IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN A. RITTER, an individual, and DARRIN D. BADGER, an individual,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the COUNTY OF CLARK, and the HONORABLE JERRY A. WIESE, II., District Court Judge,

Respondents.

and

OMNI FAMILY LIMITED PARTNERSHIP, a Nevada domestic limited partnership,

Real Party in Interest.

Supreme Court Case No.:

District Court Case No: A-13-680542-C

PETITION FOR WRIT OF MANDAMUS, OR ALTERNATIVELY, FOR WRIT OF PROHIBITION

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TO THE HONORABLE SUPREME COURT OF THE STATE OF NEVADA:

Pursuant to NRAP 21, Petitioners John A. Ritter ("Ritter") and Darrin D. Badger ("Badger") (collectively, "Petitioners") through their attorneys of record, Bogatz Law Group, hereby respectfully petition this Court for a Writ of Mandamus or Alternatively, for a Writ of Prohibition.

I. INTRODUCTION

The proverbial ink is still dripping wet with respect to this Court's ruling in Lavi v. Eighth Jud. Dist. Ct., 130 Nev. Adv. Op. 38, 325 P.3d 1265, 1267 (2014). Yet, the District Court, in ruling upon a Motion for Summary Judgment filed by Petitioners in the first of two consolidated matters, has already ignored the plain meaning of Lavi when the claims against Petitioners fit squarely within the scope of this Court's ruling. In short, the District Court refused to summarily adjudicate a case against Petitioners as guarantors despite the fact that no application for a deficiency judgment was made against them within the six-month deadline as required by NRS 40.455 – a fact readily acknowledged by Plaintiff Omni Family Limited Partnership ("Omni") in its opposition briefing. The District Court then added insult to injury by refusing to grant a Motion to Dismiss filed by Petitioners in the second of two consolidated matters wherein Omni simply added Petitioners, as guarantors, as new defendants in an already pending case against the borrower, Southwest Desert Equities, LLC ("SWDE"), nearly ten months after the six-month deadline contained in NRS 40.455 had passed. The District Court essentially found a party need only fall back on the generalized relation back of claims procedure afforded by NRCP 15(c) to overcome Lavi's requirements and step around an express bright-line statute of repose concerning deficiency actions.

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NRS 40.455 and this Court's mandate in Lavi are both plain and clear: "timely application for a deficiency judgment must be made under NRS 40.455" in order to seek a deficiency judgment. 325 P.3d at 1268. Failure to do so is fatal to the action as a whole. Put differently, generalized catch-all relation back of claims pursuant to NRCP 15(c) will not resurrect a claim made beyond the statute of repose imposed by NRS 40.455 and affirmed by Lavi.

Petitioners have no plain, speedy, or adequate remedy at law to protect their legal rights. Specifically, immediate review is required because the District Court's Order violates the clear language of NRS 40.455 and ignores Nevada Supreme Court precedent protecting obligors from untimely creditor claims. If Petitioners were to wait and appeal a final judgment, they would be forced to expend enormous amounts of time and money unnecessarily defending themselves in the underlying action and may then face a monetary judgment of likely several million dollars with a requirement to post a supersedeas bond to stay execution pending appeal. This, despite the fact that under the plain language of NRS 40.455 and Lavi, they have no liability to Omni. In this case, writ relief is appropriate, necessary and required to ensure the clear and unambiguous language and intent of the Legislature and this Court is properly enforced.

Based upon the foregoing, and as set forth in more detail herein, Petitioners respectfully submit that the Court's resolution, in their favor, of the significant legal issues presented by this Petition will promote the interests of justice and judicial economy.

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II. ISSUES PRESENTED

1. Whether the District Court erred as a matter of law when it denied Petitioners' Motion for Summary Judgment on each of Omni's claims against Petitioners in District Court Case No. A-13-680542-C, despite the fact that Omni failed to apply for a deficiency judgment against Petitioners within the statutorily mandated six-month period in accordance with Lavi v. Eighth Jud. Dist. Ct., 130 Nev. Adv. Op. 38, 325 P.3d 1265 (2014), and as expressly required by NRS 40.455.

2. Whether the District Court erred as a matter of law when it denied Petitioners' Motion to Dismiss Omni's claims against Petitioners in District Court Case No. A-14-695925-C, despite the fact that Omni failed to apply for a deficiency judgment against Petitioners within the statutorily mandated six-month period in accordance with Lavi v. Eighth Jud. Dist. Ct., 130 Nev. Adv. Op. 38, 325 P.3d 1265 (2014), and as expressly required by NRS 40.455.

3. Whether the District Court erred as a matter of law when it determined that the filing of Omni's First Amended Complaint on December 1, 2014, in District Court Case No. A-14-695925-C, adding Petitioners as new parties nearly 16 months after the foreclosure sale upon the underlying property, relates back to satisfy the six-month filing deadline contained in NRS 40.455.

