IN THE SUPREME COURT OF THE STATE OF NEVADA

***

JOHN A. RITTER, an individual; 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. 67835

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

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

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TABLE OF AUTHORITIES

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STATUTES AND RULES:

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read the following Answering 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), which requires assertions in the Answering Brief regarding matters in the record to be supported by appropriate references to the record. 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 Civil Procedure.

DATED this 29th day of June, 2015.

ROGER P. CROTEAU & ASSOCIATES, LTD.

/s/ Timothy E. Rhoda
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Petitioners herein would have this Court believe that their Petition is founded upon the District Court's failure to apply this Court's recent decision in the matter of *Lavi v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 38, 325 P.3d 1265 (2014) to claims that "fit squarely within the scope" of said decision. Petition, p. 1, ll. 11-12. While it is true that the claims against the Petitioners may be very similar to those addressed in *Lavi*, this is where the similarities end. As discussed at length below, the factual circumstances out of which this Petition arises are far different than those at issue in *Lavi*.

In the case at hand, the Real Party in Interest was misled to its detriment by the Petitioners and their counsel when it took specific actions to amend its pleadings to cite the factual allegations related to the foreclosure sale and associated deficiency at issue herein in advance of the 6 month rule of N.R.S. §40.455. Specifically, as set forth in an email dated February 10, 2014, the Petitioners and their counsel agreed to stipulate to the amendment of the pleadings at issue herein only to thereafter renege upon their agreement. Prior to their breach of this agreement – and within the 6 month period of N.R.S. §40.455 – the Petitioners and their counsel were provided with a Proposed Amended Complaint that complied in all respects with N.R.S. §40.455, and which provided the Petitioners with express notice of the claims against them. The Petitioners had further expressly agreed to the amendment of the pending complaint to add the facts related to the foreclosure sale, including the foreclosure sale price and the remaining deficiency amount owed to the Plaintiff, but Petitioners balked at the addition of the third party borrower that they now assert is penniless and without assets, as a defendant. Under these circumstances, the relation back of the Amended Complaint that was ultimately filed is necessary and proper in this instance and the District Court did not err.

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II. ISSUES PRESENTED

1. Whether an amended pleading in a breach of contract action which adds defendants and which is filed after the statute of limitations has run (in this case, after the 6 month time limitation of N.R.S. §40.455), will relate back to the date of the original pleading pursuant to NRCP 15(c) where the original pleading was timely filed and the added defendants (1) were already defendants in an separate breach of contract action; (2) received actual notice of the deficiency claim against them; (3) agreed to stipulate to the amendment of the breach of contract action to bring the deficiency claim against them in advance of the 6 month rule; (3) knew that they were proper parties; and (4) were not misled to their prejudice by the amendment.

2. Whether the consolidation of the Plaintiff's First Complaint and Second Complaint served to merge the two actions into one where all the parties are related individuals or collectively owners of the entity.

3. Whether the 6 month time limitation of N.R.S. §40.455 was waived where the loan at issue is not a purchase money loan but rather a refinance transaction.

4. Whether the 6 month time limitation of N.R.S. §40.455 was waived by the Petitioners pursuant to the terms of their Continuing Guaranty.

III. STATEMENT OF RELEVANT FACTS

The instant dispute is a breach of contract action giving rise to a claim for deficiency 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 principal amount of $2,180,000.00 (*the "Loan"*) which was made by Plaintiff/Real Party in Interest to Defendant, Southwest Desert Equities, LLC (*"Borrower"*). Appendix (*"App"*) 000036:19-21. The Loan was and is guaranteed, jointly and severally, by Defendants, John A. Ritter and Darrin D. Badger (*collectively, "Guarantors"*). App 000037:3-6. The

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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"*). App 000001-000008. 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. *Id*. The Guarantors filed an Answer and Counterclaim on June 5, 2013. Thereafter, on or about August 13, 2013, Plaintiff caused a public foreclosure sale (*"Foreclosure Sale"*) of the Property to be conducted. App 000038:10-11. Plaintiff purchased the Property at the Foreclosure Sale for the sum of $150,000.00. App 000038:12-13. Obviously, the Foreclosure Sale resulted in a significant deficiency.

While the Petitioners' statement of the procedural background of this case is relatively accurate, it downplays and/or omits some very significant facts. Specifically, subsequent to the Foreclosure Sale and prior to the six-month rule of NRS §40.455, Plaintiff's counsel, Roger P. Croteau, Esq., contacted Defendants' counsel, Randy M. Creighton, Esq., to discuss the amendment of the pleadings. App 000132:15-17. Mr. Croteau and Mr. Creighton discussed the amendment of the First Complaint to include the factual allegations related to the Foreclosure Sale such as the date of the Foreclosure Sale, the amount bid at the Foreclosure Sale and the associated deficiency. App 000132:17-19. After seeking the approval of his clients, Mr. Creighton advised that he was authorized to stipulate to the amendment. App 000132:19-20. Thereafter, on February 10, 2014, prior to the six-month deadline, Plaintiff's counsel forwarded a Stipulation and Order to Amend the First Complaint and Proposed First Amended Complaint to Defendants' counsel for their review via email. App 000132:20-22. See also App 000193-000202. The Proposed First Amended Complaint set forth all of the allegations related to the Foreclosure Sale and identified all of the facts that

identified the existence of a deficiency as to both the Borrower and the Guarantors. *Id*.

It was the understanding and belief of Plaintiff's counsel that the parties had agreed that the First Amended Complaint was to add the Borrower as a Defendant, as well as add the several allegations related to the Foreclosure Sale and associated deficiency against the existing Defendants/Guarantors as well as the Borrower. App 000132:24-26. However, upon receipt of the proposed stipulation and Proposed First Amended Complaint, Mr. Creighton reversed course, advising via email that he could not stipulate to the addition of a defendant, stating as follows:

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

App 000132-000133. See also App 000204-000205. Based upon this email, it is abundantly clear that the Guarantors received actual notice of the Plaintiff's claims for deficiency against them at the time that they received and reviewed the Proposed First Amended Complaint. *Id*. It is equally clear that they expressly authorized the addition of the deficiency claim against them with full knowledge of the extent and nature of the claims.

Because the Defendants would no longer stipulate to the proposed amendment, and because sufficient time did not exist to move to amend the pleadings, Plaintiff caused a second Complaint naming the Borrower as a Defendant to be filed on February 10, 2014, Case No. A-14-695925-C (*"Second Complaint"*). App 000133:5-8. See also App 00009-000015. Like the First Complaint, the Second Complaint included claims for Breach of Contract and Breach of the Implied Covenant of Good Faith and Fair Dealing. App 000133:8-9. The Second Complaint also included allegations related to the Foreclosure Sale that had taken place. App 000133:9-10.

