CASE NO. 84699

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

Appellants,

vs.

AAL-JAY, INC., a Nevada Corporation

Respondent,

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

The Honorable Erika Ballou

RESPONDENT AAL-JAY, INC.'S ANSWERING BRIEF TO APPELLANTS' OPENING BRIEF

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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 19th day of January, 2023.

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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 Opening Brief 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 appellants prematurely appealed the district court's May 6, 2022 order.

2. Whether the district court was within its discretion in granting the May 6, 2002 order.

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 the Fagan Trust, through its counsel, and submitted to Appellant's escrow agent for the sale of the Property. Thereafter, AAL-Jay executed the purchase agreement and 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 Appellants 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 Appellants had seller's remorse. Appellants refused to comply with the Specific Performance order requiring Respondent to file a motion for turnover. On May 6, 2022 the district court granted Respondent motion. Appellants subsequently filed this appeal.

STATEMENT OF THE FACTS

A. The Parties and Their Decade Long Business Relationship

Respondent AAL-JAY is a Nevada Corporation. AA0004. 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*. at 0005. 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. *Id*.

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*. 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 0006. 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 0006 – 7. 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. 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*. at 0007 – 8. 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. *Id*. 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*. 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.

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. *Id*. at 0009.

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. *Id.* 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. On January 12, 2021, AAL-Jay wired $50,000 into an escrow account. *Id*. at 00010.

F. Appellants 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. *Id*. Without explanation, Appellant demanded a new Purchase Price of $895,000. *Id.* 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.

[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.

G. In the Interim, to Prevent Eviction, Appellants Issue a Residential Lease Agreement

In the meantime, AAL-Jay, 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. Id. at 00011 – 12. 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 payments, interest, and taxes. *Id*.

H. Appellants Claim 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. AA00013. 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*. 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.*

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 Chris Yergensen, when she agreed to enter into another lease agreement for the months of March and April, 2021. AA00014. On March 9, 2021, Appellant presented a second lease agreement which was dated March 2, 2021 ("Second Lease Agreement"). [Citation]. Appellant also sent an unsigned Letter of Agreement attached to the March 9, 2021 email. *Id*. 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. *Id*.

Accordingly, AAL-Jay submitted two checks dated March 15, 2021, to Appellant, each in the amount of $6,800. 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 then Dr. Fagan 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 00015.

J. Appellants Re-Initiate Eviction Proceedings

On March 26, 2021, Appellants served AAL-Jay with a Seven (7) Day Notice To Pay Or Quit pursuant to NRS § 40.253 ("Seven-Day Notice"). *Id.* 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 Appellants and Pays Rent Arrears

In response to Appellants' 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, seeking specific performance, *inter alia*. *Id*.

Thereafter, on April 23, 2021, AAL-Jay delivered a cashier's check in the amount of $17,575.00 to the Appellants, 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 Appellants. *Id.* at 00105.

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. *Id*. at 00106-131. The Motion for Specific Performance was fully briefed. *Id*. 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. [Citation].

The Court held oral arguments on June 22, 2021. The Court concluded that the Appellant suffered from "seller's remorse" and ordered specific performance of the Purchase Agreement for $800,000. *Id*. at 164. 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 165-180.

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

The district court granted the motion.

M. First American Fears the Fagan Defendants will Commence Litigation and withholds the Escrow Funds

In the district court's August 26, 2021 order, Appellants were ordered to sell the Property to Buyer or its assignee for $800,000 pursuant to the Residential Purchase Agreement. *Id.* The court also ordered that the $170,000 total amount that buyer wired into escrow with First American Title Insurance Company ("First American") be used toward the close of escrow for the purchase of the Property. *Id*. However, Appellants refused to sign the Purchase Agreement. Thus, pursuant to this district court's Specific Performance Order, the Clerk of the Court executed the Purchase Agreement on behalf of the Seller.

Despite the execution of the Purchase Agreement, Appellants continued to refuse to cooperate. Appellants refused to obtain the mortgage payoff, the HOA payoff, and the necessary releases required to close on the sale of the Property. After requesting that Mr. Fagan sign the necessary papers to effectuate the sale, Mr. Fagan refused, and First American feared that Mr. Fagan would commence litigation against First American based upon communications from Mr. Fagan and/or his counsel threatening litigation against First American if they closed the sale. *Id*. at 00219-260.