III. RELIEF REQUESTED

Petitioners respectfully request this Honorable Court issue:

1. A Writ of Mandamus compelling the District Court to enter an order granting Petitioners' Motion for Summary Judgment, dismissing Omni's claims against them in District Court Case No. A-13-680542-C, for Omni's failure to

timely apply for deficiency judgment against Petitioners within the statutorily mandated six-month deadline imposed by NRS 40.455;

2. A Writ of Mandamus compelling the District Court to vacate its April 13, 2015 Order denying Petitioners' Motion to Dismiss Omni's claims against them in District Court Case No. A-14-695925-C, for Omni's failure to timely apply for deficiency judgment against Petitioners within the statutorily mandated six-month deadline imposed by NRS 40.455; and

3. A Writ of Prohibition precluding the District Court from undertaking further proceedings against Petitioners in the underlying cases, given Omni's failure to timely apply for deficiency judgment within the statutorily mandated six-month deadline imposed by NRS 40.455.

IV. STANDARD OF REVIEW AND JURISDICTION

The Nevada Constitution provides in relevant part: "[t]he supreme court shall have . . . power to issue writs of mandamus, certiorari, prohibition, quo warranto, and habeas corpus and also all writs necessary or proper to the complete exercise of its appellate jurisdiction."[1] "Mandamus is a proper remedy to compel performance of a judicial act when there is no plain, speedy, and adequate remedy at law in order to compel the performance of an act which the law requires as a duty resulting from office."[2] Additionally, prohibition "is a proper remedy to restrain a district judge from exercising a judicial function without or in excess of

[1] Nev. Const., art. 6, § 4.

[2] Smith v. Eighth Judicial Dist. Court In & For County of Clark, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991); see NRS 34.160; NRS 34.170; NRS 34.320; and NRS 34.330.

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its jurisdiction."[3] Writ relief is also an appropriate remedy where, among other things, "an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition."[4]

This Court may, through petitions for writ relief, review district court decisions denying summary judgment.[5] Specifically, "[a] writ of mandamus will issue to compel entry of a summary judgment when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law."[6] This Court reviews summary judgment orders de novo.[7]

This Court may also, through petitions for writ relief, review district court decisions denying motions to dismiss.[8] Specifically, a writ petition challenging a denial of a motion to dismiss will only be granted when "'(1) no factual dispute exists and the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule; or (2) an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor

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[3] Smith, 107 Nev. at 677, 818 P.2d at 851; NRS 34.320; NRS 34.330.

[4] State of Nev. v. Eighth Judicial Dist. Court, 118 Nev. 140, 147, 42 P.3d 233, 238 (2002).

[5] See Sandler v. Eighth Judicial Dist. Court In & For Clark County, 96 Nev. 622, 623, 614 P.2d 10, 11 (1980); Holloway v. Barrett, 87 Nev. 385, 389, 487 P.2d 501, 504 (1971).

[6] Sandler, 96 Nev. at 623, 614 P.2d at 11.

[7] See Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (summary judgment).

[8] See Desert Fireplaces Plus, Inc. v. Eighth Judicial Dist. Court ex rel. County of Clark, 120 Nev. 632, 635, 97 P.3d 607, 608-09 (2004).

of granting the petition.'"[9] This Court reviews a District Court's orders of dismissal de novo.[10] If all of plaintiff's allegations are accepted as true and still do not justify any relief, the trial court must dismiss the claims.[11]

In evaluating the propriety of writ petitions, "each case must be individually examined, and where circumstances reveal urgency or strong necessity, extraordinary relief may be granted."[12] The decision to grant writ petitions is within this Court's sound discretion.[13] Importantly, this Court may exercise its "discretion with respect to certain petitions where no disputed factual issues exist and, pursuant to clear authority under a statute or rule, the district court is obligated to dismiss an action."[14]

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[9] See Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court ex rel. County of Clark, 120 Nev. 575, 579, 97 P.3d 1132, 1134 (2004) (*quoting* State v. Dist. Court, 118 Nev. 140, 147, 42 P.3d 233, 238 (2002)).

[10] See Sanchez v. Wal-Mart Stores, Inc., 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009).

[11] See Bergmann v. Boyce, 109 Nev. 670, 674–675, 856 P.2d 560, 563 (1993) (*citing* Edgar v. Wagner, 101 Nev. 226, 228, 699 P.2d 110, 112 (1985); Capital Mortgage Holding v. Hahn, 101 Nev. 314, 315, 705 P.2d 126, 126 (1985)).

[12] Jeep Corp. v. Second Judicial Dist. Court, 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982).

[13] Walker v. Eighth Judicial Dist. Court, 120 Nev. 815, 819, 101 P.3d 787, 790 (2004).

[14] Smith v. Eighth Judicial Dist. Court In & For County of Clark, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997).

V. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND[15]

1. On or about April 17, 2007, Southwest Desert Equities, LLC ("Borrower" or "SWDE") borrowed approximately $2,180,000 ("Loan") from OneCap Mortgage Corp. – the alleged predecessor-in-interest to Omni.[16]

2. Also on or about April 17, 2007, Petitioners John A. Ritter and Darrin D. Badger executed a Continuing Guaranty ("Guaranty") to secure the Loan.[17]

3. On or about April 22, 2013, Omni filed a Complaint against only Petitioners (as guarantors) (Case No. A-13-680542-C), alleging claims for: (1) breach of the Guaranty; and (2) breach of the implied covenant of good faith and fair dealing, in connection with Petitioners' alleged default under the Guaranty ("Guaranty Complaint" or "Guaranty Action").[18]

4. On or about August 13, 2013, while the Guaranty Action was pending before this Court, Omni foreclosed on the property securing the Loan by way of a trustee's sale.[19]

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[15] Petitioners, solely for purposes of the Motion to Dismiss and Motion for Summary Judgment, did not dispute the above-cited facts alleged by Omni. During the District Court proceedings, Petitioners further reserved the right to challenge these allegations and to supplement them with competing allegations of their own. See Conway v. Circus Circus Casinos, Inc., 116 Nev. 870, 873, 8 P.3d 837, 840 (2000) (explaining that for the purpose of a motion to dismiss analysis, the Court must accept all factual allegations contained in the complaint as true). They are cited here simply to advise this Court of the alleged facts that, even if taken as true and in the light most favorable to Omni, warrant dismissal and summary judgment with respect to the deficiency claims against Ritter and Badger.

[16] 1 Petitioners' Appendix ("PA") 000001-000008.

[17] Id.

[18] Id.

[19] 1 PA 000009-000015.

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5. At no time within the six months following the foreclosure sale on the property did Omni file an application for deficiency judgment against Petitioners (guarantors) as required by NRS 40.455(1) and the Nevada Supreme Court in Lavi.

6. On or about February 10, 2014 – three days prior to the six-month deadline following the August 13, 2013 foreclosure sale on the property – Omni filed a separate Complaint against *only* the Borrower (Case No. A-14-695925-C), alleging claims for: (1) breach of the promissory note ("Promissory Note") - *deficiency*; and (2) breach of the implied covenant of good faith and fair dealing, in connection with the Borrower's alleged default under the Promissory Note ("Borrower Complaint" or "Borrower Action").[20]

7. On or about April 14, 2014, more than two months after the six-month deadline following the August 13, 2013 foreclosure sale on the property, the parties filed a Stipulation and Order to Consolidate the later Borrower Action with the earlier Guarantor Action.[21]

8. On or about September 18, 2014, Petitioners (guarantors) filed a Motion for Summary Judgment in the Guaranty Action seeking the dismissal of Omni's claims against them given Omni's failure to apply for a deficiency judgment against them within six months following the foreclosure sale on the property.[22]

[20] Id.

[21] 1 PA 000016-000017.

[22] 1 PA 000018-000034.

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9. On or about December 1, 2014 – nearly *sixteen months* following the August 13, 2013 foreclosure sale on the subject property – Omni filed an Amended Complaint in the Borrower Action naming Petitioners (guarantors) as additional Defendants, alleging claims against Petitioners (guarantors) for: (1) breach of the Guaranty – *deficiency*; and (2) breach of the implied covenant of good faith and fair dealing under the Guaranty.[23]

10. On December 12, 2014, Omni filed an Opposition in response to Petitioners' (guarantors') Motion for Summary Judgment.[24]

11. In response to the new claims filed by Omni against Petitioners (guarantors) in the Amended Borrower Complaint, Petitioners (guarantors) filed a Motion to Dismiss on January 9, 2015.[25]

12. Petitioners (guarantors) also filed their Reply in support of their Motion for Summary Judgment on January 9, 2015.[26]

13. On January 30, 3015, Omni filed its Opposition to Petitioners' (guarantors') Motion to Dismiss.[27]

14. Petitioners (guarantors) filed their Reply in support of the Motion to Dismiss on March 3, 2015.[28]

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[23] 1 PA 000035-000043.

[24] 1 PA 000044-000096.

[25] 1 PA 000097-000114.

[26] 1 PA 000115-000128.

[27] 1 PA 000129-000224.

[28] 1 PA 000225-000241.

15. After a hearing was held on both Petitioners' Motion to Dismiss and Motion for Summary Judgment on March 10, 2015, the District Court entered its Order Denying Motion to Dismiss and Motion for Summary Judgment on April 13, 2015.[29]

VI. LEGAL ARGUMENT

A. THE DISTRICT COURT ERRED AS A MATTER OF LAW WHEN IT DENIED PETITIONERS' MOTION FOR SUMMARY JUDGMENT ON EACH OF OMNI'S CLAIMS AGAINST PETITIONERS IN DISTRICT COURT CASE NO. A-13-680542-C, DESPITE THE FACT THAT OMNI FAILED TO APPLY FOR A DEFICIENCY JUDGMENT AGAINST PETITIONERS WITHIN THE STATUTORILY MANDATED SIX-MONTH PERIOD IN ACCORDANCE WITH LAVI V. EIGHTH JUD. DIST. CT., 130 NEV. ADV. OP. 38, 325 P.3D 1265 (2014), AND AS EXPRESSLY REQUIRED BY NRS 40.455.

