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**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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

Petitioners,

Supreme Court Case No: 67835

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,

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

Respondents.

and

OMNI FAMILY LIMITED  
PARTNERSHIP, a Nevada domestic  
limited partnership,

Real Party in Interest.

**MOTION TO STAY DISTRICT COURT PROCEEDINGS**

Petitioners, John A. Ritter (“Ritter”) and Darrin D. Badger (“Badger”) (collectively, “Petitioners”), by and through their attorneys of record, Bogatz Law Group, hereby respectfully move this Court for a stay of the District Court’s April 13, 2015 Order pursuant to NRAP 8. This Motion is made and based upon the

1 following Memorandum of Points and Authorities, all the papers and pleadings on  
2 file herein and upon such oral argument as the Court may permit at the hearing on  
3 this matter.

4 Dated this 1st day of May, 2015.

5 **BOGATZ LAW GROUP**

6 By: /s/ Charles M. Vlasic III, Esq.

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14 **MEMORANDUM OF POINTS AND AUTHORITIES**

15 **I. INTRODUCTION**

16 It is crucial that this Court grant a stay of the District Court litigation in this  
17 matter. Despite the plain language of NRS 40.455 and this Court's prior decision  
18 in Lavi, the District Court refused to dismiss deficiency judgment claims filed  
19 against Petitioners well after the six-month deadline set forth in NRS 40.455.  
20 Omni has already filed a Motion for Summary Judgment and the hearing is set for  
21 May 14, 2015. Omni will not voluntarily agree to a stay, and the District Court  
22 denied Petitioners' request for a stay. Without a stay, Petitioners face extensive  
23 and unnecessary expense further defending themselves and, potentially, a multi-  
24 million dollar judgment with an enormous bond requirement to stay execution  
pending an appeal. As such, Petitioners respectfully seek a stay of these  
proceedings while this Court considers Petitioners' Writ.

**II. RELEVANT PROCEDURAL BACKGROUND**

On or about April 17, 2007, Southwest Desert Equities, LLC (“SWDE”) borrowed approximately \$2,180,000 (“Loan”) from OneCap Mortgage Corp. – the alleged predecessor-in-interest to Real Party in Interest Omni Family Limited Partnership (“Omni”). Also on or about April 17, 2007, Petitioners executed a Continuing Guaranty (“Guaranty”) to secure the Loan.

On or about April 22, 2013, Omni filed a Complaint against only Petitioners, alleging claims for breach of the Guaranty and breach of the implied covenant of good faith and fair dealing, in connection with Petitioners’ alleged default under the Guaranty (“Guaranty Action”). On or about August 13, 2013, while the Guaranty Action was pending, Omni foreclosed on the property securing the Loan via a trustee’s sale. At no time within the six months following the foreclosure sale did Omni file an application for deficiency judgment against Petitioners as required by NRS 40.455(1) and this Court in Lavi (docket no. 58968).

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, SWDE, alleging claims for breach of the promissory note (“Promissory Note”) - *deficiency* and breach of the implied covenant of good faith and fair dealing, in connection with SWDE’s alleged default under the Promissory Note (“Borrower Action”).

On or about April 14, 2014, over two months after the six-month deadline following the foreclosure sale, the parties filed a Stipulation and Order to Consolidate the later Borrower Action with the earlier Guaranty Action. On or about September 18, 2014, Petitioners filed a Motion for Summary Judgment in

1 the Guaranty Action given Omni's failure to apply for a deficiency judgment  
2 against them within six months following the foreclosure sale on the property.

3 On or about December 1, 2014 – nearly *sixteen months* following the August  
4 13, 2013 foreclosure sale on the subject property – Omni filed an Amended  
5 Complaint in the Borrower Action naming Petitioners as additional Defendants,  
6 alleging claims against Petitioners for breach of the Guaranty – *deficiency* and  
7 breach of the implied covenant of good faith and fair dealing under the Guaranty.  
8 In response to the new claims filed by Omni against Petitioners in the Amended  
9 Borrower Complaint, Petitioners filed a Motion to Dismiss on January 9, 2015.

10 After a hearing was held on both of Petitioners' motions on March 10, 2015,  
11 the District Court entered its Order Denying Motion to Dismiss and Motion for  
12 Summary Judgment on April 13, 2015. Almost immediately after the District  
13 Court denied Petitioners' motions, Omni filed its own Motion for Summary  
14 Judgment, which seeks a deficiency judgment against Petitioners and SWDE for  
15 millions of dollars. The hearing on Omni's Motion is currently set for hearing on  
16 May 14, 2015. On April 28, 2015, the District Court denied Petitioners' request  
17 for a stay.

