THE PHILLIP J. FAGAN, FR. 2001 TRUST

Petitioner,

vs.

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

Respondent,

and

AAL-JAY, INC., a Nevada Corporation

Real Party in Interest.

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

The Honorable Erika Ballou

REAL PARTY IN INTEREST AAL-JAY, INC.'S ANSWERING BRIEF TO:

PETITIONER'S EMERGENCY MOTION UNDER NRAP 27(E)

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

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

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certify that the following are persons as described in NRAP 26.1(a) and must be disclosed:

1. AAL-JAY, Inc. is a Nevada corporation. No publicly traded company owns more than 10% of its stock.

2. Ogonna M. Brown and Adrienne Brantley-Lomeli of Lewis Roca LLP represented AAL-Jay, Inc. in the district court and have appeared in this Court.

These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

DATED this 15th day of September, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

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ROUTING STATEMENT

The Supreme Court should retain this appeal pursuant to NRAP 17(a)(12) because there is tension in the published decisions of the Supreme Court regarding the appealability of such an order. This matter is presumptively retained by the Nevada Supreme Court pursuant to NRAP 17(a)(12). The Petition for Writ of Mandamus and for Prohibition ("Petition") raises as a principal issue a question of statewide public importance, and/or this matter is not one of the enumerated case categories presumptively assigned to the Court of Appeals under NRAP 17(b).

ISSUES PRESENTED

1. Whether the district court was within its discretion in ordering specific performance based on the Purchase Agreement executed by Respondent.

STATEMENT OF THE CASE

This matter stems from the sale of real property ("Property") to Respondent, AAL-Jay a long-time tenant. AAL-Jay, after a decades long professional relationship with Appellant Phillip Fagan, the trustee of the Fagan Trust, executed a purchase agreement in the amount of $800,000, which purchase agreement was drafted by Appellant and submitted to Appellant's escrow agent for the sale of the Property. Thereafter, AAL-Jay wired a $50,000 earnest money deposit to escrow. Respondent then attempted to rescind the purchase agreement and demand a higher sale price of $895,000. After Appellant refused to close on the $800,000 purchase agreement, and attempted to evict AAL-Jay from the Property, AAL-Jay filed suit and sought specific performance of the purchase agreement. On August 26, 2021, the district court granted AAL-Jay's motion for specific performance, specifically finding Appellant had seller's remorse. Respondent subsequently filed for a writ of mandamus.

STATEMENT OF THE FACTS

A. The Parties and Their Decade Long Business Relationship

Respondent AAL-JAY is a Nevada Corporation. 1.Pet.App.2. It leased the Property from the owner, Appellant Philip J. Fagan, Jr., Trustee of the Philip J. Fagan, JR 2011 Trust in November of 2011. *Id*. Christiano DeCarlo, the Director of AAL-JAY, Inc. is the current occupant of the Property, and has lived there with his

family for years while improving the Property. *Id*.

B. AAL-Jay Enters into the Original Agreement to Purchase Appellant's Property

On December 8, 2016, AAL-Jay and Appellant entered into a Contract for Deed. The Contract was signed by Philip J. Fagan as Seller and Lail Leonard as President of AAL-JAY as Purchaser. 1.Pet.App.48 – 55.

Pursuant to the terms of the Contract, Appellant agreed to sell the Property to the Respondent for the purchase price of $1,050,000.00. *Id*. at 49. The Purchase Price was to be paid on a schedule agreed by the Parties. The balance of $1,000,000 was to be paid on the 1st day of each month beginning in December 2016. *Id*. The final payment was due by October 1, 2019. *Id*.

C. To Address AAL-Jay's Recent Financial Struggles the Parties Enter into the First Addendum

AAL-Jay made timely payments throughout the first year of the Agreement. *Id*. at 58. However, beginning in early 2018 AAL-Jay missed a few monthly payments. As a result of the long-lasting business relationship between the parties, in 2018, the parties entered into Addendum No. 1 to the Contract. *Id*. at 60 – 61. The Addendum was signed by Dr. Fagan on behalf of the Appellant and Ms. Leonard on behalf of the AAL-Jay. *Id*. Under the terms of the Addendum, AAL-Jay agreed to cure defaults for January, February and March 2018. *Id*. Specifically, AAL-Jay agreed to pay Appellant $12,340.97 on or before February 2, 2018. *Id*. AAL-Jay

ultimately paid $12,437.75.