It is well-settled that ***every*** obligation secured by property through a mortgage or a deed of trust is subject to Nevada's anti-deficiency statutes. First Interstate Bank of Nev. v. Shields, 102 Nev. 616, 621, 730 P.2d 429, 432 (1986) (emphasis added); see Thomas v. Valley Bank of Nev., 97 Nev. 320, 322, 629 P.2d 1205, 1207 (1981), *overruled on other grounds by* Shields. Indeed, "[t]he Legislature has shown a strong inclination towards protecting an obligor's rights under the anti[-]deficiency statutes." Lavi, 325 P.3d at 1268 (*citing* Lowe Enters. Residential Partners, L.P. v. Eighth Judicial Dist. Court, 118 Nev. 92, 103-04, 40 P.3d 405, 412-13 (2002)). Accordingly, Nevada's deficiency judgment statutes apply not only to borrowers, they also specifically apply to and protect guarantors as well. Shields, 102 Nev. at 621, 730 P.2d at 432. These protections for

[29] 1 PA 000242-000249.

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guarantors make sense because in Nevada, as in most states, "[a] guarantor is the favorite of the law." Tri-Pacific Comm'l. Brokerage, Inc. v. Boreta, 113 Nev. 203, 206, 931 P.2d 726, 729 (1997).

The timeframe for seeking a deficiency judgment is set forth in NRS 40.455. Specifically, NRS 40.455 provides in relevant part:

> ***[U]pon application of*** the judgment creditor or ***the beneficiary of the deed of trust within 6 months after the date of*** the foreclosure sale or ***the trustee's sale held pursuant to NRS 107.080***, respectively, and after the required hearing, ***the court shall award a deficiency judgment*** . . . if it appears from the sheriff's return or the recital of consideration in the trustee's deed that there is a deficiency of the proceeds of the sale and a balance remaining due to the judgment creditor or the beneficiary of the deed of trust, respectively.

NRS 40.455(1) (emphasis added). Therefore, NRS 40.455 plainly requires that an application for deficiency judgment must be made "***within 6 months*** after the date of . . . the trustee's sale held pursuant to NRS 107.080 . . . ." Id. (emphasis added).

Recently in Lavi, this Court made it very clear that a ***"timely application for a deficiency judgment must be made under NRS 40.455***" in order to seek a deficiency judgment. 325 P.3d at 1268 (emphasis added) (dismissing claims against the guarantors in a pending action where the creditor failed to make an application for deficiency judgment within six months after the trustee's sale upon the property securing the loan as required by NRS 40.455(1)); see also Walters v. Eighth Judicial District Court, 127 Nev. Adv. Op. 66, 263 P.3d 231, 234 (2011) (holding that ***NRS 40.455 "requires an application within six months after the foreclosure sale***" (emphasis added)).

In Lavi, BB&T – the successor to the original lender – brought a breach of guaranty action against the guarantor of a loan – Lavi – to recover the alleged

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balance due after default. 325 P.3d at 1266. While the case was pending, BB&T foreclosed on the property by way of a trustee's sale. Id. at 1267. A year later, BB&T moved for summary judgment regarding liability for breach of the loan guaranty, and Lavi filed a countermotion for summary judgment asserting that NRS 40.455 precluded BB&T from obtaining a judgment for the deficiency. Id. Though the district court held that NRS 40.455 did not bar BB&T's deficiency action, this Court reversed the district court. Id. Specifically, this Court held "[a]lthough BB&T commenced an action on the guaranty first under NRS 40.495(2), ***once it foreclosed it was required to satisfy NRS 40.455***." Id. at 1268 (emphasis added). Accordingly, Lavi was permitted to raise any legal and equitable defenses, including NRS 40.455(1), which requires an "application" to be made within six months after the trustee sale. Id.

Nearly identical facts and arguments raised in this case were ruled upon when this Court ***again*** confirmed its position on this issue. In Branch Banking and Trust Company v. Giordano, BB&T brought an action against Giordano for breach of guaranty. 2015 WL 495881 at * 1 (Feb. 3, 2015).[30] Three days after filing its complaint, BB&T held a trustee's sale on the property securing the loan. Id. BB&T thereafter failed to amend its complaint or make any application for a deficiency judgment within six months of the trustee's sale. Id. As a result,

[30] *Currently*, Nevada Supreme Court Rule ("NSCR") 123 generally prohibits citing unpublished opinions as legal authority (providing that: "An unpublished opinion or order of the Nevada Supreme Court shall not be regarded as precedent and shall not be cited as legal authority . . . ."). In this case, however, Giordano is not being relied upon as binding legal authority, but is merely instructive on the resolution of this matter as the pertinent facts are nearly identical. See Fitzgerald v. Clarion Mortgage Capital, No. 63522, 2012 WL 275517 at *5 (D. Nev. Jan. 31, 2012). **Also note that on February 27, 2015, Chief Justice Hardesty and Associate Justice Pickering filed a Petition with the Nevada Supreme Court (ADKT No. 0504), requesting a repeal of NSCR 123.**

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Giordano filed a motion to dismiss pursuant to NRCP 12(b)(5), which the district court granted based on BB&T's failure to comply with NRS 40.455(1). Id.

In affirming the dismissal on appeal, this Court expressly held that **a creditor's "failure to timely file [an] application for a deficiency judgment with the court per NRS 40.455 [is] fatal**." Id. (emphasis added). This Court also expressly rejected the argument (also made by Omni in this case and supported by the District Court) that principals of equity and fairness entitle an untimely creditor "**to amend its complaint to comply with NRS 40.455**." Id. at * 2, n.2 (emphasis added). This Court further explained **it does "not believe that equity or justice requires an alternative outcome**" than the dismissal of such untimely deficiency judgment claims. Id. (emphasis added).