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The Second Complaint was served upon the Borrower on March 4, 2014. App 000133:11. The two cases were thereafter consolidated by way of stipulation and order filed on April 15, 2014. App 000133:11-12. The Borrower failed to immediately file an Answer or other responsive pleading. App 000133:12-13. In retrospect, it appears that the Borrower did not answer the Second Complaint in order to enable the later denial of the "notice" mandate of the current case law. App 000133:14-16.

On December 1, 2014, Plaintiff amended the Second Complaint to add the Guarantors as Defendants. App 000133:19-20. See also App 000035-000043. This amendment was filed pursuant to NRCP 15(a) and NRCP 15(c). 000133:20. Pursuant to NRCP 15(a), leave of court was not required in order to amend the Second Complaint because no responsive pleading had yet been filed or served by the Borrower. App 000133:20-22. Given the totality of the evidence in this consolidated case, the District Court held that the amendment of the Second Complaint related back to the original date of filing pursuant to NRCP 15(c). 000242-000249. Thus, the filing was timely as to the Guarantors. As a result of the District Court's determination, the Plaintiff complied with the requirements of NRS §40.455 and the instant case is not nearly as cut and dried as the Petitioners would have this Court believe. Contrary to the arguments of the Petitioners, the Order that is the subject of this Writ proceeding is not inconsistent with this Court's decision in the matter of *Lavi.*

Lavi was issued on May 29, 2014, and thereafter corrected and published on or about August 29, 2014. For the reasons discussed below, the rule of law clarified in *Lavi* was not violated in this instance. The crux of this matter lies in N.R.C.P. 15.

IV. LEGAL ARGUMENT

1. THE ORDER AT ISSUE HEREIN IS CONSISTENT WITH LAVI

The Guarantors assert that allowing the Real Party in Interest's Amended

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Complaint to relate back to the date of the filing of the original Second Complaint would serve to emasculate the Nevada Supreme Court's decision in *Lavi*. As stated previously, the Second Complaint was timely filed and provided all of the appropriate notice necessary pursuant to *Lavi*. The Guarantors assert that allowing the claims to relate back would serve to allow any creditor to amend a pending complaint to add a new application for deficiency and thereby "simply end-around the six month deadline contained within NRS 40.455(1) by way of an amendment under NRCP 15(c)." In making this argument, the Guarantors completely ignore the fact that they received actual notice of the Plaintiff's claims against them for a deficiency after the date of the Foreclosure Sale and before the expiration of the 6-month deadline. Indeed, the Guarantors had actually received a copy of a Proposed Amended Complaint adding the facts and allegations to the breach of contract claim to identify the deficiency against them in advance of the 6 month rule and had explicitly authorized the claim to be filed against them before they ultimately reneged on their agreement. In this case, the mandates of N.R.C.P. 15 relation back was applied by the court and deemed to be not prejudicial as a result of the fact that the Petitioners unquestionably possessed actual notice of the claims and the fact that they were appropriate defendants.

In the matter of *Lavi*, the Nevada Supreme Court held that a complaint filed before a foreclosure sale cannot sufficiently put an obligor **on notice** of a deficiency claim. *Lavi*, 325 P.3d at 1269. As described above, there was no lack of notice here where the Guarantors undisputably received actual notice of the Plaintiff's claim related to a deficiency – and the amount of that deficiency – prior to the 6-month rule by virtue of their communications with their counsel as disclosed by counsel's email correspondence, and by their receipt and review of a Proposed Amended First Complaint that set forth all of the pertinent allegations. Such factual circumstances were not present in *Lavi* and make the instant case distinguishable. *Lavi's* facts end with the filing of the Complaint against the

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Guarantors and no act beyond that point. Additionally, the unity of interest between the Borrower and Guarantors is equivalent to a master/slave relationship, with the Guarantors directing the Borrower because the Guarantors are the owners of the Borrower.

The Guarantors attempt to present a "sky is falling" type argument, asserting that the relation back of the Amended Second Complaint would serve to derail Nevada's law regarding deficiency actions. This is simply not the case. The present case presents a unique set of facts whereby the Guarantors had already been sued and where they had received specific notice of the Plaintiff's deficiency-related claims against them in advance of the 6-month rule. Obviously, there is no dispute that as of the 6 month date, the Guarantors had been sued and the Borrower had been sued with all allegations relating to any deficiency after the Foreclosure Sale being contained in the Second Complaint. The Guarantors had gone so far as to authorize the amendment of the First Complaint that was then pending against them to include allegations related to the deficiency. Although they had agreed to the amendment of the First Complaint, they subsequently reneged on the agreement on the eve of the deadline on the pretext that they did not desire that the Borrower be named in the same action. This bad faith withdrawal of their agreement severely prejudiced the Plaintiff. This set of circumstances warrants the application of the relation back doctrine where in other instances it might conceivably not apply. The application of N.R.C.P. 15 to this case is unique to the facts and will in no way create a sky is falling type situation. The Borrower did not file any responsive pleading to the Second Complaint and, pursuant to N.R.C.P. 15(b), Plaintiff filed its Amended Complaint.

Simply put, the instant Writ proceeding is not about *Lavi*. It is about N.R.C.P. 15 and relation back under the facts that exist herein. The facts at issue in this case are significantly different than those of *Lavi* and its progeny and warrant an equitable application of N.R.C.P. 15. Specifically, in this case, the

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Guarantors possessed actual, specific knowledge of the fact that the Plaintiff was bringing a deficiency claim against them in advance of the 6 month rule. They furthermore possessed actual knowledge that they were appropriate defendants.

2. PLAINTIFF'S SECOND COMPLAINT MET THE REQUIREMENTS OF NRS 40.455

In the matter of *Lavi*, this Court recently held in May, 2014 (subsequent to the filing of both the First Complaint and the Second Complaint), that a complaint filed before a foreclosure sale cannot sufficiently put an obligor on notice of a deficiency claim. *Lavi*, 325 P.3d at 1269. This holding was based on the very simple fact that in such a situation, the right to a deficiency judgment has not yet vested. *Id*. In *Lavi*, the Court also reiterated its earlier holding that a document qualifies as an application pursuant to NRS 40.455 if it is written, sets forth the particular grounds for the relief sought, and is filed within NRS 40.455(1)'s six-month time frame after the trustee's sale. *Id*. at 1267 (Citing *Walters v. Eighth Judicial District Court*, 127 Nev. ____, 263 P.3d 231, 234 (2011)). Under these circumstances, Plaintiff's Second Complaint was sufficient on its face as it was filed within 6 months after the Foreclosure Sale in a "written" form and contained all of the allegations related to the Foreclosure Sale necessary to place the Defendants on notice of the deficiency.

