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**OMNI FAMILY LIMITED PARTNERSHIP**

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Clerk of Supreme Court

7  
8 IN THE SUPREME COURT OF THE STATE OF NEVADA

9 \*\*\*

10 JOHN A. RITTER, an individual;  
11 DARRIN D. BADGER, an individual,  
12 Petitioners,

13 vs.

Supreme Court Case No. 67835

14 THE EIGHTH JUDICIAL DISTRICT  
15 COURT OF THE STATE OF  
16 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

17 Respondents,

18 and

19 OMNI FAMILY LIMITED  
20 PARTNERSHIP, a Nevada domestic  
limited partnership,

21 Real Party in Interest.  
22

**OPPOSITION TO MOTION TO STAY**

**DISTRICT COURT PROCEEDINGS**

23  
24 COMES NOW, Real Party in Interest, OMNI FAMILY LIMITED  
25 PARTNERSHIP, by and through its attorneys, ROGER P. CROTEAU &  
26 ASSOCIATES, LTD., and hereby presents its Opposition to Petitioners' Motion to  
27 Stay District Court Proceedings. In support of this Opposition, Real Party in  
28

Interest relies upon the attached Memorandum of Points and Authorities, all papers and pleadings on file herein, and any oral argument that this Honorable Court may entertain at the hearing of this matter.

DATED this 13<sup>th</sup> day of May, 2015.

ROGER P. CROTEAU & ASSOCIATES, LTD.

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**OMNI FAMILY LIMITED PARTNERSHIP**

## **POINTS AND AUTHORITIES**

### **I. STATEMENT OF RELEVANT FACTS**

The instant dispute is a breach of contract deficiency action arising from the foreclosure of vacant real property located in the County of Clark, State of Nevada, identified as Assessor Parcel No. 126-01-501-005 (*the "Property"*). At issue is a loan in the amount of \$2,180,000.00 (*the "Loan"*) which was made by Plaintiff/Real Party in Interest to Defendant, Southwest Desert Equities, LLC (*"Borrower"*). The Loan was and is guaranteed by Defendants, John A. Ritter and Darrin D. Badger (*collectively, "Guarantors"*). The current outstanding balance owed to the Plaintiff by the Defendants is in excess of \$6,714,779.38.

On April 22, 2013, Plaintiff filed its Complaint against the Guarantors and Petitioners herein, Case No. A-13-680542-C (*"First Complaint"*). The First Complaint was filed in advance of the foreclosure of the Property and included claims for Breach of Contract and Breach of the Implied Covenant of Good Faith and Fair Dealing. The Guarantors filed an Answer and Counterclaim on June 5,

1 2013. Thereafter, on or about August 13, 2013, Plaintiff caused a public  
2 foreclosure sale ( "*Foreclosure Sale*" ) of the Property to be conducted. Plaintiff  
3 purchased the Property at the Foreclosure Sale for the sum of \$150,000.00.  
4 Obviously, a significant deficiency existed.

5 While the Petitioners' statement of the procedural background of this case is  
6 relatively accurate, it downplays and/or omits some very significant facts.  
7 Specifically, subsequent to the Foreclosure Sale and prior to the six-month  
8 deadline of NRS 40.455, Plaintiff's counsel, Roger P. Croteau, Esq., contacted  
9 Defendants' counsel, Randy M. Creighton, Esq., to discuss the amendment of the  
10 pleadings. Specifically, Mr. Croteau and Mr. Creighton discussed the amendment  
11 of the First Complaint to include allegations related to the Foreclosure Sale and  
12 the associated deficiency. After seeking the approval of his clients, Mr. Creighton  
13 advised that he was authorized to stipulate to the amendment. Thereafter, on  
14 February 10, 2014, prior to the six-month deadline, Plaintiff's counsel forwarded a  
15 Stipulation and Order to Amend and Proposed First Amended Complaint to  
16 Defendants' counsel via email. The Proposed First Amended Complaint set forth  
17 all of the allegations related to the Foreclosure Sale and claimed deficiency as to  
18 both the Borrower and the Guarantors. Under these circumstances, the  
19 Petitioners' assertion that "Omni did not attempt to comply with the statutory  
20 requirements until after Petitioners put Omni on alert by moving to dismiss the  
21 claims due to Omni's failure to conform to NRS 40.455" (Motion, p. 7, ll. 14-17)  
22 is quite simply false. On the contrary, any "gamesmanship" that took place was  
23 carried out purely by Mr. Creighton as set forth below.