NRCP 56(c) permits the entry of summary judgment "if the pleadings . . . show that there is no genuine issue as to any material fact that the moving party is entitled to a judgment as a matter of law." Summary judgment is proper when no genuine issue of material fact exists. Farmers Ins. Exchange v. Young, 108 Nev. 328, 330, 832 P.2d 376, 377 (1992). Moreover, the purpose of summary judgment proceedings is to pierce the pleadings and to test whether there are no issues of material fact, such that a party is entitled to a judgment as a matter of law. Dredge Corp. v. Husite Co., 78 Nev. 69, 88-89, 369 P.2d 686, 687 (1962).

In Case No. A-13-680542-C, despite the plain language of NRS 40.455(1) and the clear mandates of this Court with respect to the timeliness requirement set forth in NRS 40.455(1), Omni failed to file an application for deficiency judgment against Petitioners (guarantors) within six months after the non-judicial foreclosure

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sale was held on August 13, 2013.[31] The initial action against Petitioners (guarantors) was filed on April 22, 2013, nearly four months before the foreclosure on the property occurred. Omni has since acknowledged its initial Complaint against Petitioners is defective when it stated in its Opposition to Petitioners' Motion for Summary Judgment: "Based upon *Lavi*, the Plaintiff's First Complaint was arguably insufficient to notify the Defendants of the Plaintiff's deficiency claim."[32] When Omni itself acknowledges its first Complaint against Petitioners is improper, there is no reason the District Court should have denied the Motion for Summary Judgment.

Omni's claims against Petitioners are time barred and there can be no genuine issues regarding any fact in this case. As such, Petitioners are entitled to judgment as a matter of law, and it was error when the District Court denied Petitioners' Motion for Judgment on all of Omni's claims against them in Case No. A-13-680542-C. For these reasons, Petitioners respectfully request this Court issue a Writ of Mandamus compelling the District Court to enter an order granting, in its entirety, Petitioners' Motion for Summary Judgment.

[31] 1 PA 000001-000008.

[32] 1 PA 000051.

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B. THE DISTRICT COURT ERRED AS A MATTER OF LAW WHEN IT DENIED PETITIONERS' MOTION TO DISMISS OMNI'S CLAIMS AGAINST PETITIONERS IN DISTRICT COURT CASE NO. A-14-695925-C, DESPITE THE FACT THAT OMNI FAILED TO APPLY FOR A DEFICIENCY JUDGMENT AGAINST PETITIONERS WITHIN THE STATUTORILY MANDATED SIX-MONTH PERIOD IN ACCORDANCE WITH LAVI V. EIGHTH JUD. DIST. CT., 130 NEV. ADV. OP. 38, 325 P.3D 1265 (2014), AND AS EXPRESSLY REQUIRED BY NRS 40.455.

Because the facts and circumstances relating to both consolidated cases herein are identical, the arguments made above regarding the impropriety of the District Court's denial of their Motion for Summary Judgment in Case No. A-13-680542-C apply equally to the District Court's denial of Petitioners' Motion to Dismiss in Case No. A-14-695925-C. As such, Petitioners incorporate herein by reference each of their arguments made above with respect to the application and scope of Lavi and NRS 40.455 as to the facts and circumstances of this case.

In short, neither Lavi nor NRS 40.455 leave open any interpretation as to the treatment of untimely claims made against a guarantor: they are to be dismissed. The six-month period noted in NRS 40.455 is rigid, and any action made against any borrower and/or guarantor later than six months following foreclosure of the same is untimely and invalid. In Case No. A-14-695925-C, Omni filed an Amended Complaint bringing Petitioners (guarantors) into a separate action that had long since been brought against SWDE as the borrower. Petitioners were named as new parties to this second action on December 1, 2014, ***nearly 16 months*** following the August 13, 2013 foreclosure sale on the subject property. Turning to the plain language and intent of Lavi and NRS 40.455, no application for deficiency was made within six months of the foreclosure on the property.

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Consequently, Omni is unequivocally barred from pursuing an application for deficiency against Petitioners in District Court Case No. A-14-695925-C. Therefore, it was error for the District Court to deny Petitioners' Motion to Dismiss, and its ruling must now be reversed by this Court.

C. THE DISTRICT COURT ERRED AS A MATTER OF LAW WHEN IT DETERMINED THAT THE FILING OF OMNI'S FIRST AMENDED COMPLAINT ON DECEMBER 1, 2014, IN DISTRICT COURT CASE NO. A-14-695925-C, ADDING PETITIONERS AS NEW PARTIES NEARLY 16 MONTHS AFTER THE FORECLOSURE SALE OF THE UNDERLYING PROPERTY, RELATES BACK TO SATISFY THE SIX-MONTH FILING DEADLINE CONTAINED IN NRS 40.455.

