IN THE SUPREME COURT OF THE STATE OF NEVADA

BANK OF NEVADA, a Nevada Banking corporation, Appellant, vs. MURRAY PETERSEN, an individual, Respondent.	SUPREME COURT CASE NO. 66568 District Court Case No. A-13-680012-C

APPEAL
From the Eighth Judicial District Court
The Honorable Kenneth Cory, District Judge

APPELLANT'S OPENING BRIEF

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NRAP 26.1 Disclosure Statement

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made so that the justices of this Court may evaluate possible disqualification or recusal.

The following have an interest in the outcome of this case or are related to entities interested in the case:

- Bank of Nevada; and
- Western Alliance Bank d/b/a Bank of Nevada, a division of Western Alliance Bank.

There are no other known interested parties.

Snell & Wilmer L.L.P. has represented Bank of Nevada in this matter since its inception.

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STATEMENT OF JURISDICTION

This is an appeal from an order granting summary judgment in favor of Respondent Murray Petersen ("Petersen") and from an order denying Bank of Nevada's ("BON") Rule 59(e) Motion to Alter or Amend Judgment ("Rule 59(e) Motion"). This Court has jurisdiction over this appeal under NRAP 3A(b)(1), which provides that an appeal may be taken from a final judgment entered in the action commenced in the Court in which the judgment was rendered. The Order granting Petersen's Countermotion for Summary Judgment was entered on May 8, 2014 and the Order denying BON's Rule 59(e) Motion was entered on September 17, 2014. [III JA at 600-601; IV JA at 698-699]. BON timely filed a notice of appeal on September 22, 2014. [IV JA at 704-717].

ROUTING STATEMENT

Pursuant to NRAP 28 and NRAP 17, this matter is one presumptively retained for decision by the Supreme Court, because it falls within the Supreme Court's original jurisdiction, *see* NRAP 17(a)(1), and does not fall within any one of the subparts enumerating the Supreme Court's delegation of specific case-types to the Court of Appeals. *See* NRAP 17(b)(1)-(10)

STATEMENT OF THE ISSUE

1. Given that this action was commenced by a *junior lienholder* against a guarantor under NRS 40.495 and in conformity with NRS 40.4639, did the

District Court err by granting Petersen's Countermotion for Summary Judgment because BON did not file a "motion" under NRS 40.455?[1]

2. Given that NRS 40.4639 provides a limitation period for filing a deficiency action different from that in NRS 40.455, did the District Court err in interpreting *Lavi v. Eighth Judicial Dist. Ct.*, 130 Nev. Adv. Op. 38, 325 P.3d 1265 (2014) ("*Lavi*") as requiring a *junior lienholder* to file a motion within six months of the trustee's sale, even where the action was timely filed under NRS 40.495?

STATEMENT OF THE CASE

I. Nature of the Case

This appeal arises from a deficiency action brought against Petersen under NRS 40.495. Petersen defaulted under his commercial guaranty agreement with BON by failing to fully repay a $2,500,000 loan (the "Loan") by BON to Petersen's company – Red Card, LLC ("Red Card"). [II JA at 296-299].

Red Card subsequently defaulted on the loan and BON filed an action against Petersen (prior to foreclosure of the real property securing the Loan), seeking a deficiency judgment in the principal amount of $1,109,798.29. [I JA 1-107]. That sum was the difference between the principal balance of the indebtedness at the time the complaint was filed (as required by NRS 40.495) and the *stipulated* fair market

[1] The District Court concluded that the word "application" in NRS 40.455 means "motion". [III JA at 557-558].

value of the property securing the Loan at the time of the trustee's sale. [I JA at 155-160; II JA at 388, 408-410].

II. Underlying Proceedings and Disposition in the District Court

In ruling on BON's Motion for Summary Judgment and Petersen's Countermotion for Summary Judgment, the District Court concluded that NRS 40.455(1) applies in guarantor deficiency actions and that BON did not file a "motion" within six months of the trustee's sale under NRS 40.455(1). [III JA at 596-605]. Based on these findings, the District Court granted Petersen's Countermotion for Summary Judgment and denied BON's Motion. *Id*.