N. The District Court Orders the Turnover of the Escrow Funds

After months of endeavoring to close through First American and to

procure a loan effectuate closing, on February 28, 2022, First American advised that it was closing escrow and that any funds deposited with First American will be placed with an interpleader unless a mutually executed agreement or court order was presented prior to March 11, 2022. On March 15, 2022, AAL-Jay filed its Emergency Motion for First American Title Insurance Company to Turnover Funds in Escrow to the Buyer and Motion for Order to Show Cause Why this Court Should Not Hold Philip J. Fagan Jr. In Contempt. *Id*. In the motion Respondent argued that the court should order First American to turnover the funds held in escrow and should find that Mr. Fagan was in contempt for refusing to cooperate in accordance with the district court's order. *Id*. at 00228.

In opposition, Appellants argued that (1) the district court lacked jurisdiction over First American and (2) Mr. Fagan had complied with the order and was not in contempt. AA00267 – 271. Appellants also filed a countermotion that requested an injunction that would require Respondent to pay rent or vacate and requested clarification of the specific performance order. AA00272. Appellants argued that the order should either be voided or alternatively be amended to include a deadline for the AAL-Jay to tender performance. AA00279. The original closing date was December 17, 2020 and therefore, as that date had passed, a new closing date was needed. *Id*.

On May 6, 2022, the court granted the Respondents request for turnover and denied Appellants request for an injunction. AA00343. The court further provided clarification on its August 26, 2021 Specific Performance order. AA00343. It found that it had entered the order eight months ago and that Mr. Fagan had refused to cooperate. AA00340. Therefore, the court in response to Appellants request for clarification stated that "… the clarification is that there has to be cooperation within 30 days." AA00340.

Thereafter, Appellants appealed.

SUMMARY OF THE ARGUMENT

Appellants attempt to circumvent this Court's prior ruling that Appellants may appeal the order granting specific performance at the conclusion of this case. To do so, Appellants argue that the May 6th order granting a turnover of escrow funds and clarifying the Specific Performance order was actually an order granting a preliminary injunction. That is simply incorrect. Further, the district court was well within its discretion in ordering the turnover and clarifying its specific performance order.

Appellants cannot demonstrate they are entitled to any relief.

I.
APPELLANTS OPENING BRIEF IS AN ATTEMPT TO ATTACK THE SPECIFIC PERFORMANCE ORDER

A. Appellants Cannot File an Immediate Appeal from the Order Regarding the Countermotion for Clarification

This Court has appellate jurisdiction to review decisions of the district courts. Nev. Const. art. 6, § 4. But this Court's appellate jurisdiction is limited, *Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 444, 874 P.2d 729, 732 (1994), and the Court may only consider appeals authorized by statute or court rule. *Taylor Constr. Co. v. Hilton Hotels Corp*., 100 Nev. 207, 209, 678 P.2d 1152, 1153 (1984). Under NRAP 3(A)(b) and appeal may be taken from an order granting or refusing to grant an injunction or dissolving or refusing to dissolve an injunction.

Here, Appellants attempt to confer jurisdiction on this court by categorizing the district court's order on Appellant's motion for clarification of the August 26, 2021 Specific Performance order as an order granting or denying an injunction. The order clarifying the Specific Performance order is not an injunction, rather it is what Appellants requested and moved for, simple clarification.

No statute or court rule directly provides for an appeal from an order for clarification, see NRAP 3A(b) (designating the judgments and orders from which an appeal may be taken), nor is the clarification a a final judgment, that is substantively appealable under NRAP 3A(b)(1) (permitting an appeal from a final judgment in a civil action). The finality of an order or judgment depends on "what the

order or judgment actually does, not what it is called." *Valley Bank of Nev.*, 110 Nev. at 445, 874 P.2d at 733. To be final, an order or judgment must "dispose [ ] of all the issues presented in the case, and leave[ ] nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs." *Lee v. GNLV Corp*., 116 Nev. 424, 426, 996 P.2d 416, 417 (2000).

The opening brief specifically takes issue with a portion of the district court's order that provides clarification on the Specific Performance order. Because no statute or court rule permits an immediate appeal from an order denying or granting a motion for clarification, this Court lacks jurisdiction.