Pursuant to the Addendum, the Parties further agreed that AAL-Jay would pay Appellant on or before February 20, 2018 the monthly payments due under the Contract for April and May 2018. 1.Pet.App.60 – 61. Thereafter, AAL-Jay would make each monthly payment due on the first day of each month under the Contract and continue said monthly payments four (4) months in advance until the amount due under the Contract was paid in full. *Id*.

D. AAL-Jay Timely Makes Payments for the Arrears

AAL-Jay was also required to remain current on the payments due under the Contract for the insurance and property taxes. *Id*. On February 12, 2018, after the Parties executed the Addendum, AAL-Jay contacted Appellant's accountant to request documentation for the insurance amounts in arrears. 1.Pet.App.204. The accountant emailed Ms. Leonard advising that "[u]pon receipt of the balance due of $12,437.75, this will bring Mr. Decarlo [sic] fully paid up through June 30, 2018." *Id*.; A.App.53 – 60. In his March 9, 2018 email, Mr. Noll further stated that in order "[t]o stay 3+ months ahead, Mr. Decarlo [sic] is required to pay the July loan payment of $5,671.96 on April 1, 2018." *Id*.

On March 10, 2018, AAL-Jay paid Appellant $12,437.75, the total amount of the outstanding arrears pursuant to the Addendum. 1.Pet.App.205; A.App.62.

E. AAL-Jay Receives and Relies upon the Terms of a New Purchase Agreement

In the latter part of 2020, Mr. DeCarlo, on behalf of AAL-Jay, engaged in discussions with Dr. Fagan's attorney, Richard Scott, Esq. regarding the existing terms of the Property purchase. 1.Pet.App.207.

As a result of these conversations, on January 6, 2021, Dr. Fagan, through counsel, submitted a revised Residential Purchase Agreement for $800,000 to his Escrow Officer at First American Title Insurance Company, who in turn sent revised a Residential Purchase Agreement to Ms. Leonard. 1.Pet.App.64 – 70. According to the terms of the Purchase Agreement that was prepared by the Appellant's attorneys and remitted by the escrow company, the new Purchase Price for the Property was $800,000.00 ("New Purchase Price"), and pursuant to subsection 2(c) a deposit of $5,000 [1]to be placed in escrow as Earnest Money Deposit. *Id.* at 65. The New Purchase Price reflected the seller's application of the thirty five (35) prior payments made under the terms of the original Contract and Addendum. *Id*.

On January 11, 2021, Ms. Leonard executed the Purchase Agreement and transmitted via electronic correspondence the executed Purchase Agreement to the First American Escrow Officer. 1. Pet.App.69 – 72. On January 12, 2021, AAL-Jay wired $50,000 into an escrow account. *Id*.

[1] The EMD amount set forth in the purchase agreement was $5,000. On January 12, 2021, AAL-Jay remitted an initial EMD in the amount of $50,000.

F. Appellant Inexplicably Attempts to Rescind the Agreement

On January 12, 2021, Dr. Fagan contacted Ms. Leonard to dispute the New Purchase Price, and informed her that he was withdrawing the New Purchase Price of $800,000, notwithstanding that AAL-Jay had already accepted the offer and remitted the $50,000 payment. Without explanation, Appellant demanded a new Purchase Price of $895,000. 1.Pet.App.159 – 164. The First American Escrow Officer then presented the Revised Purchase Agreement to AAL-Jay. *Id.*

AAL-Jay refused to pay the unreasonably increased Purchase Price on the basis that the parties already had a deal to purchase the Property for $800,000.

G. In the Interim, to Prevent Eviction, Appellant Issues a Residential Lease Agreement

In the meantime, Appellant, without the advice of counsel and to avoid eviction, agreed to sign documentation that AAL-Jay believed represented an extension of time for the month of February 2021 to allow Mr. Fagan to verify the payment reconciliation relating to the thirty five prior payments. 1.Pet.App.173 – 177. The parties entered into a Residential Lease Agreement dated January 22, 2021 for the term of February 2021. *Id*. AAL-Jay agreed to pay three reoccurring payments of Wells Fargo Mortgage payment, interest, and taxes. *Id*.