In its Rule 59(e) Motion, BON argued, among other things, that because its action involved a junior deed of trust, NRS 40.455 did not apply to BON as a junior lienholder. [IV JA at 610-614]. At the District Court's invitation, BON filed a supplemental brief regarding *Lavi*, arguing that *Lavi* does not control the outcome of the instant case because *Lavi* dealt solely with the application of NRS 40.455 to first deed of trust holders suing guarantors in deficiency actions, whereas BON was suing in its capacity as a *junior lienholder*. [IV JA at 692-694]. The District Court denied BON's Rule 59(e) Motion on September 17, 2014. [IV JA at 698-703]. BON timely appealed on September 22, 2014. [IV JA at 704-717].

STATEMENT OF THE FACTS

The Loan was evidenced by two promissory notes - Note A in the principal

amount of $1,444,898 and Note B in the principal amount of $1,092,591. [I JA at 30-40]. Note A was secured by a first priority deed of trust. [I JA at 42-61]. Note B was secured by a separate, second priority *junior deed of trust*. [I JA at 63-81]. The first and junior deeds of trust both encumbered real property commonly known as 8490 Westcliff Dr., Las Vegas, Nevada 89145, upon which Red Card operated a convenience store and gas station (the "Property"). [I JA at 42-61, 63-81].

Red Card failed to make the required monthly payments due under Note A and Note B, constituting an event of default. [II JA at 165-166, 296-299]. Petersen, who personally guaranteed Red Card's performance under Note A and Note B, failed to repay the Loan in full, resulting in the filing of this guarantor deficiency action. *Id*. The Property was subsequently foreclosed and BON bought the Property at the trustee's sale for $1,400,000 [II JA at 376-383]. On December 13, 2013, BON and Petersen entered into a stipulation and order, in which Petersen and BON stipulated that, for the purposes of a deficiency calculation, the fair market value of the Property, as of the commencement date of the deficiency action, was $1,990,000 ("FMV Stip. and Order"). [I JA at 155-160]. Specifically, after applying the stipulated fair market value to Note A, BON was left with a deficiency on its junior Note B in the principal amount of $1,109,798.29. [IV JA 613-616].

SUMMARY OF THE ARGUMENT

The District Court erred when it denied BON's Motion for Summary Judgment and granted Petersen's Countermotion for Summary Judgment based upon its incorrect conclusion that under NRS 40.455(1), BON was required to file a "motion" for a deficiency judgment within six months after the trustee's sale. [III JA at 596-605, 557-558]. By its terms, NRS 40.455 does not apply to holders of *junior* liens in guarantor deficiency actions filed under NRS 40.495, and thus provided no defense to Petersen. Rather, the statute of limitation defense provided in NRS 40.4639 applies to junior lienholders seeking a deficiency judgment against a guarantor under NRS 40.495.

The District Court likewise erred in applying the holding of *Lavi* to junior lienholders like BON. *Lavi* recognizes that a secured party may commence a deficiency action before a trustee's sale, but the holding in *Lavi* is otherwise distinguishable because: (1) *Lavi* did not address junior lienholders' compliance with NRS 40.4639; (2) *Lavi* does not address NRS 40.4639's legislative history; and (3) the notice concerns in *Lavi* are wholly inapplicable to the instant case because Petersen *stipulated* to the Property's fair market value for the purpose of determining the deficiency amount.

STANDARD OF REVIEW

"This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court." *Wood v. Safeway, Inc.*, 121

Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate "when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.'" *Id.* (quoting NRCP 56(c)). "A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Id.* at 731, 121 P.3d at 1031. In reviewing a motion for summary judgment, "the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Id.* at 729, 121 P.3d at 1029.

ARGUMENT

I. NRS 40.455 Does Not Apply to Junior Lienholders, like BON.

The District Court erred in granting Petersen's Countermotion for Summary Judgment and in denying BON's Motion for Summary Judgment, because NRS 40.455 simply does not apply to BON's guarantor deficiency action against Petersen under NRS 40.495 in its capacity as a *junior lienholder*. The District Court applied NRS 40.455 to this deficiency action and held that BON did not comply with the statute because BON did not file a "motion" for a deficiency judgment within six months after foreclosure. [III JA at 596-605, 557-558]. The Legislature established a process by which a junior lienholder seeks a deficiency judgment against a guarantor under NRS 40.495 – NRS 40.4631 through 40.4639

which plainly control here, and these statutory provisions only require the filing of an "action". NRS 40.495(2); *see also* NRS 40.495(4).

