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

PETITIONER'S REPLY TO: REAL PARTY IN INTEREST'S ANSWERING BRIEF TO PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION UNDER 21(a)(6)

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I. INTRODUCTION

Real Party in Interest's answering brief argues that the District Court was within its discretion to ignore Nevada law and Nevada precedent in determining that an unsigned and unexecuted land sale contract by the land's owner should be specifically enforced against the land's owner. The District Court's Order[1] fails to even reference NRS 111.210(1) or this Court's decision in *Kern*.[2] Real Party in Interest argues that such an exercise of judicial discretion - ignoring Nevada law and Nevada case law - is not a manifest abuse or arbitrary and capricious exercise of the Court's discretion. This is nonsense. This Court has made clear that a manifest abuse or an arbitrary or capricious exercise of discretion is a "clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule."[3] Further, this Court made clear an arbitrary or capricious exercise of discretion is a decision "founded on prejudice or preference rather than on reason" and is "contrary to established rules of law."[4] Such is the case here.

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

2 *Kern v. Kern*, 107 Nev. 988, 823 P.2d 275 (1991).

3 *State of Nevada v. Eighth Judicial District Court of the State of Nevada, and Bobby Armstong, Real Party in Interest*, 127 Nev. 927, 930-931, 267 P.3d 777, 780 (2011) (citing *Steward v. McDonald*, 330 Ark. 837, 958 S.W.2d 297, 300 (1997).

4 *Id.*

Further, Real Party in Interest fails to recognize that an action of "specific performance" is a remedy to a valid contract in which the District Court must first consider prior to using its discretion in determining whether such a remedy is appropriate or not appropriate. Real Party in Interest does not address the first and foremost question: whether the land sale contract is valid in the first place in order to even consider the equitable remedy of specific performance in the second place. Real Party in Interest's willful logical leap over the first question debases Nevada contract law related to land sale contracts and Nevada's longstanding requirement that such contracts be in writing and signed by the real property's owner. This Court has long held that NRS 111.210(1) requires that land sale contracts be in writing and signed by the land's owner. This Court has made clear that courts do not have authority or the discretion to grant specific performance of a contract that is void as a matter of law, and explicitly stated that specific "enforcement of a nonenforceable contract [is] impossible."[5] Such a ruling by the District Court contrary to this established precedent is arbitrary or capricious, and a clear abuse of power.

This Court should instruct the District Court that its actions in this case were not possible pursuant to Nevada law, that its actions were not within its discretion as a matter of law, and its ruling was clearly an abuse of power, arbitrary and capricious, and in clear error. The Writ of Mandamus and/or Writ of Prohibition should be issued

[5] *Serpa v. Darling*, 107 Nev. 299, 810 P.2d 778 (1991).

by this Court, the District Court's order should be vacated and Real Party in Interest's motion for specific performance should be denied in its entirety.

II. ARGUMENT

A. The Issuance of Writ of Mandamus and/or Prohibition is Warranted in This Case.

Real Party in Interest wrongly concludes that there is no public policy or important issue of law to be clarified in this case, and that this petition is an improper request for this Court to interfere with judicial discretion. Each conclusion is wrong.

First, the Las Vegas Realtors ("LVR"), through the multiple listing service, indicates that as of August 31, 2021, over 3,000 single family homes have been sold in Southern Nevada.[6] The total market value of such residential real estate transactions exceeds $1.5 Trillion Dollars.[7] This case has implications on an important issue of law with respect to the residential real estate sales market, a huge area of public interest. Furthermore, the common understanding and practice in the real estate sales market is that a land sales contract must be signed by the land's owner for the land sales contract to be "accepted" and valid. Real Party in Interest seeks to throw this common understanding and practice on its head, which will have huge public policy implications and dramatically change customary real estate legal

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[6] Las Vegas REALTORS, *Las Vegas Housing Market Statistics*, (2021), http://www.lasvegasrealtor.com/housing-market-statistics.

[7] *Id*.

practice. Real Party in Interest's unsubstantiated conclusion that no public policy or important issue of law needs to be clarified in this case is completely disingenuous.

