**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 ANSWER TO PETITION FOR EN BANC RECONSIDERATION

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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 20th day of November, 2023.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

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## INTRODUCTION

This matter stems from the sale of real property ("Property") to Respondent, AAL-Jay, a long-time tenant. AAL-Jay 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, on August 26, 2021, the district court granted AAL-Jay's motion for specific performance, expressly finding Appellants suffered from seller's remorse. Appellants sought clarification of that order and on May 6, 2022, the district court granted Respondent motion for specific performance. Appellants subsequently filed this appeal.

Appellants now contend that the Panel erred in refusing to buy its arguments that the May 2022 was actually an order granting injunctive relief.

## EN BANC RECONSIDERATION STANDARDS

En banc reconsideration "is not favored," and it is not granted "except when (1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals, or (2) the proceeding involves

a substantial precedential, constitutional or public policy issue." NRAP 40A(a). Further, a petition "to secure and maintain uniformity of the decisions … shall demonstrate that the panel's decision is contrary to prior, published opinions of the Supreme Court or Court of Appeals and shall include specific citations to those cases." NRAP 40A(c). And a petition "based on grounds that the proceeding involves a substantial precedential, constitutional or public policy issue, … shall concisely set forth the issue, shall specify the nature of the issue, and shall demonstrate the impact of the panel's decision beyond the litigants involved." *Id*.

## ARGUMENT

The Panel correctly determined that it did not have jurisdiction over the Clarification Order because it was not immediately appealable. Appellants cannot point to any arguments or evidence the panel overlooked in coming to this conclusion. Rather, Appellants ignore the legal differences between specific performance and injunctive relief. For the reasons stated below, those argument are flawed and do not prove that reconsideration is appropriate under NRAP 40A.

### A. Appellants Conflate Specific Performance with a Mandatory Injunction

The crux of Appellants' argument is that the district court granted a "de facto injunction." Applying Appellants' logic and its 10,000-foot view of the May 2022 order, every grant of specific performance would be a grant of a "de facto injection."

Appellants believe that because a specific performance order requires a mandatory act, that is to specifically perform the terms of the contract, the order must be an injunction. This is certainly not the case and is unsupported by Nevada law.

Appellants' Petition glosses over a key difference between specific performance and injunctions. An injunction is a preventive and protective remedy, aimed at future acts; it is not intended to redress past wrongs. *Fed. Trade Comm'n v. Qualcomm Inc.*, 969 F.3d 974, 1005 (9th Cir. 2020) ("[a]s a general rule, '[p]ast wrongs are not enough for the grant of an injunction'; [instead,] an injunction will only issue if the wrongs are ongoing or likely to recur."); *Snyder v. Sullivan*, 705 P.2d 510, 513 (Colo. 1985); 42 Am.Jur.2d, Injunctions § 4. And while an injunction requires a party to do a particular thing, or to refrain from doing a particular thing, not every order with such a requirement is an injunction. *State v. Neiswanger Mgmt. Servs., LLC*, 457 Md. 441, 467, 179 A.3d 941, 957 (2018); *see also Zitella v. Mike's Transportation, LLC*, 160702, ¶ 14, 99 N.E.3d 535, 538 (2018 IL App (2d)); 42 Am. Jur. 2d Injunctions § 1.

On the other hand, a decree of specific performance remedies *a past breach* of contract by fulfilling the legitimate expectations of the wronged promisee. *Pauma Band of Luiseno Mission Indians of Pauma & Yuima Rsrv. v. California,* 813 F.3d 1155, 1167 (9th Cir. 2015) (stating specific performance is a remedy associated with breach of contract); *Baroi v. Platinum Condo. Dev., LLC*, 874 F. Supp. 2d 980, 984

(D. Nev. 2012) (stating Nevada will enforce contractual obligations through the remedy of specific performance where appropriate, particularly in real estate transactions because real property is "unique," and damages therefore may be an inadequate remedy); 5A Corbin on Contracts § 1138 (1964); Restatement (Second) of Contracts § 357, comment a (1981).

Ultimately, the key difference between a mandatory injunction and specific performance is that unlike specific performance, a mandatory injunction prescribes conduct that has not been defined by contract, and instead requires the court to choose mode of performance from wide range of possibilities. *Snyder v. Sullivan*, 705 P.2d 510, 513 (Colo. 1985).

Here, the Panel did not overlook Appellants' arguments regarding the alleged "de facto injunction" but rather properly framed them for what they were, a challenge to the prior order regarding specific performance. Further, Appellants incorrectly argued that Respondent did not claim the May 2022 order was not a "de facto junction." In fact, Respondent repeatedly pointed out (1) that Respondent never sought injunctive relief (AB pg. 16); (2) the May 2022 order was a Clarification Order of the Specific Performance Order (AB pg. 14 -15); and (3) that it was "simply incorrect" that the May 6th order was an order granting preliminary injunction (AB pg. 13).

Because the district court's order is not injunctive but rather an order regarding specific performance, Appellants cannot demonstrate any "substantial precedential, constitutional or public policy issue." NRAP 40A(a).

### B. The Panel Did Not Err in Finding it Lacked Jurisdiction

In the district court, Appellants, unhappy with the lower court's grant of specific performance and this Court's dismissal of its premature appeal, sought clarification of the specific performance order. The Court gave Appellants what it requested, clarification. Appellants then attempted to repackage that order into an order granting a mandatory injunction and appealed again. Indeed, 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). It was not an error for the Panel to determine that Appellants' arguments improperly attempted to collaterally attack the district court's Specific Performance Order.

## CONCLUSION

Based on the foregoing, Respondent, AAL-Jay Inc., respectfully requests that this Court deny the Appellants' petition.

DATED this 20th day of November, 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 40B(d) because, except as exempted by NRAP 32(a)(7), it contains 1,090 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 20th day of November, 2023.

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## CERTIFICATE OF SERVICE

I certify that on November 20, 2023, I submitted the foregoing "Respondent AAL-JAY Inc.'s Answer to Petition for En Banc Reconsideration" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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