A. NRS 40.4631 through 40.4639 govern deficiency actions by junior lienholders.

In 2011, the Legislature enacted a statutory scheme governing deficiency actions by *junior lienholders*. *See* NRS 40.4631-40.4639. NRS 40.4639 provides:

> ***A civil action*** not barred by NRS 40.430 or 40.4638 by a person to whom an obligation secured by a junior mortgage or lien on real property is owed to obtain a money judgment . . . may only be commenced within 6 months after the date of the foreclosure sale [ ].

(emphasis added). This statute specifies that a junior lienholder must commence a "***civil action***" within six months of foreclosure to obtain a deficiency judgment. The statute does not use the term "application" when referencing the institution of a deficiency judgment proceeding within six months of foreclosure like it does in NRS 40.455. A junior lienholder need only file a civil action, *i.e.* a complaint, to satisfy the requirements of NRS 40.4639.[2]

Here, Petersen waived the one action rule allowing BON to file suit separately and independently from the foreclosure sale, in accordance with NRS 40.495(2) and (4), which sections specifically authorize a lender to file suit against a guarantor before foreclosure. [II JA at 355]. BON filed the underlying action on

[2] Under NRCP 3, "[a] civil action is commenced by filing a complaint with the court."

April 12, 2013 and subsequently foreclosed on the Property on June 18, 2013. [I JA at 1-10; II JA at 376-383]. BON filed its complaint before foreclosure, instead of within six months after foreclosure; but this was not a basis for denying BON's Motion for Summary Judgment. The six month limitation period in NRS 40.4639 simply sets a deadline by which a civil action must be filed. *See infra*, section II.B. It does not prescribe when a deficiency action accrues. BON's pre-foreclosure deficiency complaint satisfied the requirements of NRS 40.4639, such that no "amendment" was required after foreclosure.

B. BON is entitled to summary judgment on Note B in the amount of $1,109,798.29.

As a *junior lienholder*, BON is entitled to summary judgment on Note B, which was secured by the sold out junior deed of trust. As of the date of the commencement of this action, the amount of indebtedness on Note A was $1,843,726.54. [II JA at 388, 408-410]. The amount of indebtedness on Note B as of the same date was $1,256,071.75. *Id*. The parties entered into the FMV Stip. and Order for the sole purpose of determining the fair market value of the Property at the time of the trustee's sale because that is the relevant date for determining a deficiency against a guarantor under NRS 40.495(4)(b). The parties stipulated to a fair market value of $1,990,000 as of the date of the trustee's sale for the purpose of calculating the deficiency amount. [I JA at 155-160]; *see also* NRS 40.495(4).

The stipulated fair market value of the Property was sufficient to satisfy the

entire indebtedness on Note A, secured by the senior deed of trust, and a portion of the indebtedness on Note B, secured by the junior deed of trust. After subtracting $1,843,726.54 (indebtedness on Note A) from $1,990,000, the remaining $146,273.46 was applied toward the indebtedness on Note B. After subtracting $146,273.46 from $1,256,071.75 (indebtedness on Note B), the deficiency remaining on Note B is $1,109,798.29, plus prejudgment interest in the amount of $150,932.00. [II JA at 388, 408-410, IV JA at 613-614].

The District Court should have awarded BON a deficiency judgment in the principal amount of $1,109,798.29 with prejudgment interest through May 20, 2014 in the amount of $150,932.00, accruing at $377.37 per day. *Id*.

C. Any argument by Petersen that BON was required to "amend" its complaint within six months after foreclosure yields an unreasonable and absurd result.

Where a guarantor deficiency action is already pending, it makes no sense to require a party to "amend" its complaint within six months of a foreclosure to re-assert the same claim against the same party under the same facts, as Petersen initially argued in his Countermotion for Summary Judgment. [III JA at 417-422]. The entire purpose of an amended complaint is to add new parties, new claims, or new material facts. *See* NRCP 15. The "amendment" contemplated by Petersen does none of these things.