H. Appellant Claims AAL-Jay is Delinquent and Initiates Eviction Proceedings

On February 23, 2021, at AAL-Jay's request, Appellant sent to AAL-Jay the amortization schedule for the Property payments. 1.Pet.App.209. AAL-Jay was current on the payments due and owing under the Amortization Schedule through March 2021, based upon the credit of a $30,000 payment made under the Promissory Note. *Id.*

On March 12, 2021, Appellant filed a Five-Day Notice to Quit for Tenancy At Will. *Id*. at 210 – 211. On March 15, 2021, the parties conferred regarding the updated Amortization Schedule. *Id.* During this discussion, Dr. Fagan agreed to have his staff itemize all payments. *Id.*

While the parties were verifying the itemization and reconciliation, Dr. Fagan represented to AAL-Jay that in furtherance of discussions regarding the purchase of the Property, that the Appellant and the AAL-Jay would enter into another lease agreement for the months of March 2021 and April 2021. *Id.* at 210.

I. To Avoid Further Eviction Proceedings, AAL-Jay Agrees to a Second Residential Lease Agreement

Ms. Leonard, without the advice of counsel, and acting on AAL-Jay's behalf, relied upon representations of Mr. Fagan's attorney, Attorney Yergensen, when she agreed to enter into another lease agreement for the months of March and April. On March 9, 2021, Appellant presented a second lease agreement which was dated

March 2, 2021 ("Second Lease Agreement"). 1.Pet.App.180 – 184. Appellant also sent an unsigned Letter of Agreement attached to the March 9, 2021 email. 1.Pet.App.210. The Letter of Agreement stated that, upon execution of the March Lease Agreement that "all other agreements are terminated and of no further force or effect." *Id.* There were also additional provisions based on proposed closing dates.

Under the terms of the Second Lease Agreement, AAL-Jay would make (2) monthly payments in the amount of $6,800 for the months of March and April 2021, of which $3,000 of the payment amount would be applied to the Modified Purchase Price. 1.Pet.App.180 – 184.

Accordingly, AAL-Jay submitted two checks dated March 15, 2021 to Appellant, each in the amount of $6,800. 1.Pet.App.210. On the same day and after submission of the March and April rent payments, Ms. Leonard executed the Second Lease Agreement on behalf of the AAL-Jay. *Id.*

Once the Second Lease Agreement was executed by the AAL-Jay, the Appellant agreed to not pursue the March 12, 2021 Five-Day Notice. *Id.* Appellant further agreed that the Purchase Agreement which would correctly reflect and apply all prior Property payments would be completed and submitted expeditiously. *Id*. However, Dr. Fagan ceased communicating in good faith regarding the fair and accurate itemization and reconciliation of the previous payments made by the

AAL-Jay and refused to sign any purchase agreement for AAL-Jay's purchase of the Property. *Id.*

On March 17, 2021, as a result of Dr. Fagan's refusal to proceed in good faith and proceed with the Purchase Agreement, AAL-Jay placed a stop payment order on the Second Residential Lease Agreement checks. *Id*. at 211.

J. Appellant Re-Initiates Eviction Proceedings

On March 26, 2021, Appellant served AAL-Jay with a Seven (7) Day Notice To Pay Or Quit pursuant to NRS § 40.253 ("Seven-Day Notice"). 1.Pet.App.211. On April 14, 2021, a hearing regarding the Seven-Day Notice was held before Judge Bateman in Justice Court at which time the Court denied the Appellant's request for summary eviction. *Id*.

K. AAL-Jay Files a Complaint Against Appellant and Pays Rent Arrears

In response to Appellant's bad faith efforts to evict AAL-Jay while AAL-Jay was awaiting Appellant's verification on the reconciliation, and to protect AAL-Jay's numerous payments remitted for the purchase of the Property, AAL-Jay initiated a lawsuit on April 6, 2021. 1.Pet.App.1 – 19.

Thereafter, on April 23, 2021, AAL-Jay delivered a cashier's check in the amount of $17, 575.00 to the Appellant, representing payment of rent for March

and April 2021, in accordance with the Second Lease Agreement, made under reservation of rights to avoid further eviction efforts by Appellant. 1.Pet.212.