Lavi provides that "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." *Lavi*, 325 P.3d at 1269. Presumably, the *Lavi* holding is premised on the concept that the foreclosure sale could conceivably make the deed of trust beneficiary whole. In this case, at the time of the Foreclosure Sale, Defendants owed in excess of $4,500,000.00, when the fair market value of the Property as determined by Plaintiff's expert was $170,000.00 – approximately 3.77% of the outstanding debt. How could the Defendants not know that the "obligor" would be subject to a deficiency? The Guarantors own

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the Borrower and have an undivided unity of interest in the Borrower such that notice to the Borrower after the Guarantors had already been sued for breach of the Guaranty, and had been provided with a Proposed Amended Complaint setting forth all of the claims against them, is and was sufficient notice of the foreclosure facts and deficiency. Sadly, NRS 40.455 does not identify what an "application" for judgment is under the law. Prior to *Lavi*, the First Complaint would have been deemed sufficient. For many of the reasons cited in the dissent in *Lavi*, neither the obligor nor the Guarantors were harmed, prejudiced or unfairly treated. This is even more clear when coupled with the notice that was provided to the Guarantors.

The Plaintiff's Second Complaint, filed on February 10, 2014, was obviously in writing and was clearly filed within the six-month time frame after the Foreclosure Sale, consistent with N.R.S. §40.455. In addition, the Second Complaint specifically alleged all of the grounds for Plaintiff's claim for a deficiency related to the Foreclosure Sale, and thereby "set forth the particular grounds for the relief sought" as required by *Lavi*, stating as follows:

> 19. As a result of the breach by Borrower and Guarantors, Plaintiff caused a Notice of Breach and Election to Sell Under Deed of Trustee to be recorded in the Office of the County Recorder of Clark County, Nevada.
> 20. The Plaintiff thereafter caused a Notice of Trustee Sale to be recorded, posted and served in accordance with applicable law.
> 21. On or about August 13, 2013, Plaintiff caused a public foreclosure sale of the Property to be conducted.
> 22. Plaintiff purchased the Property for a credit bid of $150,000.00 by successfully bidding at the foreclosure sale.
> 23. The fair market value of the Property at the time of the foreclosure sale was not more than approximately $170,000.00.
> 24. As a direct result of Defendants' breach of the Note and Guaranty, Plaintiff has been damaged in an amount in excess of $4,000,000.00.
>
> . . .
>
> 32. The Property was duly sold pursuant to applicable law for the sum of $150,000.00.
> 33. The fair market value as of the date of the foreclosure sale was not more than $170,000.00.
> 34. The proceeds from the sale of the Property at the foreclosure sale were insufficient to satisfy the debt evidenced by the Loan Documents in full.
> 35. As of the filing of this Complaint, after duly crediting all

> payments made towards the amounts due under the Note, including the amount bid and paid at the time of the foreclosure sale or the fair market value of the Property, as the case may be, the sum of at least Four Million Dollars and No Cents ($4,000,000.00) remains due and owing by Borrower pursuant to the Note, Guaranty, Forbearance Agreement and other Loan Documents.

App 00009-000015. The Second Complaint clearly met all of the requirements to constitute an "application" for a deficiency claim pursuant to NRS 40.455. The Second Complaint further identified the Guarantors as the parties responsible for any deficiency. In addition, upon information and belief, the Guarantors, either individually or through other entities owned by them, hold the entire membership interests in the Borrower. As a result, they were placed on constructive and/or actual notice of the Plaintiff's claims at the time that the Proposed Amended First Complaint was provided to their counsel and at the time that the Second Complaint was filed in a timely manner. While the Second Complaint did not specifically name the Guarantors as Defendants by name in the caption, this unintentional and harmless error was ameliorated through the eventual amendment of the Second Complaint.

The Manager of Southwest Desert Equities, LLC is Focus Investment Manager, LLC, a Nevada limited liability company of which John A. Ritter is a Manager. App 000140:18-19. Mr. Ritter executed all of the Loan Documents related to the Loan on behalf of Focus Investment Manager, LLC and Southwest Desert Equities, LLC. App 000140:19-21. In addition, Mr. Ritter and Mr. Badger personally guaranteed the payment of the Loan by executing the Guaranty. App 000140:21-22. Mr. Ritter and Mr. Badger are extremely closely interrelated with Southwest Desert Equities, LLC. App 000140:22-23. It is without doubt that the Guarantors were fully aware of all of the facts and circumstances surrounding this litigation at all points in time. App 000140:23-24.

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3. THE AMENDED SECOND COMPLAINT RELATES BACK TO THE ORIGINAL FILING DATE OF THE SECOND COMPLAINT

At the time that the Second Complaint was filed, the Borrower had not yet filed or served a responsive pleading in said action. N.R.C.P. 15 provides as follows:

> **(a) Amendments.** A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . .
> . . .
> **(c) Relation Back of Amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(Emphasis added).

The relation back effect of NRCP 15(c) applies to both the addition or substitution of parties. *Costello v. Casler*, 254 P.3d 631, 634 (Nev. 2011). An amended pleading adding a defendant that is filed after the statute of limitations has run (in this case not after the running of a statute of limitations, but after the 6 month time rule of N.R.S. §40.455) will relate back to the date of the original pleading under NRCP 15(c) if "the proper defendant (1) receives actual notice of the action; (2) knows that it is the proper party; and (3) has not been misled to its prejudice by the amendment." *Id.* (Citing *Echols v. Summa Corp.*, 95 Nev. 720, 722, 601 P.2d 716, 717 (1979)).

In this case, the Borrower and the Guarantors will be allowed to participate and present expert testimony at the time of a valuation hearing as discovery is open for all purposes. Pursuant to a Motion to Extend Discovery, upon the eventual filing of the Answer by the Borrower, Commissioner Bulla extended discovery to allow all parties to conduct discovery as to all parties to the First

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Complaint, the Second Complaint and the Amended Second Complaint. No Defendant has been prejudiced in any manner.

The Borrower and Guarantors, jointly and severally, undisputably owe in excess of $6,714,779.38 to the Plaintiff. Each of them knew at all points in time that the Plaintiff intended to pursue the deficiency against each of them. However, they possessed actual, specific knowledge of this fact at least at the time that they received and reviewed the proposed First Amended Complaint in advance of the 6 month rule of N.R.S. §40.455. The Defendants have had every opportunity to defend themselves, present evidence of fair market value of the Property and any defenses that they have asserted or may assert in this case. At the end of the day, it would be fundamentally unfair to allow the Guarantors, the undisputed responsible parties, to benefit from a windfall in the form of the forgiveness of over six million dollars, particularly after they misled the Plaintiff to its detriment regarding the amendment of the pleadings.