This Court need look no further than the application of Lavi and NRS 40.455 to the facts of this case to see it was clear error for the District Court to deny Petitioners' Motion to Dismiss Omni's claims in District Court Case No. A-14-695925-C. No application for deficiency was ***ever*** brought against Petitioners in the latter case within the six months following the foreclosure of the property on August 13, 2013. As such, Lavi and NRS 40.455 are controlling and dispositive; there is no further need of any additional analysis.

Unfortunately, the District Court ignored the controlling weight and authority of Lavi and NRS 40.455 when it applied the general principle of relation back of claims under NRCP 15(c) to the facts of this case as a means of overcoming Lavi and NRS 40.455. Even so, the application of NRCP 15(c) to the claims asserted by Omni against Petitioners fails for the reasons stated below.

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1. The Limitation Period Imposed By NRS 40.455 Is A Statute Of Repose.

Statutes of limitation bar suits because the "plaintiff was not diligent enough," while a statue of repose "is not concerned with the plaintiff's diligence; it is concerned with the defendant's peace." Underwood Cotton Co., Inc. v. Hyndai Merchant Marine (Am.), Inc., 288 F.3d 405, 408-09 (9th Cir. 2002); see also Allstate Ins. Co. v. Furgerson, 104 Nev. 772, 775 n.2, 766 P.2d 904, 906 n.2 (1988) (Statutes of repose bar causes of action after a certain period of time, regardless of whether damage or injury had been discovered. In contrast, statutes of limitation foreclose suits after a fixed period of time following occurrence of discovery of an injury.). The Ninth Circuit, in Balam-Chuc v. Mukasey, explained when a period of limitation is properly characterized as a statute of repose. 547 F.3d 1044, 1049 (9th Cir. 2008). The court in Mukasey stated:

> [A s]tatute of repose is a "**fixed**, **statutory cutoff date**, usually **independent of any variable**, such as claimant's awareness of a violation." Munoz v. Ashcroft, 339 F.3d 950, 957 (9th Cir. 2003). "A statute of repose cuts off a cause of action at a certain time irrespective of the time of accrual of the cause of action." Weddel v. Sec'y of Health & Human Servs., 100 F.3d 929, 931 (9th Cir. 1996). Perhaps the most distinguishing characteristic of a statute of repose is that it establishes "**an outer date for bringing an action**" instead of a variable period of time during which a plaintiff must assert her claim. Id.

Id. (emphasis added).

Like the Ninth Circuit, this Court has recognized the six-month deadline contained in NRS 40.455(1) is actually a statute of repose, the more strict of the two limitations periods. See FDIC v. Rhodes, 130 Nev. Adv. Op. 88, 336 P.3d 961 (2014) (wherein Chief Justice Gibbons, Justice Parraguiree, and Justice Cherry,

dissenting on other issues, stated that NRS 40.455(1) is a statute of repose and not a statute of limitations). Consequently, the holdings in both Lavi and Giordano – which expressly prohibit untimely claims that fail to comply with NRS 40.455 – concern a statute of repose that may not be limited, ignored or overcome. Given that the deadline contained within NRS 40.455 is a statute of repose with a fixed, statutory cutoff date, the District Court erred in applying the relation back doctrine contained in NRCP 15(c).

2. There Can Be No Relation Back To Overcome The Limitation Contained In NRS 40.455.

During the District Court proceedings, Omni argued that for a variety of reasons, its Amended Borrower Complaint related back pursuant to NRCP 15(c) and somehow retroactively satisfied the six-month deadline contained in NRS 40.455(1).[33] This argument lacks merit. Omni focused on the *general rule* contained within NRCP 15(c), which provides that *under certain circumstances*, "[a]n amended pleading adding a defendant that is filed after the statute of limitations has run will relate back to the date of the original pleading under NRCP 15(c) . . . ." Costello v. Casler, 127 Nev. Adv. Op. 36, 254 P.3d 631, 634 (2011).

First, however, as Petitioners (guarantors) briefed, Costello is inapplicable to this case. Costello involved a lawsuit in connection with an automobile accident. Id. at 632. Following the automobile accident, the plaintiff – Costello – sued the driver – Casler – *not knowing* that Casler had already passed away. After the statute of limitations had run, Costello learned of Casler's passing and sought to

[33] 1 PA 000141-000146.

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substitute the representative of Casler's estate, which is the party Costello should have named as the defendant in the first place. Id. In other words, Costello was a "wrong party" case, not an "additional party" case. Id. Under these facts, the Nevada Supreme Court ultimately concluded that "[a]llowing the amendment to relate back to the date of the original complaint will not prejudice Casler's estate or [its insurer]." Id. at 636. The Court further explained that this was true because "the substance of the proposed amended complaint effected no real change as ***Costello's claim remained the same***." Id. (emphasis added).

This case is much different. Here, on February 10, 2014, three days before the six-month deadline was set to run on Omni's deficiency judgment claim against *all of the Defendants*, Omni elected to sue only the Borrower under the Promissory Note in the Borrower Action.[34] Approximately ten months later, Omni amended its Borrower Complaint to allege ***an entirely new and additional claim*** under the Guaranty, against two ***entirely new and additional parties*** – the Petitioners.[35]

In other words, this Court's discussion in Costello regarding the extent of the estate and its insurer's knowledge of the timely suit prior to the proposed amendment properly naming the estate as a defendant following the expiration of the statute of limitations began with the undisputed fact that Costello *failed* to name the *proper* party initially, that the same people would be liable in any event,

[34] 1 PA 000009-000015.