### 18 **III. LEGAL ARGUMENT**

19 Nevada courts have recognized stays are necessary in general to preserve the  
20 status quo, *and in particular when district courts refuse to enforce the six-month*  
21 *statute of limitations in NRS 40.455*. See Nelson v. Heer, 121 Nev. 832, 122 P.3d  
22 1252 (2005); William Walters, Docket No. 55912; Simon Lavi, Docket No. 58968.  
23 In deciding whether to issue a stay, Nevada courts generally consider the following  
24 factors: (1) whether the object of the appeal or writ petition will be defeated if the

1 stay is denied; (2) whether appellant/petitioner will suffer irreparable or serious  
2 injury if the stay is denied; (3) whether respondent/real party in interest will suffer  
3 irreparable or serious injury if the stay is granted; and (4) whether  
4 appellant/petitioner is likely to prevail on the merits in the appeal or writ petition.  
5 NRAP 8(c); Hansen v. Eighth Judicial Dist. Ct., 116 Nev. 650, 657, 6 P.3d 982,  
6 986 (2000); Kress v. Corey, 65 Nev. 1, 189 P.2d 352 (1948). Under NRAP 8(a),  
7 parties usually must first move for a stay in the district court.

8 Here, this Court's prior granting of stays, each of the NRAP 8(c) factors, and  
9 the District Court's denial of Petitioners' request for stay all weigh heavily in favor  
10 of this Court granting a stay pending the outcome of the underlying Writ  
11 proceedings.

12 **A. PETITIONERS ARE ENTITLED TO THE SAME STAY**  
13 **ISSUED IN THE LAVI, WALTERS, AND SANDPOINTE**  
14 **CASES.**

15 Petitioners should receive the same stay issued in the Lavi, Walters, and  
16 Sandpointe cases, as this case involves similar issues regarding statutory  
17 interpretation and public policy that entitled the aforementioned cases to a stay.

18 In Lavi, this Court granted a stay of the lower court proceedings while  
19 reviewing the application of NRS 40.455 in the matter. See Lavi v. Eighth Jud.  
20 Dist. Ct., 130 Nev. Adv. Op. 38, 325 P.3d 1265, 1266 (2014). There, a lender  
21 instituted a guaranty action and, while it was pending, foreclosed on the property.  
22 Id. at 1266-67. However, it was not until almost a year later that the lender filed a  
23 motion for summary judgment and claimed it was seeking a deficiency judgment.  
24 Id. The District Court granted the motion and denied the guarantors'  
countermotion for summary judgment. Id. One of the guarantors, Lavi, filed a

1 petition for writ of mandamus and requested a stay, noting the lender failed to  
2 claim it was seeking a deficiency judgment until Lavi pointed out the lender's  
3 failure to comply with NRS 40.455. Id.; Lavi, Docket No. 58968. This Court  
4 granted a stay and, after review, issued a writ directing dismissal of the guaranty  
5 action. Lavi, Docket No. 58968.

6 In Walters, this Court also granted a stay while reviewing the application of  
7 Nevada's anti-deficiency protections. See Walters v. Eighth Jud. Dist. Ct., 263  
8 P.3d 231, 232 (2011). There, a lender implemented a breach of contract action,  
9 then a foreclosure sale was held on the underlying property. Id. Thereafter, the  
10 lender moved for summary judgment on the alleged deficiency, which the District  
11 Court held was sufficient to meet the six month deadline contained in NRS 40.455.  
12 Id. at 233. Walters thereafter filed a petition for writ of mandamus and requested a  
13 stay, which this Court granted. Walters, Docket No. 55912.

14 In Sandpointe, this Court again granted a stay while reviewing the  
15 application of Nevada's anti-deficiency protections. See Sandpointe Apts. v.  
16 Eighth Jud. Dist. Ct., 129 Nev. Adv. Op. 87, 313 P.3d 849, 852 (2013). There,  
17 guarantors in a guaranty deficiency action filed a motion for partial summary  
18 judgment under NRS 40.459. Id. The District Court denied the motion and the  
19 guarantors filed a petition for writ of mandamus. Id. The guarantors also  
20 requested a stay, which this Court granted. Id.; Sandpointe Apartments, LLC,  
21 Docket No. 59507.

22 The statutory issues Petitioners face are entirely similar to those that merited  
23 a stay in Lavi, Walters, and Sandpointe. As in those cases, which all involved  
24 appeals due to the District Court's interpretation of NRS Chapter 40, the primary

1 issue here is whether NRS 40.455 prevents Omni from avoiding the six-month  
2 deficiency application requirement. In all three of the above cases, this Court  
3 found that the issue of statutory interpretation is significant enough to warrant a  
4 stay, given the tremendous impact on the District Court proceedings if the  
5 guarantors' interpretations were correct. Here too, if Petitioners' position is  
6 correct, the District Court proceedings will be greatly impacted, to the extent that  
7 no further use of Petitioners', the Court's, or Omni's resources will be necessary,  
8 as Omni's claims against Petitioners will have to be dismissed.