NRCP 15(c) is to be liberally construed to allow relation back of the amended pleading where the opposing party will be put to no disadvantage. *Id*. (Citations omitted). How can it be alleged that the Defendants have been disadvantaged when they undisputably owe the money? If they are relieved of this liability, form would prevail over substance. Modern rules of procedure are intended to allow the court to reach the merits, as opposed to disposition on technical niceties. *Id*. at 635. A plaintiff's right to have his or her claim heard on its merits despite technical difficulties, however, must be balanced against "a defendant's right to be protected from stale claims and the attendant uncertainty they cause." *Id*. (Citing *Pargman v. Vickers*, 208 Ariz. 573, 96 P.3d 571, 576 (Ariz. Ct. App. 2004)). The State of Nevada gives liberal construction to relation back, and subscribes to a strong policy to allow cases to be decided on the merits rather than on mere technicalities. *Id*.

While the statute of limitations is not an unconscionable defense, it is not

such a meritorious defense that either the law or the fact should be strained in aid of it, nor should this court indulge in any presumptions in its favor. *Howard v. Waale-Camplan & Tiberti, Inc.*, 67 Nev. 304, 217 P.2d 872 (1950). In this case, based upon the facts at hand, the application of the shortened statute of limitations does not outweigh Nevada's strong public policy hearing claims on the merits. Further, the *Costello/Echols* factors dictate that the amendment of the Second Complaint relates back to the date of the original pleading.

A. The Guarantors received actual notice of the action

The Guarantors are believed to be the owners of the Borrower, either individually or through other business entities owned by them, and have possessed actual knowledge of this action and all of the associated facts since shortly after the filing of the First Complaint. The Borrower and the Guarantors have at all times been represented by the same counsel. Plaintiff's counsel and Defendants' counsel have communicated extensively. Defendants' counsel has represented the Guarantors and the Borrower for many ears as evidenced by the Clark County, Nevada and federal court dockets. The First Complaint specifically named the Guarantors as Defendants and asserted a breach of the loan documents. Thus, the Defendants possessed actual knowledge and notice of the Plaintiff's claims. More importantly, however, all of the Defendants received actual notice of the Plaintiff's claim for a deficiency after the Foreclosure Sale.

On February 10, 2014, in an effort to amend the First Complaint to add the Borrower and deficiency allegations against all Defendants, Plaintiff's counsel provided a Proposed First Amended Complaint to Defendants' counsel. The Proposed First Amended Complaint set forth specific allegations related to the Foreclosure Sale and the associated deficiency. Defendants' counsel had previously represented that he was authorized by the Defendants to stipulate to the filing of said Proposed First Amended Complaint. However, while Defendants had authorized their counsel to stipulate to the amendment of the First Complaint

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to add the allegations related to the Foreclosure Sale and associated deficiency, they had apparently not authorized their counsel to stipulate to add the Borrower as a Defendant. As a result, Defendants' counsel could not agree to anything and the stipulation was not executed and the First Complaint was not amended.

The Guarantors were clearly aware that the Plaintiff was asserting a claim for a deficiency against all of the Defendants and, in fact, the Guarantors, by and through their counsel, agreed to stipulate to amend the First Complaint to assert the necessary allegations against all of the Defendants. Moreover, Defendants' counsel actually provided the Guarantors with a copy of the Proposed First Amended Complaint, stating that "[he] took the proposed amended complaint to [his] Client and they stated they will not stipulate to allow another defendant to be added." Based upon the foregoing, the denial was not in good faith. Thereafter, after the Guarantors reneged on the agreement to stipulate to the amendment, the Plaintiff caused the Second Complaint to be timely filed and the parties stipulated to consolidate the two cases by way of order dated April 15, 2014.

Interestingly, the Borrower's counsel, who is also the Guarantors' counsel, has alleged that the Borrower is judgment proof and that it may not defend the Borrower if the Guarantors prevail on their Motion to Dismiss. This fact is extremely relevant because it indicates that simply adding the Borrower to the action was of no consequence. Therefore, the Defendants' refusal was a ploy designed solely for the intended purpose of misleading the Plaintiff.

The Guarantors clearly possessed actual notice of the Plaintiff's claims and both the First Complaint and Second Complaint prior to the 6 month rule of N.R.S. §40.455. The Guarantors purported to have agreed to stipulate to the amendment of the First Complaint to allege the facts associated with the deficiency prior to the 6-month deadline, only to thereafter refuse to stipulate to the addition of the Borrower as a defendant on the eve of the deadline. However, by their own counsel's admission, the Guarantors actually reviewed the proposed amended First

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Complaint, which contained all of the allegations related to the deficiency. Were the above facts insufficient, this Court stated as follows in *Costello*:

> Certain circumstances may give rise to the imputation of notice and knowledge, from an original defendant to a new defendant, for purposes of relation back. E.g., id. at 577. Courts are particularly amenable to imputing notice and knowledge when the new and original defendants share an "identity of interest." 3 James Wm. Moore, Moore's Federal Practice § 15.19[3][c] (3d ed. 2011). Although the relationship needed to establish an identity of interest for purposes of notice and knowledge varies depending on the underlying facts, an identity of interest has been found, for example, between a parent and subsidiary corporation, and based on shared legal counsel. See id. (citing numerous cases for these propositions). Some courts have also referred to this relationship as a "unity of interest" or "community of interest." E.g., Brink v. First Credit Resources, 57 F. Supp. 2d 848, 858 (D. Ariz. 1999); Perrin v. Stensland, 158 Wn. App. 185, 240 P.3d 1189, 1194 (Wash. Ct. App. 2010). Whatever label is placed on such a relationship, the fundamental idea is that when the original and new defendant "are so closely related in their business operations or other activities[,] . . . the institution of an action against one serves to provide notice of the litigation to the other." Moore, supra, § 15.19[3][c].

Costello, 254 P.3d at 635. (Emphasis added). In this case, the Borrower and the Guarantors are closely related and share the same equitable ownership and control, they all share the same legal counsel in these consolidated cases . It is this same legal counsel that presented the Guarantors with the Proposed First Amended Complaint for their approval. At that point in time, it is without a doubt that the Guarantors obtained absolute knowledge of the nature of the facts surrounding the deficiency and the associated claims against them relating to the continual claims for the deficiency amount, assuming, *arguendo*, that they did not already possess such knowledge.

Upon information and belief, the Guarantors are principals and/or owners of the Borrower. The Borrower and the Guarantors are clearly sufficiently closely related such that the institution of an action against one served to provide notice of the litigation to the other. In all cases, the Defendants share a “unity of interest” or “community of interest” that make it equitable to relate back the Amended Second Complaint.