[35] 1 PA 000035-000043.

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and it was only in that context that the extent of the proposed defendant's knowledge of the suit became relevant. Id.

Here, Omni did not *fail* to name the *proper* party initially – it properly named the Borrower. It simply wished to *add* the Petitioners (guarantors) *in addition to* the Borrower. For these reasons, any discussion of what knowledge of the claims Petitioners may or may not have had is wholly irrelevant and misplaced. Omni is the master and commander of its Complaint and had every opportunity to name any and all parties for any alleged cause of action it desired, and here failed to do so in a timely manner against Petitioners.

Moreover, this and other courts have expressly refused to allow an amended complaint to relate back after a limitations period has run where the plaintiff *elected* not to name the proposed defendant as a party when the plaintiff commenced the action. Garvey v. Clark Cnty., 91 Nev. 127, 129-30, 532 P.2d 269, 270-71 (1975); see O'Keefe v. Grenke, 825 P.2d 985, 991 (Ariz. Ct. App. 1992) (explaining that "[w]here a plaintiff knows of the existence and identity of a defendant before the statute of limitations runs, and makes a conscious election about whom to sue," the plaintiff's "deliberate, ***though ultimately erroneous or unwise***, tactical choice cannot be considered a 'mistake' in identity of a party that would allow relation-back of an amended pleading to defeat a statute of limitations defense") (emphasis added); Kuhlman v. Keith, 409 So. 2d 804, 807 (Ala. 1982) (explaining that the statute of limitations does not toll where plaintiff knew of identity and existence of persons sought to be brought into action when the original complaint was filed); Chambers v. General Elec. Co., 217 N.E. 2d 549, 551-52 (Ill. Ct. App. 1966) (explaining that a plaintiff cannot add a party by amendment after

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statute of limitations had run where its existence and legal status remained unchanged and was known to plaintiff at time original suit was filed); Harris v. E.F. Hauserman Co., 575 F.Supp. 749, 753 (N.D. Ohio 1983) (explaining that a plaintiff cannot "change his mind" about whom to sue after statute of limitations has run); Archuleta v. Duffy's, Inc., 471 F.2d 33, 35 (10th Cir. 1973) (explaining that a strategic choice of defendant does not qualify as a Rule 15(c) "mistake" where defendant was not misdirected, but was deliberately, though mistakenly, not sued); Kilkenny v. Arco Marine Inc., 800 F.2d 853, 857 (9th Cir. 1986) (refusing to allow an amended complaint to relate back where the identities of proposed additional defendants were known when the original complaint was filed and explaining that in order for "an amendment to relate back under rule 15(c), the party to be brought in must have known or should have known, within the relevant statute of limitations period, that, ***but for a mistake concerning identity***, the action would have been brought against it") (emphasis added) (*citing* Schiavone v. Fortune, 477 U.S. 21, 31 106 S. Ct. 2379, 2385 (1986)); Louisiana-Pac. Corp. v. ASARCO, Inc., 5 F.3d 431, 434 (9th Cir. 1993) (refusing to allow an amended complaint to relate back where the identities of proposed additional defendants were known when original complaint was filed); see generally Annotation, 8 A.L.R. 2d 6, *Change in Party After Statute of Limitations Has Run* (1949, 1985 & Supp. May 1991); see also Nurenberger Hercules-Werke GMBH v. Virostek, 107 Nev. 873, 881, 822 P.2d 1100, 1105 (1991) (explaining that ***the relation back doctrine "was not intended to reward indolence or lack of diligence by giving plaintiffs an automatic method of circumventing statutes of limitations***" (emphasis added)).

Indeed, there is a mountain of controlling authority on the relation back doctrine that runs completely contrary to the District Court's Order and undermines Omni's attempts to assert a new cause of action (a breach of Guaranty instead of a breach of the Promissory Note) and seek recovery from new sources (from the Guarantors instead of from the Borrower) after the deadline contained in NRS 40.455(1). The authority cited by Petitioners clearly provides that in Nevada, "***where an amendment states a new cause of action that describes a new and entirely different source of damages, the amendment does not relate back*** . . . ." Nelson v. City of Las Vegas, 99 Nev. 548, 556, 665 P.2d 1141, 1146 (1983) (emphasis added) (refusing to allow a new claim based upon a new theory of liability asserted in an amended pleading to relate back under NRCP 15(c) after the statute of limitations had run); Scott v. Dep't of Commerce, 104 Nev. 580, 586, 763 P.2d 341, 345 (1988) (refusing to allow a new claim based upon a new theory of liability had changed asserted in an amended pleading to relate back under NRCP 15(c) after the statute of limitations had run); Frances v. Plaza Pac. Equities, Inc., 109 Nev. 91, 98, 847 P.2d 722, 727 (1993) (first acknowledging that "Rule 15(c) does preclude an amendment relating back in those instances where the amendment 'states a new cause of action that describes a new and entirely different source of damages . . . ,'" but allowing a new claim to relate back in an amended pleading after the statute of limitations had run where ***neither the theory of liability nor the allegedly liable party had been changed*** (*citing* Nelson, 99 Nev. 548, 665 P.2d 1141)); see also Servatius v. United Resort Hotels, Inc., 85 Nev. 371, 373,455 P.2d 621, 622 (1969) (acknowledging the general rule that an

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amended complaint which brings a *new* party into the action "amounts to a new and independent cause of action").