L. The District Court Exercised its Discretion and Awarded Specific Performance

AAL-Jay subsequently filed its Emergency Motion for Specific Performance of Purchase Agreement on an Order Shortening Time on May 18, 2021, in an effort to obtain an adjudication for specific performance of the Purchase Agreement. 1.Pet.App.196. The Motion for Specific Performance was fully briefed. 1Pet.App.196 – 223; 2.Pet.App.237 – 289. In its briefing, AAL-Jay addressed Appellant's argument that the statue of frauds applied and argued that Appellant's actions were consistent with the existence of a contract. 2.Pet.App.280 – 289.

The Court held oral arguments on June 22, 2021. 3.Pet.App.293. AAL-Jay emphasized during oral argument that that counsel for the defendant, the seller, drafted an agreement for the purchase with a specific term of $800,000, and an earnest money deposit.[2] 3.Pet.APP296. Counsel further noted that on January 6, 2021, an escrow officer at First American Title sent the purchase agreement to AAL-Jay

[2] Section 2(c) of the purchase agreement only required a $5,000 deposit, but AAL-Jay's initial deposit was $50,000, plus an additional deposit of $120,000 in escrow on April 23, 2021, for a total deposit of $170,000 into the escrow account. A.App.140. Appellant was notified of the additional earnest money deposit from Respondent and never once instructed the escrow agent to stop accepting funds, further evidencing that Appellant believed there was an agreement.

for a purchase price of $800,000, and a $5,000 earnest money deposit. *Id*. The purchase price reflected that there were 35 prior payments that the buyer made under the terms of the original contract and addendum. *Id*. Counsel noted that the sale was on track with a successful closing when, to the buyer's surprise on January 12, 2021, Dr. Fagan contacted Ms. Leonard to dispute the purchase price, notwithstanding the fact that his lawyer drafted the document, it was submitted to escrow, and the buyer accepted the offer, signed it, and performed by funding $50,000 in escrow. *Id*. at 297.

The Court concluded that the Appellant suffered from "seller's remorse" and ordered specific performance of the Purchase Agreement for $800,000. *Id*. at 298. Specifically, the Court found that the initial Purchase Agreement had clear and definite terms and the remedy at law was inaccurate.

> I believe that the initial contract for the sale was valid. I believe that the terms of the initial contract were definite and certain. I believe that everything has been met. They were the original total price and the requirement of the 35 months in payments.
>
> I think that the remedy at law is inadequate because property is considered unique and, therefore, any monetary compensation would not be an adequate remedy for the plaintiff. And the plaintiff, I believe, tendered performance on their end by taking possession of the property as well as making payments towards purchasing the property, and I think that specific performance is actually the solution in this case.

Id. at 295.

The Court rejected Appellant's arguments included in its briefing against AAL-Jay's request for specific performance as to the Purchase Agreement, including Defendants' argument regarding the application of the statute of frauds as codified in NRS § 111.210(1).

The Court granted the motion and requested counsel for AAL-Jay to draft the order and submit it to Appellant's counsel for review.[3] *Id*. at 298.

M. Appellant Appeals From the District Court Order

After efforts for AAL-Jay and Appellant to agree on the form order failed, AAL-Jay submitted a proposed order to the court. Appellant objected to the proposed order. 3.Pet.App.300 –316. Appellant then prematurely filed a Motion for Stay Pending Adjudication of Defendants/Counterclaimants' Writ of Mandamus and/or in the Alternative, Writ of Prohibition on July 22, 2021, before the Court formally entered an order granting the Motion for Specific Performance. 3.Pet.App.317 –325. AAL-Jay objected to the motion on the basis that it was not

[3] Appellant misconstrues the district court's findings by alleging the court summarily granted the motion and stated it would order "whatever Ms. Brown puts in front' of the court." This grossly mischaracterizes the district court's findings. Rather, the district court heard oral argument from both parties and found it was "still inclined to grant the motion," and that the Court was "not [going to sign] whatever Ms. Brown puts in front, but… an Order stating what I had said." The Court then ordered that counsel for AAL-Jay "run it [the proposed order] by Mr. Yergensen." 3.Pet.298.

ripe and filed prematurely. 3.Pet.App.338 –350. At the hearing on the Appellant conceded that the motion was not ripe, and the Court noted on the record that it was still reviewing the proposed order in light of Appellant's objections to the form order.