Further, this Court has long since recognized, and it is a well-established

legal doctrine, that the law does not require the performance of idle or unnecessary acts. *See Allenbach v. Ridenour*, 51 Nev. 437, 279 P. 32, 37 (1929) ("The law does not require idle acts" that are unnecessary to do justice); *Cox v. United States*, 31 U.S. 172, 202 (1832) ("The law surely ought not to be so construed as to require of a party a mere idle ceremony[,] the law was intended for real and substantial purposes."); *Southern Pac. Co. v. Cal. Adjustment Co.*, 237 F. 954 (9th Cir. 1916) ("The law looks to the substance of things, and does not require useless forms or ceremonies."). When a lender has already filed a complaint seeking a deficiency against a guarantor pre-foreclosure, as permitted by NRS 40.495, it would be unnecessary to make the lender "amend" its complaint within six months of foreclosure sale to allege the same facts and the same claims. Such a needless act improperly exalts form over substance in contravention of Nevada law.

Finally, the District Court previously recognized that an amended complaint is unnecessary: "I tend to agree that it does not necessarily require an amendment to the Complaint but, you know, a literal reading of 455 just says an application for a deficiency judgment. That sounds like a motion to me." [III JA at 557-558]. After hearing the Court's comments, Petersen's counsel changed his stance and began to argue that there was no need for an amended complaint, only an "application":

> THE COURT: Is – is the purpose notice only? Is the purpose of 455 –

> MR. MCKNIGHT: The purpose is to make sure there is an application. He's saying –
> THE COURT: Well, but I mean that's –
> MR. MCKNIGHT: I don't – Amended Complaint, ***there's no need for an Amended Complaint***. The day after the stipulation they could've asked – made an application and said, we got the amount, and this is what our fees are, and this is what the interest is, and et cetera, et cetera, give us a judgment. That would be an application.

[III JA at 576] (emphasis added). Ultimately, the District Court's summary judgment order was based on the finding that BON had not filed an "application" – *i.e.* a "motion" – within six months after foreclosure under NRS 40.455. *However, the "application" requirement in NRS 40.455 does not apply to BON in its capacity as a junior lienholder; instead, junior lienholders only have to commence a "civil action," which is accomplished by filing a complaint. See* NRS 40.4639. As a junior lienholder, BON was only required to file "an action" for a deficiency judgment – which it did – and was not required to subsequently amend its complaint or otherwise file a redundant "application." Accordingly, the District Court should have granted summary judgment in BON's favor with respect to the indebtedness owed on Note B.

II. ***Lavi* recognizes that a secured party may commence a deficiency action before foreclosure.**

Lavi acknowledges that when a guarantor waives the one-action rule, the secured lender is "allowed to bring an action against him *prior to* completing the

foreclosure of the secured property[.]" *Lavi*, 325 P.3d at 1268 (emphasis added). This statement is consistent with NRS 40.495(4) and *Interim Capital, LLC v. Herr Law Grp., Ltd.*, 2:09-CV-1606-KJD-LRL, 2011 WL 7053806 at *1 (D. Nev. Aug. 23, 2011), which provide that a secured lender may commence a guarantor deficiency action before foreclosure.

The principle that a lender may file a guarantor deficiency action pre-foreclosure – read in harmony with NRS 40.4639's requirement to file "a civil action" before the six month statute of limitation expires – means that a junior lienholder complies with its statutory obligations by filing a complaint for a deficiency before the expiration of six months from the date of foreclosure. *See S. Nev. Homebuilders Ass'n v. Clark Cnty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (courts are required "to interpret provisions within a common statutory scheme 'harmoniously with one another in accordance with the general purpose of those statutes' and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent.").

Otherwise, a junior lienholder who commences a civil action against a guarantor pre-foreclosure would have to "amend" its complaint after foreclosure to re-assert the identical allegations against the same parties. This yields an unreasonable and absurd result. When a lender has already filed a complaint seeking a deficiency against a guarantor pre-foreclosure, as permitted by NRS 40.495(4) and *Lavi*, it would be unnecessary and redundant to make the lender

"amend" or refile its complaint within six months after foreclosure to allege the same facts and the same claims. Such a needless act improperly exalts form over substance in contravention of Nevada law. Again, however, *Lavi* did not discuss the interplay between NRS 40.495 and NRS 40.4639.