B. Appellants Raise New Arguments on Appeal

Issues not raised by party in district court are deemed waived on appeal. *Moretto Tr. of the Jerome F. Moretto 2006 Tr. v. ELK Point Country Club Homeowners Ass'n, Inc.*, 138 Nev. Adv. Op. 24, 507 P.3d 199 (2022).

Here, Appellants for the first time on appeal argue that the order regarding Appellants' motion for clarification was a "defacto injunction" in favor of Respondent. They also raise for the first time on appeal that the district court should not require Appellant to sign various documents. However, in the district court, Re-

spondent argued that (1) the district court should void the Specific Performance order because the terms of the purchase agreement were not definite and specific performance is not and claim and (2) alternatively the district court should amend the deadline to comply. AA00278 -279. Appellants never raised any issue regarding a bond, a defacto injunction, or the signing of various documents in the countermotion or at the hearing. The only mention of an injunction at the hearing was in terms of an injunction Appellants requested in their favor.

> With respect to the countermotion for a preliminary injunction, I think that one of the issues her for irreparable harm is that my client's already being harmed because he plaintiffs are causing liens to be recorded against the property and incurring the HOA violations which can very well turn into a lien on the property. And do we've asked merely for a maintenance of the status quo, you know until such time as this case has come to a conclusion where my client should have appellate rights.

AA00334 -335.

Appellants blur the lines between their arguments against for clarification of the August 26, 2021 order and their arguments against the district court's grant of the motion for specific performance. The order granting specific performance is not at issue in this appeal, but in an attempt to reargue their writ petition, Appellants improperly lump arguments relevant to the specific performance order into this appeal.

C. Appellants Take a Second Bite at the Apple, Disputing the Specific Performance Order

The basis of Appellants' opening brief is that the district court erred in ordering Appellants "to deliver $1.1 million in funds to pay off lienholders, requiring Dr. Fagan to sign all document presented to him by Plaintiff, and prohibiting Dr. Fagan from enjoying any of his rights in the property as its owner." (Opening Brief p.12-13). In doing so, Appellants contend that the district court has ordered a "defacto injunction." As argued above, Appellants' arguments improperly attempt to collaterally attack the district court's Specific Performance Order. This Court has already considered and denied a Writ of Mandamus regarding the Specific Performance Order. (Case No. 83442). Further, Appellants' notice of appeal only cites to the May 6, 2022 Order. In an attempt to avoid this Court's prior ruling, Appellants have repackaged their arguments in this appeal. Any argument relating to the specific performance order should be ignored.

D. Appellants May Appeal after 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. "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).

Appellants' ability to appeal the Turnover Order at the conclusion of the case is an adequate remedy at law. Appellants still have counterclaims pending and if Appellant's claims have merit as alleged, the District Court could award Appellants damages and/or otherwise remedy the object of this appeal. Notably, Appellants 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.

E. Respondent Never Sought, and the District Court Never Awarded, an Injunction in Favor of Respondent

Appellants argue that the district court awarded a "defacto injunction" and failed to require Respondent to post a bond. In making their argument, Appellants argue that the May 6, 2022 order in "the lower court granted both mandatory and prohibitive injunctive relief in favor of the Plaintiff, with the Plaintiff never having to file a motion pursuant to NRCP 65, or post any bond." However, a simple review of the May 6th order demonstrates that is simply not the case. As mentioned above, these arguments were never raised at the district court and any attacks on the specific performance order are not proper for this appeal.

II.

APPELLANTS HAVE NOT SHOWN AN ARBITRARY OR CAPRICIOUS EXERCISE OF DISCRETION

A. The Court Was Within Its Discretion in Clarifying its Order in Accordance with Appellants Request

Appellants contend that May 6th order was an error. (Opening Brief 12). However, Appellants have failed to demonstrate that the order was arbitrary or capricious. Indeed, Appellants requested that the district court provide a deadline for compliance. AA00279. ("The Order should alternatively be voided or amended to include a deadline for the Plaintiff to tender performance based on some finding of fact, conclusion of law, or express term in a written, signed agreement before the parties… Here the contract calls for a closing date of December 17, 2020, which obviously cannot be performed. Therefore the Order must specify and provide a basis for a later closing date." In response to this request, the Court found that the parties had 30 days to cooperate. AA00340.