24 It was the understanding of Plaintiff's counsel that the parties had agreed  
25 that the First Amended Complaint was to add the Borrower as a Defendant, as well  
26 as add allegations related to the Foreclosure Sale and associated deficiency.  
27 However, upon receipt of the proposed stipulation and Proposed First Amended  
28 Complaint, Mr. Creighton reversed course, advising via email that he could not

1 stipulate to the addition of a defendant, stating as follows:

2 I am in receipt of the email below and attached Stipulation and  
3 proposed First Amended Complaint. I had the understanding that only  
4 information to be amended/added to the complaint was regarding the  
5 foreclosure, however, after reviewing the proposed amended  
6 complaint it appears the Plaintiff is adding a defendant. I took the  
7 proposed amended complaint to my Client and they stated they will  
8 not stipulate to allow another defendant to be added.

9 Based upon this email, it is abundantly clear that the Guarantors received actual  
10 notice of the Plaintiff's claims for deficiency against them at the time that they  
11 reviewed the Proposed First Amended Complaint.

12 Because the Defendants would no longer stipulate to the proposed  
13 amendment, and because sufficient time did not exist to move to amend the  
14 pleadings, Plaintiff caused a second Complaint naming the Borrower as a  
15 Defendant to be filed on February 10, 2014, Case No. A-14-695925-C ("*Second*  
16 *Complaint*"). Like the First Complaint, the Second Complaint included claims for  
17 Breach of Contract and Breach of the Implied Covenant of Good Faith and Fair  
18 Dealing. The Second Complaint also included allegations related to the  
19 Foreclosure Sale that had taken place. The Second Complaint was served upon  
20 the Borrower on March 4, 2014. The two cases were thereafter consolidated by  
21 way of stipulation and order filed on April 15, 2014. The Borrower failed to  
22 immediately file an Answer or other responsive pleading. In retrospect, it appears  
23 that the Borrower did not answer the Second Complaint in order to enable the later  
24 denial of the "notice" mandate of the current case law.

25 On December 1, 2014, Plaintiff amended the Second Complaint to add the  
26 Guarantors as Defendants. This amendment was filed pursuant to NRCP 15(a)  
27 and NRCP 15(c). Pursuant to NRCP 15(a), leave of court was not required in  
28 order to amend the Second Complaint because no responsive pleading had yet  
been filed or served by the Borrower. The District Court held that the amendment  
of the Second Complaint related back to the original date of filing pursuant to  
NRCP 15(c). Thus, the filing was timely as to the Guarantors. As a result, the

1 Plaintiff complied with the requirements of NRS 40.455 and the instant case is not  
2 nearly as cut and dried as the Petitioners would have this Court believe.

3 In any event, the resolution of this writ proceeding will have no impact  
4 upon the liability of the Borrower for the debt owed to the Plaintiff. The Borrower  
5 is not a party to this proceeding and there has been no allegation made that the  
6 deficiency claim against the Borrower was not timely made. Under these  
7 circumstances, no good cause exists to stay the underlying case.

## 8 **II. LEGAL ARGUMENT**

### 9 **1. STATEMENT OF THE LAW**

10 In deciding whether to issue a stay, Nevada courts generally consider the  
11 following factors:

- 12 (1) Whether the object of the appeal or writ petition will be defeated  
if the stay is denied;
- 13 (2) Whether appellant/petitioner will suffer irreparable or serious  
injury if the stay is denied;
- 14 (3) Whether respondent/real party in interest will suffer irreparable or  
serious injury if the stay is granted; and
- 15 (4) Whether appellant/petitioner is likely to prevail on the merits in  
the appeal or writ petition.

16 NRAP 8(c); See also *Hansen v. Eighth Judicial Dist. Court ex rel. County of Clark*,  
17 116 Nev. 650, 657, 6 P.3d 982, 986 (2000) (*citing* NRAP 8(c); *Kress v. Corey*, 65  
18 Nev. 1, 189 P.2d 352 (1948)). The Movants summarily assert that each of these  
19 factors weighs in favor of granting the instant motion for a stay. This is simply  
20 not the case.

### 21 **2. THE INSTANT ACTION DIFFERS SUBSTANTIALLY FROM THE** 22 **CASES CITED BY THE PETITIONERS**

23 The Petitioners would have this Court hold that a movant is entitled to a  
24 stay as a matter of course where a case implicates the interpretation or application  
25 of NRS 40.455. In support of this assertion, the Petitioners cite the matters of  
26 *Lavi v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 38, 325 P.3d 1265 (2014);  
27 *Walters v. Eighth Jud. Dist. Co.*, 263 P.3d 231 (2011); and *Sandpointe Apts. v.*  
28

1 *Eighth Jud. Dist. Ct.*, 129 Nev. Adv. Op. 87, 313 P.3d 849 (2013). While a stay  
2 may have been issued in each of these cases, they are not dispositive of the instant  
3 matter.