III. *Lavi* Does Not Apply to the Instant Case.

Petersen's reliance on, and the District Court's application of, *Lavi* is misplaced because it does not control the outcome of this case. *Lavi* dealt solely with the application of NRS 40.455 to *first deed of trust holders* suing guarantors in deficiency actions. NRS 40.455 is not applicable to BON because it is a junior lienholder; thus, *Lavi* is inapplicable.

A. *Lavi* did not address the scenario where a junior lienholder like BON complied with NRS 40.4639.

Lavi does not apply in this case because its entire analysis centered on the legal and equitable defenses available to a guarantor in a deficiency action under NRS 40.465 through 40.495 brought by a first deed of trust holder. NRS 40.495(3). The statute of repose defense under NRS 40.455 does not apply to BON in its capacity as a *junior lienholder*. Rather, the statute of limitations defense under NRS 40.4631 through 40.4639 applies to junior lienholders seeking a deficiency under NRS 40.495.

NRS 40.4639 only requires a *junior lienholder* to timely commence "*[a] civil action.*" There is no requirement to file an "application," or as the District Court later

clarified, a "motion," for junior lienholders. Under NRCP 3, a junior lienholder need only file a timely complaint to satisfy the requirements of NRS 40.4639. Since BON is indisputably a junior lienholder and commenced a "civil action" for a deficiency against Petersen, pursuant to NRS 40.495, before the expiration of the limitation period provided by NRS 40.4639, it is entitled to summary judgment with respect to the remaining indebtedness that was secured by its junior deed of trust.

Lavi did not involve junior lienholders and therefore did not discuss, or even mention, NRS 40.4631 through 40.4639 or the fact that a junior lienholder is only required to file "a civil action" before the six month statute of limitation expires to obtain a deficiency judgment.

B. *Lavi* does not address the legislative history of NRS 40.4639.

"Statutes of limitation are procedural bars to a plaintiff's *action*[.]" *G&H Assoc. v. Ernest W. Hahn, Inc.*, 113 Nev. 265, 272, 934 P.2d 229, 233 (1997) (emphasis added); *see also* NRS 11.190. They do not dictate when a cause of action accrues, *only the time by which an action must be filed*. *Interim Capital, LLC,* 2011 WL 7053806 at *1.

In 2011, the Legislature added sections 40.4631 through 40.4639 to NRS Chapter 40. The legislative history pertaining to NRS 40.4639 makes clear that its six month limitation period was intended as a statute of limitations. The *Lavi* Court did not address this critical information because these statutes were not at

issue in *Lavi*.

On March 23, 2011, Assemblyman Marcus Conklin, the sponsor of the proposed addition of NRS 40.4631-40.4639, testified that the amendment, "deals with the *statute of limitations on the junior lienholder* and was part of the original intent, but was never part of the bill . . . ." *See* Minutes of Meeting – Assembly Committee on Commerce and Labor, 76th Session, March 23, 2011 at 5 (emphasis added). On May 3, 2011, Assemblyman Conklin explained that the purpose of the amendments was a requirement that junior lienholders have six months to file their deficiency actions, as opposed to six years, so it was consistent with first lienholders. Assemblyman Conklin explained that under the prior six year statute of limitations, "[a]ll the junior lienholder needs to do is wait for the economic situation to get better and file a deficiency judgment at that time." *See* Minutes of Meeting – Senate Committee on Judiciary, 76th Session, May 3, 2011 at 3-4 (emphasis added). According to legislative history, NRS 40.4639 was enacted as a statute of limitation. Legislative history clarifies that the Legislature simply intended to force secured creditors to start the process of obtaining a deficiency before the expiration of six months. The Legislature did not want junior lienholders to wait six years before filing a deficiency action, as would have otherwise been permitted under the statute of limitation governing written contracts. *See* NRS 11.190(1)(b). The Legislature's decision to allow secured creditors to commence guarantor deficiency actions before foreclosure is consistent with its six month statute

of limitation policy in section 40.4639.

C. The notice concerns in *Lavi* are inapplicable here because Petersen stipulated to the fair market value of the Property.