On August 26, 2021, the district court entered its formal Order to grant the Motion for Specific Performance. 3.Pet.App.380–402. The district court found that all the elements of Specific Performance were met, that there was no adequate remedy at law, and that the attempt to void the Purchase Agreement based upon misrepresentations to Buyer that a reconciliation of past payments would be forth-coming and adjusted accordingly in connection with the purchase of the Property. *Id*.

Thereafter, Appellant filed an Emergency Motion for Petition of Writ of Mandamus.

SUMMARY OF THE ARGUMENT

Mandamus is unwarranted in this matter. Generally, mandamus is unavailable to control discretionary actions unless that discretion is exercised arbitrarily or capriciously. Here, Appellant's Petition is limited to an improper request for this Court to interfere with judicial discretion. The record demonstrates that the district court did not exercise its discretion in an arbitrary or capricious manner.

Indeed, the district court was well within its discretion in ordering specific performance. The district court's finding that 1) the terms of the contract are definite and certain; (2) the remedy at law is inadequate; (3) the appellant has tendered performance; and (4) the court was willing to order it, *Serpa v. Darling*, 107 Nev. 299, 304, 810 P.2d 778, 782 (1991), are supported by the record. The court did not err in considering NRS 111.210(1) or *Kern v. Kern*, 107 Nev. 988, 823 P.2d 275 (1991). Appellant cannot demonstrate it is entitled to any mandamus relief.

I.

MANDAMUS, AN EXTRAORDINARY REMEDY, IS UNWARRANTED

Mandamus will not lie to control discretionary action, *Gragson v. Toco*, 90 Nev. 131, 520 P.2d 616 (1974), unless discretion is manifestly abused or is exercised arbitrarily or capriciously. *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). Furthermore, a writ will not issue if a petitioner has a plain, speedy, and adequate remedy in the ordinary course of the law. NRS 34.170; *Cote H. v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark,* 124 Nev. 36, 39, 175 P.3d 906, 908 (2008). Writs of mandamus and prohibition are extraordinary remedies. *D.R. Horton, Inc. v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark*, 123 Nev. 468, 474–75, 168 P.3d 731, 736 (2007). The right to immediately appeal or even to appeal in the future, after a final judgment is ultimately entered, will generally constitute an adequate and speedy legal remedy precluding writ relief. *Id.*

Whether a future appeal is sufficiently adequate and speedy necessarily turns on the underlying proceedings' status, the types of issues raised in the writ petition, and whether a future appeal will permit this court to meaningfully review the issues presented. *Id*. This court has broad discretion in deciding whether to consider a petition seeking relief in the form of mandamus or prohibition. *Id.*

Here, Appellant has an adequate remedy in the ordinary course of law in the form of an appeal following final judgment. Beyond that, there is no public policy or important issue of law to be clarified in this case. Appellant's Petition is limited to an improper request for this Court to interfere with judicial discretion. When the actual record is reviewed, as opposed to Appellant's misleading arguments of what the record sets forth, it is demonstrated that the District Court did not exercise her discretion in excess of that court's jurisdiction. Rather, the District Court exercised discretion in accordance with applicable statutes, case law and rules. Appellant cannot show any arbitrary or capricious exercise of discretion by the District Court that would justify extraordinary remedy of the issuance of a writ.

II.

APPELLANT HAS AN ADEQUATE REMEDY AT LAW WITH AN APPEAL FROM FINAL JUDGMENT

An appeal generally constitutes an adequate and speedy remedy precluding writ relief. *Cote H.*, 124 Nev. at 39, 175 P.3d at 908. "Even if an appeal is not immediately available because the challenged order is interlocutory in nature, the fact that the order may ultimately be challenged on appeal from the final judgment generally precludes writ relief." *Pan v. Eight Judicial Dist. Court ex rel. Cnty. of Clark,* 120 Nev. 222, 225, 88 P.3d 840, 841 (2004). "A remedy does not fail to be speedy and adequate, because, by pursuing it through the ordinary course of law, more time probably would be consumed than in a mandamus proceeding." *County of Washoe v. City of Reno*, 77 Nev. 152, 156, 360 P.2d 602, 603 (1961).