And second, this is not a matter of simple judicial discretion. This Court has recognized that a writ of mandamus is appropriate when discretion is manifestly abused or is exercised arbitrarily or capriciously.[8] Furthermore, when only legal issues are raised, this Court will review the matter *de novo*.[9]

Here, the District Court manifestly abused its discretion by ignoring Nevada law and this Court's binding precedent, despite Real Party in Interest's allegation otherwise in its answering brief.[10] Such a blatant disregard to Nevada law is a clear abuse of power by the District Court.[11] And, the issue presented here is a legal issue, whether a land sale contract requires the signature of the land's owner pursuant to Nevada law. This Court has the authority to clarify an important legal issue, under a standard of *de novo* review, through the issuance of the writ.[12] Here, the granting of the writ is the appropriate remedy given that the District Court ignored the applicable

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8 *See Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981).

9 *St. James Village, Inc., v. Cunningham*, 125 Nev. 211, 216 (2009).

10 *See* Real Party in Interest's Answering Brief, page 13, 18-20, stating "[t]he court did not err in considering NRS 111.210(1) or *Kern*." However, no such consideration was ever given. The District Court's Order does not even mention NRS 111.210(1), nor *Kern*, in the entirety of the order. *See* Appendix, Vol. III, Tab 23, PET 000380-000402, Order Granting Motion for Specific Performance of Purchase Agreement, on An Order Shortening Time.

11 *See* Footnote 3.

12 *See* Nev. Const. Art. 6 § 4. *See also* NRS 34.320, NRS 34.160 and NRAP 21.

Nevada statute, ruled contrary to Nevada case law, and provided no support for its actions under any other rules, cases or statutory authority.

B. A Land Sale Contract Not Subscribed by the Land's Owner is Void as a Matter of Law, and Therefore Cannot be Specifically Enforced.

Real Party in Interest wrongly asserts that the District Court acted within its discretion in granting specific performance under the four (4) factors expressed by this Court in *Serpa v. Darling*, 107 Nev. 299, 810 P.2d 778 (1991). But in *Serpa*, this Court first concluded that the purchase and sale agreements were unenforceable because they lacked "mutuality of obligation" and therefore, could not be enforced as a matter of law.[13] This was the holding of the *Serpa* Court: specific "enforcement of a nonenforceable contract [is] impossible."[14] The *Serpa* Court secondarily concluded that "even if we were to conclude that the agreements between the parties were enforceable . . . we do not find the terms of the parties' agreement to be sufficiently definite and certain to allow specific performance."[15]

Here, the District Court wrongly alluded to a valid contract without providing any legal support for such a conclusion. Even Real Party in Interest's answering brief fails to provide legal support for such a legal conclusion, and merely suggests to this Court, without any legal authority, that "the parties conduct was consistent with the

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13 *See Serpa*, 107 Nev. at 303 – 304 ("We conclude that the district court did not err in finding that the agreements were unenforceable").

14 *See id.* at 304.

15 *Id.*

existence of an agreement."[16] This is not Nevada law with respect to a land sale contract.

The first and foremost question of this case, as is the case with all specific performance cases, is whether the alleged "purchase agreement" (or contract) was valid in the first place. Unlike the *Serpa* Court, and even unlike the district court in *Serpa*, the District Court glosses over any discussion of whether there was an enforceable contract in the first place prior to examining whether discretion dictates the remedy of specific performance. In this case, the District Court includes a mountain of unsubstantiated factual conclusions,[17] and then haphazardly leaps to a discretionary analysis of the remedy of specific performance, citing numerous unsubstantiated facts to support its discretionary conclusion that specific performance is warranted, while patently ignoring the legal issue that NRS 111.210(1) provides that the unsigned and unexecuted "purchase agreement" is void as matter of law.[18]

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16 *See* Real Party in Interest's Answering Brief, page 18.

17 Some of the factual conclusions reached by the District Court are "seller's remorse", "lack of good faith", "deceptive actions", "fraudulently coerced", "the buyer was ready, able and willing", "equity regards", and so forth, without ever allowing the parties to conduct discovery, or hold an evidentiary hearing to establish such facts. And while the District Court may favor Real Party in Interest's storytelling over Petitioner's, the undisputed fact is that the "purchase agreement" was not signed by Petitioner as owner of the real property, which is the dispositive fact that this Court should consider.

18 Real Party in Interest, and the District Court, assert unsubstantiated facts to support their equitable conclusion that Petitioner is the bad guy, and therefore, Petitioner must sell its real property to Real Party in Interest, even though Petitioner never agreed to do so through a signed and executed purchase agreement. The

C. The "Purchase Agreement" was Not Valid by its Own Express Terms, and the District Court's Order Opens the Floodgate for Fraud Thereby Rendering NRS 111.210(1) Meaningless

Real Party in Interest's answering brief fails to even address that the "purchase agreement" was not even valid by its own express terms. Rather, Real Party in Interest alludes to certain unsubstantiated facts, such as Real Party in Interest (Buyer) having signed the "purchase agreement", delivered it to escrow, and provided the earnest money, and therefore a valid land sale contract was created. There is no case law, statutory authority, or rule to support such a conclusion. And, Real Party in Interest argues that the express terms of the alleged contract be ignored or disregarded in order to reach an "equitable" result. Again, no such legal authority supports such a conclusion.