This case is most distinguishable from *Lavi* because here, the parties entered into a stipulation resulting in the District Court entering an order establishing the fair market value of the Property within all applicable time periods in which to file an action under NRS 40.495.

One of the concerns in *Lavi* was that the procedure employed by the lender did not sufficiently put the obligor on notice that the lender sought additional recovery. *Lavi*, 325 P.3d at 1269 ("Therefore, a complaint filed before the foreclosure sale cannot sufficiently put an obligor on notice that the deed of trust beneficiary intends to seek further recovery from the obligor."). Petersen initially argued in the District Court that BON's case should be dismissed under the rationale of *Lavi* because BON did not amend its complaint to assert a deficiency claim within six months of the date of the foreclosure under NRS 40.455.[3] [III JA at 417-422]. This argument fails because (1) NRS 40.495(4) only allows lenders to obtain a deficiency judgment against guarantors; (2) NRS 40.495(2) and NRS 40.495(4) allow a lender to sue a guarantor *before* foreclosure by filing an *action*; (3) BON's detailed averments in its Complaint, including the exhibits attached

[3] Petersen later admitted that the filing of an amended complaint was unnecessary, instead arguing that an "application" or "motion" was required. *See supra*, section I.B. Such argument fails for the reasons outlined above. *Id*.

thereto, already asserted a deficiency claim; and (4) the FMV Stip. and Order, entered by the Court within six months of the trustee's sale, put Petersen on notice of the exact amount of deficiency that BON sought. [I JA at 1-10, 155-160].

NRS 40.455 applies where a deficiency claim has not yet been asserted in order to put the defendant on notice that the lender is seeking a post-foreclosure deficiency. Here, the Complaint *had already asserted a deficiency claim under NRS 40.495*, and the FMV Stip. and Order set forth the exact amount of that deficiency – leaving no question that Petersen (1) knew that BON was seeking a deficiency, and (2) knew the amount of the deficiency within six months of the trustee's sale.

The whole point of the FMV Stip. and Order was to settle the only remaining issue in the instant case: the fair market value of the Property. Prior to the FMV Stip. and Order which settled the fair market value issue, Petersen contested the fair market value of the Property at foreclosure. For example, Petersen's sixteenth affirmative defense asserts that "[t]he Fair Market Value of the property secured exceeds the amount owed." [I JA at 112]. This defense only applies when a lender is seeking a deficiency. Moreover, Petersen expressly stipulated in the Joint Case Conference Report ("JCCR") that "[t]he key issue in this case is the fair market value of the property commonly known as 8490 Westcliff Dr., Las Vegas, Nevada 89145 bearing Assessor Parcel No. 138-28-401-009." [I JA at 126]. Again, the fair market value of the Property is irrelevant

unless the plaintiff is seeking a deficiency.[4] Petersen's actions clearly indicate that he understood BON was seeking a deficiency, in fact his defenses contested the only remaining variable in the deficiency action—the fair market value of the Property. To assert after the stipulation of fair market value of the Property that BON needed to take additional steps to protect BON's right to obtain a deficiency is inconsistent with the law and with the parties' intent over the course of the case.

Any argument that BON was somehow required to "re-assert" the same deficiency claim after the trustee's sale of the Property, that requirement was either fulfilled or rendered moot by virtue of the FMV Stip. and Order, which established the fair market value of the Property. Petersen claimed the fair market value of the Property was $1,990,000. Petersen's claimed value contradicted Red Card's Chapter 7 Bankruptcy Schedules, wherein Petersen represented that the Property was valued at $1,900,000. [III JA at 483]. Notwithstanding the $90,000 discrepancy, on December 10, 2013 – *before the purported six month application deadline in NRS 40.455 expired* – BON and Petersen agreed that the fair market value of the Property as of the date of the commencement of the action was $1,990,000 and submitted their stipulation to the Court for approval. [I JA at 1-10, 155-160]. On December 13, 2013 (also within the purported six month

[4] In addition to the allegations in BON's complaint and Petersen's own conduct, the ADR Commissioner upon reviewing BON's Request for Exemption from Arbitration characterized the "Nature of the Action" as a "Deficiency" and exempted the case from arbitration for involving an amount in excess of $50,000. [I JA at 114].

deadline), the District Court approved and entered the parties' FMV Stip. and Order. *Id.* The FMV Stip. and Order, which resolved the "key issue in the case," either satisfies or renders moot the purported six month application requirement.