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B. The Guarantors knew that they were a proper party

The Guarantors have known at all points in time that they are a proper party to the Second Complaint. By virtue of the First Complaint, they possessed actual notice of the Plaintiff's claims. Furthermore, the Guarantors possessed personal knowledge of the fact that all sums owed pursuant to the Loan Documents were not paid by the Borrower and that money was due and owing. Nor did the Guarantors pay the sums due.

In addition to the foregoing, the Guarantors received actual notice of the Proposed First Amended Complaint, which set forth in detail the deficiency claim against them. This Proposed First Amended Complaint was provided to the Guarantors by their counsel and, upon review, they advised through counsel that they would not stipulate to the addition of the Borrower as a defendant. However, they had previously agreed to the proposed amendment as it related to themselves, having purportedly given their counsel permission to stipulate to the amendment of the claims against them. It is readily apparent that the Guarantors were at all times aware that they were a proper party to the Second Complaint.

C. The Guarantors have not been prejudiced by the amendment

The Guarantors have not suffered and will not suffer any prejudice as a result of their addition to the Second Complaint as Defendants. Other than a spurious counterclaim, the Defendants have no defense to the owing of the deficiency. The Guarantors have possessed actual knowledge of the Plaintiff's claims and have participated in the litigation of the First Complaint from its outset. They have filed an Answer and Counterclaim in response to the First Complaint and participated throughout the litigation. Nothing has occurred that would result in prejudice to the Guarantors. In fact, the Borrower has asserted essentially the same Counterclaim in conjunction with its Answer to the Amended Second Complaint that was ultimately filed. Frankly, the Answers to the First Complaint and Amended Second Complaint are essentially the same.

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The Plaintiff on the other hand would be severely prejudiced if the Amended Second Complaint is not deemed to relate back to its filing date or if it is not otherwise allowed to continue to prosecute its claims against all parties. Refusing to relate back would result in severe prejudice to the Plaintiff while granting a windfall to the Guarantors of over $6,714,779.38. The Guarantors would potentially be allowed to avoid liability for the payment of millions of dollars that are rightfully owed to the Plaintiff – money that the Plaintiff is "out of pocket" no less and money which the Borrower and Guarantors actually received and benefitted from. Indeed, the subject transaction was a cash-out refinance that not only paid existing debt but that put cash in an amount over $1,600,000.00 in the pockets of the Defendants. This would be far from just.

4. AMENDMENT AND RELATION BACK IS PARTICULARLY APPROPRIATE GIVEN THIS COURT'S DECISION IN THE MATTER OF LAVI

Although leave to amend was not required in this case, because the Borrower had strategically failed to file a responsive pleading, it would be especially appropriate to permit Plaintiff to amend its complaint to meet a new standard of law. See, e.g., *Sonoma County Ass'n of Retired Employees v. Sonoma County*, 708 F.3d 1109, 1117-18 (9th Cir. 2013) (holding that the court "may grant leave to amend in situations where the controlling precedents changed midway through the litigation."). In *Moss v. United States Secret Serv.*, 572 F.3d 962 (9th Cir. 2009), for example, the plaintiffs had filed suit before the Supreme Court decided *Twombly* and *Iqbal*, which imposed more stringent pleading standards upon litigants. In *Moss*, the Ninth Circuit agreed with the district court that the plaintiffs' complaint fell short of the new standard identified in said cases, but held that, "[h]aving initiated the present lawsuit without the benefit of the Court's latest pronouncements on pleadings, Plaintiffs deserve a chance to supplement their complaint with factual content in the manner that *Twombly* and *Iqbal*

require." *Moss*, 572 F.3d at 972; *see also AE ex rel. Hernandez*, 666 F.3d at 637 (holding that it was abuse of discretion to deny the plaintiff the opportunity to allege additional facts after the Ninth Circuit's clarification of the pleading standard).

In this case, the Plaintiff's Second Complaint was filed on February 10, 2014. This Court's decision in the matter of *Lavi* was not issued until May 29, 2014, and thereafter corrected and published on or about August 29, 2014. Thus, the Plaintiff herein did not have the benefit of the *Lavi* decision at the time that the Second Complaint was filed. The *Lavi* decision was reached by this Court over serious dissent, and the Plaintiff cannot be expected to have had the foresight to recognize that the Court would hold that the meaning of "make an application" would not encompass a breach of contract litigation based upon a Guaranty at the time that the Second Complaint was filed. Under the circumstances that exist in this case, allowing the pleadings to relate back would be just, equitable and fair.

Because the state of the law was unsettled at the time that the Second Complaint was filed, if the filing of the Second Complaint in and of itself is not deemed to have satisfied NRS 40.455 in and of itself where the First Complaint was already pending against the Guarantors, the relation back doctrine should be applied to allow the Plaintiff's claims to move forward against the Guarantors. Doing so will allow the Plaintiff to reach a decision of its claims on the merits pursuant to Nevada's strong public policies. The Guarantors will suffer no harm nor prejudice as a result of being required to litigate the Plaintiff's claim for money that is rightfully and justly owed by them.

5. <u>THE AMENDED COMPLAINT DOES NOT ASSERT NEW CAUSES OF ACTION AGAINST NEW PARTIES</u>

The Guarantors have argued that relation back is not appropriate where an amendment "states a new cause of action that describes a new and entirely different source of damages." *Nelson v. City of Las Vegas*, 99 Nev. 548, 556, 665

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P.2d 1141, 1146 (1983). This argument is a nonstarter. At all times relevant hereto the same damages have been claimed – the deficiency under the loan documents arising as a result of the Defendants' breach of contract. The claims against the Borrower and the Guarantors – no matter how they are phrased – amount to a breach of contract. The Plaintiff is seeking to recover money related to the Loan as a result of the Defendants' failure to pay what was owed. This claim was clearly set forth against the Guarantors in the First Complaint. The Second Complaint thereafter expanded upon the Plaintiff's breach of contract claim by including specific factual allegations related to the Foreclosure Sale and the offset that the Defendants were thus entitled to. However, the claim remains a breach of contract claim – nothing more and nothing less. Both the Guarantors and the Borrower were sued prior to the 6-month rule. Thus, no new parties were implicated by the amendment of the Second Complaint. Nor were any new claims brought – only additional facts were alleged in relation to the Foreclosure Sale.

The Guarantors also argue that relation back is not appropriate where a "plaintiff elected not to name a 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). This argument is also without basis. The Guarantors were specifically named as Defendants in the First Complaint. Thereafter, the Second Complaint was filed against the Borrower and the two cases were consolidated. Both the Guarantors and the Borrower were named Defendants in these consolidated matters prior to the 6-month rule.

The Order of Consolidation was entered on April 14, 2014. Plaintiff asserts that the consolidation placed the factual allegations related to the deficiency within the consolidated actions as of the date of filing of the Second Complaint. Under these circumstances, the Second Complaint served to satisfy NRS 40.455. In addition, this is the case in part because the Guarantors received actual notice of the allegations in advance of the filing of the Second Complaint, as well as due to

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the unity of interest between the Defendants and the common, historical legal representation of the Defendants.