4 At a glance, the above-referenced cases may appear to be substantially  
5 similar to the case at hand. However, the instant action involves facts that were  
6 not present in any of the cited cases. Specifically, in this case, the Plaintiff sought  
7 to amend its pleadings in advance of the 6-month deadline only to be misled to its  
8 detriment by the Defendants and their counsel. A Complaint was timely filed  
9 against the Borrower and later amended in such manner as to relate back to the  
10 original date of filing. None of these facts remotely appeared in the matters cited  
11 by the Petitioners. Furthermore, the Borrower is not a party to this writ  
12 proceeding and thus no good cause exists to stay the action as to the Borrower.

13 The claims against the Borrower were undisputably timely filed. Thus, the  
14 instant writ proceedings will not have a “tremendous impact on the District Court  
15 proceedings if the guarantors’ interpretations [are] correct.” Motion, p. 7, ll. 4-5.  
16 On the contrary, although the instant proceedings could conceivably result in the  
17 dismissal of the Plaintiff’s claims against the Guarantors, they will have no impact  
18 upon the Borrower’s liability to the Plaintiff. The only impact will be whether or  
19 not the Guarantors are jointly liable with the Borrower for the subject debt.

20 **3. THE OBJECT OF THE APPEAL WILL NOT BE DEFEATED IF A**  
21 **STAY IS DENIED**

22 Subsequent to the denial of the Guarantors’ Motion to Dismiss and Motion  
23 for Summary Judgment by the District Court, the Plaintiff filed a Motion for  
24 Summary Judgment against the Guarantors and the Borrower on March 19, 2015.  
25 On April 15, 2015, the Defendants filed an Opposition to said Motion for  
26 Summary Judgment. On the same date, the Defendants filed their own Motion for  
27 Summary Judgment ( “*Second MSJ*”). Both Motions are presently scheduled to be  
28 heard by the District Court on May 26, 2015.

1 The Guarantors' Motion for Stay provides little argument suggesting that  
2 the object of the appeal would be defeated if a stay is denied. The instant Petition  
3 for Writ seeks an Order compelling the District Court to reverse its denial of  
4 Guarantors' Motion to Dismiss and prior Motion for Summary Judgment.  
5 However, the Guarantors fail to point out that the Plaintiff's pending Motion for  
6 Summary Judgment seeks Summary Judgment not only against them but also  
7 against the Borrower. The Borrower was not a party to the Motion to Dismiss and  
8 prior Motion for Summary Judgment. Thus, the pending writ proceedings have  
9 nothing to do with the Borrower. Even if a writ were to be granted, it would have  
10 no impact upon the Borrower.

11 The stay of this action pending the writ proceedings would not in any way  
12 defeat the object of the appeal. In the event that a stay is denied, the instant action  
13 moves forward, and this Court grants Summary Judgment against the Defendants,  
14 the Borrower or Guarantors or both would be able to post a bond to stay execution  
15 pending an appeal. To date, the Defendants have presented little argument that  
16 the Borrower is not liable for the amounts owed pursuant to the Loan. In fact, the  
17 Guarantors have likewise presented little argument that they are not liable. On the  
18 contrary, they have sought to avoid their liability only through the technical  
19 application of the law.

20 Proceeding with this action while the writ proceedings are pending will not  
21 serve to waive any arguments that the Guarantors possess. In fact, the Defendants  
22 have already filed their Second MSJ asserting various bases upon which they  
23 claim Summary Judgment should be entered in their favor. If the Defendants were  
24 to prevail on their Second MSJ, these proceedings could conceivably be rendered  
25 moot. This would obviously be a highly favorable result for the Defendants.  
26 Under these circumstances, no basis exists for a stay.

27 **4. THE MOVANTS WILL NOT SUFFER IRREPARABLE INJURY**

28 The Movants provide almost no argument in favor of the second factor,

1 asserting only that they are “faced with having to expend enormous amounts of  
2 time, effort and legal expenses.” Motion, p. 11, ll. 4-5. On this these bases,  
3 Movants assert that a stay is appropriate. However, litigation expenses, while  
4 potentially substantial, are neither irreparable nor serious. *Hansen*, 116 Nev. at  
5 658. (citing *Dixon v. Thatcher*, 103 Nev. 414, 415, 742 P.2d 1029, 1029-30  
6 (1987); *Wisconsin Gas Co. v. F.E.R.C.*, 244 U.S. App. D.C. 349, 758 F.2d 669,  
7 674 (D.C. Cir. 1985) (noting that “mere injuries, however substantial, in terms of  
8 money, time and energy necessarily expended in the absence of a stay are not  
9 enough” to show irreparable harm) (quoting *Virginia Petroleum Job. Ass'n v.*  
10 *Federal Power Com'n*, 104 U.S. App. D.C. 106, 259 F.2d 921, 925 (D.C. Cir.  
11 1958) (additional citations omitted)). The Petitioner’s arguments that they will  
12 suffer irreparable harm if a stay is not granted are completely unfounded under the  
13 law. As a result, this factor in no manner weighs in favor of the Defendants and  
14 the instant Motion must be denied.