9 Moreover, analogous public policy concerns also justify a stay. In Lavi, the  
10 guarantors noted in their request for stay that the lender had employed substantial  
11 gamesmanship and did not attempt to comply with NRS 40.455 until after the  
12 guarantors pointed out the defects in the claims against them. Lavi, Docket No.  
13 58968. The guarantors argued this lack of even minimal effort at compliance  
14 strongly favored a stay at the District Court level. Id. Here too, Omni did not  
15 attempt to comply with the statutory requirements until *after* Petitioners put Omni  
16 on alert by moving to dismiss the claims due to Omni's failure to conform to NRS  
17 40.455. Indeed, Omni waited until nearly sixteen months after the foreclosure sale  
18 – four months longer than the Lavi lender and almost ten months longer than the  
19 statutory limit – to attempt to comply. Accordingly, Petitioners respectfully  
20 request this Court grant an immediate stay of the District Court proceedings.

21 **B. THE NRAP FACTORS ALL FAVOR A STAY OF THE**  
22 **DISTRICT COURT LITIGATION.**

23 Every factor under NRAP 8(c) justifies staying the lower court proceedings.  
24 Petitioners are likely to succeed on the merits of their writ petition, as well as lose

1 the object of their appeal if a stay is not granted. Additionally, they will suffer  
2 irreparable harm if no stay is issued, while Omni will not suffer irreparable injury  
3 upon grant of stay. Therefore, a stay is both appropriate and warranted.

4 **1. Petitioners Are Likely To Succeed On The Merits Of Their**  
5 **Writ Petition.**

6 Petitioners are likely to succeed on the merits of the writ petition filed in this  
7 Court, as the plain language of NRS 40.455 and the precedent set by Lavi illustrate  
8 the District Court's clear error in failing to grant Petitioners' Motion to Dismiss  
9 and Motion for Summary Judgment. This Court grants extraordinary writ relief  
10 when there are no factual disputes and the District Court erroneously fails to  
11 dismiss an action pursuant to clear authority under a statute or rule. See Scarbo v.  
12 Eighth Jud. Dist. Ct., 125 Nev. 118, 121, 206 P.3d 975, 977 (2009); Advanced  
13 Countertop Design, Inc. v. Second Jud. Dist. Ct., 115 Nev. 268, 270, 984 P.2d 756,  
14 758 (1999). NRS 40.455 is clear regarding the timeframe for deficiency judgment:

15 *[U]pon application of the judgment creditor or the beneficiary of the*  
16 *deed of trust within 6 months after the date of the foreclosure sale or*  
17 *the trustee's sale held pursuant to NRS 107.080, respectively, and*  
*after the required hearing, the court shall award a deficiency*  
*judgment . . .*

18 NRS 40.455(1) (emphasis added). Thus, the Nevada Legislature plainly set forth a  
19 requirement that application for deficiency judgment be made within 6 months  
20 after a trustee's sale held pursuant to NRS 107.080. Id. (emphasis added).

21 The plain language of NRS 40.455 was reaffirmed in Lavi, wherein this  
22 Court stated a *"timely application for a deficiency judgment must be made under*  
23 *NRS 40.455"* in order to seek a deficiency judgment. 325 P.3d at 1268 (emphasis  
24 added). This Court ultimately dismissed the claims against the guarantors in that



1 case, finding that despite the creditor's attempt to repair its defective complaint –  
2 namely, by referencing a deficiency application nearly six months after the  
3 deadline – the creditor ultimately failed to make an application for deficiency  
4 judgment within six months as required by NRS 40.455(1). Id.

5 Here, the plain language of NRS 40.455 clearly required the District Court  
6 to grant Petitioners' Motion to Dismiss and Motion for Summary Judgment. Omni  
7 filed an initial action against Petitioners on April 22, 2013, months prior to the  
8 foreclosure. Omni then failed to file a subsequent application for deficiency  
9 judgment against Petitioners within six months after the non-judicial foreclosure  
10 sale occurred on August 13, 2013. NRS 40.455 is quite clear: this failure means  
11 Omni is barred from pursuing a deficiency judgment against Petitioners.