6. THE CONSOLIDATION OF THE FIRST COMPLAINT AND SECOND COMPLAINT SERVED TO MERGE THE TWO ACTIONS

Both NRCP 42(a) and its federal counterpart allow for consolidation of actions that involve a common question of law or fact. NRCP 42(a) states as follows:

> **(a) Consolidation.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; **it may order all the actions consolidated**; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. (Emphasis added).

Under FRCP 42(a), which is substantially identical to NRCP 42(a), federal district courts enjoy broad, but not unfettered, discretion in ordering consolidation. Additionally, the Nevada Supreme Court has held that a district court exercises its own sound discretion in considering a motion to order a separate trial under NRCP 42(b). *Marcuse v. Del Webb Cmtys., Inc.*, 123 Nev. 278, 286 (Nev. 2007). NRCP 42(b) is separate and distinct from NRCP 42(a), stating as follows:

> **(b) Separate Trials.** The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury.

A distinction exists between true consolidation of cases, where cases are consolidated for all purposes, and their trial together for convenience, in that in true consolidation, several actions are combined into one, losing their separate identity and becoming a single action in which a single judgment is rendered, whereas if they are simply tried together for convenience or, as it is sometimes said, "consolidated for trial", they do not merge into one, but each remains separate in all procedural matters other than the joint trial. *McKinney v.*

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Greenville Ice & Fuel Co., 232 S.C. 257 (S.C. 1958). The instant actions were not consolidated simply for trial.

"Consolidation" as a term of legal procedure is generally used in three different contexts: (1) when several actions are stayed while one is tried, and the judgment in the case tried will be conclusive as to the others; (2) when several actions are combined and lose their separate identities, becoming a single action with a single judgment entered; and (3) when several actions are tried together, but each suit retains its separate character, with separate judgments entered. 9 Wright & Miller, Fed. Practice & Procedure: Civil 2d § 2382 (1995). In this case, the consolidation of the First Complaint and Second Complaint were of the second variety – the actions became a single action upon which a single judgment is intended.

Citing *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 53 S.Ct 721 (1933), the Petitioners have asserted that "it is black letter law that 'consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits in to a single cause . . . or make those who are parties in one suit parties in another.'" App 000112. This blanket statement is quite simply false as to the whole. Such a statement is only true with regard to the third type of consolidation. Indeed, the "black letter law" of Wright & Miller is cited above. The Petitioners also cite the Nevada case of *Mikulich v. Carner*, 68 Nev. 161, 228 P.2d 254 (1951), cited in *Johnson*. In *Mikulich*, the Nevada Supreme Court stated that "[c]onsolidation **for the purpose of securing a joint trial** on questions of law and fact common to all of them have been consistently construed as not having the effect of merging the several causes into a single cause." *Id*. (Emphasis added). Thus, *Mikulich* dealt with NRCP 42(b) – not NRCP 42(a). These cases are completely inapplicable to the case at hand and certainly do not constitute "black letter law" that consolidation never merges suits into a single cause of action.

Petitioners' quote of *Johnson* in support of its erroneous claim conveniently

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omits a portion of what they assert to be "black letter law." Specifically, the Court in *Johnson* (in the year 1933) stated as follows:

> **Under 28 U.S.C.S. § 734**, consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another.

Johnson, 289 U.S. 479 at 496-97. 28 U.S.C.S. §734 was removed from the United States Code in the year 1948. However, in the same year that the section was removed, the section and *Johnson* were explained in detail by the United States Customs Court as follows:

> Section 734 has been construed as authorizing actual technical consolidation at law and also trial together. 1 C. J. S. 1373, Sec. 113, Note 69. However, actual consolidation and trial together should be differentiated from each other. 1 C. J. S. 1373, *supra*. Under the latter practice, that is, trial together of several actions, the several actions, instead of being merged into one, preserve their separate identity, and such trial together of several actions does not change the rights of the parties or make those who are parties in one suit parties in another. 1 C. J. S. 1373, Sec. 113, Notes 69 to 72; *Johnson* v. *Manhattan Ry. Co*., 289 U.S. 479, 496-7, 77 L. Ed. 1331, 53 S. Ct. 721; *Toledo, St. L. [*149] & K. C. R. Co*. v. *Continental Trust Co*., 95 F. 497, [**6] 506; *Taylor* v. *Logan Trust Co*., 289 F. 51, 53; *Nolte* v. *Hudson Nav. Co*., 11 F.2d 680, 682; *Mutual Life Ins. Co*. v. *Hillmon*, 145 U.S. 285, 293, 36 L. Ed. 706, 12 S. Ct. 909.
>
> . . .
>
> **The effect of actual technical consolidation at law is to unite and merge all of the different actions consolidated into a single action for the purpose of all further proceedings, the same as if the different causes of action involved had originally been joined in a single action. 1 C. J. S. 1371, Sec. 113, Note 55; *National Union Fire Ins. Co*. v. *Chesapeake & O. Ry. Co., supra*. Under such circumstances several findings may be had upon the several causes of action stated in the pleadings, but they should be embodied in a single set of findings as in a single action, and there should be but a single judgment comprehending and settling all of the issues involved. 1 C. J. S. 1375-6, Sec. 113, Notes 7, 8, 10, and 11.**

George Lueders & Co. v. United States, 20 Cust. Ct. 146, 148-150 (Cust. Ct. 1948)(Emphasis added).

In this case, the Order consolidating these matters states as follows:

> IT IS HEREBY ORDERED that Plaintiff's action entitled *Omni Family Limited Partnership v. Southwest Desert Equities, LLC*, Case

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> No. A-14-695925-C, shall be consolidated into the first filed action, *Omni Family Limited Partnership v. John A. Ritter, et al.*, Case No. A-13-680542-C.

App 000016-000017. The stipulation did not elaborate on the common questions of fact and law at issue, however, it is readily apparent that the actions were and are substantially identical. At issue is a single Loan and one set of Loan Documents, the payment of which both the Borrower and Guarantors are jointly and severally liable. The Borrower and Guarantors have filed substantially identical Counterclaims and affirmative defenses. No party has requested a separate trial of the issues. In fact, a separate trial would controvert the parties' intent in stipulating to the consolidation. Further, separate trials would potentially subject the Borrower and the Guarantors to duplicative judgments.