Appellant's ability to appeal the Order at the conclusion of the case is an adequate remedy at law. Appellant still has counterclaims pending and if Appellant's claims have merit as alleged, the District Court could award Appellant damages and/or otherwise remedy the object of the Petition. Notably, Appellant does not want possession of the property, but simply desires the additional $95,000 it inexplicably demanded after AAL-Jay signed the purchase agreement and funded the earnest money deposit into escrow. Appellant's Petition only multiplies the proceedings and wastes judicial resources.

III.

APPELLANT HAS NOT SHOWN AN ARBITRARY OR CAPRICIOUS EXERCISE OF DISCRETION

A. The Court Was Within Its Discretion in Awarding Specific Performance

The district court here has sound discretion to grant specific performance. *Serpa v. Darling*, 107 Nev. 299, 304, 810 P.2d 778, 782 (1991) ("the decision to either grant or refuse specific performance is addressed to the sound discretion of the trial court and will not be disturbed on appeal unless an abuse of discretion is shown."). The discretion which a court of equity has to grant or refuse specific performance, and which is always exercised with reference to the circumstances of the particular case before it, may and of necessity must often be controlled by the conduct of the party who bases his refusal to perform the contract upon the failure of the other party to strictly comply with its conditions. *Gullo v. City of Las Vegas*, 131 Nev. 1287 (2015) (quoting *Cheney v. Libby*, 134 U.S. 68, 78 (1890)) (internal citations omitted)).

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

Here, the court concluded that the Appellant suffered from "seller's remorse" and ordered specific performance of the Purchase Agreement for $800,000. Specifically, the court found that the initial Purchase Agreement had clear and definite terms and the remedy at law was inadequate:

> I believe that the initial contract for the sale was valid. I believe that the terms of the initial contract were definite and certain. I believe that everything has been met. They were the original total price and the requirement of the 35 months in payments.

In making its findings, the district court considered the briefs, the record, and counsel's oral argument. The court's findings were not arbitrary or capricious.

1. The Court Did Not Err in Finding the Terms of the Purchase Agreement Are Definite and Certain.

Under the first element of specific performance, the terms of the Purchase Agreement are definite and certain. Pursuant to the Purchase Agreement that was drafted by the Appellant's attorneys and remitted to Appellant's escrow company, First American, by the Appellant's attorney, Appellant agreed to sell the Property to AAL-Jay for the New Purchase Price of $800,000.00, and the deposit for $5,000 to be placed in escrow. The New Purchase Price reflected the (35) prior payments made by AAL-Jay under the terms of the original Contract and Addendum. The Purchase Agreement was forwarded by the First American Escrow Officer, who was acting as a representative of the Appellant, to Ms. Leonard on January 6, 2021,

which Purchase Agreement was executed by Ms. Leonard on January 11, 2021 and subsequently transmitted via electronic correspondence to the First American Escrow Officer.

Appellant contends that the district court "ignored" evidence submitted in its opposition. (Pet. At 27). Not only is the alleged evidence dubious but it is also irrelevant. Appellant contends that the Purchase Agreement was not drafted by Mr. Richard Scott. While Appellant appear to dispute *who* created the Purchase Agreement on its behalf, it never disputes that a Purchase Agreement was drafted by Appellant's agent and sent to Appellant's escrow agent, and not the other way around.

2. The District Court Did Not Err in Its Application of Kern or NRS 111.210(1)

Appellant contends the district court erred in considering whether the agreement was required to be signed by the party intended to be bound. However, Appellant ignores the arguments raised and considered by the district court in AAL-Jay's briefing: that the parties conduct was consistent with the existence of an agreement.

The Court considered additional factors also defeat Appellant's statute of frauds defense (that it never signed the agreement) including Appellant's subsequent actions and AAL-Jay's escrow deposit. When the parties to a purchase agreement fail to reduce the agreement to writing, or otherwise fail to satisfy the statute

of frauds, the agreement may nevertheless be specifically enforced when the purchaser has partly performed the agreement. *In re Garcia*, 465 B.R. 181 (Bankr. D. Idaho 2011). A court has the power to compel the specific performance of one party to an oral contract for the sale of real property in the case of part-performance by the other party. *In re Destro*, 675 F.2d 1037, 1039 (9th Cir. 1982).