12 Moreover, based on the precedent set by Lavi, the District Court  
13 misinterpreted NRS 40.455 in allowing Omni to amend its complaint and  
14 substitute that for an application for deficiency judgment. NRS 40.455 does not  
15 allow any exceptions or substitutions for an actual application for deficiency  
16 judgment. In Lavi, this Court rejected the lender's argument that it had put the  
17 guarantors on notice and merely needed to reference deficiency judgment long  
18 after the deadline had passed. Id. Likewise, Omni's argument that Petitioners  
19 were on notice and it could merely repair its defective claims by amending the  
20 complaint long after the deadline passed is without merit, and the District Court  
21 should not have denied Petitioners' motions. A de novo review of the clear and  
22 unambiguous language and precedent set by Lavi is therefore likely to overturn the  
23 District Court's unsupported decision. Accordingly, Petitioners respectfully  
24 request this Court grant an immediate stay of the District Court proceedings.

**2. Petitioners Will Lose The Object Of Their Appeal If A Stay Is Not Granted.**

Petitioners will lose the object of their appeal – specifically, enforcement of the protections afforded by NRS 40.455 – if a stay is not granted. This Court has established the importance of NRS 40.455’s six-month limit to seek a deficiency judgment. Nev. State Bank v. Jamison Family P’ship, 106 Nev. 792, 798, 801 P.2d 1377, 1381 (1990); Lavi, 325 P.3d at 1267; Walters, 263 P.3d at 234. In Jamison, this Court noted that statutes of limitation provide important protections “against the evidentiary problems associated with defending a stale claim” and “promote repose by giving security and stability to human affairs.” 106 Nev. at 798, 801 P.2d at 1381 (*quoting* Wood v. Carpenter, 101 U.S. 135, 139 (1879)).

Here, if no stay is granted, Petitioners will lose the protections provided by NRS 40.455. The District Court’s April 13, 2015 Order violates the clear meaning and intent of NRS 40.455(1), and ignores this Court’s precedent protecting guarantors and strictly enforcing statutes of repose. Omni has already filed a Motion for Summary Judgment, which is set for hearing on May 14, 2015. If a stay is not granted, the hearing will occur prior to this Court’s review of the District Court’s Order. Petitioners would therefore be deprived of the protections afforded by the Legislature as they would be forced to defend themselves at a hearing that would not have otherwise occurred and, if the District Court follows the same reasoning it did in the Order, will likely be subject to a possibly several million dollar judgment in Omni’s favor. Accordingly, Petitioners respectfully request this Court grant an immediate stay of the District Court proceedings.

**3. Petitioners Will Be Irreparably Harmed If A Stay Is Not Granted.**

Petitioners will be irreparably harmed if a stay is not granted. Specifically, Petitioners are faced with having to expend enormous amounts of time, effort and legal expenses in having to defend themselves in the underlying litigation where they have no liability. Accordingly, Petitioners respectfully request this Court grant an immediate stay of the District Court proceedings.

**4. Omni Will Not Suffer Irreparable Harm If A Stay Is Granted.**

Omni will not suffer irreparable harm if a stay is granted in this matter. This Court has stated that “a mere delay in pursuing discovery in the litigation normally does not constitute irreparable harm.” Fritz Hanson A/S v. Dist. Ct., 116 Nev. 650, 658, 6 P.3d 982, 987 (2000).

Here, the prospective harm Omni might incur, if any, does not rise to the level of irreparable. Should the parties continue moving forward, any hearing or discovery may be rendered moot if this Court grants Petitioners’ Writ Petition. It makes little sense to allow Omni to continue pursuing its claims and, as a result, incur fees and costs that may ultimately be unnecessary. Further, in the event this Court does not grant Petitioners’ Writ Petition, the parties can easily begin proceeding again. While Omni might have to wait longer to pursue its claims, such limited delay does not rise to the level of irreparable harm. Id. Accordingly, Petitioners respectfully request this Court grant an immediate stay of the District Court proceedings.

**C. THE DISTRICT COURT DENIED PETITIONERS' REQUEST FOR A STAY.**

NRAP 8(a) requires parties to first seek a stay from the District Court before seeking one from this Court.

Here, Petitioners filed a Motion to Stay that the District Court denied on April 28, 2015. As such, Petitioners have complied with the requirement set by NRAP 8(a) and this request for issuance of a stay is appropriately before this Court.

**IV. CONCLUSION**

Based upon the foregoing, good cause exists to grant Petitioners' request for a stay of the lower court proceedings. Accordingly, Petitioners respectfully request this Court grant the immediate Motion To Stay District Court Proceedings.

Dated this 1st day of May, 2015.

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**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on the 1st day of May, 2015, our office caused service of a true and correct copy of the above and foregoing **MOTION TO STAY DISTRICT COURT PROCEEDINGS** 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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