When read together, the First Complaint and the Second Complaint clearly set forth all of the facts necessary to put both the Guarantors and the Borrower on notice of the Plaintiff's claim for a deficiency judgment related to the Foreclosure Sale and comply in all respects with *Lavi* and NRS §40.455. By virtue of the consolidation of the two cases, each of the Defendants further consented to the complaints being combined into a single action. Since the Second Complaint has now been amended to explicitly name the Guarantors as Defendants, there is no doubt that the Defendants have been duly noticed. Under these circumstances, both the Guarantors and the Borrower are subject to the Plaintiff's claim for a deficiency. A single cause of action may not be split and separate actions maintained. *Smith v. Hutchins*, 93 Nev. 431, 432 (Nev. 1977). The wrongful act of the defendant creates the plaintiff's cause of action. *Id*. Policy demands that all forms of injury or damage sustained by a plaintiff as a consequence of the defendant's wrongful act be recovered in one action rather than in multiple actions. *Id*. If this were not the case, a party could sue multiple parties on multiple occasions in an effort to extract duplicative recoveries.

In this particular case, as in *Smith v. Hutchins*, the Plaintiff was precluded

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from presenting all of his claims in a single action through no fault of its own. The Guarantors initially agreed to the amendment of the First Complaint only to thereafter renege upon this agreement. Upon being advised that the Guarantors would no longer stipulate to the amendment of the First Complaint, the Plaintiff had no choice other than to file the Second Complaint that was based upon the same facts as the First Complaint, specifically, the breach of the Defendants' obligations under the Loan. The Second Complaint also included specific allegations related to the Foreclosure Sale and the resulting deficiency. It is and was the Plaintiff's belief that the Second Complaint met the requirements of NRS §40.455 and provided notice to all parties.

The Guarantors were not included in the caption of the Second Complaint because they were already named in the First Complaint. In hindsight, and with the benefit of the Nevada Supreme Court's decision in the matter of *Lavi*, Plaintiff now realizes that its claims would have been more clear had the Guarantors been included in the Second Complaint at the outset. However, it is and was the Plaintiff's belief that doing so may have constituted duplicative claims against the Guarantors as the actions were primarily upon one legal claim: breach of contract. To the extent that this determination was in error, it should not serve to cause the Plaintiff to be potentially unable to recover over six million dollars that are rightfully owed to it.

7. THE GUARANTORS EXPLICITLY WAIVED THE 6 MONTH STATUTE OF LIMITATIONS OF NRS 40.455

Aside from the arguments set forth above, the Guarantors explicitly waived the applicable 6 month rule of NRS 40.455 pursuant to the terms of the Guaranty. Specifically, the Guaranty states as follows:

> 5. The obligations under this Guaranty are independent of the obligations of the Borrower. Separate action may be brought and prosecuted against Guarantor whether the action is brought against the Borrower or whether Borrower is joined in any such action. Guarantor waives the benefit of any statute of limitations **and** any one

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action rule affecting liability hereunder of the enforcement thereof.

Furthermore, the Guaranty states:

> 18. In addition to all other waivers set forth herein, Guarantor, with full understanding of the legal effect and consequences thereof, does hereby freely, voluntarily, absolutely, unconditionally, and forever waive, the rights pursuant to NRS 40.495 any and all right to claim the benefit of the provisions of NRS 40.430, or any similar statutes or laws.

N.R.S. 40.430(2) provides that "[t]his section must be construed to permit a secured creditor to realize upon the collateral for a debt or other obligation agreed upon by the debtor and creditor when the debt or other obligation was incurred." Thus, pursuant to the terms of the Guaranty, the Guarantors waived the 6-month statute of limitations of NRS 40.455. The Loan Documents were negotiated and entered into in April, 2007, and the Guaranty was executed concurrently.

The Guarantors will likely argue that the provisions of NRS 40.455 may not be waived pursuant to NRS 40.453, which states as follows:

> Except as otherwise provided in NRS 40.495:
> 1. It is hereby declared by the Legislature to be against public policy for any document **relating to the sale of real property** to contain any provision whereby a mortgagor or the grantor of a deed of trust or a guarantor or surety of the indebtedness secured thereby, waives any right secured to the person by the laws of this state.
> 2. A court shall not enforce any such provision. (Emphasis added).

However, NRS 40.453 is not applicable to this case because the Loan did not relate to a "sale of real property" but rather to the refinancing of commercial debt by sophisticated parties and secured by property that the Borrower already owned.

Borrower purchased the Property, together with several other parcels of real property, from Charlotte Knudsen, Trustee of the C. Knudsen Family Trust; Marc T. Knudsen; and Melanie Knudsen for the total sum of $4,000,000.00, by way of a Grant, Bargain, Sale Deed executed on July 8, 2003, and thereafter recorded in the Office of Clark County Recorder on December 1, 2005. App 0000207-0000215. Although a question of fact may exist as to whether the Borrower actually acquired the Property on July 8, 2003, it is clear that the Borrower has been the

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owner of record of the Property since not later than December 1, 2005. Thus, the Borrower obviously owned the Property well prior to the time that the Loan was made.

In approximately February, 2007, Original Lender solicited investors to fund the Loan and other similar loans. App 0000217-0000222. The Investor Summary Sheet provided in association with the proposed Loan described the transaction as follows:

> Focus Group is **refinancing current debt** on two parcels that are part of their Master Planned Community known as Cliffs Edge North. The loan will have a personal guarantee with John A. Ritter and Darrin D. Badger. (Emphasis added).

Id. Prior to the closing of the Loan, Business Bank of Nevada provided a pay-off statement indicating that the sum of $504,603.11 was then due and owing in association with an existing loan secured by the Property. App 0000222. Thereafter, the Buyer/Borrowers Closing Statement prepared at the time of the closing of the Loan indicates that the sum of $504,603.11 was paid to Business Bank of Nevada. App 0000224. Under these circumstances, the Loan Documents do not constitute "documents relating to the sale of real property" and NRS 40.453 is inapplicable to this matter.

A guarantor's waiver of protection has been held to be enforceable. Dianna Lee, Confirming the Enforceability of the Guaranty Agreement After Non-Judicial Foreclosure in Georgia, 65 Mercer L. Rev. 1167 (2013) (Citing *HWA Props, Inc.,* 322 Ga. App. at 887, 746 S.E.2d at 617. In *HWA Properties, Inc.*, the court of appeals, focusing on the guarantor's contractual waiver, upheld a lender's right to pursue a deficiency judgment against a guarantor without confirmation of sale. *Id.* (Citations omitted). Essentially, the court had to determine whether the lender's failure to confirm a non-judicial foreclosure sale invalidated the obligations of the principal borrower and the guarantor. *Id*. Based on the lender's failure to have the sale validly confirmed, the court of appeals held that the lender could not pursue a

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deficiency judgment against the principal borrower. *Id*. The court, however, held that the lender's failure did not affect the guarantor's liability because the guaranty stated in pertinent part as follows: "No act or thing need occur to establish the liability of [the guarantor], and no act or thing, except full payment and discharge of all indebtedness, shall in any way exonerate [the guarantor] or modify, reduce, limit or release the liability of [[the guarantor] . . . ." *Id*. The guaranty further stated:

> [The guarantor] expressly agrees that [he] shall be and remain liable, to the fullest extent permitted by applicable law, for any deficiency remaining after foreclosure of any mortgage or security interest securing [the indebtedness], whether or not the liability of [the principal borrower] or any other obligor for such deficiency is discharged pursuant to statute or judicial decision. [The guarantor] shall remain obligated, to the fullest extent permitted by law, to pay such amounts as though the [principal borrower's] obligations had not been discharged. *Id.*

Therefore, the guarantor promised the lender that he would remain liable for any deficiency, regardless of whether the principal borrower's liability was extinguished pursuant to "statute or judicial decision." *Id*.