15 **5. PLAINTIFF WILL SUFFER SERIOUS INJURY IF A STAY IS**  
16 **ENTERED**

17 As stated above, the Defendants currently owe the Plaintiff in excess of  
18 \$6,714,779.38 pursuant to the terms of the Loan. While the necessity of incurring  
19 ongoing litigation expenses does not constitute irreparable harm, the Plaintiff  
20 herein would suffer irreparable harm if the Defendants hereto divest themselves of  
21 assets prior to the point in time that it is able to obtain and execute upon a  
22 judgment. The Plaintiff should not be forced to delay its enforcement of its rights  
23 while the Defendants could conceivably be rendering themselves judgment proof.  
24 This is particularly true regarding the Borrower, which is not a party to these  
25 proceedings.

26 As set forth above, this Petition for Writ has nothing to do with the  
27 Borrower. The Borrower was not a party to the Order upon which this Petition is  
28 founded. In the unlikely event that the Petition is granted, the resulting Writ



1 would have no impact upon the Plaintiff's claims against the Borrower. The  
2 Plaintiff certainly should not be precluded from proceeding with his claims under  
3 these circumstances.

4 **6. MOVANTS ARE NOT LIKELY TO SUCCEED ON THE MERITS**

5 The Guarantors argue that they are likely to prevail, asserting that the "plain  
6 language of NRS 40.455 clearly required the District Court to grant Petitioners'  
7 Motion to Dismiss and Motion for summary Judgment." Motion, p. 9, ll. 5-6.  
8 Based upon this claim, the Guarantors believe that they are likely to succeed on  
9 the merits of their Petition. Real Party in Interest disagrees.

10 The District Court rendered its Order after serious consideration of the facts  
11 and law at issue herein, ultimately determining that the denial of the Guarantors'  
12 Motion to Dismiss and Motion for Summary Judgment was appropriate. In its  
13 Petition and this Motion, the Guarantors discount or ignore the various facts  
14 related to the relation back of the Plaintiff's Second Complaint and the  
15 gamesmanship that occurred on the part of the Defendants and their counsel.  
16 Contrary to the claims contained in the Guarantors' Petition for Writ, no basis  
17 exists to disturb the District Court's careful and well-reasoned decision. Under  
18 these circumstances, the Movants do not possess a high likelihood of success on  
19 their Petition. As a result, no good cause exists for a stay of these proceedings.

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**III. CONCLUSION**

Based upon the foregoing, Real Party in Interest respectfully requests that the instant Motion be denied in its entirety. The Movants have failed to present good cause for a stay and, in fact, the pertinent factors all weigh in favor of the denial of a stay.

DATED this 13<sup>th</sup> day of May, 2015.

ROGER P. CROTEAU & ASSOCIATES, LTD.

/s/ Timothy E. Rhoda  
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***Attorney for Real Party in Interest***  
**OMNI FAMILY LIMITED PARTNERSHIP**

**CERTIFICATE OF SERVICE**

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that I am an employee of ROGER P. CROTEAU & ASSOCIATES, LTD. and that on the 13<sup>th</sup> day of May, 2015, I caused a true and correct copy of the foregoing document to be served on all parties as follows:

X VIA ELECTRONIC SERVICE: through the Nevada Supreme Court's e-file and serve system.

X VIA U.S. MAIL: by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as indicated on service list below in the United States mail at Las Vegas, Nevada.

       VIA FACSIMILE: by causing a true copy thereof to be telecopied to the number indicated on the service list below.

       VIA PERSONAL DELIVERY: by causing a true copy hereof to be hand delivered on this date to the addressee(s) at the address(es) set forth on the service list below.

Charles M. Vlastic, Esq.  
Bogatz Law Group  
3883 Howard Hughes Parkway, Suite 790  
Las Vegas, Nevada 89169

The Honorable Jerry A. Wiese II  
Regional Justice Center  
Department 30  
200 Lewis Avenue  
Las Vegas, Nevada 89155

/s/ Timothy E. Rhoda  
An employee of ROGER P. CROTEAU &  
ASSOCIATES, LTD