B. The District Court was Within its Discretion in Denying Injunctive Relief to Appellants

Nevada Rule of Civil Procedure 65 provides the court with the authority to issue a preliminary injunction, but it is the movant's burden to demonstrate to this court that all of the elements for injunctive relief have been met. *See* NEV. REV.

STAT. § 33.010. Applying this statute, this Court has held that a preliminary injunction should issue "upon a showing that the party seeking it enjoys a reasonable probability of success on the merits and that the defendant's conduct, if allowed to continue, will result in irreparable harm for which compensatory damage is an inadequate remedy." *Dixon v. Thatcher*, 103 Nev. 414, 415, 742 P.2d 1029, 1029 (1987) (citing *Number One Rent-A-Car v. Ramada Inns*, 94 Nev. 779,780,587 P.2d 1329 (1978)); *Dangberg Holdings Nevada, L.L.C. v. Douglas Cnty. & Bd of Cnty. Comm'rs*, 115 Nev. 129,142,978 P.2d 311,319 (1999). In considering preliminary injunctions, courts may also weigh the potential hardships to the relative parties and others, and the public interest. *University and Community College System of Nevada v. Nevadans for Sound Government*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004).

Here, Appellants improperly sough injunctive relief in their opposition in connection with an expedited hearing instead of seeking a motion for injunctive relief that is properly noticed. In seeking injunctive relief, Appellants moved for preliminary injunction that would have required Respondent to pay rent or vacate the premises. However, Appellants failed to show a likelihood of success on merits. Their primary argument is that Respondent failed to make rental payments on the Property. However, the district court previously noted in its Specific Performance Order that Respondent submitted checks dated March 15, 2021 to Appellants in the

amount of $6,800 consisting of check numbers 3276 and 3277 representing March and April 2021 rental payments for the property and only stopped payment on the checks after Appellants' refusal to proceed in good faith with the Purchase Agreement. Indeed, the district court determined that any mortgage payments are a result of Appellants refusal to comply with the court's specific performance order. AA00345. Thus, Appellants' demand for interim rental payments wholly disregards the Specific Performance Order. Had Appellants complied with the Specific Performance Order instead of ignoring the order and proceeding with a lack of good faith and cooperation pursuant to the Purchase Agreement, Appellants would have received $800,000 in June 2021 after the Court ordered specific performance.

Even if Appellants were able to prove a likelihood of success on the merits, which Respondent disputes, it is axiomatic that a preliminary injunction may not issue, as a matter of law, where monetary relief would otherwise make the claimant whole. *Castillo v. United Fed. Credit Union*, 134 Nev. 13, 18, 409 P.3d 54, 59 (2018); see *also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 595, 72 S. Ct. 863 (1952) ("A plaintiff is not entitled to an injunction if money damages would fairly compensate him for any wrong he may have suffered.") (Frankfurter, concurring); *Calif. Pharmacists Ass'n v. Maxwell-Jolly,* 563 F.3d 847, 852 (9th Cir. 2009), *vacated on other grounds and remanded sub nom. Douglas v. Independent Living Ctr. Of So. Calif., Inc*., 565 U.S. 606, 132 S. Ct. 1204 (2012) ("[E]conomic

damages are not traditionally considered irreparable harm because the injury can later be remedied by a damage award.") (emphasis in original); *see also Skinvisible Pharms., Inc. v. Sunless Beauty, Ltd*., 2012 WL 1032549, at *3 (D. Nev. Mar. 27, 2012)(money damages are adequate to cure such harm and therefore there cannot be a showing or irreparable harm sufficient to warrant relief through preliminary injunction).

Given that the Appellants alleged harms that Appellants complain of are solely monetary, Appellants could be made whole through monetary relief.

C. This Court has Already Determined it is Not Proper to Review the Specific Performance Order at this Time

The district court's order regarding Specific Performance and its clarification of that order was not arbitrary or capricious. However, as previously ordered in Case No. 83422, this order should properly be considered on appeal. This court should not circumvent that order by considered the clarification order a "defacto injunction."

CONCLUSION

Accordingly, this court should affirm the district court's May 6th order that granted the turnover of the escrow funds, denied a preliminary injunction that would have required Respondent to pay monthly rent, and clarified the order regarding specific performance.

DATED this 19th day of January, 2023.

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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 4,749 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 19th day of January, 2023.

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CERTIFICATE OF SERVICE

I certify that on January 19, 2023, 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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