Significant terms expressed in alleged "purchase agreement" clearly provided that the "purchase agreement" was not valid, such as "acceptance" of the alleged "purchase agreement" is the "date that both parties have consented to a final, binding contract by affixing their signatures to this Agreement." (Emphasis added).[19] And,

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District Court's Order even goes so far as to mandate Petitioner to sign the "purchase agreement" or the Clerk of Court will do so on behalf of Petitioner, an act of judicial intervention that defies any legal authority, **and** begs the question, if all of the unsubstantiated facts support that there was some sort of valid contract, then why mandate Petitioner, or the Clerk of the Court, to sign the "purchase agreement"?

[19] *See* Appendix, Vol. III, Tab 23, at PET 000399, Exhibit A, "The Residential Purchase Agreement for $800,000" to Order Granting Motion for Specific Performance of Purchase Agreement, on An Order Shortening Time.

the closing date was December 17, 2020, some 25 days prior to Real Party in Interest signing the "purchase agreement". Each of the dates certain had expired.[20] Hence, there is not a valid contract to form a remedy of specific performance.

Most troublesome of Real Party in Interest's argument is that it would open the door to potential fraud with real estate purchase and sale transactions in Nevada, especially under these facts. As stated earlier, Real Party in Interest argues that the facts sufficient to establish the validity of a land sale contract are: a signed real estate purchase contract by the buyer (with no regard to dates certain in the alleged contract, or other express terms in the alleged contract), delivery of the real estate purchase contract signed by the buyer to an escrow (with no regard to dates certain in the alleged contract), and delivery of buyer's earnest money to an escrow (with no regard to dates certain in the alleged contract). This is the District Court's unsound position with its Order, and one can only imagine how many draft real estate purchase contracts are sitting in storage or have sat for months and have never been signed or acted upon by either party. Now, these dormant draft real estate purchase contracts will have new life, they may be sprung into life by opportunistic buyers, should the District Court's decision stand. Fortunately, Nevada's Statute of Frauds,[21] which has

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

[21] NRS 111.210(1).

been in effect for over a hundred years, protects this potential for abuse and fraud on behalf of the land's owner. As this Court has said, the enactment of Nevada's Statue of Frauds was to prevent frauds and perjuries.[22] Allowing the District Court's Order to stand would render NRS 111.210(1) meaningless, which was designed and intended to prevent such fraud.

Here, the District Court failed to give any credence or consideration to Nevada's long-standing statute,[23] nor to any of the express provisions within the "purchase agreement" itself,[24] which was a clear erroneous interpretation and application of Nevada law. This was clear error, an abuse of discretion, and was arbitrary and capricious.

III. CONCLUSION

Petitioner requests that this Court issue an immediate order vacating the District Court's Order granting the Motion for Specific Performance, and that this

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22 *Bangle v. Holland Realty Inv. Co.*, 80 Nev. 331, 334, 393 P.2d 138, 139 (1964). *See also Wilber v. Paine*, 1 Ohio 251, 255 (1824) (stating that the purpose of the statute of frauds is to prevent "frauds and perjuries"); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv.L.Rev. 1685, 1691 (1976) ("[T]he statute of frauds is supposed both to make people take notice of the legal consequences of a writing and to reduce the occasions on which judges enforce non-existent contracts because of perjured evidence.")

23 *Id*.

24 *See* Appendix, Vol. III, at PET000396-000400.

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

DATED: September 22, 2021

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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the formatting requirements of NRAP 32(a)(4) the typeface requirements of NRAP (32)(a)(5) and the type style requirements of NRAP 32(a)(6) because this reply has been prepared in a proportionally spaced typeface using Microsoft Word Processor for Windows 10 in 14 point Times New Roman font. I further certify that this petition complies with the page or type-volume limitations of NRAP 21(d), because, excluding the parts of the reply exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and contains 2,452 words.

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of September 2021, that I served a copy of the foregoing document upon counsel of record for Real Party in Interest and the District Court, Department 24, by electronic mail to the following:

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