Georgia law permits a guarantor to "waive or renounce what the law has established in his favor when he does not thereby injure others or affect the public interest. *Id*. Furthermore, under California law, "if a guarantor expressly waives the protections of the antideficiency laws, a lender may recover the deficiency judgment against the guarantor even though the antideficiency laws would bar the lender from collecting that same deficiency from the primary obligor." *Id*. Similarly, a guarantor's waiver of protection under the Texas anti-deficiency statute has been held not to violate the public policy of Texas. *Id*. (Citations omitted).

Like Georgia, California and Texas, among other states, Nevada has long recognized a public "interest in protecting the freedom of persons to contract." *Holcomb Condo. Homeowners' Ass'n v. Stewart Venture, LLC*, 129 Nev. Adv. Rep. 18, 300 P.3d 124, 128 (Nev. 2013)(Citation omitted). Because Nevada has

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long recognized a public interest in protecting the freedom of persons to contract, a party may contractually agree to a limitations period shorter than that provided by statute as long as there exists no statute to the contrary and the shortened period is reasonable, and subject to normal defenses including unconscionability and violation of public policy. *Id*. at *10. Likewise, parties should be able to contractually lengthen the applicable statute of limitations by agreement. This is exactly what the parties did in this case.

Pursuant to the Guaranty, the Guarantors waived "any statute of limitations and any one action rule affecting liability hereunder of the enforcement thereof" as well as "the rights pursuant to NRS 40.495 any and all right to claim the benefit of the provisions of NRS 40.430, or any similar statutes or laws." App 0000168-0000171. Because the parties mutually agreed in writing that these provisions of law were waived, the Defendants' Motion to Dismiss lacked any grounds. Further, the waiver was not contrary to public policy nor unenforceable pursuant to NRS 40.453, which is inapplicable to loan documents that do not relate to the sale of real property.

Plaintiff purchased the Loan and the Loan Documents in April, 2007, concurrently with the origination of the Loan, and in reliance upon all of the representations, warranties, and contractual provisions contained in the Loan Documents. The Guaranty constituted a substantial and material inducement for the Plaintiff to purchase the Loan Documents. The Plaintiff specifically understood that the Guarantors, collective waiver of the statutes of limitations AND the one action rule were two separate waivers of the Guarantor's protections. Plaintiff relied upon the fact that he could assert his claims after foreclosure in a manner unrestricted by the 6 month limitation of NRS 40.455. As such, the Guarantors' defense has been waived in its entirety as a material contractual term.

If the Guarantors objected to the waiver, they should have negotiated a modification of the Guaranty or simply not accepted the Loan. The Plaintiff, the

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Borrower and the Guarantors should be free to contract as they are all sophisticated persons. For the Court to not enforce the Guaranty as executed would violate the parties constitutional right of freedom to contract. Plaintiff does not assert that it possesses the same rights against the Borrower because the Borrower was not a party to the Guaranty.

8. <u>THE FACT THAT THE SIX MONTH RULE OF N.R.S. §40.455 MAY BE A STATUTE OF REPOSE DOES NOT LIMIT RELATION BACK</u>

The Petitioners argue that the six month deadline of N.R.S. §40.455 is a statute of repose and not a statute of limitations. While this may be the case, such a distinction is not relevant to the instant dispute. As set forth above, the claims against the Guarantors were timely filed pursuant to the relation back doctrine.

This Court has described the difference between a statute of limitations and a statute of repose as follows:

> A statute of limitations prohibits a suit after a period of time that follows the accrual of the cause of action. Moreover, a statute of limitations can be equitably tolled. In contrast, a statute of repose bars a cause of action after a specified period of time regardless of when the cause of action was discovered or a recoverable injury occurred. It conditions the cause of action on filing a suit within the statutory time period and defines the right involved in terms of the time allowed to bring suit. Such a statute seeks to give a defendant peace of mind by barring delayed litigation, so as to prevent unfair surprises that result from the revival of claims that have remained dormant for a period during which the evidence vanished and memories faded.

FDIC v. Rhodes, 130 Nev. Adv. Op. 88, 336 P.3d 961 (2014)(Citations omitted). Nothing about the relation back of the Plaintiff's Complaint in this case would offend the policy of providing piece of mind to potential defendants.

As set forth above, the Guarantors possessed actual notice of the deficiency claim against them at the time that they received the proposed First Amended Complaint that was provided to them by their counsel in advance of the 6 month deadline. Where an amended complaint relates back, the amended complaint is deemed filed on the date to which it relates back.

In this case, the Amended Complaint related back to the date on which the Second Complaint was filed. Under such circumstances, the Amended Complaint was timely filed as to both the Borrower and the Guarantors. This does not change by virtue of the fact that the 6 month deadline is a statute of repose rather than a statute of limitation. In either case, the complaint was timely.

9. THE INSTANT ACTION SHOULD BE DECIDED ON ITS MERITS.

The courts of Nevada have a general policy of deciding cases on their merits. See *Cohen v. Mirage Resorts, Inc.*, 119 Nev. Adv. Op. No. 1, 36434, 62 P.3d 720 (2003), *Abreu v. Gilmer*, 115 Nev. 308, 985 P.2d 746 (1999). In *Christy v. Carlisle*, 94 Nev. 651, 654, 584 P.2d 687, 689 (1978), this Court stated: "It is our underlying policy to have each case decided upon its merits." (Citation omitted). In this case, the interests of justice require that the Real Party in Interest be allowed to proceed with their causes of action and that the Defendants not be allowed to dismiss the claims on a mere technicality. This is particularly true given the gamesmanship that occurred when the Defendants' counsel agreed to stipulate to the amendment of the complaint, only to thereafter renege.

III. CONCLUSION

For the reasons set forth herein, Plaintiff/Real Party in Interest respectfully requests that the Petitioners' Petition be denied in its entirety.

DATED this 29th day of June, 2015.

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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 29th day of June, 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.

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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.

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

____ 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.

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