Knowing that the FMV Stip. and Order undercuts the entire premise of his countermotion, Petersen attempted to downplay its importance in a footnote, arguing that the "stipulation was signed three months after the time to amend had passed." [III JA at 418]. Petersen's argument is irrelevant, without merit, and factually incorrect. First, BON was not required to amend its Complaint as a matter of law and thus the fact that the deadline to amend pleadings had passed at the time the parties stipulated to fair market value is irrelevant. Second, even if such a requirement existed, under NRCP 16(b) a party can move to modify a scheduling order deadline upon a showing of "good cause" and, in the case of seeking leave to amend, leave "*shall* be given freely when justice so requires." NRCP 15 (emphasis added). Third, even if this was a case in which NRS 40.455 applied (for example, one not involving a junior lienholder), there is no requirement that a party must "amend" its complaint within six months and the "application" requirement was satisfied by the FMV Stip. and Order, resolving the "key issue" in the deficiency case.

By stipulating to "the key issue in the case" and jointly submitting the FMV Stip. and Order to the Court for approval within six months of the trustee's sale, BON either satisfied the six month requirement or such requirement was rendered

moot. Once the fair market value of the Property was established, all that remained in the case was a simple mathematic equation to determine the amount of the deficiency. Petersen cannot *expressly agree*, after engaging in arms-length negotiations, to the principal issue in the deficiency case, and then argue that BON was somehow required to "amend" its complaint to re-assert the identical deficiency claim already contained in the original complaint. Such an amendment would serve no purpose and would provide no additional notice that BON sought a deficiency recovery. *See Lavi*, 325 P.3d at 1269.

One of the purposes of the six month rule in NRS 40.455, as identified in its legislative history, was to avoid stale claims such that the "debtor cannot be left hanging in limbo for a number of months. Action has to be started within [then] three months.[5] You are not faced with the problem of trying to find out what the property was worth say five years ago." *See* Minutes of Meeting – Assembly Committee on Judiciary, 55th Session, March 13, 1969. Since BON filed its deficiency action against Petersen before foreclosure, as permitted under NRS 40.495, the legislature's concerns about stale claims and property valuation difficulties do not apply. Petersen has not been left in limbo and was put on notice of the Property's value, as Petersen specifically agreed and stipulated to the fair market value of the Property within six months of the trustee's sale. Accordingly,

[5] The version of the statute in effect in 1969 allowed for a three month statute of limitation.

the notice concerns in *Lavi* are wholly inapplicable to the instant case because Petersen was sufficiently on notice that BON sought a deficiency.

CONCLUSION

This is a straightforward case of breach of contract. Red Card borrowed over $2.5 million and neither Red Card nor Petersen repaid the Loan, as the contracts required them to do. These facts are undisputed. It is also undisputed that the fair market value of the Property was $1,990,000 for the purpose of calculating a deficiency judgment under NRS 40.495.

Because NRS 40.4639, and not NRS 40.455, applies to junior lienholders seeking a deficiency judgment under NRS 40.495 and *Lavi* does not apply to the facts of this case, BON respectfully requests that this Court reverse the District Court's order, which granted summary judgment in favor of Petersen, and remand this matter to the District Court with instructions to enter summary judgment in favor of BON.

Dated this 6th day of February, 2015.

SNELL & WILMER L.L.P.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the **APPELLANT'S OPENING BRIEF** complies with the typeface and type style requirements of NRAP 32(a)(4)-(6), because this brief has been prepared in a proportionally spaced typeface using a Microsoft Word 2010 processing program in 14-point Times New Roman type style. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it contains approximately 6,149 words.

Finally, I hereby certify that I have read the **APPELLANT'S OPENING BRIEF**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 6th day of February, 2015.

SNELL & WILMER L.L.P.

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On February 6, 2015, I caused to be served a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF** upon the following by the method indicated:

☐ **BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court's Service List for the above-referenced case.

☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.

☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

/s/ Ruby Lengsavath
An Employee of Snell & Wilmer L.L.P.

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