Here, AAL-Jay received a copy of the New Purchase Agreement through Appellant's escrow agent. Upon receipt, AAL-Jay signed the agreement and wired $50,000 to escrow. Further, while Appellant contends that it never believed the New Purchase Agreement was valid, Appellant, through counsel, presented AAL-Jay with an agreement that sought to void the Purchase Agreement.[4] Appellant cannot contend there was no meeting of minds when Appellant took steps to unwind the transaction under the pretext that Appellant was finalizing a reconciliation of past payments to verify the purchase price. Clearly, Appellant believed the agreement was enforceable, and the evidence presented to the Court undermines Appellant's contentions.

[4] Appellant argues that AAL-Jay signed the agreement which allegedly voided the New Purchase Agreement. However, the district court made findings that Appellant, in sending this document, fraudulently coerced AAL-Jay to attempt to void the Purchase Agreement based upon misrepresentations to Buyer that a reconciliation of past payments would be forthcoming and adjusted accordingly in connection with the purchase of the Property. 3.Pet.App.390.

Furthermore, Appellant's reliance on *Kern v. Kern*, 107 Nev. 988, 823 P.2d 275 (1991) is misplaced. In *Kern*, the Nevada Supreme Court expressed that specific performance under a contractual obligation to convey real property was not appropriate because the "agreement was not signed by the party to be bound." *Id.* at 991. However, in *Kern*, the Court also determined material terms, including price, were missing. *Id*. For example, the purchase agreement was signed only by Kay and offers no specificity, terms, or description of the property in question. *Id.* Further, neither the real property nor any of the alleged purchase price was transferred. *Id.*

Here, all material terms are present in the New Purchase Agreement. Further, unlike *Kern*, the parties conduct here is consistent with the existence of a contract. Notably, the parties in *Kern*, acted inconsistent with the agreement by failing to transfer either the property or the purchase price. It is undisputed here that AAL-Jay wired $50,000 to escrow after signing the New Purchase Agreement.

B. The District Court Did Not Err in Considering Principals of Equity

Appellant contends the Purchase Agreement is void because the escrow was allegedly not wired pursuant to the terms of the Purchase Agreement. (Pet. at 20). However, in ordering specific performance, the district court considered this Court's ruling in *Carcione v. Clark*, 96 Nev. 808,811,618 P.2d 346,348 (1980). It

noted that equity regards as done what in good conscience ought to be done. *Woods v. Bromley*, 69 Nev. 96 at 107, 241 P.2d 1103. The Court further considered this Court's analysis in *Gullo*. Specifically, the court considered that even where time is made material, by express stipulation, the failure of one of the parties to perform a condition within the particular time limited will not in every case defeat his right to specific performance, if the condition be subsequently performed, without unreasonable delay, and no circumstances have intervened that would render it unjust or inequitable to give such relief. *Gullo,* 2015 WL 233493 at *1 (internal quotation marks omitted), *quoting Mosso v. Lee*, 53 Nev. 176,182,295 P. 776, 777-78 (1931) (quoting *Cheney v. Libby*, 134 U.S. 68, 78 (1890) (internal citations omitted)).

The discretion which a court of equity has to grant or refuse specific performance, and which is always exercised with reference to the circumstances of the particular case before it, may and of necessity must often be controlled by the conduct of the party who bases his refusal to perform the contract upon the failure of the other party to strictly comply with its conditions.

The Court considered Appellant's conduct in this matter. It determined that the Seller reneged on the $800,000 Purchase Agreement in bad faith and coerced Buyer to attempt to void the Purchase Agreement based upon misrepresentations to Buyer that a reconciliation of past payments would be forthcoming in furtherance of closing the sale. It concluded that Seller's deceptive actions and unfair dealings

have prevented Buyer from purchasing the Property. Accordingly, the district court concluded Appellant's actions were unjust and wholly inequitable.

CONCLUSION

Appellant is not entitled to Mandamus relief. Even if it was, it cannot establish the district court's order was arbitrary or capricious. Accordingly, Appellant's petition should be denied.

DATED this 15th day of September, 2021.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Times New Roman font.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 4,800 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 15th day of September, 2021.

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CERTIFICATE OF SERVICE

I certify that on September 15, 2021, I submitted the foregoing "Respondent AAL-JAY Inc.'s Answering Brief" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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