Omni responded to the foregoing authority with the mistaken and overly simplistic argument that its breach of contact claim against the Borrower is essentially the same as its breach of guaranty claim against Petitioners (guarantors), and the District Court bought the argument.[36] However, this argument fails on its face because the Note and the Guaranty are completely different agreements, containing completely different terms, obligating completely different parties, and providing completely different defenses to those obligations. If it was truly the case that Omni's breach of contract claim against the Borrower and its breach of guaranty clams against Petitioners (guarantors) were one and the same, it would not have filed two separate lawsuits, against two separate sets of alleged obligors, with two separate sets of claims, and it would not now be arguing against the dismissal of only its claims against Petitioners (guarantors) under the Guaranty.

In summary, reflecting back upon the plain language of Lavi makes this matter clear: if BB&T could have simply amended its already-pending complaint to add a new application for deficiency judgment that would have related back to the date of the initial complaint, it would have done so and the entire analysis and holding in Lavi would be rendered meaningless. Indeed, BB&T – along with every other creditor who has an action pending but who fails to timely apply for a deficiency judgment – would simply end-around the six-month deadline contained

[36] 1 PA 000129-000224.

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within NRS 40.455(1) by way of an amendment under NRCP 15(c). This glaring purported loophole is clearly not permitted by this Court's decision in Lavi. Given the foregoing, any suggestion by the District Court that Omni can save its untimely application for a deficiency judgment against the Guarantors by simply amending its Borrower Complaint under NRCP 15(c) is without merit and contradicts the plain meaning and intent of Lavi. As such, the District Court erred in applying the relation back doctrine contained in NRCP 15(c).

VII. CONCLUSION

Bright lines should not be easily blurred, and Lavi outlines a bright line standard for dismissal of untimely deficiency claims brought under NRS 40.455. Here, Omni's tardy claims against Petitioners fall squarely within the confines of Lavi and they must therefore be dismissed without exception. The District Court cannot be permitted to ignore this Court's decision in Lavi and turn the ruling upon its head through a generalized misapplication of NRCP 15(c)'s relation back power.

Petitioners are compelled to bring this Writ because the District Court erred as a matter of law when it denied their Motion to Dismiss and Motion for Summary Judgment, thereby leaving them exposed to pursuit of an expressly time-barred action by Omni against them. The District Court's determination is legally unsustainable and flies directly in the face of this Court's ruling in Lavi. Petitioners have no plain, speedy, or adequate remedy at law to protect their legal rights, and Omni has already filed a Motion for Summary Judgment to try and capitalize on the District Court's incorrect application of Lavi in this case.

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For these reasons, the extraordinary relief requested by this Petition is necessary and appropriate at this time. Accordingly, Petitioners respectfully submit that the Court's resolution, in their favor, of the significant legal issues presented by this Petition will promote the interests of justice.

Dated this 20th day of April, 2015.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Petition for a Writ of Mandamus, or in the Alternative, a Writ of Prohibition, 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), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page 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 20th day of April, 2015.

Keith D. Williams, Esq.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of April, 2015, our office caused service of a true and correct copy of the above and foregoing **PETITION FOR A WRIT OF MANDAMUS, OR ALTERNATIVELY, FOR WRIT OF PROHIBITION** pursuant to the Supreme Court Electronic Filing System, and by first class United States mail, postage prepaid, Las Vegas, Nevada, to the following:

The Honorable Jerry A. Wiese, II.
Eighth Judicial District Court
Department 30
Regional Justice Center
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AFFIDAVIT OF KEITH D. WILLIAMS, ESQ. IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS, OR ALTERNATIVELY, FOR WRIT OF PROHIBITION

KEITH D. WILLIAMS, ESQ., being first duly sworn deposes and says:

1. I am over the age of 18 years and have personal knowledge of the facts stated herein, except for those stated upon information and belief, and as to those, I believe them to be true. I am an attorney at Bogatz Law Group, which is counsel of record for Petitioners John A. Ritter and Darrin D. Badger.

2. On April 13, 2015, the District Court issued an Order denying Petitioners' Motion to Dismiss and Motion for Summary Judgment. This Order, however, is a misinterpretation of clear and unambiguous statutory language and a misapplication of Nevada Supreme Court precedent.

3. Omni has already filed a Motion for Summary Judgment, which is currently set for hearing on May 14, 2015. Given the rapidly approaching trial date, any other avenues of relief would not be plain, adequate, and speedy remedies.

4. I certify and affirm that this Petition for Writ of Mandamus, or Alternatively, for Writ of Prohibition is made in good faith and not for delay.

Dated this 20th day of April, 2015.

Keith D. Williams, Esq.

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